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ANNOTATED

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VOL. 30

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. April 3, 1916.

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MARRIAGE (§ IV B — 57) — ANNULMENT—POWERS OF PROVINCIAL COURTS —CONSTITUTIONALITY—INFANT MARRIAGES WITHOUT CONSENT.

The consent to the marriage of a party under 18 required by sec. 15 of the Marriage Act (R.S.O. 1914, ch. 148) is not a condition precedent to the validity of the marriage.

[**See annotation following this case.**]

APPEAL from the judgment of Meredith, C.J.C.P. Affirmed. Statement.

The statement of claim was as follows:—

1. The infant plaintiff resides at the city of Hamilton, in the county of Wentworth, with her mother and next friend in this action. The defendant is domiciled in the city of Hamilton, but is temporarily resident in the State of New York.

2. The plaintiff was born on the 24th day of November, 1895.

3. On or about the 16th day of January, 1913, the infant plaintiff went through a form of marriage with the defendant, at the city of Hamilton, being at that time under the age of 18 years, without the consent required by the Marriage Act, R.S.O. 1914, ch. 148, sec. 15.

4. After the said ceremony the defendant left the infant plaintiff, going to the United States of America, and since the ceremony the parties hereto have not cohabited and lived together as man and wife.

5. The plaintiff therefore prays: (1) for a declaration of this Honourable Court adjudging that a valid marriage was not effected or entered into between the parties hereto, and annulling the said marriage; (2) for such other relief as to this Honourable Court may seem meet.

The defendant did not appear nor defend, and the plaintiff had the pleadings noted as closed against him on the 1st February, 1915.

The judgment of the trial Judge given on May 19, 1916, was as follows:

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MEREDITH, C.J.C.P.:—This is another of those cases which, though of infrequent occurrence in this Province, invariably, indeed necessarily, direct attention to the uncertain and unsatisfactory state of the marriage and divorce laws of Canada whenever they do occur: uncertain and unsatisfactory not only in the conflicting and indecisive character of the case-law upon the subjects, but equally so of the statute-law; and so it has been for many years, notwithstanding the fact that it is a thing regarding which it is of the utmost importance, not only to the persons directly concerned, but to the public as well, that there should be certainty and certainty of a satisfactory character. This case affords ample proof of all this, though other cases may afford much more. How can it be but unsatisfactory for man and woman to be uncertain whether they are really husband and wife; whether they were lawfully married to one another; as well as whether any of the ordinary Courts of law have any power to settle the question?

The conflict of judicial opinion in the Courts of this Province has been over the question whether its Courts have any power to decree that sort of divorce which follows a finding that the marriage was not a valid one; or to pronounce a declaratory decree as to the validity or invalidity of the marriage. The cases are very much opposed to one another, or, rather, the expressions of judicial opinion in them are; and they are the less helpful as none of them was ever carried to a court of appeal.

The conflict in the Province of British Columbia seems to have been mainly over the question whether the Courts of that Province had jurisdiction in divorce cases generally: a question which the Judicial Committee of the Privy Council ultimately had no difficulty in answering in the affirmative: *Watts* v. *Watts*, [1908] A.C. 573; under laws in force in the Province before it became a part of the Dominion of Canada, and unaltered by the Parliament of Canada since.

The contests in the Province of Quebec have been of a wider character; and really were whether the subject of marriage is, or may be, under ecclesiastic control: see *Hébert* v. *Clouatre* (1912), 6 D.L.R. 411, and *Ussher* v. *Ussher*, [1912] L.R. 2 Ir. 445.

The recent attempt to make plain and certain much of that which is so uncertain and unsatisfactory ended unfortunately only in a repetition of that which the Act says: that the subject of solemnisation of marriage, in the Province, is a subject within the exclusive legislative power of the Province.

Regarding legislation:—

Under the British North America Act, 1867, "marriage and divorce" are put within the exclusive legislative powers of the "Parliament of Canada" (sec. 91 (26)), with the exception of "the solemnisation of marriage in the Province," which is placed under the exclusive power of the Legislatures of the Provinces (sec. 92 (12)).

In the 48 years that have gone by since that Act was passed, there has been considerable provincial legislation upon the subject; but in the Dominion Parliament, with its very much wider powers, not a line, beyond in effect permitting a man to marry his deceased wife's sister or a daughter of his deceased wife's sister.

The result of all this is that uncertainty and that unsatisfactory state of affairs, upon a subject of such general and vital importance as marriage and divorce, to which I have referred: a state of affairs which gives rise to the main question involved in this case, the question whether the Legislature of this Province exceeded its power in enacting sec. 36 of the Marriage Act, R.S.O. 1914, ch. 148.

To an ordinary reader of the constitutional enactment, it might be very difficult to perceive how it was possible that there could be so much contention, and so much litigation, over the meaning of the plain words committing to the Parliament of Canada the subject of marriage generally and the subject of divorce generally and exclusively, and to each Province the subject of solemnisation of marriage, within the Province, only.

To make a contention, as has been done, the effect of which is to place, substantially, the whole subject of marriage under provincial legislative power, is, as it seems to me, to make a contention without any kind of foundation other than the desire that it might be so; the whole subject goes to Parliament with the one exception, "Solemnisation" out of it; the exception

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alone goes to the Provinces, exercisable by each, but only so as to affect marriages within its territorial limits.

Nor can I perceive any ground for contention, in this case, over the meaning of the words "Solemnisation of Marriage;" for, if they be given the extremest width of meaning, as wide as the meaning which some of the Courts in the United States of America have given them, and perhaps could hardly help giving them in order to give effect to the legislation in which they were used, or if they be given the meaning which I have no doubt they were intended to convey, that is, the religious ceremony which in those days in Canada was essential to a valid marriage, they cannot come near giving any kind of warrant to the Legislature of this Province to enact the legislation now in question. Solemnisation covers the ceremonial form by which marriage may be effected; it cannot affect the capacity of the man or woman to marry. Nor can it afford any justification for the creation of a Court to consider any question of such capacity, nor indeed, in my opinion, to consider any question of the validity of the marriage with a view to any judgment directly respecting it, and the less a judgment *in rem* such as that sought in this action. That such things come within the exclusive legislative power of the Parliament of Canada, under the words "Marriage and Divorce," I cannot doubt. Those words were intended to embrace the whole of both subjects in their widest sense. Complete power to legislate upon these subjects was intended to be conferred; all, with the exception of solemnisation of marriage, being given to Parliament; and so that legislative body must have power over the capacity of the contracting parties, as well as over the whole subject of divorce, in the widest meaning of that word. Whenever the interposition of any court is needed to sever any kind of a marriage tie, that court must be a divorce court, by whatsoever name it may be called; and divorce in its entirety is within the exclusive legislative power of the Parliament of Canada. Pages of argument aimed really at having the exception not only made the rule but virtually to swallow up the rule, leaving to Parliament not even a crumb of the wedding cake, tend only to defeat their object.

That the fullest power—as full as that of the Imperial Parliament—to legislate in respect of marriage and divorce has been conferred, no one will deny; and that the wide power is in the Parliament of Canada, and quite a comparatively narrow power over the subject is in the Provincial Legislatures, is obvious; they have power over the ceremonial part of marriage only; and that power restricted to marriage effected within the territorial limits of the Province only; so that, if one do not like the ceremonial of any particular Province, he or she may choose that of another, and be married as lawfully in the one Province as the other: see *Swifte* v. *Attorney-General for Ireland*, [1912] A.C. 276; and also *Ussher* v. *Ussher*, [1912] 2 I.R. 445. So, too, the Parliament of Canada might render by legislation any solemnisation unnecessary, or abolish marriage altogether, or indeed make it a crime. No such power can vest in the Provinces: their power is to provide for solemnisation only: and, as I have said, the fullest power must vest somewhere.

For very many years before as well as after the passing of the British North America Act, 1867, there never was any suggestion—that I am aware of—that any Provincial Court in Ontario had any kind of divorce jurisdiction—except that to which I shall presently refer—nor any kind of power to make any kind of judgment *in rem* as to the validity of any marriage; and the purpose and effect of the constitutional legislation in question was to commit to Parliament the whole subject of divorce, and so, as far as this Province was concerned, with quite a clean sheet, and as in nearly half a century Parliament has written substantially nothing upon that sheet, but one conclusion is possible, namely, that there is but one Court, for this Province, in which the parties to a marriage can be relieved from any marriage tie that binds them, and that is the High Court of Parliament in form—a committee of the Senate, perhaps, in reality.

The exception I have mentioned is the divorce *â mensâ et thoro*. Under the name of alimony, this Court has power to adjudge that which is tantamount to a divorce from bed and board, by reason of pre-confederation law, with which the Parliament of Canada has so far not seen fit to interfere, but of course will when it establishes a divorce court.

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In the only case in which, as far as I know, it has ever been held that the Courts of this Province have power to avoid or nullify a marriage, the learned Judge who decided it also expressed the opinion that, if there were not that power, yet there was power, under post-confederation provincial legislation, to make a declaratory judgment of the same character.* In several later cases that has been denied, on the ground that the provincial legislation permitting this Court to "make binding declarations of right, whether any consequential relief is or could be claimed or not," was not intended to, and does not, extend the jurisdiction of the Court to any subject not before within such jurisdiction.

It is quite obvious that that legislation cannot affect such a case as this; it is not to be considered that the Legislature intended to enact something beyond its power; and, if there were such an intention, it would be fruitless. There being no power to avoid or annul a marriage, there can be no power to declare it avoidable or annulable.

It is quite obvious, too, that such legislation would authorise a declaration, founded upon a finding, incidentally but not directly, that the parties to the marriage were or were not man and wife; for instance, on the subject of dower or even an inchoate right of dower, or alimony, or of the woman's right to pledge the man's credit, as his wife; but no finding that the man and woman were not husband and wife could be rightly based upon a voidable marriage, valid until avoided by a court of competent jurisdiction, unless such a court had avoided it: see *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1915] W.N. 131, [1915] 2 K.B. 536.

My conclusions, therefore, are that the provincial legislation in question is *ultra vires*; and that, therefore, this Court has not power under it, nor has it power otherwise, to consider the matters in question in this action; and that, though it has the declaratory powers I have mentioned, they are quite inapplicable to the plaintiff's claim. I accordingly abstain from making any finding upon any of the facts involved—a thing which would

*See *Lawless* v. *Chamberlain*, 18 O.R. 296.

be unwarranted in one having no power to determine them because of want of jurisdiction.

And I am precluded from giving effect to my opinion on the question of the jurisdiction of this Court by sec. 32 of the Judicature Act, which renders a Judge of this Court incompetent to disregard a prior known judgment of any other Judge of co-ordinate jurisdiction, on any question of law or practice, without his concurrence, and provides that a Judge who deems such previous decision wrong, and the case of sufficient importance, may refer the case before him to a Divisional Court—that is, the ultimate provincial court of appeal in Ontario.

My opinion, upon each point that I have dealt with, is, necessarily, in conflict with a prior known judgment of a Judge of co-ordinate jurisdiction, there being decisions of such Judges both ways upon all points; and emphatically the case is of sufficient importance to go further; indeed, the questions involved ought to have gone to a court of appeal long ago.

This case is accordingly referred to a Divisional Court.

George S. Kerr, K.C., for the plaintiff.

The defendant was not represented.

Edward Bayly, K.C., for the Attorney-General for Ontario.

The Attorney-General for Canada was not represented.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an action which came on for trial before the Chief Justice of the Common Pleas, sitting without a jury, at Hamilton, on April 9, 1915. Meredith, C.J.O.

The learned Chief Justice, after hearing the evidence and the arguments of counsel, believing himself bound by a decision of a Judge of co-ordinate authority, which in his opinion was wrong, to hold what he considered not to be the law, to be the law, referred the case to a Divisional Court of the Appellate Division, under the provisions of sub-sec. 3 of sec. 32 of the Judicature Act (R.S.O. 1914, ch. 56).

It may be open to question whether the circumstances which existed warranted a reference to a Divisional Court, but no objection was made by any of the parties to our treating the case as having been properly referred; and, in any case, it would be proper for us to deal with the matter as if it were an appeal by the plaintiff from a judgment of the trial Judge dismissing her action.

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The sole question to be determined is, whether or not the provisions of sec. 36 of the Marriage Act, R.S.O. 1914, ch. 148, are *intra vires* the Legislature of ntario.

The provisions of sec. 36 are as follows:—

"36.—(1) Where a form of marriage has been or is gone through between persons either of whom is under the age of 18 years without the consent required by section 15, in the case of a license, or where, without a similar consent in fact, such form of marriage has been or is gone through between such persons after a proclamation of their intention to intermarry, the Supreme Court, notwithstanding that a license or certificate was granted or that such proclamation was made and that the ceremony was performed by a person authorised by law to solemnise marriage, shall have jurisdiction and power in an action brought by either party, who was at the time of the ceremony under the age of 18 years, to declare and adjudge that a valid marriage was not effected or entered into;

"Provided that such persons have not, after the ceremony, cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of 19 years.

"(2) Nothing in this section shall affect the excepted cases mentioned in section 16 or apply where, after the ceremony, there has occurred that which, if a valid marriage had taken place, would have been a consummation thereof.

"(3) The Supreme Court shall not be bound to grant relief in the cases provided for by this section where carnal intercourse has taken place between the parties before the ceremony."

Section 37 deals with the procedure in actions brought under sec. 36 and stands or falls with it.

By sec. 91 (26) of the British North America Act, exclusive authority to make laws in relation to "marriage and divorce" is vested in the Parliament of Canada; and, by sec. 92 (12) of the same Act, exclusive authority to make laws in relation to "the solemnisation of marriage in the Province" is vested in the Provincial Legislatures.

The question as to the extent of the exclusive authority to legislate as to these matters of the Parliament of Canada and of the Provincial Legislature respectively was the subject of contro-

versy for many years. It was, however, finally settled by the decision of the Judicial Committee of the Privy Council in *In re Marriage Legislation in Canada*, [1912] A.C. 880, that everything which is included in the solemnisation of marriage is excepted from the exclusive jurisdiction to legislate as to marriage which is vested in the Parliament of Canada.

In stating the opinion of the Board, the Lord Chancellor said: "The real controversy between the parties was as to whether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by sec. 91. If this is so, then the provincial power extends only to the directory regulation of the formalities by which the contract is to be authenticated, and does not extend to any question of validity. This was the view contended for by one set of the learned counsel who argued the case at their Lordships' Bar. The other learned counsel contended that the power conferred by sec. 92 to deal with the solemnisation of marriage within a Province had cut down the effect of the words in sec. 91, and effected a distribution of powers under which the Legislature of the Province had the exclusive capacity to determine by whom the marriage ceremony might be performed, and to make the officiation of the proper person a condition of the validity of the marriage" (p. 886).

The conclusion to which the Board came was that "the provision in sec. 92 conferring on the Provincial Legislature the exclusive power to make laws relating to the solemnisation of marriage in the Province operates by way of exception to the powers conferred as regards marriage by sec. 91, and enables the Provincial Legislature to enact conditions as to solemnisation which may affect the validity of the contract . . . *Primâ facie* these words" (i.e., "solemnisation of marriage") "appear to their Lordships to import that the whole of what solemnisation ordinarily meant in the systems of law of the Provinces of Canada at the time of Confederation is intended to come within them, including conditions which affect validity. There is no greater difficulty in putting on the language of the statute this construction than there is in putting on it the alternative construction contended for. Both readings of the provision in sec. 92 are in the nature of limitations of the effect of the words of sec. 91, and there is, in their Lordships' opinion, no reason why what they consider to be the

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natural construction of the words 'solemnisation of marriage,' having regard to the law existing in Canada when the British North America Act was passed, should not prevail" (p. 887).

In view of this decision, two questions only have to be considered in order to determine whether or not sec. 36 is *ultra vires* the Provincial Legislature:—

1. Does the Marriage Act make the consent required by its 15th section a condition precedent to the formation of a valid marriage?

2. And, if that question be answered in the affirmative, the further question, Are the provisions of sec. 15 *intra vires* the Provincial Legislature as being part of what is comprehended in the words "solemnisation of marriage," as those words have been interpreted in the *Marriage* case?

In my opinion, the answer to the first of these questions must be in the negative. What sec. 15 provides is, I think, in the nature of a direction to the issuer of marriage licenses. The affidavit which one of the contracting parties is required by sec. 19 (1) to make, before a license or certificate is issued, must state, among other things:—

"(*d*) the age of the deponent, and that the other contracting party is of the full age of 18 years, or the age of such other contracting party, if under the age of 18 years, as the case may be;"

"(*f*) the facts necessary to enable the issuer or deputy-issuer to judge whether or not the required consent has been duly given in the case of any party under the age of 18 years, or whether or not such consent is necessary."

Then by sec. 21 it is provided that if "the person having authority to issue the license or certificate has personal knowledge that the facts are not as required by section 15, he shal not issue the license or certificate; and if he has reason to believe or suspect that the facts are not as so required, he shall, before issuing the license or certificate, require further evidence to his satisfaction in addition to the affidavit prescribed by section 19."

Reading sec. 15 in the light of the provisions of secs. 19 and 21, the words "shall be required before," in sec. 15, mean, I think, shall be required by the person who issues the license or by the person by whom the proclamation of the intention of the parties to intermarry is made. If it were otherwise, and compliance with the requirement of sec. 15 were essential to the validity of the

marriage, it would follow that, although both of the contracting parties honestly believed and had reason to believe that each of them had attained the full age of 18 years, when in fact they or one of them had not, their marriage would be invalid. Good faith has nothing to do with the matter; if the fact exists, that consequence follows. It may happen sometimes, perhaps often, that persons proposing to marry do not know their own ages, and oftener still do not know the age of the other party to the proposed marriage; and it is impossible for me to believe that any Legislature would have enacted a law which would render invalid a marriage otherwise valid because both of the parties or one of them had not attained the age of 18 years, and the required consent had not been obtained, if it was honestly believed that that age had been attained by both of them.

Other instances of what I think are directory provisions are found in sec. 5. Surely it cannot have been intended that, if a marriage takes place more than three months after proclamation of the intention to marry or after the date of the license or certificate, or if the marriage is solemnised between ten o'clock in the afternoon and six o'clock before noon, or without the presence of two or more witnesses, or if the witnesses fail to affix their names as witnesses to the record in the register, or if the marriage is solemnised by a clergyman who was the issuer of the license or certificate, the marriage is invalid. Of these requirements of the law the contracting parties may be in blissful ignorance, and it would be a shocking thing if, where they had not been complied with, the persons who had married and had afterwards cohabited in the belief that they were man and wife were to be held to be living in adultery and the children of the marriage to be illegitimate.

It was argued by Mr. Bayly that sec. 36, when read in connection with sec. 15, shews that the intention of the Legislature was to make compliance with the provisions of sec. 15 essential to the formation of a valid marriage. I do not agree with that contention. If anything, a contrary intention is indicated. The jurisdiction which sec. 36 assumes to confer on the Supreme Court is, not to declare and adjudge any marriage which has taken place without the consent required by sec. 15 not to be a valid marriage, but so to declare and adjudge only in an action by a party who, at the time the ceremony of marriage was gone through, was under

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the age of 18 years, and then only if the parties have not after the ceremony cohabited and lived together as man and wife, and if the action is brought before the person bringing it has attained the age of 19 years.

There would have been more force in the argument if sec. 36 had given jurisdiction to declare and adjudge that any marriage that had been solemnised without the required consent was not a valid marriage; but, even if that had been the provision of the section, I do not think the argument would have been entitled to prevail. If marriages without the required consent are, as is contended they are, invalid, it was unnecessary to confer jurisdiction to declare and adjudge them to be invalid, as the Supreme Court had that jurisdiction vested in it by the Judicature Act. Then, if the section is *intra vires*, what is the position of parties who have married without the required consent, in the cases that are excluded from the operation of the section?

If it is intended that compliance with the requirements of the marriage law as to matters prior to the performance of the marriage ceremony shall be essential to the formation of a valid marriage, it is, I think, incumbent on the Legislature to say so in plain and unequivocal language; and that, in my opinion, in the case with which I am dealing, it has not done.

The provisions of R.S.O. 1914, ch. 148, sec. 15 (1), and sec. 19 (1) (*f*), as to consent, are substantially the same as those of the Imperial Act 4 Geo. IV. ch. 76, sec. 16, except that the consent is required in the case of a contracting party who is under the age of 21 years.

The effect of sec. 16 of the Imperial Act was considered by the Court of King's Bench in *Rex* v. *Inhabitants of Birmingham* (1828), 8 B. & C. 29, and it was held that its provisions were directory only. Delivering the judgment of the Court, Lord Tenterden, C.J., pointed out that the language of the section "is merely to *require* consent, it does not proceed to make the marriage void, if solemnised without consent." Other provisions of the Act, which are not to be found in the Provincial Act, were referred to in support of the conclusion to which the Court came; but I have no doubt that the result would have been the same if those provisions had not been contained in the Act, for in making reference to them Lord Tenterden begins by saying, "If there were any

doubt upon the construction of that section" (i.e., sec. 16), "it would be removed . . ."

The law had at one time been otherwise. The provision of the Act 26 Geo. II. ch. 33, sec. 11, as to consent, was, that if a marriage was solemnised by license without the consent the marriage should be "absolutely null and void to all intents and purposes."

Section 11 was repealed by 3 Geo. IV. ch. 75, the preamble of which, after reciting the section, recites that the Act was for the remedy of the great evils and injustice which had arisen from the provisions of the section, and a new section (8) was enacted, containing provisions very similar to those of the Provincial Act which are contained in sec. 15 (1) and sec. 19 (1) (*f*).

Section 8 was in turn repealed by 4 Geo. IV. ch. 76, and there was substituted for it the section of the Act which was under consideration in *Rex* v. *Inhabitants of Birmingham*.

It is not, I think, an unreasonable inference that the draftsman of the Act 37 Vict. ch. 6, the provisions of which, with some changes and additions, now form R.S.O. 1914, ch. 148, had before him these statutes and the *Birmingham* case, and deliberately refrained from embodying in the Act a provision like that contained in sec. 11 of 26 Geo. II. ch. 33. The then Attorney-General for the Province, the late Sir Oliver Mowat, an able and most careful lawyer, was, I have no doubt, the draftsman of the Act, as the bill was introduced into the Legislative Assembly by him.

As I have come to the conclusion that the answer to the first question must be in the negative, it is unnecessary to answer the second question.

I should have thought, apart from authority, that the provision requiring consent is *ultra vires* a Provincial Legislature. It is in effect a restriction upon the right of a person under the age of 18 years to marry, and therefore a restriction upon his personal capacity to contract marriage; and I should have thought that the provision, therefore, deals with a matter which does not fall within sec. 92 (12) as being part of what is included in "solemnisation of marriage," but is one as to which the Parliament of Canada alone has authority to legislate. It may be, however, that we would be bound by decided cases to hold otherwise.

I would dismiss the action without costs.

Appeal dismissed.

ANNOTATION

By ALFRED B. MORINE, K.C., Toronto (Bar of Nova Scotia, Newfoundland and Ontario), Consulting Editor of D.L.R.

Annotation. **Void and voidable marriages—Decrees of nullity—Jurisdiction of Supreme Court of Ontario—Critical review of decided cases.**

This action was tried at Hamilton on April 9, 1915, before Meredith, C.J.C.P., without a jury. It was referred by him to a Divisional Court.

The unanimous judgment of the Court, composed of Meredith, C.J.O., Maclaren, Garrow, Magee and Hodgins, JJ.A., was delivered by Meredith, C.J.O., in April, 1916.

The plaintiff alleged that she, being then under 18 years of age, went through a form of marriage to the defendant in January, 1913, without the consent required by the Marriage Act, R.S.O. 1914, ch. 148, and that the parties had not cohabited and lived together after the ceremony. The trial Judge refused to make any findings on the facts, but as no defence had been filed, and the defendant did not appear, the argument on the appeal proceeded as if the facts were as alleged.

The trial Judge was of opinion that neither inherently, nor by the Judicature Act, nor yet by the Marriage Act, has the Supreme Court of Ontario power to avoid or annul a marriage, or to declare it avoidable or annullable, and that sec. 36 of the Marriage Act is *ultra vires* the Ontario Legislature; but as Boyd, C., had expressed a contrary opinion in *Lawless* v. *Chamberlain*, 18 O.R. 296, he held that he was precluded from giving effect to his opinion, and so referred the case.

The Appeal Court held that the Judicature Act conferred jurisdiction to declare the invalidity of invalid marriages, and that sec. 36 of the Marriage Act was, therefore, unnecessary for that purpose, but gave no reasons for this opinion, and the action was dismissed on the ground that the Marriage Act did not make consent essential to the validity of the marriage of minors.

THE QUESTION INVOLVED.

The trial Judge said:—"The main question involved in this case is whether the legislature of this province exceeded its power in enacting sec. 36 of the Marriage Act," and he was of opinion that it did. The Divisional Court, because of the interpretation it placed upon the Act as to the consequence of non-consent, did not expressly give judgment on the constitutional question thus raised by the trial Judge. But, inasmuch as it did not express any doubt as to the constitutionality of the section, and asserted jurisdiction under the Judicature Act, it impliedly did not agree with the trial Judge's opinion. Meredith, C.J.O., expressed the opinion that, apart from authority (*Marriage* case, 7 D.L.R. 629), sec. 15 of the Marriage Act, requiring consent to the marriage of minors, being in the nature of a restriction upon personal capacity to contract marriage, might be *ultra vires* the legislature, upon the ground, apparently, that status or capacity is part of the "Marriage and Divorce" jurisdiction of Parliament (sub-sec. 16, sec. 91, B.N.A. Act, 1867). As a decision on this point was expressly avoided, the opinion of the Chief Justice may be treated as personal. The implication to be drawn from the judgment of the Divisional Court seems, therefore, to be, that the legislature can confer jurisdiction to make a decree of nullity, and inasmuch as the other Judges expressed a general consent to the judgment of Meredith, C.J.O., it is fair to assume that they individually also hold the view that sec. 15 of the Marriage Act is *ultra vires* the legislature.

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THE POWER TO CONFER JURISDICTION.

In cases regarding nullity decided before *Peppiatt* v. *Peppiatt*, a distinction does not appear to have been made between jurisdiction to hear and determine actions for declaration of nullity, and the grounds upon which jurisdiction, if any existed, should be exercised; or between the power of legislatures to confer jurisdiction to hear and determine actions, and to enact laws affecting the validity of marriages. "Jurisdiction is a dignity which a man hath by power to do justice in causes of complaint made before him" (Termes de la Ley). In the exercise of that dignity he does justice according to the law applicable to the complaint. It is submitted that provincial legislatures may confer jurisdiction upon Courts to hear matters within the exclusive legislative jurisdiction of Parliament:—

"The constitution of provincial Courts includes the power to determine the jurisdiction of the Court, and places that jurisdiction beyond the control of the Dominion Parliament." Per Meredith, C.J. (Quebec), *Valin* v. *Langlois*, 5 Q.L.R. 1.

"The jurisdiction of Parliament to legislate as regards the jurisdiction of the provincial Courts is, I consider, excluded by sub-sec. 14, sec. 92, B.N.A. Act, inasmuch as the constitution, maintenance and organization of provincial Courts plainly includes the power to define the jurisdiction of such Courts, territorially as well as in other respects." Per Strong, J., in *Re County Courts of B.C.*, 21 Can. S.C.R. 446.

It is submitted that jurisdiction to deal with a matter and the grounds upon which it shall be dealt with are severable, and that the former may be conferred by the legislature though the latter be within the exclusive authority of Parliament.

A REVIEW OF THE DECISIONS.

Before considering the various questions that *Peppiatt* v. *Peppiatt* gives rise to, it is well to recall certain judgments in Ontario Courts. In *Lawless* v. *Chamberlain* (1889), 18 O.R. 296, a declaration of nullity was sought on the ground that the plaintiff had consented to the ceremony of marriage under duress. The action was dismissed on the ground that the proof fell short of the allegations, but Boyd, C., held that under the Judicature Act, and also by the inherent jurisdiction of the Court, he had power to make the decree. He said that the Chancery Courts in England had such jurisdiction, though they had not exercised it except during the Cromwellian period. In *T.* v. *B.* (1907), 15 O.L.R. 224, Boyd, C., denied the jurisdiction of the Supreme Court to make a decree of nullity because of the impotency of one of the parties, on the ground that for such a cause a marriage was voidable only, not void *ab initio*, and that Ecclesiastical Courts only had jurisdiction in such a matter in England. A Divisional Court followed this judgment in *Leakim* v. *Leakim* (1912) 6 D.L.R. 875. In *A.* v. *B.* (1909), 23 O.L.R. 261, a declaration of nullity was sought on the ground that one of the parties was insane when the form of marriage was gone through. Insanity was found as a fact by Clute, J., but he held that, while a section of the Judicature Act (now sec. 16 (*b*)) gave the Court power to make declaratory judgments where no consequential relief was claimed, it did not enlarge the jurisdiction of the Court, and that the Court had never had power to declare the nullity of a marriage ceremony. In *Hallman* v. *Hallman*, 5 O.W.N. 976; *Prowd* v. *Spence*, 10 D.L.R. 215, and a number of other actions, Lennox, J., has expressed his agreement with the judgment of Clute, J.,

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NO INTERPRETATION GIVEN.

It should be noted that none of the preceding cases involved an interpretation of the Marriage Act. They are of value only in this connection in relation to the question of the jurisdiction of the Supreme Court to entertain suits for nullity. *Lawless* v. *Chamberlain* and *T.* v. *B.* both mention the question of inherent jurisdiction, the first to affirm, the second to deny. A learned writer (Holmested on Matrimonial Jurisdiction, at p. 8), says that the decrees sought in these cases were both in relation to voidable marriages, neither void *ab initio*, and, therefore, that *T.* v. *B.* "looks very like a distinct retreat from the position taken up in *Lawless* v. *Chamberlain*." We suggest that in *Lawless* v. *Chamberlain* the marriage was treated by Boyd, C., as void *ab initio*, on the ground that without free consent there could be no contract, or, as the Judge expressed it, "*consensus, non concubitus, facit matrimonium*," while in *T.* v. *B.* the marriage was voidable only.

"It has been debated whether a marriage brought about by duress is void *de facto* as well as *de jure*, so that it does not need the sentence of any Court to pronounce it invalid, or whether it is voidable only. The better opinion would seem to be that it is voidable only. Want of consent (by the principals themselves) may be purged away. A contract void *ab initio* cannot be ratified." Eversley, p. 68.

"The term 'voidable' implies an option to the parties to treat the relationship as binding or not binding. Until set aside it is valid for all civil purposes. When set aside it is rendered void from the beginning. The distinction between void and voidable arose because the temporal Courts prohibited the spiritual Courts from bastardizing the issue of voidable marriages after the death of one of the parties. The jurisdiction in suits for nullity of voidable marriages belonged exclusively to Ecclesiastical Courts." Eversley, p. 59.

It must be confessed, however, that, as Boyd, C., expressed in *Lawless* v. *Chamberlain*, the opinion that under sec. 28 of the Judicature Act, 1897, the Supreme Court had jurisdiction and power to declare the nullity of a void marriage because no other jurisdiction to do so existed, it is difficult to see why he did not on that ground consider voidable marriages as well as void ceremonies within the jurisdiction and power of the Supreme Court. The King's Ecclesiastical Law as to voidable marriages is part of the common law of England (see *per* Tyndall, C.J., in *Reg.* v. *Millis*, 10 Cl. & F. 534, at 671), and, therefore, part of the common law of this province, and, while in England that law would be applicable only by Ecclesiastical Courts, it would seem to be applicable here by the Supreme Court, if the interpretation placed on sec. 28 of the Judicature Act, 1897, by Boyd, C., were correct. But we cannot assent to this interpretation of sec. 28 of the Judicature Act, 1897, which reads as follows:—

"The High Court shall have the like jurisdiction and power as the Court of Chancery in England possessed on the 10th of June, 1857, as a Court of

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Equity, to administer justice in all cases in which there existed no adequate remedy at law."

Boyd, C., referred to this section in *Lawless* v. *Chamberlain* as though it gave jurisdiction in all cases in which there existed no other adequate remedy. It does not seem as though this section means more than this, that the High Court shall apply those powers which English Chancery Courts exercised prior to 1857 where common law Courts gave no relief. But the Ecclesiastical Courts were common law Courts, and could give relief where nullity was claimed, so that equity had nothing to do with the matter. (*Per* Dr. Lushington, in the Consistory Court of London, in *B.* v. *M.*, 2 Rob. Ecc. Cas. 580). If there was an "adequate remedy at law" in England, prior to 1857, the section in question gave no power to the High Court here.

CONFUSION OF NULLITY WITH DIVORCE.

Meredith, C.J.C.P., says:—"The conflict of judicial opinion in the Courts of this province has been over the question whether the Courts have the power to decree that *sort of divorce* which follows a finding that the marriage was not a valid one, or to pronounce a declaratory decree as to the validity or invalidity of the marriage."

Speaking of declaration of *nullity* generally as *divorce* does not aid clear thinking on this subject. "Marriage may mean either the acts, agreement or ceremony by which two persons enter into wedlock, or their subsequent relation created thereby:" (Cyc., vol. 26, p. 825).

Suits for nullity apply to the former, not to the latter; they pray the Court to decree "that the *ceremony* of marriage is null and void." (Brown and Watts on Divorce, 8th ed., p. 426.) Suits for divorce pray the Court to decree that "The said marriage may be dissolved"; for judicial separation, "That the plaintiff may be separated from the defendant."

"There can be no adultery if there be no marriage, and it is always held both here and in common law that the first point to be proved in divorce cases is the marriage, which the other party may contest; and if he does not, the form of the sentence in such cases pronounces that there has been a true and lawful marriage as well as a violation of it." (See Sir Wm. Scott, in *Guest* v. *Shepley*, 2 Hagg. Con. R. 321, in Consistory Court of London.)

A claim for nullity denies that there ever was a valid marriage; for dissolution, or judicial separation, asserts an existing and valid marriage, as the very basis of the proceedings. As to void marriages, a learned writer says:—"Civil disabilities, *e.g.*, prior marriage, want of age, idiocy, prohibited degrees, make the contract void *ab initio*, not merely voidable; these do not dissolve a contract already made, but they render the parties incapable of contracting at all; and any union formed between the parties is meretricious, and not matrimonial. A marriage is termed void when it is good for no legal purpose; and its invalidity may be maintained in any proceeding, in any Court between any parties, whether in the lifetime or after the death of the supposed husband or wife, and whether the question arises directly or collaterally." Eversely, p. 59.

A voidable marriage, however, is valid for all civil purposes until a declaration of nullity has been made by a competent Court. Nevertheless, such a declaration is not a divorce, for the ceremony is declared void *ab initio* (Eversley, p. 59).

THE QUESTIONS FOR SOLUTION.

Peppiatt v. *Peppiatt* presents two main questions for solution: (1) Has the Supreme Court jurisdiction to make a decree of nullity? (2) Is the con-

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sent of parents made essential to a valid marriage of minors by the Marriage Act? Jurisdiction may be inherent or under the Judicature Act; or it may be that jurisdiction exists only by virtue of the Marriage Act, and so is confined to the specific cause therein set forth—lack of the consent to the marriage of minors prescribed by the Act. Whether jurisdiction exists inherently or is asserted under provincial legislation, the constitutional issue is presented—has the provincial legislature power to enact the Marriage Act, for, if jurisdiction be inherent, that Act, if *intra vires*, may limit the jurisdiction by implication, and, if *ultra vires*, jurisdiction is left as it was: whereas, if there be no inherent jurisdiction, the Judicature Act may have conferred and the Marriage Act have limited it, or the Judicature Act may not have conferred it, and the only jurisdiction may be under the Marriage Act.

The trial Judge in *Peppiatt* v. *Peppiatt* said that, as he held the opinion, in opposition to the judgment of Boyd, C. (*Lawless* v. *Chamberlain*), that no jurisdiction existed, he made no findings as to the facts, but referred the question of jurisdiction to the Divisional Court. That Court asserted that the Judicature Act gave jurisdiction, but, unfortunately, gave no reasons for its finding. That omission was regrettable, in view of the opinions expressed on the point in the cases cited above. With deference, it is submitted that the jurisdiction of the Court should have been exhaustively discussed and established before any interpretation was placed on the provisions of the Marriage Act as to consent, for without such jurisdiction the Court manifestly had no right to interpret the Act; and also, because if there be jurisdiction outside the Marriage Act, it is important that its extent should be known; does it extend, for instance, to the power to annul voidable marriages as well as to declare the nullity of ceremonies void because of civil impediments?

INHERENT CHANCERY JURISDICTION.

Upon the point of the inherent jurisdiction of Chancery Courts to deal with actions for nullity, Boyd, C., in *Lawless* v. *Chamberlain*, referred approvingly to certain judgments by Kent, Sanford and Walworth, respectively Chancellors of New York State. Carefully examined, they do not much strengthen the proposition that such jurisdiction exists here, except possibly as to marriages void *ab initio*. In *W.* v. *W.* (1820), 4 Johns Ch. R. 343, a declaration was sought that a marriage with a lunatic was void. Jurisdiction was asserted by Kent, C., on the ground that as the Court had authority over lunatics, and by statute to grant divorces for certain causes, it also had power to declare nullity, because no other Court had it. Incidentally he admitted that Chancery Courts in England had never exercised such a power, but he gave as a reason the fact that Ecclesiastical Courts which had the power existed there. In *F.* v. *G.* (1825), Hopk. Ch. 541, a decree of nullity was sought because the marriage had been brought about by abduction, terror and fraud, and Sanford, C., granted the decree on the ground that a Court of Chancery had power to vacate all contracts induced by fraud, and why not this? He admitted that this was a new application of an old principle as to fraud vitiating all contracts, and that there was no precedent in England for such a decree by a Court of Chancery. But in *B.* v. *B.* (1825), Hopk. Ch. 628, a case not mentioned by Boyd, C., a decree of nullity on the ground of the impotency of one of the parties was refused by Sanford, C., who said that for such a canonical disability a marriage was

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voidable only, that the English Chancery Courts had never exercised jurisdiction over such a matter, that the powers of English Ecclesiastical Courts had not been conferred on any Courts in New York State, and that "this Court has no power to dissolve a marriage for impotence. "We have," he said, "no judicature authorised to determine by a substantive and effectual sentence that marriages are legal or illegal." In *P.* v. *P.* (1831), 2 Paige Ch. 501, Chancellor Walworth held that by virtue of a local statute he had power to grant a divorce *a mensa et thoro*, and, in referring to the decisions of Kent and Sanford, he pointed out, that, while they had asserted jurisdiction as to marriages void *ab initio*, Sanford, C., had denied it as to voidable marriages, which distinction he approved. As to marriages void *ab initio*, Chancellor Walworth said:—"That part of the common law of England which rendered a marriage void . . . was undoubtedly brought to this colony, and formed part of the common law of this country. . . . When the rights of the parties existed independently of any peculiar remedies which were entrusted to the exclusive cognizance of a particular Court, it was competent for the Superior Courts of the colony to administer such relief as was consistent with their ordinary forms of proceedings in other cases. . . . As the right to dissolve a marriage merely voidable could only be exercised by the aid of the Ecclesiastical Courts in England, and no such Court was ever organized here . . . it may reasonably be presumed that the right did not exist. Such a jurisdiction cannot now be exercised here by any Court without the direct or implied sanction of the legislature."

If, therefore, the marriage in *Lawless* v. *Chamberlain* was voidable only, not void *ab initio*, the American cases cited by Boyd, C., were really opposed to his decision, which gives point to our suggestion that he treated the marriage as void, not voidable.

JURISDICTION UNDER JUDICATURE ACT.

There has been much discussion upon the question whether that section which is now 16 (*b*) of the Judicature Act, 1914, confers jurisdiction to declare the nullity of marriage ceremonies. The majority of the Judges who have discussed the matter say "No," but the Divisional Court apparently said "Yes" in *Peppiatt* v. *Peppiatt*. The section is as follows:—

"No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

In *Reid* v. *Aull* (1914), 32 O.L.R. 68, a declaration of nullity was sought on the ground that the marriage ceremony had been procured by fraud, and was performed while the plaintiff was under the influence of intoxicating drink. Middleton, J., dismissed the action, on the intervention of the Attorney-General, on the ground that the Court had no jurisdiction. He held that the opinion expressed by Boyd, C., in *L.* v. *C.*, had been overruled by a Divisional Court in *May* v. *May*, 22 O.L.R. 559, but examined the subject independently, and came to the conclusion that no part of the jurisdiction exercised by Ecclesiastical Courts in England had been given in any way to the Supreme Court here. He made no distinction between void and voidable marriages, and, as to sec. 16 (*b*) of the Judicature Act, said that "the power to make declaratory decrees is not to be exercised in respect of matters over which the Court has no general jurisdiction," citing *Barraclough* v. *Brown*, [1897] A.C. 615. But in the case last cited, which was an action

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to recover certain penalties, Lord Davey gave the fact that a statute expressly conferred jurisdiction on another tribunal as a reason for holding that a section similar to 16 (*b*) did not extend the jurisdiction of the Court, a reason which does not apply here in nullity proceedings, and he also pointed out that the rule was made in England by a committee of Judges, who could not be held to have power to extend the jurisdiction given by Parliament, whereas here the section in question is a part of the Judicature Act. Nevertheless, as other sections of the Act expressly deal with jurisdiction, it is perhaps proper to read sec. 16 (*b*) as if it were expressly qualified, *at the conclusion of the section*, by the addition of the words "in the exercise of its jurisdiction." The English rule and the Ontario section are precisely similar, and should be given the same meaning:—"The rules were made to carry out the Act, not to enlarge it" (*per* Brett, L.J., in *Longman* v. *East*, 3 C.P.D. 152-156).

JURISDICTION EXISTS AS TO VOID MARRIAGES.

It is submitted, however, that as the Supreme Court undeniably had and exercised the right to declare the nullity of void marriage ceremonies when the question arose either directly or collaterally (Eversley, p. 59), but in practice did not, prior to sec. 16 (*b*), make declarations "in the air," that is, where no consequential relief was sought (*Langdale* v. *Briggs*, 8 DeG. M. & G. 391), the effect of sec. 16 (*b*) may be to warrant declarations of nullity in relation to void ceremonies of marriage where the proceedings are for declarations merely, and no consequential relief is sought. This would not be the effect in relation to voidable marriages, since other Courts exercised no jurisdiction in relation to them, directly or indirectly, but treated them as valid until an Ecclesiastical Court had declared them otherwise. The effect of sec. 16 (*b*) may be, therefore, to warrant the exercise of an existing jurisdiction in a class of actions not previously entertained in practice; that is to say, may warrant declarations of nullity as to void ceremonies, but not as to voidable marriages. Meredith, C.J.C.P., says, in *Peppiatt* v. *Peppiatt*, "There being no power to avoid or annul a marriage, there can be no power to declare it avoidable or annullable," but in that case the Court was not asked, as already pointed out, to annul or avoid a marriage, or to declare it annullable or avoidable, but merely to declare that the ceremony was in fact null and void; therefore, a declaration of right was all that was required.

POWER OF THE LEGISLATURE.

As to the jurisdiction of the legislature to enact the Marriage Act, Meredith, C.J.C.P., says:—"My conclusions are that the provincial legislation in question is *ultra vires*, and that this Court has no power under it, nor has it power otherwise, to consider the matters in question in this action."

The Divisional Court asserted jurisdiction, under the Judicature Act, to make a declaration of nullity, and did not question the constitutionality of the Marriage Act in that respect, but Meredith, C.J.O., expressed doubt as to the right of the legislature to enact sec. 15 of the Marriage Act, considering that it affected the capacity of persons to marry, and, therefore; might fall under "Marriage," within the jurisdiction of Parliament. But parental consent is a part of the form or ceremony or marriage (*Sottomayor* v. *DeBarros* (1877), 3 P.D. 1, 7), and "the exclusive power to make laws relating to the solemnization of marriage in the province . . . enables the provincial legislature to enact conditions as to solemnization which may affect the validity of the contract." (*Marriage* case, 7 D.L.R. 629.)

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"Where a power falls within the legitimate meaning of any class of subjects reserved to the local legislatures by sec. 92 of the B.N.A. Act, 1867, the control of those bodies is as exclusive, full and absolute as that of the Dominion Parliament over matters within its jurisdiction. (Lefroy, Canada's Federal System, 181, citing *Bank of Toronto* v. *Lambe* (1887), 12 A.C., at p. 586).

Can it successfully be maintained that to enact that a minor shall not be married without parental consent is an interference with the status or capacity of the minor; it is not saying that he is not capable of marriage, but that parental consent shall be obtained? It would be quite as forcible to say that the provision that no person shall be married without banns or license is an interference with the capacity of parties, and exclusively within "marriage," and, therefore, *ultra vires* the legislature.

Meredith, C.J.C.P., says:—"If the words 'solemnization of marriage' (in the B.N.A. Act, 1867) be given the extremest width of meaning, or if they be given the meaning of the religious ceremony which in 1867 in Canada was essential to marriage, they cannot come near giving any kind of warrant to the legislature of this province to enact the legislation now in question. Solemnization covers the ceremonial or form by which the marriage may be effected; it cannot affect the capacity of the man or woman to marry. Nor can it afford any justification for the creation of a Court to consider any question of the validity of the marriage with a view to any judgment directly respecting it. . . . Whenever the interpretation of any Court is needed to sever any kind of a marriage tie, that Court must be a divorce Court."

In considering the foregoing extract, it is worth while pointing out once more that sec. 36 of the Marriage Act does not purport to give "power to sever any kind of a marriage tie," but merely to declare, in respect of a very limited class of cases, that no tie was ever created. In its widest meaning "solemnization" plainly includes preliminaries leading up to it (*Sottomayor* v. *DeBarros* (1877), 3 P.D. 1, 7); in its narrowest sense, that of the celebrating ceremony—it could be made to amount to the same thing, by providing that the latter should not be valid unless certain preliminaries took place.

INTERPRETATION OF THE MARRIAGE ACT.

In considering the interpretation which should be placed on secs. 15 and 36 of the Marriage Act, certain admitted principles should be borne in mind, such as:—"The law assumes a favourable attitude towards the marriage state . . . the presumption of law is clearly in its favour."

"The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive. . . . Mere irregularity in the form of the marriage ceremony is not fatal to the validity of the marriage." (*Catterall* v. *Catterall*, 1 Rob. Ecc. Cas. 580.)

"Directions as to the manner, and even prohibition under a penalty other than nullity, do not necessarily imply a nullity." *Per* Lord Blackburn, *Lauderdale Peerage*, 10 A.C. 748.

"Unless the statute expressly declares a marriage contracted without the necessary consent (of parents) a nullity, it is to be construed as only directory in this respect. (26 Cyc. 835.)

"All such requisites as banns, etc., are formal, and a marriage is void only when their deficiency is known to both parties to the ceremony." (Brown and Watts, 101.)

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"Prohibitory words have never been held to create a nullity, unless that nullity is declared in the Act. (Brown and Watts, 102.)

"The consent of parents has been held to be directory only, and its want does not render the marriage celebrated without it invalid." (*Rex* v. *Birmingham*, 8 B. & C. 29.)

The last-mentioned case was relied upon by the Divisional Court in deciding *Peppiatt* v. *Peppiatt*. The judgment in *Rex* v. *Birmingham* was based on the change in the statute law made by 4 Geo. IV. ch. 76. Lord Tenterden, C.J., said, in effect, that 26 Geo. II. ch. 33, sec. 11, had expressly enacted that such a marriage as this was void for lack of the father's consent, the husband being a minor, but that it had been repealed by 3 Geo. IV. ch. 35, sec. 1, because it had been productive of great evils, and then 4 Geo. IV. ch. 76, sec. 14, in requiring parental consent to the marriages of minors, did not say that without it they should be null and void, while sec. 22, in enumerating the causes which made ceremonies void, did not include lack of parental consent. Therefore, he held the marriage valid. It should be remarked also that the Court was dealing with the interpretation of a provision applicable to all marriages of minors, with or without consummation, and in which the legitimacy of children might be involved. It does not appear that the decision in *Rex* v. *Birmingham* is applicable to the circumstances set forth in sec. 36 of the Marriage Act. No such changes have taken place in provincial as in English legislation; in the Marriage Act the marriage of minors not followed by consummation is dealt with. The legitimacy of children cannot be at stake in such cases.

THE SECTIONS TO BE INTERPRETED.

Sections 15, 19, 21 and 36 of the Marriage Act read (in part) as follows:—

"15. (1) Where either of the parties to an intended marriage not a widower or a widow is under the age of eighteen years, the consent of the father, if living, or, if he is dead, of the mother, if living, or of a guardian, if any has been duly appointed, *shall be required* before the license is issued, or before the proclamation of the intention of the parties to intermarry is made."

"19. (1) Before a license or certificate is issued, one of the parties to the intended marriage shall personally make an affidavit, Form 3, before the issuer or deputy issuer, which shall state (certain things set forth)."

"21. (1) Where the person having authority to issue the license or certificate has personal knowledge that the facts are not as required, by sec. 15, he shall not issue the license or certificate; and if he has reason to believe or suspect that the facts are not as so required he shall, before issuing the license or certificate, require further evidence to his satisfaction in addition to this affidavit prescribed by sec. 19."

"36. (1) Where a form of marriage has been or is gone through between persons either or whom is under the age of eighteen years, without the consent required by sec. 15, in the case of a license, or where, without a similar consent in fact, such form of marriage has been or is gone through between such persons after a proclamation of their intention to intermarry, the Supreme Court, notwithstanding that a license or certificate was granted or that such proclamation was made and that the ceremony was performed by a person authorized by law to solemnize marriage shall have jurisdiction and power in an action brought by either party who was at the time of the ceremony under the age of eighteen years, to declare and adjudge that a valid marriage was not effected or entered into;

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"Provided that such persons have not after the ceremony cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of nineteen years."

"(2) Nothing in this section shall affect the excepted cases mentioned in section 16 or apply where after the ceremony there has occurred that which if a valid marriage had taken place would have been a consummation thereof."

"(3) The Supreme Court shall not be bound to grant relief in the cases provided for by this section where carnal intercourse has taken place between the parties before the ceremony."

The Divisional Court, in *Peppiatt* v. *Peppiatt*, held that the provision in sec. 15, that "the consent of the father, etc., shall be required," meant "required by the issuer of the license," because by sec. 19 it is specified that an affidavit shall be made of the facts necessary to satisfy the issuer as to consent, and by sec. 21 the issuer is empowered to refuse a license if he has personal knowledge that consent has not been given, or to "require further evidence." But surely it cannot reasonably be maintained that it is the failure of an issuer to require a consent, not the marriage of minors without consent, which is a violation of sec. 15. For instance, if a penalty by fine or imprisonment were provided for a breach of sec. 15, would it be imposed on the issuer for failure to require the consent, or on the minor for failure to procure it? Sec. 19 says "the issuer may refuse a license if he has personal knowledge that the facts are not as required in sec. 15." Does that mean "if he has not required the consent," or "if the consent has not been given"? If the latter, is it not plain that sec. 15 means that the consent shall be necessary before a license is issued? Was sec. 15 enacted by the legislature as a direction to the issuers of marriage licenses as to their personal duty, or as imposing a condition upon minors to procure parental consent, or both? According to the interpretation by the Divisional Court, sec. 15 would be fully complied with if the issuer of licenses "required" a consent even if none were in fact given, the mere requisition would be sufficient without compliance; in fact, the judgment has made the section comparatively useless, for no penalty follows the infraction. Sec. 15 (2) says:—"No license shall be issued without the production of the consent," not "without the issuer requiring a consent." If, then, a document purporting to be a license is issued, without consent having been given, is it, in law, a license, or is it merely a "*scrap of paper*"? In *Mather* v. *Ney*, 3 M. & S. 265, it was held that a publication of banns by false names was no publication at all; may not a license given in violation of the Marriage Act be regarded as no license at all? Finally, sec. 36 says that if a marriage has been performed "without the consent required by Sec. 15," not "without a consent being required," the Supreme Court shall have jurisdiction to adjudge that a valid marriage was not effected. Does not this conclusively prove that consent is the thing made essential by sec. 15, not that the issuer of licenses shall require something to be done?

IS THE CONSENT ESSENTIAL?

If the consent prescribed by sec. 15 of the Marriage Act be not given before the ceremony, is the ceremony void *ab initio*, or voidable, and does sec. 36 impose a duty or confer a discretion on the Supreme Court? On behalf of the Attorney-General, it was submitted to the Divisional Court that, while the Marriage Act did not expressly enact that invalidity should result from a breach of sec. 15, discretion was conferred on the Court by sec. 36

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as to a limited class of cases. To this Meredith, C.J.O., replies that if sec. 36 enabled the Court to declare the invalidity of all marriages in violation of sec. 15, the argument that invalidity results would be stronger. It is difficult to assent to this line of reasoning, which amounts to this, that the power of the Court is less actual because it is limited to a specific class of cases. An exactly opposite contention would not be without force. To enact that all ceremonies of marriage of minors without the prescribed consent were invalid, no matter what the consequences had been, would surely require much more explicit language than to authorize a Court to say that marriage ceremonies not followed by cohabitation were null and void. It was careful deliberation apparently which induced the legislature to confine the Court's power to a limited class, with regard to the public conscience as to such matters, and to the sad results of more drastic legislation in England which had been repealed.

No notice would seem to have been taken of sec. 35 of the Marriage Act by the Divisional Court in considering the meaning of the Marriage Act. That section reads as follows:—

"Every marriage . . . between persons not under a legal disqualification shall, after three years from the time of the solemnization thereof . . . or upon the death of either party before the expiry of such time, be deemed a valid marriage . . . notwithstanding . . . any irregularity or insufficiency in the issue of the license."

Does not the plain implication arise from these words that within the time named a marriage without a license properly procured shall be deemed invalid?

Nor did the Divisional Court have regard, apparently, to sub-sec. 3 of sec. 36, which provides:—

"The Supreme Court shall not be bound to grant relief in the cases provided for by this section where carnal intercourse has taken place between the parties before the ceremony."

Surely it is impossible to escape the conclusion from these words, that where no such intercourse had occurred, the Supreme Court "is bound to grant the relief provided for"? The suggestion, for the Attorney-General, that sec. 36 clothes the Court with a merely discretionary power can hardly be acceded to. Within the defined circumstances, an obligation, not a discretion, is imposed upon the Court. Where an Act says that a Court "may" do a certain thing for the general benefit, or for a class of persons specifically pointed out, "words of permission are obligatory" (*Russell* v. *Russell*, [1895] P. 315; *Rex* v. *Havering*, 5 B. & Ald. 691), and "the power ought to be exercised" (*Julius* v. *Oxford*), 5 App. Cas. 214).

MARRIAGES ARE NOT VOID.

Finally, we suggest that marriages of minors in violation of sec. 15 of the Marriage Act are not void, that is to say, are not invalid as, of course, as in the case of persons legally disqualified; but those which fall within the limitations set forth in sec. 36 are voidable within three years, or before the death of one of the parties within that period, or if legal proceedings have been taken during that period to question the marriage.

They are not void because (1) the Act does not expressly make them so; (2) they cannot be questioned after a limited time; (3) they cannot be declared null if the parties have had carnal intercourse before or cohabitation after the ceremony; (4) they can only be questioned by one of the

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parties. A limited portion of them are voidable because (1) with regard to them the Supreme Court is bound to declare that they were not effected or entered into if they are questioned by one of the parties to them within the prescribed period; and (2) because until the Supreme Court has made such a declaration they are good to all intents and purposes. The second proviso to sec. 35, which provides that nothing shall make "valid" an otherwise invalid marriage if either of the parties have "contracted marriage according to law" within the time limited for questioning marriages, seems to imply that marriages in violation of the Marriage Act are invalid, but probably the correct interpretation of the proviso is, that the period of limitation prescribed for questioning marriages does not apply if either party has "contracted matrimony according to law" within it. In a declaration under sec. 36, the Supreme Court would probably declare the marriage void *ab initio*, as Ecclesiastical Courts in England do in reference to voidable marriages. If it be the right view that the Supreme Court has no jurisdiction inherently or under sec. 16 (*b*) of the Judicature Act to hear and determine as to voidable marriages, it follows that sec. 36 of the Marriage Act confers the only jurisdiction the Court possesses to deal with violations of sec. 15, such as *Peppiatt* v. *Peppiatt* presented. That may be the answer to the remark of Meredith, C.J.O., that the Court had under the Judicature Act the jurisdiction conferred by the Marriage Act, if the latter rendered invalid the marriages defined by sec. 36. Under the Judicature Act the Supreme Court may have power as to void ceremonies, and under the Marriage Act as to ceremonies voidable under the Act.

CONCLUSIONS.

The following conclusions are suggested with deference:—

1. The Supreme Court of Ontario has jurisdiction inherently to declare the nullity of void ceremonies, and sec. 16 (*b*) of the Judicature Act, 1914, authorizes such declarations of nullity even where no consequential relief is or could be claimed.

2. No Court in Ontario has inherent jurisdiction in relation to voidable marriages and consequently decrees as to them are not authorized by sec. 16(*b*) of the Judicature Act, 1914.

3. The legislature of Ontario has the constitutional power to confer jurisdiction upon the Supreme Court of the province to hear and determine actions for declarations as to both void and voidable marriages; and, therefore, the provisions of the Judicature Act and the Marriage Act, in this regard, are *intra vires*.

4. The common law of England as to void and voidable marriages (except as to jurisdiction to hear actions in relation to voidable marriages) is in force in Ontario, and, if jurisdiction were conferred by the legislature, the remedies pursued in England, as to voidable as well as to void marriages, could be applied here.

5. Section 15 of the Marriage Act does not make the prescribed consent essential to a valid marriage of minors, but, by the combined effect of secs. 35 and 36 a limited class of ceremonies may, within a stated time, be declared non-effective, *ab initio*. Sections 35 and 36 are *intra vires* the legislature of Ontario.

These suggestions are made with deference. The subject is of great interest and very complicated. The very difficult question as to the constitutional powers of Parliament and legislature respectively ought to be set

Annotation. at rest by some proper proceeding to test it. The jurisdiction of the provincial Courts should be placed beyond dispute. It is not creditable that it should be possible to say with great show of reason, as a majority of Judges who have discussed the matter have said, that there is no existing jurisdiction in the Courts of Ontario to deal with any proceedings for nullity, no matter how sad the circumstances may be.

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HARRIS v. MEYERS.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley, Harris and Chisholm, JJ. April 22, 1916.

MARRIAGE (§ IV B—57)—ANNULMENT—PERSONS UNDER AGE—FALSE AFFIDAVIT—LACK OF PARENTAL CONSENT.

Neither absence of the consent by parents required by statute nor a false affidavit by the husband, made to procure the license to marry, nor false statements by the parties to the celebrating clergyman, made to induce him to perform the ceremony, invalidate a marriage. The policy of the law is not to invalidate marriages because of irregularities leading to them.

[*Catterall* v. *Sweetman*, 1 Rob. Ecc. Rep. 304. *The King* v. *Birmingham*, 8 B. & C. 29, referred to, and see also *Peppiatt* v. *Peppiatt*, 30 D.L.R. 1.]

Statement. APPEAL from the judgment of Ritchie, E.J., Judge Ordinary of the Court for Divorce and Matrimonial Causes, dismissing plaintiff's petition to have a marriage annulled. Affirmed.

W. J. O'Hearn, K.C., for appellant.

Graham, C.J. GRAHAM, C.J.:—The whole question is whether the marriage which was celebrated between the respondent and the daughter of the petitioner is void and to be set aside by the Court for Divorce and Matrimonial Causes. This is an appeal from that Court.

The girl was but 15 years of age when she went through the form of marriage. Her parents had not, as the statute requires in such a case, consented thereto, and knew nothing of it. Moreover the respondent had included in his affidavit, in order to obtain the license, a false statement that she was of the age of 19 years, and that her father had consented to the proposed marriage. As a fact this affidavit was void, because it was filled up by a clerk in the office of the issuer of licenses who did not administer any oath, but simply asked the respondent if the statements were true.

Before the clergyman (one already having refused to perform the ceremony) there was deception. The respondent said that she was about 18, and at the ceremony she herself replied to the clergyman that she was 19 having previously been instructed by the respondent to misrepresent the age and conceal her real age, which she did by dressing to look older than she was. The

intervention of the parents and bringing the child home prevented the consummation of the marriage, as the Judge has found. The marriage license itself contains this provision:

> Provided always that by reason of any affinity, consanguinity, prior marriage, or any other lawful cause, there be no legal impediment in this behalf; otherwise, if any fraud shall appear to have been committed at the time of granting this license, either by false suggestions or concealment of the truth, this license shall be null and void to all intents and purposes whatsoever. Acts of 1907, ch. 30.

But the provision which sanctions that form is as follows: (The Solemnization of Marriage Act, R.S.N.S. 1900, ch. 111, sec. 7):

> Marriage licenses shall be under the hand and seal of the Lieutenant-Governor, and may be in the form A. in the schedule hereto or to the like effect.

In my opinion the Imperial Statute, 26 Geo. II. ch. 33, sec. 11, G.B., Lord Hardwicke's Act, could not be said to be now in force in this province. That statute expressly provided that for certain acts or omissions the marriage should be void. The legislature of Nova Scotia at its first session, 32 Geo. II. ch. 17 (provincial) passed an Act concerning marriage and divorce, and it contained a provision that no marriage was to be solemnized without license or banns under a penalty of £50 on the person officiating. And from time to time legislation on this subject has been passed by the provincial legislature. It has been frequently held that English statutes passed previously to the existence of our legislature cannot be held to be in force in this province after our legislature has passed somewhat similar provisions covering the subject. Our own statutes do not contain a provision that the breach of any of the provisions in force shall make a marriage void, but merely depend on other penalties to secure obedience to them, but this seems to be necessary in order to nullify a marriage. *Catterall* v. *Sweetman* (1845), 1 Rob. Eccl. Rep. 304; *The King* v. *Birmingham*, 8 B. & C. 29.

Lord Tenterden in the latter case deals with the English provision passed after 26 Geo. II., ch. 38, namely, 4 Geo. IV. c. 76, which contained these words:

> And such consent is hereby required for the marriage of such party so under age.

And he says:

> The language of this section is merely to require consent. It does not proceed to make the marriage void if solemnized without consent.

Our statute, ch. 111, sec. 11, simply provides that the "consent

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of the father" . . . "shall be obtained before a license for such marriage is issued."

I think this provision is no stronger than the English provision which was before Lord Tenterden, C.J. As to the falsity in the affidavit, it is the Dominion Parliament which deals with that subject generally, and the penalty for such perjury is there presented. That, and that alone, must be looked to and not a proceeding to have the marriage declared void.

The absence of a valid affidavit for obtaining the license does not render the marriage invalid. It only provides that the person applying for a license "shall make an affidavit containing the following particulars." "Shall" is a strong word but, according to the two cases cited, more is required in order to render a marriage void. Then, in this case, there is the peculiarity that the marriage has never been consummated. But that is not material. In the *Queen* v. *Millis*, 8 E.R. 844, 10 Cl. & Fin. 534, at 822, Lord Denman says:—

> The law of England, as I understand it (says Lord Tenterden) was that per *verba de præsenti* followed by cohabitation, was *ipsum matrimonium* . . . The cohabitation is universally known to make no difference in this matter, yet I do not think the word was introduced by inadvertence; I rather ascribe it to that caution which led him to reject no circumstance that tended in the smallest degree to countenance his decision in each particular case

In Bishop on Marriage and Divorce, s. 228, it is said:

> The copula is in no part the marriage; it only serves to some extent as evidence thereof. A maxim of the civil law, equally also of the ecclesiastical, of the common, indeed of all law governing the subject is *consensus non concubitus facit matrimonium*. Hence when parties capable of intermarrying agree to present marriage the relation is made thereby complete and what is sometimes called the consummation adds nothing to it.

The author cites *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 54; *Lindo* v. *Belisario*, 1 Hagg. Cons. 216, and *Patrick* v. *Patrick*, 3 Phillimore 496.

This brings me to the strong language from the license which I have already quoted. The difficulty about that is that there is no substantial enactment or provision in the Act anywhere providing as a penalty a dissolution of the marriage. And in the license itself there is nothing imposing as a penalty a dissolution of the marriage if any of these things happen. The fact that the license is to be null and void carries the matter no further whatever it means. It is an empty thrust against the marriage. Indeed, the use of that form of license is permissive, only. "May"

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is used and admits of variation, or the use of one to the like effect. I think that under the two cases first cited you must have an express provision rendering the marriage void for any act or omission or the marriage cannot be declared void. This is a good common law marriage. 2 Kent 87. There was a clergyman. *Queen* v. *Millis*, 10 Cl. & Fin. 534; *Beamish* v. *Beamish*, 9 H. of L. Cas. 274.

The appeal, therefore, must be dismissed, without costs, of course, as the respondent has not appeared.

Russell, J.
Longley, J.
Chisholm, J.

RUSSELL, LONGLEY and CHISHOLM, JJ., concurred.

Harris, J.

HARRIS, J.:—I agree that the appeal must be dismissed, and I have only a few words to add to what has been said by the Chief Justice.

The English statute, 4 Geo. IV. ch. 76, under which *Rex* v. *Birmingham*, 8 B.&C. 29, 35, was decided, read: "and such consent is hereby required for the marriage of such party so under age."

Ch. 111, sec. 11, of the Revised Statutes of Nova Scotia reads:

> the consent . . . shall be obtained before a license for such marriage is issued.

Ch. 148, sec. 15, of the R.S.O. reads:

> The consent . . . shall be required before the license is issued.

The three statutes mean, in my opinion, practically the same thing, and the decision of Tenterden, C.J., in the *Birmingham* case is applicable to all of them.

The history of the legislation in England throws some light on the meaning of the statutes. Under ch. 33 of 26 Geo. II., sec. 11, it was provided that if consent was not first had and obtained, the marriage "shall be absolutely null and void, to all intents and purposes." This provision is cited in the preamble of ch. 75 of 3 Geo. IV., and it is further stated in the preamble that "great evils and injustice have arisen from such provision." Parliament then proceeded to repeal ch. 33 of 26 Geo. II., sec. 11, and to enact other provisions which were later repealed by 4 Geo. IV., and new provisions substituted. When in Ontario and Nova Scotia the legislatures came to deal with the question the stringent provisions of the old statute which Parliament had solemnly stated had been found to be productive of great evils and injustice were not adopted, but the words used were similar to those in the later English statutes under which the *Birmingham* case had been decided.

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In *Regina* v. *Roblin*, 21 U.C.Q.B. 352, Robinson, C.J., in delivering the judgment of the Court, after considering the English Acts, at p. 358, said:

We think the want of consent of the father of the minor, under the circumstances stated, was, as we have already stated, a lawful cause to hinder the marriage, for, if the fact had been known, we must assume that the license would not have been issued, as it ought not to have been by law, and so the marriage by license would not or should not have taken place, though if the license had issued, and the marriage had taken place, it would not have been void.

The policy of the law is evidently not to invalidate a marriage by reason of any irregularity or non-compliance with the provisions of the Act leading up to the issue of the license, and this applies to the objection raised as to the affidavit as well as the want of consent in this case.

I agree, also, with the Chief Justice as to the words of the form of the license.

The enacting portion of the statute is clear and contains no provision making the license void for any fraud committed at the time of granting it. The words of Lord Penzance, in *Dean* v. *Green*, 8 P.D. 79 at 89, seem to me to be apt. He said:

Such being the effect of the enacting portions of the statute, it would be quite contrary to the recognized principles upon which Courts of law construe Acts of Parliament to enlarge the conditions of the enactment and thereby restrain its operation, by any reference to the words of a mere form given for convenience sake in a schedule, and still more so, when that restricted operation is not favourable to the liberty of the subject but the reverse.

Under the circumstances I do not think the words of the form of license can be given the effect of an enacting clause.

It is interesting to note that the Ontario Marriage Act, (R.S.O. 1914, ch. 148, sec. 36 (3)) has been amended by adding the following section:

(1). Where a form of marriage has been or is gone through between persons either one of whom is under the age of 18 years without the consent required by section 15, in the case of a license, or where, without a similar consent in fact; such form of marriage has been, or so gone through, a Court of Justice shall have jurisdiction and power notwithstanding that a license or certificate was granted, and that the ceremony was performed by a person authorized by law to solemnize marriage, in an action brought by either party who was at the time of the ceremony under the age of 18 years to declare and adjudge that a valid marriage was not effected or entered into. (2) Provided that such have not after the ceremony cohabited or lived together as man and wife, and that such action shall be brought before the person bringing it has attained the age of 19 years. . . . (4) The High Court of Justice shall not be bound to grant relief in the cases provided for by this

section where carnal intercourse has taken place between the parties before the ceremony.

We have no such statute in this province, and this Court cannot grant the relief asked for.

The appeal should, I think, be dismissed. *Appeal dismissed.*

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Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Parmoor. July 25, 1916.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—SALE OF LAND—TIME AS ESSENCE OF CONTRACT.

Where time is expressly made the essence of an agreement for the sale of land, specific performance of it will not be decreed in favour of the purchaser who was in default.

[See *Steedman* v. *Drinkle* (P.C.) 25 D.L.R. 420.]

2. VENDOR AND PURCHASER (§ I C—13)—ABILITY TO CONVEY—MORTGAGE —PROMISE TO DISCHARGE.

The fact that the vendor of property encumbered by an undischarged mortgage has not the legal power to compel the mortgagee to discharge the mortgage before the time fixed for closing the sale does not affect his ability to convey the fee if it can be shewn that he had obtained a promise from the mortgagee to discharge the mortgage at the time of closing, and that promise has not in the meantime been revoked.

[*Snell* v. *Brickles*, 20 D.L.R. 209, 49 Can. S.C.R. 360, reversed; 12 D.L.R. 753, 28 O.L.R. 358, affirmed.]

Statement.

APPEAL by special leave from a judgment of the Supreme Court of Canada, 20 D.L.R. 209, allowing, by a majority of three to two, an appeal from an unanimous judgment of five members of the Appellate Division of the Supreme Court of Ontario, 12 D.L.R. 753, 28 O.L.R. 358, 49 Can. S.C.R. 360, setting aside the judgment at the trial, 9 D.L.R. 840.

The judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON:—The action out of which the appeal arises was brought by the respondent against Isaac Brickles, since deceased, claiming specific performance of an agreement dated February 20, 1912, entered into between the respondent and Brickles acting through one G. W. Ormerod as his agent whereby Brickles agreed to sell and the respondent to purchase certain parcels of land in the township of Scarborough and county of York in the Province of Ontario for the sum of $7,500 to be paid and secured, as follows: $500 as a deposit on entering into the agreement, $2,000 on the acceptance of the title and the delivery of the deed of conveyance, and the balance, $5,000, to be secured by a mortgage executed by the respondent of the property purchased to "be drawn on the vendor's solicitor's usual form" containing the three clauses specified.

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This agreement contains several special clauses. It is only necessary to state the purport and effect of those bearing upon the questions upon which the appeal turns.

(1) The vendor was not bound to furnish any abstract of title or, any title deed, or evidence of title, except such as he might have had in his possession. (2) The purchaser was left to search the title at his own expense, had 10 days to examine it, and if he did not object in writing within that period he was to be deemed to have accepted the title. (3) If any valid objection was made to the title within that time the vendor was given a reasonable time to remove it. (4) If the purchaser should make default in completing the purchase "in the manner and at the time mentioned," *i.e.*, March 15, 1912, any money theretofore paid on account might at the option of the vendor be retained by him as "liquidated damages" and the contract, at his option, be put an end to, the vendor being entitled to resell the lands without reference to the purchaser. (5) Time was made in all respects strictly of the essence of the contract.

The purchaser's solicitors, Messrs. Proudfoot, Duncan, Grant, and Skeans, did not prepare the deed of conveyance, nor apparently did they claim or intend to do so. The vendor's solicitors, Messrs. Du Vernet & Co., took that matter in hand, and the purchaser and his solicitors apparently acquiesced in that arrangement. On February 21, 1912, the vendor's solicitors wrote to the solicitors of the purchaser to the following effect:—

Dear Sirs,

Re Brickles to Snell, lots 1 and 2, Plan 412, Scarboro' Township.

We understand that you are acting for William H. Snell, who is purchasing the above lands from our client, Isaac Brickles. Enclosed please find draft deed for approval.

On the following day the vendor's solicitors again wrote to the purchaser's solicitors, enclosing a corrected description of the lands to be conveyed, and requesting them to detach the first page of the copy deed sent the previous day, and to replace it with the page enclosed. On February 27, the vendor's solicitors sent to the same firm a third letter to the following effect:—

Dear Sirs,

Would you please return draft deed herein approved, with your objections to title, as our client will be in the office on Saturday.

These, however, were not the only communications which passed between the two firms of solicitors touching the carrying

out of the contract. Mr. Melville Grant was the member of the firm of the respondent solicitors who had charge of the matter on behalf of his firm, and Mr. Ross the member of the other firm who had charge of the matter on behalf of the vendor.

Mr. Grant commenced to examine the vendor's title on February 22, 1912, and had his examination practically completed on the 29th of that month, when he received the last-mentioned letter, dated February 27, 1912. By the first week in March he had completed the searches, and was ready to accept the title. There remained, however, one matter to be cleared up, in reference to which he spoke to Mr. Ross over the telephone on March 5, namely, the existence of an undischarged mortgage of the property sold. He then informed Mr. Ross that the title was satisfactory, but that there was a mortgage which should be discharged. To this Mr. Ross replied that he would have it discharged on closing. On March 12, Mr. Ross telephoned to him that the vendor was in his—Mr. Ross's—office; that March 15 was the day for closing, and asked him to return the draft deed. To this Mr. Grant replied that his firm were ready to close, that the only point they wanted cleared up was the question of the mortgage. Mr. Ross said he would have this done, and then Mr. Grant replied that he would return the draft deed.

On the next day, Wednesday, the 13th, he brought out the deed from, presumably, his safe or some such place for the purpose of returning it, when he found he had nobody in his office to whom he could dictate the letter he intended to send with the deed. He, therefore, postponed the sending of it till the next day, Thursday, the 14th. He was, however, suddenly taken ill on that day, and was ill and unable to attend to the matter till Monday, the 18th. He then telephoned to Mr. Ross, stating his firm were ready to close the matter and he would like to get it closed, and asking him if they could close. To which Mr. Ross replied that his client had been in with him and that as the matter had not been closed on the 15th, had refused to carry out the agreement. On March 18, the vendor's solicitors wrote to the purchaser's solicitor a letter in the terms following:—

Dear Sirs,

Re Sale—Brickles to Snell, parts of lots 1 and 2, plan 412, York.

The vendor called at our office to-day to ascertain whether this sale had been closed, as the date for closing was the 15th instant. We had to inform him that we had not heard from you, that you had not returned the

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draft deed, not put in any objections to title. Under the agreement, "in every respect time is to be strictly of the essence thereof." The vendor has now instructed us to write you informing you and your client that on account of your default he will not carry out the contract, and the same is now rescinded.

There facts are all admitted. There is no controversy or dispute about them. From them it is clear that all parties concerned were anxious to carry out the sale, and that the delay was due mainly, if not entirely, to the sudden and unexpected illness of Mr. Grant. It is quite true that he might, on Wednesday, the 13th, have himself written the letter he desired to send to the vendor's solicitors accompanying the deed, and not have postponed matters till next day. And it may well be he would have done so if he had apprehended his illness. If that be a fault it is certainly a trivial one; but, even so, the vendor is still entitled to stand upon "the letter of his bond." The writ was issued by the purchaser on April 23, 1912. The only specific relief it claims is specific performance of the agreement of February 20, 1912. There is a claim for such further relief as the nature of of the case may require, but that can only mean such further relief as is ancillary to the main specific relief claimed.

It is, their Lordships think, very unfortunate that a claim in the alternative was not inserted for a return of the deposit of $500, or that, if not originally claimed, liberty should not have been asked to amend the pleadings by inserting such a claim, so that there might have been a complete adjudication on all matters in dispute between the parties, and all further litigation have been prevented. That, however, has not been done, and their Lordships therefore can only deal with the issues raised by the pleadings as they stand. The trial Judge held that the purchaser, the plaintiff, was not in default so as to entitle the defendant, the vendor, to rely upon the clause as to time being the essence of the contract, and granted a decree for specific performances. The Supreme Court of Ontario set aside this decree, and ordered and adjudged that the action should be dismissed. The Supreme Court of Canada, the Chief Justice, and Anglin, J., dissenting, reversed this decision, and ordered that the judgment of the trial Judge should be restored.

Davies and Duff, JJ., expressly held that the case was governed by the decision of this Board in the case of *Kilmer* v. *B.C. Orchard Lands*, [1913] A.C. 319, 10 D.L.R. 172, and Brodeur, J., concurred

with them. The Court had not, of course, the advantage of having before it the judgment of this Board, in the more recent case of *Steedman* v. *Drinkle and Another*, delivered on the 21st December, 1915, [1916] A.C. 275, 25 D.L.R. 420, in which the former case was explained and it was pointed out that in it their Lordships must have been of opinion that the stipulation as to time being of the essence of the contract did not apply as the facts stood, since the defendant company had themselves agreed to extend beyond the day fixed the time for the payment of the instalment of the purchase-money, the non-payment of which by Kilmer they relied upon as entitling them to enforce the forfeiture.

This was the feature which distinguished that case from the later case of *Steedman* v. *Drinkle and Another*. In the latter, the purchaser made default in the payment of an instalment of the purchase-money. The vendor did not give any further time for the payment of it; on the contrary, he took advantage of the default immediately and cancelled the agreement. The Board decided that as time was expressly made the essence of the contract, specific performance of it could not be decreed in favour of the purchaser who was in default; but held that the forfeiture of the money paid under the contract was a penalty from which relief might be granted on proper terms. Faced with these difficulties, Mr. Tilley, counsel for the respondent, abandoned the grounds upon which the decision appealed from was based by the Supreme Court, but stoutly contended that the vendor was not entitled to treat the purchaser's omission to close the transaction on March 15, 1912, as a default giving him, the vendor, the right to rescind, as the latter was not at that time ready (*i.e.*, able) and willing to convey to the purchaser the fee of the property sold, inasmuch, as, first, he had not before that day paid off and discharged the then existing mortgage on the land, and procured the legal estate in the lands to be revested in him; and, second, as the vendor's solicitors' form of mortgage had never been delivered or tendered to the purchaser to enable his own solicitors to prepare the mortgage deed, by which the balance of the purchase-money was to be secured to the vendor.

Counsel was, having regard to the terms of the fifth paragraph of the plaintiff's reply and joinder of issue, quite entitled to raise these points. The second is easily answered. It was

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the duty of the intended mortgagor, the respondent, to have the mortgage deed prepared. Neither he nor his solicitors ever asked the vendor or his solicitors to furnish him or them with the form prescribed. It was the business of the purchaser or his solicitors to procure it, and neither the vendor nor his solicitors were in any default in having omitted to furnish this form unasked. The first point is the more substantial. The mortgage to be discharged bore date November 1, 1904. It was made by Isaac Brickles to one Lucy Male, a married woman, wife of one George Male, to secure the repayment of a sum (not specified in the case) by instalments of $100 each on November 1, in every year until the entire debt with interest at 5% was paid. In the spring of 1912 something over the trifling sum of $200 remained due on this mortgage. The entire sum due about November 1, 1912, for principal and interest was $300, which was then paid in full, and a discharge signed by the mortgagee. The hearing did not take place till November 26 following. The vendor was at that date undoubtedly ready, *i.e.*, able, to convey the interest purchased. It is quite true the vendor had not on or before March 15 any legal power to compel Mrs. Male to accept against her will the unpaid balance of the mortgage debt with the interest thereon, so as to vest in himself the interest in the lands he had contracted to sell, but a written statement, signed by her husband, George Male, dated in the month of November, 1912, and an affidavit of the same date made by his wife, were, by consent, received in evidence at the trial as proof of the facts stated in them. From the first it appeared that Brickles about the time the sale was contemplated told George Male that he was about to sell these lands, and asked Male if he would consent to receive the mortgage money; he replied in the affirmative and afterwards informed his wife of the offer, and she was satisfied.

Mrs. Male in her affidavit stated that she was prepared at any time, upon payment of the principal, and interest due under the mortgage, to execute a discharge therefor in favour of Isaac Brickles; and that had she been called upon on or before March 15, 1912, to do so would have done so. It is to be borne in mind that on March 5, Mr. Ross informed Mr. Grant over the telephone that he, Ross, would have "a discharge of this mortgage on closing." Mr. Grant did not suggest that this would be too late. On the contrary, he apparently acquiesced in the arrange-

ment. That assurance was repeated by Mr. Ross on March 12, 1912. And again, no objection was made to it by Mr. Grant.

A very simple procedure for the discharge of mortgages and the revesting in the mortgagor of his former estate in the property mortgaged is provided by secs. 62 and 67 of the Registry of Deeds Act (R.S.O. 1914, ch. 124). A form of document called a discharge has merely to be filled up and authenticated in the manner prescribed. On this being duly registered the mortgage debt is discharged, and the legal estate revested in the mortgagor.

Their Lordships are clearly of the opinion that the vendor was not bound to have the mortgage discharged, and the legal estate revested in him before March 15, 1912. It would have been quite sufficient to have had these things done immediately before the closing of the transaction on that day, and so the solicitors for the parties obviously understood and intended. Mr. Tilley, however, urged that even though the documents admitted should be taken as satisfactory proof that Male and his wife had consented before that date to the discharge of the mortgage, they might at any moment up to the signing of the discharge have changed their minds and refused to sign it, and as Brickles could not have compelled them not thus to change their minds he was not in point of law ready on March 15 to complete. No reason was suggested why they should change their minds. In fact they apparently had not done so, as they were paid off in full before November 1, 1912. There was no evidence given to suggest that they ever contemplated such a change; and, the question is, must it be held, in the absence of such evidence, that the vendor was disabled from conveying the interest sold, owing to the bare possibility that a contingent and improbable event might conceivably occur? No authority was cited which went to such a length as that.

In the case of *Re Head's Trustees and Macdonald*, 45 Ch. D., 310, a testator, after giving to his wife a life estate in his real and personal estate authorised, but did not direct his trustees to pay his debts, and did not charge his real estate with the payment of his debts so that the trustees had not, during the lifetime of the widow, any power to sell the real estate, but he did empower them to sell the real estate after her death and divide the proceeds amongst his children. The trustees entered into a

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contract to sell some portion of the real estate, the contract to be completed on January 24, 1890. On that day the vendors had not obtained the concurrence of the beneficiaries, and the purchaser repudiated the contract and asked for a return of the deposit. On January 29, the solicitor for the vendors wrote to say that he could make a good title with the concurrence of the beneficiaries which the vendors would procure, and Fry and Lopes, L.JJ., certainly seem to have endorsed the opinion that if the vendors had at once, when the objection to the title was made, offered the concurrence of the beneficiaries, shown that they could and would concur, and gave an opportunity of investigating their title the trustees might have forced the purchaser to take the title. In argument in that case it was urged on behalf of the purchaser, on the familiar authority of *Forrer* v. *Nash*, 35 Beav. 167, that the vendors not having been able to convey, nor to force the concurrence of the beneficiaries, the purchaser was not bound to wait to see whether that concurrence could be obtained, but Fry, L.J., at p. 317, said:—

> Objection having been taken to the title, the vendors said that they would have to obtain the concurrence of the beneficiaries. Now if that had been done at an early stage of the proceedings, and if the trustees had been able to shew that the beneficiaries did in fact consent to join, and an opportunity had been given of investigating their title, and it had been shown that they would concur in a reasonable time, it is by no means clear to me that the vendors might not have enforced their contract. It is not necessary to decide that point.

In the present case the purchaser's solicitors knew of the existence, and presumably of the nature, of this mortgage, they apparently satisfied themselves as to that. They never made any requisition as to proof of the mortgagee's title. They merely required that the mortgage should be discharged. It could only be discharged with the consent of the mortgagee or her assigns. He was assured it would be discharged. The vendor had obtained the legal power and authority to discharge it. There is no suggestion that that power and authority, if unrevoked, would not be sufficient, the only infirmity about it was that it was revocable at the option of those who conferred it. This case seems a much stronger one in favour of the vendor's ability to convey than that of *Re Head's Trustees*.

In *Esdaile* v. *Stephenson*, 6 Madd. 366, the master reported that the vendor could make a good title if a widow would release

her jointure, which was secured by a term. The vendor undertook by parole before the master to procure her to release it. This was held to be insufficient. But that case is quite distinguishable from this. The widow was not shown to have ever given her consent to release her jointure. The respondent cited several authorities, amongst others the following: *Brewer* v. *Broadwood*, 22 Ch. D. 105. In that case the purchaser had bought an agreement for a lease. He repudiated on the ground that the agreement was voidable at the will of the lessor unless certain works were completed on the land within a certain time; the work had not been completed within the time, and the agreement was therefore voidable, but on the day on which the contract was repudiated the lessor consented, in case certain rent was paid up within a week, to extend the time for finishing the incompleted work to over 7 months. Here the purchaser bought a valid agreement for a lease. The vendor had never that to sell. He had only a voidable lease to sell. The rent stipulated for was never paid, the condition on which further time was given was never performed. The purchaser was held to have been entitled to repudiate. That case does not establish that a consent to a certain thing which, if unrevoked, would validate a vendor's title, is ineffectual for that purpose if, though unrevoked in fact, it is revocable in character.

In *Bellamy* v. *Debenham*, [1891] 1 Ch. 412, the plaintiff sold a house but on copyhold land, subsequently enfranchised, the mines, etc., being reserved to the Lord of the Manor, and never vested in the vendor. On the purchaser discovering that the vendor was not entitled to the mines he repudiated before the day fixed for completion, June 24, 1889. He persisted in that, and though the vendor before that date began to negotiate for the purchase of the mines, he did not till after action brought and long after June 24, 1889, acquire the mines. It was held that the vendor was not entitled either to a decree for specific performance or for damages. The case of *Sprague* v. *Booth*, [1909] A.C. 576, does not apply to the present case.

These authorities do not, in their Lordships' opinion, support the respondent's contention on this point. They think he has failed to show that the vendor was not, in fact, on March 15, ready, *i.e.*, able, to convey the property purchased. They think therefore, on the whole, that the appeal succeeds, that the decree

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appealed from was erroneous and should be reversed, and the decree of the Supreme Court of Ontario (12 D.L.R. 753), dated March 18, 1913, restored. And they will humbly advise His Majesty accordingly. The respondent must pay the costs here and in the Supreme Court of Canada. *Appeal allowed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. May 2, 1916.

VENDOR AND PURCHASER (§ II — 30) — CONVEYANCE À DROIT DE RÉMÉRÉ — DELAY IN REDEMPTION — EXTENSION.

Upon a failure to exercise within the stipulated period, or extension thereof, the right to redeem lands conveyed *droit de réméré*, as security for a loan, the purchaser becomes absolute owner, after the time limited for redemption and the Courts of Quebec have no power to grant relief by extending the time for redemption; the purchaser's letter, after the expiration of the redemption period, demanding payment of the loan before a certain date, does not operate as an extension of the right.

[Arts. 1549-50, 2248, C.C. Que., applied.]

Statement.

APPEAL from the judgment of the Superior Court, sitting in review, at Quebec, affirming the judgment of Letellier, J., in the Superior Court, District of Roberval, maintaining the plaintiff's action with costs. Mignault, one of the defendants, as security for the re-payment of a loan, executed a deed of sale of his lands to the plaintiff's vendor reserving to himself the right to redeem the lands so sold within a specified time. He did not do so and, after the time fixed for redemption had expired, the agent of the purchaser *à réméré* wrote a letter to Mignault demanding payment of the sum loaned before a date mentioned and notifying him that, unless it was paid within that time, the rights of the purchaser under the deed would be exercised. Owing to mistakes in transmission of the money through the mails, the payment was not made until after the date mentioned in the letter, when, as the property had been sold to the plaintiff in the meantime, the money forwarded in payment was refused and returned to Mignault. Sometime prior to the expiration of the time for redemption, Mignault had made a donation of the lands in question to Octave Gagnon, one of the defendants, and granted a right of passage over the lands to the other defendant. The plaintiff, having registered the deed conveying the lands to him, brought action, *au pétitoire*, to recover the lands against Mignault and the two other defendants, now appellants. Mignault, appearing separately, filed a defence to the action offering to pay the amount

due on the loan but did not do so nor deposit the money in Court and, finally, he suffered judgment to be rendered against him *ex parte*. The other defendants filed a joint defence to the action and brought the amount due into Court, asking for special relief in the circumstances.

Statement.

Belcourt, K.C., and *Chevrier*, for appellants.

A. Lemieux, K.C., and *Arthur Bélanger*, for respondent.

FITZPATRICK, C.J.:—In this case the plaintiff, now respondent, claims to be the owner of a lot of land in possession of the defendant Mignault who is not a party to this appeal. The questions to be determined are:

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(*a*) Whether the transactions which passed between the plaintiff's auteur, Dame Marthe Bourgard, and her agent Turcotte on the one hand, and the defendant Mignault on the other, are such as to prevent plaintiff from asserting his title as owner to the land;

(*b*) Whether by reason of the course of the proceedings in the Courts below the present appellants are precluded from asserting their claim to what, in a legal system different from that which prevails in the Province of Quebec, would be called *equitable relief*.

I state the questions thus broadly so as to include a new and interesting point raised by Brodeur, J., and which apparently did not occur to any of the counsel in the case. It is not referred to in the factums, was not mentioned at the argument here and passed unnoticed in both Courts below. Assuming that it is properly before us, I will endeavour to deal with this new point when in the examination of the evidence I reach the letter out of which it arises.

The issues raised by the pleadings and decided in both Courts below offer very little difficulty. We are all, I believe, agreed that, by reason of Mignault's failure to exercise his right of redemption within the stipulated period, the title to the land vested in Miss Bourgard.

The only real difficulty arises out of the letter subsequently written by Notary Turcotte to Mignault. To appreciate the bearing of that letter it will be necessary to consider all the facts as they appear on the record.

On October 9, 1908, by deed passed before Turcotte, N.P., the defendant Mignault sold to Dame Marthe Bourgard a plot

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of land described as lot No. 49 B., 6th range of the cadastre of the township of Normandin. The sale was made subject to a right of redemption exercisable within 5 years and purports to convey "*tous les droits, intérêts, titres et prétentions et améliorations*" that the vendor had in the lot described. All payments under the deed were to be made at the domicile of the purchaser at St. Michel de Bellechasse, many miles distant from the residence of the vendor who remained in possession of the property sold, and for the convenience of both parties it was agreed that the notary would be authorised to receive all the payments which the deed called for. The right of redemption was not exercised within the delay, which expired October 9, 1913, and, thereupon, Miss Bourgard remained absolute owner of the property (art. 1550 C.C.). We are all, I understand, agreed that the stipulated term in a deed like the one under consideration must be strictly observed and that it is not within the power of the Court to extend it. (Arts. 1549 and 2248 C.C.)

On November 8, 1913, Turcotte wrote Mignault to say that his client wanted her money and that, if not paid before the twentieth of that month, she would be obliged to sell her interest in the property. Not having received an answer to this letter, Miss Bourgard on December 11, 1913, sold the property to the plaintiff, respondent, who brought this petitory action in April, 1914, against Mignault and the two appellants, Octave and Abel Gagnon. The latter were brought into the case as donees of the property by deed from Mignault passed September 4, 1911.

Mignault appeared in the action separately, moved for particulars as to the circumstances under which the property was acquired by the plaintiff—and then gave notice of his intention to refund the amount received by him when the sale "*à réméré*" was made with interest and costs (*sauf à parfaire*). This notice was filed on June 6, 1914. Apparently the offer was not acted upon; no money was tendered or deposited in Court. On June 12, 1914, the case, on the issue with Mignault, was inscribed for proof and hearing on the merits *ex parte*. And judgment was rendered declaring that Mignault had forfeited his right to repurchase and that plaintiff was absolute owner of the property. From that judgment there has been no appeal. Much importance was attached, I think rightly, in both Courts below to that judgment in its bearing upon the issue with the appellants.

In November, 1914, the appellants filed their joint plea alleging that the "*vente à réméré*" was merely a disguised loan, that the property was really worth over $1,100 and that within the stipulated period (November 13, 1913), the amount due in capit and interest was sent by registered mail to Turcotte who in the interval had removed from St. Cyrille de Normandin to Quebec, but being improperly addressed the letter did not reach its destination and was returned, after December 20, 1913, by the post office authorities to the sender, Mignault, who again forwarded the money to Turcotte at his right address; that the latter improperly refused to accept the money on the ground that the delay had expired; and the defendants, Gagnon, brought the amount due into Court with their pleadings.

On these issues the parties went to trial, and the facts as alleged were either admitted or proved by oral and documentary evidence. The trial Judge maintained the action on the ground that the right of redemption not having been exercised within the stipulated delay the deed of sale to Miss Bourgard became absolute, and, consequently, the deed of donation by Mignault to appellants was without effect. He also held that the *ex parte* judgment against Mignault was a complete bar to any rights which the appellants might have acquired under the deed. This judgment was confirmed on appeal to the Court of Review.

This is undoubtedly a hard case. The property is apparently worth more than the amount paid for it and the evident intention of the parties was that the title in the property should return to the seller when he had paid his debt. The position is made more difficult by the *bonâ fide* attempt of Mignault to honestly fulfil his obligations frustrated by the unfortunate mistake made by the postmaster in addressing his letter to Turcotte, a mistake which is easily understood when we take into account the illiteracy and lack of familiarity with affairs of men in their position. Mignault, however, when notified by the notary that his second letter arrived too late, took no steps to assert his rights alleging the circumstances under which he had failed to meet his obligations. Had he done so, it is conceivable that, notwithstanding the very stringent provisions of the Code, some measure of relief might have been given him. But, as the Judges below point out, he remained silent until towards the end of April, 1914, when the respondent brought this suit and then he was content to serve

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the notice to which I referred without giving effect to his alleged intention to refund the purchase price and he did not bring the money into Court. He allowed judgment ordering him to give up the property to go against him *ex parte* and no attempt has been made to have that judgment set aside. It is therefore *chose jugée* as to him. The appellants are in no better position than Mignault. By their deed of donation, made subsequent to the sale to Miss Bourgard, they acquired Mignault's rights, such as they were at that time, and they could in law acquire nothing more (*Sirois* v. *Carrier*, 13 Que K.B. 242; *Levasseur* v. *Pelletier*, 40 Que. S.C. 490; *Ménard* v. *Guibord*, 31 Que. S.C. 484). When the delay expired Mignault lost his rights and appellants' title derived from Mignault must have the same fate.

In these circumstances I agree entirely in the conclusion reached by the Judges of both Courts below. It is impossible to give appellants any relief. Upon its true construction the deed by Mignault to Bourgard must be held to operate as an absolute sale to which was attached a conditional right of re-purchase to be exercised within a fixed delay which, as I have already said, the Court has no power to extend, *Shaw* v. *Jeffery*, 13 Moo. P.C. 432.

Laurent with his usual lucidity of thought and expression says:—

> Dans notre droit moderne les Juges ne peuvent déroger aux conventions des parties; c'est une loi pour eux comme pour les contractants.

The whole subject is discussed in *Salvas* v. *Vassal*, 27 Can. S.C.R. 68, approved of in *Queen* v. *Montminy*, 29 Can. S. .R. 484, at 490.

Here Brodeur, J., raises, as I have already said, an interesting and difficult question as to the effect of the letter written by Turcotte on November 13, 1913, which reads as follows:—

> Monsieur Romuald Mignault, Cultivateur,
> Normandin,
>
> Cher Monsieur:—
>
> En arrivant de Normandin, j'ai trouvé ici une lettre de la personne qui vous a prêté les $300 par mon entremise, qui m'informe qu'elle a absolument besoin de son argent. *Si vous ne pouvez pas le lui rembourser, elle sera forcée de vendre ses droits.*
>
> Or comme vous le savez, c'est un acte à réméré que vous avez, et il serait fort embêtant pour vous que celà tomberait à des personnes qui aimeraient à faire de la misère, car le tout est dû depuis le 20 octobre dernier.
>
> J'espérais pouvoir vous rencontrer à mon voyage à Normandin, mais je

n'ai pu vous voir. On m'a dit que vous n'étiez pas à l'église, quand je me suis informé de vous.

Dans tous les cas, je compte que vous y verrez d'hui à une dizaine de jours, car passé le vingt novembre ce sera trop tard.

Votre bien dévoué, J. S. N. Turcotte.

At the date of this letter Mignault was in default and Miss Bourgard was the indisputable owner of the property. She was free to do with it as she chose. This letter must be read with the following admission made by the parties at the trial:—

Les parties admettent que le notaire Turcotte qui a agi comme notaire sur la vente à réméré consentie par le défendeur Mignault en faveur de Mademoiselle Bourgard était *autorisé à donner un délai jusqu'au vingt (20) de novembre mil neuf cent treize (1913), pour retraire la propriété et* autorisé à recevoir l'argent pour Mademoiselle Beauregard, et que l'autorisation pour prolonger le délai était donné par Mademoiselle Beauregard.

Taken together, it seems to me the letter and the admission evidence an intention on the part of Miss Bourgard not to insist upon enforcing her strict rights under the deed of sale if the vendor would pay the amount of the purchase price of the property on or before November 20, 1913, or, in other words, the purchaser agrees to extend until that date the period within which the right of redemption may be exercised by the vendor. That is the construction put upon the letter at the time by both parties. Mignault says, when examined as a witness, that immediately on its receipt he went to the bank, drew out his money and sent the amount he owed by post-office order to Turcotte.

In their plea to the action of revendication of the property, the present appellants say:—

Que le ou vers le 8 novembre 1913, le notaire Turcotte, agent de Delle. Bourgard, avertit le défendeur Mignault que *le délai pour le réméré était prolongé jusqu'au vingt novembre, 1913.*

In the suit as brought the plaintiff's demand is in revendication of the property and Mignault, to whom Turcotte's letter is addressed, declares his intention to refund the money but without giving effect to his good intention. He does not invoke the letter or allege that he acquired under it any rights to the property or that it in any way changed the position except with respect to the delay within which he might exercise his right of redemption. My brother Brodeur refers to Troplong, Vente (at p. 220, *post*), where it is said that the legal effect of such a letter would be equivalent to a promise of sale of the property to Mignault. The same opinion is expressed by other writers collected in Guillouard, "*Traité de la Vente*," vol. 2, pp. 190 and 191, art. 654.

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It will be found, however, on reference to the text writers that they are not in accord. I would draw special attention to this very significant sentence in Beaudry "*Vente*," No. 1636, p. 541:—

> Du moins la prolongation conventionelle du terme ne pourrait porter aucune atteinte aux droits des tiers qui auraient acquis de l'acheteur.

It would seem that all the authors are preoccupied with the fear that the rights acquired by third parties in the interval between the expiration of the stipulated term and the date of the document granting the extension may be prejudiced. But assuming that Troplong's theory is accepted and that at the expiration of the period there can be no extension of the right of redemption, and that the new agreement is to be considered as equivalent to a promise of sale, I cannot, even in that view, see how it is possible to give the appellants any relief for two reasons which seem to me unanaswerable.

At the time the letter in question was written the stipulated delay had expired and Miss Bourgard had become absolute owner of the property and, as a necessary consequence, any rights acquired by the appellants under the deed of donation from Mignault lapsed. The most that can be said is that the letter operated as a promise to sell the property to Mignault on condition that he should take advantage of the offer before November 20, 1913, which he failed to do (Pothier, "*Vente*," No. 480; *vide* Fournier, J., in *Grange* v. *McLennan*, 9 Can. S.C.R. 385, at 393 *et seq.*, referring to Dorion, C.J., in the Court below. Refer also to Troplong, at p. 394). Further, when this suit was brought, instead of taking advantage of the new opportunity afforded him to redeem his property or to assert his right under the presumed promise of sale, Mignault was content to give the notice above referred to and allowed judgment to go against him by default. This judgment, as held by the Court of Review, disposes of any right Mignault had in the property, and, as I have already said, appellants' title is derived from, and is dependent on, that of their *auteur* Mignault.

The second objection which, as at present advised, seems to me absolutely unanswerable, is that the respondent having bought the property from Miss Bourgard who was, at the time, absolute owner, his registered title cannot be affected by the unregistered promise of sale given to Mignault. There is nothing

in the evidence to shew—and it is not suggested—that respondent had any knowledge of the Turcotte letter.

I have gone into this at some length because this undoubtedly is a very hard case and hard cases have a tendency to make bad law. Our duty, of course, is to do justice, but "according to law."

I am disposed also to think that this new point should not be considered now. The attention of counsel has not been directed to it and we are not, on this record, in a position to do justice to all the parties and to the Courts below. *Vide The "Tasmania,"* 15 App. Cas. 223, *per* Lord Herschell at 225; *Browne* v. *Dunn*, 6 R. 67, at 75; *Dufresne* v. *Desforges*, 47 Can. S.C.R. 382; *Connecticut Fire Ins. Co.* v. *Kavanagh*, [1892] A.C. 473; *Cleveland* v. *Chanbliss*, 64 Ga. 352.

Another question was raised on this appeal which does not seem to have been brought to the attention of the Courts below although I find it mentioned in the factums in review. It is said, as far as I can understand the facts, that the lot of land could not be sold by Mignault without the consent of his wife. In fact, there is nothing to shew that in October, 1908, Mignault was married. He does say, when examined as a witness (in 1914), that he was married for a second time, and it also appears in the deeds to appellants that he was married in 1911, but this record is silent as to his status in 1908.

Further it is impossible for me to understand this point by reference to 6 Edw. VII., ch. 21, sec. 1. (Que.) That section reads:—

1. Art. 1744 of the Revised Statutes, as enacted by the Act 60 Viet., ch. 27, sec. 1, is amended by adding thereto the following clause:

The owner of the homestead may, however, under the same conditions and upon observing the same formalities as for its alienation, hypothecate it and thereby render it subject to seizure and sale.

Then 60 Viet., ch. 27, sec. 1, reads as follows:—

1. Arts. 1743, 1744 and 1745 of the Revised Statutes are replaced by the following:

1743.—No public lands, granted to a *bonâ fide* settler by instruments in the form of location tickets, licenses of occupation, or certificates of sale or other titles of a similar nature or to the same effect, in virtue of chapter sixth of title fourth of these Revised Statutes, respecting the Department of Crown Lands and the matters connected therewith, and according to the orders-in-council and regulations passed in virtue of the said chapter, shall, so long as letters-patent are not issued therefor, be pledged or hypothecated by judgment or otherwise, or be liable to seizure or execution for any debt

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whatsoever, except for the price of such lands, nor can the buildings, constructions and improvements thereon, including the mills which the settler makes use of for his own proper service, notwithstanding articles 1980 and 1981 of the Civil Code, and arts. 553 and 554 of the Code of Civil Procedure.

1744.—Every settler upon public lands in the province, who has received letters-patent for such land, shall hold such land, provided it does not exceed 200 acres in extent, and if it does so, then 200 acres thereof, together with the buildings, constructions and improvements thereon, including the mills employed of by such settler for his own use as a "homestead."

No such homestead shall, during the life of the original grantee, of his widow and of his, her or their children and descendants, in the direct line, be liable to be seized and sold for any debt whatsoever. The proprietor of a homestead may alienate the same either by gratuitous or onerous title. However, if married, the notarial consent of his consort is required, and, if the latter is dead, and the proprietor has minor children, the consent of a family council, homologated by the Superior Court of the district in which the homestead is situated, or by a Judge of that Court.

But the statute of 9 Edward VII., ch. 30, sec. 5, provides:

No acts or transactions made and entered into in virtue of arts. 1743 and 1744 of the Revised Statutes as contained in the Act 60 Vict., ch. 27, sec. 1, amended by the Act 6 Edward VII., ch. 21, sec. 1, shall be deemed to have been invalidated by this Act.

The proprietor of a homestead and of public lands in virtue of arts. 1743 and 1744 of the Revised Statutes, has the right, and is declared to have always had the right to alienate by gratuitous or by onerous title, even without the consent of his consort expressed in a notarial deed.

This Act shall not affect pending cases which may have been taken before the coming into force thereof.

Although it does appear that the lot in question was acquired from the Crown under location ticket there is nothing to shew that the patent had not issued previous to the date of the sale to Miss Bourgard. On the contrary, all the presumptions arising from the recitals in the deeds of donation point to the title having issued before 1908.

I am of opinion that the appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—With great reluctance because of the extreme hardship to the appellant under the facts as proved of maintaining the judgment appealed from, I feel myself obliged under the law as it stands in the Province of Quebec to concur in dismissing this appeal.

Idington, J.

IDINGTON, J.:—I regret to find that this is one of those cases in which the law does not enable the Court to execute justice and hence that this appeal must be dismissed.

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DUFF, J.:—Not having heard the whole of the argument I take no part in the judgment.

Anglin, J.

ANGLIN, J.:—But for the letter of notary Turcotte, written on November 8, 1913, giving the appellants until November 20, 1913, to pay the sum of $300 and interest, it would appear that their rights had become extinguished and the title under which the respondents hold absolute on October 20, 1913. Arts. 1549, 1550 and 2248 C.C. That letter probably did not effect a prolongation of the right of redemption (*droit de réméré*) but operated only as a unilateral promise of re-sale (7 Mignault, 159). If, however, the letter could be regarded as having extended the right of redemption, the extended right would be of the same nature and subject to the same conditions, and, the money not having been paid, it would have expired on November 20, 1913, with the like consequences. If, on the other hand, the letter merely amounts to a promise of re-sale, that lapsed on non-payment of the price within the delay stipulated. *Taché* v. *Stanton*, 13 Que. S.C. 505; *Marcoux* v. *Nolan*, 9 Q.L.R. 263; *Munro* v. *Dufresne*, M.L.R. 4 Q.B. 176; *Foster* v. *Fraser*, M.L.R. 6 Q.B. 405; 4 S.C. 436; Cujas, 25 Dig.; Pothier, "*Vente*," No. 63.

Brodeur, J.

BRODEUR, J.:—On October 20, 1908, Romuald Mignault sold *droit de réméré* (with right of redemption) to Miss Bourgard the property in question in this case for a sum of $300.

The *droit de réméré* had to be exercised on or before October 20, 1913, by remitting to the purchaser the sum of $300, plus interest at 6% per annum. It was agreed that during that time Mignault would remain in possession of the property, that he would keep it in good condition for renting, that he would pay the municipal and school taxes and also the interest on the sum of $300.

That sale was registered in the registry office of the county.

On September 4, 1911, Mignault gave the property in question among others to his son-in-law, Octave Gagnon, one of the appellants in the present case, with obligation to keep, feed and clothe the donor and his spouse during their lifetime, or to pay to them an annual income of $100 a year and to pay their mortgage debts and other debts affecting said property.

It is very evident that the sum of $300 paid by Miss Bourgard did not represent the full value of the property and that the *vente à réméré* had been had recourse to in the interest of the

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parties so as to be able further to guarantee the reimbursement of the sum that Miss Bourgard was lending to Mignault.

The deed purported that the payments both of the capital and of the interest had to be made at the domicile of the buyer *à réméré*. The parties did not live in the same region. A distance of about 200 miles separated them. Then it was agreed that the notary who had put the deed through and was living near the seller's place could receive the money. The deed was therefore modified on that score. Later on, the notary left Lake St. John to come and live in Quebec City.

On October 20, 1913, the date fixed by the agreement for the exercise of the *faculté de réméré*, the reimbursement of the loaned capital was not made and then, by virtue of art. 1550 C.C., Miss Bourgard remained the absolute owner of the property sold.

On November 8, 1913, Mr. Turcotte, Miss Bourgard's notary, wrote to Mr. Mignault, asking him to reimburse the sum of $300, and he added that if he could not pay before November 20, his client would have to sell her interest.

On November 13, Mr. Mignault bought at the post-office an order for the sum due, both capital and interest, and sent it to notary Turcotte, Quebec, to whom the payments of interests had previously been made. But instead of addressing the letter to Hebert St., which had been mentioned to him, he addressed it to Albert St. and the letter, after going to several post offices, came back to the sender only on December 20.

He sent again at once the order to notary Turcotte, but in the meantime Miss Bourgard had sold her interest to the respondent in the present case, Nicolas Bélanger, on December 11, 1913, and the notary then returned the money to Mignault.

Bélanger now takes a petitory action against Mignault and Octave Gagnon and he also aims his suit against Abel Gagnon because Mignault had given him a right of way on the property.

The appellants submit that the deed between the parties was evidently a contract of loan and not a contract of sale.

It is true that the parties entered into negotiations for a loan: but as the guarantees which were offered by Mr. Mignault were not sufficient, I suppose, to guarantee the loan, it was agreed that they would have recourse to a sale *à droit de réméré* so as to be able to make sure the reimbursement of the loan. The parties

have accepted that method of contract and we cannot interfere to change their agreement which had evidently been made after due deliberation.

In the Province of Quebec, the *réméré* is generally stipulated only to give a safer guarantee to the creditor who has loaned his money and does not want to run the risk of losing part of it through incurring the costs necessary to have the property sold judicially That contract is legal even when the selling price is far below the value of the property, for the annulment of a contract for depreciation of over one-half does not exist any more. *Salvas* v. *Vassal*, 27 Can. S.C.R. 68.

It is undeniable that the plaintiff, respondent, shews a moral sense more or less facile by refusing to accept the money which was offered to him with his judicial costs and insisting on keeping a property representing a far greater value than the sum he has disbursed. It is to be hoped that his conscience will some day shew him the evil of his conduct and urge him to repair the wrong and damage which he caused to the appellants.

I had thought during the argument that the opinion expressed by Troplong and others on the nature of the new agreement which had taken place between the parties through notary Turcotte's letter of November 8, 1913, could permit of our allowing the appeal. But that new agreement, according to the opinion of those authors, could at most be considered only a promise of sale. Miss Bourgard who would have become the irrevocable owner, owing to the non-exercise of the *droit de réméré*, would then by the letter of her notary, Turcotte, have promised to sell the property in question up to November 20, 1913. It was therefore for the promising buyer to offer the payment of the price of this promise of sale within the stipulated delays. He did not do it, or rather the postal order he sent did not reach its destination. *Munro* v. *Dufresne*, M.L.R. 4 Q.B. 176; *Foster* v. *Fraser*, M.L.R. 6 Q.B. 405; *Dechamps* v. *Goold*, Q.R. 6 Q.B. 367.

It was claimed also before this Court that the sale *avec faculté de réméré* was void because it had not been registered in the Crown's Lands office.

That point was not raised in the Court below and it is possible that if it had been it would have brought forth evidence which would have destroyed all the strength of that objection. We cannot therefore entertain it in the present case.

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I am therefore reluctantly bound to come to the conclusion that the appeal must be dismissed with costs, while formulating the hope that the respondent will see that justice is rendered to the old man and the latter's son-in-law who are deprived of the fruit of several years' work. *Appeal dismissed.*

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Ontario Supreme Court, Boyd, C. February 21, 1916.

MARSHALLING ASSETS (§ I—5)—INSURANCE FUNDS—MORTGAGEES—EXECUTION CREDITORS.

Where in case of loss the insurance upon certain property is, by the terms of the policy, payable in the first place to a first mortgagee, and, secondly, to a second mortgagee, and executions have been registered before the second mortgage was made, the first mortgagee has a right by statute (Mortgagee's Act, R.S.O. 1914, ch. 112, sec. 6, sub-sec. 3) to apply all the insurance money to the satisfaction of his mortgage, and cannot be compelled to take part of his claim from the proceeds of the sale of the remaining mortgaged property, so as to leave a portion of the insurance money to the second mortgagee.

Statement.

APPEAL by the defendants the Cornwall Beef Co. and Donald Ciotti, execution creditors of the defendants Genitti, the mortgagors, and made parties in the Master's office as subsequent incumbrancers, in a mortgage action, from the report of the Local Master at Sault Ste. Marie, upon the grounds following:—

(1) Because the Master had found by para. 6 of the report that the defendant Elizabeth S. Wilcox was entitled to rank upon the insurance moneys (referred to in para. 5) next after the claim of the plaintiffs, whereas the insurance moneys were paid by the Norwich Union Fire Insurance Society to and applied by the plaintiffs on account of their mortgage on the 23rd December, 1915, as appeared from the affidavit of Walter J. Helm, assistant manager of the plaintiffs, filed in the Master's office, and the said Master had no power to set aside or interfere with the plaintiffs' application of the said insurance moneys.

(2) Because the Master, by para. 8 of his report, had found that, at the date of the report, there was due to the plaintiffs for principal money, interest, and costs the sums following, namely:—

Balance of principal money etc.	$1,931.38
Costs of action taxed at	41.35
Costs and disbursements in Master's office taxed at	287.76
Total	$2,160.49

Whereas the Master should have found, in accordance with the affidavit of the said Walter J. Helm, filed in the Master's office, that at the date of the report there were due the sums following, *viz.*:—

Balance of principal	$329.68
Interest to the 17th January, 1916	10.60
Costs of action	41.35
Costs in Master's office	287.76
Total	$669.39

(3) Because the Master, by para. 10 of his report, had settled the priorities between all the parties to this action who had proved their claims, in accordance with the order, in the terms of schedule A. thereto, instead of in accordance with the respective priorities in the order as set out in para. 8 thereof, and in the Master's certificate (or report) dated the 24th September, 1915.

(4) Because the Master, by para. 10 of the report, found that the moneys in Court (i.e., the purchase-money to the amou t of $1,500 paid into Court as set out in para. 3 of the report) should be paid out to the various parties as set forth in schedule B. thereto, whereby the sum of $138.67 was directed to be paid out of said purchase-money in Court to the defendant Elizabeth S. Wilcox, notwithstanding that, by para. 6 of the report, the Master had found and reported that the execution creditors the Cornwall Beef Company and Donald Ciotti were entitled to rank upon the said purchase-money next after the claim of the plaintiffs; and, although, in para. 6 of his report, the Master, by invoking the doctrine of "marshalling," ranked the claim of the defendant Wilcox in priority to the execution creditors upon the insurance moneys, the Master had given effect to the plaintiffs' application of the insurance money in the order for payment out of Court by schedule B. under para. 10 of his report, as follows: "To the plaintiffs, balance of their claim as shewn in report, $2,160.49, less amount of insurance money retained by them, $1,491.10 =$669.39," and there was not a sufficient fund in Court, after payment of the claims of the prior incumbrancers, according to their respective priorities in their order as set out in para. 8 of the report, to leave any sum whatever for the defendant Wilcox, and schedule B. should be corrected and amended accordingly.

(5) Because the amount of damage done to the building and

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allowed to the purchaser under para. 7 of the report, *viz.*, the sum of $38, had been paid to the plaintiffs, and the amount to be paid to the plaintiffs, as set out in schedule B. to the report, should be reduced by the sum of $38, and the said sum should be added to the amount to be paid to the appellant execution creditors, and apportioned between them, and the report should be amended accordingly.

(6) Because the said Master by his report, notwithstanding the plaintiffs' appropriation of the insurance moneys, deals with the purchase-money paid into Court, as set out in para. 3 thereof, and the insurance money paid to the plaintiffs, as set out in schedule B. thereto, as two separate funds, whereas the total of the respective sums should be treated as one fund, being the proceeds of the property of the mortgagor, and distributable according to the priorities of the several incumbrancers, as found by the Master's certificate (or report) of the 24th September, 1915, and in the order as set out in para. 8 of the report.

(7) Because the Master, by schedule A. (part II.) of his report, set out the insurance money "as received and retained by the plaintiffs," and thereby dealt with and exercised jurisdiction over the same, whereas the said insurance money had been already appropriated by the plaintiffs on their claim under their mortgage, as proven by the affidavit of the plaintiffs' manager, filed in the Master s office, from which affidavit the Master ascertained and fixed the amount to be paid to the plaintiffs out of the purchase-money in Court, as set out in schedule B. to his report, and the Master had no power so to deal with the said insurance money, and all that part of the report so dealing therewith should be amended accordingly.

(8) In the absence of any appropriation of the said insurance money by the plaintiffs the Master had no power to invoke the doctrine of "marshalling" in favour of the defendant Wilcox (5th incumbrancer) in priority to and to the prejudice of the execution creditors (4th incumbrancers), as the insurance moneys, if treated as a separate fund, must stand in the place of the mortgaged premises, and the insurance moneys, when received, until so appropriated by the plaintiffs on the mortgage, "are a security in the same sense, and to the same extent exactly, as the land, and are redeemable in the same terms" (see judgment of Maclennan, J.A., in *Edmonds* v. *Hamilton*

Provident and Loan Society (1891), 18 A.R. 347, at p. 367), and therefore subject to the priorities as found by the Master in para. 6 of his report, in respect of the purchase-money.

(9) Because the appropriation of the said insurance money by the plaintiffs on the day of receipt thereof, as proven by affidavit filed in the Master's office, was final, and the plaintiffs had a right so to apply the said insurance money in reduction of the mortgage-debt herein; and hence there remained only the purchase-money in Court to be distributed under the Master's report, and the Master had exceeded his jurisdiction by attempting to ignore, or recall, or otherwise apply the same, under any doctrine of "marshalling" to the prejudice of the established priorities herein.

A. W. Langmuir, for the appellants.

G. S. Hodgson, for the plaintiffs.

No one appeared for the defendant Wilcox, who was served with notice of the appeal.

Boyd, C.

BOYD, C.:—The doctrine of marshalling has been misapplied by the Master in dealing with the administration of money in this case.

"Marshalling" properly arises (as tersely put by Romilly *arguendo*) "where a creditor, who has two funds, chooses to resort to the only fund upon which other creditors can go, they shall stand in his place for so much against the fund, to which they otherwise could not have access:" *Aldrich* v. *Cooper* (1803), 8 Ves. 382, 383.

The Master has treated the moneys derived from mortgaged premises as two funds because part comes from insurance moneys upon the buildings destroyed by fire, and part is from sale of the mortgaged premises after the fire. He has dealt with the proceeds of the insurance by process of marshalling between prior and subsequent mortgagees, and has thus impaired the rights of execution creditors intermediate between the mortgagees. To explain, it is necessary to summarise the important facts and dates.

The plaintiffs' mortgage is on a lot with buildings in Sault Ste. Marie, and was made on the 11th July, 1912, and is the first incumbrance. It contained a covenant that the mortgagor should insure for the mortgagees' benefit. This mortgage was about $2,000. On the 27th January, 1914, an execution was

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registered against the land by the Cornwall Beef Company for over $300, and another writ against land by Ciotti on the 15th May, 1914, for less than $100.

The second mortgage was to Elizabeth S. Wilcox for $225 on the 8th July, 1914. [This also had a covenant by mortgagor to insure.]

The plaintiffs' writ to realise on their security issued on the 19th May, 1915, and judgment to take accounts on the 23rd July, 1915, under which the above subsequent incumbrancers were brought in and made parties.

On the 24th February, 1915, there had been a partial fire on the premises and a loss of $415, of which $176 was expended in repairs, and the balance, $238, was received by the first mortgagees and applied on the mortgage as of date the 26th March, 1915. This fact is not material except as reducing the mortgage account.

On the 31st October, 1915, there was a second fire, and the amount of the loss was fixed at $1,491, which was paid over by the insurance company on the 23rd December, 1915.

The lands were offered for sale by public auction on the 15th November, 1915, but this proved abortive (no bid reaching the bid reserved), and they were afterwards sold by private tender to Marinelli, a third mortgagee, for $1,500, which was paid into Court in January, 1916.

The Master states (in his reasons) that the portion of the buildings destroyed by fire was covered by an insurance policy in which the loss was made payable to the plaintiffs and the defendant Wilcox. The insurance company issued its cheque payable to the plaintiffs and this defendant. The said defendant endorsed the cheque and returned it to the plaintiffs, accompanied by a letter from her solicitor claiming to be entitled to share in the insurance money, under the covenant to insure in her mortgage, in priority to the execution creditors. The plaintiffs held the insurance money so received, "and proceeded with the sale of the property." As to this last sentence, the affidavit of Helm, the plaintiffs' manager, shews that the cheque for $1,491 was received about the 23rd December, 1915, and was on that day applied on account of the company's mortgage.

The Midland Loan and Savings Company took out, under their mortgage, a policy for $3,000, paid the premiums, and

charged them to the mortgagor, before the existence of the Wilcox mortgage.

The policy existing at the date of the second fire was dated the 19th July, 1915, and insured the mortgagor against loss by fire to the extent of $2,500 upon the buildings, and contained a co-insurance clause, by which the loss was made payable "in the first instance to the Midland Loan Company" (plaintiffs) "and in the second instance to Elizabeth S. Wilcox as their interests may appear." It was taken out in this form by the plaintiffs and the premiums paid by them and charged against the mortgagor.

The Master regards and has treated these as two funds issuing from the mortgaged premises, i.e., the $1,500 from sale moneys and $1,491 from insurance moneys, and has apportioned the latter ratably between the two mortgagees. He says: "As to the purchase-money, admittedly the execution creditors are entitled to rank in priority to the defendant Wilcox . . . The execution creditors are not entitled to rank on the insurance moneys in priority to the defendant Wilcox. This, then, leaves the plaintiffs with two funds available for satisfaction of their mortgage: the purchase-money, in which the execution creditors are entitled to share next after the claim of the plaintiffs; and the insurance money, upon which the defendant Wilcox is entitled to rank. I am of opinion that the doctrine of marshalling comes into operation, and that the plaintiffs' claim should be assessed ratably over the two funds, and that the remainder go to the respective parties as above indicated."

It will simplify the consideration of the questions involved to know that the amount of the insurance was not sufficient to satisfy the claim of the first mortgagees. It is not needful to consider what, if any, claim the execution creditors might have on the insurance moneys if any balance had been left after satisfaction of the first mortgage. On the view of the situation as expounded in *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A.R. 347, the insurance money, when received by the mortgagees, was a security in the same sense and to the same extent as the land, and therefore redeemable in the same terms by any one entitled to redeem, e.g., the execution creditors. So that it is by no means to be taken as of course that the execution creditors had no voice or interest in the application of the insurance. But this is an aspect of the case that does not now arise upon the facts.

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The Master appears to have overlooked the effect of the contract as to these insurance moneys. They were not held as joint moneys or as ratably distributable, but to be payable firstly to the Midland company and secondly to Wilcox as their interests may appear. That is, according to the respective amounts due on the mortgages and according as their interests may appear—which would involve a consideration of priorities.

There are in truth not two funds to administer: one fund represented by the insurance money was at home in the hands of the plaintiffs before the other fund from the sale moneys arose. By the terms of the statute (the Mortgages Act), R.S.O. 1914, ch. 112, sec. 6 (2), the mortgagees had the right to apply all the insurance money to satisfy their own mortgage, which right they exercised on the 23rd December, 1915; and that concludes any other claim to dispose otherwise of the money. That reduces the first mortgage for the benefit, as is right, of the execution creditors, and affords no ground of complaint to the second mortgagee (see *Edmonds* v. *Hamilton Provident and Loan Society*, *u.s.*)

The first mortgage, by the receipt of the two sums for insurance, had been reduced to $340.28 on the 17th January, 1916, date of final report. This does not include, I understand, costs taxed to the plaintiffs of $41.35 in the action and $287.76 in the Master's office, and these sums will, if so, be added and the total paid out of the money in Court. But that money in Court will have to be reduced by refund to the purchaser, as found by the Master, of $377.05, and also by payments of prior liens to Bernardi of $172.25 and to Gallagher $59.75. Next after this and after the plaintiffs the balance is to go to the execution creditors the Cornwall Beef Company and Ciotti—which will more than exhaust the sale moneys, as I understand. These figures and computations to be revised by the Registrar in Toronto, if the parties do not agree.

As to costs, Wilcox did not appear on the appeal, and the plaintiffs stood neutral on the ground that either way they would get paid in full. The plaintiffs are responsible for the shape in which the report was appealed from, and moved too precipitately to confirm the report and distribute.

The purchaser is entitled to his vesting order, and the plaintiffs should get no costs beyond what is already taxed. The appellants

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will get their costs of appeal out of the fund in Court as a first charge before payment to the plaintiffs. The report had better be readjusted on the terms of the present judgment, so as to fix exactly the amount to be paid out to the respective parties entitled.

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MAN.

K. B.

Manitoba King's Bench, Mathers, C.J.K.B. June 22, 1916.

DAMAGES (§ III A 1—40)—BREACH OF THRESHING AGREEMENT.

The measure of damages for a breach of contract to thresh wheat which causes an inferior grade is not the difference in the price of the grades at the time the wheat would have been sold except for the breach, but the difference in the price actually obtained for the inferior grade, and the price which the wheat would have brought if the breach had not occurred; the injured party is only entitled to be placed in the same position as if the breach had not occurred.

[*Smeed* v. *Foord*, 1 El. & El. 602; *Wertheim* v. *Chicoutimi*, [1911] A.C. 301, referred to.]

Statement.

ACTION by a thresher to recover the price of threshing.

J. R. Haney, for the plaintiff.

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

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—The defendant counterclaims for damages for breach of contract in not threshing at the time agreed upon. The plaintiff's claim is not disputed.

The defendant alleges an agreement made on August 31 last by which the plaintiff agreed to come to her after threshing for his father and brother. The evidence is extremely contradictory as to whether or not the machine was to be taken to the defendant's place after completing the threshing of Jno. Dipple, Jr.; but I think it is established beyond doubt that the plaintiff did agree to thresh the defendant's grain after he had threshed that of one Nichols. While threshing for Jno. Dipple, Jr., a dispute arose between the plaintiff and Victor Nichols and the defendant's son Henry as to where the machine was to go next, and it was finally agreed to settle the dispute by tossing a coin. Nichols won the toss and the machine went to his place, but it was clearly understood that it should go to the defendant's next. Instead of doing so the plaintiff, in order to "cut out" another thresher, took his machine from Nichols' place to that of one Lamb, and finally arrived at the defendant's place on September 24. After threshing oats for about three-quarters of a day it began to rain and continued raining until the defendant's unthreshed crop was seriously damaged. The occurrence of just such an event was within the contemplation of both parties. It was known that

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the defendant's crop was in stook in the field. It was known, also, that it was impossible then for the defendant to secure another machine. Both recognized—as did all the farmers in the neighbourhood—that delays were dangerous and might result in serious loss to the defendant by rain. On the principle of *Smeed* v. *Foord*, 1 El. & El. 602, I think the plaintiff is liable for the damage, if any, which the defendant sustained by reason of his breach of agreement to thresh defendant's grain immediately after threshing that of Nichols.

The plaintiff finished at Nichols' on Tuesday, September 21, and should have moved to the defendant's place that evening. Instead of doing so he went to Lamb's and did not reach the defendant's until about 10 a.m. on the 24th, and after a few hours' threshing they were compelled to stop by rain. Up to that time the defendant's crop had been uninjured and was in good condition for threshing. Between September 24 and October 8 one or two attempts were made to complete the threshing, but the grain was on each occasion found to be too wet. On the latter date threshing was resumed and completed on the 13th, although the grain was still out of condition.

Had the plaintiff come to the defendant's place at the time he agreed to come I find that at least 2,500 bushels of the defendant's wheat would have been threshed before the rain came, and that it would have graded No. 2 Northern. When sold it graded "No. 3 Northern tough."

The defendant claims that she is entitled to be paid the difference in value between wheat graded No. 2 Northern and No. 3 Northern tough. The average spread between these two grades was in the fall of 1915 about 10c. and if this is the measure of her damage the assessment would consist in merely calculating 10c. per bushel on 2,500 bushels.

The defendant says her intention was to market her grain as soon as she conveniently could after threshing and that had the plaintiff commenced to thresh at the time he agreed to she would probably have sold about September 30 or October 1 following. On the former date the market price of No. 2 Northern was 90¼c. and on the latter 88⅝c. There is, therefore, no evidence that had the plaintiff fulfilled his contract to the letter the defendant would have realized more than 90¼c. per bushel. The threshing

was completed on October 13. When the defendant sold on October 29, and November 3, she realized 90⅜c. and for dried grain 96⅜c. For undried wheat, No. 3 Northern tough, on November 3, the market price was 92⅝c. The net result is that the defendant actually received more money for her wheat than she probably would have received had the plaintiff fulfilled his contract and threshed her grain at the time he agreed to thresh it.

The defendant contends that notwithstanding she is entitled to receive from the plaintiff as damages for his breach of contract the difference between No. 2 Northern, the grade her wheat would have received if undamaged, and No. 3 Northern tough, the grade it actually did receive. If this contention were acceded to the defendant would make a profit out of the plaintiff's breach of contract. It is not the intention of the law that such a result should flow from a breach of contract. The principle is that the complaining party should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. Had the defendant contemplated holding her grain after it had been threshed for a favourable market in which to sell there might be some basis for the defendant's contention. Her evidence is, however, that she intended to sell it as soon as she conveniently could thereafter, probably about September 30. Had the contract been exactly performed and she carried out her intention of selling as soon as she conveniently could thereafter the evidence is that she would have obtained a price not exceeding 90¼c. per bushel. That price then must be accepted as the value of the wheat to her if there had been no breach. But there was a breach and the wheat was not threshed and ready for market until October 13, because of the fault of the plaintiff. Surely her damage is the difference in money value to her of the wheat had it been threshed in time and its money value at the time it actually was threshed. The best evidence of the value of the grain to her after it was actually threshed is the value she obtained for it. As previously pointed out, she actually realised more money than she would have realised had there been no breach of contract. Wherein, then, has she been damnified? Had the market price of the wheat fallen or remained stationary between the periods mentioned, the defendant's damage would have been real, but as a matter of fact, there was between those periods an advance in price more than

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sufficient to compensate the defendant for the loss in quality, with the result that she has suffered no loss.

The decision of the Privy Council in *Wertheim* v. *Chicoutimi*, [1911] A.C. 301, bears out this conclusion.

Mathers, C.J.K.B.

The result is that the plaintiff is entitled to a verdict for $623.50 and costs of suit. The defendant is entitled to a verdict upon her counterclaim for nominal damages of one shilling. I allow no costs of counterclaim to either party.

Judgment accordingly.

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HENDERSON v. CANADIAN PACIFIC R. CO.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J. and Newlands, Brown and McKay, JJ. July 17, 1916.

GARNISHMENT (§ I D — 30) — WAGES DUE IN ANOTHER PROVINCE — JURISDICTION OF COURT UNDER DOMINION WINDING-UP ACT.

A garnishee order *nisi* issued by the Supreme Court of Ontario at the suit of the liquidator of an insolvent company, under the provisions of the Winding-up Act (R.S.C. 1906, ch. 144), is no answer to a workman's claim for judgment under the Master and Servant Act (R.S.S. 1909, ch. 149), for wages earned in the Province of Saskatchewan.

(*Ed. Note.*—An interesting discussion took place as to the extra-territorial jurisdiction of provincial Courts under the Dominion Winding-up Act, upon which the Court was equally divided.)

Statement.

APPEAL by way of a stated case from an order of a magistrate under the Winding-up Act (R.S.C. 1906, ch. 144). Affirmed: Court equally divided

N. R. Craig, for defendant, appellant.

G. E. Taylor, K.C., for respondent.

Haultain, C.J.

HAULTAIN, C.J.:—I agree with my brother Newlands that the garnishee order *nisi* is no answer to Henderson's claim for wages, and would therefore answer the question submitted to us in the affirmative.

I am, however, of opinion that the garnishee proceedings were properly taken, and that the Winding-up Court had jurisdiction in the matter, and, in view of the importance of the matter, will express my opinion at length.

The jurisdiction of the Winding-up Court is prescribed by parliament in virtue of its paramount and exclusive right to legislate with regard to bankruptcy.

Sec. 13 of the Winding-up Act provides for a Winding-up Court, and gives it exclusive jurisdiction to make the winding-up order. Sec. 108 prescribes what the practice and procedure of the Court shall be. Sec. 111 gives the Court power to allow service of process or proceedings under the Act to be made on

persons out of the jurisdiction "in the same manner and with the like effect as in ordinary actions or suits within the ordinary jurisdiction of the Court."

Sec. 13 indicates the Court which, for the purposes of the Act, is given jurisdiction throughout the Dominion and sec. 108 provides the machinery for carrying out its functions under the Act. As the Court has jurisdiction throughout the Dominion, sec. 111, like sec. 115, makes provision for the service of its process or proceedings outside the limits of its ordinary jurisdiction.

Sec. 114 provides that debts due to any person against whom an order under the Act is made for the payment of money may, in any province where the attachment and garnishment of debts is allowed by law, be attached and garnisheed in the same manner as debts in such province due to a judgment debtor may be attached and garnisheed by a judgment creditor.

This section, read with sec. 111, in my opinion clearly brings a garnishee outside of the ordinary jurisdiction of the Court within the jurisdiction, and gives to the service of the garnishee summons the same effect as if it had been served in an ordinary action within the ordinary jurisdiction of the Court. The use of the words "ordinary jurisdiction" in sec. 111, seems to me to meet most of the objections which have been made by counsel for the respondent against the jurisdiction of the Ontario Court. These arguments, to my mind, are based on a confusion of the terms "jurisdiction" and "procedure."

What has been done in this case? A winding-up order has been made and a liquidator has been appointed. A judgment at the suit of the liquidator has been recovered against the respondent for $104, in the Ontario Court. In view of sec. 111 of the Act, and of the main object of the Act, no one can question the jurisdiction of the Ontario Court, although the respondent was presumably served with the writ or initial process outside of that province. Garnishee proceedings founded on that judgment were taken in the same Court and, under the provisions of secs. 111 and 114, service of the garnishee process on the respondent outside of Ontario brought him within the jurisdiction of the Ontario Court to the like effect as if he had been served in Ontario in an action within the ordinary jurisdiction of the Ontario Court. Questions of proper service and objections to the manner in which

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the original judgment was obtained, are not matter with which we have anything to do. We are not a Court of appeal under the Act, nor is the Ontario Court a "foreign" Court whose judgment and procedure we can call in question, as argued by Mr. Taylor. If the respondent was not properly served, or if the order made against him was improperly obtained and was not made in conformity with the provisions of the Act, those are matters in regard to which he must seek his relief in the Ontario Court to whose jurisdiction he is subject.

Another objection raised on behalf of the respondent is set out in his factum as follows:—

> This debt is not an asset of the company in liquidation.
>
> The argument that the Court having jurisdiction over the winding-up has jurisdiction over this debt as an asset of the company is fallacious. The debt due to the complainant by the railway company is not and never was an asset of the National Railway Association Limited.
>
> This debt due to the complainant by the railway is not within the description "property," effects "and choses in action to which the company is or appears to be entitled," and is not therefore an asset in the custody or under the control of the liquidator, Winding-Up Act, sec. 33, or expressly within the control of the Court having charge of the liquidation.

In support of this proposition, the cases of *Re Dome Lode Development Co.*, 17 W.L.R. 610, and *Blais* v. *Bankers Trust Corp.*, 14 D.L.R. 277, were cited. Neither of these cases seems to me to support the proposition. The first case only decided that the Yukon Court could not exercise its auxiliary jurisdiction in a winding-up matter until formally put in a position to do so under the Act. The second case practically decided the same question in the same way.

I do not think it necessary to discuss whether the debt owing by the garnishee to the respondent comes within the meaning of the words, "property, effects and choses in action to which the company is entitled."

Sec. 34 (*a*) of the Act empowers the liquidator to bring any action or other legal proceeding in his own name as liquidator or in the name or on behalf of the company, and sec. 114 expressly authorises the attachment and garnishment of debts and prescribes the procedure.

Another argument made on behalf of the respondent was that under secs. 125, 126 and 127 of the Act, the order made against the respondent should have been transferred by the Ontario Court to the Supreme Court of this province for the purpose of being

enforced here. If that means that the order should have been made an order or judgment of our Court in order, for instance, to enforce payment by execution I quite agree. But I cannot agree that those sections refer to garnishee proceedings, for the reasons already stated.

Haultain, C.J.

What I have said with regard to the effect of sec. 111 disposes of any question which has arisen about the service in Ontario of the garnishee proceedings on the Railway Co. It also, in my opinion, makes any discussion of the effect of the decisions in *Rex* v. *Lovitt*, [1912] A.C. 212; *Royal Bank* v. *Rex*, 9 D.L.R. 337, [1913] A.C. 283 and *McMulkin* v. *Traders Bank*, 6 D.L.R. 184, 26 O.L.R. 1, quite unnecessary.

McKay, J., concurred.

McKay, J

NEWLANDS, J.:—This is a case stated by the police magistrate at Moose Jaw. The facts are as follows:—

Newlands, J.

Henderson was a brakeman in the employ of the C.P.R. at Moose Jaw where he had resided for the past 4 years and had never resided in the Province of Ontario. That during the time he so resided at Moose Jaw he had been in the employ of the C.P.R. and had been paid his wages by a paymaster of the company at Moose Jaw on the 15th of each month for the wages earned during the previous month. In the month of December, 1915, he earned $92.75 which he subsequently demanded from the paymaster at Moose Jaw on January 15, 1916. Payment of his wages was refused because a garnishee order *nisi* had been served upon the C.P.R. at Toronto in the Province of Ontario in a proceeding in the Supreme Court of Ontario entitled:—

In the matter of the Winding-up Act being ch. 144 of the R.S.C. and the amending Acts and in the matter of the National Railway Association Limited.

The National Railway Ass. Ltd., a company incorporated under the laws of Ontario, had become insolvent and was being wound up under the Winding-up Act, ch. 144, R.S.C. A liquidator had been appointed by the Supreme Court of Ontario and an order made p acing the name of Henderson amongst the contributories of the company. A further order was made requiring him to pay the amount found due from him as a contributory and judgment entered therein in said Supreme Court, after which the garnishee order *nisi* above mentioned was issued. None of these orders were served personally upon Henderson

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and he had not actually received any notice in connection with the liquidation proceedings.

When the paymaster refused to pay Henderson his wages he took proceedings against the C.P.R. under the Masters and Servants Act, R.S.S. 1909, ch. 149. After hearing the parties, the magistrate made an order against the C.P.R. for the payment of such wages, and at the request of the parties made a reference to this Court *en banc* under the provisions of part XV. of the Criminal Code, made applicable to the proceedings herein by the Police Magistrates Act, ch. 61 R.S.S.

The question submitted for the judgment of the Court by the police magistrate is:—

Was I right on the facts aforesaid in making the order for payment and distress?

It was argued before us that under the Dominion Winding-up Act the Supreme Court of a province became a Dominion Court with authority to collect the assets of a company in liquidation in any part of Canada. Upon this theory the Supreme Court of Ontario would have jurisdiction over Henderson though resident outside of the jurisdiction of that Court, and that therefore the garnishee order *nisi* issued by that Court would have the same effect as if issued by the Supreme Court of Saskatchewan. I cannot agree with this argument because in that event it would have been unnecessary to have enacted secs. 125-6 and 7 of the Winding-up Act, which provide for the enforcement of the judgments and orders of the Court of the province through the Courts of the province where the property is situated or the persons to be affected thereby reside. Except as is provided in secs. 115 and 116 that Act confers no extra-territorial jurisdiction upon a provincial Court and, therefore, the question submitted to us may be considered as if the company in question was not in liquidation.

In *McMulkin* v. *Traders Bank*, 6 D.L.R. 184, 26 O.L.R. 1, it was held that a debt similar to the one in question here could be garnisheed; *i.e.*, "where some third person is indebted to the judgment debtor and is within Ontario." The only question which was considered in that case was whether a similar indebtedness was subject to attachment at the instance of the judgment creditor in the Ontario Courts. The question whether such legislation was *ultra vires* of Ontario was not considered because no notice had been served as required by sec. 60 of the Judicature

Act of that province that such contentions would be urged. It is, however, necessary for me to consider this question in order to conclude what effect the Courts of this province should give to the garnishee order *nisi* issued by the Supreme Court of Ontario. It is all the more necessary to consider this question because of sec. 114 of the Winding-up Act, which provides —

> Debts due to any person against whom such order for the payment of money, costs or expenses has been obtained, may, in any province where the attachment and garnishment of debts is allowed by law, be attached and garnisheed in the same manner as debts in such province due to a judgment debtor may be attached and garnisheed by a judgment creditor.

From this section it was argued that if the rules of the Supreme Court of Ontario allowed the debt in this case to be garnisheed, then the Winding-up Act conferred that power upon the Court granting the winding-up order.

This section, however, does not confer any extra powers upon the Court. It is, therefore, necessary to consider what powers the Court has; and as it can only have such powers as the legislation creating it could confer upon it then the question of *ultra vires* must be considered.

Upon this question it might be sufficient to cite: *Royal Bank of Canada* v. *The King*, 9 D.L.R. 337.

At p. 345 Viscount Haldane, L.C., says —

> In the opinion of their Lordships the effect of the statute of 1910, if validly enacted, would have been to preclude the bank from fulfilling its legal obligation to return their money to the bondholders, whose right to this return was a civil right which had arisen, and remained enforceable outside the province. The statute was on this ground beyond the powers of the Legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it.

The same language would apply to this case. Henderson's right to collect his wages was a civil right which had arisen and remained enforceable outside the Province of Ontario, and any legislation of that province to attach such a debt would be *ultra vires*, as it would neither be confined to property and civil rights within that province, nor directed solely to matters of merely local or private nature within it. If the Legislature of Alberta could not attach money payable outside the province to persons resident outside that province by a corporation having an agency within Alberta, then the Legislature of Ontario cannot authorise the Courts of that province to attach moneys payable outside

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the province, to a person resident outside the province, by a company having an agent within Ontario.

In *King* v. *Lovitt*, [1912] A.C. 212, it was held that a branch bank was for certain purposes to be regarded as a distinct trading body. If this decision be applied to the C.P.R., which does business in all the provinces of Canada, as well as Great Britain and several foreign countries, then the company would not be resident in Ontario for the purposes of service of the garnishee summons. As I have said, in *McMulkin* v. *Traders Bank*, *supra*, it was held that such service could be made, but in that case the Court was deciding only upon the wording of their rule of Court, but where the question is the *ultra vires* of the rule then *King* v. *Lovitt* becomes of more importance.

The C.P.R. has its head office in Montreal. It is divided into eastern and western divisions. All that part of Ontario east of Fort William is in the eastern district and the remainder in the western district. The head officials of the western district are resident at Winnipeg. This western district is again divided into divisions. Henderson worked in the Saskatchewan Division with headquarters at Moose Jaw.

In *The King* v. *Lovitt*, Lord Robson, at 219, said:—

Although branch banks are agencies of one principal firm, it is well settled that for certain special purposes of banking business they may be regarded as distinct trading bodies. Thus, it was held in *Woodland* v. *Fear* (1857), 7 El. & Bl. 519, that the obligation of a bank to pay the cheques of a customer rested primarily on the branch at which he kept his account, and that the bank in that case had rightfully refused to cash the cheque at another branch. Commenting on that decision, Sir Montague Smith, in delivering the judgment of their Lordship's Board in *Prince* v. *Oriental Bank Corporation*, 3 App. C. 325, points out that it would be difficult for a bank to carry on its business by means of branches on any other footing, because the officials at one branch do not know the state of a man's account at another branch.

The obligation to pay Henderson's wages, adapting the words of the above quotation to this case, rested primarily on the division in which he worked, and another division could rightfully refuse to pay, as it would be difficult for the railway to carry on business on any other footing, because the officials of one division would not know the state of a workman's account in another division.

If the debt in question is attachable in Ontario then, in order to do no injustice to the garnishee, the Courts of that province

should be able to restrain Henderson by injunction from collecting his wages in his own country. This they cannot do.

In *Carron Iron Co.* v. *MacLaren*, 5 H.L.C. 416, Lord Cranworth, L.C., said at 442:—

> The existence of such an agency may, in some cases, enable third parties to sue the principals, though out of the jurisdiction, by reason of their being for certain purposes represented by their agents. But I can discover no principle which would justify the Courts of this country in holding that the existence of an agency here for the sale of goods can deprive a foreign principal of his rights as a creditor in his own country. It must be observed that we are dealing with the case of a foreigner, or rather a foreign corporation, seeking no assistance from the Courts of this country. If the appellants had come in under the decree, so as to obtain payment partially from the English assets, a very different question would arise, according to a doctrine in *Beauchamp* v. *The Marquis of Huntley*, Jac. 546, where Lord Eldon restrained a creditor, who had proved under an English decree, from further prosecuting a creditor's suit in Ireland. It is sufficient to say that that is not the case before the House. The appellants are not restrained by reason of their having sought or obtained any relief in this country, but solely because they had agencies for the sale of their goods in this country.
>
> Suppose the case of a Manchester manufacturer, with an agent for the sale of his goods in Paris. If a debtor of the manufacturer were to die in France, leaving assets there and in this country, it would surely be competent for the manufacturer, as a creditor (say by bond) of the deceased debtor, to sue his executors or heir in this country so as to obtain payment, and to profit by the priority which he would derive from his bond. The French Courts clearly could not prevent this, if the creditor had no goods within their jurisdiction. It seems a strange anomaly that the accident of the creditor having goods in a foreign country, and an agent there for the sale of them, should prevent him from having the same means of recovering payment of a debt in this country which he would have had if he had happened to have no agent nor any goods abroad.
>
> So again, put the case of a person dying in France indebted; some of his debts being such as give the creditor by the laws of France a priority (I believe wages of servants and fees of physicians come within this class), we should surely be exercising a strange jurisdiction in this country if we should seek to restrain the French creditor from enforcing such a French right in his own Courts; nor can I see how the fact of his having an agent or goods in this country would vary the case.

The Lord Chancellor's remarks have a very pertinent bearing upon this case. Henderson is an unmarried man and we were informed by counsel that, therefore, the whole of his wages could be garnisheed in Ontario. In this province $25 of his wages is exempt from attachment. What laws are to apply in this case; those of Ontario, or Saskatchewan, where the wages are earned? It would certainly be a strange jurisdiction if the Courts of Ontario could prevent him from collecting even the $25, which under the

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laws of the country in which he worked and earned the wages attached, that amount was exempt, from any such process.

I have gone as thoroughly as I could into this case because it is a test case and affects a large number of workmen on the C.P.R. If it had not been for its importance I would have rested my decision upon another point altogether, which is the one on which the police magistrate based his decision; that is, that a garnishee order *nisi* is no answer to Henderson's right to judgment. As was pointed out in *Saskatoon Hardware Co.* v. *Priel*, 22 D.L.R. 911, r. 516, provides that payment made by or execution levied upon, a garnishee shall be a valid discharge to him against the judgment debtor to the amount paid or levied.

In this case neither payment nor a levy has been made, therefore, as Romer, L J., said in *Re H.B.*, [1904] 1 K.B. 94, at 97:—

> How can a garnishee order *nisi* prevent the creditor from issuing execution on a judgment? It is not either payment of the debt or an execution.

Upon this point I would also cite: *Genge* v. *Freeman*, 14 P.R. (Ont.) 330.

I am, therefore, of the opinion that the magistrate was right in making the order for payment and distress and that the question asked should be answered in the affirmative.

Brown, J.

BROWN, J.:—I concur in the view that the garnishee order *nisi* is no answer to Henderson's right to judgment.

Judgment affirmed; Court divided.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. March 21, 1916.

SALE (§ I B—11)—APPROPRIATION—REASONABLE TIME OF DELIVERY.

Inspection, measuring and branding of logs under a contract of sale is a sufficient appropriation to pass the property in the whole cut so inspected and branded. Where no definite time for delivery appears to have been actually fixed, the law will imply a duty to deliver within a reasonable time.

Statement.

APPEAL by the plaintiff from the judgment of CLUTE, J., at the trial, dismissing the action and awarding the defendant $2,200 upon his counterclaim. Reversed.

J. M. Ferguson and *J. T. Mulcahy*, for appellant.

T. Johnson, for defendant, respondent.

Garrow, J.A.

GARROW, J.A.:—The plaintiff's cause of action, as set forth in the statement of claim, is, that the plaintiff agreed to sell and the defendant agreed to buy all the saw-logs and timber to be cut and taken out by the plaintiff during the saw-log season

of 1913-1914, at the price of $12 per thousand for certain of the logs and $13.50 per thousand for certain other kinds of logs, and at prices of 15 cents and 30 cents and 40 cents per piece for certain small saw-logs; that the plaintiff took out and delivered to the defendant, as agreed, at Sucker Lake and other points arranged with the defendant, considerable quantities of saw-logs of the various kinds, amounting in all to the sum of $6,892.12, upon which the defendant still owed a balance of $2,358.44.

The contract was wholly verbal, and, as was perhaps to be expected, the defendant's version varies from that put forward by the plaintiff. The defendant in his pleading said that in or about the month of October, 1913, the plaintiff agreed to sell and the defendant agreed to buy all the saw-logs and timber cut and taken out by the plaintiff *and delivered at Sucker Lake* during the season of 1913-1914; that the plaintiff delivered to the defendant at Sucker Lake, in the season of 1914, in pursuance of his said agreement, logs and timber (giving the details) amounting in value according to the agreement to the sum of $2,228.84; that the plaintiff neglected and failed to deliver the balance of the logs and timber cut by him in 1913-1914, but in the spring of 1915 delivered a part of the said stock, which the defendant refused to accept; that the defendant had paid to the plaintiff on account of such logs and timber the sum of $4,623.58, and had performed work upon such logs and timber at the plaintiff's request, amounting with such payment to the sum of $5,226.65; and by way of counterclaim he claimed damages for non-delivery, together with a return of the money overpaid, amounting to the sum of $2,983.17.

The plaintiff's allegation therefore was, that what he sold and what the defendant bought was the whole of his cut; while the defendant contends that he only agreed to buy so much of the cut as was passed down stream into Sucker Lake in the season of 1914; although, if that is so, his allegation that the plaintiff neglected and failed to deliver the balance of the cut seems to be inconsistent. Clute, J., accepted the defendant's version, dismissed the action and gave the defendant judgment on his counterclaim for the sum of $2,200 and costs. The decision does not apparently turn on any nice questions of disputed testimony, or, in other words, upon credibility. The main facts are really not in dispute.

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The defendant is a saw-miller, having a saw-mill on Sucker Lake, and he purchased the logs with the intention of cutting them into lumber at his mill. There is no doubt at all, in my opinion, upon the whole evidence, written and verbal, that the defendant intended to buy and did buy, as the plaintiff says, the whole cut, and not merely a part of it. At the time of the purchase it was, no doubt, the expectation and intention of all parties that the whole cut would be delivered into Sucker Lake, the place of delivery agreed upon, in the season of 1914, and probably early in the season, depending upon the sufficiency of water in the various runways leading to the lake.

When the agreement was made, the logs had almost all been prepared ready for delivery into the water when the time came; and later, when they had all been manufactured and were ready for delivery, they were inspected by the defendant, and, with the aid of a licensed scaler, Mr. Fairhall, scaled, and their contents ascertained, and they were also then branded with the defendant's own brand.

Afterwards, in the spring of 1914, a quantity of them was sent down into Sucker Lake. Apparently no separate tally of these was kept or attempted, either by the plaintiff or by the defendant —an unlikely oversight, it seems to me, unless they were, as I have no doubt they were, regarded by both parties simply as a part of the whole still to come, water permitting. This also seems to agree with the method followed by the defendant in making advances upon the purchase-money, which evidently entirely ignored the actual deliveries into Sucker Lake; with the result that at the end of the season the defendant had advanced a very large sum beyond the value of the logs which had been delivered—a sum that he now seeks to recover back.

Whatever else is obscure, it is, I think, apparent that the plaintiff's version that what he sold to the defendant was the whole cut, and not merely a part of it, is the correct one. And it is, I think, also established by the evidence, the leading features of which bearing upon this question I have recited, that not only did the defendant buy the whole cut, but that the effect of what took place in measuring and branding was to pass the property in the whole so inspected, measured and branded, to him as finally appropriated and accepted under the contract, within

the numerous authorities upon that subject. See *Craig* v. *Beardmore*, 7 O.L.R. 674.

That the defendant so regarded it himself is apparent, if from nothing else, from his letter of the 22nd October, 1914, in which he offered to "release his brand" on certain conditions. Indeed, but for such a construction he would have had no security for the large advances he was making: a circumstance always of weight in considering such cases. See *per* Osler, J.A., in *Wilson* v. *Shaver*, 3 O.L.R. 110, 114.

The question of the property passing does not appear to have been discussed before Clute, J., although it was much relied on in the argument before us by counsel for the plaintiff. The main discussion before Clute, J., to judge by the notes of judgment, was as to the other and more obscure and much more difficult question of the term of the agreement concerning delivery, some of the logs not having been delivered until the following season, when they were refused by the defendant.

It does not, of course, determine that question to say that the property in the logs had passed to the defendant, nor, if the evidence upon the question of the time of delivery was clear, could it help to vary what must otherwise be the correct conclusion upon the evidence. Its value, in my opinion, is in helping to understand and to construe and apply evidence which is not clear and precise, as, in my opinion, the evidence upon this branch on both sides may very properly be characterised. If the property had not passed, the defendant had no interest in any logs which did not succeed in reaching Sucker Lake. But, on the other hand, if the logs were his under the bargain, he was interested not only in those sent down but in those which were left.

The direct evidence upon this branch is somewhat meagre. When the plaintiff was in the witness-box this occurred:—

"His Lordship: Do I understand the difference between the parties is this: that the defendant claims that these logs all were to be delivered that season down to Sucker Lake, and claims damages because they were not, and because they were not he claims he has overpaid you?

"Mr. Mulcahy: Yes, that is the situation.

"His Lordship (to witness, plaintiff): What do you say? A. I undertook to deliver the logs that season, I understood they were to be delivered (interrupted).

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"Q. Then you did not deliver them? A. No, not all."

In cross-examination the plaintiff remarked:—

"Q. I understand you admit you were to deliver these logs in Sucker Lake in the season of 1914? A. I was to drive out the logs.

"Q. To Sucker Lake? A. Yes.

"Q. In the season of 1914? A. I understood that, yes, if there was water enough.

"Q. Was anything said about water enough when you made your original bargain? A. No.

"Q. You were to drive them to Sucker Lake? A. Yes.

"His Lordship: That season? A. That was mentioned when we made the bargain, my Lord.

"Mr. Johnson: When were you to deliver these logs at Sucker Lake? A. There was no time mentioned when I was to have them at Sucker Lake.

"Q. You could have them there whenever you liked? A. I did not think of it that way. My idea was to get them there as soon as I could.

"Q. Were you to deliver them there in the season of 1914? A. That was not specified when Mr. Greer bought the logs.

"Q. You were examined a few days ago in this action? A. Yes.

"Q. You were asked then, 'Q. Was there anything else in the bargain, give me the prices? A. Well, I was to deliver the logs in Sucker Lake. Q. When? A. I expected to deliver them in the following spring. Q. That was the spring of 1914? A. Yes. Q. Was that the bargain, that they were to be delivered in 1914? A. That was the understanding. There was no guarantee.'"

The cross-examination was then resumed:—

"Q. Was that the understanding, that they were to be delivered in 1914? A. No, it was not specified.

"Q. Can you explain your answer? A. I fully expected to have delivered them in 1914.

"Q. You said that was the understanding? A. I don't remember saying that it was the understanding; I expected to deliver them.

. . . . .

"Q. If you expected it, don't you think he expected it too? A. I have no reason to doubt that he expected it."

Evidence on the subject on behalf of the defendant was given —after the plaintiff had been examined—by the defendant and his son John Greer junior. In his examination in chief the defendant was asked:—

"Q. Tell me what the bargain was between you and the p aintiff about the delivery of these logs? A. They were to be delivered in the season of 1914.

"Q. Where? A. In Sucker Lake."

The son was asked:—

"Q. Do you know anything about this bargain between your father and Mr. White? A. I was present at the time. . . .

"Q. What was the bargain? Mr. White was to put the logs into Sucker Lake in the spring of 1914, during the sawing season of 1914."

That is, I think, practically all the testimony upon the subject of delivery. It will be noted that, while desire and intention are freely admitted by the plaintiff, he states more than once that nothing was actually said upon the subject. All parties assumed, as self-interest itself suggested, that delivery would be completed in the season of 1914. And it should be noted that, although the defendant and his son were both examined after the plaintiff had given his evidence, neither of them denied the plaintiff's statement that nothing was said about delivering in 1914. What they were asked was, "the bargain," not what was said, and wha they answered was an inference only which they expect the Court to adopt.

In estimating the value of the evidence it is impossible to ignore the fact that in the meantime the war had seriously affected the building and lumber trades, thus supplying an obvious motive to the defendant for escaping or trying to escape, if possible, from an onerous contract. That he had such a desire is reasonably obvious from his rather singular letter of the 22nd October, 1914, before referred to, written, it will be observed, previous to the close of the season, which, on the evidence, only ends in the following month. He wrote as follows: "I have been unable to dispose of my present stock of lumber, and therefore I am afraid that we will not be in a position this season to handle any more than we have on hand at the present time. With regard to logs in Concession Lake, the way lumber is going at the present time I

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cannot see that we could take them at last year's prices. Had they been delivered according to our agreement, during this season, we would have tried to keep our word, *but are willing to release our mark* at any time, providing we can arrange settlement for money overpaid on account of logs . . ."

Had the letter been a very little more explicit, it would have amounted to a repudiation of the contract before breach, thus relieving the plaintiff from making further delivery and giving him one more string to his bow.

There is little of value one way or the other in the only other written communication, namely, the letter, also from the defendant to the plaintiff, of the 27th November, 1914, although it does seem a little odd, if the defendant was so sure of his ground that a final breach has been committed by the non-delivery before the close of the season, that he should have troubled himself to suggest to the plaintiff that "it would be a fine thing to fit up your creek for driving," which could only have meant, to have any sense at all, driving out the remaining logs in the next season.

What then is the proper conclusion upon the evidence upon the question of delivery? Certainly not, I think, that there was a definite, fixed, and absolute bargain that delivery would be made in the season of 1914. The parties knew that the only way in which delivery could reasonably be made was by means of water, and that, if it failed, as it afterwards did, delivery would be impossbile in that season. The circumstances, therefore, strongly suggest that, even if it were assumed that the agreement was to deliver in 1914, it should be assumed to have contained an implied term or proviso based upon the continued sufficiency of the water-supply. Similar implications, I have no doubt, have been made in much weaker cases.

Another view, and upon the whole the view which I prefer, is that there was upon the whole evidence no exact time for delivery actually fixed, with the result that the law would imply a duty to perform within a reasonable time as the true contract. What is a reasonable time is of course a question of fact, and upon that question I would without hesitation find that the final delivery made by the plaintiff in 1915 was, under the circumstances, made within a reasonable time.

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For these reasons, I would allow the appeal, and the plaintiff should have judgment for his claim, with costs throughout, including the costs, if any, upon the counterclaim.

I understand the amount of the claim is not in dispute or is the subject merely of calculation, and, if so, it can be settled by the Registrar and inserted in this judgment.

MACLAREN, J.A., agreed with GARROW, J.A.

MEREDITH, C.J.O.:—I have had the opportunity of reading the opinions of my brothers Garrow and Hodgins.

If the proper conclusion upon the evidence be that the appellant was bound to deliver the saw-logs in Sucker Lake during the season of 1914, I would agree with my brother Hodgins that the action fails and that the judgment of the trial Judge should be affirmed.

I am, however, unable to come to that conclusion. Upon the whole evidence, the proper conclusion is, I think, that both parties thought that there would be nothing to prevent the appellant from delivering the logs during the season of 1914, and that that would be done. They both knew, however, that the only practicable means of bringing them down to Sucker Lake was by floating them by the water route by which the appellant subsequently was bringing them down when the difficu ty caused by the lowness of the water was met with, and that it was not intended that there should be an absolute obligation to bring the logs down during the season of 1914, but only to do that if it were practicable to bring them down by the water route they were intended to take, and that if it should not be practicable to do this they were to be brought down within a reasonable time.

What occurred when the shortness of the water became evident appears to me to confirm this view. It is true that, if the obligation to deliver in the season of 1914 had been absolute, what occurred would not have amounted to a waiver of that term of the contract; but, although that is the case, what occurred may be looked at for the purpose of ascertaining what the contract really was. It was owing to the advice of the respondent that the course was taken of making sure of getting part of the logs down with the water that was then available for floating them, and leaving the remainder to be brought down at another time. This was a natural thing for the respondent to desire to have done, as the property in the logs had passed to him, and he had made

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large payments on account of the purchase-price. A change in the attitude of the respondent in this respect did not take place until the market price of saw-logs had fallen, owing probably to the breaking out of the war, and I have little doubt that but for that it would never have entered into the mind of the respondent that, if the appellant should be unable to make delivery of the remainder of the logs during the season of 1914, the respondent would be entitled to refuse to take them in the following season.

Upon the whole, I agree with my brother Garrow's view as to the proper disposition to be made of the appeal.

Hodgins, J.A.

HODGINS, J.A.:—This appeal was argued chiefly on a ground not brought to the attention of the learned trial Judge, and not considered by him, i.e., that the property in the saw-logs had passed to the respondent prior to the difficulties which arose later on in the season, and that by reason thereof the appellant was entitled to the full price.

The logs had been cut and were in the bush, and, after the bargain, were scaled and were stamped by the respondent. He admits that this was done when scaling for the purpose of being sure of the number of logs, and also to shew that they were his logs. This was a definite appropriation of the saw-logs to the contract of January, 1914, if indeed anything further was needed; the contract being for logs already cut and skidded and identified by negotiations had in 1913, as well as in January, 1914.

These facts are clearly sufficient to indicate that in this Province the property in the logs then passed to the respondent, notwithstanding that the appellant had still to make delivery: *Wilson* v. *Shaver*, 1 O.L.R. 107, 3 O.L.R. 110; *Craig* v. *Beardmore*, 7 O L.R 674.

The logs were hauled, some to Concession Lake and put on the ice, some to the Beaver Meadow, below the lake, and the remainder—about 500 pieces—to Sucker Lake itself, where all were ultimately to be delivered during the season of 1914.

Payments by way of advance were made from time to time, but these payments were all subject to the understanding that the logs were all to be delivered during the season, when the balance would be finally adjusted

The respondent defines this season as lasting till the "freeze up," which he puts as prior to the 27th November, 1914. As, therefore, the property had passed and the time for delivery had

not expired, the actions of the respondent throughout this period are quite consistent and easily understood.

When he and the appellant met in May, 1914, they had to decide what was best to do, having regard to the scarcity of water. Both were interested, for what the appellant was required to drive were at that time the logs of the respondent. The decision was an amicable one, and did not change the legal position of either.

The appellant had the right and was bound to deliver at any time during the season which was not then ended, and the respondent did not interfere with this primary right or duty by giving his opinion or assent as to the best course to be taken at that juncture.

The giving of the note and the rendering of an account in October were natural and proper, as the contract was still unbroken. The first assertion that there was default was in the letter of the 22nd October, 1914, which refers to the statement as having been previously delivered, and says that, had the logs "been delivered according to our agreement during this season, we would have tried to keep our word," while it demurs at taking them later at the contract price.

The letter of the 27th November, 1914, I think, indicates an unwillingness to give up the logs entirely, the suggestion that this "would be a fine time to fit up your creek for driving" being consistent with a readiness to take the logs next spring, though with some rearrangement of price. But disputes ensued, and the respondent declined to accept future delivery. The logs remaining were actually put into Sucker Lake in the spring of 1915; and the question is, whether, in view of the passing of the property, the appellant can succeed as in a case of delayed delivery, or on the contention that he was merely a bailee charged with delivery and liable only for negligence

The account put in (exhibit 7) shews, by comparison with the statement (exhibit 3), that all the logs in the latter under the heading "S. White Account" were delivered in 1914, as well as some of those in "G. White Account," leaving a considerable portion in Concession Lake.

The rights of the parties must be worked out by regarding their position under the agreement and what they did during its currency. The contract was an entire one for the sale and

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delivery of specified and ascertained goods. It is evident, however, that, while the contract was entire, delivery was not necessarily to be made all at one time, but that both in intention and in practice partial delivery was expected and accepted as proper performance of the appellant's obligation. If the contract was entire, and delivery was to be made at one time, the purchaser might reject a partial delivery and refuse to accept anything short of the whole order, or he might, in the events which transpired here, have repudiated the whole contract in November, but only on terms of returning what he had already got: *Oxendale* v. *Wetherell* (1829), 9 B. & C. 386; *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128. But, if partial delivery is in accordance with the contract or is accepted, although not provided for, the contract is treated as if it were separable, and each delivery is dealt with by itself: *Bragg* v. *Cole* (1821), 6 Moore (C.P.) 114; *Tarling* v. *O'Riordan* (1878), 2 L.R. Ir. 82; *Jackson* v. *Rotax Motor and Cycle Co.*, [1910] 2 K.B. 937 (C.A.)

In the latter case (p. 950), a statement of Morris, C.J., in *Tarling* v. *O'Riordan* is accepted as correctly enunciating the law where the parties intend separate deliveries, and not one delivery, and where the second delivery is not in accordance with the contract: "The defendant here accepted the first bale, and used it finding it was correct. At the time he so accepted it he could not contemplate that the remaining goods would not be sent also correctly. In my opinion the defendant was only bound to pay for the bale that was correct and accepted by him in part performance of his contract, and was not bound to pay for any portion of the second bale which he was not bound to accept."

The last sentence, having regard to the point involved in that case, would be clearer if the last few words read "which bale he was not bound to accept." Applying that statement to the facts of this case, the respondent accepted what was delivered in time, and it cannot be asserted that he knew as a fact that the remainder could not have been driven that season during the autumn freshets. Both parties were entitled to wait and see, and did so.

Does the fact that the property had passed make any substantial difference in so far as the right of rejection on late delivery or liability for the whole purchase-money is concerned? In the case of *Gilmour* v. *Supple* (1858), 11 Moore P.C. 551, 566, Sir

Cresswell Cresswell laid down the general rule in these terms: 'By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shewn that such was not the intention of the parties. Various circumstances have been treated by our Courts as sufficiently indicating such contrary intention." The qualification as to "contrary intention" applies equally to the vesting of the property and to the vesting of the right to the price.

In *Calcu'ta and Burmah Steam Navigation Co.* v. *De Mattos*, 11 W.R. 1024, 32 L.J.Q.B. 322, 33 L.J. Q.B. 214 (1864), the Court of Queen's Bench (Cockburn, C.J., Blackburn and Mellor, JJ., *dissentiente* Wightman, J.), held that, on the proper construction of the contract, the property in a cargo of 1,166 tons of coal had passed to the purchaser (the company). One-half the purchase money had been paid to De Mattos, the seller, on the delivery on board the ship, and the balance was to be paid "on right delivery at Rangoon." The ship was damaged en route, but the cargo, to the extent of 850 tons, was transferred and ultimately reached Rangoon, but not in such a way as to constitute "right delivery" under the contract. It was in fact sold at auction at Rangoon by the carrier and bought by the company. De Mattos sued for the balance of the purchase-price, but the Court unanimously decided that he could not recover. On the question as to whether he was bound to repay what he had received and to pay damages for non-delivery, the Court was divided, two of the learned Judges being of opinion that his liability to repay was saved by the provision that one-half of the purchase-money was by the contract to be paid on delivery on board, and consequently the right to that half vested in De Mattos on shipment. In the Exchequer Chamber, Erle, C.J., Channell, B., Willes and Williams, JJ. (Martin and Pigott, BB., dissenting), affirmed the conclusion that the property has passed on shipment, but all the members of the Court were of opinion that De Mattos could not recover the balance of the purchase-price. Willes and Williams, JJ., thought that the company could recover damages for non-delivery.

This case shews not only that the passing of the property is not sufficient to entitle the seller to recover the whole contract price without delivery, if delivery is part of the consideration

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(see *Forbes* v. *Smith* (1863), 11 W.R. 574), but that the risk during the transit attaches to the seller, who is bound to deliver, to the extent of so much of the price as is contingently payable. It has been followed in *Dupont* v. *British South Africa Co.* (1901), 18 Times L.R. 24, a decision of Kennedy, J., a Judge of experience in commercial cases. He quotes with approval the statement of Blackburn, J., in the *De Mattos* case, 32 L.J. Q.B. at p. 328, that the parties "may bargain that the property shall vest in the purchaser, as owner, as soon as the goods are shipped, that they shall then be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving."

Applying the law as laid down in the foregoing cases, the rights of the parties may be summarised as follows:—

The respondent was entitled to keep and is bound to pay for the logs etc. delivered into Sucker Lake during the season of 1914, at the contract prices. It was competent to him, upon subsequent default, to reject the residue, but that refusal to accept must be taken as an election not to assert title to the logs. The respondent, not having possession, is not entitled to a lien for the amount overpaid by him; but the appellant is bound to repay it, because the overpayment was by way of advance, and not in any sense under a term of the contract vesting the right to it in the appellant on partial delivery or at any stage of the transit.

Owing to the course taken at the trial and acquiesced in, as shewn by the judgment and notice of appeal, the Court is relieved of the necessity of deciding whether the respondent is entitled to damages for non-delivery. The items objected to by the appellant in regard to the services of one of the respondent's men were properly allowed. The loss of the sinkers falls naturally upon the appellant, they being part of the logs undelivered. Apart from that, if the respondent had accepted what was delivered in the spring of 1915, subject to his claim for damages for late delivery, the result would be the same, as the sinkers were lost during the time when the appellant was in default. Their loss would be properly attributable to the retention in the water caused by the delay in delivery.

It may be noted that the provision in the English Sale of Goods Act, 1893, sec. 11 (1) (*c.*), that, where the property has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not

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as a ground for rejection, is conditional upon the contract of sale not being severable. In this case it is, as has been pointed out, severable in its nature, and was so treated by the parties.

The result is, that the judgment should be affirmed and the appeal dismissed with costs.

Hodgins, J.A.

Since writing the foregoing, I have had the opportunity of reading the opinion of my brother Garrow. I regret that I am not able to agree with it in so far as it disregards the finding of the learned trial Judge that the bargain was to deliver during the season of 1914. If the terms of the contract were to be determined by what was probable under the circumstances, it would, I think, be most unlikely that, of all stipulations in a log contract, the time of delivery would be omitted. But in this case the finding is based not only upon explicit evidence given by the respondent and his son, but upon two admissions by the appellant. The appellant sought to qualify these admissions, and the value of his whole evidence was therefore properly a matter for the trial Judge. In addition to this consideration, there is the fact that the finding is not directly challenged in the notice of appeal, nor was it controverted before us. While, therefore, the appellant did all he could, I am unable to concur in the view that the contract contained no provision as to the time of delivery, or that, if it did, it was to be conditional on a sufficient supply of water being available.

Magee, J.A.

MAGEE, J.A., agreed with HODGINS, J.A

Appeal allowed; MAGEE *and* HODGINS, JJ.A., *dissenting.*

IMP.

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SMITH v. RUR. MUN. OF VERMILION HILLS.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Atkinson, Lord Shaw, and Lord Parmoor, July 25, 1916.

CONSTITUTIONAL LAW (§ II A 4—212)—PROVINCIAL TAXATION POWERS—CROWN LANDS—INTEREST OF LESSEE.

Though under sec. 125 of the British North America Act, 1867, the provinces have no constitutional power to tax Crown lands, that restriction does not prevent them from imposing a tax upon the interest of a tenant of such lands under grazing leases from the Dominion Government.

[*Smith* v. *Rur. Mun. of Vermilion Hills*, 20 D.L.R. 114, 49 Can. S.C.R. 563, affirmed. See also *Southern Alberta Land Co.* v. *McLean*, 29 D.L.R. 403.]

Statement.

APPEAL from 20 D.L.R. 114, 49 Can. S.C.R. 563. Affirmed.

The judgment of the Board was delivered by

Viscount Haldane.

VISCOUNT HALDANE:—This appeal arises out of an action in which the appellant was held liable in the Courts below

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to pay a sum of $3,118.78, being the amount assessed as tax upon certain lands in the province of Saskatchewan. The appellant's interest in these lands was conferred by leases from the Crown, granted to him by the Dominion Government, for grazing purposes. The lands were situated within a local improvement district, which was subsequently organised as a municipality under a statute of the province. The tax in question was assessed by this municipality, which was the plaintiff in the action and is the respondent on this appeal.

The only question now raised is whether the appellant could be assessed for the tax, regard being had to sec. 125 of the B.N.A. Act, 1867, which provides that "no lands or property belonging to Canada or any province shall be liable to taxation."

The Province of Saskatchewan formed part of the North-West Territory. But it was not organised under sec. 146 of the Act of 1867, which provides for the admission of that Territory by address to the Crown. It was organised and admitted by an Act of the Dominion Parliament. This Act was itself passed under the powers conferred by the B.N.A. Act, 1871, which enabled the Parliament of Canada to establish new provinces in any territories forming part of the Dominion, but not included in any of its provinces, and to make provision for the administration, peace, order, and good government of any such new province. The Act of the Dominion Parliament, passed in 1905 in regard to Saskatchewan under these provisions, was the 4-5 of Edw. VII., ch. 42, and known as the Saskatchewan Act. This established the part of the North-West Territory to which it related as the Province of Saskatchewan, and provided that the provisions of the B.N.A. Acts, which, of course, included sec. 125 of the Act of 1867 already referred to, should apply as if Saskatchewan had been an originally united province and set up a constitution for the new province analogous to that of the other provinces. By sec. 20 it was enacted that as the new province was not to have the public land as a source of revenue, Canada should make certain annual payments to it. By sec. 21 the Crown lands were to continue to be vested in the Crown and to be administered by the Government of Canada for the purposes of Canada.

It is thus clear that the authorities of the province have no

power to tax Crown lands, and the real question is whether this restriction prevents them from imposing the tax in controversy upon a tenant of Crown lands. The appellant was tenant of the parcels of land to which the taxation was directed under two leases from the Dominion Government, for terms of years determinable on notice, and with restrictions on assignment. The leases were granted for grazing purposes. The taxes in controversy were imposed under the provisions of certain statutes of the Legislature of Saskatchewan passed for the purpose of facilitating local improvements and for enabling assessments to that end. Under these statutes districts are to be constituted with councils. The council is in each case empowered to impose a tax of restricted amount upon "every owner or occupant in the district for land owned or occupied by him." "Owner" is defined to include any person who has any right, title, or estate whatsoever, or any interest other than that of a mere occupant in any land. "Occupant" is to include the inhabitant occupier of any land, or, if there be no inhabitant occupier, the person entitled to the possession thereof, and the leaseholder or holder under agreement for sale, and any person having or enjoying in any way, or for any purpose whatsoever, the use of land. "Land" includes lands, tenements, and hereditaments, and any estate or interest therein. The secretary of every district is to make an annual return shewing the lands on which the taxes have not been paid, and in case default is proved a Judge of the Supreme Court may make an adjudication, the effect of which is to vest the land, but subject to redemption, in the Crown in right of the province.

The appellant was duly assessed in respect of the land comprised in the two leases, and the question is whether the assessment was valid. It is contended for the appellant that the tax is sought to be imposed on the land itself, which belongs to the Crown in right of Canada, and not on any individual who is interested in it. For the respondent, on the other hand, it is argued that all that is taxed is the interest of the appellant as a tenant of the land and not the land itself as owned by the Crown.

Their Lordships have arrived at the conclusion that the Supreme Court of Canada (20 D.L.R. 114) were right in affirming the judgment of the Supreme Court of Saskatchewan (13 D.L.R. 182), which adopted the latter of these contentions. Following their decision in the analogous case from Alberta of *Calgary and*

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Edmonton Land Co. v. *The Attor.-Gen. of Alberta* (45 Can. S.C.R. 170), where the scheme and definitions in the Local Improvement Act of that province were substantially the same as those in the present case, the Supreme Court of Canada held that the taxing statute of Saskatchewan must be read, in accordance with a well-known principle, as not applying to the Crown or its lands. But they thought that there was no reason why it should not be treated as applying to an interest acquired by a private person under a lease from the Crown. The definitions of "land," "owner," and "occupant" make it easy to interpret the expression "land" as excluding any interest which still remains in the Crown. Their Lordships agree with this reasoning. They are of opinion that, although the appellant is sought to be taxed in respect of his occupation of land the fee of which is in the Crown, the operation of the statute imposing the tax is limited to the appellant's own interest. It appears to them that not only can the statute be read as meaning this and no more than this when it uses the word "land," but that it ought to be so read in order to make it consistent with sec. 125 of the B.N.A. Act of 1867 and not a nullity.

Other points were argued in the Courts below, such as that the province had no power to attach to a person not domiciled within it a personal liability to pay taxes, and that the respondent municipality had not the right to collect the assessments in question, even if they were lawfully imposed. But these other points were not pressed on behalf of the appellant in the argument at their Lordships' Bar, and it is therefore not necessary to deal with them.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with one set of costs.

The interveners will bear their own costs. *Appeal dismissed.*

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S. C.

TORONTO RAILWAY CO. v. CITY OF TORONTO AND C.P.R. CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin, and Brodeur, JJ., May 2, 1916.

RAILWAY BOARD (§ 1—2)—JURISDICTION—PROTECTION OF CROSSINGS—APPORTIONMENT OF COSTS.

The Board of Railway Commissioners, in ordering the elimination of a level crossing and the substitution of a subway therefor, for purposes of public safety, has jurisdiction under the Railway Act (R.S.C. 1906, ch. 37), to direct a portion of the cost to be borne by a street railway company benefitted or affected by such order. The power of the Board to make such order is not affected by an existing agreement whereby the company obtained rights to lay tracks.

Statement.

APPEAL from an order of the Board of Railway Commissioners for Canada on certain questions of law, by leave of the Board, and on a question of jurisdiction, by leave of the Chief Justice of Canada.

The following are the questions so submitted to the Supreme Court of Canada for decision:—

"1. That the Board of Railway Commissioners for Canada had no jurisdiction to order the Toronto R. Co. to contribute to the cost of the construction of the subway at Avenue Road.

"2. That by reason of the terms of the agreement between the Toronto R. Co. and the City of Toronto, dated September 1, 1891, and confirmed by 55 Vict., ch. 99, the Toronto R. Co. should not have been ordered to contribute to the cost of the said subway.

"3. By reason of the agreement between the Toronto R. Co. and the City of Toronto, dated September 1, 1891, and the Act of the legislature confirming the same, that the said Toronto R. Co. is entitled to the use of the said street in the exercise of its franchise. And because the City of Toronto and the C.P.R. Co. agree upon the elimination of the grade at the crossing of the said street by the C.P.R. Co. it does not entitle either party to call upon the Toronto R. Co. to contribute to the cost of the same."

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

Colquhoun, for the respondent the City of Toronto.

FITZPATRICK, C.J.:—This is an appeal by leave against an order of the Board of Railway Commissioners for Canada dated November 12, 1914, made in the matter of the apportionment of the cost of the grade separation work at North Toronto (exclusive of Yonge St.), whereby and so far as the appellants are alone concerned it was ordered

Fitzpatrick, C.J.

that 10% of the cost of the separation of grades at Avenue Road, North Toronto, be borne and paid by the Toronto Street R. Co.

The Railway Act gives power to the Railway Board where a railway is constructed across a highway to order that the railway be carried over the highway and to order what portion, if any, of cost is to be borne respectively by the municipal or other corporation or person in respect of such order. Though perhaps not very clearly worded, the meaning of sec. 238 must be that such order must be with a view to the protection, safety and convenience of the public.

That this enactment is *intra vires* of the power of parliament

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I do not think admits of doubt; it was so decided in the case of *City of Toronto* v. *C.P.R. Co.*, [1908] A.C. 54. We have therefore only to consider whether or not the order so far as it directed the appellant to pay a portion of the cost was made without jurisdiction.

At the argument much stress was laid by counsel for the appellant on the case of *B.C. Electric R. Co.* v. *Vancouver, etc., R. Co. and The City of Vancouver*, 19 D.L.R. 91, [1914] A.C. 1067; indeed, I apprehend that but for that case the present appeal would hardly have been brought. The decision of the Judicial Committee in that case, however, depends upon the facts of the particular case. The application to the Railway Board for an order for four streets to be carried across the railway on viaducts was made by the city corporation and their Lordships approved of the statement that

> the occasion for the application arose from the necessity of determining the permanent grade of these four streets.

The judgment continues, pp. 95 and 96:—

> It follows, therefore, that the application was a matter between the corporation and the railway company alone. . . . It is evident from the reasons given by the Railway Board that they directed the tramway company to pay a proportion of the cost of the improvements because they were of opinion that the tramway company would benefit by them. . . . The fundamental error underlying the decision of the Railway Board is that they have considered that the fact that the tramway company would be benefitted by the works, gave them jurisdiction to make them pay the cost or a portion of it.
>
> There is nothing in the Railway Act which gives any such jurisdiction.

Now the facts in the present case are wholly different. It is abundantly clear from the record that the substantial and, indeed I think I may say only, reason for the order of the Railway Board for this grade separation was the elimination of dangerous crossings. That incidentally the tramway company will be benefitted by the separation of the grades cannot of course bring the case within the ruling of the Judicial Committee in the *Vancouver* case. If the tramway company could have been ordered to pay part of the cost though they derived no benefit from the work, it would be absurd to suppose that they could not be so ordered because they did obtain benefit.

It can make no difference that occasion was taken for abolishing this crossing when the separation of grades in a neighbouring street was decided upon. The two subways were naturally and

properly ordered as part of one scheme for the public safety and convenience.

Whatever the rights of the appellant and the City of Toronto, respondent, under their agreement they are only as between the parties and cannot affect the validity of the order of the Railway Board.

DAVIES, J.:—This is an appeal from an order of the Board of Railway Commissioners directing the Toronto R. Co. to pay a portion of the cost of a subway ordered by the Board to be constructed at Avenue Road in the City of Toronto. Leave to appeal was granted by the Chief Justice on the ground that the Board had no jurisdiction to make the order complained of. Leave to appeal was also granted by the Chief Commissioner upon certain questions of law: 1. As to the power of the Board to order the appellant to contribute to the cost of the construction of the subway in question. 2. As to the effect of an agreement between the appellant and the City of Toronto upon the granting of the order appealed from; or, as I understand the questions, whether that agreement precluded the Board from making such order.

The main question of the jurisdiction of the Board to make the order involves the constitutionality of the provisions of the Railway Act under which it professedly was made, and also involves the questions whether, assuming the sections to be constitutionally valid, the order of the Board was really and truly made under its paramount power of providing at railway and highway crossings for the safety and protection of the public, or whether the subway at Avenue Road was a matter really and practically of street improvements merely, the costs of which the appellants could not be obliged to contribute to.

Passing by for a moment its constitutional validity, sec. 227 of the Railway Act, as amended by the Act of 1909 regulating the crossing of railway lines by other railway tracks or lines, vests very ample and complete powers in the Railway Board alike as to the terms, conditions and incidents subject to which such crossing may be allowed, as also with respect to the kind and nature of such crossing, and when read in conjunction with secs. 28 and 32 of the Railway Act would authorise the Board to proceed under such sec. 227 as well on its own motion, as on a special

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application for leave to permit a crossing; and as well with respect to an existing crossing which had been allowed by it or by its predecessor the Railway Committee of the Privy Council as with respect to a right to a new crossing sought to be obtained.

When it is once made clear to the Board of Railway Commissioners that the public protection and safety requires that a crossing of railway tracks applied for should only be granted on certain terms and conditions or that an existing crossing requires additional safeguards and protection, then I think under sec. 227 of the Act coupled with the 28th, 29th, 32nd and 59th sections the powers of the Board are complete for the purposes the legislature intended and may be exercised by them either of their own motion or on special application made to them.

If I am wrong in my construction of these sections of the Act, I am still of the opinion that under the special circumstances of this case, namely, where the double tracks of the Toronto Street Railway along Avenue Road cross the double tracks of the Canadian Pacific Railway where they cross that road, the Board had ample powers under sec. 258 relating to highway crossings to make such order as to the protection, safety and convenience of the public as it did make in this case and including that part of the order assigning the proportion of the costs of the new protection works to the Toronto Street Railway which in the judgment of the Board that street railway should assume and pay.

Then comes the question whether in making the order now in appeal assigning the street railway's contribution towards the construction work ordered, the Board acted under its paramount power of providing for the protection and safety of the public at these railway crossings on this public street or highway, or made it for some other reason or motive.

Mr. McCarthy contended strenuously that they did not make it under the paramount power for protection and safety and that the assessment of the Toronto Street Railway was not legal or justifiable, because it was based, as he contended, upon the grounds that the Toronto Street R. Co. were relieved of the expense of contributing to the cost of operating the then interlocking plant necessitated by their crossing at rail level the tracks of the Canadian Pacific Railway and were also relieved of the possibility of an accident at that crossing. That was, he con-

tended, the real reason for assessing a contribution towards the subway upon the Toronto Railway.

No doubt some observations were made by the Assistant Chief Commissioner in the reasons given on May 5, 1914, for the order assessing a portion of the cost of the protection works ordered on and at Avenue Road which give colour to this argument.

These observations and the argument at bar on the point necessitated a very close scrutiny of the entire record of the proceedings before the Board of Railway Commissioners at its several meetings in order to determine what the real grounds were on which the order complained of was made. I have made such a scrutiny with the result that no doubt exists in my mind that the controlling ground which moved the commissioners to make the order in question was the safety and protection of the public and that the separation of the grades at Avenue Road was ordered mainly if not entirely for that reason, and not with any idea of municipal improvement. The observations made by the assistant chief commissioner in his reasons for making the subway order were intended, I think, not as reasons for the making of the order for the subway, but rather as reasons in support of the quantum of the cost which they had allotted to the Toronto R. Co. to pay.

The then existing interlocking plant at the crossing in question which constituted the protection and safety provided for the public at this point was no doubt sufficient for the day and times when it was ordered. But the City of Toronto, it is a matter of common knowledge, has enormously increased its population during the past few years. The traffic on its principal streets has greatly increased and the Board, in acting as it did in making the order, had the benefit of a report on the subject it was dealing with made by its engineers and a knowledge of the facts gained from such report and the plans before it and from the repeated discussions by counsel at its several meetings and from, I assume, actual views of the locality made by its members.

Mr. Maclean, one of the Board of Railway Commissioners, in his reasons for concurring in the order appealed from, says:—

> At the hearing, Mr. Geary, for the city, pressed with great earnestness the contention that the city should not be called upon to contribute to the cost of the grade separation. The work, however, is undoubtedly in the *interest of public safety. The element of danger which was manifestly present* was attributable not only to the increase of traffic on the railway, but also to the increase of traffic on the highways. The railway was rightfully in

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its location, under proper sanction of law; and the Board is, in my opinion justified in following the methods of division of cost which it hitherto has applied. The fact that the method of distribution of cost has had the sanction of precedent, is, to my mind, by no means the most important factor.

On the whole, I repeat, the only conclusion I could draw from a careful reading of the whole record is that the paramount consideration which weighed with the Board and moved it to make the order was the "protection, safety and convenience of the public."

Then with regard to the constitutional validity of the sections in question, I cannot entertain any doubt. Similar legislation was before this Court in the case of *City of Toronto* v. *G.T.R. Co.*, 37 Can. S.C.R. 232, when the constitutional validity of secs. 187 and 188 of the Railway Act of 1888 was involved. Substantially, and for the purposes of this constitutional argument, these sections are the same as those of the present Railway Act now before us. This Court held these sections to be *intra vires* of the Parliament of Canada. Leave to appeal was refused by the Privy Council.

Subsequently the question of the constitutional validity of these secs. 187 and 188 of the Railway Act of 1888 was brought before the Judicial Committee in the case of the *City of Toronto* v. *C.P.R. Co.*, [1908] A.C. 54, when they were held to be *intra vires* and where it was further held that a municipal corporation was a "person interested" within the meaning of the words of the section.

In delivering the judgment of their Lordships, Lord Collins says:—

> In the present case it seems quite clear to their Lordships that if, to use the language above quoted, "the field were clear," the sections impugned do no more than provide reasonable means for safeguarding in the common interest the public and the railway which is committed to the exclusive jurisdiction of the Legislature which enacted them, and were, therefore, *intra vires*. If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and in the view of their Lordships there is nothing *ultra vires* in the ancillary power conferred by the sections on the Committee to make an equitable adjustment of the expenses among the persons interested. This legislation is clearly passed from a point of view more natural in a young and growing community interested in developing the resources of a vast territory as yet not fully settled than it could possibly be in the narrow and thickly populated area of such a country as England. To such a community it might well seem reasonable that those who derived special advantages from the proximity of a railway might bear a special share of the expenses of safeguarding it. Both the substantive and the ancillary provision are alike reasonable and *intra vires* of the Dominion Legislature, and on

the principles above cited must prevail, even if there is legislation *intra vires* of the provincial legislature dealing with the same subject matter and in some sense inconsistent.

I find myself in the face of the different provisions of the Railway Act and the decisions of the Courts upon them quite unable to appreciate or accept the argument that the Toronto Street Railway is not a company "interested or affected" in the change of grades at the Avenue Road and the protective works ordered there within the meaning of the sections of the Act applicable.

The recent decision of the Privy Council in the *B.C. Electric R. Co.* v. *Vancouver, Victoria and Eastern R. Co. and City of Vancouver*, 19 D.L.R. 91, [1914] A.C. 1067, was of course much relied upon by the appellant who sought to make the facts of this appeal analogous to the facts of that case. Superficially there may be some resemblance between the facts in both cases, but it is only superficially. The head-note to the report of the *B.C. Electric Railway* case, [1914] A.C. 1067, before the Privy Council states the facts and the decision as follows:—

The corporation of the City of Vancouver, wishing to alter the grading of four streets in the city which were crossed by the tracks of a Dominion railway, applied to the Board of Railway Commissioners for Canada for authority to carry the streets over the railway tracks on bridges. Along two of the streets in question a railway company, working wholly within the province under provincial statutory authority, ran tramways. The Board authorized the work and ordered that a part of the cost of construction should be borne by the provincial company, on the ground that that company would benefit by the alteration:—

Held, that the order, so far as it imposed part of the cost of the proposed work upon the provincial railway company, was not within the powers conferred upon the Board of Railway Commissioners by the Railway Act and was invalid.

Turning to the reasons for the judgment of the Judicial Committee, as pronounced by Lord Moulton, it will be seen how utterly inapplicable that judgment is to the case before us. His Lordship in the first place entirely agrees with the remarks of Duff, J., of this Court as to the *ground and reason* of the application of the corporation to the Railway Board. He goes on to say:—

Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question, he said, whether on the one hand the grade was to be elevated, or on the other, the grade was to be made to conform to the grade of the railway tracks and level crossings established. It was necessary to have the matter disposed of because people were applying for permits to build upon these streets, and these could not be granted owing to

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the inability of the municipality to give the grade of the streets. The council preferred the former of the two alternative courses because they recognized that the street grades were too low and must inevitably be raised.

His Lordship then adds:—

It follows, therefore, that the application was a matter between the corporation and the railway company alone.

The proposed works for which the authority of the Railway Board had been asked and granted was a matter merely of "street improvements" and he goes on to say:—

It is evident from the reasons given by the Railway Board that they directed the tramway company to pay a proportion of the cost of the improvements because *they were of the opinion that the tramway company would benefit by them.*

And later he sums up his reasons for judgment by saying:—

The fundamental error underlying the decision of the Railway Board is that they have considered that the fact that the tramway company would be benefitted by the works gave them jurisdiction to make them pay the cost or a portion of it. There is nothing in the Railway Act which gives any such jurisdiction.

He further points out that the order does not come under the powers of section 59 of the Railway Act:—

It does not direct that any work should be done. It is an order of a *purely permissive character* granting a privilege to the corporation which they may exercise at the expense of a third party, and it leaves it to the corporation to decide whether they shall avail themselves of it or not. The provisions of sec. 59 relate to a wholly different class of cases.

The substance of the judgment, as I understand it, is that on the facts the works for which the electric company was ordered, on the application of the corporation of the city, to pay a portion of the cost were not works ordered by the Board "for the safety and protection of the public" at railway or highway crossings, but were merely a matter of street improvements, and that the order was of a

purely permissive character granting a privilege to the corporation which they might exercise at the expense of a third party.

There is nothing comparable between such a proposed work and the one ordered in this case. The one is a matter merely of "street improvements" for which a "permissive order" is given and a part of the expense of which if undertaken at all by the corporation is ordered to be paid by an electric company because the works may benefit it. The other, the one before us, is a work ordered by the Railway Commissioners under, as I hold, their paramount power of ordering works at highway and railway crossings for the safety and protection of the public.

As I hold the sections of the Act in question, and before by me specially referred to, to be *intra vires* of the Parliament of Canada and the works ordered to have been so ordered not as a matter of street improvements but for the safety and protection of the public, I would dismiss the appeal against the jurisdiction of the Board with costs.

I would answer the questions of law submitted to us as follows: The first question in the affirmative; The second question: I do not think the agreement referred to in the second and third questions precluded the Board from making the order requiring the Toronto Railway to contribute to the cost of the subway ordered.

IDINGTON, J.:—The Railway Commissioners for Canada, clearly intending to promote the safety of the public and solely for that purpose, acting upon their own initiative, as empowered to do when they see fit for such a purpose, ordered on September 13, 1910, their approval of a plan dated May, 1910, filed by the railway company.

The plan so referred to was the result of many meetings and much work by both the officers of the C.P.R. Co. and of the Board, in the way of meeting the wishes of the latter to have some of the many grade crossings done away with.

It appears from the circular of July 15, 1909, that the Board had been prompted, to take the steps it did, by parliament in 1909 providing aid for the elimination of grade crossings, and by the discussion therein, and the general expression of public opinion.

Such being the origin of what led up to the order of September 13, 1910, and the subsequent history exhibiting the determination of the Board on the subject, I read this order made, after hearing all the parties concerned, as an imperative direction to the railway companies concerned to eliminate the Avenue Road grade crossing and separate there the grades at crossing of the two railways.

The informal nature of the order leads me to state thus why I assume it must be treated as an order of the character I ascribe to it.

The parties concerned never seem to have supposed it anything else, but like people of sense acted upon it as if it must be obeyed.

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The C.P.R. Co. apparently had the burden of the work imposed upon it but the other company was put for many months to great inconvenience before venturing to lay its rails on the subway thus created.

In making the order the Board reserved the question of the cost of work and all implied therein for a future hearing, if the parties could not agree.

When that came the appellant disputed any liability and denied any power in the Board to deal with the subject, as it (the appellant) was a purely provincial corporation.

Nevertheless the Board ordered the appellant to pay 10% of the cost and allowed it to appeal on three questions for our decision.

The first is as follows:—

1. Whether the Board had power to order the Toronto Railway Company to contribute to the cost of the construction of the subway in question,

and merely involves the question of jurisdiction in respect of which leave to appeal had already been given by the Chief Justice of this Court.

I think, having regard to what appears in the case and which I have tried to epitomize, and also to the general scope of the Railway Act and direct requirements of many provisions more or less bearing upon the powers of the Board and especially those of sec. 8, sub-sec. (*a*), sec. 59 and sec. 238 of the Railway Act that the Board had jurisdiction to make the order now in question.

Sec. 238 clearly expresses the power to deal with the whole matter by directing the separation of grades.

Sec. 8, sub-sec. (*a*) as clearly indicates the crossing of these roads as a subject matter within the jurisdiction of the Board.

And sec. 59 seems to enable the Board to apportion the cost between those interested and direct payment accordingly.

These sections must be read in the form they now respectively stand, for sec. 238 as it stood in the R.S.C. 1906 has been repealed and been much expanded by the section substituted therefor in 8 & 9 Edw. VII., ch. 32, sec. 5, probably to meet the *Toronto Viaduct* case, [1911] A.C. 461, which I am about to refer to, and incidentally to put beyond question the powers of the Board over such a subject matter as grade crossings. The latter section enables in express terms the Board of its own motion,

or upon complaint or application, by or on behalf of the Crown, or any

municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, etc.

My only difficulty in the case is an apparent conflict of authority raised by the decision relied upon in the argument by appellant's counsel to which I am about to refer.

On the one hand we have these clear and explicit provisions of the Railway Act as it stands amended and the decision of the Judicial Committee of the Privy Council maintaining decisions of this Court and Ontario Courts holding, under the provisions of the Railway Act as it then stood before the Act was made so explicit as it now is, that mere municipal corporations only indirectly interested were liable to contribute even to a less effective (and only secondary) means of providing for the safety of the public.

I say these municipal corporations were only indirectly interested for they had only, in regard to highways, a duty to keep them in repair. They might or might not own them and had only a limited authority to levy taxes, in short, were mere creatures of the local legislature liable to have their powers expanded or contracted as it saw fit. Nevertheless they were held parties interested.

These cases are represented by what appears to be the final authoritative decision of the Judicial Committee in the case of *City of Toronto* v. *C.P.R. Co.*, [1908] A.C. 54.

It would seem as if the appellant running a street railway across the C.P.R. Co.'s (respondent's) railway in the locality and situation such as described in the opinion judgment of the Board should be much more directly interested in the safety of the public at that crossing point than any mere municipal corporation.

No one ever supposed for an instant that so long as the highway was kept in repair the municipality was liable for any of the numerous accidents at such crossings. But even provincial railways and tramways have had to suffer in that regard.

Yet, on the other hand, years after the decision above referred to and when sec. 238 of the Act had been amended and other legislation passed dealing with the very grave question of grade crossings and seeking through the Board to eliminate them in part at least, we have the decision of the Court above in the case

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of the *B.C. Electric R. Co.* v. *Vancouver, etc. R. Co.*, 19 D.L.R. 91, [1914] A.C. 1067, reversing an order of the Board maintained by this Court, approving of a plan for separating the grades as in the order here in question, and directing the appellant (there in question) to contribute to the expense of executing that plan of separation.

The difference between the scheme propounded in that plan and the one involved herein is that the municipal corporation plan there was to carry its highway, and therewith the B.C. Electric Railway, over the steam railway, by a bridge instead of as here in question providing for the crossing by the raising of the C.P.R. track and the highway going under in a subway wherein the appellant might lay a new track and thus attain identically the same object which was to separate the grades and thus ensure the safety of the public.

One other difference was that the application there was made to the Board by the municipal corporation and here the proceeding is one initiated by the Board.

I am puzzled to know how that creates any substantial difference, for sec. 238 as amended expressly provided for "any municipal or other corporation" moving in the matter. Nor can I see that because that municipal corporation incidentally desired something to proceed in way of settling its street grades contemporaneously with executing a most desirable purpose of eliminating one or more grade crossings, their application should be held null.

It is quite clear that the Board imagined they were acting within the legislation promoting the abolition of grade crossings, for by the order made in that case it provided for three grants of $5,000 each being paid out of the Railway Grade Crossing fund, created by parliament for the express purpose of eliminating progressively the grade crossings.

The only other distinction between that case and this would seem to be that the order was permissive or conditional instead of being peremptory. Probably that was a gentler method of accomplishing the desired result and could hurt no one, unless and until acted upon, and then would execute the wishes of the Board.

The relations between the appellant and the municipality

at that particular juncture added force to the vigorous objections made to that phase of the order.

The distinction between the permissive and conditional character of that order, especially under the circumstances existent in connection therewith and this one, clearly made on the initiative of the Board, and free from obvious difficulties suggested in the other, I think distinguishes the two cases sufficiently to maintain the order now in question without at all disregarding the decision of the Court above.

It is to be observed that the Court above refrained from acting upon the view of the law presented by the minority judgment in that case in this Court. That is the more noticeable for the Court above drew its statement of fact from that very judgment which strenuously maintained the position that it would be *ultra vires* parliament to enact anything upon which such an order as there in question could be founded. The alleged power of parliament is what appellant also challenges and denies herein and thus raises the only really important question in this case.

Unless and until it is expressly held by the Court above that it is not, as heretofore supposed, to be within the power of parliament to deal effectively with all relating to crossing railroads (whether they are both the properties of corporate creations of parliament or one or more the property of a provincial corporation and the other of parliament) so long as one is the creation of parliament, I think we are bound by the view taken by the Court above in the earlier Toronto case, and certainly not overruled in this later *B.C. Electric R. Co.'s Case*, 19 D.L.R. 91, [1914] A.C. 1067, to abide by what I think has become settled law.

That view of the law was upheld in this Court in the case of *In re Alberta Railway Act*, 12 D.L.R. 150, 48 Can. S.C.R. 9, and in the same case in the Privy Council, *Att'y-Gen'l for Alberta* v. *Att'y-Gen'l for Canada*, 22 D.L.R. 501, [1915] A.C. 363, at 370.

I am not disposed to confine as suggested should be done the words of the Railway Act referring to crossing railways to the mere physical contact of a crossing on the level, for the sections of the Act already referred to evidently contemplate a crossing where there is no such crossing contact possible. Indeed, in our country in many places such a thing would be impossible, yet control of the crossings must fall under the words "crossing

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railways." I therefore think the appellant came for the purposes of this case within the jurisdiction of the Board.

The leave given originally to appellant to cross the Canadian Pacific Railway on Avenue Road ended, as I understood Mr. McCarthy frankly to concede, when the Board decided on another mode of crossing. And it follows that it must, in using the new method of effecting that crossing, be held assenting to the Board's adoption of the new plan. It must abide by the terms imposed upon its impliedly assenting thereto and accepting and using that new mode. I say impliedly for there was no express order made in that regard.

Counsel assumes that the appellant had a right to use the highway and needs no more. I do not think it is any answer in law. It is ingenious, but will not stand examination, as someone may find to his cost should he running a car plunge through that subway at the moment of an accident on the spot, when he might need authority for being there at all, and wish his master had got an express order from the Board giving him the right to be there.

As to the other two questions presented I see nothing in the agreement between the appellant and the city disabling the Board from dealing with the matter as it has.

There may be something fairly arguable as to the power of the Board to have placed upon the city part of the burden of the cost, either under the decisions I have referred to, or under those coupled with the terms of the agreement.

I can find nothing in either as a matter of law imperatively binding the Board to do so. And when the safety of the public is the chief thing involved, then the inutility of contracts or implication therein for or by way of binding the power of the Board was exemplified in *C.P.R. Co.* v. *City of Toronto et al*, [1911] A.C. 461, and in the same case in this Court. Secs. 237 and 248, possibly enacted to fit that case and all such like, were made to predominate over everything else standing in the way of the Board.

I express, indeed have, no opinion as to the legal right to remedy now by one against the other of such contracting parties as the appellant and the city.

Perhaps if the orders of the Board presented in a formally express manner the exact authority it is presuming to act under,

the doing so might avoid some confusion and possible miscarriage of what it intends to direct.

I may also add that much we heard of the Yonge St. crossing and its relation to the questions involved herein seems to me beside that which we have to deal with.

Yonge St. crossing turned out to be a mere question of public convenience which is equally within the power of the Board as that relative to the safety of the public. It has nothing to do with the questions raised herein except historically, as it were.

I see no reason why the Board should not deal with both questions at the same time.

I think the appeal should be dismissed with costs.

ANGLIN, J.:—The Toronto Railway Company, a provincial corporation operating a line of electric tramway on Avenue Road, a public street in the City of Toronto, appeal against an order of the Dominion Board of Railway Commissioners, whereby it is required to pay one-tenth of the cost of constructing a subway ordered by the Board at the crossing of Avenue Road by the tracks of the C.P.R. Co., a Dominion corporation operating a steam railway. At the point in question there had been since 1902 a crossing at rail level of the tracks of the Canadian Pacific Railway, by the tracks of the Toronto Railway, authorised by orders of the Railway Committee of the Privy Council made on the application of the Toronto Railway Company under secs. 173-177 of the Dominion Railway Act of 1888—the predecessors of secs. 227-229 of the present Railway Act, R.S.C. 1906, ch. 37. By those orders the Toronto Railway Company was required to provide, and to pay the cost of maintaining, certain additional protection at this highway crossing ordered by the Railway Committee in consequence of the advent of its tramway.

In 1909 the Dominion Parliament established a fund for

aiding in the providing by actual construction work of protection, safety and convenience for the public in respect of highway crossings of the railway at rail level,

and placed the administration of this fund, subject to certain restrictions, in the hands of the Railway Board (Railway Act, sec. 239 (*a*) enacted by 8 & 9 Edw. VII., ch. 32, sec. 7).

The record discloses that the proceedings which led to the making of the order for the separation of the grades of the C.P. Railway and of Avenue Road, including the grade of the Toronto

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Railway, were initiated on July 1, 1909, by the Railway Board of its own motion for the purpose of carrying out the intention of Parliament in passing the legislation of that year embodied in sec. 239 (*a*) of the Railway Act. No doubt the project for the elimination of the level crossing at Yonge St., which was first taken up, probably because it was the most important, led to the consideration of the neighbouring crossing at Avenue Road and to the direction given by the Board, on the recommendation of its chief engineer, that the C.P.R. Co. should submit plans covering the elimination of the latter level crossing as well as that at Yonge St. But it is equally clear that the Board in giving this direction and in making its subsequent order for the separation of grades and the construction of the subway at Avenue Road was not solely influenced by the fact that the carrying out of the Yonge St. project rendered the work at Avenue Road desirable, if not necessary, but was actuated largely, if not chiefly, by the consideration that the level crossing at Avenue Road itself was highly dangerous and that its elimination was demanded in the interests of "the protection, safety and convenience of the public." As the Chief Commissioner (Mr. Mabee) remarked, when making an order on June 17, 1910, adding the Toronto R. Co. as a party because it was interested in the Avenue Road crossing, though not in that at Yonge St. plans for both having been presented,

> These plans now certainly take care of two very dangerous crossings.

The C.P.R. Co. had itself reported Yonge St. and Avenue Road as dangerous crossings and counsel representing it alluded to that fact at the meeting of the Board at which the subway plans were approved. The appellant's somewhat disingenuous reference to the grade of Avenue Road as having been "altered by arrangement between the municipality and the Dominion road" is an obvious attempt to bring this case within the purview of the recent decision of the Privy Council in the *B.C. Electric R. Co.* v. *Vancouver, Victoria and Eastern R. Co.*, 19 D.L.R. 91, [1914] A.C. 1067.

Moreover, if the proceedings should be regarded as having been commenced solely in respect of the Yonge St. crossing, under sub-sec. 1 of sec. 238, as enacted by 8 & 9 Edw. VII., ch. 32, sec. 5, the Board is empowered to deal not only with any highway crossing at which in its opinion the protection, safety and convenience of the public require that it shall order works

to be executed or other measures to be taken, but also with any other crossing directly or indirectly affected.

The question presented is whether under these circumstances the Railway Board had jurisdiction to order the Toronto R. Co. to bear a portion of the cost of the works which it directed at Avenue Road. Its jurisdiction is contested upon two grounds —that the Dominion Railway Act does not purport to confer such jurisdiction upon it; and that, if it does, the legislation is *ultra vires*.

For the sake of brevity I shall speak of railways under the legislative jurisdiction of the Parliament of Canada as Dominion railways and of railways or tramways under provincial legislative jurisdiction as provincial railways or tramways.

It is obvious that in the present case there are two matters in respect of which the Railway Board may have jurisdiction— one, the crossing of the Dominion railway by the provincial tramway; the other, the crossing of the Dominion railway by the street or highway. These crossings are separately dealt with by the Railway Act—the former by sec. 227-229; the latter by sec. 237 *et seq.* For sections substituted for secs. 237 and 238 of R.S.C. ch. 37, see 8 & 9 Edw. VII., ch. 32, secs. 4-6.

By sec. 8 (*a*) of the Dominion Railway Act every provincial railway or tramway which connects with or crosses a Dominion railway is made subject to the provisions of that Act relating to the connection or crossing of one railway or tramway by another, so far as relates to such crossing. The provisions thus made applicable are secs. 227 and 229. (*B.C. Electric R. Co.* v. *Vancouver, Victoria and Eastern Railway Co.*, 19 D.L.R. 91, [1914] A.C. 1067, at 1075.)

Under sec. 227 the crossing of a Dominion railway by the tracks or lines of any other railway company without leave of the Board, is prohibited: by sub-sec. 3 the Board is empowered (*a*) to grant a crossing application on such terms as to protection and safety as it deems expedient; (*b*) to change the plan submitted and fix the place and mode of crossing; (*c*) to direct that one line or track or one set of lines or tracks be carried over or under another line or track or set of lines or tracks; (*d*) to direct the construction of such works, structures, etc., as appear to it best adapted to remove and prevent all danger of accident, injury or damage.

This section, *ex facie*, deals only with an application for leave

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in the first instance to cross a Dominion railway and does not explicitly cover the case of a change or modification becoming necessary or desirable in the protection or character of a crossing already established. It is argued for the respondents, however, that the order of the Board may be treated as having terminated the existing right of level crossing, which had been granted to the Toronto R. Co. by the Railway Committee of the Privy Council, and that, having regard to all the circumstances, that company should be deemed to have been again an applicant to the Board for leave to cross the Dominion railway, this time by means of a subway. Under sec. 29 of the Railway Act the Board may

review, rescind, change, alter or vary any order or decision made by it,

and by sec. 32 (2) it is given the like power in respect of orders which had been made by the Railway Committee of the Privy Council, which it succeeded. The Board would, therefore, seem to have been competent to vary the order originally made by the Railway Committee of the Privy Council, which granted the application of the Toronto R. Co. to cross the tracks of the C.P.R. at rail level, by directing under clauses (*b*) (*c*) and (*d*) of sub-sec. 3 of sec. 227, that the mode of crossing should be changed, that the lines or tracks of the Toronto Railway should be carried under those of the C.P.R. and that works or structures deemed by the Board best adapted to remove or prevent all danger of accident, injury, or damage should be constructed, etc. The Board might make such an order *sua sponte* (sec. 28); and by sec. 59 it is empowered to

order by what company, municipality or person interested or affected

by any order made for the construction of works, and in what proportion, the cost and expense thereof shall be paid. It would seem to follow that without treating the Toronto R. Co. as an applicant to it for a right to cross the lines or tracks of the C.P.R. by means of or through a subway, the Board, subject to the question of the constitutionality of the Dominion Legislation, in view of the provisions of sec. 8 (*a*), had jurisdiction, exercising the powers conferred on it by secs. 28, 29, 32 (2), 227 (3) and 59, to make the order in question.

Subject again to the question of constitutional validity, I think it also had jurisdiction to make that order under sec. 238, as enacted by 8 & 9 Edw. VII., ch. 32. The subject matter before it was the crossing of a Dominion railway by a highway as

well as by a provincial tramway. Sec. 238, unlike sec. 227, expressly deals with existing crossings. The jurisdiction of the Board under sec. 238 to order, of its own motion, or upon complaint or application, that the highway be carried under the railway and that the works in its opinion best adapted to remove or diminish the danger or obstruction in respect of such crossing be constructed is unquestioned. Its power under sub-sec. 3 of sec. 238 or sub-sec. 2 of sec. 59 to order the payment of a portion of the cost of such works by the provincial municipal corporation which controls the highway at the actual crossing has not been challenged since the decision of this Court in *City of Toronto* v. *Grand Trunk R. Co.*, 37 Can. S.C.R. 232, from which the Privy Council refused leave to appeal, 37 Can. S.C.R., p. ix; its right to require another municipal corporation in control of an adjacent portion of the highway not actually crossed by the railway also to contribute to the cost of the works ordered was expressly affirmed by the Judicial Committee, when challenged not merely upon the construction of sec. 188 of the Railway Act of 1888 and sec. 47 of the Railway Act of 1903 (corresponding respectively to sec. 238 and sec. 59 of the present statute), but also upon the constitutional validity of these provisions. It was then held that a municipal corporation in either position was a "person interested" within the meaning of sec. 188 of the Act of 1888—"a municipality or person interested or affected" within the meaning of sec. 47 of the Act of 1903; *City of Toronto* v. *C.P.R. Co.*, [1908] A.C. 54.

The language of the present sec. 59 is the same as that of sec. 47 of the Act of 1903; that of the present sec. 238 (3) is:—

> The Board may order what portion, if any, of the cost is to be borne respectively by the company, municipal or other corporation, or person

on whose application the Board may, under sub-sec. 1, order the construction of the works.

It was also held by the Privy Council that

> there is nothing *ultra vires* in the ancillary power conferred by the sections on the Committee (now the Board) to make an equitable adjustment of the expenses among persons interested. . . . Both the substantive and the ancillary provisions are alike reasonable and *intra vires* of the Dominion Legislature. *City of Toronto* v. *C.P.R. Co.*, [1908] A.C. 54, at 58-9.

The substantive provision empowered the Board to order the works; the ancillary, to apportion the cost and to direct payment.

In respect of the constitutional validity of the sections of the

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Railway Act in so far as they authorize the imposition of the cost of works or precautionary measures upon persons or bodies other than the Dominion Railway concerned, I am unable to discern any real ground of distinction between municipal corporations, the creatures of, and, in all their relations, subject to the control of, the provincial legislatures, to which exclusive legislative power in regard to "municipal institutions in the province" has been committed by clause 8 of sec. 92 of the B.N.A. Act, and "local works and undertakings" (including provincial railways), which are likewise placed under exclusive provincial control by clause 10 of the same section. Since the Dominion railway company might, however inequitably, be required to bear the entire burden of the expense of crossing protection, it cannot be said to be absolutely necessary that the Railway Board should have authority to impose any part of that expense on any other person or on any other corporation, Dominion or provincial. In regard to both municipal corporations and provincial railway corporations alike Dominion interference must be confined to what is

> necessarily incidental to the exercise of the powers conferred on it by the enumerative heads of clause 91 of the B.N.A. Act

Att'y-Gen'l for Ontario v. *Att'y-Gen'l for Canada*, [1896] A.C. 348, at 360, other than "the regulation of trade and commerce." *City of Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C., 333, at 343, 344. The right of the Dominion Parliament to provide for "an equitable distribution among the persons interested" of the expense of furnishing "reasonable means for safe-guarding in the common interest the public and the railway" when Dominion railways are crossed by highways has been expressly recognised in the Privy Council in *City of Toronto* v. *C.P.R. Co.*, [1908] A.C. 54, as something within the ancillary power of parliament—as necessarily incidental to its exclusive jurisdiction over

> lines of . . . railways . . . connecting the province with any other province or provinces or extending beyond the limits of provinces. B.N.A. Act, sec. 92, clause 10 (*a*).

The power to order municipal corporations to contribute to the cost of crossing works cannot be any more necessary to complete and effective legislative jurisdiction over Dominion railways than the like power in respect of tramway companies whose lines cross such railways. Neither provincial railways nor municipal high-

ways are dealt with by the Railway Board as such under the legislation in question. Both the provincial railway company and the municipal corporation are dealt with under it merely as bodies interested in crossings of Dominion railways and because of such interest, affected by the orders of the Board.

The question remains whether under the circumstances of the present case the Toronto R. Co. is a "company, municipality or person interested in, or affected by, the order" for the construction of a subway at Avenue Road and the depression of its tracks involved therein, within the purview of sec. 59 of the Railway Act, or a "corporation or person" on whose complaint or application the Board might have ordered the works under sec. 238 of the same Act. Whether the order of the Board should be viewed solely as an exercise of its power under sec. 238 (supplemented if need be by sec. 59), the Toronto R. Co. being concerned because of its presence and rights upon the highway, or whether as to that company the order should also be regarded as made under the provisions of clauses (*c*) and (*d*) of sub-sec. 3 of sec. 227, supplemented by the provisions of secs. 28, 29, 32(2), 59 and 8(*a*) I entirely fail to appreciate the force of the contention that the company is not a "company interested or affected" within the meaning of sec. 59 by the order of the Board for the change in conditions at the Avenue Road crossing or that it is not a "corporation" on whose application that order might have been made under sec. 238 and therefore under sub-sec. 3 liable for such portion of the cost of the works directed as the Board has ordered it to bear. The order for the separation of grades and the construction of the subway certainly affects the Toronto R. Co. very directly. It deprives it of its existing right of level crossing and provides for it a new and much more advantageous means of crossing the Dominion railway. It may well be too that the width and depth of the subway ordered depended, to some extent at least, upon the use of the highway by the Toronto Railway for its double lines of track. Its presence upon the highway may have constituted the chief element of danger in the existing level crossing. I find it difficult to conceive how it could properly be held that the Toronto R. Co. was not interested or affected or was not a "corporation" within sub-secs. 1 and 3 of sec. 238.

The recent case of *B.C. Electric R. Co.* v. *Vancouver, Victoria*

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and Eastern R. Co., 19 D.L.R. 91, [1914] A.C. 1067, was much relied upon at bar by counsel for the appellant. In that case, in the opinion of the Judicial Committee, "the ground and reason of the application" of the municipal corporation, on which the Board acted, was municipal convenience and improvement. It was, in their Lordships' opinion, "a matter between the corporation and the railway company alone," from which the proper inference would seem to be that the order made by the Board was not regarded as an "order as to the protection, safety and convenience of the public" within sub-sec. 1 of sec. 238, in respect of which under sub-sec. 3 the Board might order that a portion of the cost of the works should be borne by a corporation or person other than the Dominion railway or the municipal corporation at whose instance they were directed or sanctioned. In such a case the Judicial Committee negatives the right of the Board to order payment of a portion of the cost of the works merely because some benefit would accrue therefrom to the body or person upon whom it is sought to impose that burden. The order made by the Board did not "direct that any work should be done;" it was merely permissive. Therefore their Lordships held that it was not within the purview of sec. 59.

Dealing with the question presented solely as one of construction of the Railway Act, and determining nothing as to the power of parliament to confer upon the Railway Board the jurisdiction which it had attempted to exercise, their Lordships held that, in ordering the provincial tramway company, whose tracks running along the highway crossed the tracks of the Dominion railway company at rail level on two of the four streets in question, to pay a part of the cost of constructing bridges on those two streets to carry the highway, and incidentally the tracks of the tramway company, over those of the Dominion railway, the Board had exceeded the jurisdiction which the statute purports to confer upon it. But they rejected the contention of counsel for the Dominion railway company that, on the authority of *G.T.P.R. Co.* v. *Fort William Land Investment Co.*, [1912] A.C. 224, the whole order should be rescinded.

The application to the Railway Commission in *B.C. Electric R. Co.* v. *Vancouver, Victoria and Eastern R. Co.*, 19 D.L.R. 91, was made under secs. 237 and 238 of the Railway Act, as enacted by 8 & 9 Edw. VII., ch. 32. As it concerned existing crossings,

sec. 238 was the provision applicable. The Railway Board dealt with the matter as one of grade separation. The sentence of the judgment of the Assistant Chief Commissioner in which he grants the application is as follows:—

> In this matter the Board is of the opinion that the application should be granted for the approval of grade separation at these four streets, Hastings, Pender, Keefer, and Harris.

After directing that the work on the four streets should be proceeded with at once, he adds

> Therefore, having decided that much, it is incumbent on us to say in what proportions the cost shall be borne by the interested parties.

After dealing with the circumstances, making special allusion to the very considerable traffic on the tramway as indicative of the desirability of grade separation from "the point of view of safety and convenience," the commissioner pointed out the advantages to the tramway company of an overhead crossing and it was ordered to pay 20% of the cost of the works. By the order the commissioners directed that towards the cost of one of the two crossings in which the tramway company was interested $5,000 should be paid out of the fund established by the legislation of 1909 (Railway Act, sec. 239 (*a*))

> for the purpose of aiding in the providing by actual construction work of protection, safety and convenience for the public in respect of highway crossings at the railway at rail level.

They regretted that the limitation precluding aid for more than three crossings in any one municipality in one year prevented their giving a like sum out of the fund towards the other crossing.

Nevertheless, their Lordships of the Judicial Committee viewed the matter dealt with not as one in which the action of the Board had been influenced by considerations of protection, safety or convenience of the public, but as one of street improvement merely, in which the municipal corporation and the Dominion railway company were alone concerned. There is no allusion in their judgment to sec. 238, as enacted by 8 & 9 Edw. VII., ch. 32, the third sub-section of which in explicit terms empowers the Railway Board to apportion amongst the "company, municipal or other corporation or person" on whose complaint or application it might have proceeded, the cost of any works or protection which it might order under sub-sec. 1. There was no similar provision in sec. 238 of the Railway Act as it appears in ch. 37 of the R.S.C. of 1906, and, if I may make the suggestion without

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disrespect, it would almost seem that the provisions of the amendment in 8 & 9 Edw. VII. had escaped their Lordships' attention. The point made as to the permissive character of the order pronounced by the Railway Board and the consequent inapplicability of sec. 59 appear rather to support that view. Prior to the amendment of 1909 the authority to apportion the cost of works ordered under sec. 238 depended on sec. 59; since that time sec. 238 itself contains the empowering provision.

In the present case the order is not permissive but mandatory. The proceedings were instituted not by a municipal corporation but by the Board itself. They were prompted by the legislation of 1909 providing a fund to aid in the construction of works for the protection, safety and convenience of the public. That the Board was influenced by considerations of public safety was made clear in what took place prior to the addition, on June 7, 1910, of the Toronto R. Co. as a party interested and again when the decision was finally reached on September 13, 1910, to order grade separation and subways at Yonge St. and Avenue Road and to reserve for further consideration the question of cost. It is not at all improbable that one of the chief sources of danger in the case of Avenue Road was the crossing at rail level at the foot of a steep hill of the double tracks of the C.P. Railway by the double tracks of the Toronto Railway. The advantages to the latter company of the subway crossing are obvious. That it was affected by the order and interested in the work seems to me to be as indisputable as that it was a corporation on whose complaint or application the order for the works might have been made (sec. 238 (1)). This case is therefore in several respects clearly distinguishable from that of *B.C. Elec. R. Co.* v. *Vancouver, Victoria and Eastern R. Co.*, 19 D.L.R. 91, [1914] A.C. 1067, as viewed by their Lordships of the Judicial Committee. With great respect, assuming jurisdiction, the facts that the presence and operation of the Toronto R. Co. at the crossing had very largely contributed to the danger to be removed and that the substituted method of crossing would be distinctly advantageous to it, seem to me most cogent reasons for requiring it to contribute to the cost of making the necessary change.

In *Ottawa Electric R. Co.* v. *City of Ottawa*, 37 Can. S.C.R. 354, an order similar to that now complained of, made against the Ottawa Electric R. Co. which happened to be a Dominion corpora-

tion, was sustained by this Court explicitly on the ground that it was a "person interested or affected" within the meaning of sec. 47 of the Railway Act of 1903. Sec. 47 corresponds to present sec. 59. When the *Ottawa Electric* case was decided sec. 238 did not contain the provision enabling the Board to apportion cost now found in sub-sec. 3. The decision of this Court in *B.C. Elec. R. Co.* v. *Vancouver, Victoria and Eastern R. Co.*, 13 D.L.R. 308, 48 Can. S.C.R. 98, that sec. 59 of the Railway Act and sec. 238 as enacted by 8 & 9 Edw. VII., ch. 32, are *intra vires* of the Dominion Parliament was not affected by the judgment of the Privy Council on the appeal, 19 D.L.R. 91, [1914] A.C. 1067.

When apprised that the Toronto R. Co. intended to question the jurisdiction of the Railway Board to order it to bear a portion of the cost of the works at the Avenue Road crossing the assistant chief commissioner thought it proper to supplement a statement made when pronouncing that order, so that "the reasons on which (his) judgment rested in regard to the division of cost . . . should be clearly set out." His purpose apparently was to put it beyond doubt that the Board had been actuated by considerations of public protection and safety. That was clearly unnecessary in view of the history of the proceedings which led up to the order being made for separation of grades and approving of the subway scheme and plans, and of passages in them in which the dangerous character of the crossing at Avenue Road had been emphasized. Moreover, by the Board's order of November 12, 1914, payment of 20% of the cost of constructing three of the subways (not exceeding $5,000 in any one case) directed in connection with the grade separation scheme in North Toronto, of which the grade separation at Avenue Road formed a part, was authorised to be made out of the railway grade crossing fund established by sec. 239 (*a*) of the Railway Act (8 & 9 Edw. VII. ch. 32). This order could not properly have been made unless the work so aided was for the protection, safety and convenience of the public. The commissioner probably thought it advisable, however, in view of the fact that when making the order for distribution of cost he had specially alluded to the undoubted advantages which the Toronto R. Co. would derive from the substitution of the subway for a level crossing, to state explicitly that the action of the Board in directing that substitution had been influenced by the danger of the existing level crossing. He had

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referred to the incidental advantages of a subway to the Toronto R. Co. not as a reason for ordering the separation of grades and the construction of the subway but as a ground for imposing 10% of the cost on that company.

Mr. McCarthy objected to these additional reasons being considered and also challenged the accuracy of the allusions in them to an accident at the Queen St. crossing, owing to a tramway overrunning Scotch blocks which were set against it, and to another accident at Front St. The records of the Railway Commission, produced by Mr. MacMurchy, bore out the statements of the assistant chief commissioner as to both cases. Since the appeal to this Court is confined to questions of jurisdiction and of law, I think it desirable that in cases which are to come here we should have full and explicit findings from the Board upon all matters of fact which may become material for our consideration. I can readily understand that in the hurry of disposing of the very numerous cases with which the Railway Board is called upon to deal, commissioners in stating the grounds on which they proceed may omit to advert expressly to facts present to the minds of themselves and the parties before them, but of particular moment only when a question of jurisdiction or of law is actually mooted. I agree with the view expressed by the chief commissioner, Sir Henry Drayton, that

> not only has the assistant chief commissioner the right to deliver extended reasons for his judgment at any time that he desires, but that it was his duty so to do, in case any pertinent issue had not been covered in his previous reasons. Under the Act, questions of fact have to be disposed of by the Board, and all accessory findings of fact should be made by the Board so as to relieve the Justices of the Supreme Court from the consideration of all issues except the questions of law submitted.

The only remaining question is that raised in regard to the effect of paragraphs 13 and 18 of the agreement between the City of Toronto and the Toronto R. Co. whereby, that company contends, the city is obliged to furnish a right of way on its streets for the company's tracks. This provision, it is argued, relieves the company from all liability to contribute to the expense of alterations in the grades of streets. It may be that, as between the parties to it, the agreement entitles the company to indemnification from the city in respect of such cost. On that question of civil rights in the province the Dominion Railway Board was not competent to pass; and of course I express no view. But I

find nothing in the agreement which in anywise interferes with the right of the Board to deal with the Toronto R. Co. as a company or person interested in and affected by its order for separation of grades and the construction of a subway at the Avenue Road crossing, or as a corporation on whose complaint or application that order might have been made and as such liable to bear the portion of the cost which the Board has deemed it proper to impose upon it. This was the view taken by this Court in the *Ottawa* case already adverted to (37 Can. S.C.R. 354) of similar clauses in an agreement between the City of Ottawa and the Ottawa Electric R. Co.

I would, for these reasons, answer the first question submitted by the Board of Railway Commissioners in the affirmative. To the second and third questions I would answer that I find nothing in the terms of the agreement referred to which precluded the Board making the order requiring the Toronto R. Co. to contribute to the cost of the subway at Avenue Road. The appeal against the jurisdiction of the Board to pronounce that order should be dismissed and the appellant should pay the costs of the respondents.

BRODEUR, J.:—I thought at first that the facts of this case were similar to those adjudicated upon in the *Vancouver* case, 19 D.L.R. 91, [1914] A.C. 1067, but they are so different that I have come to the conclusion that this appeal should be dismissed.

The application for a subway was not made by the municipality as in the *Vancouver* case, 19 D.L.R. 91, [1914] A.C. 1067, but the correspondence and the procedure shew that the Board of its own motion inquired into and determined the order complained of.

It is not a matter of municipal improvement that the Board acted upon but it was a question of the protection and safety of the public.

Mr. Commissioner McLean in his judgment puts that very clearly when he said:—

> The work is undoubtedly in the interest of public safety. The element of danger which was manifestly present was attributable not only to the increase of traffic on the railway but also to the increase of traffic on the highways.

It is true that the assistant chief commissioner in his first opinion, dated May 5, 1914, mentions other grounds to justify the action

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of the Board, but he states also that the construction of a subway will remove the possibility of the accidents which the level crossing in spite of the protection already existing might render possible.

The street railway company became with regard to this crossing under the jurisdiction of the Board when it applied some years ago for a level crossing. The Railway Committee could have directed then that the tracks of the street railway should be carried under the tracks of the railway company (sec. 227, sub-secs. 3-6 Railway Act) but it simply granted the application and ordered under the provisions of sec. 229 the adoption of appliances which were then considered sufficient for the public safety and convenience.

The street railway company remained concerning the carrying out of that order under the control and the jurisdiction of the Board and if later on the public interest required some better protection, the construction of a subway, for example, the Board could revise its former order and proceed to determine the condition in which the crossing should take place (28-29-227 Railway Act).

The Board was empowered then under sub-sec. 3 of sec. 237 or 238 to determine what portion of the cost of the improvement should be borne by the street railway company.

The facts disclosed in the present case shew conclusively that the powers exercised are ancillary to the control which the Parliament of Canada has on federal railways.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed.

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MEUNIER v. HINMAN.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. August 18, 1916.

MECHANICS' LIENS (§ VII—55)—HOW LOST—LIS PENDENS IMPROPERLY ISSUED.

Under the Mechanics' Lien Act, R.S.M. 1913, ch. 125, only the County Court for the judicial division in which the property affected is situated has jurisdiction to try an action under the Act; a *lis pendens* issued in any other jurisdiction has no effect on the property; unless a *lis pendens* is issued in the proper jurisdiction within the prescribed time, the lien wholly ceases to exist.

Statement.

APPEAL from the judgment of a County Court in an action under the Mechanics' Liens Act (R.S.M. 1913, ch. 125). Varied.

H. V. Hudson and *R. W. Campbell*, for appellant Gordon.

J. F. Waller and *H. C. Morrison*, for respondent, plaintiff.

The judgment of the Court was delivered by

HOWELL, C.J.M.:—The County Court has jurisdiction in mechanics' lien cases solely because of the provisions in the Act, ch. 125, R.S.M. 1913.

Sec. 27 of the Act provides that an action may be brought to enforce the lien

in the County Court of the judicial division in which the property affected by the lien is situated, according to the ordinary procedure of such Court, except where the same is varied by this Act.

Sec. 28 varies the ordinary procedure and instead of a writ of summons directs the suit to be started by a statement of claim as in the King's Bench. Secs. 29, 30 and 31 direct the procedure following the statement of claim and setting out the defendant's method of defence and providing for notice of trial; thus quite departing from the ordinary practice and procedure of that Court.

Sec. 22 of the Act declares that the registered lien

shall absolutely cease to exist after the expiration of ninety days . . . unless in the meantime an action is commenced to realize the claim under the provisions of this Act or an action is commenced in which the claim may be realized under the provisions of this Act, and a certificate of *lis pendens* in respect thereof, issued from the Court in which the action is brought, according to form No. 5 in the schedule hereto, is registered in the proper registry office or land titles office.

Preceding sections provide for the registry of a lien and declare that the lien shall be void unless registered within a limited time.

The land upon which the lien is claimed in this matter is situate in the judicial division of the County Court of St. Boniface. This action was begun, however, in the County Court of Winnipeg in January 14, 1915, and the next day a certificate of *lis pendens* was duly issued from that Court and was on that day duly registered in the proper registry office.

On March 27, 1915, an order was made under secs. 73 and 74 of the County Courts Act transferring the suit and all the papers to the St. Boniface County Court and in that Court the suit was prosecuted in that cause so transferred and the judgment appealed against was pronounced therein.

No certificate of *lis pendens* was issued or registered other than as above stated.

Clearly the County Court of Winnipeg had no jurisdiction to entertain the peculiar action provided for by the statute. It is not necessary here to consider what power was given by sec. 74 of the County Courts Act. It is sufficient to state that there

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has been no certificate of *lis pendens* issued from the Court having jurisdiction in this matter as required by sec. 22 and therefore the lien has ceased to exist.

It must be declared that the liens of Meunier and Brown upon the lands in question have ceased to exist and are void and the judgment must be varied accordingly.

The personal judgment against Hinman must stand. The costs of the trial before the County Court Judge must be paid by the plaintiff and Mr. Brown in whose favour the lien was given and the defendant must have the costs of appeal against the plaintiff and Brown. *Judgment varied.*

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TOWNSHIP OF KING v. BEAMISH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, and Magee, JJ.A., and Masten, J. March 21, 1916.

SPECIFIC PERFORMANCE (§ I B—15)—PAROL AGREEMENT PARTLY PERFORMED—WANT OF CORPORATE SEAL NO DEFENCE—COMPLETENESS.

Taking possession of land and removing gravel therefrom in pursuance of a parol agreement for a lease are acts of part performance which take the case out of the Statute of Frauds, and specific performance of the agreement will be decreed; where there is part performance, invalidity of the agreement cannot be set up because of the want of the corporate seal of the lessee, or the absence of seals to municipal resolutions authorizing it. The agreement is not incomplete because it provided that a survey or description of the land, and the demise thereof, should be prepared by the municipality's clerk.

Statement.

APPEAL by the plaintiffs from the judgment of DENTON, Junior Judge of the County Court of the County of York, dismissing an action, brought in that Court, for specific performance of a parol agreement alleged to have been entered into by them with the defendant on the 5th June, 1915, by which the defendant, in consideration of $200 which they agreed to pay him, agreed to demise to them land in the township of King, for the term of eight years, with the right during the term to remove gravel from the land. The plaintiffs alleged acts of part performance by them sufficient to entitle them to have the agreement specificially performed notwithstanding the provisions of the Statute of Frauds, viz., taking possession of the land and removing gravel from it, with the knowledge and consent of the defendant.

McGregor Young, K.C., for appellants.

W. T. J. Lee, for defendant, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment of the County Court of the County of York dated the

20th January, 1916, which was directed to be entered by a Junior Judge of that Court (Denton), after the trial before him, sitting without a jury, on the 14th January, 1916.

The appellants sue for specific performance of a parol agreement alleged to have been entered into by them with the respondent on the 5th day of June, 1915, by which the respondent, in consideration of $200, which they agreed to pay to him, agreed to demise to them a part of lot No. 6 in the 11th concession of the township of King, containing one acre, which is described in the statement of claim, for the term of eight years, with the right during the term to remove the gravel in the land; and the appellants allege acts of part performance by them sufficient to entitle them to have the agreement specifically performed notwithstanding the provisions of the Statute of Frauds. These acts are, taking possession of the land and the removal of gravel from it, with the knowledge and consent of the respondent.

The facts are few and simple, and most of them not in dispute. The respondent was the owner of the one acre in question, which forms part of his farm, and the appellants were desirous of obtaining gravel for use on their roads. A member of the council, Mr. Kaake, by its direction, saw the respondent and discussed with him the question of obtaining gravel from his land. Mr. Kaake reported to the council that, as the fact was, the respondent was willing to sell the gravel, but not to sell it by the load.

At a meeting of the council, three of its members, the Deputy Reeve (Mr. Watson), Mr. Kaake, and Mr. Campbell, were authorised to negotiate with the respondent with respect to the gravel, and to enter into an agreement with him for the purchase of it for a lump sum, but no formal resolution was passed. These three members of the council, and Mr. Davis, its road overseer, met the respondent on the land on the 5th June, and an agreement was there come to that the respondent should lease to the appellants a part of his lot containing about an acre. The part of the lot to be leased was agreed on. It was bounded on two sides by fences, on the third side by the orchard, and on the fourth side the boundary was to be on the line of an elm tree which stood at the gateway. On the two unfenced sides the respondent was to put up fences. According to the testimony of witnesses called by the appellants, where there were no fences stakes were planted to

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mark the corners of the acre, but this was denied by the respondent. It was also agreed that a "survey or description" of the acre should be made by the Clerk, who was also to prepare the lease, and that the parties should meet at the office of the Clerk for the purpose of executing the lease, and that in the meantime the appellants should be entitled to enter upon the land and remove gravel from it, which it was arranged they might do on the following Tuesday.

The three members of the council, on the same day, reported to the council the arrangement they had made with the respondent, and the following resolution was passed by the council:—

"June 5th, 1915.

"Moved by A. Campbell, seconded by F. H. Robinson, that the Clerk be instructed to draw up a lease for the purchase of a gravel-pit owned by Victor Beamish, rear of lot 6, concession 11, for the sum of $200, said lease to extend for a period of eight years, description of property subject to agreement by committee.

"Carried. "W. J. WELLS, Reeve."

According to the respondent's testimony, which is, however, in conflict with that of the witnesses called by the appellants, the agreement was to be subject to the approval of the council, and it was arranged that Mr. Kaake should call him up by telephone that night and let him know the result of the council meeting. He admits that Mr. Kaake did this and said to him, "I guess we will take the gravel."

On the following Tuesday, Mr. Davis went on the land, opened a pit, and commenced to draw gravel from it, and continued to draw it until the then requirements of the appellants were satisfied, drawing in all several hundred loads. On the 23rd June, the following letter was written and sent by the respondent to Mr. Kaake:— "Bolton, June 23rd, 1915.

"Mr. E. Kaake. Dear Sir. As I have got into trouble about opening that gravel-pit, I thought I had better drop you a few lines, as I never thought about the mortgage holder having any say in a thing like this. I have been notified to not allow any more gravel to go out without his consent, and I think you had better call in and see E. C. Beamish, as he holds the mortgage, and if he thinks I had better fill up the pit, we will see what we can do, or if he will let it go out by the yard.

"Yours truly, V. Beamish, Bolton P.O."

At the first meeting of the council (after the 5th June), which took place on the 26th June, the following resolution was passed:—

"June 26th, 1915.

"Moved by J. A. Watson, seconded by E. J. Kaake,

"That the Reeve and Clerk be instructed to proceed at earliest possible date to execute lease according to agreement by Councillors Kaake, Campbell, and Watson, between Victor Beamish and the Township of King, for gravel-pit on lot 6, con. 11; and providing they do not come to terms of said agreement, said Reeve and Clerk to take steps to expropriate at once.

"Carried. "W. J. Wells."

The survey was made by the Clerk, and the lease was prepared by him, and was subsequently tendered to the respondent for execution, but he refused to execute it.

Mr. Watson explained that the council's purpose in adding the proviso in the resolution of the 26th June was to authorise steps to be taken to expropriate if the respondent should refuse to carry out his agreement, and he (Watson) was very positive that all the terms of the agreement were settled at the meeting of the 5th June, and that nothing remained to be done thereafter but to get the description of the land, to prepare and execute the lease, and to pay the $200.

The learned Judge found it unnecessary to determine whether "no agreement was in fact arrived at," by reason of the fact that "a survey and description had to be made and lease prepared;" his conclusion being that, even if that were found in favour of the appellants, they would not be entitled to succeed.

The basis for that conclusion was that acts of part performance to take a case out of the Statute of Frauds must be such as to render it a fraud in the vendor to take advantage of the contract not being in writing, and the learned Judge thought it impossible to say "that in this case the act of taking out this gravel creates a situation which would render it a fraud on the plaintiffs or render it unjust that the defendant should be allowed to take advantage of the statute."

I am, with great respect, unable to agree with that conclusion, which is, I think, based upon a misapprehension as to what is meant by "fraud" in the cases dealing with the effect of part performance.

It is quite true, in a sense, that the doctrine as to part per-

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formance is based upon the view that it is a fraud on the part of a vendor to set up the statute as a defence to an action for specific performance where there has been part performance of the contract by the purchaser, but what that means is, I think, well stated in Fry on Specific Performance, 5th ed., pp. 294, 295, paras. 585, 586, where it is said:—

"585. Secondly, the principle upon which the Court exercises jurisdiction in adjudging specific performance of parol contracts followed by a part performance, is the fraud and injustice which would result from allowing the party charged to refuse to perform his part, after performance by the other upon the faith of the contract and with the knowledge of the party charged. . . .

"586. 'Courts of Equity,' said Lord Cottenham, 'exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. . .' " *Mundy* v. *Jolliffe* (1839), 5 My. & Cr. 167, 177.

The view of the learned Judge is directly opposed to what was said by Turner, L.J., in *Wilson* v. *West Hartlepool R.W. Co.* (1865), 2 DeG. J. & S. 475, 492, 493. Referring to the doctrine of part performance he said: "It was contended on their" (i.e., the defendants') "part that companies are not bound by acts of part performance, and that the acts which have been done in this case furnish no equity against the defendants, because they are acts to the prejudice of the defendants only, and not of the plaintiff; but I cannot accede to either of these arguments. Neither of them is, in my opinion, consistent with the principle on which this Court proceeds in cases of part performance. The Court proceeds in such cases on the ground of fraud, and I cannot hold that acts which, if done by an individual, would amount to a fraud ought not to be so considered if done by a company, nor can I say that it is no prejudice to the plaintiff to have been permitted to take possession on the faith of an agreement, and afterwards to be held liable to be treated as a trespasser and turned out of possession on the ground that there was no agreement. There is authority

for saying that in the eye of this Court it is a fraud to set up the absence of agreement when possession has been given upon the faith of it."

Taking possession by the purchaser is an act of part performance; and, where a contract has been partly executed by possession having been taken under it, the Court will strain its power to enforce a complete performance: *Parker* v. *Taswell* (1858), 2 DeG. & J. 559, 571.

What amounts to taking possession under a contract must in all cases depend on the nature of the subject-matter of the contract. In the case at bar, the appellants entered into possession of the gravel-pit, which was the subject of the contract they had entered into, and dug for and removed several hundred loads of the gravel. It was not necessary, as it is in some cases where it is claimed that the title of the owner is by force of the Statute of Limitations extinguished, to shew continuous pedal possession. In order to exclude the operation of the Statute of Frauds, such a possession as the subject-matter of the contract admits of is sufficient—e.g., in the case of vacant land, entry upon it for the purpose of taking possession with the consent of the vendor is sufficient, although the purchaser does not remain upon the land but goes upon it only when he has occasion to do so.

As I have come to the conclusion that the judgment cannot be supported on the ground upon which it was based by the learned Judge, it is necessary to consider the other questions with which he did not deal.

I am unable to agree with the contention of counsel for the respondent that the agreement was incomplete by reason of the term as to the survey and description and the preparation of the lease. This is clear as to the term with regard to the preparation of the lease. If it were otherwise, an agreement for the sale of land which provides for the execution of the conveyance would be incomplete. All that was meant by the term that a survey or description of the land should be prepared by the clerk was, that he should ascertain the metes and bounds of the land in order that a description of it might be inserted in the lease. The subject of the demise was certain, and nothing remained to be done but to obtain by measurements a description of it for that purpose.

Without explanation, the resolution of the council would

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appear to indicate that an agreement had not been come to at the meeting with the respondent on the 5th June, and that the matter of the lease had not proceeded beyond the stage of negotiations; but, read in the light of the surrounding circumstances and the testimony of the Deputy Reeve, that is not the effect of the resolution.

There remains to be considered a further question, which does not appear to have been raised at the trial, viz., whether, because there was not assent under the appellants' corporate seal to the terms that had been agreed upon between the respondent and the members of the council who made the arrangement with him, there was no agreement.

In my opinion, this objection cannot prevail. For the same reason that the respondent is precluded by the acts of part performance from setting up the Statute of Frauds, the appellants are prevented from setting up the absence of a seal to the two resolutions of their council. It was held in *Wilson* v. *West Hartlepool R.W. Co.* (*supra*) that, where the purchaser had been let into possession under the contract, the vendors could not set up the absence of their corporate seal; and in Fry on Specific Performance, 5th ed., p. 323, para. 648, it is said to be "clear that such part performance as will prevent an ordinary defendant from setting up the defence of the Statute of Frauds, will prevent a defendant company from setting up either that defence or a defence grounded on the absence of the corporate seal, or of the statutory formalities, in accordance with which the company may be enabled to contract."

I see no reason why the same rule should not be applied in the case of a municipal corporation, notwithstanding the provision of sec. 249 of the Municipal Act that, "except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents, and its powers shall be exercised by by-law."

In *Waterous Engine Works Co.* v. *Town of Palmerston* (1892), 21 S.C.R. 556, the contract was in respect of chattels, to which the doctrine of part performance does not apply, and that case is for that reason distinguishable.

I would for these reasons allow the appeal with costs, and substitute for the judgment which was pronounced, judgment for specific performance, with costs. *Appeal allowed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. May 2, 1916.

1. PUBLIC LANDS (§ I A—1)—INDIAN RESERVE LANDS—INDIANS AS PURCHASERS.

Under the Indian Act (39 Vict. ch. 18, sec. 31, R.S.C. (1886), ch. 43, sec. 42) Indians have the right to become purchasers of public lands which, on surrender to the Crown, have ceased to be a part of an Indian "reserve."

2. CONSTITUTIONAL LAW (§ I G—140)—DOMINION OR PROVINCIAL DOMAIN—INDIAN LANDS.

Crown lands not surveyed and appropriated to the use of Indians prior to July 1, 1867, are not "lands reserved for the Indians" within the meaning of sec. 91 (24) of the British North America Act, 1867, and consequently are not under Dominion control; the presumption is that they become vested in the Crown in the right of the province (*Per* Idington, J.). On the principle *omnia presumuntur rite esse acta* the order-in-council of 1853 respecting the constitution of the "reserve" being carried out, the surrender thereof by the Indians to the Crown with a trust resulting in their favour has made it subject to Dominion control under sec. 91 (*per* Duff and Anglin, JJ.).

[*St. Catharines Milling and Lumber Co.* v. *Reg.*, 14 App. Cas. 46, distinguished; *Doherty* v. *Giroux*, 24 Que. K.B. 433, affirmed.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, 24 Que. K.B. 433, *sub. nom. Doherty* v. *Giroux*, affirming the judgment of Letellier, J., in the Superior Court, District of Chicoutimi, dismissing the action. Affirmed.

G. G. Stuart, K.C., and *L. P. Girard*, for appellant.

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

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The appellant, the Attorney-General for the Dominion of Canada, claims in this suit to have it declared that the Crown is the owner of a certain half-lot of land, being lot No. 3 of the first range, Canton Ouiatchouan, in the Parish of St. Prime and County of Lake St. John.

In the first paragraph of the amended declaration it is stated that the Crown has always been and still is the owner of the lot No. 3. This, however, is only inaccurate drafting of which there is much in the record. There is no doubt that the claim of the Crown is only to the south-east half of lot No. 3, and it is not disputed that the respondent has a good title to the north-west half of lot No. 3. The respondent has been in possession of the whole of lot No. 3 for upwards of a quarter of a century during which time the Government has taken no effective steps to question his right to any part of the lot.

By an order-in-council, dated August 9-11, 1853, approval was given to a schedule shewing the distribution of land set apart under the statute 14 & 15 Vict., ch. 106, for the benefit of the

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Indian tribes in Lower Canada. Included in this schedule was a reservation in favour of the Montagnais of Lake St. John. The half-lot in question was comprised in this reservation.

On June 25, 1869, the Montagnais Band of Indians surrendered to the Crown, for sale, a portion of the reservation including lot No. 3. This land so surrendered was put up for sale and it would appear that on June 21, 1873, the north-west half-lot No. 3 was sold to the respondent and, on May 7, 1878, the south-east half-lot was sold to one David Philippe.

Under a judgment obtained by the *mis-en-cause*, O. Bouchard, against D. Philippe the latter's half of lot No. 3 was sold at a sheriff's sale to the respondent on March 7, 1889.

The Crown alleges that David Philippe was an Indian, that he was, at the time of the sheriff's sale, in possession of the land on which he had been located by the Crown and that, consequently, the Crown still held the half-lot as "Indian Lands" and as such liable neither to taxation nor to execution.

The fallacy in this argument is in the statement that David Philippe had been located on the land; it involves the proposition that, whilst all the other lots into which the reserve had been divided were sold outright to their purchasers, this particular half-lot was not sold to the purchaser David Philippe, but that, being an Indian, he was only "located" on the land in the meaning of that term in the Indian Act.

To shew the impossibility of supporting such a contention it is only necessary to turn to the sections in point in the statute. The Act in force on May 7, 1878, the date of the sale to David Philippe, was the Indian Act, 1876 (39 Vict., ch. 18). Section 3 is as follows:—

> 3. The following terms contained in this Act shall be held to have the meaning hereinafter assigned to them unless such meaning be repugnant to the subject or inconsistent with the context.
>
> (3) The term "Indian" means:
>
> First, any male person of Indian blood reputed to belong to a particular band . . .
>
> (6) The term "Reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians of which the legal title is in the Crown, but which is unsurrendered. . . .
>
> (8) The term "Indian Lands" means any reserve or portion of a reserve which has been surrendered to the Crown. . . .
>
> (12) The term "person" means an individual other than an Indian, unless the context clearly requires another construction.

By sec. 5, the superintendent-general may authorise that the whole or any portion of a reserve be subdivided into lots.

6. In a *reserve* or *portion of a reserve* subdivided by survey into lots, no Indian shall be deemed to be lawfully in possession of one or more of such lots, or part of a lot unless he or she has been or shall be located for the same by the band, with the approval of the superintendent-general.

7. On the superintendent-general approving of any location as aforesaid he shall issue in triplicate a ticket granting a location to such Indian.

8. The conferring of any such location-title as aforesaid shall not have the effect of rendering the land covered thereby subject to seizure under legal process or transferable except to an Indian of the same band.

The statute, it will be observed, makes provision for the conferring of a location-title *only on a reserve*, that is on unsurrendered lands and then by the band, not by the Crown.

Then after sec. 25 and following, dealing with surrenders of reserves to the Crown, we have secs. 29 and following under the caption, "Management and Sale of Indian Lands." There is no suggestion in these sections, or anywhere else in the Act, that Indian lands may not be sold to an Indian.

I suppose it may well be that it would not be a common occurrence for an Indian to be a purchaser at a sale of Indian lands, but it is one thing to say the statute did not contemplate this and quite another to say that it intended to forbid it. I can imagine no reason why an Indian should not purchase such lands; there is no doubt as to his capacity to hold real estate. This is recognized by sec. 64, which provides that:

No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds real estate under lease or in fee simple, or personal property, outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate.

This really disposes of the appellant's case but, out of respect for the Judge of the Court of King's Bench who dissented from the majority of the Court and one of whose points is taken up in the appellants' factum, a few words may be added.

The whole ground of the dissenting opinion is really in the following paragraph:

Les Indiens d'une tribu localisée sur une réserve pourraient se réunir en conseil d'une manière solennelle et décider (si la majorité de la bande le voulait) de remettre tout ou partie de cette réserve à la Couronne et alors la Couronne vendrait ou disposerait de ce qu'elle reçevrait ainsi, dans l'intérêt de la tribu indienne et pour son bénéfice exclusif, mais à la condition—dont la nécessité se voit très bien—de ne jamais vendre une partie quelconque de ces réserves à des sauvages. On a même pris le soin de dire que toute "per-

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sonne" pourrait devenir acquéreur de ces propriétés mais qu'un sauvage ne pourrait pas être une de ces personnes.

I am myself quite unable to appreciate the necessity or occasion for any such condition as the Judge suggests but it is unnecessary to discuss this because, as far as I have been able to ascertain, it is purely imaginary. The Judge says further on:—

Ce nommé Philippe était un sauvage, et la loi défendait positivement qu'un sauvage pût acquérir cette propriété.

No reference is given and I know of no such prohibition, positive or otherwise.

The point taken in appellant's factum that a "person," as defined by the Indian Act, does not include an Indian has reference to the section dealing with certificates of sale which is sec. 31 of 39 Vict., ch. 18 and sec. 42 of ch. 43, Revised Statutes of Canada. There seems to be some obscurity about this section because the marginal note which has been carried through all the amendments and revisions of the Act is "Effect of *former* certificates of sale or receipts." The section, however, seems to look to future certificates, and, as I apprehend, is designed to meet the inconvenience of delay in the issue of patents. Be that as it may, the section does not provide that any "person" may purchase these lands but that an Indian may not be one of these "persons:" all that it does provide is that a certificate of sale or receipt for the money, duly registered as therein mentioned, shall give the purchaser the same rights as he would have under a patent from the Crown.

The definition of terms is, at the commencement of sec. 3, said to apply only when not inconsistent with the context and this is emphasized by its special repetition in the 12th item in which the word "person" is defined. I cannot think that such an accidental use of the word "person" for "purchaser" or any other word to indicate him could possibly be held to involve by inference a positive law against an Indian becoming a purchaser for which prohibition there is no other warrant. I think in such case the context would clearly require another construction.

But this is not all; the appellant has assumed that the case is governed by the Indian Act, ch. 43 of the Revised Statutes of 1886, but this is not so, and when we look at the Indian Act of 1876 we find that the word "person" does not occur at all in the extract quoted by the appellant which sets forth what the certificate of sale or receipt for money shall entitle the purchaser to.

The word used is "party" shewing conclusively that the legislature had no intention, even by an inference through the interpretation section, to prevent the acquisition by an Indian of Indian lands put up for sale.

The word "party" is several times used when distinctly intended to include both "persons" and "Indians." See secs. 12 and 14.

This substitution in the revised statute of the word "person" for the word "party" is an instance of the danger attending such changes in the revision of the statutes. Obviously the revisers had no idea of enacting an important law by the change they made but regarded it simply as a linguistic embellishment; it has, however, misled two of the Judges of the Court of King's Bench into finding a positive law against the sale of Indian lands to an Indian. Fitzpatrick, C.J.

At the hearing I was considerably impressed with the argument that, even if there had never been a valid sale to David Philippe, the transactions between Euchère Otis, the local agent of the superintendent-general, and the respondent constituted a sale to the latter which was also confirmed by the Department of Indian Affairs. If, however, the views that I have previously expressed are correct, it is unnecessary to consider this point further. If the sale to David Philippe, in 1878, was good, the Crown had nothing left to grant to Giroux in 1889.

Pelletier, J., delivering the dissenting judgment in the Court of King's Bench, says that he has endeavoured to find in the record the necessary grounds for confirming the judgment, since such confirmation (if it could be legally given) would seem to him more in accordance with equity. With this view I agree and it is therefore satisfactory to be able to conclude that the judgment is in conformity not only with equity in its most general meaning, but also with the law.

The appeal should be dismissed with costs.

IDINGTON, J.:—The appellant seeks to have the Crown declared the proprietor of part of a lot of land in Quebec and respondent removed therefrom and ordered to account for the fruits thereof for the past 26 years. Idington, J.

The circumstances under which the claim is made are peculiar and some novel questions of law are raised. Much diversity of judicial opinion in the Courts below seems to exist relative to some of these questions.

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To put the matter briefly, the appellant claims that the land in question is part of a tract of land known as an "Indian Reserve" which had become vested by virtue of certain legislation in the Crown, in trust for a tribe of Indians; that part of it was thereafter surrendered by the tribe to the Crown for the purposes of sale for the benefit of said tribe; that this part of the lot now in question was in course of time sold to an Indian of said tribe; that he paid five 25/100 dollars on account of the purchase; that thereafter, under a judgment got against him, the land was sold by the sheriff to respondent for $500; that thereupon he paid to the Indian Department $164 as the balance of the purchase-money due the Crown, and procured the receipt therefor, which appears, hereinafter, from the local sales agent of the Indian Department; that he then went into possession and improved the land and has remained so possessed ever since till, according to assessed values, it has risen from being worth only $500 in 1889, when respondent entered, to be worth $3,200 in 1913, when this litigation was pending, that the Indian purchaser was incapacitated by statute from buying lands in a "Reserve;" and that the sheriff's sale was, as part of the result, null and void and hence that respondent got nothing by his purchase.

To realize the force and effect of these several allegations we must examine the statutes upon which the rights of the Indians rested, their powers of surrender thereunder, and the effect of the B.N.A. Act under and by virtue of which the claim of the appellant is asserted.

The Parliament of Old Canada, by 14 & 15 Vict. ch. 106, enacted:

That tracts of land in Lower Canada, not exceeding in the whole 230,000 acres, may, under orders-in-council to be made in that behalf, be described, surveyed and set out by the Commissioner of Crown Lands, and such tracts of land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada, for which they shall be respectively directed to be set apart in any order-in-council, to be made as aforesaid, and the said tracts of land shall accordingly, by virtue of this Act, and without any price or payment being required therefor, be vested in and managed by the Commissioner of Indian Lands for Lower Canada, under the Act passed in the session held in the thirteenth and fourteenth years of Her Majesty's reign, and intituled, *An "Act for the better protection of the Lands and Property of the Indians in Lower Canada."*

In the last mentioned Act, ch. 42 of 13 & 14 Vict., there is enacted:

It shall be lawful for the Governor to appoint from time to time a Commissioner of Indian Lands for Lower Canada in whom and in whose successors

by the name aforesaid all the lands or property in Lower Canada which are or shall be set apart, or appropriated to or for the use of any tribe or body of Indians, shall be and are hereby vested in trust for such tribe or body and who shall be held in law to be in the occupation and possession of any lands in Lower Canada actually occupied or possessed by any such tribe or body in common or by any chief or member thereof or other party for the use or benefit of such tribe or body and shall be entitled to receive and recover the rents issues and profits of such lands and property, and shall and may, in and by the name aforesaid, be subject to the provisions hereinafter made, exercise and defend all or any of the rights lawfully appertaining to the proprietor, possessor or occupant of such land or property.

In the evidence in the case there is a certified copy of an order-in-council of August, 1853, which reads as follows:—

On the letter from the Honourable Commissioner of Crown Lands, dated June 8, 1853, submitting for approval a schedule shewing the distribution of the area of land set apart and appropriated under the statute 14 & 15 Vict., ch. 106, for the benefit of the Indian Tribes in Lower Canada.

The Committee humbly advise that the said schedule be approved and that the lands referred to be distributed and appropriated as therein proposed.

This is vouched for by a certificate of the Assistant-Commissioner of Crown Lands, in 1889.

The schedule referred to in the said order-in-council does not appear in evidence. Neither does the letter.

There does, however, appear a schedule in the case, certified by the same Assistant-Commissioner of Crown Lands and of same date as last mentioned certificate. This on its face cannot be the schedule referred to in said order-in-council. It is as follows:

SCHEDULE

Shewing the distribution of the area of land set apart and appropriated under the statute 14th and 15th Vict., ch. 106, for the benefit of Indian Tribes in Lower Canada.

County.	Township or Locality.	No. of Acres.	Description of Boundaries.	Names of the Indian Tribes.	Remarks.	
	Peribonca River.	16,000	A tract five miles on the River Peribonca, north of Lake St. John.	Montagnais of Lake St. John and Tadoussac.	Indians having their hunting grounds along the Saguenay and its tributaries.	Surveyed. Exchanged for a tract on the west shore of Lake St. John.
Saguenay	Metabetchouan	4,000	The ranges 1st and C. south of Lake St. John. (And other lands).			Surveyed.

Certified a true copy of the original of record in this Department.

(Sgd.) E. E. TACHÉ, Assist.-Commissioner.

Department of Crown Lands, Quebec, 30th April, 1889.

Crown Lands Department, Toronto, 23rd February, 1858, Ind.

(Sgd.) JOSEPH WAUHEBE, P.L.

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I may remark that the marginal note

Surveyed. Exchanged for a tract on the west shore of Lake St. John. Surveyed.

cannot have formed part of an order-in-council in 1853. That note is something evidently written in after the date of the order-in-council and I infer has been a note made by someone in reference to an exchange proposed on September 4, 1856, to which I am about to refer. Who wrote it? When was it written? By what authority?

The certificate seems as presented in the case to be placed higher up than the note at left hand side and signed by Mr. Wauhebe. It is probable, however, the certificate was intended to present this note as part of the original record purported to be certified to.

What then does the date signify in this note? It is of February, 1858. Who was Mr. Wauhebe? What office did he fill? What was the purpose of the extract as it left his hands? Was the marginal note part of what he seems to be certifying to?

The importance of a definite answer to these queries and all implied therein becomes apparent when we find that the title of the Crown, as represented by appellant, depends upon the effect to be given the most indefinite terms of an order-in-council of September 4, 1856, which is as follows:—

On the application of the Montagnais Tribe of Indians of the Saguenay, thro' David E. Price, Esq'r, M.P.P., for the appointment of Mr. Georges McKenzie as interpreter and to distribute all moneys or goods given to the Tribe; and for the grant of a tract of land on Lake St. John, commencing at the River Ouiatchouanish, to form a township of 6 miles square; also, that the grant of £50 per annum, may be increased to £100, and continue annually.

The report from the Crown Lands Department dated July 25, 1856, states that the tract of land set apart for the Montagnais Indians, lies in the Township of Metabetchouan, west side of the river of that name and that this land, together with the tract of Peribonca, north side of Lake St. John, are still reserved for those Indians, but that as they appear desirous of obtaining a grant of the land at Pointe Bleue, on the western border of Lake St. John, there appears no objection to an exchange.

The Committee recommend that the exchange be effected and the grant made accordingly. Certified,

(Sgd.) WM. H. LEE,
C. E. C.

To the Supt.-Gen'l Indian Affairs,
etc., etc., etc.

Certified a true copy.
DUNCAN SCOTT.
Deputy Superintendent-General of Indian Affairs.

There is nothing in the case to explain what was done pursuant to this order, and when, if anything ever was done. There is nothing in the printed case shewing any definite survey ever was made of the lands thus recommended to be given in exchange for the lands which had been allotted to some Indians.

The Act of 14 & 15 Vict., ch. 106, makes it clear by the above quotation therefrom that orders-in-council setting apart land for the use of Indians should be described, surveyed and set out by the Commissioner of Crown Lands, and that only in such event can such tracts of land be considered as set apart and appropriated for the use of the Indians.

Again, it is clearly intended by the earlier enactment of 13 & 14 Vict. that the lands intended to be vested in the Commissioner of Indian Lands are such as have been set apart or appropriated to the use of Indians. When we consider that the lands to be so vested by virtue of those Acts are to be only lands which have been surveyed and set apart by the Commissioner of Crown Lands, it is very clear that something more than an order-in-council, such as that produced, merely approving of the proposed scheme of exchange, was needed to vest lands at Pointe Bleue in the Commissioner of Indian Lands.

Yet, strange to say, there is nothing of the kind in the case or anything from which it can be fairly inferred that the necessary steps ever had been taken.

Counsel for the appellant referred to a blue print in the record; and I understood him to suggest it was made in 1866. Examining it, I can find no date upon it; but I do find another plan purporting to be a survey made by one Dumais, P.L.S., in 1866. Probably it is by reference thereto he fixed the date of the blue print, if I understood him correctly. This latter plan has stamped upon it the words "Department of Indian Affairs, Ottawa, Canada;" and inside these, set in a circle, are the words "Survey Branch, True, Reduced Copy, W. A. Austin, 18.6.00." I infer that probably the latter plan is but a reduced copy of the former and that both refer to some survey made in 1866.

So far as I can find from the case, or the record from which the case is taken, the foregoing presents all there is entitling appellant to assert a title in the Crown on behalf of the Dominion. Clearly the order-in-council recommending an exchange, without more, furnishes no evidence of title.

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It might be said with some force, but for the constitutional history of Canada involved in the inquiry, that what we do find later on furnishes something from which after such lapse of years some inferences might be drawn. There are two difficulties in the way. All that transpired after July 1, 1867, when the B.N.A. Act came into force, can be no effect unless and until we have established a state of facts, preceding that date, which would enable the B.N.A. Act by its operation to give control of the said lands to the Crown on behalf of the Dominion.

By sec. 91, sub-sec. 24 of said Act, one of the subject matters over which the Dominion Parliament was given exclusive legislative authority was "Indians and Lands reserved for Indians."

The question is thus raised whether or not the lands in question herein fall definitely within the terms "Lands reserved for Indians."

The Dominion Parliament, immediately after Confederation, by 31 Vict., ch. 42, asserted its legislative authority over such lands as reserved for Indians. All that took place afterwards relative to the lands in question can be of no effect in law unless the alleged reserve had been duly constituted on or before July 1, 1867.

It seems impossible on such evidence as thus presented to find anything bringing the lands in question within the scope of and under the operation of the B.N.A. Act.

But there is another difficulty created by the enactment, in 1860, by the Parliament of Old Canada of 23 Vict., ch. 151, sec. 4, which provides as follows:—

4. No release or surrender of lands reserved for the use of Indians, or of any tribe or band of Indians, shall be valid or binding except on the following conditions.

This is followed by two sub-sections which specify the steps which must be taken to enable a surrender to be made. It is to be observed that this was passed within 3 years and 10 months from the order-in-council recommending the exchange made of the lands on the Peribonca and Metabetchouan rivers held as reserves for the Indians in question.

If the survey and setting apart contemplated by the proposed exchange was not made and fully completed by June 30, 1860, when the bill, which had been reserved by the Governor in May, was assented to, the completion of that exchange would require

the due observance by the Indians of the form of surrender imperatively required by the last mentioned Act.

There is nothing to indicate this ever was complied with. Hence, surveys made in 1866, or at any time after June 30, 1860, cannot help without evidence of such compliance. There is no evidence of any Indians in fact having been found on the Pointe Bleue reservation before the year 1869. If one had to speculate he might infer something took place between 1866 and 1869. But we are not at liberty to do so, or found a judgment herein for appellant, without evidence or only upon the merest scintilla thereof.

The appeal, therefore, fails, in my opinion. I think the distinction claimed by Mr. Stewart to exist between reserves duly constituted under the Acts above referred to, whereby the land became vested in commissioners in trust, and such reserves as involved in the case of *St. Catherine's Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 46, and some other cases referred to, was well taken.

But, as this case stands, there being no evidence of the land having been duly vested before July 1, 1867, in commissioners in trust, or otherwise falling within the operation of the B.N.A. Act, sec. 91, sub-sec. 24, the presumption is in favour of the land being vested in the Crown on behalf of Quebec.

Assuming, for argument's sake, that there is any evidence upon which to find the land vested in the Crown on behalf of the Dominion and that there is evidence of a sale by the Crown to David Philippe, upon which he paid only five 25/100 dollars, how does that help the appellant?

Admitting the invalidity of the sale and nullity of the sheriff's sale, and discarding both as null, there is evidence which goes far to establish the recognition by the Crown of the respondent as the purchaser. The local agent gave respondent the following receipt:—

Roberval, Pointe Bleue,

$164.32. 22 juin, 1889.

Reçu de M. Pierre Giroux la somme de cent soixant et quatre piastres et 32 cents, en payement du ½ lot S. E. No. Rang 1er, du Township Ouiatchouan suivant instruction de Dep. et avec contrat de Vente pour le dit ½ lot.

L. E. ORIS, A.S.

And the Department of Indian Affairs, at Ottawa, set down in its books a recognition of respondent as purchaser.

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It would have been, I incline to think, quite competent for the Crown under all the circumstances, and without any detriment either to the trust or anything else, to have taken the position in 1889, as may be inferred was done, that the said receipt and entry in the books should stand forever as a final disposition of the affair.

The reasons against such a course of action being taken by the Crown were of rather a technical character; even assuming Philippe was debarred from buying, upon which I pass no opinion.

Under the law as it has long existed there was the possibility of recognizing any Indian qualified to be enfranchised and thereby beyond doubt entitled to become a buyer. It may be inferred even at this distance of time that if the questions now raised had, at the time when respondent was set down in the books of the department as purchaser of the lands in question, been viewed in light thereof and the foregoing circumstances and especially having regard to the fact that, in any event, Philippe alone was to blame, and had no more substantial grievance at least none worth more than $5.25 to set up, and seeing respondent had contributed $500 to pay his debts and paid practically the whole purchase money to the Crown, no harm would have been done by letting the recognition of respondent stand.

I must not be understood as holding that there cannot be discovered abundant evidence to cover the very palpable defects I point out in the proof of title adduced herein. This is not one of the many cases wherein probabilities must be weighed. It is upon the record as it presents the title to the lot in question that we must pass. Fortunately the result does justice herein even if the result of blunders in failing to produce evidence which may exist.

The appeal must be dismissed with costs.

Duff, J.

DUFF, J.:—The action out of which this appeal arises was brought in the Superior Court for the District of Chicoutimi, in the Province of Quebec, by the Attorney-General of the Dominion on behalf of the Crown claiming a declaration that a certain lot of land was the property of the Crown and possession of the same.

The three questions which it will be necessary to discuss are:—

1st.—Was the lot in question within the limits of an Indian Reserve constituted under the authority of 14 & 15 Vict., ch.

106? 2nd.—If so, is the title vested in His Majesty in right of the Dominion of Canada or has the Attorney-General of Canada, on other grounds, a title to maintain the action? 3rd.—Was a professed sale of the lot made in 1878 to one David Philippe, member of the Montagnais tribe, by an agent of the Department of Indian Affairs, a valid sale?

I shall first state the facts bearing upon the 1st and 2nd of these questions. On August 9, 1853, an order-in-council was passed by which certain tracts of land were severally appropriated for the benefit of the Indian tribes in Lower Canada under the authority of the statute above mentioned. Two tracts were set apart for the benefit of the Montagnais Band, one on the Metabetchouan and one on the Peribonca river in the Saguenay district. A few years afterwards, on the request of the tribe, the Governor-in-Council sanctioned an exchange of the Peribonca tract for a tract at Pointe Bleue, Ouiatchouan, on the western border of Lake St. John. In August, 1869, the Governor-General in Council, by order, accepted what professed to be a surrender by the Montagnais Indians of the reserve constituting the Township of Ouiatchouan which admittedly is the tract of land that the order-in-council of 1851 authorized to be substituted for the Peribonca Reserve. In view of the contention that the exchange was never effected, it is desirable to set out this order-in-council and the surrender in full. They are, as follows:—

Copy of a Report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor-General in Council on August 17, 1869.

The Committee have had under consideration a memorandum dated August 3, 1869, from the Hon. the Secretary of State submitting for acceptance by Your Excellency in Council under the provisions of the 8th section of the Act, 31 Vict. ch. 42, a surrender bearing date June 25, 1869, executed at Metabetchouan, in the District of Chicoutimi, by Basil Usisorina, Luke Usisorina, Mark Pise Thewamerin and others, parties thereto as chiefs and principal men of the Band of Montagnais Indians, claiming to be those for whose benefit the reserve at Lake St. John, known as the Township of Ouiatchouan, was set apart, executed in the presence of Rev'd Dominique Racine, authorized by the Hon. the Secretary of State to receive said surrender and in that of the Hon. Mr. Justice Roy, Judge of the Superior Court in the District of Chicoutimi, such surrender conveying their interest and right in certain lands on the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th ranges of the said Township of Ouiatchouan, indicated on the copy of a map by provincial surveyor P. H. Dumais, dated A.D. 1866, attached to the said surrender and vesting the lands so surrendered in the Crown in trust to sell and convey the same for the benefit of the said Indians, and their descendants, and on

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condition that the moneys received in payment for the same shall be placed at interest in order to such interest being periodically divided among the said Montagnais Indians.

The Committee advise that the surrender be accepted and enrolled in the usual manner in the office of the Registrar-General. Certified, Certified a true copy. (Sgd.) WM. H. LEE, Clk. P. C.

DUNCAN SCOTT,
Deputy Superintendent-General of Indian Affairs.

Surrender by the Band of Montagnais Indians for whom was set apart the Reserve of the Township of Ouiatchouan, in the Province of Quebec, to Her Majesty Queen Victoria, of their lands in the Indian Reserve there, as described below, to be sold for their benefit.

Know all men that the undersigned Chief and Principal Men of the above mentioned band living on the above mentioned reserve, for and acting on behalf of our people, do hereby remise, release, surrender, quit-claim and yield up to our Sovereign Lady the Queen, Her Heirs and Successors forever, all and singular those certain parcels or tracts of land situated in the Dominion of Canada and in that part of the said Province of Quebec, being composed of concessions one, two, three, parts of four, five, six and the whole of seven and eight, in the said Township of Ouiatchouan, as described and set forth in the map or plan hereunto annexed.

To have and to hold the same unto Her said Majesty the Queen, Her Heirs and Successors forever, in trust, to sell and convey the same to such person or persons and upon such terms as the Government of the said Dominion of Canada shall or may deem most conducive to the interest of us, the said Chief and Principal men and our people in all the time to come and upon the further condition that the moneys received from the sale thereof shall, after deducting the usual proportion for expense of management, be placed at interest, and that the interest money so accruing from such investment shall be paid annually, or semi-annually to us and our descendants. And we the said Chiefs and principal men of the band aforesaid do, on behalf of our people and for ourselves, hereby ratify and confirm and promise to ratify and confirm whatever the Government of this Dominion of Canada may do or cause to be lawfully done in connection with the disposal and sale of the said lands.

In witness thereof, the said Chiefs and principal men have set our hands and affixed our seal unto this instrument in the said Province of Quebec, at Post Metabetchouan. Done at our Council-House this twenty-fifth day of June in the year of our Lord one thousand eight hundred and sixty-nine.

Signed, sealed, and delivered in the presence of:

D. ROY,

Judge of the Superior Court and of the District of Chicoutimi. Signed by the Chief and thirty-six other Indians, members of the Band.

Since the acceptance of this surrender the lands have been dealt with by the Department of Indian Affairs as lands surrendered under provisions of the Indian Act and held by the Crown under that Act.

First, then, of the contention that the Ouiatchouan Reserve was never lawfully constituted. The order-in-council and the

surrender registered pursuant to the order-in-council constitute, in my judgment, together, a public document within the meaning of the rule stated in Taylor on Evidence, 1769*a*, and the recitals in this document are, therefore, *primâ facie* evidence of the facts stated. (See *Sturla* v. *Freccia, et al*, 5 App. Cas. 623, at 643-4). Evidence is thereby afforded that the Montagnais Band of Indians did occupy this tract of land as a reserve and the principle *omnia præsumuntur rite esse acta* is sufficient to justify, *primâ facie*, the conclusion that the order-in-council was carried out and that their occupation was a legal one.

The second question depends upon the character of the Indian title to this reserve at the time the B.N.A. Act came into force. If at that time there was vested in the Crown in right of the Province of Canada an interest in these lands which properly falls within the description "land," as that word is used in sec. 109 of the B.N.A. Act, or within the word "property" within the meaning of sec. 117, then that interest (as it is not suggested that sec. 108 has any application), passed to the Province of Quebec. It is necessary, therefore, to consider the nature of the Indian title and, as that depends upon the meaning and effect of certain parts of ch. 14, C.S.L.C., it will be convenient to set out these provisions in full. They are, as follows:—

7. Le gouverneur pourra nommer, au besoin, un Commissaire des terres des Sauvages pour le Bas-Canada, qui, ainsi que ses successeurs, sous le nom susdit, sera mis en possession, pour et au nom de toute tribu ou peuplade de sauvages, de toutes les terres ou propriétés dans le Bas-Canada, affectées à l'usage d'aucune tribu ou peuplade de Sauvages, et sera censé en loi occuper et posseder aucune des terres dans le Bas-Canada, actuellement possedées ou occupées par toute telle tribu ou peuplade, ou par tout chef ou membre d'icelle, ou autre personne, pour l'usage ou profit de tels tribu ou peuplade; et il aura droit de recevoir et recouvrer les rentes, redevances et profits, provenant de telles terres et propriétés, et sous le nom susdit; mais eu egard aux dispositions ci-dessous établies, il exercera et maintiendra tous et chacun les droits qui appartiennent légitimement aux propriétaires, possesseurs ou occupants de telles terres ou propriétés.

8. Toutes les poursuites, actions ou procédures portées par ou contre le dit commissaire, seront intentées et conduites par ou contre lui, sous le nom susdit seulement, et ne seront pas périmées or discontinuées par son décès, sa destitution ou sa resignation, mais seront continués par ou contre son successeur en office.

2. Tel commissaire aura, dans chaque district civil du Bas-Canada, un bureau qui sera son domicile légal, et où tout ordre, avis ou autre procédure pourra lui être légalement signifié; et il pourra nommer des députes, et leur déléguer tels pouvoir qu'il jugera expédient de leur déléguer de temps à

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autre, ou qu'il recevra ordre du gouverneur de leur déléguer. 13 & 14 V., c. 42, s. 2, moins le proviso.

9. Le dit commissaire pourra concéder ou louer, ou grever toute telle terre ou propriété, comme susdit, et reçevoir ou recouvrer les rentes, redevances et profits en provenant, de même que tout propriétaire, possesseur ou occupant légitime de telle terre pourrait le faire; mais il sera soumis, en toute chose, aux instructions qu'il pourra reçevoir de temps à autre du gouverneur, et il sera personnellement responsable à la couronne de tous ses actes et plus particulièrement de tout acte fait contrairement à ces instructions, et il rendra compte de tous les deniers par lui reçus et les emploiera de telle manière, en tel temps, et les paiera à telle personne ou officier qui pourra être nommé par le gouverneur, et il fera rapport de temps à autre, de toutes les matières relatives à sa charge, en telle manière et forme, et donnera tel cautionnement que le gouverneur prescrira et éxigera; et tous les deniers et effets mobiliers qu'il reçevra ou qui viendront en sa possession, en sa qualité de commissaire, s'il n'en a pas rendu compte, et s'ils ne sont pas employés et payés comme susdit, ou s'ils ne sont pas remis par toute personne qui aura été commissaire à son successeur en charge, pourront être recouvrés de toute personne qui aura été commissaire, et de ses cautions, conjointement et solidairement, par la couronne, ou par tel successeur en charge dans aucune cour ayant juridiction civile, jusqu'a concurrence du montant ou de la valeur, 13 & 14 V., c. 42, s. 3.

12. Des étendues de terre, dans le Bas-Canada, n'excédant pas en totalité deux cent trente mille acres, pourront (en autant que la chose n'a pas encore été faite sous l'autorité de l'acte 14 & 15 V., c. 106), en vertu des ordres-en-conseil emanés à cet égard, être désignées, arpentées et reservées par le commissaire des terres de la couronne; et ces étendues de terre seront respectivement reservées et affectées à l'usage des diverses tribus sauvages du Bas-Canada, pour lesquelles, respectivement, il est ordonné qu'elles soient reservées par tout ordre-en-conseil emané comme susdit; et les dites étendues de terre seront, en conséquence, en vertu du présent acte, et sans condition de prix ni de paiement, transferées au Commissaire des terres des Sauvages pour le Bas-Canada, et par lui administrées conformement au présent acte. 14 & 15 V., c. 106, s. 1.

The tract in question was set apart under the authority of sec. 12. Our inquiry concerns the effect of secs. 7, 8, and 9 as touching the nature of the Indian interest.

1st. It may be observed that the Commissioner is to hold the Indian lands "pur et au nom" of the tribe or band and that he is deemed in law to occupy and to possess them "pour l'usage et au profit de telle tribu ou peuplade." These appear to be the dominating provisions, and they express the intention that any ownership, possession or right vested in the Commissioner is vested in him for the benefit of the Indians. Therefore, the rights which are expressly given him are rights which are to be exercised by him for them as by tutor for pupil.

Looking at the *ensemble* of the rights and powers expressly

given I can entertain no doubt that in the sum they amount to ownership. By par. 7 he is given a right to receive and to recover the rents and profits

et il exercera et maintiendra tous et chacun les droits qui appartiennent legitimement aux propriétaires.

By sec. 9:—

Le dit commissaire pourra concéder ou louer, ou grever toute telle terre ou propriété, comme susdit, et recevoir et recouvrer les rentes redevances et profits en provenant, de même que tout propriétaire, possesseur ou occupant légitime de telle terre pourra le faire.

This in the sum, I repeat, is ownership; and none the less so that in the administration of the property the Commissioner is accountable to the Governor. The Governor in this respect does not represent the Crown as proprietor but as *parens patriæ*.

It seems to follow that, on the passing of the B.N.A. Act, this ownership passed under the legislative jurisdiction of the Dominion as falling within the subject Indian Lands, and I see no reason to doubt that the provisions of the Act of 1868 (sec. 26, ch. 42) by which the Secretary of State, as Superintendent-General of Indian Affairs, was substituted for the Commissioner provided for by the enactments just cited as the trustee of the Indian title were well within the authority of the Parliament of Canada; nor can I see on what ground it could be contended that the provisions of the Indian Act (ch. 43, R.S.C.), providing for the surrender of Indian lands or the provisions relating to the sale of the same after the surrender are not within the ambit of that authority.

But it is argued that, on the surrender being made, the lands, under the authority of *St. Catherine's Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 46, became vested in the Crown and fell under the control of the province. There are two answers. First: The Indian interest being, as I have pointed out, ownership is by the terms of the surrender a surrender to Her Majesty in trust to be dealt with in a certain manner for the benefit of the Indians. The Dominion Parliament, having plenary authority to deal with the subject of Indian Lands and having authorized such a transfer of the Indian title, it is difficult to see on what ground the transfer could be held not to take effect according to its terms or on what grounds the trusts, upon which the transfer was accepted, can be treated as non-operative.

2nd. If I am right in my view as to the character of the

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Indian title, it is obvious that any interest of the Crown was a contingent interest to become vested only in the event of the disappearance of the Indians while the lands remained unsold. If that event had taken place, it may be that there would have been a resulting trust in favour of the Crown and if the lands in such an eventuality remained unsold in the hands of the Dominion the question might arise whether as a "royalty" the Crown in the right of the province would not be entitled to the benefit of them. But all this has no application here. So long as the band exists the band is the beneficial owner of the land in question or of the moneys arising out of the sale of them.

The distinction between this case and the case of *St. Catherine's Milling Company*, 14 App. Cas. 46, is not difficult to perceive. The Privy Council held in that case that the right of the Indians resting on the proclamation of 1873, was a "personal and usufructuary right" depending entirely upon the bounty of the Crown. The Crown had a paramount and substantial interest at the time of Confederation, which interest remained within the province. The surrender of the Indian right to the Crown (which was not, it may be observed, a surrender to the Dominion Government), left the interest of the province unencumbered. There is no analogy between that case and this, if I am right in my view that the Indian interest amounted to beneficial ownership, the rights of ownership, in some respects, being exercisable not by the Indians but by their statutory tutor, the Commissioner. The surrender of that ownership in trust under the terms of the instrument of 1868 cannot be held, without entirely defeating the intention of it, to have the effect of destroying the beneficial interest of the Indians.

The third question arises in this way. Professing to act under the authority of the Indian Act (ch. 18 of 1876), the Indian agent, in May, 1878, sold the lot in question to one David Philippe, a member of the Montagnais Band. On March 7, 1889, this land was sold by the sheriff under a judgment against Philippe, and adjudged to the respondent Giroux. The appellant alleged that Philippe was not a competent purchaser and that, by certain provisions of the statutes relating to Indians, the sale to Philippe was forbidden and that the sale was contrary to law.

Two distinct points are made by Mr. Stuart. First, he says that the effect of sec. 42 of the Indian Act (ch. 43, R.S.C., 1886),

taken with sec. 2, sub-secs. *c* and *h*, precludes an Indian, within the meaning of the Act, from becoming the purchaser of any part of a surrendered reserve. Sec. 42, on the literal construction of it might, no doubt, be held to confine the benefits of the certificate of the sale or receipt for the money received on the sale of Indian lands to a "person" within the meaning of sec. 2 (*c*), that is, to some individual other than an Indian. But the conclusive objection to this line of argument is to be found in the Act of 1876 (ch. 18) which was in force when Philippe purchased. Sec. 31 of that Act dealt with the effect of a certificate of sale or a receipt for money received on the sale of Indian lands. It is to the "party to whom the same was or shall be made or granted" that the section refers and the definition of "person" in the interpretation section is without effect.

The second point made rests upon sub-sec. 3 of sec. 77 of the Act, R.S.C. 1886, ch. 43, as amended by 51 Vict., ch. 22, sec. 3. It will be convenient to set out sections 77 and 78 incorporating that amendment. They are as follows:—

Sec. 77. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds, in his individual right, real estate under a lease or in fee simple, or personal property outside of the reserve or special reserve in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate:

2. No taxes shall be levied on the real property of any Indian, acquired under the enfranchisement clauses of this Act, until the same has been declared liable to taxation by proclamation of the Governor in Council, published in the *Canada Gazette:*

3. All land vested in the Crown or in any person, in trust for or for the use of any Indian or non-treaty Indian or any band or irregular band of Indians or non-treaty Indians, shall be exempt from taxation, except those lands which, having been surrendered by the bands owning them, though unpatented, have been located by or sold or agreed to be sold to any person; and, except as against the Crown and any Indian located on the land, the same shall be liable to taxation in like manner as other lands in the same locality; but nothing herein contained shall interfere with the right of the superintendent-general to cancel the original sale or location of any land, or shall render such land liable to taxation until it is again sold or located.

Sec. 78. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the next preceding section; but any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid. 43 V., ch. 28, sec. 77.

The argument is that "any Indian located on the land"

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excludes an Indian purchaser under sec. 31 of the Act of 1876. I think that argument fails. The meaning of "located Indian," I think, is made sufficiently clear by reference to secs. 16, 17, 18 and 20 of the Act of 1886 and, in my judgment, clearly refers to an Indian located under those provisions, that is to say, an Indian who has been permitted to occupy part of the reserve in respect of which he has a location ticket and continues to occupy it notwithstanding the surrender of the reserve. The scheme of these sections appears to be that real estate held by an Indian within the reserve where he resides shall not be subject to taxation or to be charged by mortgage or judgment, but it does not appear to be within the scheme to exempt property purchased by an Indian as purchaser outside of the reserve on which he is living. "Reserve," it may be observed, by reference to the interpretation clause, does not apply to a surrendered reserve.

I may add that the Act does not appear to contemplate the disabling of the Indians from acquiring property and engaging in transactions outside the reserve. See sec. 67, for example, in addition to secs. 64, 65, and 66.

Anglin, J.
Brodeur, J.

ANGLIN, J., concurred with DUFF, J.

BRODEUR, J.:—This is a petitory action by the Attorney-General of Canada praying that the Crown be declared the owner of the south-eastern half of lot No. 3 in the first range of the township of Ouiatchouan.

The facts that gave rise to the present case are as follows:—The land in question formed part of an Indian reserve established by virtue of the Act 14 & 15 Vict. ch. 106. In 1869, the band of Montagnais Indians owning the reserve decided to cede and abandon, among others, the first range of the township of Ouiatchouan. Later, on May 7, 1878, the Superintendent of Indian Affairs sold to a man named David Philippe, for the sum of $26.25, the property in question in this case, which originally formed part of the Indian reserve but had become part of the public domain following the cession made by the band.

David Philippe having incurred some debts, judgment was rendered against him and the property was sold by the sheriff. The land was adjudged to the defendant—respondent, Giroux, who took possession of it, entirely cleared it and made of it a property having a good value.

Some doubts having been raised by the Crown on the validity

of the decree, the acquirer Giroux, so as to avoid a lawsuit with the government, chose to take a title from the latter and got from the agent a receipt which reads, as follows:—

$164.32. Roberval, Pointe-Bleue, June 22, 1889.

Received from Mr. Pierre Giroux the sum of one hundred and sixty-four dollars and 32 cents, in payment for ½ lot s.e. range 1st of the Township of Ouiatchouan according to instructions from the department and with deed of sale for said ½ lot. L. E. OTIS, A. S.

This new sale was confirmed and approved of by the Department of Indian Affairs; it was also approved of by the Department of Justice. Later on, however, we see by the correspondence on file that the Department of Indian Affairs having asked for the opinion of the Department of Justice concerning the validity of the sale, alleging that the so-called Philippe was an Indian located on the reserve and that it might properly be asked if that fact did not affect the validity of the judicial sale, the Department of Justice answered that under the circumstances, by virtue of sec. 79 of the Indian Act as amended by 51 Vict. ch. 12, sec. 75, the land could not be legally mortgaged and that the property could not be sold under authority of justice.

In spite of that opinion of the Department of Justice, no action seems to have been taken by the Department for 22 years after the judicial sale.

The first question which presents itself is whether an Indian can buy from the Government a land which was originally in a reserve but has been abandoned.

When the reserves are so abandoned by the Indians, the Crown sees to it that those lands are administered, sold or rented for the benefit and advantage of the Indians. By virtue of the law, the Crown is bound to sell those lands to the first persons that apply and according to the prices that it determines.

There was some doubt as to the said David Philippe being an Indian or not. Some doubt has even been expressed as to the band to which he might belong. Some claim he was an Abenakis, others a Montagnais.

But, even supposing that he was a Montagnais Indian, that as such he was entitled to live on the Indian Reserve at Pointe Bleue, it remains none the less true that from the moment such reserve or part of such reserve was abandoned to the Crown nothing prevented an Indian from buying one of the lands so abandoned.

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Brodeur, J.

Indians have, concerning the reserves, restricted rights and obligations, but when those reserves have been abandoned to the Crown it seems to me that an Indian could have the right to buy one of those lands, to cultivate it, to make the products his own and to enjoy in that connection the same rights and privileges as the white people. To assert the contrary would be, in my opinion, to deny to those Indians the rights to develop and to become part of a more advanced civilization.

The appellant, however, alleges that only the white people can buy those lands from the Crown.

There is no doubt, I think, that an Indian could, like any other settler, buy lands from the Crown; and, in my opinion, a text would be required much more explicit than sec. 42, which was quoted to us, to claim that in the case of a reserve which formerly belonged to the Indians the latter would be prevented from being able to take their abode there as settlers.

Sec. 42 of the Indian Act of 1886, quoted by Mr. Stuart, could not be interpreted as excluding the Indians from the right of being able to buy.

I therefore consider that Philippe had the right to buy that land from the Crown and that the judicial sale which took place is valid and that Giroux became through a good title the acquirer of the land claimed by the appellant.

But there is something more. Supposing that the Crown had no right to sell the property to Philippe, there is no doubt that it could and should sell it to Giroux. Then, in 1889, the Crown itself had a sum of $164.32 paid to it by Giroux as purchase price of the property in question and the Department itself confirmed such sale made through its agent.

I therefore consider that, under the circumstances, there can be no doubt as to Giroux's right of property in the land in question and consequently the judgment of the Courts below which dismissed the action must be confirmed with costs. *Appeal dismissed.*

MAN.

C. A.

LABERGE v. MERCHANTS BANK.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. August 18, 1916.

1. PLEADING (§ V—345)—REPLICATION—ISSUE AS TO INVALIDITY OF SECURITY TO BANK—CONFESSION AND AVOIDANCE.

Where an action has been commenced by creditors attacking an assignment of goods to a bank as security, as being a fraudulent preference, a further plea as to the invalidity of the security under the Bank

Act, (R.S.C. 1906, ch. 29, sec. 88), though not set out in the statement of claim itself, may be set up in the replication—in confession and avoidance of that issue as set up in the statement of defence.

2. DISMISSAL AND DISCONTINUANCE (§ I—4)—DELAY IN PROSECUTION—REINSTATEMENT.

An action should not be dismissed merely for a delay in prosecution not seriously prejudicial to the interests of anyone; the party should be given time to proceed with the next step upon paying the costs of the application for dismissal; if this be not permitted, the action will be reinstated on appeal.

Statement.

APPEAL from an order of Mathers, C.J.K.B., dismissing an action. Reversed.

Isaac Pitblado, K.C., for appellant, plaintiff.

T. R. Robertson, K.C., for Merchants Bank.

R. W. Campbell, for Winnipeg Fur Co.

The judgment of the Court was delivered by

Richards, J.A.

RICHARDS, J.A.:—The plaintiffs claim that they are creditors of the Winnipeg Fur Co. Ltd., which I shall refer to as "the company" and sue on behalf of themselves and all other creditors of the company excepting the Merchants Bank of Canada, which for brevity I shall call "the bank."

The statement of claim filed November 3, 1914, alleged that the company, in October, 1914, while insolvent to the knowledge of the bank, assigned, transferred and delivered to the bank without consideration, all the company's stock of goods in Winnipeg and that the bank took possession thereof and was about to sell them.

The relief asked is a declaration that the above assignment is void as against the company's creditors other than the bank, an injunction to restrain the bank from disposing of the goods, an order for the delivery of such goods by the bank to a receiver to be appointed and further and other relief.

The bank's statement of defence sets up advances to the company in consideration of the company pledging to the bank goods under sec. 88 of the Bank Act, and of the giving by the company of an instrument in the form "C" to the Bank Act, pledging to the bank such goods to secure such advances, and that the goods in question are those so pledged, or others of substantially the same character substituted therefor by the company and covered by such instruments.

The part of sec. 88 of the Bank Act (R.S.C. 1906, ch. 29) in question says:—

(3) The bank may lend money to any person engaged in business as

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a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him or procured for such manufacture.

The section allows the owner to give the security in the form in schedule "C" to the Act, which gives the bank the same rights as those acquired under a warehouse receipt.

The plaintiffs replied denying the bank's right to take these securities under sec. 88, because (as alleged in the replication) the goods had been purchased by the company in a completely manufactured state and had not been worked upon, and further manufactured by the company.

The action was brought to trial without jury before the Chief Justice of the Court of King's Bench.

At the trial in January, 1915, the plaintiffs' counsel offered evidence to shew that the goods were as set up in the replication. Counsel for the bank objected that the matter set up in the replication raised a different cause of action from that set out in the statement of claim. The trial Judge upheld the objection and made an order giving the plaintiffs liberty to amend the statement of claim as they might be advised, ordering the costs of the action up to that date to be costs in the cause to the defendants in any event, and striking the case off the list of those set down for trial.

No appeal was taken against that order, and the plaintiffs have not yet availed themselves of the right to amend so given them.

While matters so stood the plaintiff Laliberte obtained a judgment in an action by himself alone against the company and, under his execution, certain of the goods were seized.

The sheriff interpleaded, and on October 14, 1915, an order was made for the trial of an issue in which Laliberte was to be plaintiff and the bank defendant. That issue had not been tried when the motion to dismiss this action was made, as mentioned later on.

Apparently there were some negotiations to settle the present action, but their extent is not shewn.

On October 26, 1915, the bank's solicitor wrote the plaintiff's solicitor, who seemed to have been also Laliberte's solicitor in his separate action, also asking to have the latter case proceeded with. He received a reply two days later that the plaintiff's

solicitor wished to set down the Laliberte case and immediately after to set down the Laberge case (the one before us now) so that the whole matter could be disposed of at once. The reply referred to the leave given to amend and proceeded to serve the amended pleadings that day or the next.

Nothing further appears until February 4, 1916, when the bank's solicitor moved to dismiss this action for want of prosecution. In answer to the motion affidavits were filed to shew that the delays had been contrary to the instructions of the plaintiffs, who had been urging their solicitor to press the case on.

On February 14, the Chief Justice of the King's Bench made an order on the above motion dismissing the action with costs without prejudice to the plaintiffs' right to bring a new one. From that order an appeal has been taken to this Court.

As there has been no appeal from the decision of the trial Judge as to the plaintiffs' right to give evidence under the pleadings as they stood when the case came to trial, to shew that the goods were such that the company could not give the bank security on them under sec. 88 of the Bank Act, we can not here interfere with the order then made. But as the question may arise again in the action I think it should be referred to.

With great deference I am unable to agree with that view of the pleadings. I assume that the Chief Justice thought the action brought really to attack the validity of the securities given to the bank—as probably it really was—and that therefore it should have been begun by arraigning their validity in the statement of claim.

That the action might have been so begun, I have no doubt, but laying it in that form would be open, from the pleaders' point of view, to the objection that, if the bank had any other claim to hold the goods than that derived under sec. 88, the action would not, without amendment of the pleadings, test the right of such further claim.

Then, too, to require the plaintiffs to have so sued presupposes knowledge on their part which, in fact, they might not have had, when suing, that the bank claimed by virtue of security given under sec. 88.

The plaintiffs' claim really is that a preference was given the bank by the company while the latter was insolvent. That

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position was none the less, I submit, a correct one to take, although the bank had been given the alleged securities if such securities were in fact invalid. If they were then, unless the bank had other legal rights to justify their taking of the goods, they, the bank, were in the same position as if they had merely taken the goods with the company's consent and without any pretence of holding securities. To require the plaintiffs to attack the security in their statement of claim would have been to compel them to anticipate the defence, or perhaps only one of the several defences.

I am, with deference, of opinion that the statement of claim properly left it to the bank to state in what manner they justified the taking.

When the bank pleaded, as their justification, their securities and sec. 88 of the Bank Act, the plaintiffs might have amended their statement of claim by attacking the validity of such securities. But, with deference, I cannot see why, as the law permits a replication, they might not raise the question by one.

What is sought to be set up by the one pleaded is not an addition to that which the plaintiffs had to allege, to make their case in their first pleadings. It is only an answer to that which the defendants set up as their defence—a pleading in confession and avoidance of that defence.

I have gone fully into the foregoing in order that if the question should arise again in this case, as it may, the views of this Court should be known.

Then, as to the question raised by this appeal, I cannot say that the delay by the plaintiffs has been satisfactorily accounted for. There appear to have been some negotiations for a settlement, but they are too vaguely stated in the material before us to be of use to the Court on this point.

The plaintiffs' solicitor seems to have expected to bring on the Laliberte interpleader for trial, and as it raised much the same questions as are in issue here, to get those questions thus decided. But no reason is given why the Laliberte case was delayed, especially after the promise to bring it on, made in October.

It seems to me that we must hold that there had been unnecessary delay.

We are, however, of opinion that despite such delay, the rule stated in *Eaton* v. *Storer*, 22 Ch. D. 91, is the proper one to follow

in ordinary cases. There the plaintiff twice got extensions of time for filing his reply to the statement of defence. A week after the expiry of the second period the defendant served notice of motion for judgment. The plaintiff then, by leave, moved to have a summons for leave to deliver a reply, heard by the Judge.

On the return of the summons the Judge dismissed it with costs on account of the gross delay in putting in so simple a pleading as a reply, and held that the plaintiff was entitled to no further indulgence. The motion for judgment was also dismissed.

Later the plaintiff served notice of appeal from the order refus ng him further time. No explanation of the delay was given.

Sir George Jessel, M.R., said (22 Ch. D., p. 92):—

> The plaintiff was out of time, and in that case if a motion is made for judgment on admissions in the pleadings, or if the analogous step is taken of a motion to dismiss for want of prosecution, the usual course is to give the plaintiff time to take the next step upon his paying costs, which is a sufficient punishment, and will prevent the rules from becoming a dead letter. This course will not be departed from unless there is some special circumstance such as excessive delay.

The plaintiff there was compelled to pay the costs of the application to the Judge below, but was given the costs of the appeal.

Here we do not think there was such delay as should on the application to dismiss, have prevented the giving of further time to bring on the trial, the plaintiffs, of course, paying the costs of the application. Nor does there seem any other special circumstance to make it improper to follow the above rule. It appears that by arrangement the goods were sold and the bank held the proceeds till the issue is settled. So they are not suffering greatly merely from the delay.

The order appealed from will be set aside and the action restored to the files of the Court; the plaintiffs to pay the costs of the defendants' application for the dismissal of the action, but the defendants to pay the plaintiffs' costs of this appeal; such costs in each case to be costs in the cause in any event to the party entitled to open. The plaintiffs to have one month from the giving of this judgment within which to amend their statement of claim, as they may be advised.

Appeal allowed.

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S.C.

HARRISON v. MATHIESON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. March 24, 1916.

TRUSTS (§ IIB—51)—LIABILITY OF WIFE FOR PROCURING HUSBAND'S BREACH OF TRUST—ACCOUNTING—INTEREST.

Misapplication of trust funds by a husband in payment of his wife's debts, to which she agreed, renders the wife liable to make good the breach of trust; she is also liable for such trust moneys as were made a gift to her, even without knowledge of their trust character, since she merely holds them as a volunteer, and not as a transferee for value; in accounting for it she is also chargeable with the interest which, but for the misapplication, the fund would have produced from investment.

Statement. APPEAL by the defendant from the judgment of Lennox, J., varying the report of a Local Judge, to whom, by the judgment at the trial, the whole action was referred, under sec. 65 of the Judicature Act. Affirmed.

The judgment appealed from is as follows:—The only question in dispute in this action now is as to the sum for which the defendant Mary Mathieson should be made personally liable. By the report in appeal it is found that the estate of John Hugh Mathieson is indebted to the plaintiff in the sum of $16,105.25—counting interest only to the 1st November instant. The plaintiff claims that the defendant Mary Mathieson (it will be convenient to refer to her as the defendant) should be held liable for the whole of this indebtedness.

The learned Judge at London, to whom this action was referred, reports the facts very fully and specifically; and, with one exception hereinafter referred to, I find no reason to object to any of the learned Judge's findings of fact.

With very great respect, however, I am of opinion that, in addition to the sums for which the defendant is found to be liable by the report, the learned Judge should have found the defendant personally liable for the following sums of money, namely:—

1907, Jan. 4.	Part proceeds of debenture of the London and Erie Company applied upon a promissory note of the defendant and her husband, John Hugh Mathieson	$5,230.00
1912, Mar. 23.	To paid Avern Pardoe for defendant out of trust funds	503.00
" May 4	" " " "	623.00
" July 8	" London and Erie "	1,343.00
	Making a total additional liability of	$7,699.00

with interest upon those several sums at five per cent. per annum computed with annual rests from the dates at which they were respectively paid out of the trust fund by the deceased John Hugh Mathieson.

As to the last three of these items the learned Judge finds that they were all paid out of trust funds and in breach of the trust by the defendant's husband and were applied upon debts owing by the defendant and for her benefit—the $1,343 in discharge of a mortgage upon her property, and the indebtedness to Pardoe being secured upon shares of stock held by the defendant—but that the payments were made "without her prior knowledge or procurement," and for this reason the learned Judge finds that the defendant is not liable for their repayment—basing his conclusion of law upon *Ewart* v. *Steven* (1871), 18 Gr. 35. In that case, and in all the cases referred to in support of it, the misappropriating trustee was not only acting without authority, express or implied, to commit his *cestui que trust* to an obligation, but, what was more important still, he was under a legal and moral obligation to make the payments complained of, and the judgments all proceeded upon the ground, as stated by Mr. Justice Gwynne at p. 40 in *Ewart* v. *Steven*: "These moneys being so applied for the benefit of the Steven estate, made the *cestuis que trustent* of that estate purchasers for value without notice." With deference, I am of opinion that all this is clearly distinguishable from a case in which, as here, an insolvent husband makes a purely voluntary gift of trust moneys to his wife.

I attach no weight to the argument that John Hugh Mathieson was a constructive trustee of his wife's money as well. He was her agent, and without means of his own, as the defendant well knew, and they were jointly engaged in reckless speculation upon borrowed money at short dates. The defendant up to a certain point is a shrewd, capable woman, and interested herself in and intermeddled with the trust estate and kept track of it—to some extent at all events. Her letters, before this litigation arose, prove this. Her letters written after the litigation shew that she was familiar with his system of book-keeping and with the trust account, and his system, as far as it affected the *cestui que trust*, was peculiar, deceptive and fraudulent. She did away with or refused to

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produce books important to a full revelation of the dealing of the husband and wife *inter se*, and touching the trust funds. She had already joined with her husband in, in fact had seemingly induced him to commit, breaches of trust—the circuitous so-called loan to the plaintiff and the loan to Mrs. Tytler. With all this knowledge, she mixed and mingled the trust moneys with her own, for with her knowledge and consent they were deposited in the same bank account. Out of this account from time to time moneys were drawn as required or desired for any purpose, for living expenses, speculation, or as might be. There is very strong reason to suspect that she and her husband made this trust money, for any and all purposes, their own—for the time being only, of course, and intending no doubt to make it good when the time for accounting came around, and they had amassed fabulous fortunes, as they hoped—although this is not in terms found by the report. This does not, in my opinion, afford a close analogy to the cases relied upon.

Of some of this, however, the transaction by which the Huron and Erie debenture was fraudulently misappropriated gives some indication. The defendant or her husband purchased as a speculation a block of the capital stock of the Superior Portland Cement Company. They borrowed the money to do this from a bank upon their joint promissory note at three months. When it became due, there was no money, and it was renewed for a month, and when it again became due it was again renewed for twelve days, and at the end of this time almost the total proceeds of the trust debenture, $5,230, was applied in part payment of this joint promissory note.

The learned Judge says: "The defendant Mary Mathieson, when she made the said promissory note for $10,500, had reason to know that it was the intention of the said John Hugh Mathieson to use the said sum of $5,400 (the trust debenture) in part payment of the said note: but I find that the said defendant Mary Mathieson is not liable to the plaintiff for the said sum of $5,400 so lost as aforesaid."

Even if I regard this as the only instance in which the defendant joined with the trustee in committing a breach of trust—and it is not—and whether I regard the stock as purchased for the trustee or for the defendant and put into the trustee's name to qualify him as a director, as the defendant specifically declared at the

time—and the whole circumstances of the case point to this conclusion—I am unable to concur in the conclusion of law come to by the learned Judge: Halsbury's Laws of England, vol. 28, p. 204, note (*n*); *Barnes* v. *Addy* (1874), L.R. 9 Ch. 244; *Pannell* v. *Hurley* (1845), 2 Coll. 241. The law of *Bank of Montreal* v. *Stuart*, [1910] A.C. 120, does not alter the facts.

The written statements of the defendant after her husband's death, the mixing of the funds, the suppression of the books, and the way in which the defendant's testimony has been characterised, are important elements in the consideration of the matters in issue; but I find it unnecessary to discuss them.

There will be an order amending the report as above set out, with costs of the motion to be paid by the defendant out of her own funds.

R. S. Robertson, for appellant.

R. McKay, K.C., and *R. T. Harding*, for respondent.

[The cross-appeal was dismissed at the hearing.]

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the defendant Mary Mathieson from the order of Lennox, J., dated the 13th November, 1915, varying the report dated the 8th October, 1915, of the Senior Judge of the County Court of the County of Middlesex, to whom, by the judgment at the trial, dated the 29th March, 1915, the whole action was referred, under sec. 65 of the Judicature Act. There was also a cross-appeal by the plaintiff, which was dismissed after the argument. Meredith, C.J.O.

Both the appellant and the respondent appealed from the report, and by the order now in appeal the appeal of the now respondent was allowed as to certain items of his claim and dismissed as to the other items, and the appeal of the now appellant was dismissed.

The present appeal is against the order in so far as it varied the report of the Referee and dismissed the appeal of the now appellant.

It will be convenient to deal first with the items which were the subject of the appellant's appeal from the report. These items were two in number, one of $1,900 and the other of $206, for which the Referee found that the appellant was answerable, and which he directed to be set off against a mortgage from the respondent to the appellant.

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I entirely agree with the conclusion of the Referee on this branch of the case, and cannot usefully add anything to the reasons assigned by him for coming to his conclusion.

The other items in controversy are:—

(1) A sum of $5,230, the proceeds of a debenture of the Huron and Erie Savings and Loan Company which the appellant's husband held as trustee for the respondent, and which were applied by the husband in part payment of a promissory note for $10,500, made by him and the appellant (or a renewal of it), which was discounted at one of the banks, the proceeds being used to pay for shares in the Superior Portland Cement Company.

(2) A sum of $503 belonging to the trust, which was applied on the 23rd March, 1914, to pay a debt of the appellant.

(3) A sum of $623 belonging to the trust, which was applied in like manner on the 12th May, 1914.

(4) A sum of $1,347 belonging to the trust, which was applied on the 9th May, 1912, towards the payment of a mortgage made by the appellant on lands belonging to her.

That these moneys belonged to the trust and were applied in the manner I have just mentioned is not open to question, and it was so found by the Referee.

The Referee finds as to the first of these items, and there is ample evidence to warrant his finding, that the appellant was present at various interviews with the agent of the Superior Portland Cement Company who solicited the subscription for the shares and knew all the details of the investment, and that in a discussion between the appellant and her husband as to paying for the shares, as they had not "ready cash," mention was made of a debenture of the Huron and Erie, "which would represent about one-half of the obligation," and some property that could be mortgaged.

The appellant denied that this took place, but her denial was not believed by the Referee, who considered the testimony of Ryan that it did take place "more worthy of credence than the defendant."

What was proposed to be done, viz., to provide one-half of the money required to pay for the shares by means of the Huron and Erie debenture, was subsequently done—the debenture was converted into money, and the money was used, as I have said,

in part payment of the note by the discount of which the money to pay for the shares was obtained, or a renewal of it.

It is not suggested that the debenture spoken of in the discussion between the appellant and her husband was any other than the debenture which belonged to the trust fund.

There is therefore proved an agreement between the husband, the trustee of the fund, and the appellant, that a breach of trust should be committed; and the fraudulent conversion of the debenture which they had in contemplation was ultimately carried out, and the money realised from it was used at all events to discharge a debt for which the appellant was liable, if not to repay money borrowed by her and her husband to pay for shares which belonged to her, though they stood in her husband's name.

It is to me a startling proposition that on this state of facts the appellant is not liable to make good the breach of trust.

It was argued on her behalf that the arrangement, if made, was that the money to be raised should be raised either by the conversion of the debenture or by the mortgage of property, and that the appellant may well have believed that the money that was paid was raised on mortgage.

There are several answers to this contention. In the first place, the discussion was as to raising only one-half of the money by means of the debenture, and the other half on mortgage; the mortgage was to be of the appellant's property, and the mortgage which she gave on her property was for $5,000 only. She therefore knew that the remainder of the money was not raised on mortgage, and the irresistible inference is that she must have known that it was raised in the way it had been arranged that it should be raised. The mortgage for $5.000 was made for the purpose of paying off the last renewal of the note given for the money borrowed to pay for the shares, which had been reduced by that time to $4,700, and this renewal note was paid out of the mortgage loan. The proceeds of the loan ($4,870) were deposited by the husband to the credit of his banking account on the 24th July, 1907, and the note for $4,700 was charged to his account on the following day. Before this deposit and debit, the amount at the credit of the husband in the account was $244.88. These facts afford, to my mind, conclusive evidence that the arrangement as to paying for the shares was carried out in its entirety.

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It was also argued on behalf of the appellant that she thought that the note, except so much of it as was paid out of the loan on the mortgage, was paid out of moneys of her own which her husband had in hand; but there is nothing to warrant any such conclusion. The appellant was intimately acquainted with her husband's affairs, and must have known that there was no money available from that source; and, in my opinion, she could not escape from the consequences of the breach of trust which she and her husband had agreed to commit and which was committed, unless she could shew clearly that it had been afterwards arranged that the contemplated breach of trust should not be committed, and that the money which it had been intended to obtain by means of it should be provided in some other way; and that she has not done.

With great respect, I think that the learned Referee erred in accepting the denial of the appellant of all knowledge of or participation in the misapplication of the debenture, in the face of the evidence and the circumstances which warrant the conclusion that she not only knew of but actively participated in it; the denial, too, of one whose testimony in other respects he did not believe, and whom he found to be an untruthful and dishonest woman; and, if it were necessary, in order to fix the appellant with liability in respect of the debenture, which, in my opinion, it is not, so to find, I should be prepared to find that she not only knew of and acquiesced in the fraudulent conversion of the debenture to her own and her husband's use, but conspired with her husband to convert and misapply it.

Then with regard to the other items. It is undoubted that the money was in each case taken from the trust fund and was used to pay a debt, in the fourth case a mortgage-debt, of the appellant.

While it is true that the respondent would not be entitled to follow these moneys in the hands of the creditors of the appellant to whom they were paid, because in that case the creditors would be in the position of transferees for value, unless he were able to shew that they had notice that the moneys were trust moneys, the respondent is, in my opinion, entitled to recover them from the appellant, if she was, as I think she was, *quoad* the transactions, a volunteer: Jarman on Wills, 12th ed., pp. 1099, 1100, and cases there cited.

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What was done in this case was, in substance and effect, to make a gift to the appellant of so much of the trust fund as was applied in payment of her debts; and the appellant was, therefore, a volunteer, and is bound by the trust which was impressed on the money which was so applied, even if, which I very much doubt, she had no knowledge that the money which was being applied to pay her debts was trust money. Indeed, notwithstanding her denial, for the reasons I have given in dealing with the first item, it properly may be found, I think, that she had that knowledge.

It was argued by counsel for the appellant that her husband was indebted to the appellant for money of hers which he had received and should have had in his hands available to pay the sums which he paid on her account and which she has been held to be liable to repay. If such a case had been made out, it is at all events probable that the appellant would have been entitled to succeed as to these items; but she has, I think, entirely failed to make out such a case.

It is not open upon the evidence to doubt that the appellant and her husband were engaged in speculations in stocks, that these speculations were large transactions, and that, in most if not in all cases, they resulted in the loss of all that had been invested. An examination of the bank account of the husband shews that, although considerable sums which were the proceeds of sales of the appellant's lands, were from time to time deposited to the credit of the account, the balances of the husband, at his credit, were generally small, and in some cases were debit balances, and that the credit side of the account was largely made up of items representing the proceeds of notes discounted. In December, 1905, and in 1906, fourteen notes were discounted; in 1907, eleven; in 1908, thirteen; in 1909, four; in 1910, five; in 1911, four; and in 1912 and 1913, fourteen—some of them, no doubt, renewals. These notes were produced at the trial before the Referee. All of them were joint, or joint and several, promissory notes of the appellant and her husband, and on all of them, except one for $250 dated the 24th August, 1912, the appellant's signature is the first. Many of the notes were for small sums (one of them for $50) and most of them at short dates. Several of them were demand notes—two of them appear to have been held over

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by the bank for a considerable time before they were paid, and one of these appears to have been paid by instalments.

A perusal of the bank account leads to the conclusion that it was the account of a man who was chronically "hard up" and was "driven from post to pillar."

It is impossible for me to believe that a woman having the business ability the appellant possesses, and having the knowledge, as she admits she had, that her own and her husband's money went into this account, was not fully alive to the condition of her husband's finances, and well aware that her money was being used for the purposes of speculating in stocks and was lost in these speculations; and I have no hesitation in coming to the conclusion that she well knew that she had no claim against her husband for the money of hers which had been paid in to the credit of his banking account, and that he had no money of hers in his hands to make the payments that are in question.

If these conclusions are warranted by the evidence, the position of the appellant in respect of the moneys applied in payment of her debts is that of a volunteer, and she is bound to make good to the trust estate the money which was taken from it to pay them.

There remains to be considered the question as to the manner in which the account against the appellant is to be taken. By the order of my brother Lennox, the appellant is charged with interest at the rate of five per cent. per annum with annual rests; and the contention of the appellant is, that the account should not have been taken with annual rests.

It was, in my opinion, proper to take the account with annual rests, for the reason that the trustee was so charged in *Gilroy* v. *Stephens* (1882), 51 L.J. Ch. 834, namely, that it was the duty of the trustee to have invested the money which he misapplied; and, if he had done so, the investment would have produced five per cent. compound interest. It is proper to say, however, that in a subsequent case, *Owen* v. *Richmond*, [1895] W.N. 29, Kekewich, J., declined to follow *Gilroy* v. *Stephens*, because, in his opinion, "the old rule allowing interest at four per cent. ought not to be departed from." He thought "that that rule ought to be revised, having regard to the altered circumstances existing at the present day," but that it ought not to be done by a single Judge of the Chancery Division.

This old rule is, in my opinion, not applicable to circumstances in this Province in this day, and the principle applied by Fry, J., in *Gilroy* v. *Stephens* should, I think, be applied.

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

WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG. Re PUBLIC UTILITIES ACT.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue and Haggart, JJ.A. August 18, 1916.

STREET RAILWAYS (§ II—15)—NEGLIGENCE—ESCAPE OF ELECTRIC CURRENT—JURISDICTION OF COMMISSION—APPEALS FROM—CONSTITUTIONALITY—APPOINTIVE POWERS.

EDITOR'S NOTE.—On the hearing of this appeal five chief points were considered:—(1)Was the appellant company liable for damage resulting from its negligence, (2) was it liable aside from negligence, (3) was the order of the commissioner within his powers, in directing certain specific things to be done, (4) is the statute *intra vires* the legislature, or does it conflict in part with sec. 91 of the B.N.A. Act, 1867, (5) can the Supreme Court hear, on an appeal under the statute, an objection to the jurisdiction of the commissioner, on the ground that the part of the statute which provides for his appointment is *ultra vires*, or is that a point of law as to which the decision of the commissioner cannot be appealed from?

The commissioner decided that the company was liable for negligence, and the effect of the equal division of the Judges of Appeal was, of course, to leave his judgment undisturbed. The Chief Justice was of opinion that the company was liable aside from negligence. Richards, J.A., held that the Court had no right to consider this question, as, under the statute, the commissioner is the sole judge of fact and law, except as to jurisdiction. Perdue, J.A., held that, aside from negligence, the company was not liable. The Chief Justice, Richards, and Haggart, JJ.A., held that the commissioner's order, aside from the question as to jurisdiction, was within the power, which the statute purported to convey. Perdue, J.A., dissented on this point, holding that the order amounted to an interference with the statutory powers of the company. The Chief Justice gave no opinion as to the constitutionality of the Act; nor did Richards, J.A., Perdue and Haggart, JJ.A., held it to be unconstitutional, in so far as it authorized the appointment of a commissioner by the Lieut.-Governor-in-Council for the province.

The statute in question limits an appeal to "the jurisdiction of the commissioner." The Chief Justice held that this only meant "whether the company, its structures and operations are subject to the Act." Richards, J.A., agreed with him on this point. Perdue, J.A., held that the objection to the jurisdiction of the commissioner, upon the ground that his appointment violated sec. 96 of the B.N.A. Act, 1867, could be heard in an appeal under the statute, because, while that part of the statute which provided for the appointment might be *ultra vires*, the remainder might be *intra vires*. Haggart, J.A., agreed with him.

The general effect of the marked difference of opinion by the Judges is to leave unsettled all the questions which arise, and as they are very important generally, it is to be hoped that they will be carried to a higher Court.

Statement.

APPEAL from two orders of the Public Utility Commissioner.

J. H. Munson, K.C., *E. Anderson*, K.C., and *D. H. Laird*, K.C., for Winnipeg Elec. R. Co.

Hon. A. B. Hudson, K.C., Attorney-General, for the Crown.

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J. B. Hugg, for Utilities Commissioner.

T. A. Hunt, K.C., corporation counsel, for City of Winnipeg.

HOWELL, C.J.M.:—The Winnipeg Electric R. Co.—(which I shall hereafter refer to as the company)—operate on the streets of the city of Winnipeg—(which I shall hereafter refer to as the city)—a street railway the motive power of which is electricity conveyed to the cars by the over-head trolley system. The authority to do this work is given by the Legislature of Manitoba, which ratified a by-law of the city and an agreement between the city and the company set forth in 55 Vict. ch. 56, and the schedule thereto.

The city operates a waterworks system requiring iron pipes which are placed in the streets some distance below the surface, and thus the city also uses portions below the surface of the same streets occupied and used on the surface by the company.

To operate the cars the electric current is carried by the trolley wire at high voltage to the top of the car and then through the motor to the wheels, and then to the rail, where, as a negative or return current at low voltage, it follows the rail back to the power house, and thus completes the circuit without which the electric power would not be available. To keep this negative current to a greater extent intact, the company, after a time, connected the ends of the rails with copper devices, and sometimes at the request of the city, other schemes or methods were taken.

Apparently, through the want of complete conductivity, some of the current escapes from or leaves the rails and, conducted by the moist earth, reaches the iron water pipe of the city, and, by electrolysis, it does great damage. I gather from the evidence that owing to the high voltage brought into the city by the company since they commenced using their water power, and owing to the great area which is now covered by their railway, this evil has greatly increased and to endeavour to control and prevent the escape of this current the order complained of was made.

The soil and freehold of the streets in the city are vested in His Majesty for the use of the province, but the possession of the streets is vested in the city. Sec. 721 of the City Charter, 1 & 2 Edw. VII, ch. 77, is as follows:

721. No encroachment or nuisance whatever shall be made or left by any person in or on any roads or public highways under penalty of a fine not exceeding the sum of twenty dollars.

Sec. 878 authorises the city to excavate for and lay down water pipes in and upon the streets and, in its language,

> to repair, cut and dig up, if necessary, and to lay down the said pipes . . . through, over or under the public ways, streets, street railways, lanes or other passages of the city.

The company alone at the passage of this Act operated and had a right to operate, and it alone now operates, a street railway in the city, and this legislation, therefore, applies to it. Sec. 900 of the Act gives the city power to bring an action for any injury or damage done to the water pipes.

It is to be kept in mind that all this legislation, except secs. 878 and 900, was in force and applied to the city through the Municipal Act before the city procured a special charter, and was the law before and at the time of the enactment authorizing the company to use the streets above mentioned.

Damages caused by escape of this current from the rails is not a new matter; it was considered more than 25 years ago in the United States in the case of *Cumberland* v. *United Electric*, 42 Fed. Rep. 273. A case similar to this one between a water-works company and an electric railway company was commenced in the United States in 1898, and after various reports and decisions it was decided in 1910 and is reported as *Peoria W. Co.* v. *Peoria R. Co.*, 181 Fed. Rep. 990.

The case is most instructive on the questions of fact in this matter and at length describes how this negative current has a tendency to leave the rails and to enter the iron water pipes. In that case, as here, the company was authorized to operate their road by electricity, and there, as here, the single trolley system was used and the rails with copper connections were used to complete the electric current and, as in this case, portions of the negative current left the rails and entered the water pipes to the great damage of the latter. In the Act permitting that company to operate its street railway there are two clauses, as follows:—

> Sec. 2. Said company shall operate said railway and propel its cars by electric motive power and not otherwise.
>
> Sec. 22. Said Central Railway Company shall be liable for and pay to the persons, companies or corporations injured, all damages which may result from the passage of this ordinance or from carelessness, negligence or misconduct of said company or any agent or servant of said company in the operation of said railway or railways which it may build, own, lease or control.

Sec. 18 of the city by-law, part of the schedule to the company's Act, is as follows:—

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The applicants shall be liable for and shall indemnify the city against all damages arising out of the construction or operating of their railways.

In considering this clause it would be well also to keep in mind sec. 721 of the city charter above quoted.

In the American case last above referred to, the company was enjoined from continuing the injury.

The case of *Eastern and S. Africa Tel. Co.* v. *Cape Town*, [1902] A.C. 381, decides that the escape of electricity from the rails of a street railway may create such an injury or disturbance to others that the rules in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, would apply; but in that case the rules in *Rylands* v. *Fletcher* were not applied to that part of the defendant's lines operated under statute, because, by their agreement with the town, they were in express terms permitted to use the rails to return the negative current.

The company claim that under the by-law and agreement with the city and their Act they are similarly protected. The by-law contains the following clauses:—

2 (*a*) The construction of any line of railway on any street or highway shall not be commenced until a plan thereof shewing the location on street, position and style of the track, road-bed, rails, poles, wires and all other appliances shall have been submitted to and approved of by the city engineer.

3 (*a*) The overhead or trolley system of electricity is to be adopted.

(a. 1) All poles erected shall be of such size, height and material, and shall be placed at such distances apart on the boulevards or streets as shall be designated by the city engineer and shall be erected, and said wire strung thereon under the supervision and subject to the inspection of the city engineer, who may give directions as to the same from time to time, and shall be built so as to interfere as little as practicable with all other public uses of said streets, and both material and workmanship shall be of an approved class and kind. Trolley wires must be supported from poles on sides of streets, unless otherwise decided by council, and the city will assist the company, by taking such proceedings as shall not involve expense or cost to the city, as may be necessary and expedient in securing any requisite elevation of all wires, telephone or otherwise, so as to facilitate the operation of the company's system by electricity.

(a. 2) The location on streets, the position and style of the track, road-bed, rails, poles, wires and all other appliances shall conform to and agree with the plans approved by the engineer.

In discussing the rights of the company it seems to me the matter can well be divided into two parts:—1st. Aside from the question of negligence, is the company liable for damages caused by them because of their bringing on their property this dangerous element? And, 2nd, are they negligent in their manner of carrying on this work?

Now, as to the first question; by sec. 18 of the by-law above quoted, the company is to be liable for all damages arising out of the operating of the railways; and sec. 721 of the city charter, above quoted, creates a liability for a nuisance made on the highway.

In *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, the electric light company was empowered to operate in the city by electric plant; but their authority had in it this clause:—

> Nothing in this order shall exonerate the undertakers from any indictment, action or other proceeding for nuisance in the event of any nuisance being caused by them;

and I gather from the judgment of Lord Halsbury that he thinks them liable apart from the question of negligence.

In *Midwood* v. *Manchester*, [1905] 2 K.B. 597, the defendant, the city of Manchester, was authorized and empowered to lay down below the surface in the streets cables to conduct electric energy to various parts of the city for lighting and other purposes. The Board of Trade order authorizing this work contained the following two orders:—

Clause 67 of the order was as follows:—

> The undertakers shall be answerable for all accidents, damages, and injuries happening through the act or default of the undertakers, or of any person in their employment, by reason of or in consequence of any of the undertakers' works, and shall save harmless all authorities, bodies, and persons by whom any street is repairable, and all other authorities, companies, and bodies, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents, damages, and injuries.

Clause 70 of the order was as follows:—

> Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them.

At p. 607, the Master of the Rolls, after referring to the *Shelfer* case, says —

> It seems to me that that case is really on all-fours in point of principle with the present, and that by reason of the provision of clause 70 of the order what clearly amounted to a nuisance is unprotected, and therefore the defendants are liable to make good the damage occasioned to the plaintiffs, apart from any question of negligence. That is sufficient to decide the case.

Romer, L.J., at p. 609, uses the following language:—

> I agree that by the order certain works are expressly authorized to be done by the defendants, and, therefore, as regards those works it may properly be said that, upon the true construction of the order, they could not be treated as being in themselves a nuisance under clause 70. For example,

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express power is given to break up the streets for the purpose of laying mains, to lay mains, and to send electricity along them; but there is no authority either expressly, or I think impliedly, given to the defendants by the order authorizing them to allow a leakage of electricity from their mains so as to cause an explosion, or to injure the property of the plaintiffs in the way in which they have injured it. That being so, there is, in my opinion, an end of the case.

The case of *Charing Cross* v. *London*, [1913] 3 K.B. 442, and in appeal, [1914] 3 K.B. 772, discusses this subject. There the defendants, a waterworks company, were authorized to lay down water pipes below the surface in the streets and the plaintiffs, an electric light company, were authorized to lay down electric cables in the streets below the surface. The Act authorizing the defendants to do their work contained this clause:—

> Nothing in this Act shall exempt the company from any indictment, suit, action or other proceeding at law or in equity in respect of any nuisance caused by them.

Apparently without any neglect the defendants' water pipe burst and injured the plaintiffs' cable—it was indeed found as a fact that the defendants were not negligent. It appears that the defendant company occupied the streets with their water pipes before the plaintiffs did any work. Lord Sumner, at p. 781, states one of the arguments of the defendants in these words:—

> We got there first and the plaintiffs came with their cables afterwards, and they must, therefore, take the place as they find it: one of the ways in which that place may be dangerous is the presence of our mains, and, unless there is negligence, they cannot recover.

The Court held that the defendants were liable on the principles of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, and that the question of negligence did not arise. They brought upon the premises a dangerous element, and if it escaped they must pay damages.

The Court also held that although the waterworks company got their rights and occupied the ground before the plaintiffs yet they were liable, as the plaintiffs were entitled to assume that although the defendants were entitled to excavate and lay down their water pipes, they were not beyond this act to permit any nuisance in the operation of the works.

In the cases above reviewed it was contended that as the company was authorized to do the work, all damages and nuisances which were caused by construction and operation they were, by implication of law, protected against, on the principles laid down on this subject in railway cases; but the above quotation from the *Midwood* case shews how closely this principle is applied.

The case of *Vandry* v. *Quebec*, 53 Can. S.C.R. 72, 29 D.L.R. 530 touches points akin to this case. However, Sir Louis Davies in that case held that clause creating liability for damages did not apply to the accident, and I think the same may be said as to the judgment of Duff, J. The other Judges decided the case on the construction of the Quebec Code.

When in 1892 the legislature granted the company its rights, I assume it was known by all that a new, dangerous and to some extent experimental force was to be used and that some limitation should be put upon the company to protect the rights of others. A system of waterworks then existed in Winnipeg, owned by a company and constructed and operated just as that of the city is now constructed and operated, and these works are now owned and operated by the city as part of their system.

The company were by their Act and agreement authorized to enter upon the streets and break up the surface and put in ties to support the rails and lay rails with switches and erect poles and string wires. To do this they might disturb a foot in depth of the streets and deeper where excavation is required for the poles, and in doing this work so expressly authorized, it seems to me the company can only be liable for negligence.

To the extent of the powers expressly or by necessary implication given by the Act to the company, sec. 721 must be considered as amended, but only to that extent, and the damages referred to in sec. 18 of the by-law caused by the works thus expressly authorized, it seems to me, the company would be protected against unless, of course, they are negligent.

I think I am safe in assuming that the legislature, the company and the city officials, when the Act and the by-law were passed, had no thought or idea as to straying away of the return electric current and as to the damages which might arise from electrolysis. If the work had not since then been greatly extended by extending the lines of railway in all parts of the city and away beyond the city boundary, and by vastly increasing the voltages from the company's hydraulic works, there probably even now would be but little damage from such stray currents. If the parties did not know that the negative current might stray away and cause a great damage and nuisance, it can scarcely be said that it was intended that the company should be granted immunity from this damage. On the contrary, it might well be said that sec. 18 was

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put in for the very purpose of providing for unknown dangers, and sec. 721 of the city charter could not have been intended to be amended so as to grant a right to commit such a great nuisance not then in contemplation of any of the parties.

The defendants claim, however, that they complied with the regulations required by secs. 2 and 3 of the by-law above set forth, and as the road has been constructed and it is not shewn that there has been a violation of these provisions I shall assume that these rules have been complied with and that the road was originally constructed with the approval of the city engineer. Even so constructed the company would be liable to a third party under sec. 18, but they contend that having constructed the works as above required they are not liable for damages to the city's property which arise from the operation of the road.

Very likely owing to the low voltage then in use and the limited area then covered by the company's lines of road any damages caused by electrolysis to the water pipes were negligible, and extra means to take care of the negative current were not required. It might, perhaps, be urged, also, that the engineer was only given power to supervise the work which they performed and that he had no power to require them to construct something extra to more carefully conserve the return current.

However, it seems to me that sec. 18 merely provides that having constructed the road as required the company are liable for damages. They would have been liable for this damage if the old Water Works Co. still owned the water pipes and on the principles above discussed they are, I think, still liable for damage to the pipes although at present owned by the city. The company were to construct the road subject to the supervision of a public official and when so constructed they were to be liable for damages under sec. 18, and I see no reason for excluding the city from the protection of the section.

The city has suffered great damage from and arising out of the operating of the company's railway within sec. 18 of the by-law, and this damage is continuing, and, from the evidence, I should think it can only be prevented by the company in some way providing a better means for the return of the negative current, and for these damages I think the company is legally liable to the city. If this were an ordinary action begun in the Court, I would think an injunction should be granted.

Counsel for the company very strenuously urged that the legislature, in establishing the commission, really created a Court, and that the Act in authorizing the appointment of a commissioner by the Lieutenant-Governor-in-Council was legislating on a subject wholly within sec. 96 of the B.N.A. Act, and therefore beyond the power of the legislature, and, as a consequence, the commissioner had no power to hear this matter and to make the order complained of.

The statute provides that when a commissioner is appointed under the Act and has, pursuant to the Act, heard a case, then, subject to many conditions, an appeal can be taken to this Court. Of course if he had been appointed by the Dominion authorities there could be no appeal, for there is no power of appeal given against any such order.

The commissioner appointed by the local authorities is made a Court, not one appointed by the Dominion, and if there is an appeal it is only from the commissioner locally appointed. If the legislation is *ultra vires* the order of the commissioner is of no force, and need not be obeyed, and could be so declared by the Courts of this province in the ordinary way.

The appeal given by sec. 70 (Public Utilities Act R.S.M. 1913, ch. 166) is limited to "any question involving the jurisdiction of the commission," and I cannot think that the legislature intended thereby to give this Court in this peculiar proceeding special power to decide whether the whole genius of the Act was *ultra vires*.

I think this question is not open to decision in this appeal.

Sec. 52 after giving very full and wide powers to the commission, contains this clause: "And shall have full jurisdiction to hear and determine all matters whether of law or of fact."

Sec. 69 of the Act is as follows:

> The decision of the commission upon any question of fact or law within its jurisdiction, and as to whether any company, municipality or person is or is not a party interested within the meaning of this Act, shall be binding and conclusive upon all companies and persons and municipal corporations and in all Courts.
>
> (2) The commission shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act, and, save as herein otherwise provided, no order, decision or proceeding of the commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any Court, even when the question of its jurisdiction is raised.

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It seems to me that the words "save as herein otherwise provided" refer only to this appeal provided for by sec. 70. Section 70 authorizes this appeal, as follows:—

> An appeal shall lie to the Court of Appeal . . . from any final decision of the commission upon any question involving the jurisdiction of the commission.

Before further considering these sections it is well to refer to the case of *Re Toronto R. Co. and Toronto*, 19 O.L.R. 396, where Moss, C.J., in giving the judgment of the Court of Appeal, at p. 399, states that under the Ontario Act the question of law alone is open to appeal and states "there being no appeal upon any question of fact, 6 Edw. VII, ch. 31, secs. 41 (3) and 43 (2)." Sub.-sec. 3 of sec. 41 of that statute is like our sec. 69 above quoted except that it leaves out the words "or law," and thus in Ontario the facts found only and not the law are binding and conclusive in all Courts. Again, sec. 43, sub-sec. 2, in the Ontario Act, gives a right of appeal not only on the question of jurisdiction but also "upon any question of law" and thus gives to the appellate Court much wider jurisdiction in these matters than is given here. If the right of appeal in Ontario had been as restricted as the Act in question here, I think there would have been no such decision in Ontario.

The Act applies to the company and the commissioner heard evidence and reports of electrical experts and heard counsel for the parties and made a full and clear report of his findings both of law and fact, and from this finding and report, and the order made thereon this appeal is taken.

The Government of Manitoba was one of the complainants before the commission asserting that electrolysis caused by the escape of the negative current was injuring the underground structures of the government telephone system, and the Attorney-General appeared to support this claim. The commissioner, in clause 8. of his report, states as a fact that the order was necessary to protect this government property.

After setting forth at length the facts which were brought before him, the commissioner as to the facts and law relating to the city's claim disposed of them, as follows:—

> I held that there was nothing in the by-law 543 or the agreement thereunder to absolve the company from the duty to apply the most approved methods of preventing injury to the property of others, including the city of Winnipeg.

I assume that the city had approved under by-law 543 the nature of the original construction of the works of the company. There was no evidence to the contrary. In my view that did not prevent them from applying to this commission for other remedial measures that should at a later date be found necessary and be available. This was not asking something else under the by-law. It was applying the general law of the province.

I was guided by the principle which I held as a matter of law to exist, that a person using a dangerous element, even lawfully, was bound to do everything reasonably within his power to avoid injury to others. And, as above stated, I could not construe by-law 543 and the agreement thereunder to exclude the application of that general principle here.

I considered these questions to affect the merits in law and in fact, and to be therefore within the jurisdiction of this commission.

As a matter of law I think the company is liable on the principles above stated under sec. 18 of the by-law for damages to the government property.

With regard to liability of the company on the ground of negligence which I have not discussed the commissioner has, as above quoted, distinctly disposed of it against the company, at all events, within the limits of the city of Winnipeg.

There is nothing before us to shew the company's rights to operate or construct street railway lines outside the territorial limits of the city, and nothing to shew that there is any restrictive clause binding the company there similar to clause 18 of the city by-law. The outside municipalities were not represented on the appeal, unless the Attorney-General, appearing for the commissioner, should be held to appear in support of the whole order. However, as the commissioner held the company liable for negligence in law and in fact within the city, to me it follows that he must also have thought them liable outside, connected as the whole system is by wires, rails and cars and all receiving the electric current within and through the city.

Again, I take up for consideration sec. 70; but it seems to me it must be read as explained by sec. 69. In that section there is a declaration that the commissioner's finding of fact and law within his jurisdiction is binding "in all Courts," and I agree with Moss, C.J., that these words include this Court of Appeal sitting in appeal in this matter, and I am fortified in this conclusion by the expressions in sec. 52 above quoted.

If I have correctly construed these sections, in an appeal under sec. 70 we must assume that the decision appealed against is sound in law and in fact.

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The appeal then must be limited simply as the statute states, "to the jurisdiction of the commission." I have already stated that in my view the legislature did not intend, nor does the statute permit or contemplate an appeal because of the alleged infringement on the B.N.A. Act.

The only matter then open to appeal in my view of the law is whether the company, its structures and operations are subject to the Act, and if so whether the order made by the commissioner is within the powers given to him by the Act.

It is clear that under sec. 3 the company and its works and operations are subject to the Act. If this matter was an ordinary law suit and if the Court concluded on fact and law as the commissioner has, an injunction restraining the company from continuing the damages would ordinarily follow as in the *Peoria* case above referred to, and that case is also an authority for holding that the Court would only enjoin or restrain the company from continuing the damages, and would have no power to direct certain specific things to be done, as the commissioner has ordered in this case. Secs. 21 and 52 I think give the commissioner power to make the order which he has made.

Holding as I do that the facts and law as found by the commissioner are not open to review in this appeal, it was perhaps unnecessary to consider the liability of the company under sec. 18 of the by-law aside from negligence, but the commissioner not having considered this aspect of the matter, I thought it well to consider it.

To repeat, I think the company is liable to the city and should be restrained from creating further injury to the water pipes by electrolysis because of clause 18 of the by-law, and of sec. 721 of the city charter. The commissioner has found in fact and in law that the company is liable for such negligence sufficient to justify this Court in restraining the company from continuing the nuisance. The statute applies to the company, and its works, and, to my mind, is wide enough to authorise the making of the order appealed from.

The appeal must be dismissed.

Richards, J.A.

RICHARDS, J.A.:—This matter has come to us as an appeal from a final decision of the Public Utilities Commission, and solely by virtue of sec. 70 of the Public Utilities Act (R.S.M. 1913, ch. 166).

That section says:

70. An appeal shall lie to the Court of Appeal . . . from any final decision of the commission upon any question involving the jurisdiction of the commission. . . .

It does not specifically say that there shall be no appeal upon any other question; but I think the appeal is so limited by other sections of the Act.

Sec. 64 says:

64. The decision of the commission upon any question of fact or law within its jurisdiction shall be final, and be *res judicata*.

Sec. 69 (2) reads:

2. The commission shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act, or by any other Act, and, save as herein otherwise provided, no order, decision or proceeding of the commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any Court, even when the question of its jurisdiction is raised.

The two last named sections, and particularly 69 (2)—distinctly, I think, show that nothing can be considered by us under sec. 70, except the question of jurisdiction.

The appellants, the Street R. Co. argue that, under sec. 70, they can raise two questions of jurisdiction:—

First, that the Act itself is *ultra vires* in that, because it creates a Court with extraordinary powers, greater than those of of any other Court in Manitoba, and provides that the Lieutenant-Governor in Council may appoint the commissioner to exercise these powers and constitute such Court, it infringes on the powers of appointment of Judges reserved to the Dominion by the B.N.A. Act.

Next, that even admitting the Act, and the appointment of the commissioner under it, to be *intra vires*, the commissioner has, in the orders in question, exceeded the powers which the Act purports to give him.

Dealing with the first point, it seems to me not open to this Court to consider. The object of the Act is the creation of the commission and the conferring of powers on it. It is true that sec. 79 provides that if any section or provision of the Act shall be held to be unconstitutional no other section or provision of the Act shall be affected thereby. But the real object of the Act is as above.

Sec. 70, conferring jurisdiction on this Court, limits us to the question of the jurisdiction of the commission as to the matter

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before us. If the Act is *ultra vires* as to the appointment of the commissioner then there has been no valid order for us to deal with and the Act is inoperative as to the purpose for which it was enacted.

I cannot think that, by sec. 70, the legislature meant to confer on us power to say that the Act itself or any part of it is *ultra vires*. Ch. 38 of R.S.M. 1913, is expressly provided to deal with such questions.

The objection seems to go to the root of our jurisdiction under sec. 70, as well as to that of the commission under the Act. If the one is invalid so is the other.

I express no opinion as to our powers, as a Court of Appeal, to deal with the question of the constitutionality of the Act if it should come by way of an appeal from any judgment of the Court of King's Bench, in a case where that constitutionality is in issue. But in an appeal under sec. 70 we can exercise only the powers the section gives us.

I think therefore that we cannot consider the first ground.

Then, assuming the Act to be *intra vires* of the legislature, I think as stated above that we have no power to question the commissioner's findings of fact or law. If I am right in that then it is not for us to say whether he is right or wrong in his holding that the company are compellable to do what the orders require.

We can only say whether, assuming him to be right in the findings of fact and law implied by the orders, he had jurisdiction to make such orders. All questions of legal rights as between the city and the company, including the construction of contracts and statutes, are matters of law. He has decided them, in so far as the orders before us affect them, and, so far as our powers under the Act are concerned, his decision is absolute. We cannot consider or interpret the contracts between the parties. Those are matters of law, and he has decided them.

Then, assuming the Act to be constitutional and assuming him to be right, as to both fact and law, in making the order, had he jurisdiction, under the Act itself, to make such order?

Sec. 21 gives him a general supervision over all public utilities and empowers him to make such orders regarding equipment, appliances, safety devices, extension of works or systems . . . as are necessary for the safety or convenience of the public or

for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

The order in question seems to me to come within the above: It is in effect equipment, appliances, and, in a sense, safety devices, for the safety of the public, that the order really requires.

Sec. 40 enables the commissioner to make such order as he thinks proper under the circumstances.

Sec. 59 implies that he may direct any structure, appliances, equipment or works to be provided, constructed, re-constructed, altered, repaired, installed, used or maintained.

Sec. 52 enables him to require any company to do. . . in any manner prescribed by him, so far as is not inconsistent with the Act or any other Act, any act, matter or thing which the company is or may be required to do under the Act or any other Act or any regulating order or direction of the commission, or under any agreement, and to forbid the doing of things contrary to such Acts, regulation, order, direction or agreement.

By other sections much greater powers of enforcement of orders are given than are possessed by any other Court.

If the commissioner took the view that, under sec. 18 of the company's contract with the city, the company was liable for the injury caused by electrolysis (as apparently he did) we have no power, under sec. 70, to review such holding but must accept that view of the law as correct.

Then, so holding, it seems to me that he had power to make the order, the carrying out of which is intended to stop the injury caused by electrolysis.

The fact that the order does not expressly say the electrolysis is to be stopped but provides that the return currents are to be lessened to an extent which the evidence before him shewed would have that result, does not seem to me to affect the matter. With so great a field of jurisdiction ordering that which will effect the purpose should be held sufficient.

Then again I can see no objection in the fact that he has not specified in the orders how the return currents are to be so modified. It is not contended that there are not available methods for causing such modifications. And, as it is the result, and not the means of getting that result, that is aimed at, it seems to me that the means were properly left unspecified.

I would dismiss the appeal with costs.

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Perdue, J.A.

PERDUE, J.A.:—An application to the Public Utilities Commissioner was made by the city of Winnipeg to compel the Winnipeg Electric R. Co. to establish proper measures of prevention against damage to underground cables and mains by electrolysis caused by electrical currents from the electric railway system of the company. Certain other municipalities were notified of the inquiry by the commissioner. They did not appear and take part in it, but their interests were considered under the provision in the Act allowing the commissioner to take up matters, of his own initiative. The certificate of the commissioner shews the facts that were in evidence before him. Two orders, numbers 261 and 274, were pronounced by him, and this appeal is brought by the Winnipeg Electric R. Co. against these orders.

Number 261 is a lengthy document which I shall not set out *in extenso*. Briefly, it orders the company to so construct and maintain its railway tracks and other parts of its system that a certain result may be attained in regard to the electrical conductivity of the rails. The object is to secure a free return of the current to the central station and lessen the danger of electrolysis to underground metallic pipes or structures caused by electricity escaping from the rails. The order contains a number of directions of a highly technical character. It was made, as the commissioner states, substantially in accordance with the recommendations of Mr. Ganz, an electrical expert of high standing.

By number 274 the costs of the inquiry before the commissioner and his report were fixed at $7,671.50, and were ordered to be paid by the Winnipeg Electric R. Co. to the secretary of the commission.

A main ground of appeal is that the Public Utilities Act, R.S.M. (1913), ch. 166, is *ultra vires;* that the Act creates a Court and constitutes the commissioner a Court of record, giving the Court such powers that it is in fact a superior Court; that the Lieutenant-Governor-in-Council had no power to appoint the commissioner; that the salary of the commissioner is paid, not by the Dominion of Canada, but by the Province of Manitoba.

It is objected by respondents on the appeal that the constitutional question cannot be argued on this appeal, because the jurisdiction of the Court of Appeal to hear an appeal from the commissioner is conferred by sec. 70 of the Act itself, that is, by

the same Act that is attacked as being unconstitutional. Sec. 70 is as follows:—

70. An appeal shall lie to the Court of Appeal, in conformity with the rules governing appeals to that Court from the Court of King's Bench or a Judge thereof, from any final decision of the commission upon any question involving the jurisdiction of the commission, but such appeal can be taken only by permission of a Judge of the Court of Appeal given upon a petition presented to him within fifteen days from the rendering of the decision, notice of which petition must be given to the parties and to the commission within said fifteen days. The costs of such application shall be in the discretion of the said Judge.

The jurisdiction of the commissioner to make the orders in question was objected to upon the investigation, and the objection was overruled by him.

It is well settled that an Act either of parliament or of a provincial legislature may be declared *ultra vires* in part without invalidating the rest of the Act, if the part which is *ultra vires* is separate in its operation from the rest of the Act. See the authorities collected by Mr. Lefroy in his text book on Legislative Power in Canada, pp. 289-299; also, *City of Montreal* v. *Montreal Street Ry. Co.*, [1912] A.C. 333, where sub-sec. (*b*) of sec. 8 of the Railway Act was declared to be *ultra vires*.

Sec. 79 of the Public Utilities Act is as follows:—

79. If, for any reason, any section or provision of this Act shall be questioned in any Court, and shall be held to be unconstitutional or invalid, no other section or provision of this Act shall be affected thereby.

The introduction of this section into the Act shewed the desire of the legislature to preserve all that might be valid in the Act if certain parts of the Act should be declared to be beyond the power of the legislature to enact. Sec. 70 confers the right to appeal to the Court of Appeal "upon any question involving the jurisdiction of the commission." The procedure upon the appeal and the power of the Court to entertain it are contained in secs. 71-76. These sections, 70-76, stand apart from the rest of the Act. The commission is a Court of law and from that Court there is by the statute an appeal to the Court of Appeal upon a question involving the jurisdiction of the commission. The jurisdiction of the commissioner to make the orders appealed from was raised before him during the progress of the investigation and he ruled that he had power to make the orders. See certificate of commissioner, clause (*m*) and final clause. I take it from the last clause of the certificate that the power of the legislature to

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pass the Act was called in question and a ruling made by the commissioner. An appeal lies to this Court on the question there raised, as it involves the jurisdiction of the commission. I am therefore of opinion that the question as to the power of the legislature to create the Court and appoint the commissioner is properly before the Court of Appeal on this appeal.

The object of the Act seems to have been to create a commission to exercise powers over provincial public utilities resembling, but as to the class of subjects more extensive than, those conferred by the Dominion Railway Act upon the Railway Commission. I think the legislature intended to create a tribunal which would be under provincial control, whose presiding officer would be appointed by the provincial government, and would have exclusive jurisdiction in all matters assigned to the tribunal for adjudication. But if the Act creates a Court which has substantially the powers of a superior Court, and purports to authorise the Lieutenant-Governor-in-Council to appoint the Judge of that Court and to pay his salary out of the provincial treasury, then the legislature is clearly exceeding its powers. The B.N.A. Act confers upon the legislature in each province the right exclusively to make laws in relation to

> the administration of justice in the province, including the constitution, maintenance and organization of provincial Courts both of civil and of criminal jurisdiction and including procedure in civil matters in these courts: sec. 92, sub-sec. 14.

But in no other provision of the B.N.A. Act is there any power conferred on a provincial legislature in respect of Courts or Judges, or the appointment and qualification of Judges. By sec. 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.

By sec. 99:

> The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons.

By sec. 100 it is enacted that:—

> The salaries, allowances and pensions of the Judges of the Superior, District and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

The provisions of the B.N.A. Act for the creation of provincial

Courts, the appointment, payment and continuance in office of the Judges and the manner in which they may be removed, constitute a code in themselves. The province has power over the constitution, maintenance and organisation of the provincial Courts, both civil and criminal, and over the procedure in civil matters. But the Court when constituted by the province has no vitality until the Judge or Judges are appointed and, in the case of a Superior, District or County Court, the appointment rests wholly with the federal authority. Further, the salaries of the Judges of these Courts are fixed and provided by the Parliament of Canada.

Sec. 5 of the Public Utilities Act is as follows:—

> The Lieutenant-Governor-in-Council may appoint a commissioner, to be called "The Public Utility Commissioner." The commissioner shall constitute a Court, which shall be a Court of record and shall have a seal of his office, bearing the words, "Public Utility Commissioner."

Sec. 2 (*b*) defines at length the meaning of the expression "public utility." Shortly, that expression means and includes every corporation (other than a municipal corporation) and every person or association of persons who operate, manage, or control any system, works, &c., for the conveyance of telegraph or telephone messages or for the conveyance of travellers or goods over a railway, street railway or tramway, or for the production, transmission, &c., of water, gas, heat, light or power either directly or indirectly to or for the public, also the Manitoba government telephones and grain elevators. It may also include a municipality engaged in any of the above businesses where it voluntarily comes under the Act (sec. 4). Secs. 20-28 set out the jurisdiction and powers of the Court. They include amongst other things all questions relating to the transportation of goods and passengers over any tramway, street railway or steam railway under the jurisdiction of the province, the fixing of rates and the adjustment of disputes between a municipality and a public utility. The commission also has general supervision over all provincial public utilities, and may make orders regarding equipment, appliances, safety devices, extensions, &c. (sec. 21).

The commission may investigate any matter concerning a public utility; it may impose and enforce regulations as to the protection of employees, and impose and enforce regulations for the prevention of accidents: it may compel railways or street railways to establish connections where they join or intersect

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(sec. 23). It may order the joint user of poles, conduits, &c. (sec. 24). For the purpose of clearing and improving streets the commission may direct that the span wires of street railways may be affixed to private buildings abutting on the street (sec. 25). The commission may require any public utility to comply with the laws of the province and conform to the duties imposed upon it by its own charter or any agreement with a municipality or other public utility, to furnish proper service, to make extensions, to keep its books in a certain way, to carry a depreciation account and fix proper rates of depreciation and set apart the moneys therefor. The above are only some of the powers conferred on the commission.

The Act applies to all public utilities owned or controlled by the Government, to all public utilities owned or operated by any company incorporated at or after the session of 1912, and to every person, company or corporation owning or operating any railway, street railway or tramway to which the jurisdiction of the province extended, but not including those operated by a municipality which has not voluntarily come under the Act.

In respect of its own class of subjects the territorial jurisdiction of the Court so constituted comprises the whole Province of Manitoba. It is not a District Court or a County Court. Can it be designated an inferior Court? Inferior Courts are so called in England because they were subject to the control and supervision of the Court of King's Bench, 9 Hals. p. 11. The view has been taken that a provincial legislature may create an inferior Court, such as a magistrate's Court for the collection of small amounts, and appoint officers to preside over them, so long as they do not interfere with sec. 96 of the B.N.A. Act. See discussion in Lefroy, Can. Fed. System, pp. 555-562. The Court created by the Public Utilities Act can in no sense be regarded as an inferior Court. By sec. 64,

> The decision of the commission upon any question of fact *or law* within its jurisdiction shall be final and be *res judicata*.

It is also declared that the Court created by the Act has exclusive jurisdiction

> In all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act: Sec. 69 (2).

The commission has sole jurisdiction and almost unlimited power over great interests involving immense sums of money. In many

respects it has powers which are not possessed by any other Court in the province. I would refer to secs. 45, 46, 52, 55, 56.

Sec. 56 confers an extraordinary power. It provides that if a public utility has not complied with an order of the commission and if the commission is of opinion that there are no effectual means of compelling obedience, the commissioner shall transmit to the Attorney-General a certificate setting forth the nature of the order and the default. The section proceeds:—

> Such default so established shall be ground, after public notice in the *Manitoba Gazette* of the receipt of the said certificate by the Attorney-General, for an action to dissolve the public utility or to annul the letters patent incorporating it. The proceedings upon such action shall be governed by the rules in force under "The King's Bench Act" as nearly as may be.

The Court in which such "action" is to be taken is not particularly mentioned. The King's Bench rules are to be applied but that does not mean that the jurisdiction is conferred on that Court, but rather the contrary. If it were meant that the Court of King's Bench should be the Court in which the action should be tried, there would be no necessity for the provision contained in the last sentence of the section. Reading the section with secs. 40-44, 52, 64 and 69, it would appear that the action is to be brought in the commissioner's Court. Apparently power is intended to be given in such action to dissolve a public utility even where it was incorporated by an Act of the legislature. The question whether this involves compulsory winding-up also arises. Dissolution of a corporation would necessitate winding-up.

The use of the expression *res judicata* in section 64 implies that the matter has come in question in a Court of competent jurisdiction, that it has been controverted and that it has been finally decided: See *Langmead v. Maple*, 18 C.B.N.S. 255, at 270.

By sec. 69:

> The decision of the commission upon any question of fact *or law* within its jurisdiction, and as to whether any company, municipality or person is or is not a party interested within the meaning of this Act, shall be binding and conclusive upon all companies and persons and municipal corporations *and in all Courts.*

The commission has

> exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act, and, save as herein otherwise provided, no order, decision or proceeding of the commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any Court, *even when the question of its jurisdiction is raised,* "save as herein otherwise provided."

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The exception in this quotation refers to the provision for an appeal given by sec. 70 where a question of jurisdiction is involved. Sec. 69 (4) further declares that:—

> In determining any question of fact, the commissioner shall not be concluded by the finding or judgment *of any other Court* in any suit, prosecution or proceeding involving the determination of such fact, but such finding or judgment shall, in proceedings before the commission, be *primâ facie* evidence only.

The result is that the decision of the commission on a *question of fact or law* within its jurisdiction is final, *res judicata* (sec. 64) and binding on all Courts (sec. 69), but the judgment of any other Court, on a question of fact, tried and determined between the same parties, is *primâ facie* evidence only before the commissioner's Court: sec. 69 (4).

The commission has, in respect of enforcing the attendance of witnesses, the awarding of costs, the production of books and documents, the enforcement of its orders, the entry on and inspection of property,

> the punishment of contempt of Court and other matters necessary or proper for the due exercise of its jurisdiction, or for carrying this Act into effect, . . . all such powers, rights and privileges as are vested in the Court of King's Bench or a Judge thereof, including the ordering of costs to be paid by any party in its discretion. Sec. 44.

The commission may issue commissions to take evidence outside Manitoba: sec. 43; Sheriffs, deputy sheriffs and other peace officers shall be *ex officio* officers of the commission and aid it in the exercise of its jurisdiction: sec. 49. It may issue orders which are in effect orders of mandamus or injunction: sec. 52. It shall have full jurisdiction to hear and determine all matters, whether of law of or fact, and shall, as respects witnesses, production, enforcement of orders and other matters necessary for the exercise of its jurisdiction or for carrying the Act or any other Act or any regulation, order, &c., into effect, have all the powers, rights, &c., of the Court of King's Bench: sec. 52. It would, indeed, be difficult to define the limits of the commissioner's power under this section. The numerous and extensive powers conferred upon the commission shew that the intention was to make it a Court with exclusive and absolute jurisdiction over interests of the very highest importance involving the rights of corporations, shareholders and bondholders. It is superior to the Superior Courts.

The clauses in the Dominion Railway Act constituting the

Board of Railway Commissioners appear to have been used as precedents in framing the sections of the Public Utilities Act. The Manitoba statute, however, covers a greater variety of subjects and its enactments are in many respects much wider. There may be an appeal from the Board of Railway Commissioners on a question of jurisdiction and also on a question of law. The decision of the Public Utility Commissioner upon a question of law binds all persons, corporations and Courts. But there is this wide difference between the powers of the Dominion and the province:— the Parliament of Canada may establish additional Courts for the better administration of the laws of Canada (B.N.A. Act, sec. 101), and may appoint the Judges of such Courts and pay their salaries. The provincial legislature may create provincial Courts, but it has not been given the power of appointing and paying Judges.

The Ontario Railway and Municipal Board Act, R.S.O. (1914), ch. 186, was passed for the purpose of constituting a commission similar to, but with powers much less extensive than, those possessed by the Public Utility Commissioner of Manitoba. The Ontario Act empowers the Lieutenant-Governor-in-Council to appoint a commission to be called "the Ontario Railway and Municipal Board." The Board is not created a Court, the use of that word is avoided, but it is declared that the Board "shall have all the powers of a Court of record and shall have an official seal which shall be judicially noted." I am not aware that these words have received judicial interpretation as to the meaning and effect to be placed upon them. It may be that the meaning is that the Board shall have the powers which are possessed by every Court of record, namely, to enroll its acts and judicial proceedings as records and to give to such records the evidential effects of judicial records: See Stephens Com., vol. III, pp. 501, 502; Taylor, Ev., sec. 1667. The special powers assigned to the Board created by the Ontario Act are set out in the Act. By that Act the findings of the Board on fact only are conclusive (sec. 45), although it may hear and determine questions of law or of fact (sec. 21-3). A question of law may be referred to the Divisional Court (sec. 46). An appeal lies from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law (sec. 48). Without assuming to pronounce upon the validity of the Ontario Act, it is evident that the Public Utilities Act of

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this province goes far beyond the Ontario Act in the powers conferred upon the commissioner, and in the effect given to his decisions and orders. The words used in sec. 5 of the Public Utilities Act are taken from the Railway and Canal Traffic Act 1888 (Imp.) and are adopted without hesitation as to their constitutional effect. The Ontario legislature, while conferring upon the Board created by it all the powers of a Court of record, avoided designating it a Court. It saw the danger, whether the means taken to escape it were sufficient or not. But the "Public Utility Commissioner" is declared to be a Court of record whose decision upon any question of law as well as fact within his jurisdiction shall be binding and conclusive upon all companies, persons and municipal corporations, and in all Courts. It is given many powers formerly exercisable by superior Courts only, and within the ambit of its jurisdiction it exercises the functions of a superior Court. The fact that the officer who performs the judicial functions of the Court is named "commissioner" instead of "Judge" does not affect the matter.

In *Colonial Inv. and Loan Co.* v. *Grady*, 24 D.L.R. 176, it was held by the Supreme Court of Alberta, sitting in appeal, that

> A provincial statute which confers upon a Master-in-Chambers the extraordinary powers of a Judge, in respect of actions for the enforcement of mortgages or agreements for the sale of land, is in conflict with the appointive power of sec. 96 of the B.N.A. Act, . . . and is therefore *ultra vires*.

The statute in question in that case still left all proceedings in matters covered by it to be taken in the Supreme Court of the Province, but enacted that a very special procedure should be taken before the Master-in-Chambers in that Court to enforce any right, remedy or obligation under a mortgage, encumbrance or agreement for sale. Stuart, J., said, p. 178, in delivering the judgment of the Court:—

> It is obvious that it was left entirely in the discretion of the Master to decide whether or not he should exercise powers which were undoubtedly as full and complete as those held by a Judge of the Supreme Court. He could, indeed, if he thought best, direct an action to be brought or an issue to be tried, but it was still open to him to hear oral evidence as at a trial, and to give as full and as final a judgment as a Judge of the Court could give, no matter what issue of fact, *e.g.*, fraud or other ground, of defence, might have been raised. He was to do all this "in the Supreme Court." It seems to me that it is impossible to avoid the conclusion that by such legislation the Master was constituted in effect a Judge of the Supreme Court, with a jurisdiction limited, indeed, to its *extent*, but not in its *content;* that is, limited to a certain very important branch of litigation, but practically unlimited

within that sphere, and subject only, with respect to his final judgment, to an appeal to the Appellate Division in the same way as a final judgment of any ordinary Judge of the Supreme Court. For this reason I think the legislation was *ultra vires* of a provincial legislature, inasmuch as it was inconsistent with the appointing power, expressly given to the Dominion in the B.N.A. Act.

I would also refer to the report of Sir John Thompson, Minister of Justice, on the disallowance of the Quebec Act, 51 & 52 Vict. ch. 20, to be found in Mr. Lefroy's "Legislative Power in Canada," pp. 141-174. By that Act the Lieutenant-Governor-in-Council was authorised to abolish the Circuit Court sitting in the District of Montreal, a Court of record having jurisdiction up to $200, and to establish a special Court of record under the name of "District Magistrates' Court of Montreal". The new Court was to be composed of two justices to be appointed by the Lieutenant-Governor-in-Council and to be paid by the province. The report dealt with the constitutional question in a very instructive manner and recommended that the Act should be disallowed. In Mr. Lefroy's later work on "Canada's Federal System," commencing at p. 525, there is a very useful discussion upon this point and a summary of the cases bearing upon it.

Sub-sec. 14 of sec. 92 and secs. 96, 99 and 100 of the B.N.A. Act contain within themselves the provisions relating to the constitution of provincial Courts, the appointment of the Judges, their tenure of office and the payment of their salaries, allowances and pensions. The Imperial Parliament in allotting to provincial legislatures the constitution, maintenance and organization of provincial Courts both of civil and of criminal jurisdiction advisedly conferred upon the Dominion Government the power of appointing the judges and the duty of fixing and paying their salaries. The legislature of each province was empowered to create Courts having both civil and criminal jurisdiction. The criminal law and procedure in criminal matters, although allotted as subjects of legislation to the Dominion parliament, are administered in Courts constituted by the legislatures of the several provinces.

Rights respecting many subjects of civil jurisdiction, such as bills of exchange and promissory notes, banking, interest, legal tender, etc., are administered in the provincial Courts although legislation in respect of such subjects was allotted to the Dominion parliament. In such cases the Dominion authority

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has to rely on provincial tribunals for the administration of Dominion laws. It has in fact been held that the Dominion parliament has power to impose new duties upon existing provincial Courts: *Valin* v. *Langlois*, 5 App. Cas. 115, 120.

A voice in the creation of the provincial Courts was therefore given to the Dominion government. The appointment of the Judges and the fixing and paying of their salaries was conferred upon that government. A Court cannot come into complete existence and exercise any powers without the appointment of a Judge or Judges. In fact the Judges sitting in their official capacity are commonly spoken of as "the Court." The result is that a provincial Court is the joint creation of the province and the Dominion, the first contributing the constitution and civil procedure and the latter the Judges.

The independence of the Judges was secured by sec. 99 of the B.N.A. Act. This section declares that the Judges shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons. The section was adopted from the Act of Settlement, 12 & 13 Wm. III., ch. 2, clause 3, art. 7, and was made a part of the constitution of Canada. It cannot therefore be interfered with either by parliament or by a provincial legislature. The Public Utilities Act declares the Public Utility Commissioner to be a Court of record. He is appointed by the Lieutenant-Governor-in-Council, his salary is paid by the province and he may be removed at any time by the Lieutenant-Governor-in-Council for cause (sec. 6). This is a weak provision for securing the tenure of office and independence of a Judge, as compared with that provided by sec. 99 of the B.N.A. Act. If the provincial legislature can create a Court with powers as extensive as those assigned to the commissioner by the Public Utilities Act, why can it not constitute other Courts presided over by commissioners, having absolute jurisdiction in respect of other classes of subjects within the legislative control of the province? The result would be that the existing Courts might be deprived of jurisdiction in respect of many important subjects and these handed over to be dealt with by Judges appointed, paid and removable by the provincial government, Judges from whose decisions there would be no appeal. This, it appears to me, would be contrary to the provisions and intention of the B.N.A. Act. It might mean the taking away

piece-meal of much of the jurisdiction of the Superior Courts, whose Judges are appointed by the Dominion government, and conferring the jurisdiction so taken away upon Courts whose Judges are appointed by the provincial government, and whose tenure of office is controlled by the same authority. This would be to "do that indirectly which you are prohibited from doing directly," contrary to established principle: See *Madden* v. *Nelson & Fort Sheppard R. Co.*, [1899] A.C. 626, 627.

The fact that an Act of a provincial legislature has not been disallowed by the Governor-General-in-Council does not of itself make the Act constitutional. Lefroy, Canada's Fed. Sys., p. 217. The Dominion government declined to disallow the Alberta Act of 1910, ch. 9, but the Act was afterwards declared to be *ultra vires* by the Privy Council: *Royal Bank* v. *Rex*, [1913] A.C. 283, 9 D.L.R. 337; Lefroy, Can. Fed. Sys., pp. 42-44.

The Public Utilities Commissioner has performed excellent services in the past and the commission would be a most useful one if its powers were limited to those which the provincial legislature might lawfully confer under the provisions of the B.N.A. Act. Some sections of the Act may be considered as substantive enactments, valid from a constitutional standpoint, and separable from the clauses dealing with the powers of the commissioner. Examples of these may be found in sec. 29, sub-secs. (*a*), (*b*), (*d*), sec. 31, except sub-sec. (3). But I think that the provincial legislature in constituting a person of its own selection a Court of record under the name of the "Public Utility Commissioner" and conferring on that Court the complete and absolute jurisdiction conferred by the Act in respect of an important class of subjects, has exceeded the powers allotted to provincial legislatures under the B.N.A. Act.

Apart from the constitutional question, it is objected that the Act does not authorise the commissioner to make the order from which this appeal is brought. The Winnipeg Electric R. Co. was originally incorporated under the name of "The Winnipeg Electric Street R. Co." in the year 1892 by the statute 55 Vict. ch. 56. The corporation received its present name on its amalgamation with the Winnipeg General Power Co. in 1904 under powers conferred by 1 & 2 Edw. VII. ch. 75 and 3 & 4 Edw. VII. ch. 87. In 1892 and prior to the incorporation of the company, an agreement was entered into between the City of Winnipeg

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and James Ross and William Mackenzie whereby these two persons, called the applicants, were given the exclusive right and privilege of constructing and operating street railways on the streets of the city subject to the terms of the agreement. The city council passed by-law No. 543 embodying the terms of the agreement. This by-law is to be found in schedule "A" to the company's Act of Incorporation. The Act declares in sec. 34 that the by-law

> is hereby validated and confirmed in all respects as if the said by-law had been enacted by the legislature of this province, and the said company shall be entitled to all the franchises, powers, rights and privileges thereunder.

The city consented to the ratification of the by-law by the legislature (by-law, clause 25), and that all the rights and privileges conferred under the by-law might be transferred to and become vested in a company to be formed by the applicants (by-law, clause 33). In accordance with the agreement set forth in the by-law the company was incorporated with the powers contained in the Act of Incorporation and the by-law was given the effect of an Act of the Legislature of Manitoba.

The following portions of the by-law are to be particularly noted in connection with this appeal:—

> 2 (a) The construction of any line of railway on any street or highway shall not be commenced until a plan thereof showing the location on street, position and style of the track, road-bed, rails, poles, wires and all other appliances shall have been submitted to and approved of by the city engineer.
>
> 3. The lines are to be built, equipped and operated subject to the following regulations and the applicants are to conform thereto:
>
> (a) The overhead or trolley system of electricity is to be adopted.
>
> (a. 2) The location on streets, the position and style of the track, road-bed, rails, poles, wires and all other appliances shall conform to and agree with the plans approved by the engineer.
>
> 4. If, after seven years, from the passing of this by-law the council desires to change the character or application of the electric motive power for drawing or propelling the cars, three years' notice of such desired change is to be given to the applicants and the said applicants shall within such period of three years make such changes and within said time shall operate their railway system lines and cars by means of such new electric motive power if practically and commercially feasible.
>
> 18. The applicants shall be liable for and shall indemnify the city against all damages arising out of the construction or operating of their railways.
>
> 32. The applicants paying the said sum of $20 per car and such other sums as may be due from them and performing and fulfilling all the conditions, stipulations, restrictions and covenants in this by-law provided for, shall and may peaceably and quietly hold and enjoy the rights and privileges hereby granted without any let or hindrance or trouble of or by the city or any person or persons on its behalf.

Secs. 19, 20 and 22 provide for arbitration of questions which may arise between the city and the applicants.

The contract to be executed pursuant to clause 35 of by-law No. 543 was entered into on June 4, 1892, by the Winnipeg Electric Street R. Co. and the City of Winnipeg, the rights of the applicants having been transferred to the company. This purchase and transfer were ratified in 1895 by the Manitoba statute 58 & 59 Vict. ch. 54, sec. 2, and the contract of June 4, 1892, which repeats the agreement contained in by-law No. 543, was confirmed and validated by the same statute.

The street railway system of the Winnipeg Electric R. Co. has been in operation since the year 1892 and during that period has been operated by the overhead or single trolley system. It must be assumed that the construction of the railway was in accordance with the by-law and contract and received the approval of the city engineer. It would follow that the style of the track, road-bed, rails, poles, wires and all other appliances were submitted to and approved by him in accordance with sec. 2 (*a*) and 3, (*a*. 2) of the by-law. The system of operating the road by an overhead single trolley as then known and used was adopted and this necessarily involved the use of the rails for the return current to reach the central station. The embodiment of the contract in the Act incorporating the Winnipeg Electric R. Co., and the declaration in sec. 34 of the Act, gives to the terms of the contract the effect of statutory provisions. The city, which is the complainant before the Utilities Commissioner, was satisfied with the protection afforded by the statute. Besides the powers possessed by their engineer of supervising the works contained in clauses 2 (*a*) and 3 (*a*. 2), clause 18 of the by-law declared that the company shall be liable for and shall indemnify the city "against all damages arising out of the construction or operation of their railways." The council of the City of Winnipeg and the legislature of the province were satisfied with these clauses as providing a sufficient protection to the interests represented by the city council. There was no clause making the company liable for nuisance. I need not attempt in this case to interpret the meaning and effect of clause 18. The relief afforded by the clause, whatever it may be, is to be enforced through the ordinary Courts having jurisdiction in the matter.

In 1895 when the agreement between the city and the company

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was ratified by the legislature for the second time, the danger from stray currents of electricity under the single trolley system was well known. In England, Lord Cross' committee in 1893 made recommendations that certain precautions should be employed in the use of electric power to guard against electrolytic action upon gas, water or other metallic pipes or structures. But in 1895 the Manitoba legislature and the city were satisfied with the safeguards provided by the agreement and the statute, and no restriction was placed upon the company's powers.

The single trolley system using the rails for the return current was specially authorised by the Act of the legislature to be adopted by the company. A certain escape of electrical current is inseparable from this system. In *Eastern & S.A. Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A.C. 381, the electric tramway in that case was operated by means of the same system as that in use by the Winnipeg Electric R. Co. The statute incorporating the Cape Town Tramways Co. contained a clause giving relief to the council of Cape Town or other body or person

> in the event of any electric leak taking place and damage being thereby caused at any time by electrolysis or otherwise.

The same statute also provided that the use of the rails for the return current should require the consent of the council. This consent was obtained under a condition providing for the making of a test to discover leakage of current and for the stoppage of cars until the leakage should be localised and removed. Lord Robertson, in giving the judgment of the Judicial Committee, said, at p. 395:—

> The language of both the statutory undertaking and of the condition seems to point to some defect in apparatus not contemplated as a condition of the working of the system. But the departure of the electricity from the rails arose from no defect, but from the necessary condition of things, if the tramcars were to run and the rails to be used as a return. The evidence shews clearly that, if uninsulated (as was the case here), the rails of necessity conduct home to the central station only some of the electricity, the rest leaving the rails and going afield. Giving to the word "leak" whatever expression may be appropriate to its extension to electricity, their lordships do not consider the event which has occurred to fall within the undertaking and condition. The escape was, on the contrary, a natural incident of the operations legalized under the statutes.

The legislature has authorised the Winnipeg Electric R. Co. to use and employ electric power for the operation of its cars in the manner provided by the Act of incorporation and the contract embodied in that Act and made part of it. The safeguards

provided are those contained in the clauses giving supervision of the construction and works to the city engineer in addition to the relief afforded by clause 18 of the contract. No protection is specially given against the danger of electrolysis. If there had been no statutory authority for the use of electricity by the company and the company had made use of it and electrical currents had escaped into the earth and had caused damage, the principle of *Fletcher* v. *Rylands*, L.R. 3 H.L. 330, would be applicable, and persons sustaining injury to themselves or to the ordinary use of their property by such currents would be entitled to maintain an action for damages: See *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186, 201; *Eastern & S.A. Tel. Co.* v. *Cape Town Tramway Co., supra*. But the company in accumulating and using these great currents of electricity was acting under its statutory powers and unless it is shewn that there has been negligence in the exercise of these powers the company is not liable. A great number of cases establish this principle in regard to ordinary railways. The decisions asserting this principle began with *The King* v. *Pease*, 4 B. & Ad. 30, and *Vaughan* v. *Taff Vale R. Co.*, 5 H. & N. 679. It was established by the House of Lords in *Hammersmith R. Co.* v. *Brand*, L.R. 4 H.L. 171, and approved in *Caledonian R. Co.* v. *Walker's Trustees*, 7 App. Cas. 259, 260, *London, B. & S.C. R. Co.* v. *Truman*, 11 App. Cas. 45, *Atty-Gen.* v. *Met. R. Co.*, [1894] 1 Q.B. 384, and other cases. In *National Telephone Co.* v. *Baker, supra*, Kekewich, J., applied the same principle to electric tramways and it is, no doubt, applicable to all works authorised by the proper legislative power, subject of course to any restriction that may be contained in the enactment giving the authority. In *Geddis* v. *Bann Reservoir*, 3 App. Cas. 430, Lord Blackburn, referring to this principle, said:—

> 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 authorized, 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 authorized, if it be done negligently.

I will assume that serious damage has been caused to water-pipes and other underground metallic pipes by currents of electricity which have escaped from the rails of the Winnipeg Electric R. Co. If this damage is the result of negligence on the part of the company in the construction of the work the injured parties may seek the proper relief in the Courts in the ordinary way.

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The question of negligence is not properly before this Court on the present appeal. It would, however, appear from the material in the record that the company has been making repeated efforts to prevent the escape of currents of electricity from the rails and has adopted and carried out the recommendation made by the city engineer and the further recommendation made by Professor Herdt at the request of the city, with the object of preventing such escape. Professor Ganz, whose report is the basis of the order appealed from, states that he is of opinion that the bonding of the tracks and special work in Winnipeg is now in generally satisfactory condition (p. 34). The complaint of the city was based upon the alleged defective bonding of the rails (clause 6 of application).

Professor Ganz prefaced his recommendations to the commissioner with this statement:—

> I wish to point out in these recommendations relating to improvements in the railway system, I have avoided as far as possible specifying types of construction, and have generally recommended the results to be obtained, leaving the decision of the mode of obtaining these results to the railway company.

The commissioner states that his order was made substantially in accordance with Professor Ganz's recommendations, with the possible exception of clause 13 of the order which was adopted from the English Board of Trade Regulations. The main clauses of the order, those to which particular objection is taken, direct that certain results shall be accomplished. The order does not direct, except in certain less important matters, that any appliances, equipment or special mode of construction should be adopted in order to obtain particular results, but directs that specified results shall be attained whether the attainment of these is possible or not in view of the conditions respecting soil, climate, &c., and of other special circumstances that may exist. It is claimed on the part of the city that the commissioner has power to make such an order under secs. 21, 31 and 52 of the Public Utilities Act. Sec. 21, in so far as it relates to the matter in question, is as follows:—

> The commission shall have a general supervision over all public utilities subject to the legislative authority of the province, and may make such orders regarding equipment, appliances, safety devices, extension of works or systems, reporting and other matters, as are necessary for the safety or convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

It does not appear to me that this section gives power to the commission to order, for example, that rail joints shall not possess more than a certain resistance, or that the rails shall be so designed and constructed, operated and maintained, that the average potential difference between two points 1,000 ft. apart during 10 minutes' time shall not exceed one volt, and so on. I think the section was intended to enable the commissioner to order certain specified equipment, appliances, &c., deemed necessary for the safety and convenience of the public or for the proper carrying out of any contract, &c.

Sec. 31 does not refer to a railway of any kind. Sec. 52 enables the commissioner to order a company, person or municipal corporation to do any act which the company, person or municipal corporation is required to do under the Act or any other Act. Its purpose is to enable the commissioner to enforce the doing of things directed to be done by statute or his own order, and to forbid the doing of things which are contrary to any statute, order, agreement, &c.

But the object of the order in this case is to restrict the company's statutory powers or to impose upon it in the exercise of these powers new obligations not contemplated by the contract or the statute.

There is a contract between the city and the company, a contract which is statutory. The company has also the powers set forth in the several Acts of the legislature relating to it and its component companies. On the faith of the above it has undertaken and completed the works, expended large sums of money and incurred, as I understand, great obligations. As long as the company uses its powers without negligence, the statutes protect it. If the proper use of these authorised powers cause damage or danger to other persons or corporations it is for the legislature itself to intervene and provide a remedy if none already exists. The legislature has power, if it deems proper, to enact the order of the commissioner as a statute and in this way amend or add to the provisions of the existing statutes relating to the company. But there is no power given to the commissioner to repeal or amend or ignore any provision contained in a statute of the province. I cannot find anything in the Act which would justify the conclusion that the legislature, even if it has the power

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to do so, intended to delegate to the commissioner its legislative functions in respect of public utilities. The authority to legislate or to interfere with existing legislation in the slightest degree would be a dangerous power in the hands of any officer, no matter how able or upright he might be. His actions would not be subject to the safeguards that surround ordinary legislation. It would be a delegation of legislative functions and unconstitutional. See Lord Selborne's dictum in *The Queen* v. *Burah*, 3 App. Cas. 889, at 905.

I have the very highest respect for the judicial ability, business capacity and experience of Mr. Robson, the Public Utilities Commissioner who made the order.

He felt, no doubt, the pressing necessity of the situation and believed that he was fully justified, from every aspect, in making the order, and that the observance of its terms would accomplish the result desired. But the main terms of the order practically enact that the company shall assume onerous obligations and make expensive changes in its system not contemplated in the agreement with the city or in the statutory enactments authorizing the work. The order in fact alters in material respects the terms of an agreement which has been enacted as a statute. With great respect for the commissioner's opinion, I think that the Public Utilities Act does not give him power to make the order.

I would allow the appeal and set aside the orders.

Haggart, J.A.

HAGGART, J.A.:—This appeal is brought before us under sec. 70, ch. 166, R.S.M., The Public Utilities Act [cited in full in judgment of Perdue, J.A.].

The leave or permission was given by a Judge of this Court and his order was not appealed against, so that we have before us the questions open to appeal that were before the commissioner, Mr. Robson, who made the order we are now reviewing.

The power of the provincial legislature to pass The Public Utilities Act is challenged on this appeal.

Sec. 92 of the B.N.A. Act enacts that the legislature may exclusively make laws in relation to,

(13): Property and civil rights in the province, (14): The administration of justice in the province, including the constitution, maintenance and organization of provincial Courts both of civil, and of criminal jurisdiction, and including procedure in civil matters in those Courts.

In *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, Lord Watson, in delivering the judgment of the Court, on p. 583, said:—

It is the proper function of a Court of law to determine what are the limits of the jurisdiction committed to them, but when that point has been settled Courts of law have no right whatever to enquire whether their jurisdiction has been exercised wisely or not.

In the *Fisheries Case*, [1898] A.C. 700, Lord Herschell, at p. 713, who gave the reasons for the judgment of the Court, said:—

The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used. If it is the only remedy is an appeal to those by whom the legislature is elected.

Lefroy, on "Canadian Federal System," at p. 192, cites the above cases as authority for the proposition that injustice is no ground of invalidity as to such provincial or Dominion legislation.

It is contended that the order of the commissioner confers rights and imposes obligations which were not contemplated by the city or the company when they entered into the contract set out in the schedule to by-law 543 of the city, which is validated and confirmed by ch. 56 of the statutes of Manitoba for 1892, which statute creates the corporation known as "The Winnipeg Electric Street Railway."

Under the foregoing authorities I think that the legislature could by direct legislative enactment impose on the Winnipeg Electric R. Co. all the burdens and obligations set out in the order of the commissioner even if a serious injustice should be done, that something like confiscation should be the result, that the charter and contract with the city which was their chief asset for raising money for the construction of the work should be rendered of much less value, and that the security of the shareholders and bondholders should be impaired.

I think further that under sec. 92 (14) it had power to create a tribunal with the powers set out in secs. 20 to 29 in the Public Utilities Act.

In making this concession, it does not follow that the Lieutenant-Governor-in-Council has power to appoint a judicial officer with the judicial, legislative and executive powers which the legislature assumes to endow him with in the Public Utilities Act. Nor does it follow that the legislature can accomplish the same object by delegating these extensive powers of legislation to some one whom the Act styles a commissioner.

The Act would, of course, be in many respects inoperative

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without a commissioner, but that is no reason for giving validity to the statute.

Here the province is a party to the controversy. Not only is it claimed that the city water-mains are damaged, but the sheathed or coated telephone cables, the property of the province, are affected by this electrolysis, and it is just possible that the framers of the B.N.A. Act had in view the probable future existence of such circumstances as those mentioned above when by sec. 96 of the B.N.A. Act it was enacted that "the Governor-General-in-Council 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 powers of this new Court are extensive. It is declared to be a Court of record. There is no limit as to the amount of money or property involved. Its territorial limits are the boundaries of the province: and the fact that there is delegated to the commissioner extraordinary legislative and executive powers makes the tribunal none the less a Court.

There is no definition of a Superior Court in the B.N.A. Act or our Interpretation Act.

This question was recently discussed before the Supreme Court of Alberta sitting *en banc* in *Col. Invest. Co.* v. *Grady*, 24 D.L.R. 176, where it was held that

> A provincial statute which confers upon a Master the extraordinary powers of a Judge in respect of actions for the enforcement of mortgages or agreements for the sale of land was in conflict with the appointive power of sec. 96 of the B.N.A. Act, which provides for the appointment of Judges by the Governor-General-in-Council, and was, therefore, *ultra vires*.

Lefroy, on p. 527, thus discusses the subject of Dominion power over the appointment of Judges:—

> In his report just referred to Sir John Thompson says that the view has been taken by nearly all the Ministers of Justice since the union of the provinces 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.

Mr. Wheeler, in his work on Confederation Law of Canada, in discussing the effect of sec. 96, on p. 389, says:—

> The Minister of Justice, John Macdonald (evidently Sir John) concurred in a report made by his deputy, June 14, 1879, *that* it was beyond the powers of the local legislatures to allow to the Judges of the County Court (evidently the Superior Courts) fees for performing their duties as such Judges while they at the same time received a fixed salary from the Dominion Government for the performance of those duties. Reference was made to an Act

of Ontario in 1869, 32 Vict. ch. 22, whereby the sum of $1,000 each year was allowed to the Judges of the Superior Courts payable out of the moneys of the province. The opinion of the law officers of the Crown in England was taken and they were of opinion that the Act was incompetent. The then Minister of Justice expressed his own opinion that the Judges of the Superior Courts could not properly and without a breach of the provisions of the B.N.A. Act receive emolument for performing the judicial duties from any power but the power which appoints and pays them the legal salary attached to the office.

It is suggested that we have no right in this Court to consider the constitutionality of the Public Utilities Act because the right to appeal exists only under that Act.

I think we have jurisdiction sufficient to declare that the commissioner had no jurisdiction to make the order appealed against.

It is not necessary to question the validity of the whole Act. All that is necessary to justify the setting aside of the order numbered 261 is to declare that sec. 5, which assumes to authorise the Lieutenant-Governor-in-Council to appoint a commissioner, and that secs. 20 to 29, which assume to clothe him with the extensive powers therein set out or either of them are *ultra vires*.

In fact the legislature, anticipating some such action as the present, by sec. 79, enacted that

> If, for any reason, any section or provision of this Act shall be questioned in any Court, and shall be held to be unconstitutional or invalid, no other section or provision of this Act shall be affected thereby.

Relying upon the rest of the Act, the Winnipeg Electric R. Co. is properly before this Court.

Secs. 5 and 20 to 29 inclusive of the Public Utilities Act are, in my mind, *ultra vires* of the local legislature. It is a Manitoba law repugnant to the Imperial statute. The province has assumed to deal with Dominion matters. The judicial official is appointed by the executive council of Manitoba and is paid out of provincial funds, and it is our duty to declare the enactment void.

Challenging the power and qualification of the commissioner I think in substance raises a "question involving the jurisdiction of the commission" as provided by sec. 70 of the Act.

I would allow the appeal

Appeal dismissed, the Court being equally divided.

[NOTE.—Leave to appeal to the Privy Council granted September 18, 1916].

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TAYLOR v. VANDERBURGH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren and Magee, JJ.A., and Riddell, J. March 21, 1916.

EVIDENCE (§ X F—722)—ACTS OF PREDECESSORS IN TITLE TO REBUT PRESUMPTION OF OWNERSHIP—POSSESSION.

The statements, acts and conduct of predecessors in title, with reference to the ownership of a strip of land, are receivable in evidence against a party claiming through them, by title obtained subsequent to such statements and conduct, and may be taken in connection with other circumstances to displace the presumption of ownership arising from possession.

Statement.

Appeal by the defendant from the judgment of the Senior Judge of the County Court of the County of Lambton in favour of the plaintiff.

The judgment appealed from is as follows:—

MACWATT, Co. C.J.:—The plaintiff (James A. Taylor) claims to be the owner of the west half of the south half of the south half of lot No. 6 in the 1st concession of the township of Moore, in the county of Lambton, containing 25 acres more or less, and alleges that the defendant has taken possession of part of the said lands, containing 3.12 acres more or less.

This the defendant denies, and alleges that the said 3.12 acres are part of what he purchased as 25 acres of the east half of the said lot from the third party, John Shepherd.

On the 22nd October, 1897, Alexander Taylor et ux. conveyed by deed to the plaintiff the west half of the south quarter of lot No. 6 aforesaid, containing 25 acres more or less, which lands had been conveyed to Taylor on the 22nd May, 1885.

On the 26th August, 1901, Taylor conveyed to the third party (*inter alia*) the east half of the south half of the south half of lot No. 6 aforesaid, containing 25 acres more or less.

On the 20th May, 1911, the third party, by deed, conveyed to Harry Vanderburgh, the defendant, the east half of the south quarter of lot 6, containing 25 acres more or less.

Exhibit 5 shews that there is a fence which runs from the town-line north to the boundary-line between the north and south halves of lot 6, and which has been there for about 30 years.

From exhibit 5—a rather informal and indefinite survey made for the plaintiff by Mr. Baird, P.L.S.—he shews that from where the fence is located to the easterly boundary of the west half of the said lot there are 3.12 acres, which would leave only 21.88 acres in the westerly half, as it is in any case short, containing only 24.78

acres, thus shewing the lands west of the westerly boundary of the land conveyed to the defendant to the fence to be 3.12 acres, which are the lands in dispute.

In a similar informal and equally indefinite survey made for the defendant by Mr. Plater, P.L.S., he made the amount of land to be 3.22 acres. In his evidence the third party shews that he and the plaintiff, by tape measurement, found out that the line between the halves is as shewn by Baird and Plater, or thereabouts.

The defendant asserts that he purchased all the land within the fences, and not merely the 25 acres called for by his deed; and, if this be not established, he claims to be indemnified by the third party to the extent of the judgment and costs, if any, found against him. The third party says that he purchased 25 acres, and got that quantity, and no more, and those 25 acres he sold to the defendant, who inspected and examined the land before purchase.

The defendant claims title by possession; he contends that "25 acres more or less" covered the 3.12 additional acres; that the third party is liable to him because of misrepresentation; and that he is entitled in any case to be paid for his improvements.

The third party admits that, when he purchased in 1901, through a Mr. Talbot, the agent of the Western Real Estate Exchange Limited, of London, Ontario, after examining the land he imagined that he had purchased all within the fences. He bought in the same way as the defendant did, 25 acres more or less; and when, shortly afterwards, he found that his line did not come up to the westerly fence, but that he still had 25 acres, he was satisfied. He admits that there was nothing to indicate to a stranger that there was more than 25 acres in the part fenced. When the defendant and he went to examine the property, standing on his own land opposite to the property now the defendant's, he said to him, "There is the 25 acres." He just sold it as he bought it himself; he did not feel deceived when, after he bought, he found out that he was not getting all within the fences, as he did not care so long as he got 25 acres, which he did.

He admits that the defendant might have been misled; but he did not ask where the boundaries were.

Talbot, the agent who carried out the sale to the third party, as well as the one to the defendant, and was present when the latter examined the 25 acres, corroborates the third party as to

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what was said. Talbot says that nothing was mentioned about fences or boundaries—just "There is the 25 acres;" that he sold just the south-east quarter, containing 25 acres.

The defendant and the third party exchanged farms in the sale.

The defendant, it is clear, was purchasing only 25 acres, and he has got that quantity of land.

There is nothing in his claim of title by possession. He purchased only in 1911, and the third party, who got the property in 1901, never set up title to the 3.12 acres or to anything but the 25 acres.

I do not believe that the third party deliberately misled the defendant. He is a stolid sort of man, one who, knowing he had 25 acres, while he may have thought at first all within the fences contained 25 acres, just as soon as he found out to the contrary, was quite satisfied. He had bought 25 acres, and that quantity he had.

Apart from the fact that the third party never claimed title to the 3.12 acres, the plaintiff exercised acts of ownership over the lands up to the year 1911.

The plaintiff is also a stolid individual, and I am of opinion that he is too easy-going to take much trouble over anything. If this were not the case, the fence would have been placed on the true line years ago, when they taped the land.

The defendant is of a different temperament altogether—a keen man, and one who wants all he can get—as, while he knows he has 25 acres, and that was all he purchased, he wants the 3.12 acres in addition, because of the words "more or less."

His claim that he will be greatly damaged if he does not get all within the fences, I am of opinion, is not a valid one. The loss of 3.12 acres of pasture-land, in the state it is now in, will not injure him nearly as much as it would the plaintiff, who only has 24.78 acres in the quarter he owns; so, if the 3.12 acres were deducted, he would have only 21.66 acres for his south-west quarter, instead of 25 acres.

(1) I find as a fact that the defendant is not entitled to possession of the land within the fences, amounting, as is said, to 28.12 acres, but only to 25 acres thereof.

(2) That the plaintiff is entitled to possession of the 3.12

acres within the fences as described in the statement of claim and exhibit 5.

(3) That the defendant has full 25 acres in his possession, and that the correct line will shew this.

(4) That the third party was not guilty of misrepresentation.

(5) That the defendant is not entitled to anything for improvements, as, while he erected part of a new fence, I direct the plaintiff, at his own expense, to remove the fence to the true line as found by Mr. Baird, which will affect the defendant's expenditure.

The claim of title by possession I can hardly believe was set up by the defendant with any hope of success.

He got title to the lands in May, 1911, and his predecessor in title, the third party, who obtained title in September, 1901, never claimed or set up title in any shape or form, but in fact repudiates the idea.

The plaintiff has all along exercised acts of ownership openly and freely without let or hindrance from any one, such as pasturing his cattle, and cutting down the timber. The land being vacant, no claim can be set up such as was made in *Coffin* v. *North American Land Co.* (1891), 21 O.R. 80, which has been overruled by *Piper* v. *Stevenson* 12 D.L.R. 820, 28 O.L.R. 379. The plaintiff never abandoned the land. Abandonment is a matter of intention: *Piper* v. *Stevenson*, *ante*.

The paper title has been proved and admitted. The Supreme Court of Canada in *Sherren* v. *Pearson* (1887), 14 S.C.R. 581, at p. 585, laid down that "to enable the defendant to recover he must shew an actual possession, an occupation exclusive, continuous, open or visible and notorious for 20 (10) years. It must not be equivocal, occasional, or for a special or temporary purpose."

As to the words "more or less" covering the 3.12 acres, I am of opinion that the cases are clear that the defendant can make no such claim. He purchased 25 acres, and that he has got. Further, his deed calls for the east half of the south-west quarter of lot 6, 25 acres, and that he has got.

In *Wilson Lumber Co.* v. *Simpson* (1910), 22 O.L.R. 452, it was held that, while there was a deficiency of 11 feet 6 inches in the depth of the land sold, 98 feet 6 inches instead of 110 feet, the purchase-price being a bulk sum, not a price per foot, the words

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"more or less," added to the statement of the depth, controlled that statement, so that the plaintiffs were not entitled to compensation for the deficiency—the difference not being so great as to raise the presumption of fraud or gross mistake.

[The learned Judge then quoted from the judgment of Sir William Meredith, C.J.C.P., in that case, at pp. 458 and 459, and referred to the affirmance of it by a Divisional Court (1911), 23 O.L.R. 253.]

In *Flight* v. *Booth* (1834), 1 Bing. N.C. 370, the rule is stated as follows, at p. 377: "In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, *the purchaser might never have entered into the contract at all*, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation."

In my opinion, the purchaser would have entered into the contract even if he had known that all within the fences was not to be conveyed to him. He was *exchanging* his land for *25 acres*, and got what he contracted for, 25 acres.

On the question of misrepresentation, the learned Judge referred to Dart on Vendor and Purchaser, 5th ed. (1876), p. 103; *Hamilton* v. *Margolius* (1914), 22 D.L.R. 387; Halsbury's Laws of England, vol. 20, paras. 1647, 1648, 1650, 1651, 1674, 1682; *Derry* v. *Peek* (1889), 14 App. Cas. 337, 375, 380; *Heilbut Symons & Co.* v. *Buckleton*, [1913] A.C. 30; *Nocton* v. *Lord Ashburton*, [1914] A.C. 932; *Evans* v. *Collins* (1844), 5 Q.B. 804; *Richardson* v. *Silvester* (1873), L.R. 9 Q.B. 34, 37; *Marnham* v. *Weaver* (1899), 80 L.T.R. 412, 413.

There will be judgment for the plaintiff for the possession of the lands described in the statement of claim and exhibit 5, consisting of 3.12 acres, being the quantity of land between the fence to the west and the true westerly line of the east half of the south quarter of lot 6 in the 1st concession of Moore.

The plaintiff is ordered to move the fence from its present position running north and south to the true line as found by Mr. Baird.

The defendant is not entitled to anything for improvements.

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I have carefully considered the question of costs, and can see no reason why they should not go in the usual manner. The defendant will, therefore, pay the costs of the plaintiff and of the third party.

A. Weir, for appellant.

MEREDITH, C.J.O.:—The contest between the appellant and the respondent Taylor is as to the ownership of a strip of land, 142 feet wide, which forms part of the south half of the south half of lot number 6 in the 1st concession of the township of Moore, and the action is brought by the respondent Taylor to recover possession of it, the allegation of the statement of claim being that he is the owner of it and that the appellant took possession of it in May, 1911, and has wrongfully held possession of it since that time. The appellant defends, alleging that he is in possession of the land and has had possession of it by himself and those under whom he claims for a period long enough to extinguish the title of the owner. Meredith, C.J.O.

The defence based upon the Statute of Limitations entirely failed and was not seriously pressed upon the argument before us; but it was contended by counsel for the appellant that his possession was *primâ facie* evidence of ownership, and that the presumption of ownership arising from his possession was not rebutted, because, as was contended, the respondent Taylor had failed to prove title to the land. Counsel for the appellant also contended that, if the respondent Taylor was entitled to recover, the appellant was entitled to damages from the respondent Shepherd, upon whom a third party notice claiming damages for deceit was served.

The south half of the south half of lot 6, containing 50 acres, was owned by Alexander Taylor, who conveyed to the respondent Taylor, on the 22nd October, 1897, the west half of it, and to the third party on the 26th August, 1901, the east half of it, which the third party conveyed on the 20th May, 1911, to the appellant.

At the time of the conveyance to the third party, there was a fence which ran from the front to the rear of the land parallel to the side lines of the lot. This fence was not, as the respondents contend, on the dividing line between the east and west halves, but 142 feet east of it, and it is the strip of land between this fence and that dividing line as to which the controversy has arisen.

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There was a fence on the east boundary of the fifty acres when the third party purchased, and for some years before. It was the boundary-line fence between the 50 acres and the lot to the east of it, and was recognised by all parties interested as marking the easterly boundary of the 50 acres, and appears to have been so treated by the appellant ever since he acquired the east half of the 50 acres.

I agree with the contention of the learned counsel for the appellant that the appellant's possession of the land in question afforded evidence of his ownership, entitling him to succeed, unless the presumption of ownership arising from his possession was rebutted.

It was shewn conclusively that, although the third party at first thought that the land conveyed to him extended to the west fence to which I have referred, when informed that it did not, and that that fence was not upon the dividing line between the east and west halves of the 50 acres, he acquiesced; and that, while he continued to be the owner of the east half, the strip of land in question was treated and dealt with as, and acknowledged by the third party to be, the property of the respondent Taylor.

Statements by persons in possession of property, qualifying or affecting their title thereto, are receivable against a party claiming through them by title subsequent to the admission: Phipson on Evidence, 5th ed., p. 224.

For the same reason that such statements are receivable, the acts and conduct of a predecessor in title inconsistent with the existence in him of a right or title which a person who derives title from him is asserting, are receivable; and, if that be the case, the acts and conduct of the third party to which reference has been made, were receivable in evidence against the appellant; and I am of opinion that they, at all events when taken in connection with the existence of the easterly fence and the recognition of that fence as being the line fence on that side of the lot, displaced the presumption of ownership arising from the appellant's possession, and entitled the respondent Taylor to succeed.

I agree with the learned County Court Judge as to the disposition of the claim against the third party, and can usefully add nothing to the reasons which he gives for the conclusion to which he came on that branch of the case.

I would affirm the judgment and dismiss the appeal with costs.

MACLAREN, J.A., and RIDDELL, J., concurred.

MAGEE, J.A.:—It is, I think, clear that the plaintiff was in possession of the parcel in dispute at the time, in 1911, at which the defendant obtained the deed from Shepherd of the east half of the south quarter of lot No. 6. The fence which the defendant seeks to have recognised as his west boundary was never intended as or considered to be a boundary fence between the east and west halves. It was put up by the plaintiff's father, before 1897, simply as a field fence at the back of his clearing in front, that is, at the west side of the then existing bush. The plaintiff had possession of both halves when Shepherd bought the east half in 1901 from the plaintiff's father. Shepherd never claimed the parcel in dispute but always recognised the plaintiff's ownership of it. This was known by the neighbour upon the north, and evidenced on the ground by Shepherd's new wire fence along the town line road at the south, extending only as far as the line claimed by the plaintiff, and being there joined by a rail-fence in front of the plaintiff's land, while at the north side it was shewn by Shepherd's newly repaired fence being made one rail higher than the plaintiff's where they joined at the same line—and trees nearest to the line being blazed under the direction of Shepherd and the plaintiff after they had satisfied themselves by measurement where the line should be. The land between that line and the clearing fence was recognised by both to be the plaintiff's, and the burden of repairing the whole of that fence was borne by the plaintiff and not half by Shepherd. He cut wood and timber upon it as late as March, 1911, two months before the defendant brought the pastured cattle upon it each year, which, by arrangement, were allowed to roam over Shepherd's twenty-five acres, in return for Shepherd's cattle being allowed to go upon the three acres. In all respects the plaintiff was as much in possession of that three acres as of the remaining twenty-two acres of his half. Being in possession was *primâ facie* proof of his ownership without further evidence of the location of the exact boundary-line. Upon this possession, the defendant, without any authority, entered, and was *primâ facie* a trespasser. The burden is upon him to justify this disturbance of the existing state of things; and any presumption which might arise in his favour by his alleged possession is displaced by the antecedent peaceable possession of the plaintiff which he interfered with. Apart from the admissions

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of the plaintiff's title by Shepherd, the defendant's predecessor in title, to which my Lord the Chief Justice has referred, the plaintiff has the advantage of peaceful enjoyment shewn as existing at the time when the defendant came upon the scene and disturbed the *status quo*.

As regards Shepherd, whom the defendant has brought in as a third party, he only conveyed and only professed to convey the east half of the south quarter. If the defendant claims that he has not the enjoyment of that which was so conveyed, the burden is upon him to shew the true boundary, and he certainly fails to shew that it extended beyond the line recognised as the east boundary of the plaintiff's land. The evidence failed to establish any representation by Shepherd that it extended beyond that, or was all fenced, or included more than the twenty-five acres which the defendant has.

One cannot regret that the defendant's too keen desire to acquire other people's property should result in his having to bear the costs of the action and of the appeal.

I agree that the judgment should be affirmed.

Appeal dismissed with costs.

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Ontario Supreme Court, Kelly, J. March 21, 1916.

1. HUSBAND AND WIFE (§ II B—71)—WIFE'S SEPARATE ESTATE—BUSINESS MANAGED BY HUSBAND—RIGHTS OF HUSBAND'S CREDITORS—TRUST.

Where a wife, with her own money, purchases a drug business and employs her husband at a nominal salary as manager, to carry on the business in her name, the profits of the business are hers, and cannot be reached under a personal judgment against the husband, even though the drugs sold were labelled with the husband's name. The transaction discloses no fraudulent design to defeat the husband's creditors. With regard, however, to shares in a wholesale drug business purchased by the husband with his own money, and standing in the wife's name, she is merely a trustee for the husband, and the shares and profits upon the shares are liable for satisfaction of a judgment debt against the husband.

2. JUDGMENT (§ V—252)—ILLEGALITY OF ASSIGNMENT—ENFORCEABILITY.

Where the assignment of a judgment debt is of an illegal nature, the assignee cannot enforce it, but the illegality does not affect the right of action of the assignor.

Statement.

ACTION by one Walker, who in 1895 obtained a judgment for the payment of money against Thomas Franklin Brown, and by one Guise-Bagley, to whom the judgment, which was unsatisfied, had been assigned, as plaintiffs, against Thomas

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Statement.

Franklin Brown and his wife Effie Florence Brown, as defendants, for a declaration that the defendant Effie Florence Brown was a trustee for her co-defendant of certain property and assets; that these were liable to satisfy the judgment-debt; and (by amendment) that part of the supposed earnings of a business purchased by the defendant Effie Florence Brown were proceeds of a separate business of the defendant Thomas Franklin Brown.

Hamilton Cassels, K.C., for the plaintiffs.

George H. Watson, K.C., for the defendants.

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KELLY, J.:—In the early part of the year 1889, the defendant Thomas Franklin Brown was a member of a firm carrying on business at Tottenham and elsewhere as general merchants, under the name of Brown Brothers & Son, the other members of the firm being his father, Thomas Brown, and his uncle, Joseph Albert Brown. On the 6th June of that year, they made an assignment for the benefit of creditors.

The insolvent firm was indebted to the plaintiff Walker; and on the 3rd September, 1895, he obtained a judgment against them for the debt and costs, which remains unsatisfied. The present action is against Thomas Franklin Brown and his wife, Effie Florence Brown, for a declaration that the latter is a trustee for her co-defendant of certain property and assets, including moneys deposited in banks, moneys secured by mortgages of real estate, and real estate in the town of Shelburne, all standing in her name, and an automobile; and for a further declaration that these are liable to satisfy the judgment-debt.

Before the close of the trial, the plaintiffs' counsel made application to amend the statement of claim by alleging that part of the earnings of the business purchased by the defendant Effie Florence Brown from one Belfry, hereinafter referred to, were and are proceeds of a separate business carried on by the defendant Thomas Franklin Brown. I have allowed the amendment.

The defendants were married in November, 1885. The defendant Thomas Franklin Brown in 1883 qualified and became registered as a druggist; and, since that time, the membership fees required by the Pharmacy Act to keep him in good standing as a pharmaceutical chemist have been paid.

At the time of the defendants' marriage, Mrs. Brown was possessed of money in her own right, amounting to somewhat more than $650, which she had earned by working as a milliner.

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On the 29th August, 1889, she entered into a written agreement to purchase from Belfry his stock in trade, consisting of drugs, stationery, shop-fixtures, etc., in the village of Shelburne, paying therefor $250 in cash, the balance of the purchase-money being secured by a chattel mortgage from her to him. The cash payment of $250 was made out of Mrs. Brown's personal moneys; that is conceded by the plaintiffs, as well as sufficiently established by the evidence. The subsequent payments were made out of moneys earned in the business so purchased. This business has been carried on ever since without any apparent change of ownership, and has been successful to the extent of not only supporting the defendants, but also of enabling them to accumulate a substantial amount of profits, part of which is invested in the securities or assets now sought to be reached.

The position of the defendants is, that the business and all the proceeds thereof were and have continued to be the separate property of the wife. On the 29th August, 1889, the day on which she made the contract for purchase from Belfry, Mrs. Brown executed, in favour of her husband, a power of attorney, general in form, including the signing, making, and endorsing of her name to cheques, orders for the payment of money, bills of exchange, notes, drafts, etc., and the doing of "all things necessary to the carrying on of any business he may manage for me."

Leases of premises in which the business has been carried on have been taken from time to time in the name of Mrs. Brown, the business bank account has always been in her name, the conveyance of the real estate has been to her, and the books of account are as if the business was hers. Her husband has acted in the capacity of manager of the business; and on the 15th April, 1892, a written agreement was entered into between them, declaring that the purchase by Mrs. Brown from Belfry was upon the express understanding that her co-defendant would "run" and manage the business for her, and that he had done so from the time of the purchase; and it was therein agreed that she should pay him for his services $10 a month, and that she should, so long as he managed the business, pay the fees necessary to keep him in good standing as a registered pharmacist. The agreement also provided that the husband "shall to the best of his ability 'run' said business, and bind the first party" (his wife) "in all matters pertain-

ing thereto as if the first party was a registered pharmacist and acting herself in the premises, it being expressly understood that he shall keep proper books of account shewing all transactions of said business and that will clearly and properly disclose its position at all times." There is a further provision that, in the event of Mrs. Brown's death, her husband shall carry on, for the benefit of the party or parties named in her will, the business until wound up as directed by the will, and that all contracts made subsequent to her decease in prosecution thereof by the husband shall bind her estate.

The business has always gone on in the manner contemplated by this agreement and the above mentioned power of attorney. The books of account are in form consistent with this; and, as they shew and also both defendants testify, the husband in all these years has been paid regularly $10 per month for his services as his wife's employee. The sale of drugs has always been and continues to be a part of the business; the husband has been the only one qualified to do dispensing and deal in certain commodities which only a pharmacist may deal in. A label which is usually attached to the drugs sold in this business is in this form:—

T. F. BROWN
Chemist and Druggist
SHELBURNE ONTARIO.

Purchases of drugs or drug supplies were made from various companies, with one of which, the United Drug Company Limited, a written agreement of the 23rd February, 1910, was entered into by the defendant Thomas Franklin Brown and his son J. F. Brown (who is also a qualified pharmacist), by which these two men were given the exclusive right to handle certain drug-merchandise in Shelburne; and about the same time they subscribed for one share of capital stock, of the par value of $100, in this company. The secretary-treasurer of the company was called for the plaintiffs and testified that to entitle a person to purchase the company's goods he must be a shareholder.

In 1915, the defendant Thomas Franklin Brown and his son became the holders of two shares, of the par value of $50 each, of the capital stock of the Drug Trading Company Limited. The evidence of the managing director of that company is that the defendant T. F. Brown has been purchasing his company's goods

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and receiving dividends on sales of the company's goods which only a shareholder may receive

I refer specially to these transactions because the plaintiffs attach great importance to them as supporting their contention that the business is that of the husband and not of the wife; that, notwithstanding the express terms of the husband's employment, and the fact that the business was purchased out of the wife's moneys, and has been carried on during all these years in her name, the husband has a proprietary interest in it, and particularly in that part which comprises drugs, prescriptions, etc.; that, as the wife was not qualified to carry on a drug business, it could not have been that the husband included in the services agreed to be performed for her, such as depended upon his qualification as a druggist.

Where a husband is associated with a business said to be his wife's, the question whether he is her agent, or whether the business belongs to him, is one of fact; and the test appears to be, whether the wife is trading independently of her husband without being accountable to him for the profits of the business. The mere fact that a married woman engages the services of her husband in the management of, or as an employee in, her separate business, does not of itself entitle him to a proprietary interest in it or in its proceeds; nor are the profits which arise from his labour or skill, by the simple fact of such engagement or employment, deprived of the character of separate estate of the wife, or rendered subject to the claims of his creditors.

In any given case into which other elements enter they must be given consideration.

In *Campbell* v. *Cole* (1884), 7 O.R. 127, a decision of a Divisional Court, the judgment rested mainly on three grounds which were held to distinguish that case from *Murray* v. *McCallum* (1883), 8 A.R. 277, to which reference will be made later on. These grounds were: first, that the husband was not in receipt of wages, and so in a subordinate position; second, that he interfered in the management of the business ostensibly as owner; and, third, that he actually interfered in the particular transaction which led to the incurring of the debt which was sought to be recovered. There was no written agreement defining the business relationship between the husband and wife, and it fell to the Court to determine, n the circumstances under which the business was carried on,

whether the husband was the agent for the wife or in reality the owner of the business. The Court determined in favour of ownership by the husband. The facts, it will be observed, were distinguishable from those of the present case.

In *Harrison* v. *Douglass* (1877), 40 U.C.R. 410, referred to in the judgment in *Campbell* v. *Cole*, this strong language is used as against ownership in the wife (p. 415): "If the occupation or trade be such that the wife cannot carry it on without the husband's active co-operation or agency, it is not easy to discover in what sense it can honestly be called an occupation or trade carried on by her 'separately from her husband.'" There, again, the Court was dealing with circumstances and facts quite different from those now before me.

Laporte v. *Costick* (1874), 31 L.T.R. 434, also referred to, is not a parallel case, and was decided on different facts, the effect of the finding there being that the wife was not acting independently of the husband; that she was his servant or employee, and not he hers.

In *Meakin* v. *Samson* (1878), 28 U.C.C.P. 355, where the judgment of the Court *en banc* was against the wife, who claimed to have been trading separately, the husband, who had been engaged in business, had become insolvent and had failed to obtain his discharge. Certain persons who had been his creditors, and knew his inability to carry on business on his own behalf, furnished the plaintiff, who had no separate estate, with goods, taking her notes in payment. The business name used was that of the wife, but the business was carried on entirely by the husband, acting under a power of attorney from her which enabled him to enter into all contracts and give notes etc. in her name, and at an alleged salary of $10 a week. The wife and children all lived together away from the place of business, which the wife seldom visited and never for business purposes. This happened at a time when a married woman could not be held liable on a promise to pay unless she had separate estate, and it was the view of the Court that she was not possessed of separate estate, unless the goods furnished to her could be so considered. A majority of the Court held that the wife was not entitled to the goods; that there was no separate trading by her within the meaning of the statutes; and that the whole thing was a device to enable the husband to carry on business in the

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plaintiff's name, and so defeat his creditors. In his reasons for judgment, Hagarty, C.J., at p. 364, says: "I agree with my brother Gwynne that if any of the merchants who appeared in this case had chosen to present or give to this claimant a quantity of goods to start her in some really separate business, or to supply her wants, or to aid in the support of her and her family, they had a right so to do, and such goods would be her separate property. But nothing of that kind is presented here. No personal communication took place between the wife and the parties furnishing the goods; and the dealing is carried on in the guise of a sale of goods as to a dealer on the ordinary terms of credit, and notes given therefor in the name of a firm, which her husband alleges to have consisted of herself, and signed by her husband for her. I am of opinion that this is not one of the ways in which the Legislature has permitted a married woman to acquire property apart from her husband's rights or control. The goods are certainly not given, they are professedly sold for business purposes."

These statements are of service in determining what constitutes separate estate. The plaintiff was there risking nothing in embarking in business. Had her separate estate been involved, it would not have been unreasonable for her to have endeavoured to protect it against the claims of her husband's creditors; but she had no such separate property needing that protection. In that respect at least, there is a substantial distinction between that case and the one now under consideration.

In re Gearing (1879), 4 A.R. 173, has also been cited. In some respects it bears resemblance to the present case; but important points of distinction are: that it there appeared to have been understood by every one engaged in the transaction that the object of the purchase of the insolvent husband's estate in the name of the wife, for which she gave her promissory notes secured by a mortgage on her separate real estate, was to enable the husband to continue the business, and the judgment rested entirely upon the conclusion that, granting the stock in trade to have been the wife's separate property, she never employed it in trade separate from her husband, and was never herself a separate trader.

In *Murray* v. *McCallum*, 8 A.R. 277, above referred to, the Court being equally divided, the judgment appealed from, upholding the separate trade or business by the wife, was affirmed.

Cameron, J., who concurred with the Chief Justice in dismissing the appeal, put the matter thus, at p. 306: "If the husband lives in the house with the wife where she carries on business, she does not in one sense carry on an occupation or trade separate from him. But if he has no interest in the occupation or trade it is separate from him in a legal sense." And at p. 307: "In my opinion the employment by her of her husband in any occupation or trade she may carry on will not make her property or the proceeds of such occupation or trade her husband's or liable for his debts. And unless it appears by the evidence in the case that the husband has a legal interest in or right or interference with the business without her consent, as matter of law, such property or the proceeds of such occupation or trade cannot be held to be the husband's or be made liable for his debts. It must thus be a question of fact in every case. Is the occupation or trade of the wife carried on by her separately from her husband?"

It will be observed that in many cases, where the finding has been against the business being the separate property of the wife, there has been nothing in writing defining the relationship of the husband and the wife towards each other in the conduct of the business, and inferences have had to be drawn solely from their conduct and acts.

This brings us to another phase of the matter much relied upon by the plaintiffs—the husband's activity in the conduct of the business, for his services in which during all these years his sole remuneration has been $10 per month and the payment of the annual fee to keep him in good standing as a registered pharmacist. This is pointed to as indicating either that the business is his own or that he has a proprietary interest therein. That, however, is not conclusive as against a separate trading by the wife. There is no law that I know of which compels a man in the position of the defendant Thomas F. Brown to give his services for any stated remuneration or to work for his creditors; even though a young, active man, such as was this defendant at the time of the purchase of the business in 1889, should be willing to place himself in the menial position of spending the best years of his life in his wife's employ at a rate of remuneration which he has been receiving for more than a quarter of a century. It may be, too, that the remuneration he has received is commensurate with the value

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of his services; there is no evidence before me to determine that value.

In *Baby* v. *Ross* (1892) 14 P.R. 440, where the judgment-debtor's wife had mortgaged her farm for the purpose of paying some of his debts, and, after the mortgage, instead of continuing to work the farm for his own benefit or on shares with his wife, as he had formerly done, he agreed that until the mortgage was paid off he would work it for his wife alone, it was held that this was not illegal or unreasonable, and on no principle could it be said that this was a making away with property in order to defeat or defraud creditors.

That a man is not legally compellable to labour for his creditors was held in *Rush* v. *Vought* (1867), 55 Penn. St. 437; and there is authority for the proposition that the absence of a definite agreement as to his compensation (for employment by his wife) does not alter the rule. Nor, in my opinion, is the situation altered by the fact that the services agreed to be performed include those involving special or exceptional skill or knowledge on the part of the employee. If such a one choose to market for a price the product of his special qualification, the fact that he is indebted to others should not be an objection to his doing so.

In a New Jersey case, *Arnold* v. *Talcott* (1897), 55 N.J. Eq. 519, the right of a wife to engage for pay the services of her husband was upheld, the decision being that if a married woman in good faith employ her husband to devise and perfect mechanical inventions for her, she agreeing to pay all the expenses to be incurred and also to pay him a salary out of her separate estate, and in pursuance thereof the patents for the inventions are issued or assigned to her, the patents and their proceeds are her separate property and cannot be reached by the husband's creditors.

In *Guttman* v. *Scannell* (1857), 7 Cal. 455, the judgment was, that a fraud upon the husband's creditors will not be conclusively presumed although the trade carried on by the wife is unsuited to her sex.

But, again, it is said that the arrangement entered into at the time Mrs. Brown purchased the Shelburne business in 1889, and evidenced by the writing entered into three years later, was simply a scheme or device to put any assets of the husband beyond the reach of his creditors, and so defeat their just claims. Transactions of this kind are to be scrutinised closely, and I do not desire

to be taken as disagreeing with any of the authorities cited by the plaintiffs, which, I think, are not cases parallel to the present one. The situation, as it appears to me, is not that there was a design to place the husband's property out of the reach of his creditors, but to preserve and keep the wife's property out of their reach. There was sufficient to suggest to her that course. Her husband was a member of a partnership whose business ventures had failed; in the failure moneys of hers derived from her personal earnings before her marriage, and lent to the partnership after her marriage, were lost Having had some personal experience in business, she may have had confidence in her own ability to embark successfully in business, and she may not have been willing to trust her moneys to her husband, whose past experiences were not attended with success and whose confidence in himself and whose ambitions do not seem to have taken him, even in the prime of life, above an earning of $10 per month. It is not shewn that the success which has attended the business which she entered into in 1889 has been due to any special ability on her husband's part.

One other objection under this heading remains to be considered, namely, that the husband has a proprietary interest in that part of the business—the drug business—which she has been enabled to carry on only through him as a qualified pharmacist; that, not being so qualified, her engagement of her husband as her manager or employee did not extend to acts of his which only a person so qualified could perform, and that to that extent the proceeds of the business belong to him and not to her.

The Pharmacy Act, R.S.O. 1914, ch. 164, sec. 22, declares that no person other than a person registered under sec. 17 shall be entitled to be called a pharmaceutical chemist; and no person except a pharmaceutical chemist, or his registered apprentice, shall compound prescriptions of medical practitioners; and sec. 28 (*a*), that no person shall "sell or keep open shop for retailing, dispensing or compounding poisons, drugs or medicines" except certain articles therein mentioned, or (*b*) "assume or use the title of 'Chemist and Druggist' . . . or any sign, title or advertisement, implying or calculated to lead the public to infer that he is registered under this Act . . . and has a certificate under section 20." It is urged that the effect of these enactments is to place the wife under such prohibition as to render the returns from sales of articles or commodities which she is so prohibited from

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selling, the property of the husband and not hers. For contravening any of these prohibitory provisions, the Act imposes a penalty. It is manifest that what is aimed at is the protection of the public against the danger incident to the handling or selling of dangerous drugs or drug commodities by unqualified persons.

In *The Queen ex rel. Warner* v. *Simpson* (1896), 27 O.R. 603, cited for the plaintiffs, it was held that a person so unqualified could not escape the penalties provided by the Act by the mere fact that he employed a qualified person to conduct his drug business, under whose supervision that part of the business was carried on. The question involved was, whether the defendant did keep an open shop "for retailing, dispensing, and compounding poisons, contrary to the form of the Pharmacy Act," the information having been laid under sec. 24 of the Act then in force (R.S.O. 1887, ch. 151). That section is in identical words with the corresponding section now in force. The decision was, that the defendant did keep open shop within the meaning of the Act, and thereby became liable for the penalties prescribed by the Act, but it did not go so far as to declare the defendant disentitled to the benefit of the proceeds of the business, or that such proceeds belonged to the qualified pharmacist employed by him. Indeed, the contrary seems to have been the view, for in his reasons for judgment Meredith, C.J., said: "The profits of the business were his" (the defendant's) "less what he paid Lusk, who was a servant"—Lusk being the qualified pharmacist employed by the defendant.

It may be that Mrs. Brown, in carrying on the business as she conducted it, employing a qualified pharmacist to perform for her acts and services which she is prohibited by the Pharmacy Act from performing, has rendered herself liable to the penalties prescribed by the Act. That, however, is not for determination here. I cannot see that the proceeds of the drug department of her business, except in the excepted instances to which I shall presently refer, are, under the circumstances, the property of the husband.

I am, however, of opinion that the commodities purchased by the husband from manufacturers and dealers in the manner and under the circumstances in which purchases were made from the United Drug Company Limited and the Drug Trading Company of Toronto, above referred to, and the proceeds of the sales of these

commodities, did not and do not constitute a part of Mrs. Brown's business, but belong to her husband. These transactions were entered into personally by him and in his own name (in one case his son being a co-purchaser with him); personally he subscribed for the shares of the capital stock of these companies, the purchase of which was limited to qualified pharmacists; and the dividends thereon have been paid to the purchasers. His wife was not a party to these transactions, and there is no sufficient evidence that the purchases were made for her or under authority from her. Ostensibly, and, as I believe, as a fact, these transactions were on his own account. The whole surrounding circumstances bear that out. His statement at the trial that he made a mistake in entering into one of these contracts in his own name does not impress me. I am unable to come to any other conclusion but that any moneys arising from these purchases belong not to the wife's business, but are the property of the husband.

In respect of the interest he has so acquired, and also in respect of any other purchases he may have made under similar circumstances and in like form—and both as to the capital stock he acquired in the selling companies and the goods purchased from these companies under these or similar contracts in which a purchase of capital stock is involved—the interest he acquired and the proceeds thereof became his, and not his wife's or a part of her separate estate; and, so far as that interest enters into the business carried on by the wife or into the assets purchased from the earnings of the business, she is a trustee for her husband, and such interest is liable to satisfy the judgment-debt referred to.

The defendant Effie Florence Brown sets up the further defence that the transfer by the plaintiff Walker to his co-plaintiff of an interest in the judgment referred to was for a wrongful and illegal purpose, and that it and the prosecution of this action in pursuance thereof are illegal.

The facts are that on the 17th January, 1913, the plaintiff Walker made a written assignment to his co-plaintiff of the judgment-debt and his rights thereunder, and covenanted to do all necessary acts and things to enable him at his own cost to recover, with the right to use the assignor's name in any proceedings for recovery. Concurrently with the assignment, the assignee made a written declaration that, though the assignment was absolute in form, the real intention was, not to make the assignee the bene-

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ficial owner, but to secure him against the costs of enforcing the judgment, and, after satisfying the costs, that he should account to the assignor for all moneys received; and the assignee declared himself a trustee for his co-plaintiff accordingly.

This, the defendant Mrs. Brown asserts, disentitled the plaintiffs to recover. Had the action been brought by the plaintiff Guise-Bagley, the assignee, alone, the objection would have been well taken, following what was laid down by a Divisional Court in *Colville* v. *Small* (1910), 22 O.L.R. 426. But the same judgment, instead of denying the right to the original holder of the claim (here the judgment) to assert his claim notwithstanding the assignment, rather affirms that right. The present case could not be put in more apt language than the following, in which my brother Riddell (at pp. 427 and 428) expressed his reasons for his conclusions: "The general principle is, that all champertous agreements are void—the older cases say *malum in se*. If then a party to a champertous agreement must rely upon the illegal agreement to sustain an action, he fails; but, if he, although a party to such an agreement, can make out his case without calling in the agreement, the existence of the invalid agreement does not void the right of action he has without it. For example, if a plaintiff have agreed with his solicitor or a third person to give him a portion of the profits arising from the successful prosecution of a suit, upon being indemnified against the costs, he will not be barred in his action—he is in the same position *quoad* the defendant as though he threw away the agreement altogether—the agreement does not enter into the action. The fact of the agreement being void does not affect the actual right of action he has. But, if the solicitor or third person, assignee, should bring an action, as he has no right of action at all unless the agreement has effect, and it has none in law, he will fail."

That fully covers the present case in favour of the plaintiff Walker's right, and against the plaintiff Guise-Bagley's right, to maintain the action.

Judgment will be in favour of the plaintiff Walker in accordance with the above findings; and there will be a reference to the Master in Ordinary to ascertain the value of the defendant Thomas Franklin Brown's proprietary interest in the business derived from the purchase of drugs and commodities from the said two com-

panies, and from his subscription to the capital stock of these two companies, and to ascertain if other similar purchases were made on similar terms and conditions, and the value of Thomas Franklin Brown's further interest in the business as the result of such further similar purchases.

Further directions and costs of the action are reserved until after the Master's report.

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The KING v. DIMOCK.

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New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White, and Grimmer, JJ. April 12, 1916.

1. LICENSE (§ II C—25)—THEATRES—POWERS OF MUNICIPALITY—AMOUNT. The corporate powers of a municipality, under sec. 64(24) of the Towns Incorporation Act (C.S.N.B., ch. 166), to license and regulate all theatres, is subject to the limitation of sec. 3 of ch. 168, that the license fee on "public places of amusement" shall not exceed $50; a by-law imposing on moving picture shows an annual license fee of $300 is *ultra vires* and void.

Statement.

APPEAL on question referred by McKeown, J., as to an application before him for an order for review under sec. 44 of the Summary Convictions Act (C.S.N.B. 1903, ch. 123), of a conviction made by Mathias Comeau, Police Magistrate for the Town of Dalhousie, on June 29 last, against Samuel W. Dimock, for unlawfully operating a moving picture show in the town of Dalhousie without having obtained the license therefor required by the by-law of the town, on the ground that the by-law of the town under which the conviction was made imposing a license fee of $300 per year, or any part thereof, on moving picture shows is *ultra vires*.

H. A. Powell, K.C., for defendant, supported the application.

E. R. Richard, supported the conviction.

Baxter, Attorney-General, same side.

The judgment of the Court was delivered by

Grimmer, J.

GRIMMER, J.:—This was an application for review from a conviction made by the police magistrate of the town of Dalhousie, on June 29 last, on the information of John Barbour, town marshal of the said town of Dalhousie, charging that on May 14, 1915, the said Samuel W. Dimock did unlawfully operate a moving picture show in the said town of Dalhousie, without having first obtained the license required therefor by the by-law of the said town.

An order for review was made by McKeown, J., on the second day of August last, and the matter was afterwards by him referred to this Court.

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The grounds upon which it is sought to avoid the conviction are as follows: 1. The town council had no authority to pass the by-law. 2. The statute, the Towns Incorporation Act, does not authorise the town council to pass a by-law fixing any license fee as the subject of taxation. 3. That if the town council had power to prescribe a fee for the clerical work connected with issuing a license the charge of $300 is unreasonable, and the by-law is void. 4. The council had no power to impose a fee for the clerical work of issuing a license. 5. The matter of licensing is provided for by the Con. Stat., ch. 168, sec. 3, p. 2133.

The town of Dalhousie was incorporated, and received all its corporate rights as a town proper under the so called Towns Incorporation Act, C.S., ch. 166, and by sec. 64 thereof power is conferred upon the town council to make by-laws for the good rule and government of the said town, and to carry out the provisions of the statute. The council is also given power to revive, repeal, alter and amend the by-laws when made and passed, keeping, however, always within the authority of the chapter quoted. Under sec. 64, among other things, the council has power, by sub-sec. 21 thereof, "to license, regulate or prevent billiard tables, bowling alleys, or other places of amusement." By sub-sec. 27 it has power to impose a tax by way of license, on the owners or harborers of dogs, etc., but in no other portion of the section, of which there are 63 sub-sections, is any authority given to enact a by-law fixing a license fee as the subject of taxation. While then, under its charter, the town has full power to license and regulate a place of amusement, under which head a moving picture show could without doubt be included, it does not thereby obtain or acquire the power to pass or enact a by-law providing a tax by way of license for such show, and recourse must be had to ch. 168 of the Con. Stat. 1903, which is entitled, "An Act respecting power to cities and towns to regulate the placing and maintenance of electric wires, and to license and regulate certain places of amusement." Sec. 3 of this chapter provides as follows:—

That in addition to all powers of making by-laws otherwise conferred by law upon any cities, or incorporated towns, throughout the province, they and each of them are hereby authorized and empowered to make and ordain by-laws to license, regulate or prohibit the keeping of public billiard saloons, bowling alleys, or other public places of amusement, and to impose a license fee on granting such license of a sum not exceeding fifty dollars per annum, but nothing herein contained shall prevent any city or town from

exacting such greater fee than fifty dollars for such license as may be authorized in the case of such city or town by any by-law in force at the passage hereof.

The portion of this section to the words "per annum" were passed by the legislature as ch. 58 of the Acts of 1890, with the exception that it was then made to cover cities, towns and the county councils of the municipalities throughout the province, but this provision was by the Act of 1898, ch. 34, sec. 132, schedule 2, an Act relating to Municipalities, repealed in so far as it related to the county councils of the municipalities. The concluding portion of sec. 3 was probably added when the statutes were consolidated, as the provision there stated does not seem to appear or be found in previous existing legislation. Attention must have been drawn to the fact that in some cities or towns there were existing by-laws which did not harmonise with the first part of this section, and which were rendered inoperative thereby, and to overcome this difficulty the addition spoken of was doubtless made to the section. The fact that towns under their charters were unable to make or ordain by-laws providing for fixing license fees as the subject of taxation, led undoubtedly to the passage of ch. 58, of the Acts of 1890, under which for the first time cities and towns were given the right to license places of public amusement and to impose a fee therefor.

It seems somewhat extraordinary why sec. 3 of ch. 168 before quoted, was not included in the provisions of the Towns Incorporation Act, where it would ordinarily be looked for, and in fact all provisions relating to the enacting of by-laws for same purposes would naturally be expected within the confines of the chapter, but as it is not there presumably it was intended to be of general application to all cities and towns alike, therefore it follows, if I have correctly stated the existing legislation and the stages through which it passed, that the town council of Dalhousie had no authority to pass the by-law imposing a fee of $300 for a license to operate a moving picture show, and the by-law to that effect dated May 12, 1915, would be *ultra vires* of the power of the council, and therefore void, and objections 1 and 2 to the conviction would prevail. The return from the magistrate shews that on September 10, 1913, the town council passed a by-law providing a license for a moving picture or other similar exhibition, and imposing a fee of $50 per annum, or any part thereof, for the

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same, thus recognising at that time that their power and authority was limited so far as the fee was concerned to the sum of $50, and this, I think, they had full authority to do, and the by-law will continue in force until repealed. Later, other advice seems to have prevailed, and the by-law of May 12, 1915, was passed fixing the license fee at $300, which I think the council did not have power to do, and the same is therefore void. Having come to this conclusion it is unnecessary to consider the other grounds of objection.

Mr. Justice McKeown will be advised to set the conviction aside. *Conviction set aside.*

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Re RESERVISTS AND VOLUNTEERS RELIEF ACT.

Alberta Supreme Court, Harvey, C.J. August 29, 1916.

FRAUDULENT CONVEYANCES (§ VIII—40)—VOLUNTEERS AND RESERVISTS RELIEF ACT—INTENTION TO DEFRAUD.

In order to obtain an order permitting the commencement of an action under the Volunteers and Reservists Act (Alta. 1916, ch. 6, sec. 9), to prevent property from being disposed of, on the ground that it is being done fraudulently to defeat creditors, there must be clear and convincing evidence of an intention to so defraud.

Statement.

APPLICATION by the British America Paint Co. under sec. 9, of the Volunteers and Reservists Relief Act (Alta. Stats. 1916, ch. 6) for leave to enter proceedings to prevent the disposition by one Brace of certain stock-in-trade. Refused.

S. S. Cormack, for applicant.

No one *contra*.

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HARVEY, C.J.:—Brace has enlisted in the Canadian Overseas forces and is disposing of his stock-in-trade consisting of hardware and furniture. He has advertised that his stock of $8,000 will be on sale commencing August 12 "regardless of cost, terms cash."

The plaintiffs claim that he is indebted to them in a sum of over $500 and the plaintiffs' manager makes oath that he believes he is attempting to sell his stock with intent to defraud his creditors generally and the plaintiff company in particular; his reasons being that on August 17 he interviewed Brace and found he was selling some goods below cost, that he asked him for payment of his account and Brace asked what proposition he had to make, that he said he had no proposition to make but wanted payment in full but would give a month or so if he wanted time, that Brace said he didn't want time but wouldn't consider paying in full, that he had enlisted and the company would have a hard time

forcing him to pay, but that he would not say at that time whether he would take advantage of the Act.

On these grounds the company asks for a writ of attachment.

The section provides that

> Notwithstanding anything in this Act, if it is made to appear to the Supreme Court or a Judge thereof that any volunteer . . . or any member of his family . . . is disposing of, or dealing with, the property of such volunteer or reservist fraudulently or with the intent to defeat the creditors of such volunteer or reservist, or that the property of any volunteer or reservist is being wasted or dissipated . . . the Court or Judge may make such order or permit such action or proceeding to be taken as the said Court or Judge may deem requisite for the proper preservation of such property, etc.

Assuming that by "preservation of such property" it is intended to include the holding of property for the protection and benefit of creditors it is apparent that to put the sheriff in possession under a writ of attachment, or a receiver in possession under a receiver order, of personal property would involve a great expense since it would require to be held for a year after the war ends, and the indefinite period before it ends, unless the volunteer is sooner discharged, and in many cases it would result in nothing but loss to both creditor and debtor.

It is apparent too that to deprive the volunteer and his family of the right to dispose of his own personal property for such a period of time might work a great hardship and the applicant must therefore bring himself clearly within the terms of the statute in order to succeed.

In my opinion the present applicant fails in this respect.

That the volunteer is selling his stock-in-trade seems the natural consequence of his enlistment for service in a war such as we are at present engaged in unless he has someone in whose charge the business can be left as to which I have no evidence. That he is selling some goods below cost is also to be expected as in no other way can such goods be disposed of on short notice.

That he has said that the applicant would have a hard time making him pay does not appear to me to contain any evidence of intent to defraud his creditors. The Act in question was passed expressly for the purpose of making it impossible for creditors to make their debtors, who come within its provisions, pay their debts, and it is the natural answer a debtor who has the protection of the Act would make to a pressing creditor. It may quite be that the debtor is selling with the intention of paying his creditors

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as far as the proceeds will permit, for there is no reason to suppose that the applicant is the sole creditor, and the debtor's request for a composition may be evidence of nothing more than an honest attempt to pay his creditors rateably.

The debtor is certainly not selling his goods fraudulently as far as appears, but he is doing it with the fullest publicity, and the evidence does not satisfy me that he is doing it with intent to defraud his creditors, and the application must therefore be refused.

Application refused.

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CITY OF EDMONTON v. CALGARY AND EDMONTON R. CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 13, 1916.

RAILWAYS (§ IIA—10)—REGISTRATION OF LOCATION PLAN—SENIORITY OVER MUNICIPALITY—HIGHWAYS.

The proper registration of the location plan of a railway approved by the Board of Railway Commissioners sufficiently establishes the railway company's seniority over a municipality, at points of highways not previously dedicated by the filing of plans or used, constructed or accepted by the corporation.

Statement.

APPEAL on a case stated by the Board of Railway Commissioners for Canada for the opinion of the Supreme Court of Canada pursuant to the Railway Act.

STATED CASE.

1. Prior to September 30, 1902, the Hudson Bay Co. was registered as owner . . . of the portion of their reserve in the City of Edmonton now in question.

2. On September 30, 1902, a plan of subdivision of a portion of the reserve was registered in the Land Titles Office. A memorandum of the registration was noted upon the outstanding certificate of title and a new certificate of title was issued to the Hudson Bay Co.

3. On May 27, 1905, the Calgary and Edmonton R. Co. caused to be filed in the Land Titles Office for the North Alberta Land Registration District a railway location plan which had been duly sanctioned by the Board of Railway Commissioners under the provisions of the Railway Act on May 3, 1905.

4. On November 20, 1905, a further plan of subdivision was registered by the Hudson Bay Co. A memorandum of the registration was placed upon the Hudson Bay Co.'s certificate of title and a new certificate of title was issued.

5. Agreements for sale and transfers were from time to time

made by the Hudson Bay Co. according to plans B 2 and B 4, as shewn by the indorsements on certificates of title. The company retained those lots corresponding with the lands shewn as required by the Calgary and Edmonton Railway on plan, ex. 4.

6. Evidence was given before the Board at its sittings at Edmonton on October 31, 1913, as follows:—

* * * * * *

7. On October 20, 1909, an agreement was made between the City of Edmonton and the Calgary and Edmonton R. Co. The by-law of the City of Edmonton adopting this agreement was validated and confirmed by the Alberta statutes of 1910, ch. 5.

8. On April 1, 1912, a transfer was executed by the City of Edmonton pursuant to the agreement, transferring to the Calgary and Edmonton R. Co. the lands described in par. 2 of the agreement. This transfer was delivered by the city to the railway company and on August 5, 1912, was returned by the railway company's solicitor to the city solicitor for correction owing to objections taken by the surveyor of the Land Titles Office to the accuracy of the description of the land. Since then the railway company has repeatedly requested its return but this has not been done as, in the opinion of the registrar, a portion of the lane adjoining in the rear of the lots abutting on Jasper Ave. between 9th and 10th Sts. has not yet been dedicated by the Hudson Bay Co. and negotiations for the purpose of removing this difficulty are proceeding.

9. Transfers have been made by the Hudson Bay Co. and others to the Calgary and Edmonton R. Co. of those of the lots according to plan B 4, required by the latter company for railway purposes, and the latter company has now become the registered owner of the lands shewn upon the location plans as required, except such parts of the said lands as are shewn as streets and lanes on plan B 4, and which are described in the transfer. The transfer from the Hudson Bay Co. to the Calgary and Edmonton R. Co. was made and accepted on the terms set out in the letters from Curle & Bond, solicitors for the Calgary and Edmonton R. Co. to the commissioner of the Hudson Bay Co. and the reply thereto.

10. Except as stated in the foregoing paragraphs neither party to the application before the Board of Railway Commissioners had acquired any rights in respect of the land in question.

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12. The formal order made by the Board on the application was as follows:—

Upon the hearing of the application at the sittings of the Board held at the city of Edmonton, in the Province of Alberta, on Friday, October 31, 1913, in presence of counsel for the said city, the Calgary and Edmonton R. Co., and the C.P.R. Co.; and what was alleged by counsel aforesaid:—Counsel for the said municipality submitting that it was necessary, in the first instance, to determine whether or not the municipality has, as a matter of title, the right to open the said highway and was the owner of the land required for the said highway so as to make the said highway senior to the railway;

The Board finds and adjudges that the title of the railway company is sufficient and effective as against the municipality, and that should the said highway be opened, such opening would be subject to the seniority of the railway company's title and construction.

(Sgd.) H. L. DRAYTON,
Chief Commissioner,
Board of Railway Commissioners for Canada.

13. The questions which at the request of the Corporation of the City of Edmonton are stated by the Board and submitted for determination by the Supreme Court of Canada are:—

(1) Whether as a matter of law the filing of the location plan by the railway company in the appropriate Land Titles Office (said plan having been duly approved by the Board under the provisions of the Act and carried into effect by the railway company), is sufficient and effective to establish the railway company's seniority to the municipality at points where highways were not dedicated by plan or otherwise or actually used, constructed or accepted by the municipality at the time the location plan was so filed?

(2) If as a matter of law the municipality had the right as against the railway company to maintain highways at the points in question, was such right discharged by the statute of the Province of Alberta, 10 Edw. VII., ch. 5, sec. 1, and the by-law and agreement thereby validated and confirmed?

O. M. Biggar, K.C., for the appellant.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—My answer to the first question is in the affirmative and it will, therefore, be unnecessary to answer the second.

The question for determination and the circumstances under which this matter was brought before the Railway Board and referred here are fully explained in the notes of my brother Anglin.

Once the location of the railway was officially approved of

by the Board and the plan filed with the registrar the right of the railway company to take the land, subject to the payment of compensation, was absolute. By the deposit of the plan the Hudson Bay Co. was divested of the power to dispose of its property within the limits of the right-of-way: "*the land was put extra commercium.*" The deposit of the approved plan with the registrar fastened a servitude upon the land taken and gave the company a statutory right to acquire a complete title to it for railway purposes. The railway company would not be trespassing if it entered upon the land even before its expropriation. *Vide Re Ruttan and Dreifus and C.N.R. Co.*, 7 O.W.R. 568, at 571. Compare secs. 178, 180 of the Railway Act.

It followed necessarily that the filing of the location plan by the railway company with the registrar was sufficient and effective to establish the railway company's seniority to the municipality at points where the highways were not dedicated by plans or otherwise or actually used, constructed or accepted by the municipality at the time the location plan was filed. *Vide Williamsport R. Co.* v. *Philadelphia R. Co.*, 141 Penn. 407.

DAVIES, J.:—I answer the first question referred in the affirmative, which dispenses with an answer being given to the second question. Davies, J.

IDINGTON, J.:—I would answer the first question herein submitted in the affirmative. That question being so answered, the second question does not seem to call for any answer. Idington, J.

ANGLIN, J.:—The question for determination in this case is whether after a railway company had deposited in the proper registry office its location plan, profile and book of reference under secs. 122-124 of the Railway Act 1903 (now secs. 158-160 of the R.S.C. 1906, ch. 37), the owner of the property across which the railway, according to the plan, etc., so deposited, is carried, can by filing a subdivision plan thereof before notice has been served, under sec. 154 of the Act of 1903 (now sec. 193), oblige the railway company to recognise the existence as highways of streets shewn upon such plan of subdivision as carried across the located right-of-way of the railway. Anglin, J.

The location plan, etc., duly approved, were deposited in May, 1905, and notice thereof was duly given under sec. 152 (now sec. 191). The plan of subdivision was filed in November, 1905.

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The railway company took actual possession of the right-of-way and constructed its railway upon the portion of it in question some time before the enactment of 8 and 9 Edw. VII., ch. 32, sec. 3. It does not appear when notice under sec. 154 (now sec. 193), was given.

Sec. 153 of the Railway Act of 1903 (now sec. 192, R.S.C. 1906, ch. 37), was in these terms:—

> The deposit of a plan, profile and book of reference, and the notice of such deposit, shall be deemed a general notice to all parties of the lands which will be required for the railway and works; and the date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained.

It was, in my opinion, not within the power of the landowner, after the deposit of the location plan, etc., in anywise to affect the land thereby designated as that which the company intended to acquire for its right-of-way so as to interfere with the right of expropriation or to render its exercise more burdensome or less advantageous to the company.

The agreement of 1909 made between the City of Edmonton and the railway company in my opinion did not affect their respective rights in regard to the question before us. While unable, in view of the express reservation in it of the city's right to set up the contention that Athabasca and Peace Aves. extend as public highways across the railway right-of-way, to concur in the view expressed by the chief commissioner that the agreement of 1909

> extinguished any right the public might have of using the continuation of Peace and Athabasca Avenues across the right-of-way of the railway company,

I am on the other hand of the opinion that nothing in that agreement involves any recognition by the company of these two streets as highways crossing its right-of-way, or interferes with its maintaining whatever rights it had acquired by the deposit of its approved location plan, etc.

I would, for these reasons, answer the first question submitted by the Board of Railway Commissioners in the affirmative—a conclusion which renders an answer to the second question unnecessary.

Brodeur, J.

BRODEUR, J.:—The Board of Railway Commissioners has referred the following questions for the consideration of this Court:

> 1. Whether as a matter of law the filing of the location plan by the railway company in the appropriate Land Titles Office (said plan having been duly

approved by the Board under the provisions of the Act and carried into effect by the railway company), is sufficient and effective to establish the railway company's seniority to the municipality at points where highways were not dedicated by plan or otherwise, or actually used, constructed or accepted by the municipality at the time the location plan was so filed?

2. If, as a matter of law, the municipality had the right as against the railway company to maintain highways at the points in question was such right discharged by the statute of the Province of Alberta, 10 Edw. VII., ch. 5, sec. 1, and the by-law and agreement thereby validated and confirmed?

In 1905 the respondent company registered a location plan under the provisions of sec. 160 of the Railway Act. It appears that the railway company without having paid a compensation to the landowners started to construct its railway. It is not very clear in the evidence whether this possession of the land has been taken with the permission of the owner; but it is to be supposed, however, that the company was not considered as a trespasser, since no injunction has been taken to prevent it.

Some months after the deposit of the plans with the registrar, the land owner filed with the registrar a subdivision plan of the property in question on which the street Athabasca Avenue was mentioned. There is no formal evidence as to the date at which this street was dedicated to or accepted by the municipality appellant; but it is pretty evident that the railway was constructed before the street was established as a public work by by-law or was assumed for public use by the City of Edmonton (Ordinances N.W.T. 1904, ch. 19, sec. 6 of Title XXX.).

The situation might be different if before the construction of the railway the municipality had constructed its highway. I would be inclined to think that the highway would be considered then as having the seniority, though the location plan of the railway would have been previously deposited.

We could then apply the principle enunciated by the Board of Railway Commissioners in the case of the *C.N.R. Co. and the C.P.R. Co.* and known as the *Kaiser Crossing* case, 7 Can. Ry. Cas. 297, in which Mr. Mabee, the then chairman of the Board, said:—

> I do not think that the mere approval of the plans filed with it necessarily gives seniority to the plans first approved . . . It seems to me that the railway that is in actual occupation with an existing work upon the ground with the ownership of the fee at the point of crossing has much stronger claims to seniority than the railway which has merely obtained a prior sanction of its plans.

That decision was followed by the Board in another case of the *C.N.R. Co.* v. *C.P.R. Co.*, 11 Can. Ry. Cas. 432, that held that:

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Construction and not approval of location gave priority.

Assuming then that the construction of the railway in the present case has preceded the construction of the highway, I have no hesitation in answering in the affirmative the first question.

In view of that answer to the first question, it is not necessary to deal with the second question. *Judgment accordingly.*

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JONES v. TUCKER.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin, and Brodeur, JJ. June 19, 1916.

1. SPECIFIC PERFORMANCE (§ IE 1—30)—EXCHANGE OF LANDS—PROPERTY SITUATE IN FOREIGN COUNTRY.

An agreement to sell land situated in a province of Canada may be ordered by a Court thereof to be specifically performed by a vendor resident in the province despite the fact that a part of the price to be paid is land situated in a foreign jurisdiction: there is mutuality of remedy when the parties can obtain similar remedies in different jurisdictions.

2. APPEAL (§ I B—5)—ORDER OF REFERENCE—FINALITY OF JUDGMENT.

Questioned whether an order directing a reference is a "final judgment" to give the Court jurisdiction to entertain an appeal on the merits of the case.

[*Tucker* v. *Jones*, 25 D.L.R. 278, 8 S.L.R. 387, affirmed.]

Statement.

APPEAL from the judgment of the Supreme Court of Saskatchewan, 25 D.L.R. 278, 8 S.L.R. 387, which varied the judgment of Newlands, J., at the trial, whereby specific performance was decreed, by directing that there should be a reference for inquiry and report on the plaintiff's title to foreign lands and, on the filing of such report, that either party should be at liberty to apply for such judgment as he might be entitled to.

Haydon, for the appellant.

G. F. Henderson, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I entertain grave doubts whether this appeal ought to be entertained by this Court. There is no judgment in the action; the decree directing a reference to the local registrar does not order that on the respondent proving title the appellant is to make a conveyance of his lands in Saskatchewan, but, on the contrary, orders that, on the report being filed, either party is to be at liberty to apply for such judgment as he may be entitled to.

I am, with much diffidence, of opinion that the appeal must fail on the merits. There seems to me nothing in the first point taken by the appellant that, the respondent not having proved his title at the trial, a reference should not have been directed. The plaintiff, in bringing his action for specific performance, was not

obliged to prove his title. The rule, as I understand it, is that the defendant is entitled to ask for a reference on the title, which the Court will grant as a condition of extending its assistance to the plaintiff.

As to the second point, the appellant claims that there was no mutuality of remedy, but that is, I think, unfounded. It would have been open to the appellant to go, for specific performance, to the Courts in whose jurisdiction the lands were situate precisely as the respondent has done. The question of mutuality depends upon each of the parties having their remedy, not upon the particular Court in which it is to be sought. I think it makes no difference that the lands are in a foreign country rather than in another province of the Dominion. If they had been situate in Ontario, it might have been necessary for the appellant to go to the Ontario Courts for a decree for specific performance, but he would none the less have had his remedy equally with the respondent.

The present is not in the least like reported cases in which the Courts have refused specific performance on the ground of want of mutuality. These all assume that, if the Court in which the action is brought cannot give a remedy, the defendant has none. In the case of *Flight* v. *Bolland*, 4 Russ. 298, an infant having brought suit for specific performance, the bill was dismissed because, of course, the defendant could have brought no such suit against the plaintiff, and, therefore, the remedy was not mutual.

There might, perhaps, be cases where the Courts of the foreign country would not afford relief, though the present is, doubtless, not one of them. It must, however, lie on the party claiming that there is no mutuality in the contract, because he is without remedy to shew that this is so. The respondent went into the foreign country and made his contract for the purchase, by exchange, of lands in that country, and there should certainly be no presumption that he cannot enforce his contract in the same way that the respondent can do in this country.

DAVIES, J.:—This was an appeal from a judgment of the Supreme Court of Saskatchewan varying the judgment of the trial Judge, which judgment had decreed specific performance of an agreement made between the parties for the sale of a piece of land in Saskatchewan from defendant, appellant, to plaintiff, and also directing a reference on other points. DAVIES, J.

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The decree of the Appellate Court now appealed from and under consideration merely directed that there should be a reference as to the plaintiff's title to the piece of land in Iowa which the plaintiff was to convey to the defendant in exchange for the Saskatchewan lands and for a report upon such title, and that, upon such report being filed, either party should be at liberty to apply to the trial Judge "*for such judgment as he would be entitled to.*" The appellant's contentions were that the respondent, plaintiff, had failed at the trial to prove his title to the Iowa lands, and that no reference should have been made as directed; and, secondly, that the plaintiff being a non-resident, the Court could not enforce the contract as against him, and had, therefore, no jurisdiction.

As to the latter point, I agree with the judgment appealed from that, as the decree sought for by the plaintiff is for specific performance of the contract respecting the Saskatchewan lands, the Court has jurisdiction to make a decree, and that the reference directed to be made as to the title of the Iowa lands to be exchanged for the Saskatchewan lands is a matter of procedure and practice. The fact of the plaintiff being a non-resident could not, in my opinion, take away the jurisdiction they would otherwise possess; nor could the fact that the consideration for the sale of the Saskatchewan lands to the plaintiff was the conveyance to the defendant of certain lands in Iowa have that effect.

The Appellate Court had jurisdiction to deal with the matter before it, namely, the contractual obligation of the defendant to convey the Saskatchewan lands to the plaintiff, and I approve of the disposition they made of the appeal. It may be argued with much force that, being a matter of procedure and practice and the exercise of a judicial discretion, this Court would not interfere with the judgment appealed from on that ground. It must be remembered, however, that this judgment is "in the nature of a suit or proceeding in equity," and that our jurisdiction is governed by sub-sec. *c* of sec. 38. It is not necessary that a judgment under this section, to be appealable, should be a "final judgment."

In dismissing the appeal, I desire, in view of the broad language of sub-sec. *c* of sec. 38, to base my judgment upon the ground that the Court below had jurisdiction to deal with the appeal

before them, and that the disposition they made of the appeal was a proper one under the circumstances.

IDINGTON, J. (dissenting):—These litigants entered into a contract in writing, in the United States, where respondent resided and still resides, whereby the appellant agreed to sell to him a section of land in Saskatchewan at the agreed consideration of $22,800, and, in consideration thereof, the respondent agreed to sell and convey to appellant real estate situate in Iowa same being put in at an agreed consideration of $16,000.

The respondent agreed thereby to execute a mortgage to the appellant on the Canadian lands for $6,800.

It was well understood by the parties, at the time of the making of the contract, that appellant only owned the half of the section of land he professed to be selling, but he said he had the authority of his brother, who owned the other half of the section, to deal with the whole, as they express it.

It turned out that the brother, though assenting in general terms to appellant's desire to sell and dispose of the whole section, never intended to assent to an exchange, and, perhaps, never had heard, till the contract was made, of the exchange proposal now in question, and, when told of it, at once refused to have anything to do with such a transaction.

The respondent sued both brothers for specific performance. At the trial the action was dismissed as against the one who had not signed the contract.

Evidence was given shewing that the north half-section, belonging to the brother thus dismissed, was worth $30 an acre, and the south half, belonging to appellant, which was improved, and had buildings on it, was worth $40 an acre.

The price fixed, for the whole section, by the contract, works out about $35.66 per acre for the whole.

The respondent, upon failing as against the brother of appellant, offered in Court to accept the south half-section belonging to the appellant, and give in exchange the Iowa property.

This the trial Judge assented to and gave judgment accordingly. There was evidence given professing to prove the title of the respondent to the Iowa property. The attorney giving that evidence stated, in doing so, the conclusion which should have been left to the Court to draw from legal facts laying the foundation for the Court to do so.

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Because of there being no evidence otherwise enabling the trial Judge to act upon such a transgression of the rule in such cases, the Court below set the judgment aside, and directed evidence to be taken by the registrar as to the title and to report thereon, and that either party should then be at liberty to apply to the trial Judge for such judgment as he might be entitled to.

The appellant contends this was not the judgment the Court of appeal should have given, but one dismissing the action on the grounds that the respondent had failed in his proof of title, and that, in any event, the production of such proof and determination thereof involved exactly such questions as would have arisen had the appellant been seeking specific performance of the contract to convey Iowa lands, which the Court could not grant under the existent facts.

In other words, he says there never existed that mutuality of contract

> which might, at the time it was entered into, have been enforced by either of the parties against the other.

I quote the pith of the first sentence of the chapter on "want of mutuality in the contract" in Sir Edward Fry's work on Specific Performance.

I felt disposed, during the argument, to think the point of view presented by Elwood, J., possibly maintainable by looking at the land in the foreign country as simply the consideration, and all needed herein was to find if that was ascertainable and ready to be delivered as any other price where specific performance might be ordered. But, upon reflection and an examination of the authorities, it seems to me clear such a proposition is more plausible than sound in law, and is untenable.

The contract, as amended by the Court, is simply one of exchange of two parcels of land respectively situated in different countries.

In one way of looking at the matter, this is a claim by the purchaser to have a contract for the purchase of land in Canada specifically enforced. In the other way of looking at it, this is simply a claim by the vendor to have a contract for the sale of land in the United States specifically enforced by the recovery of the consideration therefor.

If we look at the new contract made by the Court and to be enforced, the question is reduced to that simple form, if we strip

the matter of mere forms and verbiage, and have due regard to that which has become the substance of all that is involved.

I have been unable to find any case in which exactly the like case to this has been decided. But there are many cases in which the principle has been affirmed that the Courts must refuse to entertain any claim as enforceable against the lands in a foreign jurisdiction. Where the party against whom relief is sought, it may be in relation to lands abroad, has been found resident within the jurisdiction of the Court, it has exercised jurisdiction in a variety of ways, as illustrated in the case of *Penn* v. *Lord Baltimore*, 1 Ves. Sr. 444, and in White and Tudor's Leading Cases, vol. 2, p. 1047, and in 1 Eq. Cas. Abrgd. 133, there are to be found a number of cases cited which must be considered, if one would be seised of the principle involved.

The elaborate judgment of Lord Chancellor Herschell in the case of *British S. Africa Co.* v. *Companhia de Moçambique*, [1893] A.C. 602, has a most instructive review of the foundation upon which such a jurisdiction rests, and, at p. 626, contains the following concise statement of what I take to be the law:—

> Whilst Courts of equity have never claimed to act directly upon lands situate abroad, they have purported to act upon the conscience of persons living there. In *Lord Cranstown* v. *Johnston*, 3 Ves. 170, 182, Sir R. P. Arden, M.R., said: "*Archer* v. *Preston*, 1 Eq. Cas. Ab. 133 cl. 3, *Lord Arglasse* v. *Muschamp*, 1 Vern. 75, 125, and *Lord Kildare* v. *Eustace*, 1 Vern. 419, clearly shew that, with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situate in England."

The distinction made throughout in all the leading cases is between remedies *in personam* and *in rem*.

Apply the principles involved to the facts herein, and we are met by two or three outstanding facts which would seem to render a suit by the appellant against the respondent for specific performance as hopeless as one can conceive.

The contract was entered into in the foreign state. The land is there. And the respondent, the vendor of that land, resides there, and, so far as we know, never was in Canada before the proceedings herein, except to inspect this land offered in exchange, and he then had 15 days to elect whether he should proceed with or abandon the contract. His presence at the trial as a witness could certainly make no safe foundation for applying the rule as

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laid down in Fry's work or above quotation from Lord Herschell's judgment.

How, then, can we find that mutuality the law requires?

The case does not fall within any of the numerous exceptions to the rule. Surely there is quite as much want of mutuality as in the case of an infant as exemplified in the case of *Flight* v. *Bolland*, 4 Russ. 298, where specific performance was sought by an infant and refused expressly on the ground that such relief could not be obtained by the defendant against him.

There is an article by the late Professor Ames, of Harvard, to be found in a posthumous publication of his lectures on Legal History, etc., criticizing the statement of the law by Sir Edward Fry in the chapter I have above quoted from, in which he questions the accuracy of the definition which I am for the present accepting. The exigencies of this case do not require me to re-examine Sir Edward Fry's proposition, but, nevertheless, the article is well worth reading and consideration by those who would understand the doctrine of mutuality of contract in question.

It is to be observed that the fundamental rule of the game resting on mutuality is, perhaps, obscured by the numerous exceptions and subsidiary rules, yet the former seems firmly established, even if the masters of the law disagree in regard to the form of its expression.

There is another point taken against the judgment in the appellant's factum. It is submitted that the *cy-près* doctrine invoked in dealing with the agreement and compensation made in the way I have mentioned does not apply to this case.

The reason assigned in the factum seems merely a repetition of want of mutuality, but, on examining the evidence, there is, to my mind, a much graver objection. It is this:—The appellant never pretended he owned any but half of the section, and merely pretended he had authority from his brother to deal with his half thereof brought in question.

When a man has, in error, made a contract for sale of more than he has, and the parties he is dealing with know it, or should from the nature of the transaction have known it, the Court does not permit of abatement of price by way of compensation to a purchaser, or, in other words, attempt to make a new equitable bargain for the parties.

See the cases of *Castle* v. *Wilkinson*, 5 Ch. App. 534; *Avery* v.

Griffin, L.R. 6 Eq. 606; *Cahill* v. *Cahill*, 8 App. Cas. 420; *Rudd* v. *Lascelles*, [1900] 1 Ch. 815, and the case of *Mortlock* v. *Buller*, 10 Ves. 292, at 316, where the principle is stated upon which the Court acts.

I cannot conceive the doctrine of compensation applicable when, as here, the parties knew the appellant had, in fact, no title, and depended on his assurance of authority as an agent.

In that case I think all the respondent can claim is the expense he incurred or was put to by reason of the failure of the agent in warranting his authority when he had none, or at least none which would cover the contract entered into.

I would be disposed to say, in order to end, if possible, this litigation, that if the respondent assents to the abandonment of such claim for damages, the action should be dismissed without costs, otherwise the appeal should be allowed with costs throughout.

Since writing the foregoing, my Lord the Chief Justice calls my attention to the case of *Montgomery* v. *Ruppensburg*, 31 O.R. 433, which I cannot follow, especially as, I respectfully submit, the cases relied upon do not touch the principle involved. One of the cases apparently in point goes upon the exceptional case of the contract being unilateral, or, at all events, so as regards the Statute of Frauds. That class of cases and many other exceptions are dealt with both by Sir Edward Fry, affirming the principle I rely upon, and by the late Professor Ames in the work I have referred to above.

Since writing above, the decision of this Court, in *St. John Lumber Co.* v. *Roy*, 29 D.L.R. 12, 53 Can. S.C.R. 310, renders it doubtful if this case is appealable. My reasons in support of my dissent in that case may suggest grounds for distinguishing. And, if we have jurisdiction, I abide by my reasons herein expressed as above.

But if the judgment appealed from should be treated merely as an exercise of discretion, the case of *Union Bank of Halifax* v. *Dickie*, 41 Can. S.C.R. 13, would apply.

ANGLIN, J.:—By an agreement in writing, dated December 12, 1913, the defendant William W. Jones agreed to sell to the plaintiff the whole of s. 17, in tp. 4 and r. 3, west of the 2nd m., in the Province of Saskatchewan, in consideration of the sum of

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$22,800, payable, as to $16,000 thereof, by the conveyance to him of certain property in the town of Jefferson, in the State of Iowa, U.S.A., and, as to the balance of $6,800, by the delivery of a mortgage for the said sum, upon terms therein set out, to be made by the plaintiff in favour of the defendant.

The plaintiff sues for specific performance of this agreement. At the trial it developed that the defendant, Wm. W. Jones, could not make title to the north half of the section, which was owned by his co-defendant, John R. Jones, who was not a party to the agreement. The action was dismissed as against John R. Jones. Upon the defendant, Wm. W. Jones, objecting that a decree could not be made against him under the agreement sued upon involving payment by him of $3,200, the difference in value between the land owned by him and the Jefferson property, the respondent, through his counsel, offered to take the defendant's half-section in exchange for his Jefferson property without any cash compensation or difference in price. This adjustment must have been agreed to by the defendant if the Court should be of opinion that the facts that the plaintiff is a foreigner and that the property which he had agreed to convey in exchange is foreign land did not disentitle him to the relief of specific performance, and if his title to the Jefferson property were sufficiently proved. I say "must have been agreed to," because the trial Judge, in his reasons for judgment, says: "I am of the opinion that the plaintiff is entitled to specific performance under the terms agreed to in Court," and, in the defendant's appeal to the Court *en banc* from the judgment entered for specific performance, it was not urged that such an agreement had not in fact been made at the trial. The defendant's inability to convey part of the property which he had undertaken to give in exchange cannot avail him as a defence to the plaintiff's action for specific performance of the contract, so far as he can carry it out, on the basis of an even exchange, the plaintiff relinquishing all claim to payment of the difference between the value of the Jefferson property and the half-section of the Saskatchewan land which the defendant is able to convey: Fry on Specific Performance (5th ed.), pp. 599 *et seq.* Moreover, in view of what occurred at the trial, it is, in my opinion, now too late to urge any such defence.

The decree of the trial Judge declared the right to specific performance, referred a matter of adjustment of insurance to the

local registrar, and ordered the defendant to convey his Saskatchewan land upon the plaintiff executing and delivering to him a good and sufficient deed of the Jefferson property.

On appeal to the Court *en banc*, as appears from the judgment of Elwood, J., only two objections were urged against this judgment. That Judge says:—

> The defendant appeals and contends that the plaintiff has not made out a good title to the Iowa property, and also that the Court will not decree specific performance because the claim depends on title to land in a foreign country.

The Appellate Court was of the opinion that, although the fact that the land to be conveyed by the plaintiff was situated abroad did not preclude specific performance being decreed, the plaintiff had not proved his title to it. Instead of dismissing the action, however, the Court, in the exercise of its discretion, referred it to the local registrar to inquire into and report upon the plaintiff's title, and ordered that, upon such report being filed, either party should be at liberty to apply to the trial Judge for such judgment as he may be entitled to. The defendant now appeals asking that this action be dismissed on two grounds, in addition to that with which I have already dealt, namely, (*a*) that the fact that the plaintiff's property is foreign land prevents the Court decreeing specific performance; (*b*) that the plaintiff should not have been given a second opportunity to prove his title.

As I understand the position of the action, and as counsel for the plaintiff conceded, except perhaps the futility of the defence based on the defendant's inability to convey the north half of the section in question, no substantive right of either party has been determined. The judgment of the provincial Appellate Court is not final under sec. 2(*e*) of the Supreme Court Act, as amended by 3 & 4 Geo. V., ch. 51, sec. 1. While it may strictly be appealable under sec. 38 of the Supreme Court Act as a judgment in an equitable action (see also sec. 45), having regard to the purely discretionary character of the order made and to the fact that it determines nothing against the appellant, there would seem to be grave grounds of objection to this appeal being entertained at all. Moreover, although, there being no cross-appeal, we should assume that the evidence of title adduced by the plaintiff and accepted by the trial Judge as sufficient was, in fact,

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insufficient, it would require a very strong and very clear case indeed to justify our interfering with the discretion exercised in giving the plaintiff another opportunity to prove his title, and dismissing his action solely on the ground that he had had his day in Court.

It is perhaps better, however, that we should express our view upon the other ground of appeal, because, if it should be well taken, the reference directed as to title and proceedings consequent thereon would be useless, and the action should have been, and should now be, dismissed.

This question was determined favourably to the plaintiff by Sir Wm. Meredith, C.J.O., when Chief Justice of the Common Pleas, in *Montgomery* v. *Ruppensburg*, 31 O.R. 433. The defendant's objection is really twofold—because the property to be conveyed by the plaintiff is foreign land, he maintains that there is an absence of the mutuality essential to the remedy of specific performance, and that the Court lacks jurisdiction to entertain this action.

That there is mutuality of obligation under the contract before us is unquestionable, and on that ground the many cases in which Courts of equity have refused specific performance of contracts voidable because of incapacity of one of the parties to the contract, *e.g.*, infancy or coverture, are distinguishable. There is in the present case also mutuality of remedy in the sense that the defendant presumably could have had, in the Courts of Iowa, relief similar to that which the plaintiff is seeking in Saskatchewan. The closest analogy seems to be presented by a case in which the Statute of Frauds would have afforded a defence to the plaintiff had he been sued for specific performance by the defendant. The plaintiff renders the remedy mutual by bringing the action, and on that ground is allowed to maintain it: Fry on Specific Performance (5th ed.), par. 470-1. Unilateral contracts afford other instances.

If the position of the parties were reversed—that is, if the defendant, resident within Saskatchewan, were the owner of the foreign land and the plaintiff, resident abroad, the owner of the land in Saskatchewan—I could understand the objection taken to the jurisdiction of the Court, although I would consider it equally untenable. What is sought in this action is to enforce the conveyance by the defendant, a resident of Saskatchewan, of property

in that province in exchange for other property (whether within or without the province is immaterial), which the plaintiff is ready and willing to transfer to him.

The jurisdiction of Courts of equity which act *in personam*, to decree specific performance of a contract for the sale of foreign land, where the person against whom relief is sought, and whose conscience is bound by the agreement, resides within the jurisdiction, is well established: *Penn* v. *Lord Baltimore*, White & Tud. 1 L.C. Eq. 800, 804; *British S. Africa Co.* v. *Companhia de Moçambique*, [1892] 2 Q.B. 358, pp. 363-4; [1893] A.C. 602, at 626; *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *Ex p. Pollard*, 1 Mont. & Ch. 239, at 250; *Lord Portarlington* v. *Soulby*, 3 My. & K. 104, at 108; *Archer* v. *Preston*, 1 Eq. Cas. Ab. 133, Cl. 3. Where the parties were domiciled and the property was situate abroad, it was held, in *Davis* v. *Park*, 8 Ch. App. 862*n*, that, notwithstanding that the plaintiff and one of the two defendants had come within the jurisdiction, the Vice-Chancellor had *exercised a proper discretion* in discharging an order made in an action for specific performance giving leave to serve the defendant, who was without the jurisdiction. Moreover, since the jurisdiction rests upon some contract or equity between the parties which presents a case for its exercise *in personam* (*Norris* v. *Chambres*, 29 Beav. 246; 3 DeG., F. & J. 583; *Re Hawthorne*, 23 Ch. D. 743), Courts of equity will not entertain actions to determine other rights or questions of title in regard to immoveable property situate abroad (*Deschamps* v. *Miller*, [1908] 1 Ch. 856), or claims which must be enforced directly against the foreign land: *Black Point Syndicate* v. *Eastern Concessions Ltd.*, 79 L.T. 658; *Grey* v. *Manitoba and N.W.R. Co.*, [1897] A.C. 254. But no such difficulty presents itself in this case. By bringing his action in the Supreme Court of Saskatchewan, the plaintiff has submitted himself to that Court's jurisdiction *in personam*. He has waived whatever right he had to be sued upon his contract in the forum of his domicile, and has made the remedy in the Saskatchewan Court mutual: *Martin* v. *Mitchell*, 2 J. & W. 413, at 426-7. It is in the power of that Court to provide, as was provided in the decree pronounced by the trial Judge, that the defendant shall be required to convey only upon the plaintiff making title and conveying his foreign property, which he has offered to do. Indeed, if it be thought advisable for the protection of the defend-

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ant, the Court may require that the conveyance of his property to the plaintiff shall remain in the hands of its officer, and shall not be delivered to the plaintiff until his conveyance of the Iowa property has been duly recorded and the officer is satisfied that a clear and satisfactory title to it has been vested in the defendant. The plaintiff seeking relief must submit to whatever terms the Court, in the interests of justice, may impose as a condition of granting it. He who seeks equity must do equity. The plaintiff, suing in the Court of Saskatchewan, has also submitted to its jurisdiction to decree rescission of the entire contract should he be unable, or for any reason fail, to carry out his obligations under it or to fulfil whatever terms or conditions the Court may impose upon him.

But, as I have said, I cannot appreciate the ground of the objection made to the jurisdiction. I am unable to find any satisfactory ground of distinction between foreign land and money or chattels as the consideration for and upon receipt of which the defendant is to be required to convey his property.

I would, for these reasons, affirm the judgment of the Supreme Court of Saskatchewan, and dismiss this appeal with costs.

Brodeur, J.

BRODEUR, J.:—This appeal should be dismissed. The appellant, Jones, practically obtained from the Court of Appeal all he required to protect his rights. The objections which he now raises might and will be more properly dealt with when the trial Judge is moved to render the judgment which either party might be entitled to. *Appeal dismissed.*

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CANADIAN NORTHERN R. CO. v. DIPLOCK.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin, and Brodeur, JJ. May 25, 1916.

CARRIERS (§ II H 1—141)—LIABILITY FOR INJURY TO TRESPASSERS —NEGLIGENT EVICTION.

A railway company is liable to a trespasser for damages sustained by him in consequence of the reckless indifference of a brakeman, amounting to negligence, while ejecting another trespasser from the train.

[*Diplock* v. *Can. North. R. Co.*, 26 D.L.R. 544, 9 S.L.R. 31, affirmed.]

Statement.

APPEAL from the judgment of the Supreme Court of Saskatchewan, 26 D.L.R. 544, 9 S.L.R. 31, affirming the judgment entered at the trial by Elwood, J., on the findings of the jury, in favour of the plaintiff for damages assessed at $1,730 with costs.

O. H. Clark, K.C., for appellants.

Chrysler, K.C., for the respondent.

FITZPATRICK, C.J.:—The questions submitted to the jury are so involved and so numerous as to lead necessarily to unsatisfactory results. They do not, however, appear to have been objected to.

From the answers we must assume the following facts are found: (*a*) that plaintiff, stealing a ride on the company's train, sought refuge on the ledge of the tender with the witness Thacker; (*b*) that the brakeman Wagner knew that both men were on the train when it started from the station; (*c*) that, instructed by the conductor to put them both off, he went forward and ordered them both off; (*d*) that Wagner, without any attempt at investigation to ascertain the relative positions of the men, shoved Thacker off and in so doing shoved the plaintiff off also; (*e*) that the reasonable and probable result of Thacker being put off was that plaintiff would go also and that the speed of the train made it dangerous to put the men off at the time.

Both plaintiff and Thacker were trespassing, but, although the general principle is that a man trespasses at his own risk, it is undoubted that in this instance it was the duty of the railway officials when aware of the presence of the two trespassers not to put them off in such a manner as to endanger their safety. Sec. 281 of the Railway Act, although not directly in point here, is an application of this general principle, particularly when read with the instructions of the company that the train should be stopped before putting anybody off.

Whether, in the circumstances, Wagner was acting within the scope of his employment in view of the evidence is doubtful, but the point was not raised either here or below and he apparently thought that he had the authority of the conductor. *Vide Hutchins* v. *London City Council*, 38 Times L.R. 179.

There is no doubt that on the findings of the jury, and there is ample evidence to support them, unnecessary violence was used towards Thacker and his removal from the train in the circumstances endangered his safety. If the accident had happened to Thacker there would be little doubt that he would have his recourse against the company. Now, as to the plaintiff, Wagner had reason to believe that both men were together, otherwise he would not have ordered them both off. And in shoving Thacker off the train improperly he caused the injury of which plaintiff

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complains. If Wagner was acting within the scope of his employment, and this apparently is not denied, plaintiff must succeed. The principle of law is that a tort-feasor must be assumed to have contemplated and be liable for all those injuries which result from the wrongful act together with such incidents as a reasonable man might in the circumstances have expected to result in the ordinary course of nature. *Fletcher* v. *Smith*, 2 App. Cas. 781, in 1877, at 787, 788; *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524. The rule of the ordinary course of nature and probable consequences "is after all only a guide to the exercise of common sense." And the jury have found on the evidence that the fall of plaintiff from the train was the reasonable and probable consequence or result of the violence used improperly to eject Thacker. When we consider the dark night, the narrow ledge on which both men stood, the unnecessary violence of Wagner's attack on Thacker and his knowledge of the plaintiff's presence somewhere on the ledge, the finding of the jury must be sustained.

I would dismiss with costs.

Davies, J.

DAVIES, J. (dissenting):—This is an appeal from a judgment of the Supreme Court of Saskatchewan affirming the judgment for the plaintiff entered by the trial Judge on the findings of the jury. Newlands, J., dissented on the ground that the plaintiff was one of two trespassers stealing rides upon the railway train and that the trespasser's only right in such cases is that

> the railway company must not wilfully injure him or unnecessarily and knowingly increase the normal risk by deliberately placing unexpected dangers in the way

and that it had not been proved or found by that jury that the company or its servants had done so.

The admitted facts are that the plaintiff and one Thacker were stealing rides upon the appellant's railway and were discovered by the conductor while the train stopped at Hanley Station, a small side station on the railway line. The conductor ordered them off the train and they got off and walked across the track to the east side and hid themselves behind some box cars there. The plaintiff says that as soon as the train began to move he and Thacker climbed on again between the tender of the engine and the baggage car, Thacker going ahead, and that when he (Diplock) got up, Thacker had already taken up a position alongside of the ladder which ran down the centre of the back of the tender and that he was standing on the ledge of the tender. He says:—

Thacker was holding on to the ladder and he (Diplock) was holding on to the hand-rail at the outside.

His position was either on the ledge of the tender or on the steps leading to it. The only light there was what was shining out of the car door. The brakeman says he only saw "just one man" on the back of that tender, that he "did not know that the other man was on the outside on the west side" and that he "did not see him at the time."

Now, whether the plaintiff was actually upon the ledge holding on the hand-rail or was on the step and so holding is uncertain. The jury did not find that he either saw or should have seen him though they answered the question whether he should have investigated where Diplock was before shoving off Thacker in the affirmative. Answering the question of fact "whether Wagner knew that Diplock was in the position he was" they say "dubious." The question whether he should have investigated and found out is one of law, not of fact for the jury. The facts as stated by the brakeman are that, when he opened the door of the baggage car, he saw only one man on the ledge, that he called to him and asked him to come in the car; that the man refused, and he (Wagner) grappled with him and pushed him off. It may well be that if Thacker who was seen by Wagner and pushed by him had been injured the company would under the findings of the jury as to the dangerous rate of speed of the train have been liable to him in damages. But how can that liability arise with respect to a trespasser whose presence there the brakeman did not know of? The jury were unable to find that Wagner knew that Diplock was in the position he was. Without such a finding it is impossible for me to hold that the company should be held liable.

Plaintiff was a trespasser. He was trespassing at his own risk. The company was undoubtedly under a duty not wilfully to injure him. But how could they be said to have wilfully injured him when they did not know of his presence there? It is said they must be held to have known because the conductor told the brakeman there were two men stealing a ride and to put them off. But the brakeman swears that when he went to put them off he only saw one man and did not see the other. The jury cannot have disbelieved him or they could not have found it was "dubious" whether Wagner knew that Diplock was in the position

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he was. If the knowledge of Diplock's position at the time he pushed Thacker off was known to Wagner, the brakeman, there might be a very strong contention made that the company was liable for damages to Diplock for any injuries he sustained on the ground that he had been wilfully injured by Wagner's improper and illegal action. But he could only recover in cases where there was either wilful injury caused to him or where the deliberate action of one of the company's servants placed unexpected dangers in his way. The company could not be held liable to a trespasser for the mere negligence of their servants. There must be much more than negligence. There must be deliberate or wilful wrongful action causing the injuries complained of.

If Wagner did not know and, in the absence of a finding to the contrary, we should accept the evidence that he did not, then no such responsibility arises.

I am quite at a loss to understand how it can be successfully argued that because the brakeman was told to go and put off two men who were stealing rides and in discharging that duty he found only one man that he was bound before putting that one off to institute a search for the other. He may well have assumed that when he gave the order to the man he did see to get off the other man whom he did not see obeyed it. But whether that be so or not he neither saw nor knew of the presence of the other man (the plaintiff) and therefore owed him no duty.

The law on the subject of the liability of a railway company is laid down by the Judicial Committee of the Privy Council in the case of *Grand Trunk R. Co.* v. *Barnett*, [1911] A.C. 361, at 369, as follows:—

> The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled, unnecessarily and knowingly to increase the normal risk by deliberately placing unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances. A carrier cannot protect himself against the consequences which may follow on the breach of such an obligation (as for instance, by a charge to cover insurance against the risk); for there can be no contracts with trespassers; nor can he prevent the supposed obligation from arising by keeping the trespasser off his premises, for a trespasser seeks no leave and gives no notice.
>
> The general rule, therefore, is that a man trespasses at his own risk. This is shewn by a long line of authorities, of which *Great Northern R. Co.* v.

Harrison, 10 Ex. 376; *Lygo* v. *Newbold*, 9 Ex. 302, and *Murley* v. *Grove*, 46 J.P. 560, are familiar examples.

Accepting this law and applying it to the findings of the jury and the facts as admitted, I am of opinion that the appeal should be allowed and the action dismissed with costs.

IDINGTON, J.:—The respondent and one Thacker were stealing a ride on appellant's train. When, as it was starting, the conductor said to the brakeman, Wagner,

> There are two men on the end of the car; go and put them off.

It was at night time. The men were standing on the ledge of the tender next the baggage car. Wagner proceeded to the place indicated and tried ineffectually to get Thacker into the baggage car and then said to him "well get off" and gave him a shove which had the desired effect.

The jury find the train was then moving at a speed such as to make it dangerous for him to alight. The result upon respondent of the shoving of Thacker by Wagner appears in the answers to the questions, as follows:—

1. Q. Was the plaintiff injured by the wheels of the C.N.R. train passing over his feet? A. Yes. 2. Q. How did he get under the train? A. Result of being pushed. (a) Q. Did Wagner assault Thacker by kicking or pushing? A. Yes. (b) Q. Where was Diplock when Wagner attacked Thacker? A. On ledge of tender, west of Thacker. (c) Q. Was the reasonable and probable result of Wagner kicking or pushing Thacker that Diplock would be pushed off the train? A. Yes. (d) Q. Did Diplock fall off the train as a result? A. Yes. (e) Q. Was that the cause of his injury? A. Yes. (f) Q. Was Wagner's conduct towards Thacker adopted with the object of putting Thacker off the train? A. Yes. (g) Q. If yes, was Wagner acting in course of his employment? A. Yes. (h) Q. Did Wagner know that Diplock was in the position he was? A. Dubious. (i) Q. If he did not know, should he have investigated to find out where Diplock was before he shoved or kicked Thacker? A. Yes.

The other questions and answers relevant to the issues involved in these are as follows:—

(m) Q. Was the speed of the train when ordered to get off such as to make it dangerous for him to alight? A. Yes. (n) Q. Did Wagner know it was dangerous, or should he have known, having regard to all the circumstances? A. Yes. (o) Q. Was the conduct of Wagner reasonable and proper? A. No. (p) Q. Was Wagner, in ordering Thacker and Diplock off the train acting in the course of his employment? A. Yes.

The finding of the jury as to the rate of speed of the train shews it was an unlawful assault and battery that was thus committed upon Thacker by Wagner. As a legal result thereof, he and his employers are liable for the consequences thereof to others.

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This is not a case of negligence in which other considerations might have been involved as in *Grand Trunk R. Co.* v. *Barnett*, [1911] A.C. 361, so much discussed in the case.

It is the law involved in the well known squib case *Scott* v. *Shepherd*, 1 Sm. L.C. (12th ed.) 513, that should be our guide herein subject to the qualifications to be found as the result of later development of the law resting upon the principle laid down in that case.

The above question (c) and answer thereto seems to me to cover all that need concern us as to these qualifications.

The undisputed terms of the conductor's order indicated to the brakeman that there were two men at the place where the scuffle was had and that both were to be dealt with. Thus the answer of the jury was amply justified by the facts.

The questions of wilfulness and actual accurate knowledge of how these men stood, though much discussed below and in argument here and held by the jury "dubious" seems to me beside the question.

Assuming in such case the brakeman had, as I imagine probable, authority to arrest Thacker and hand him over to the police as a trespasser and had been merely discharging that lawful duty, when a scuffle ensued as result of Thacker's resistance, and the respondent had as part of the consequences accidentally been knocked off the car and injured he, as a trespasser, could have had no remedy.

I assume, in stating the law thus that there had been in such supposed case no undue violence on the part of the brakeman and that he had been duly and properly discharging his duty to arrest and keep Thacker in charge.

I desire only to illustrate the wide difference that exists between the case of a man doing an unlawful act and that of a man doing a perfectly legal act.

In the latter case knowledge and wilfulness might have a very important bearing in determining the consequences of what one so placed should be held liable for in a way that is not open to him doing an unlawful act to urge on his behalf.

There was much made in argument, and by the Judge who dissented in the Court below, of the inconsistent nature of the questions first put and later by reason of the trial Judge putting the following question:—

(j) Q. If Diplock jumped from the train and was not shoved off did he jump because of any order or command of Wagner? A. Yes.

If there had been nothing else in the case than this question and some others following it evidently related thereto or intended to be so there would have to be a new trial to determine the fact of whether Diplock in fact did jump in obedience to what was said and was not pushed off for strangely enough there was no question put to elicit the fact.

The putting of such an hypothetical case and getting an answer thereto leads nowhere.

However, the whole of these academic questions relative to an assumption of jumping off are rendered harmless as they are needless by the express answer to the second question and others I have quoted.

I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Very reluctantly, because of the unmeritorious features of the plaintiff's case and because I realize and appreciate the grave dangers and difficulties to which trainmen are exposed in dealing with such characters as the plaintiff and his companion Thacker, when stealing rides on trains, I have reached the conclusion that this appeal cannot succeed. A perusal of the record has left me under the impression that, if trying it without a jury, I should not improbably have dismissed the action on the ground that it had not been satisfactorily shewn that the plaintiff was injured as a result of what took place between the brakeman, Wagner, and Thacker. But findings of the jury which have not been seriously attacked establish that the plaintiff was pushed or forced off the defendant company's train, while it was travelling at a speed which made it dangerous for him to alight, as the result of an attempt made by Wagner, in carrying out orders of the conductor, to force the plaintiff's companion Thacker off the train.

I fully agree that if Wagner had not had reason to believe that the plaintiff, Diplock, was in the narrow and admittedly dangerous space between the tender of the engine and the baggage car, when he pushed or shoved Thacker, no liability to Diplock would have been incurred. The plaintiff was a trespasser and liability to him would not arise from any mere negligence. But the railway company's employee was not on that account

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entitled unnecessarily and knowingly to increase the normal risk by placing unexpected danger in his way.

Grand Trunk R. v. *Barnett*, [1911] A.C. 361, at 369.

The jury has not found that Wagner knew "that Diplock was in the position he was." They have found that "he should have investigated" to find where Diplock was before he "shoved or kicked Thacker." Wagner's evidence is that, as the train was about to leave Hanley Station, the conductor said to him,

> There are two men on the end of the car; go and put them off.

He immediately proceeded to do so. He opened the door of the baggage car and saw Thacker standing on a ledge at the back of the tender. He could see only one-half of the back of the tender. The light was weak and uncertain. He says he did not know that the other man was on the west side and that he could not see him. Although he "assumed" there were two men there, he did not take any steps to locate the second man. He did not concern himself about him.

Reading the jury's findings in the light of this evidence, I understand them to mean that, although Wagner did not see Diplock and did not know his exact position, he had reason to believe that he was somewhere in the narrow space between the tender and the baggage car and acted on that assumption, and that in failing to look for him before wrongfully dealing with Thacker in a way which necessarily increased the risk to anybody else in the perilous position in which he had reason to believe the plaintiff might be, he had disregarded the right which even a trespasser has that he should not be wantonly or recklessly exposed to unnecessary risk by one who has reason to believe that his acts will have that effect. The duty of a common carrier to a trespasser is thus stated by Bailey, J., of the Supreme Court of Illinois, in *Chicago, Burlington and Quincy R. Co.* v. *Mehlsack*, 19 Am. St. Rep. 17, at 20:—

> His duty rests merely upon the grounds of general humanity and respect for the rights of others, and requires him to so perform the transportation service as not wantonly or carelessly to be an aggressor towards third persons whether such persons are on or off the vehicle.

An observation of Lord Robson, at p. 371 of the report of *Grand Trunk R. Co.* v. *Barnett*, [1911] A.C. 361, is apt to mislead. Referring to the speech of the Earl of Halsbury in *Lowery* v. *Walker*, [1911] A.C. 10, at 13 he quotes His Lordship as having said that

the word "trespasser" would have carried the learned counsel for the defendant all the way he wants to get

i.e., one would infer from the use made of this passage, to the conclusion of non-liability. But the rest of Lord Halsbury's sentence was

to a somewhat difficult and intricate question of law upon which various views might be entertained.

In the same case Lord Shaw of Dunfermline had pointedly withheld his assent to the pronouncements of Darling, J., and Vaughan-Williams, L.J., in the lower Courts as to immunity for injuries caused to mere trespassers.

Wagner, though aware of Diplock's probable presence in a position of peril, seems to have allowed himself to be carried away by excitement, caused, no doubt, by Thacker's successful resistance to his efforts to draw him within the baggage car and, with reckless indifference to the consequences either to Thacker or to Diplock, tried to push the former off the train. His attitude towards Diplock is probably correctly expressed in his answer "I did not bother my head about him."

Under these circumstances, I think the verdict and judgment for the plaintiff should not be disturbed.

BRODEUR, J. (dissenting):—The jury in their verdict have not found that the brakeman Wagner knew that the respondent, Diplock, was in the position he was in when Wagner tried to push Diplock's companion off the car. Diplock had no business to be on the car of the appellant company; he was even stealing a ride at the time.

The Privy Council in the case of *Grand Trunk R. Co.* v. *Barnett*, [1911] A.C. 361, has decided that

Although the common carriers are under a duty to a trespasser not wilfully to injure him, they are not liable to him for mere negligence and that as the accident was due to the negligence of the carrier's servants and not to any wilful act the trespasser was not entitled to recover.

Applying that decision to the present case I find that the plaintiff respondent was not wilfully injured because the jury have been unable to state in their verdict whether the brakeman knew that Diplock was there.

I think the appeal should be allowed and that the action should be dismissed with costs. *Appeal dismissed.*

MAN.

C. A.

DUTTON v. CANADIAN NORTHERN R. CO.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. June 19, 1916.

1. RAILWAYS (§ II D 7—75)—FIRES—INTEREST OF PLAINTIFF—WRONGFUL OWNER IN POSSESSION.

One in possession of timber which he has wrongfully taken to his limits from government lands has a sufficient possessory title to maintain an action for their destruction by fires caused by sparks from locomotives in violation of secs. 297-8 of the Railway Act (R.S.C. 1906, ch. 37, amended by 1-2 Geo. V. 1911, ch. 22, sec. 10).

2. APPEAL (§ VII L 2—480)—REDUCTION OF DAMAGES.

An award of damages greater than the amount claimed in the pleadings will be reduced on appeal.

[*Dutton v. Can. North. R. Co.*, 23 D.L.R. 43, affirmed except as to damages.]

Statement.

APPEAL from the judgment of Mathers, C.J.K.B., 23 D.L.R. 43, by which he allowed plaintiffs damages to the extent of $41,000 for loss sustained by reason of their timber limit being destroyed by fire from sparks emanating from one of defendants' locomotives. Verdict reduced to $30,299.53.

Howell, C.J.M.

HOWELL, C.J.M.:—I see no reason for interfering with the finding by the Chief Justice as to the cause of the fire, nor would I disturb his conclusion of fact that the defendants did not remove the *onus* which was upon them as to negligence.

The defendants urged strongly that the siding agreement relieved them from liability. Clause 6 of the agreement, set forth in the judgment, provided that the defendants should not be responsible for their own negligence and purported to release them from a direct liability created by statute. The agreement is a printed form and is manifestly one prepared by the defendants for the purpose of protecting them from the additional risk caused by creating another siding, and was not, I should think, intended to protect them from loss by fire to property miles away and not caused in any way by the use of the siding. This fire was caused by a train running through and which did not stop at or use the siding, and I think the Chief Justice did not put a too restrictive meaning to this clause.

The Chief Justice held that the possession of the logs which was proved at the trial to be in the plaintiff was sufficient to entitle him to recover for their value. Counsel for the defendants asked to put in a portion of the examination of the plaintiff on discovery. I have read that portion of the examination, and in it the plaintiff states that a portion of the logs which were burned had been cut on another limit, the property of the government,

upon which, I gather, the plaintiff had no right to cut. The logs so cut had been removed to the plaintiff's limit where they were burned while thus really in his possession, and it appears that the government timber dues were paid upon these logs but apparently without the knowledge of the government that the logs had been wrongfully cut from another limit. In other parts of the case apparently counsel for the defendants endeavoured by cross-examination of the plaintiff to shew that the plaintiff's title to a portion of the logs was that he had cut them upon other portions of government lands to which he had no right and when so cut he moved them upon his own limit where they were burned. As I understand it, the Chief Justice held that as against the defendants' negligence the plaintiff would be entitled to recover the value of the logs, he being in possession by having cut them by trespassing upon the lands of the Government and by moving them upon his own land.

The authorities seem clear that if the plaintiff was bailee of the logs or otherwise lawfully in possession he would be entitled to recover their value. A finder of an article would no doubt in such a case be entitled to recover the full value as in *Armory* v. *Delamirie*, 1 Str. 504, 1 Smith's L.C., 11th ed., 356, where all the authorities are fully discussed.

The very question came up for discussion in the United States in *Northern Pacific* v. *Lewis*, 51 Fed. 658. In that case the plaintiff cut cordwood on the lands of the Federal Government at different places and then hauled it and piled it on other lands belonging to the government near the railway from which place he was loading it on cars and sending it to market. He had a foreman at the piles whose duty it was to rake the ground around it and protect it from fire and ship the same to market. A fire starting from the railway by the negligence of the defendants, the railway company, destroyed the wood. A jury found for the plaintiff, and the matter came up before three Federal Court Judges by way of error, who supported the finding of the jury. At p. 663, the Judge who gave the judgment used the following language:—

> This case comes within the general rule governing the action of trespass for injury to personal property. In such a case possession is *prima facie* evidence of right, and no stranger may disturb that possession without shewing some authority or right from the true owner. The rule applies to the negligent destruction of property, as well as to its wrongful taking and

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asportation. The fact that the land on which the wood was cut was government land, and the wood, when cut and sawed, still belonged to the United States, and the fact that the defendants in error may have been trespassers, can make no difference with the application of the rule. In such a case the defendant is not allowed to justify his own wrong by shewing the plaintiff's wrong, and he is not allowed to question the title of plaintiff in possession unless he connects himself with the true title.

This case went in appeal to the U.S. Supreme Court and is reported in 162 U.S. 366. That Court reversed the decision of the Circuit Court of Appeals above referred to, by holding that because the trespasser had placed the wood upon another portion of government land it still remained the property of, and was in the possession of the government and therefore the plaintiff was not entitled to recover. The Court did not controvert the law set forth in the above quotation, but, at p. 379, used the following language:—

> It is unnecessary to say whether the plaintiff would have proved a good cause of action by proof of possession merely, if the facts in regard to the illegal character of the cutting had also been proved.

In the voluminous notes to the *Armory* case, above referred to, and in *Eastern Construction Co.* v. *National Trust Co.*, 15 D.L.R. 755, [1914] A.C. 197, the English cases are all reviewed and I do not, according to my reading, find any authority where as against a defendant who has been merely negligent the possession of a plaintiff obtained as set forth in the citation from 51 Fed. R. above mentioned is sufficient. In some of the English cases, wide language is used and because of this and of the above mentioned Federal case, I shall, with much doubt and hesitation, support the decision of the trial Judge.

As to the plaintiff's cross-appeal, I have only to say that the facts were fully before the trial Judge, who heard the plaintiff's evidence, and he believed and drew the inference that his sworn statement made to the government, about seven months after the fire, was intended to shew the entire loss. Five years later when he gave evidence he does not intimate that he ever made a subsequent statement as to further loss. It was his duty to keep a daily count of the logs cut and make returns and also to make returns of the logs manufactured and he could readily give the exact numbers by a mere reference to the returns.

The plaintiff had two limits and the logs cut on the northerly one were hauled to the other one where they were burned. In his return as to this northerly limit in the column as to cut logs

there is inserted the words "haul count." The reason for this entry is shewn in the daily cutting return for the northerly limit, ex. 31, and shews why the words were used. He says the same words should have been used in his return of logs on the southerly limit and that his clear and sworn statement of his loss shewn by ex. 27 should be modified accordingly and should only read as the number of the logs drawn to the river bank and should not be held to include the logs burned in the bush. He had made to the government returns of the daily cut of the logs and then he must make a return after that of the disposition of the logs to fix the dues payable, and for this purpose seven months after the fire he made this return. He does not pretend that he ever afterwards during the years that elapsed between the fire and the time he gave his evidence made any other claim that more logs were burned. I not only would not reverse the finding of fact, but think from the evidence that finding was the only conclusion to arrive at.

The plaintiff in his statement of claim, and again in the particulars, gave a detailed statement of the value of the various logs destroyed. At the trial evidence was given for the plaintiff to prove the value and witnesses fixed the value higher than that set in the statement of claim. This was objected to by counsel for the defendants, and the trial Judge, in reply, stated:—

He cannot get any more than he claimed, but there is no harm in showing that the loss was larger.

The statement of claim was not amended nor was there an application to amend. Counsel for the defendants, relying upon this statement, called no witnesses as to value. In giving judgment, the Judge, I understand from inadvertence, calculated the damages upon the higher valuation given by some of the witnesses.

The damages must be reduced to the values put in the statement of claim and particulars.

In the judgment there was an error in additions of the logs burned by 5,000 logs. This is admitted by both parties.

The amount of the judgment must be reduced by these two amounts, leaving it a judgment for the plaintiffs for the sum of $30,299.53. In all other respects the judgment must stand.

The defendant will have the costs of the appeal and of the cross-appeal, which is dismissed.

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Richards, J.A.

RICHARDS, J.A.:—Four questions arise under the defendant's appeal:—1. Were the defendants, if not relieved by the siding agreement, liable for loss caused by the fire; and, if so, was their liability limited, by sec. 298 of The Railway Act, to $5,000? 2. Did the trial Judge err in refusing to admit evidence, that some of the logs burned had been cut on government land by the plaintiff as a trespasser? 3. Does the exemption given by the siding agreement cover what otherwise would be liability for the loss? 4. Should the values of the burned logs, as found by the trial Judge, be left as found, or should they be reduced to the values set up in the statement of claim, which they exceed?

As to the 1st question, I think the evidence justified the findings that the fire which caused the damage was started by the company's locomotive, and that the company failed to shew that they had, as to that locomotive, used modern and efficient appliances, and that they had not otherwise been guilty of negligence. They are therefore not entitled to avail themselves, under sec. 298, of the $5,000 limit of liability.

The evidence referred to in the 2nd question was tendered by the defendants, but the Judge refused to admit it. He found—rightly I think—that, at the time of the fire, the plaintiff was in possession of the logs. The defendants could be in no better position than that of a trespasser, whether the action lay in trespass or trespass on the case. In either way the defendants were wrongdoers.

The law is clear that, as against a wrongdoer, the plaintiff ordinarily need only prove possession. But it is argued that such is not the law where a plaintiff, though in possession, has got such possession solely by his own acts of trespass and has no other title. If shewing the plaintiff to be in that position would be a bar to his recovering, in whole or in part, or would affect the quantum of damages in respect of such logs as could be shewn to have been cut outside of the plaintiff's limits, then the evidence would have been improperly refused and the defendants would be entitled to a new trial.

I have been unable to find any English or Canadian case directly in point. There are plenty of decisions saying that possession is sufficient title as against a wrongdoer. But I find none that clearly say that such possession is, or is not, sufficient

where the plaintiff had been equally a wrongdoer, and, though possessed, had no right to such possession.

As far as I can see, however, the rule, that possession is sufficient, turns on the principle that the wrongdoer defendant is, because of such wrongdoing, not entitled to question the plaintiff's position, and therefore possession, as against him, is sufficient. To allow him to go behind that would be to bring in, as a defence, the rights of third parties through whom the defendant does not claim.

The only English judicial expression of opinion that I can find is that used by Blackburn, J., in *Buckley* v. *Gross*, 3 B. & S. 566 at 574. It is an *obiter dictum* but by a high authority on questions relating to title to goods. As far as it goes it seems to mean that the plaintiff's possession, even if got by wrongdoing, is sufficient title against another wrongdoer. He says:—

> I do not wish to question the doctrine laid down in several cases, that possession of personal property is sufficient title against a wrongdoer; nor that it is no answer to the plaintiff in such a case to say that there is a third person who could lawfully take the chattel from him: and I do not know that it makes any difference whether the goods had been feloniously taken or not.

In *Northern Pacific R. Co.* v. *Lewis*, 51 Fed. 658, a circuit Court of Appeals held that, in a similar case to this, possession by the plaintiff is sufficient. I refer to the extract from it given in the Chief Justice's judgment in this case. That view of the law was not interfered with by the Supreme Court of the United States, 162 U.S. 366, where that decision, in 51 Fed., was reversed because the Court thought the plaintiff did not shew even possession.

On the whole, I am of opinion that the facts sought to be shewn by the defendants would not have affected the plaintiff's right to recover, and that the evidence tendered was rightly excluded.

As to the damages, the authorities I think shew that, as to the logs, if any, cut outside of the limits, the plaintiff could recover the full value.

The 3rd question is fully dealt with by the trial Judge, whose reasoning I adopt.

I think the 4th question should be held in the defendants' favour.

The statement of claim reads:—

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The plaintiff therefore claims damages as follows: 3,250,000 feet of logs stored upon landings of the plaintiff and ready for shipment . . . $32,500.

There are other items given, but the losses of logs in respect of which damages are found in the plaintiff's favour are all covered by the above item. It will be seen that the claim is for $10 per 1,000 ft.

In the plaintiff's evidence, after a statement by him that certain calculations left "a balance of $13.04 a thousand loss," is the following:—

Now, applying that to the total number of feet you gave us, 3,933,000 feet of board measure, how much would that shew your actual loss to be? A. If I haven't made any error in my figures, which is merely a matter of arithmetic, it would be $51,312.40, which represents the loss to the logs on the landings only.

Mr. Clark: I don't suppose my learned friend is going to shew a greater loss than he claims?

His Lordship: He cannot get any more than he claims, but there is no harm in shewing that the loss was larger.

Mr. Clark: It goes in then subject to my objection.

His Lordship: It is a mere matter of calculating the figures he has previously given.

Apparently the plaintiff's counsel did not object to the above ruling, which implied, amongst other things, as I read it, that the values of the logs would not, in computing the damages, be held to be greater than as claimed in the pleadings—that is, not greater than $10 per 1,000 ft. board measure.

No request seems to have been made for an amendment. I do not hold that a Judge is necessarily debarred from giving greater damages than have been claimed. That point need not be considered. But I think that, in view of the foregoing, no greater value should be allowed in this case per 1,000 ft. than that claimed in the pleadings.

Counsel for defendants had surely the right to say that, because of the above, they were not called upon to contest the values in excess of $10 per 1,000, and that, therefore, they called no evidence for that purpose.

With deference, I think the objection should prevail and the values as found be reduced to $10 per 1,000 ft.

The plaintiff cross-appeals as to 10,500 logs, which he says were burned where piled in the bush, they not having been hauled to the river bank.

The trial Judge treated the returns to the government of the

number of logs burned as shewing the total loss from the fire and refused to allow for more than the number so returned.

The plaintiff claims that the logs burned in the bush had not been included in the returns of those burned because, as he avers, no logs were ever returned by him, as cut, until they had been hauled to the river.

He further argues that, as the returns of burned logs were only made for the purpose of informing the government of the number of those already returned as cut, which because of being burned would not be available to manufacture at the mill, they necessarily did not include such as were burned of those as to the cutting of which no returns had been made.

The foregoing is supported by the evidence of the plaintiff who swore that those in the bush, and not hauled, had never been returned, and so none of them were reported as having been burned.

The evidence does shew that many logs that had not been hauled were burned. I think the crucial question as to them, on this cross-appeal, is whether they had been returned to the government as cut. If they had, the presumption is strong that they were included in the report of those lost by fire. If they had not, the presumption is the other way; and, in such case, we should perhaps be justified in holding that the trial Judge had omitted to allow for them when assessing the damages.

The plaintiff's evidence on the above is neither contradicted, nor corroborated, by verbal testimony. But there are a number of returns put in evidence that seem to contradict him. There were also in evidence camp books kept by the plaintiff's agents under the government regulations, in which the number of logs cut day by day had to be entered daily. These books, with an affidavit of their correctness, had to be sent to the government at the end of each season.

It is difficult to see why these camp books should be required if the government were to be informed only of the number of those hauled to the streams on which they were to be floated.

It would have been easy to call, as witnesses, government officials, who would testify as to the point in question. Mr. Freeman, the Crown timber agent at Winnipeg, could doubtless have settled the point. But, though he was actually called by

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plaintiff as a witness on other points, he was asked nothing as to that.

It was suggested that the trial Judge, by mistake, overlooked the logs in the bush. I find that he did not, but that he thought the plaintiff's unsupported testimony as to their not having been returned should not be given effect to as against the presumptions to the contrary, to be gathered from the returns and the camp books.

As he dealt with the question and found as above, I cannot see my way to interfere with his finding.

The plaintiff's counsel abandoned, before this Court, the allowance in respect of the 231,481 ft. board measure (5,000 logs) the last item found by the trial Judge in the plaintiff's favour.

Allowing for the other items of loss, as found in the plaintiff's favour, at $10 per 1,000 ft. board measure (their value per 1,000 ft. as set out in the statement of claim) the loss is as follows:—2,443,842 ft. B.M. worth $10 per 1,000, $24,438.42; 486,111 ft. B.M. worth $10 per 1,000, $4,861.11—$29,299.53. Added for loss of camp outfit, $1,000; total loss, $30,299.53.

I would vary the judgment entered in the Court below by reducing it to $30,299.53 with costs as granted by the trial Judge. The plaintiff is to pay the defendants' costs of both appeals.

Perdue, J.A.

PERDUE, J.A.:—The trial Judge found as a fact that the fire was caused by a locomotive belonging to the defendant company and he also found that the company had failed to shew that it used efficient appliances to prevent the emission of sparks, so as to bring itself within the proviso to sec. 298 of the Railway Act. The trial Judge also found that the company was guilty of negligence under sec. 297 in that it failed to keep its right of way free from "unnecessary combustible matter" and that the fire originated in that matter. I think the evidence sufficiently supports his findings.

The next point urged by the defendant company in its appeal is that the plaintiff had not shewn sufficient title to the logs to maintain the action. The evidence sufficiently shews that the plaintiff was in lawful occupation of the land where the logs lay and that he was in possession of them. The logs cut on the two timber limits were clearly the property of the plaintiff. The only question of importance raised as to title was that respecting

some logs which, it is suggested by the defendant, were cut on government land, in respect of which the plaintiff held no license to cut timber, and that these logs were in fact the property of the government. It is a leading principle of English law,

That bare possession constitutes a sufficient title to enable the party enjoying it to obtain legal remedy against a mere wrong-doer: Smith's L. Cas. 12th ed. p. 397.

The cases in support of this proposition are numerous and many are referred to in discussing the leading case of *Armory* v. *Delamirie*, 1 Str. 504 at 505. In that case it was held that the finder of a jewel, though he does not acquire an absolute property or ownership, yet has such a property in it as will enable him to keep it against all but the rightful owner, and consequently may maintain trover. This principle has been applied in a great number of cases. I need only refer to the late and authoritative decisions in which it has been recognised: *The "Winkfield,"* [1902] P. 42; *Glenwood Lumber* v. *Phillips*, [1904] A.C. 405; *Eastern Construction Co.* v. *National Trust Co.*, 15 D.L.R. 755, [1914] A.C. 197. The result of the decisions is that against a wrongdoer, possession is title and an outstanding claim of a third party (*jus tertii*) cannot be set up to excuse either trespass or conversion. See *Jefferies* v. *G.W.R. Co.*, 5 E. & B. 802, 805; *The "Winkfield," supra*, pp. 54, 55. No doubt it is open to the alleged wrongdoer to set up and shew, if he can, a superior title in himself or in some one under whom he claims, against which a mere possessory title in the plaintiff would not be sufficient. In the present case there is no pretence that the defendant had any property in or title to the chattels in question either in itself or on behalf of any other person.

It is urged that although mere possession of goods may be sufficient to enable the holder to maintain an action in trespass or trover it does not entitle him to maintain an action in case, where the wrong complained of is caused not directly but indirectly as a consequence of some actionable negligence, and that the damage complained of by the plaintiff in this suit was essentially one in case, the fire having spread from the right of way to timber berth 974. In *Rooth* v. *Wilson*, 1 B. & Ald. 59, it was held that a gratuitous bailee of a horse, who had possession of it but no other property in it, might maintain an action in case for the value of the animal which had been killed by falling into the field of the defendant in the suit, by reason of a defective fence which the defendant was bound to repair. Abbot, J., said:—

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I think that the same possession which would enable the plaintiff to maintain trespass would enable him to maintain this action.

All the Judges agreed as to the sufficiency of the possessory title. Bailey, J., said, "case is a possessory action." This decision is specially cited and referred to in the *Winkfield* case.

The "Winkfield," [1902] P. 42, arose out of a collision between that ship and another ship, the "Mexican." Cross-actions were commenced and the "Winkfield" admitted liability for a moiety of the damage sustained by the other ship. Proceedings were commenced by the owners of the "Winkfield" against the owners of the "Mexican" and all persons having claims arising out of the collision, and they obtained a decree limiting their liability to a certain sum which they paid into Court. The Postmaster-General made a claim for parcels and registered letters which was allowed in part, but a part of the claim which related to the estimated value of letters and parcels in respect of which no claim had been made or instructions received from senders or addressees was disallowed. It was held by the Court of Appeal that the Postmaster-General should recover in respect of the part of his claim which was disallowed. In giving the judgment of the Court, Collins, M.R., said:—

> It seems to me that the position that possession is good against a wrongdoer and that the latter cannot set up the *jus tertii* unless he claims under it, is well established in our law, and really concludes this case against the respondents. As I shall shew presently, a long series of authorities establishes this in actions of trover and trespass at the suit of a possessor. And the principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor.

I have quoted this case somewhat fully because, as it appears to me, it disposes of the question raised as to the sufficiency of a possessory title as against a wrongdoer in an action on the case for the loss of goods by a tortious act of the defendant. But the *Winkfield* case is also of importance in dealing with another point raised by defendant. During the trial the defendant sought to put in evidence that a quantity of the logs included in the plaintiff's claim had been cut on government land outside the timber berths in question. Objection was taken to the reception of this evidence and the trial Judge refused to admit the evidence. The last

sentence in the passage I have quoted from the *Winkfield* case shews that a wrongdoer who does not claim title in himself must treat the possessor as the owner for all purposes. This is the same view that was taken in *Jeffries* v. *Great Western R. Co.*, 5 El. & Bl. 802. That was an action in trover in which the plaintiff had proved that defendants had seized certain trucks in his possession claiming them as their own. The defendants sought to prove that before the plaintiff obtained possession the party from whom he obtained them had become bankrupt, that at the time of the conversion the goods were not the plaintiff's and that the defendants, if responsible for the conversion, were responsible to the assignees in bankruptcy and not to the plaintiff. The trial Judge, the Chief Baron, refused to admit the evidence. When the case came before the full Court in term Lord Campbell, C.J., in giving judgment, said:—

> I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by shewing that there was title in some third person; for against a wrongdoer possession is a title.

Wightman, J., was of the same opinion. Crompton, J., at p. 807, was very clear that the evidence should not be admitted:

> We are now (he said) to decide whether a wrongdoer in actual possession of goods, the property of a stranger, can recover their value in an action of trover against a wrongdoer who takes the goods from him. My impression has always been, like that of the rest of the Court, that he can do so; but that is a question on which there has been considerable doubt, and which has never been expressly decided.

Then, after referring to *Elliott* v. *Kemp*, 7 M. & W. 306, 312, and quoting a paragraph from the judgment of Parke, B., he goes on to say:—

> It is now necessary to decide that point: for in this case the defendant is a wrongdoer, and he has not been permitted to give in evidence the title of a third person against whom he is himself a wrongdoer. The question is, should he be permitted to do so? My impression has always been that the better opinion was that stated in note (1) to *Wilbraham* v. *Snow*, 2 Wm. Saund. 47, 85 E.R. 624; and I therefore think that the Chief Baron ruled rightly when he rejected this evidence.

In *Buckley* v. *Gross*, 3 B. & S. 566, Blackburn, J., in stating possession of personal property is sufficient title against a wrongdoer and that the title of a third party could not be set up, added the words:—

> And I do not know that it makes any difference whether the goods had been feloniously taken or not.

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I think that the evidence sought to be put in to attack the plaintiff's title in this case was properly rejected.

I think the plaintiff was entitled upon the evidence to maintain this action and to recover under sec. 298 of the Railway Act. It was not alleged in the statement of defence that the Crown or any other person was interested in the property destroyed. If the plaintiff were in fact a bailee for the Crown of part of the logs in question, the plaintiff, being in possession, would be entitled as against defendant, as a wrongdoer, to recover the full value of the goods, and the defendant, having once paid full damages to the bailee, has an answer to any action by the bailor: *The Winkfield, supra*, pp. 54, 60-61.

Another defence raised is that under an agreement entered into on May 1, 1907, the defendant permitted the plaintiff to construct a siding at a point on its railway line shewn on a plan annexed, which shews that this point was within timber berth 974; and that clause 6 of the agreement (which is set out in the judgment of Mathers, C.J.), released defendant from liability for any damage or injury to the said siding or to the buildings, fences or other property whatsoever of the party of the second part (the plaintiff) or of any other person or persons whomsoever in or upon the said premises, by fire or sparks communicated from any locomotive or car on the railway company (the defendants), etc.

The recital to the agreement sets out that the party of the second part is interested in a lumber business situated at Greenbush (the point in question), and near the railway of the company and that he "desires to have a railway siding built connecting said premises with the said railway." I agree with the trial Judge that the words in cl. 6 releasing the defendant from liability for damage caused by fire must be restricted to that done to property on "the premises." I think that the parties when using that expression meant the mill, yard and appurtenances of plaintiff's lumber business at Greenbush which was connected by the siding in question with the defendant's railway.

The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given: per Lord Westbury in *London & S.W.R. Co.* v. *Blackmore*, L.R. 4 H.L. 610, 623.

See also *Turner* v. *Turner*, 14 Ch. D. 829, 834, 835. What was in the contemplation of the parties to the release relied upon in the present case was that the putting in of the siding should not

increase the defendant's liability or subject it to any greater risk or obligation than existed prior to the construction of the siding.

I agree with RICHARDS, J.A., in dismissing the cross-appeal for the reasons he has set forth in his judgment. I agree also that the amount of damages awarded to the plaintiff should be reduced to the sum stated in Mr. Justice Richard's judgment.

Perdue, J.A.

CAMERON, J.A.:—In my opinion the defendant fails on the various grounds of appeal taken and concur in dismissing the appeal. It seems to me, after consideration, that the Chief Justice of the King's Bench was justified on the weight of authority in refusing to admit evidence submitted with the intention of shewing the ownership of some of the logs burned was that of the Crown and not of the plaintiff.

Cameron, J.A.

As to the cross-appeal I agree with the judgment of Richards, J., I must say that I have felt that there was a good deal of force in the argument addressed to us on this subject. If the evidence of the plaintiff, in explanation of the returns made by him, had been borne out by other satisfactory testimony the conclusion to be drawn might well have been entirely different. In the circumstances, however, I find myself unwilling to disturb the finding of the Chief Justice of the King's Bench.

I agree in fixing the amount of the judgment at that arrived at by Richards, J.

HAGGART, J.A.:—I have had the privilege of perusing the reasons of the Chief Justice of Manitoba and agree with his disposition of the case. I would not interfere with the conclusion of the Chief Justice of the King's Bench, that the cause of the fire was the operation of a defective locomotive and the allowing of dead grass, weeds and combustible matter to accumulate on the right of way. I would further agree with him in holding that the injury or damage contemplated in the indemnity or immunity clause in the siding agreement was such as might result from the construction, existence and operation of the spur leading to the mill. The statutory obligations imposed on the main line would be unaffected.

Haggart, J.A.

A serious question in this appeal is, was the trial Judge right in refusing to allow evidence tending to shew that a portion of the property destroyed was not owned by the plaintiff? The defendant's contention is that the measure of the damages would be the actual loss of the plaintiff.

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The defendants urged that *Northern Pacific R.* v. *Lewis*, 162 U.S.R. 366, supported their contention. The facts were in some respects similar to those in this case; but there the wood which was cut from the government land was piled on the government land near the railway and was in charge of the plaintiff's foreman, who was shipping portions of it from time to time to market.

It was expressly held in that case that there was neither actual nor constructive possession. Here the timber was piled on the plaintiff's own timber berth. The trial Judge finds there was possession in this case, and I would not interfere with that finding.

In the above case the Court endeavours to draw a distinction between the case where the injury is the result of a negligent act and where the injury is the result of an overt act; between an action of trespass on the case and trespass *de bonis asportatis*.

The judgment of Peckham, J., is a very able one, appeals to one's idea of what should be substantially fair and just, and he supports his reasons by many American authorities; but while our English cases are not overruled or modified by the decision of equally high authority we shall have to follow them, in holding that possession is good as against a wrongdoer and that the wrongdoer cannot set up the *jus tertii* unless he claims under it.

Eastern Construction Co. v. *National Trust Co.* 15 D.L.R. 755, [1914] A.C. 197, one of the most recent decisions of the Privy Council is an authority for the foregoing proposition. Timber was wrongfully cut on government land. The plaintiffs were bailees of the Crown. Lord Atkinson, who delivered the judgment of the Court, says, at p. 763:—

> No doubt in that position of things, if nothing more had occurred, they would have been entitled to have recovered from Miller & Dickson and possibly from the Construction Company the full value of the timber felled, as well as any special damage they might themselves have sustained by reason of being deprived of the possession of the felled trees, not because they had in truth and fact any proprietary rights in or title to the property in the trees or in the ties into which they were manufactured, but because, to use the words of Lord Campbell in *Jeffries* v. *G .W. R. Co.* (1856), 5 E. & B. 802, 805, "As against a wrongdoer possession is title."

And it being subsequently arranged that the wrongdoer might go on and cut the remaining timber and pay the ordinary government dues, there was then practically a transfer to them of the Crown property or rights in the timber and Lord Atkinson proceeds on p. 763 to say:—

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These being the rights and obligations of the bailee, it is obvious that if, before action brought by him against the wrongdoer, the bailor has clothed that wrongdoer with the ownership of the goods, the bailee cannot recover from the wrongdoer, thus converted into the true owner, the full value of the goods, no more than he could recover their full value from the bailor himself. In such an action the defendant would not be setting up a *jus tertii*, but, as donee or assignee of the *tertius a jus sui*.

For the foregoing reasons the judgment was reversed and entered in favour of the alleged wrongdoer. In this case if the Crown had before this suit transferred or given to the defendants their interest in the property in question they would be entitled to the same relief.

Glenwood Lumber Co. v. *Phillips*, [1904] A.C. 405; *Re Winkfield*, [1902] P. 42; *Jeffries* v. *G.W.R. Co.*, 5 E. & B. 802, are to my mind conclusive in favour of the plaintiff's contention.

Armory v. *Delamirie*, 1 Str. 504, 505, is authority that the finder of a jewel may maintain trover for the conversion thereof by a wrongdoer.

Smith's Leading Cases, vol. 1, p. 396, discusses the question as to how far bare possession is sufficient title against a wrongdoer.

As between the Crown and the plaintiff, the plaintiff would have to account to the Crown if the Crown should assert and make good the case sought to be set up by the defendants: *Nicholls* v. *Bastard*, 2 C.M. & R. 659 at 660.

I would dismiss the appeal on the main question, but reduce the amounts of the judgment as indicated by my brother Judges.

Appeal dismissed; damages reduced.

LAFOREST v. FACTORIES INSURANCE CO.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ., May 2, 1916.

1. INSURANCE (III E 1—92)—STATUTORY CONDITIONS—AGAINST KEEPING COAL OIL—BINDING EFFECT.

Fire insurance is subject, in the Province of Quebec, to certain statutory conditions, and it is required that they shall be endorsed upon policies. Every application is, therefore, impliedly for insurance subject to such conditions, except as varied by the parties under conditions which permit such variation, and noted upon the policy. It is not necessary for the insurer to notify the insured of any particular in which the policy differs from the application.

2. INSURANCE (§ V B 3—190)—KNOWLEDGE OF AGENT AS AFFECTING CONDITIONS—WAIVER.

Knowledge by the insurer's soliciting agent that coal oil in large quantities was kept on the premises, contrary to a condition of the policy, does not constitute notice of that fact to the insurer; nor does knowledge of that fact prior to the insurance imply knowledge that it would be so kept afterwards, and is not equivalent to a waiver of the condition.

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3 INSURANCE (§ V B 3—190)—WAIVER—AGENT'S OFFER TO ADJUST—AUTHORITY.

An offer of settlement of an insurance claim by the adjusting agent does not, in the absence of proof of authority to that end, operate as a waiver of any objections which might be urged against the claim by the insurer.

[*Factories Ins. Co.* v. *Laforest*, 24 Que. K.B. 543, affirmed].

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side (24 Que. K.B. 543), reversing the judgment of Pouliot, J., at the trial, in the Superior Court, District of Arthabaska, and dismissing the plaintiff's action with costs.

G. G. Stuart, K.C., and *Crépeau*, K.C., for appellant.

Aimé Geoffrion, K.C., and *Perrault*, K.C., for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—At the close of the argument I was under the impression that the plaintiff, appellant, was fairly entitled to succeed. But a careful examination of the pleadings and evidence, documentary and oral, leads me irresistibly, if regretfully, to a contrary conclusion.

The action is brought to recover the amount due under a policy of insurance on a stock of goods in a country store in the Province of Quebec. There is no doubt that the goods covered by the policy were destroyed by fire on November 25, 1913. The company sets up by way of defence every objection that the ingenuity of counsel could suggest and the plaintiff is entitled at least to the benefit of my opinion that his claim was made honestly, and he fails to succeed on a ground which involves neither moral nor legal turpitude.

The action was maintained in the Superior Court, but on appeal it was held that there was a breach of the condition in the policy which forbade the keeping and storing on the premises of coal oil in quantities exceeding five gallons without the permission in writing of the company and on that ground the action was dismissed. In my opinion that judgment must be affirmed.

I am satisfied that the insured was in complete ignorance of the statute when he applied for the insurance and it does not appear that his attention was ever drawn to the condition now invoked after the policy came into his possession. He acted throughout in perfect good faith and frankly disclosed to the officials of the company at the date of his application and when he filed his claim that coal oil was kept on the premises. Were I dealing with this case in the Court of first instance I would have some difficulty in finding that the evidence was sufficiently

conclusive as to the quantity of oil in the store at the time of the fire. The clerk, Lacerte, says that during the evening of the day preceding the fire he brought one "*quart*" of oil into the store, and that he sold a quantity which he estimates at possibly about twelve gallons, and I accept this evidence in preference to that given by the witness Demers. There is no evidence as to the quantity of oil contained in a "*quart*" and Laforest speaks of a "*tonne*" containing 45 gallons. It does not appear that the one measure is deemed to be the equivalent of the other. Technically there is, of course, a wide difference between the two.

However, I am not satisfied that I have sufficient doubt to rebut the presumption that the decision appealed against is right.

The appellant also urges that the agent of the company who solicited the risk, visited the premises, and knew that coal oil was kept and stored there at the time he filled in the application. Although I am of opinion that his knowledge was the knowledge of the company because acquired in the course of his employment (*Bawden* v. *London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534; *Wells* v. *Smith*, [1914] 3 K.B. 722), I cannot hold that knowledge to be equivalent to a waiver of the condition which requires that, once the policy attaches, coal oil cannot be kept or stored on the premises without the written consent of the company.

The appellant relies, also, on the second statutory condition which creates a presumption that the policy issued conforms to the terms of the application. This point is so fully and satisfactorily covered by my brother Anglin in his notes that it is unnecessary for me to do more than refer to *Provident Savings Life Assurance Society* v. *Mowat*, 32 Can. S.C.R. 147.

At the argument I was strongly inclined to hold that the appeal must succeed because the parties had subsequently to the fire entered into an agreement which in the language of the Quebec Code is called a "transaction" (1918 C.C.) with respect to this claim and that in the result the plaintiff was entitled to recover $2,800. I accept the version given by the plaintiff and his wife of the interview during which the compromise was discussed. But to transact it was necessary for the officials of the company to have "complete control over the subject matter in dispute" (1919 C.C.) and I cannot find in the record sufficient evidence to

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justify me in holding that Demers and Tanguay had such control. The principle of the Quebec law is:—

Peuvent seuls transiger les mandataires et administrateurs du patrimoine d'autrui qui ont reçu un pouvoir spécial à cet effet. *King* v. *Pinsoneault*, L.R. 6 P.C. 245.

This appeal must be dismissed with costs.

Idington, J.

IDINGTON, J.:—The appellant stored and kept upon his premises within the meaning of one of the statutory conditions of the policy of insurance in question herein, as an identically worded policy was construed, by a minority in this Court and by the Judicial Committee of the Privy Council in the case of *Thompson* v. *Equity Fire Ins. Co.*, [1910] A.C. 592, and thereby forfeited his right to recover herein.

The application of appellant for the insurance in question herein contained the following obligation on his part:—

Moreover, the applicant agrees that he will not keep either lime or ashes in wooden vessels, in or near the above described buildings, and that he will not make any use of stoves for coal oil or for gasoline, and that he will not procure any other policy of insurance on the same properties in other companies, without giving notice to this insurance company, under penalty of the nullity of the policy for which he now applies.

His counsel now presents the novel argument that inasmuch as in the same set of statutory conditions required by law to be indorsed on every policy of insurance there is the following clause,

After application for insurance, it shall be presumed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing, the particulars wherein the policy differs from the application,

the respondent was bound to point out in writing the first mentioned condition, as a particular wherein the policy differed from the application. I am unable to assent to this proposition.

There is, in fact no conflict between the terms of the application and the policy if we have regard to the law (now well known to insured) binding the insurer to print upon its policy the statutory conditions. It may be that the obligation above quoted from the application would be a new or additional condition which, unless also printed in a different coloured ink, as required by the statute, might by such omission become null.

That is the converse of this case and the insured is protected by the statute in that regard.

The obvious purpose of the condition, which is now presented

for our consideration, was to meet the not infrequent cases of a variation in or departure from the description of the subject matter insured, as given in the application, or the time to run, or rate (if any) specified therein. Such like errors sometimes might creep in and the insured was thus protected.

It is suggested that the condition, by virtue of which I hold the appellant fails, is one which an insurer might waive. It is very suggestive that the contention does not seem to have been set up in the appellant's pleadings. The omission might be overcome if the law and facts sustained the contention, but, if serious, why was it omitted from the pleading?

The appellant also sets up that the respondent settled and agreed to pay the sum claimed.

That is met by evidence disputing that of appellant and that in any event the agent had no power to bind respondent in that regard.

Holding these views there is no need to consider other issues raised.

I think the appeal must be dismissed with costs.

Duff, J.

DUFF, J.:—The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The appellant urges three grounds of appeal against the judgment of the Court of King's Bench which held that he cannot recover upon his insurance policy with the defendant company, because, in breach of statutory condition 10 (*f*), which was indorsed upon the policy as required by art. 7034 R.S.Q., when his premises were burned he had upon them for the purpose of sale thirty gallons of coal oil without having obtained the permission in writing of the company. *Thompson* v. *Equity Fire Ins. Co.*, [1910] A.C. 592.

(1) The appellant maintains that the company through its agents adjusted his loss at $2,800 and agreed to pay him that sum in satisfaction of his claim. This fact is denied: it has not been found in favour of the appellant; and the evidence does not warrant such a finding being made.

(2) He contends that, because the application signed by the insured contains conditions, to which he thereby agrees that his policy shall be subject, but neither sets out the statutory conditions nor refers to them, it must, under the second statutory condition, in the absence of written notice from the company to the insured particularly calling the conditions indorsed upon the

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policy to his attention, be deemed free from all such conditions not covered by those expressed in the application, *i.e.*, it must be deemed such a contract as would be constituted by a bare acceptance of the application of the insured.

By art. 7034 R.S.Q. every company is required to print the statutory conditions upon every policy of fire insurance which it issues and is allowed to vary such conditions only by complying with arts. 7035 and 7036. If the conditions are not so printed the policy is nevertheless deemed subject to those of them which contain provisions in the interest of the insured. If the statute is complied with, the statutory conditions in favour of the company as well as those in favour of the insured create contractual obligations between them. Having regard to this state of the law every application for insurance should, in my opinion, be deemed an application for a policy subject to the statutory conditions, except in so far as they may be varied in conformity with art. 7035—that is, for a policy which the company may lawfully issue. It may well be that the effect of statutory condition No. 2 is to prevent the insurance company binding the insured by any condition inserted in the policy, other than the statutory conditions, by way of variation or otherwise, which differs from or adds to those expressed in the application. It may be that the statutory conditions themselves should be deemed modified in so far as they are inconsistent with any term expressed in the application —although, in the absence of a variation noted upon the policy itself as prescribed by art. 7035, that view would seem to present some difficulties. But the legislature did not intend that the statutory conditions should be set forth in the application for insurance; and I am satisfied that, where these conditions have been duly printed upon the policy as required by the statute, it is subject to them, notwithstanding that they are neither set forth nor expressly referred to in the application. In so far as anything in the opinion of Osler, J.A., in *Mitchell* v. *City of London Assurance Co.*, 15 A.R. (Ont.) 262, at p. 278-9, may conflict with this conclusion I am, with great respect, unable to agree with it.

(3) Because, as counsel for the appellant asserted, it is common knowledge that the sale of coal oil is a part of the business of every coun ry general store, and the agent for the defendant company, when soliciting the plaintiff's insurance, saw coal oil on his premises, he contended that the company should not be

heard to set up the condition relied upon; and he cited *Mitchell* v. *City of London Assurance Co.*, 15 A.R. (Ont.) 262, in support of his argument. But the keeping of coal oil upon the in ured premises is not a necessary part of the business in the case of a country general store as is the carrying of a small quantity of lubricating oil upon a steam tug. Coal oil might have been kept outside and brought into the shop, if at all, in the permitted quantity, *i.e.*, not exceeding five gallons. Notice to a mere soliciting agent—unlike notice to a general agent—is not notice to the insurance company; and, if it were, notice that coal oil was kept on the premises before they were insured does not involve knowledge that it will be kept there afterwards in violation of an expressed condition of the policy.

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

Brodeur, J.

BRODEUR, J. (dissenting):—The question relates to a claim for the amount of an insurance against fire. Several issues were raised by the defendant, the insurance company, against the claim of the plaintiff. The latter was successful in having his action maintained in the Superior Court; but, in the Court of Appeal it was decided that the insured could not succeed in his claim for the amount of his loss incurred because he had in his shop a quantity of coal oil greater than what was permitted by the conditions of his policy.

The plaintiff appeals to this Court from that judgment and, amongst other things, contends that the condition in the policy on which the Court of Appeal based its opinion that the action should be dismissed did not constitute any part of the contractual obligations which existed between him and the insurance company.

Contrary to the practice which is generally followed, I am informed, since the legislature has deemed proper to determine the conditions of policies of insurance, the respondent company, in the present case, procured the signing of an application for insurance by the plaintiff.

It is necessary to ascertain whether or not, when there has been an application for insurance made, the conditions inserted in the policy which might be incompatible with this application can be invoked by the insurer.

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Art. 7034 of the R.S.Q. declares that the conditions indicated in that article form part of every contract of insurance as against the insurer Amongst these conditions is No. 2, which reads as follows:—

After the application for insurance, it is to be considered that any policy sent to the insured is to be deemed to be conformable to the terms of the application, unless the company indicates in writing the particulars in which the policy differs from the application.

It seems to me that this article is sufficiently explicit in itself to avoid any ambiguity. After all, it merely affirms the doctrine which is found in all contracts, that is that as soon as there has been a proposition made and that this proposition has been accepted, the contract is deemed to be made according to the terms of the proposition. In regard to the contract of insurance, therefore, it is stipulated that if there is an application for insurance and there has been a policy issued in response to that application, such policy is reputed to be in conformity with the terms of the application, unless the company indicates in a formal manner that it is unable to accept the proposal which has been made to it.

Why has this legislation been adopted? It is because insurance companies had the habit of inserting in very small type in their policies a multitude of conditions and clauses which had for their effect virtually to cause every source of obligation on their part to disappear. The Courts, on many occasions, have given a liberal interpretation to these extraordinary clauses. But, on the other hand, they gave rise to such a number of lawsuits that the legislature believed it to be its duty to intervene and stipulate the conditions under which such policies should be deemed to have been issued, while declaring, nevertheless, that these conditions should only have effect as against the insurer.

The legislator has declared, nevertheless, at the same time, what were the conditions to which the insured should find himself bound and has taken the trouble to draft himself these conditions in order to avoid surprise, I might even say frauds, which were previously practised against the insured. He has left to the contracting parties the duty of determining, in so far as the insured was concerned, whether or not they should form part of the contract.

One of these conditions stipulated by art. 7034 is the condition

No. 10, which provides that the company is not liable for the following losses, that is to say:—

(f) For loss or damage arising when coal oil, camphine, gasoline, an inflammable fluid, benzine, naphtha or any liquid products thereof, or any constituent parts of them (except clarified coal oil for lighting purposes only, of a quantity not exceeding 5 gallons).

The condition which I have just quoted textually, can it be invoked in the present case by the insurance company? I say *no;* and this is why.

An application for insurance is made by Laforest, the plaintiff. This application for insurance determined the amount of the insurance which he desired to obtain, the rate, the premium, the goods in the shop which were to be insured and the building in which this merchandise was situated. He made a description, in answer to certain questions which were put to him, of the value of the land, of the buildings, of the hypothecs which affected it, and he made a declaration as to whether he had previously suffered losses from fire, what were the means of protection which he had against fire, and to whom the amount of any losses should be payable, and he added this:

The said applicant warrants and agrees, by these presents, with respect to the said company, that that which precedes is the true, exact and entire statement of all the facts and circumstances concerning the condition, situation, value and risk of the property which is to be insured, in so far as he himself is aware, and he consents that such description with the plan which appears elsewhere, should be considered as forming the basis of the responsibility of this company, as well as an essential part of this contract of insurance. It is moreover agreed that if the agent signs or fills up this form of application he will, in such case, be the agent of the insured and not of the company. Moreover, the applicant agrees that he will not keep lime, nor ashes, in vessels of wood, in or near the above described buildings, that he will not make use of coal oil or gasoline stoves, nor procure any other policy of insurance on the same property in other companies, without notifying this company, under the penalty of the nullity of the policy for which he applies. At any time when property insured by this company may be destroyed or damaged by fire, or by lightning, the balance of the deposit note which has not been assessed shall be deducted from the claim which may have to be paid. It is further by these presents understood and agreed that in the case of damage to the property insured or the destruction thereof, this company shall in no case be responsible for more than two-thirds of the value of such property at the time of the loss, in the case of there being other insurances in the proportion *pro rata* of the two-thirds of the value of the property insured. Any declarations or answers other than those mentioned in the present application cannot be invoked against the company.

These are the conditions upon which he proposes that the defendant company shall insure him. The defendant company,

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in response to this application, sends him a policy and on the back of this policy we find all the conditions of art. 7034. We find, amongst others, the condition No. 2, which I have quoted above, and the condition No. 10.

Condition No. 2 necessarily binds the company, because the article tells us that the conditions indicated in this article must be considered as against the insurer as a warranty of every contract of insurance. This condition formally declares that the contract of insurance must be considered, in these circumstances, as being absolutely in conformity with the terms of the application, unless the company should have indicated in writing the particulars in regard to which the policy differs from the application. Now, there is no evidence in the record, moreover, it has not been suggested and it has not been pleaded that the company had given notice that it was unable to issue a policy on the conditions enumerated in the application. The company, therefore, must be deemed, in my opinion, to have desired to insure the plaintiff on the conditions which he indicated in his application; and all the other conditions, in consequence, which it may have inserted on the back of the policy cannot be binding on the insured.

The respondent invokes in its favour the judgment rendered by this Court in the case of *Provident Savings Life Assur. Soc.* v. *Mowat*, 32 Can. S.C.R. 147, where it was decided that

> A contract of life insurance is complete on delivery of the policy to the insured and payment of the first premium. Where the insured, being able to read, has had ample opportunity to examine the policy, and not being misled by the company as to its terms nor induced not to read it, has neglected to do so, he cannot after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon.

I do not believe that this decision, which was rendered in 1902, can be invoked under the subsequent legislation which has determined the conditions under which contracts of insurance against fire may be formulated.

The delivery of the policy might have in the first instance bound the insured, as the Supreme Court has decided in this *Mowat* case; but, now, I consider that the legislation in providing that the policy shall be deemed to be in conformity with the terms of the application has overruled the principle of law enunciated in this decision.

In these circumstances, I am, therefore, of the opinion that the condition invoked against the insured by the Court of Appeal

does not bind him, cannot be invoked against him; and, consequently, the judgment of the Superior Court which condemned the insurance company to pay the amount which it undertook to pay is well founded.

The appeal should be allowed with costs in this Court and in the Court of Appeal. *Appeal dismissed.*

CANADIAN MORTGAGE INVESTMENT CO. v. BAIRD.

Alberta Supreme Court, Beck, J. July 8, 1916.

MORTGAGE (§ VI A—70)—*Practice as to enforcement—Interest Act—"Just allowances"—"Extraordinary costs, charges and expenses."*]—Action on a mortgage.

D. S. Moffat, for plaintiff.

F. S. Selwood, for defendant Baird.

BECK, J.:—The defendant Baird is the mortgagor; the defendant Wright is a second mortgagee.

The only real grounds of dispute against the plaintiff company, as both parties doubtless knew from the beginning, are, (1) founded on the Interest Act, R.S.C. ch. 120, the ground being that the principal and interest are blended and there is no statement shewing the amount of principal money advanced and the rate of interest chargeable thereon calculated yearly not in advance, and, (2) that certain sums charged by the company for payments to their solicitors or agents for collection of moneys collected by them from the mortgagor on account of the mortgage and some other disbursements were improperly charged against the mortgagor.

In my opinion all these questions would have been open for discussion on a motion for judgment and if the proper direction were then given, on the taking of the account of the amount owing under the mortgage, and the mortgagor would have been entitled to have had notice of the taking of the account, if he had filed merely a demand of notice. The costs of both parties would thereby have been considerably less than under the method adopted, viz., of putting in a defence and having the points of law set down for hearing.

A mortgage action is one in which, in face of a demand of notice, judgment by default cannot be entered. If a demand of notice is served, there must be notice of motion for judgment. These questions ought to have been raised and dealt with on

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such a motion or have been left with a proper direction to be dealt with on a reference to take the account, with the right on the part of the referee to refer these points of law to a Judge.

I have some comments to make also on the statement of claim. It covers 8 pages, probably over 20 folios. It could easily, if no immaterial allegations were to be found in it and if the material allegations were succinctly stated, have been contained in two pages. See forms appended to the English Judicature Act, App. C. ii, No. 5.

Sec. 6 of the Interest Act reads, so far as material, as follows:—

Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable . . . on any plan under which the payments of principal money and interest are blended . . . no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half yearly not in advance.

There is in the mortgage the following statement:—

It is declared and agreed between the mortgagor and the mortgagees that the principal sum secured hereby is $1,300, and the rate of interest chargeable thereon and on all sums which may be added to the mortgage moneys hereunder is 10% per annum, as well after as before default.

I think this statement is a sufficient compliance with the Act. It was contended that "statement shewing," etc., "calculated," etc., calls for a statement of figures indicating the method of calculation by which the monthly instalments of blended principal and interest are arrived at, and, further, that the statement must shew that the interest is not calculated in advance. I think "statement" here is used in the same sense as in "statement of claim," "statement of facts," "statement of affairs" (which imports more than mere figures). I think that the words "not in advance" are not required to be in the statement but constitute a prohibition on the mortgagee against calculating the interest in advance.

The purpose of the statutory provision is to enable the mortgagor to make his own calculation at any time of the amount he owes. The effect of a declaration giving such information as is given in the clause contained in the present mortgage is to enable him to do this. All he has to do is to take the principal sum advanced, charge interest thereon at the rate stated from the date of advance up to the date of his first payment, whether made promptly or not, then credit the amount of the payment, and pro-

ceed thus throughout; in other words, make the calculation in exactly the same way as if the mortgage were one for a term of years bearing the stated rate of interest without any obligation or privilege of paying in blended payments of principal and interest. The result ought to be the same as that shewn by the tables used by the company. The company cannot recover more than is shewn on the method of calculation I have indicated. If there were a mistake in the calculation of the periodical blended payments, I think it would not invalidate the mortgage but would entitle either party to rectification. As a matter of fact, in the present case a rough calculation shews the results of the two methods of calculation to be very close; an exact calculation would doubtless bring exactly the same result.

The items in question under the other head are, (1) insurance premiums, (2) fees paid for tax certificates, "legal charges" which include, (3) commissions on collection of arrears charged by solicitors or agents of the mortgagees and, (4) solicitors' charges for letters; in the two latter cases there being no proceedings in Court or under the Land Titles Act.

As to the insurance premiums, they are recoverable because of the usual provision in the mortgage authorizing their payment, and even without this as a payment made to protect the security. There was no dispute about these items. The other items are of the character discussed in the books under the heading of "just allowances," or under the wider heading of "extraordinary costs, charges and expenses," which are something differing from and beyond the costs taxable in the mortgage proceedings (see *Secord* v. *Tessier*, 3 A.L.R. 56), and such items, speaking generally, are not allowed as a matter of course, but a special case must be made for them, and they can be allowed only if there is in the judgment a special direction making them a subject of account. (*Ib.*).

Generally speaking, items of expense reasonable in amount and reasonably incurred in preserving the security or in efforts to realize it are allowed without any special covenant in the mortgage, and, generally speaking, a covenant will not magnify the right. The fact that the mortgagee has or has not gone into possession is a material circumstance. The mortgagee is not entitled to make any personal profit from his own services.

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Taking up the particular items, I think the mortgagees are entitled to the fees paid for searches to ascertain whether the taxes were in arrear or not, but this is not a thing to be put into the hands of a solicitor, but to be done by the mortgagees themselves. As to letters by the solicitors demanding payment, I think these are not collectable except as charges included in the taxable costs of proceedings pending or subsequently commenced.

As to commissions on collections, in the absence of the mortgagee having taken possession or of a receiver having been appointed, and in the absence of an arrangement made after default, I think commissions on collections made, whether in consequence of legal proceedings or not, are not, unless under extremely special circumstances, allowable. I think they should not be allowed in the present case.

As to the costs. The defendant will have no costs. The plaintiffs will have their costs as if the defendant had filed a demand of notice only, *i.e.*, as if the action had been undefended, but the defendant had appeared on the motion for judgment and the taking of the accounts, and the scale of costs to be applied will be that applicable to the amount found owing upon the mortgage after the account has been taken on the basis I have indicated, or the amount which on that basis was owing at the date of the commencement of the proceedings, whichever is the lower, if there is a difference. *Judgment for plaintiff.*

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Re WAR RELIEF ACT AND LAND REGISTRY ACT.

British Columbia Supreme Court, Morrison, J. July 29, 1916.

MORATORIUM (§ I—1)—*War Relief Act—Effect on Land Registry Act—Absolute order of foreclosure.*]—Application to compel the registration of foreclosure order absolute. Granted.

H. A. Bourne, for applicant.

G. W. Gwynne, for Land Registry.

MORRISON, J.:—On April 19, 1916, an order absolute of foreclosure was made in an action in which one of the defendants, who had an interest in the lands in question before the date of the order absolute, is a volunteer for active service.

On April 28, 1916, an application was made in Form "A," provided by the Land Registry Act, to register the plaintiff as the owner in fee of the said lands by virtue of the said order absolute, thereupon the District Registrar of Titles required that

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the plaintiff give 30 days' notice under sec. 134 of the Land Registry Act to all persons appearing in the Land Registry to have an interest in the land in question. This notice was duly given. On May 29, 1916 (being a date after that of the order absolute and the application to register and before the date of expiry of the aforesaid 30 days), the War Relief Act came into force. In the meantime the District Registrar of Titles served on the plaintiff's solicitors notice under sec. 108 of the Land Registry Act declining to register the plaintiff as owner in fee on the ground that "No proof is filed here that the defendants in the foreclosure action are not protected by sec. 2 of the War Relief Act.

The plaintiff now by way of petition prays that the registrar be ordered to complete registration of the said order absolute. On the hearing of the petition Mr. Gwynne, who appeared as counsel for the district registrar, requested that other questions which have arisen or may likely arise as to the construction of the Act be ruled upon at the same time.

As to the question arising out of the petition based on the peculiar facts before me I have, notwithstanding Mr. Gwynne's very strong argument, little doubt. I think that the plaintiff should have his application accepted by the registrar. As to the other questions submitted they are of such importance that I hesitate to deal with them without full argument.

Application granted.

GREGORY v. WILLIAMS.

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New Brunswick Supreme Court, McLeod, C.J., White and Grimmer, JJ. April 26, 1916.

MASTER AND SERVANT (§ I E—40)—*Wrongful dismissal—Election of remedies.*]—Appeal from the judgment of Barry, J., staying an action for wrongful dismissal. Affirmed.

J. B. M. Baxter, A.G., for plaintiff, appellant.

W. B. Wallace, K.C., *contra.*

The judgment of the Court was delivered by

GRIMMER, J.:—The facts in this suit do not seem to be in dispute. On May 7, 1913, the defendants by contract in writing hired the plaintiff for one year from that date, at a salary of $2,000, payable monthly at $166.66. The contract also provided for a commission of 10 per cent. on business done, and not less

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than $500 was guaranteed from this source. The plaintiff was dismissed by defendants December 15, 1913, and in the February following brought an action to recover pay for his services for November and December, 1913, and January, 1914. The suit was tried before Barry, J., without a jury, and a verdict was found in favour of the plaintiff, the time allowed being from November 7 to December 7, and from thence to December 15, the date of dismissal, it appearing on the trial that the plaintiff had been paid for the first six months. By examining the judgment in the case we find the Judge states that:—

at the trial it was agreed by counsel that the statement of claim should be extended so as to include the last three months of the period of service covered by the contract, so that the action is now to be treated as if it were not commenced until after the expiration of the year. This agreement was made to avoid the necessity of a second suit in the event of its being determined that the plaintiff is entitled to recover in respect of the 3 months' services first sued for.

It was stated on the argument and admitted that at the trial the plaintiff proposed to amend the pleadings pursuant to such agreement, but the defendants objecting the amendment was not made. A verdict was entered for the plaintiff for $179.19 and costs, the Judge holding that he had sued on an implied contract arising out of actual services, and therefore he could only recover for the time he had actually served, which he found was one and a half months. He also found as a fact that the dismissal of the plaintiff was wrongful and unjustifiable.

The case was not appealed, but in the month of November, 1914, the plaintiff commenced a second suit for damages for breach of the contract in the wrongful dismissal, and application was thereupon made to Barry J., to stay this action as being frivolous, vexatious and an abuse of process, on the following grounds, viz.:—1. Because the plaintiff could have joined his claim in this action, with his claim in the first action, under O. 18; 2. Because the plaintiff, having elected to sue for wages under a written contract, cannot now sue for damages for a breach of the same contract, in consequence of the alleged non-performance of it by the defendants.

On September 9 last, judgment was delivered staying this action, which is the subject of this appeal.

The Judge in his judgment discussed fully the right of action in cases of this kind, between master and servant, and held that

in point of law when a servant was wrongfully dismissed he had the choice of pursuing one of two remedies, that is, he might treat the contract of hiring and service as continuing, and bring a special action for the breach of the contract for the wrongful dismissal, or he might treat the contract as rescinded, and sue as upon *quantum meruit* for the services he had actually rendered. That, if he chose the latter course, he sued upon an implied contract, arising out of actual services, and could only recover for the time he had actually served, and that having made an election, he was thereby bound and could not pursue both remedies. In this, I think, under the authorities, he arrived at a correct conclusion.

In *Goodman* v. *Pocock* (1850), 15 Q.B. 576, cited on the argument, a clerk dismissed in the middle of a broken quarter, sued for a wrongful dismissal and recovered damages, actual services not being considered as they could only be recovered under an *indebitatus* count.

The plaintiff then brought another action under an *indebitatus* count for his services during the broken quarter. It was held on appeal the action was not maintainable, because the plaintiff in his first action on the special contract, had treated it as an open contract, and he could not afterwards recover under the *indebitatus* count as for services under a rescinded contract. Lord Campbell in delivering his judgment said:—

I have not the slightest doubt that this action must fail as to the claim now in question. The plaintiff was hired for a year at wages payable quarterly, and in the middle of a quarter he was wrongfully dismissed. He might then have rescinded the contract, and have recovered *pro rata* on a *quantum meruit*. But he did not do this. He sued on the special contract, and recovered damages for a breach of it. By this course he treated the contract as subsisting, and he recovered damages on that footing.

Coleridge, J., says:—

In a case like this the servant may either treat the contract as rescinded and bring *indebitatus assumpsit*, or he may sue on the contract, but he cannot do both, and if he has two counts he must take the verdict on one only. Here the plaintiff elected to sue on the contract, and he cannot now sue in this form.

Erle, J., also said:—

I am of the same opinion. The plaintiff had the option either to treat the contract as rescinded and to sue for his actual service, or to sue on the contract for the wrongful dismissal. He chose the latter course, and he cannot now turn round and try the former course.

Halsbury in vol. 20, at 110, cites and approves of the law as

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laid down in *Goodman* v. *Pocock*, and its kindred cases, there stating that a servant wrongfully dismissed may treat the contract as continuing and sue for damages for its breach, or he may treat the contract as rescinded and sue upon a *quantum meruit* for the services actually rendered, and for which he has not been paid. He may elect to pursue either remedy at his option, but he is bound by his option and cannot pursue both.

In this case the plaintiff by his first action, which must be taken as his election, choice and option, treated the contract as rescinded, thus acquiescing in the master's wrongful act, and he recovered for the value of his services actually rendered. He cannot, therefore, under the authorities stated, which must be considered conclusive, now claim or treat the contract as existing and maintain an action for damages. His election and decision was final and he must abide thereby.

In view of all the circumstances of the case, and particularly of the fact that the learned Judge on the trial found that the dismissal of the plaintiff was wrongful and unjustified, the appeal will be dismissed without costs. The cases of *Pagani* v. *Gandolfi* (1826), 2 C. & P. 370, *Planché* v. *Colburn* (1831), 8 Bing. 14, and *Bruce* v. *Calder*, [1895] 2 Q.B. 253, in addition to those cited may be referred to. *Appeal dismissed.*

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OVERTON v. GERRITY.

Saskatchewan Supreme Court, Lamont, J. June, 12 1916.

HOMESTEAD (§ IV A—30)—*Transfer of—Parties—Signature of wife.*]—Action to set aside transfer of homestead.

Bothwell, for plaintiff.

Hutcheson, for defendant.

LAMONT, J.:—This action is brought by Anna Overton, wife of A. E. Overton, to set aside a transfer of lot 9, in block 8, in the village of Piapot to defendant, by the said A. E. Overton, on the ground that the property transferred was the homestead of the said Overton, and that the plaintiff was not a consenting party thereto.

The facts are all admitted. The defendant admits that he took a transfer of the above described property from A. E. Overton on February 11, 1916; that when he did so he knew that the plaintiff was the wife of the said Overton, and that she was temporarily absent owing to sickness in her family. He also

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knew that Overton and his wife and family had been in actual residence upon the said premises for 2 years prior to the taking of the transfer. Further, he admits that the plaintiff did not execute, nor was she a consenting party to the said transfer, and he does not contend that she ever released any rights obtained by her under the Act Respecting Homesteads. The defendant claims that when he took the transfer he thought a homestead, under the Homestead Act, meant the homestead which Overton had under the Dominion Lands Act. The plaintiff admits that she cannot shew that such was not the defendant's belief.

Sec. 1 of the Act Respecting Homesteads (Stats. Sask. (1915), ch. 29) reads as follows:—

1. The word "homestead" in this Act shall mean a homestead under the provisions of paragraphs 9 and 10 of sec. 2 of the Exemptions Act: Provided that a homestead under said par. 10 shall not be restricted in value to $1,500.

Under the Exemptions Act the term "homestead" has been held to mean the home of the debtor, the actual residence of himself and his family: *Purdy* v. *Colton*, 1 S.L.R. 288. The residence includes the lot upon which the dwelling house is situate according to the registered plan of the same, Exemptions Act (ch. 47 R.S.S.), sec. 2, sub-sec. 10.

As the plaintiff and her husband had their residence upon the property in question, it was their homestead.

Sec. 2 of the Act Respecting Homesteads provides, that no transfer of a homestead shall be effectual for that purpose unless signed by the owner and his wife, if he has a wife, and she appears before a District Court Judge or other officer specified in said section, and, upon being examined, separate and apart from her husband, acknowledges that she understands her rights in the homestead and signs the transfer of her own free will and consent. This, it is admitted, the plaintiff did not do. The transfer, therefore, was not effectual to pass the property to the defendant.

Judgment for plaintiff.

CANADA TRUST CO. v. LAYTON.

Saskatchewan Supreme Court, McKay, J. April 17, 1916.

MORTGAGE (§ VI B—75)—*Registrar's jurisdiction as to default judgment.*]—Application referred by Master in Chambers.

Smith, for plaintiff.

No one, for defendant.

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McKAY, J.:—The claim sued on is a liquidated claim, and, from what the Local Master says in his reference, apparently default judgment would have been signed by the local registrar were it not for the provisions of the Land Titles Act, sec. 93, subsec. 10, and the Judicature Act (1914) Sask. Stat. ch. 20, sec. 4, clause 8. Both these provisions are practically the same, and the latter is worded as follows:—

8. In case default has occurred in making any payment due under a mortgage or in the observance of any covenant contained therein, and under the terms of the mortgage, by reason of such default, the whole principal and interest secured have become due and payable, the mortgagor may, notwithstanding any provision to the contrary, and at any time prior to sale or foreclosure, perform such covenant or pay such arrear as may be in default, together with costs to be taxed, and he shall thereupon be relieved from the consequence of such default.

The question to decide, then, is, does this provision prevent the local registrar from signing a default judgment herein?

In *Wasson* v. *Harker*, 8 D.L.R. 88, this Court *en banc* held that the above provision in the Land Titles Act applied to all mortgages, and it was immaterial what procedure the mortgagee adopted to obtain his remedy. Under this decision, therefore, this provision applies in an action on the covenant in the mortgage just as effectually as in an action for sale or foreclosure of the mortgaged premises.

The question, then, narrows down to this: Can the local registrar sign a judgment for the full amount of a liquidated claim, with a proviso that, upon payment of the arrears in default under the mortgage with costs to be taxed, the defendant will be relieved from the consequence of his default?

It seems to me he can. Both the arrears and the additional amount which becomes due by the acceleration clause are liquidated claims, and the local registrar, under rule 121, has power to sign judgment by default for liquidated claims.

The plaintiff will be entitled to his costs of this application.

UNION BANK OF CANADA v. MOUNTAIN.

Saskatchewan Supreme Court, McKay, J. March 22, 1916.

PARTIES (§ II A I—66)—*Creditor's action to set aside fraudulent conveyance—Grantor as party defendant.*]—Appeal from an order of the Master in Chambers, striking out W. E. Mountain as a defendant, and dismissing the action as against him with costs.

H. Y. MacDonald, K.C., for plaintiff.

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Johnston, for defendant W. E. Mountain.

McKAY, J.:—The plaintiff is a judgment creditor of W. E. Mountain, and brought this action, as originally framed, for the purpose of setting aside certain transfers of his land made by him when insolvent to his co-defendant W. J. Mountain voluntarily and fraudulently, with the intent and design of defeating, hindering, delaying and prejudicing the plaintiff and his other creditors, in the recovery of their debts. But the claim, as admitted during the application before me, was subsequently amended, to the effect that the said lands were transferred in order that the said "land should be preserved to the defendant Willows E. Mountain by being held for him in the name of the defendant W. J. Mountain as trustee for his co-defendant under a secret trust," and by adding to clause 1 of the prayer for relief, which claims:—

1 That the transfers hereinbefore referred to and described be declared to be null and void as against the plaintiff: (the following), or in the alternative, a declaration that the defendant W. J. Mountain holds the said land as trustee for the defendant Willows E. Mountain.

And, as was pointed out to me during the argument, the defendant W. J. Mountain states in his defence filed that the defendant W. E. Mountain transferred the lands in question to him as security for a debt and holds the same only as such security, and therefore in effect admits that he holds this land as trustee for his co-defendant subject to his claim only. In other words, that the transfers are only by way of mortgage.

According to the pleadings, therefore, it is alleged that W. E. Mountain still has some claim or interest in the land in question, and as the plaintiff is asking that this land be sold to satisfy his judgment, I think he is a proper party under the circumstances.

See *Gunn* v. *Vinegratsky*, 20 Man. L.R. 311, also Judge Stuart's dictum in *Clinton* v. *Sellers*, 1 A.L.R. 135.

There is no doubt that in an ordinary action, as this one was originally framed, to set aside transfers when brought by a judgment creditor, the judgment debtor and grantor is not a necessary or proper party.

Mills v. *Harris*, 21 D.L.R. 233, and the cases there referred to, are clear authority for this. But it seems to me that these cases so hold on the ground that the grantor has transferred and conveyed away his interest, and has no further claim or interest

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in the subject matter of the transfer or conveyance and no relief is asked against him, but in the case at bar it is alleged he still has an interest in the lands transferred and it is asked that these lands be sold. *Appeal allowed.*

MATHER v. ROSS.

Saskatchewan Supreme Court, McKay, J. February 9, 1916.

LANDLORD AND TENANT (§ II C—21)—*Cropping lease—Tenancy for year or at will.*]—Action to recover possession of land and mesne profits.

G. H. Barr, for plaintiffs.

H. M. P. DeRoche, for defendant.

MCKAY, J.:—The plaintiffs claim that by a verbal lease made during the month of April, 1914, they leased to the defendant for one year from March 1, 1914, all of section 1 in tp. 22, in r. 4, w. of the 2nd m., for one-third of the crop, and on the expiration of the year the defendant refused to give up possession and is still in occupation of the land.

The defendant denies it was a lease for one year, but claims that, while occupying the east half of section 9 in said township and range under a written lease, plaintiffs and defendant in the early part of April, 1914, arranged that he should abandon said east half of 9 and occupy said section 1, that nothing was arranged between the parties as to the length of the term of the new tenancy, but it was understood he was to pay the plaintiffs one-third of the crop by way of rent, and that defendant entered into possession on April 15, 1915, and paid one-third of the crop to the plaintiffs, and defendant is still in occupation and thereby became a yearly tenant.

At the trial, the defendant's counsel admitted that the tenancy under which defendant entered into possession, and sworn to by the defendant, was a tenancy at will, but that the fact of the plaintiffs accepting the one-third of the crop in payment of one year's rent changed this tenancy into a yearly tenancy, and cited a number of authorities in support of this contention. The authorities, however, simply go to shew that the payment and acceptance of a yearly rent, where premises have been occupied for a number of years, will change what was originally a tenancy at will into a yearly tenancy. And the cases cited—such as *Cox*

v. *Bent* (1828), 5 Bingham 185, and *Knight* v. *Benett*, 3 Bing. 361, were cases where the tenant had entered into possession under an agreement for a lease, and remained in possession for several years and paid rent equivalent to and accepted as a yearly rent; a state of facts altogether different from those in the case at bar, where the defendant was in quiet possession only one year and paid the one-third of the crop for this first year only, and which is perfectly consistent with the plaintiff's contention that the land was leased only for one year for one-third of the crop.

I believe plaintiff Mann's evidence that he had leased the land in question to defendant for one year only from March 1, 1915, and so find. The defendant therefore wrongfully refused to give up possession in the spring of 1915, when requested to do so by plaintiffs.

The plaintiffs tried to get defendant off the land in question in time to enable them to crop it in 1915, but were unable to do so, and defendant remained in possession and occupation and is still in possession and occupation, but he did not crop it in 1915—although the evidence shews he could have done so—and allowed it to run to weeds, in consequence of which the land is now not in as good condition as it was when the defendant went into occupation in the spring of 1914, and defendant has not paid anything in the way of rent or mesne profits for 1915.

The evidence shews that 400 acres could have been cropped in 1915, and the defendant swears that he considers $4,600 would be a reasonable profit, above all expenses, for his share—two-thirds of the crop—for that year. The plaintiff Mann swears that if he had had the use of his land, this land in question, in 1915, a reasonable profit would have been $2,400. I think both amounts rather high.

I will allow plaintiffs $1,600 for mesne profits.

The result will be that the plaintiffs will have judgment against the defendant for recovery of and immediate possession of the land in question, and $1,600 for mesne profits with costs. The defendant's counterclaim is dismissed.

Judgment for plaintiff.

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ARMISHAW v. SACHT.

British Columbia Supreme Court, Murphy, J. June 5, 1916.

COSTS (§II—20)—*Actionability—Losses caused by judicial proceedings—Necessity of order.*]—Action for costs. Dismissed.

J. E. Bird and *Miss E. Patterson*, for plaintiff.

C. S. Arnold, for Waugh.

R. Cassidy, K.C. and *A. C. McIntosh*, for Sacht.

MURPHY, J.:—Particulars of damage as found by the jury are "legal costs, fares and expenses to Vancouver and return, loss of time on farm." It may be that party and party costs can be recovered in such an action as this, but if so it must be shewn that there has been a judgment for costs in the action of *Waugh* v. *Armishaw* and apparently also that such costs could not be recovered from Waugh. *Cotterell* v. *Jones*, 21 L.J. C.P. 2. At the trial plaintiff's counsel undertook to put in as exhibit 18 the order dismissing the receivership application with costs. It turns out that this order was apparently never taken out. The Chamber list shews that such an order was made but the records of the registry office shew nothing further was done and plaintiff's solicitor has been unable to produce it. Plaintiff therefore falls squarely within the first proposition above laid down, *i.e.*, he has not shewn that he has ever gained a legal right to these costs, which I take to be the *ratio decidendi* of *Cotterell* v. *Jones*. That action was framed, as is this, as a conspiracy action. This obviates the necessity of considering whether the action could succeed without proof that such costs could not be recovered from Waugh, which also was not proven.

As to the other points of damage alleged, "fares and expenses to Vancouver and return, loss of time on farm," these in view of the other answers of the jury clearly in my opinion refer to losses caused by the civil proceedings in *Waugh* v. *Armishaw*, and particularly to receivership applications. These are what are termed in these cases "extra costs" and are not recognized by law. *Saville* v. *Roberts* (1698) 1 Ld. Raym. 374; *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q.B.D. 674; *Barnett* v. *Eccles Corporation*, [1900] 2 Q.B. 423; *Wiffen* v. *Bailey, etc.*, [1915] 1 K.B. 600.

Action dismissed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 13, 1916.

DAMAGES (§ III L2—250)—EXPROPRIATION OF LAND—SPECIAL VALUE—ADAPTABILITY FOR BUSINESS.

Where its location and adaptability make land worth more to the owner than its intrinsic value, those circumstances should not be taken into consideration in fixing the compensation after expropriation; what a prudent man in the owner's place would pay is the proper measure of value.

[*Re Schooley and Lake Erie & Northern R. Co.*, 25 D.L.R. 537, 34 O.L.R. 328, varied.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 25 D.L.R. 537, 34 O.L.R. 328, affirming with a slight variation of the award of the arbitrators appointed to determine the compensation to respondents for their property expropriated.

The respondents carried on an ice business in Brantford and the business premises were expropriated for purposes of appellants' railway. The evidence produced before the arbitrators appointed to determine their compensation showed that the premises were specially adapted for their business and the arbitrators awarded for such special adaptability the sum of $20,000 representing the annual saving of expense over the cost of doing business in another place capitalized for 10 years. This was added to the $29,000 allowed as the market value of the property. The Appellate Division upheld the award save as to $800 allowed for sawdust which was struck off.

Brewster, K.C., for appellants.

Cowan, K.C., for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—Any question of principle involved in this case is, I think, covered by the authority of the decision of the Judicial Committee in *Pastoral Finance Assoc.* v. *The Minister*, [1914] A.C. 1083.

The arbitrators here have found the market value of the property and then added to the amount the special value of the land to the respondents. To this special value the respondents were undoubtedly entitled whatever exception may be taken to the way in which it was arrived at. In the case above referred to the Judicial Committee say:—

> The substantial ground on which the majority of the Court based their decision was that the appellants were not entitled to anything beyond the market value of the land. . . . Their Lordships have no hesitation in

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deciding that the principle underlying this decision is erroneous. The appellants were clearly entitled to receive compensation based on the value of the land to them.

The Appellate Division, following this ruling, has held that the respondents were entitled to the special value which the arbitrators have allowed. The Court indeed takes exception to the method adopted for arriving at the proper compensation by first taking the market value of the property and then ascertaining and adding the special value to the respondents. The Court considers, and I think rightly, that the preferable method would have been to ascertain simply the value of the property to the respondents and base upon this the compensation to which they were entitled. The Court, however, finds and again, I think, rightly, that there has been no error in principle which can affect the amount of the compensation awarded. With the amount allowed the Court professes itself satisfied and declines to vary it.

The only question, therefore, for this Court to determine is, in my opinion, the adequacy of the amount of the compensation awarded.

Although I think the sum of $29,000 at which the jury have estimated the market value of the property is a very liberal allowance, I am not disposed to interfere with this, holding as I do, that unless the award of arbitrators is clearly excessive, it should not be disturbed on an appeal to the Courts. Notwithstanding, however, this disposition to interfere as little as possible with the award of arbitrators on a simple question of amount, I cannot accept the finding with regard to the special value of the property to the respondents. The sum of $20,000 cannot, I think, be justified by anything in the evidence pointing to such loss by the respondents as would entitle them to compensation on this scale.

Under the circumstances it is necessary to adhere to the method of valuation which the arbitrators have adopted and to deal separately with the loss which the respondents have sustained by reason of the special value of the property to them.

Upon reading the evidence and giving the matter the most careful consideration, the conclusion that I have arrived at is, that if to the market value found by the arbitrators at $29,000 there is added $4,000 for the so-called special value, the respondents

will have received full and ample compensation for the loss which they have sustained by the taking from them of their property.

The appeal must be allowed to the extent of reducing the total award to the sum of $33,000. The appeal of the respondents is dismissed.

DAVIES, J.:—This appeal is from the judgment of the First Appellate Division of Ontario confirming an award made by arbitrators appointed to value the compensation payable to the respondents for two pieces of property expropriated by the railway company in the city of Brantford on which the respondents carried on an ice business, less the sum of $800 for sawdust which was disallowed.

There was a cross-appeal by the respondents to restore this $800; but I may as well dispose of this cross-appeal by saying that I am quite in accord with the Appellate Division in disallowing this item.

As to the award, the business premises consisted of two distinct parcels of land with buildings upon them, one called the Water St. lands and the other the Greenwich St. lands. As to the former, the arbitrators valued the compensation payable for the lands at $4,620 and the buildings at $3,500, and as to the latter, the lands at $10,560 and the buildings at $8,400. The values placed upon the machinery and the saw-dust between the walls are not in dispute.

The total value awarded for the lands, buildings, sawdust and machinery amounted to $29,000 and in their written reasons the arbitrators explained that

> the values put upon these lands and buildings is their intrinsic value or real value as taken for any purpose, not necessarily the ice business, but we found also that these lands were especially adapted for the ice business, reducing the handling and storing of ice to a minimum of expense and making it much less expensive than it can be done for at the premises to which the claimants propose removing or indeed in any other premises in the city of Brantford that were mentioned or pointed out to us.

The arbitrators then proceed to add to the "intrinsic or real value" of the lands and buildings as determined by them the sum of $20,000 for the reason, as explained by them, of "special adaptability" of the lands for the business of the ice company, thus increasing their award to $49,000. Their language in the award is:—

> Then in addition also for the extra cost of harvesting ice in any other place

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in the city of Brantford or what may be termed "special adaptability" interest in the lands expropriated by the railway company

With respect to this item, the main one in dispute, the Appellate Division says:—

> The amount of $20,000 seems large, having regard to the figures awarded for the land and buildings in this case. But there seems to be no basis on which it can fairly be reduced, if, as I think was intended, it represents the special value of the land expropriated and damages for disturbance to business.

I am extremely reluctant to set aside or alter the award of arbitrators who have had the advantages of seeing and hearing the witnesses and visiting the property, and with respect to the $29,000 awarded, though I agree it is very large and, specially with respect to the amount awarded for the Water St. *buildings*, which had been condemned by the city inspector as dilapidated and dangerous, indefensibly large, yet I am not, in view of the judgment of the Appellate Division, disposed to interfere with it holding that it includes all damages for compulsory purchase.

With respect to the additional amount of $20,000 added under the head of "special adaptability," I am of opinion that the arbitrators proceeded upon a wrong principle.

They first found on conflicting evidence that the extra expense of harvesting and selling the ice at the proposed new location would be $2,000 yearly and they proceed to allow this amount for 10 years in addition to the intrinsic value of the property taken. There is no justification in my judgment for such an arbitrary assessment.

The true principle on which they should have proceeded is that laid down by the Judicial Committee in the *Pastoral Finance Assoc.* v. *The Minister*, [1914] A.C. 1083, namely, that this special suitability of the lands expropriated for the carrying on of an ice business and the additional profits which the owners will derive from so carrying it on, are proper elements in assessing the compensation, but the owner is not entitled to have the capitalized value of those savings and profits added to the market value of the lands.

Their Lordships say at p. 1088 of the report of the above case:—

> That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it

could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that *they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.* Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would, no doubt reckon out those savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.

This statement of the law shews clearly that in arbitrarily adding ten times the amount of their estimate of the extra yearly cost of harvesting and selling their ice product, the arbitrators proceeded upon a wrong principle and one which, if indorsed by the Courts, would, in many cases (I think in this case), be productive of great wrong.

After giving the facts of the case and the arguments at bar and in the respective factums every consideration and giving the judgment which, in my opinion, the Appellate Court should have given, I have reached the conclusion that a prudent man in their position might have been willing to give for the lands taken a sum certainly not greater than $5,000 for these special advantages and adaptability to the ice business in addition to their intrinsic value as found by the arbitrators. In this view my brother Anglin concurs but we agree to reduce that $5,000 down to $4,000 in order that there may be a majority judgment reached. The judgment appealed from accordingly will be reduced to $33,000.

IDINGTON, J.:—This appeal arises out of the expropriation by appellant under the Railway Act of lands in Brantford used by the respondents for carrying on an ice business. Idington, J.

The arbitrators' award for compensation amounted to a total of $49,000 made up as follows:—

Machinery (valued by consent), $675; Water Street lands, $1,620; Water Street buildings $3,500; Greenwich Street lands, $10,560; Greenwich Street buildings, $8,400; Sawdust in walls, $445; Sawdust in ice house for covering ice, $800 = $29,000.

Then in addition also for the extra cost of harvesting ice in any other

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place in the city of Brantford or what may be termed "special adaptability" interest in the lands expropriated by the railway company, making a grand total of $49,000.

The Appellate Division of the Supreme Court of Ontario struck out the $800 item for sawdust used for covering in the ice house, thus leaving $28,200 for lands and buildings.

How such an item of purely personal property crept into such an award puzzles me, yet respondents ask its restoration. The remaining items of the original $29,000 are claimed to be high but admittedly cannot be contested here with much hope of success in face of the evidence and no legal principle violated in acting thereon.

The additional item of $20,000 does not seem to be justifiable on any legal principle put forward to support it when dependent only upon such evidence as relied upon.

The expression of the arbitrators of what the item stands for is rather confusing and, I most respectfully submit, seems the result of the confusion of thought which lies at the root of the error into which the arbitrators fell. And their later deliveries of divergent reasons supporting their respective views, apparently after an appeal was in sight, is an unsatisfactory method of doing so, for the reasons under such circumstances do not carry the same weight as if they had been delivered with the award.

The lands are to be estimated in such cases as in question herein upon the basis of their market value. And it is what they are worth to the owner that is to be considered.

In fixing the market value at the figure they did I have to assume the arbitrators proceeded on their appreciation of the evidence before them. We are not seriously asked to change that. But in that evidence so far as counsel in argument or in factum has directed our consideration, there was nothing presented to shew that there was any market price for ice house sites as distinguished from their values for anything else. Yet it is that market price of any land possessing special adaptability for anything that has to be determined if we are in principle to follow the latest authority reiterating the rule in the case of *Cedars Rapids Man. & Power Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569, at p. 579.

The direct evidence which ought to be required to fix the market value in that regard has not been produced. In the indirect

way, of entering into a long and elaborate investigation of the comparative cost of operating with this plant where it is, as compared with a plant assumed to be placed some place else, there is alleged to exist the basis of a calculation of value to be added to the market price.

Not a tittle of evidence is referred to shewing that any sane man of business would think of investing $48,200 for land and buildings of the kind in question devoted to an ice business selling four thousand tons of ice per season.

The proposition seems to me to sound rather hollow. And without going so far as to hold, as matter of law, that you cannot prove value and even market value by an involved process like unto that tried but uncompleted here, I may say the process has (if it ever can be made operative and serviceable), failed in this case because of that reasonable approach to completion which would make it worth anything being entirely wanting.

Would any one looking ahead to the enlightenment of the public on the subject of health and the gradual enforcement of the results thereof, through boards of health and otherwise, think of purifying the Grand River sewage for the express purpose of an ice business? Would he shew his faith in the business sense of doing so by paying $20,000 for the privilege when and where pure water is to be found and ice produced therefrom at perhaps less expense in any convenient spot? And all for the sake of a few incidental and temporary advantages of handling the product at a trifling less expense. And in Brantford, we are asked to believe these incidental advantages will extend over a period of ten or twenty years. The economic and social forces are against the realization of such imaginary contingencies.

There is only one other ice business in the city and that is supplied by pure water and involves a haulage of a mile and a half more than respondents either had to or has now to face in way of competition.

The proof that this plant has been made profitable and had been placed on a permanently profitable basis that would justify an investment of $48,200, has fallen short. Indeed so far as I can see the evidence is the other way.

The appellant's factum presents a statement of counsel's estimate of the results so far as known which I do not adopt in its

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entirety. But in the main it ought to have been met and displaced if untrustworthy.

The only reason I imagine for respondents' able counsel failing therein is that the main facts were against him attempting it.

Moreover, though respondent's counsel properly enough put forward the interest on $29,000 as an item of expense in order to test whether or not there was such a profit in the business as to render it likely an owner getting that sum for his business stand could rightly complain, yet it is to be observed that the problem facing us is whether or not any one would think of paying $48,200 for such a business stand and to test that we must take interest on the latter sum as a test of what strain the proposition to be maintained by respondents will stand.

Unless there was either a highly profitable or at least a clearly substantial, profitable and permanently established business existent on the premises, this mode of proof of market value thereof is worthless.

All the elaborate calculations of a possible difference in cost of handling are of no consequence if the thing itself has failed to produce to the owner such a productive investment that reasonable men must say he would not and should not be asked to part with such a property for its ordinary market value.

If he expects others, even a railway company, to pay him for depriving him of a business stand something beyond ordinary market value, he must be ready and willing to demonstrate the fact just as fully as possible and allow the fullest possible investigation on the basis of such a proposition.

There was neither cash book nor ledger kept in the business and the only possible available and substantial means of testing the matter was an inspection and thorough investigation of the bank book and that was refused.

There was, therefore, in short no proof upon which the arbitrators should have been allowed any such sum as the item in question, and that part of the award should be stricken out.

The ordinary ten per centum allowance for compulsory taking in absence of such proper proof should be allowed instead, amounting to $2,820.

This is not a case for referring back, for the respondents had deliberately refused that proper investigation of the lines of proof upon which they rested their claim.

The appeal should be allowed with costs here but without costs to either party in the Court below, and the award amended in the way I have indicated.

ANGLIN, J.:—I concur with DAVIES, J.

BRODEUR, J.:—This is an appeal concerning the compensation which should be awarded to the respondents for the expropriation of lands in the city of Brantford. Those properties were used by the respondents for harvesting and storing ice. They were situated on the Grand River and they were specially adaptable for that business. The current of the river afforded facilities for storing ice which reduced to a minimum the cost of the work.

There is not much difficulty with regard to the value put upon the lands and the buildings. The three arbitrators have come to a unanimous conclusion in that respect.

There is, however, a difference between them. One of the arbitrators is of opinion that the price which has been awarded for the lands and the buildings would have included also the special adaptability of this property for the ice business.

The other two arbitrators, on the other hand, state that $29,000, which is the amount awarded for the lands and buildings, would simply give the intrinsic value of the property for any purpose, not necessarily the ice business; but they find that the lands were specially adapted for the ice business and that it has cost less to the owners for handling and storing their ice than it will cost at the place where they will have to remove their place of business.

It appears that the reason for this low degree of expense is that the ice field is some distance above the buildings and that the respondents used to cut the ice in squares on that field. They would cut then a canal through the ice to the storehouse and float the ice down this canal each block being ready for storage.

The other arbitrator does not dispute the advantage of the convenience of harvesting ice at that point; but he claims that the railway company had the option of either compensating them for such advantage or of compensating them for the establishment of the business so far as such business was incidental to the land expropriated. He does not dispute the fact that, if the method adopted by the majority of the arbitrators is correct, the value put as to damages incurred would be correct.

CAN.

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LAKE ERIE AND NORTHERN R. CO. v. SCHOOLEY.

Brodeur, J.

The railway companies in exercising their right of eminent domain are bound not only to pay the market value of the lands expropriated but also the damages incurred by the owner in connection with the expropriation.

Here is a man who had, on account of the convenient site of his business, particular advantages for handling it. Those advantages could not be secured elsewhere and in order to carry out the same business as he was doing before he will have to pay extra costs and incur additional expenditure. He will suffer damages then as a result of that expropriation and it seems to me that the principles of law enunciated above render the railway company liable for those additional costs.

The Privy Council in the case of *Pastoral Finance Assoc.* v. *The Minister*, [1914] A.C. 1083, decided that the special suitability of the land for a business which the owner carries on elsewhere but intends to transfer to that land and the savings and additional profits which he will derive from so doing are elements in assessing the compensation.

It seems to me that, applying the principles enunciated in the above decision of the Privy Council, the owners, respondents, are in this case entitled to be compensated for special adaptability for the lands expropriated or for extra cost of harvesting ice in any other place in the locality.

The arbitrators have awarded the sum of $20,000 for such compensation and they are all unanimous as to the amount of that compensation if the above principle is right. The amount seems to be very high; but I would not feel disposed to substitute my own judgment as to the value for the judgment of the arbitrators.

There has been a cross-appeal by the respondents concerning a sum of $800 which was awarded by the arbitrators for the sawdust which was in the ice house for covering ice. That amount was refused by the Appellate Division, and I concur in the views expressed by that Court that the owners are not entitled to the same.

For these reasons the appeal and the cross-appeal should both be dismissed with costs.

Appeal allowed.

JONES v. BERLINER GRAMOPHONE CO.

QUE.

S. C.

Quebec Superior Court, Guerin, J. June 1, 1916.

SOLICITORS (§ II C 1—30)—RIGHT TO FEES IN ADDITION TO WAGES—DUAL CAPACITY.

A lawyer employed as a collector at a weekly salary has the right, in addition to his wages, to taxed fees for services rendered in his professional capacity.

ACTION for solicitor's fees. Statement.

Robillard, Julien, Tétreau & Marin, for plaintiff.

Cook & Magee, for defendant.

The plaintiff is an advocate who sues for his fees.

The company-defendant on May 14, 1912, advertised for a collector. The plaintiff applied for the position and was accepted with a salary of $12 to $18 a week.

The defendant discovering that the plaintiff was a lawyer entrusted him with a number of cases before the Courts. The plaintiff occupied for it and earned several bills of costs which were regularly taxed. The defendant paid the disbursements, but no arrangement was made as to the fees.

The plaintiff claims by his action the sum of $1,100, balance of his account for professional services composed of costs of judgments and executions.

The defendant's pretensions are that the plaintiff was its employee as collector, at a salary of $12 a week with an agreed increase, and could not claim more than his salary, which was duly paid to him. It is at the demand of the plaintiff himself that he acted as a lawyer for the defendant. In July, 1912, the plaintiff suggested to the defendant that if he was allowed to act as its lawyer, he would have greater facilities for the collection of their accounts. The defendant then furnished and equipped for him a special office, paying all his expenses and disbursements and increased his salary to the sum of $18 per week. He was later on discharged, because he was not fulfilling his duties towards the defendant in a satisfactory manner; and this action is only an afterthought due to his dismissal.

The Court maintained the plaintiff's action by the following judgment:—

"Considering that the defendant having advertised in the public press for a collector, the plaintiff did, on May 14, 1912, apply for this position, and on the 18th of the same month, the defendant offered to engage him as such at the rate of $12 per week, and the plaintiff accepted said offer;

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"Considering that the plaintiff did almost immediately thereafter begin his duties as such collector, and that his salary was gradually raised to $18 per week;

"Considering that after the plaintiff had been in the defendant's employ as such collector for about one year, a fact of which the defendant was ignorant up to that time, came to the knowledge of the defendant, namely, that the plaintiff was a member of the Bar of Montreal, and thereupon a number of cases in the Superior Court and in the Circuit Court of this district were entrusted to the plaintiff who continued as usual his services, collecting the defendant's accounts, but who moreover with the defendant's sanction appeared as their attorney *ad litem*, caused many writs to be issued, and proceeded to judgment in many cases and earned many bills of cost, which, at divers times, were regularly taxed by the prothonotary of this Court or by the clerk of the Circuit Court of this district;

"Considering that it appears from the evidence that the defendant advanced to the plaintiff all the disbursements which were required for the purpose of these litigations, but it also appears that no arrangement was made as to the fees which the plaintiff earned in these different suits according to the tariff of advocates, practising their profession in both these Courts;

"Considering that the wages which the defendant paid to the plaintiff as a collector do not deprive him of the right to claim his taxed fees in the cases where the plaintiff thus acted as advocate with the knowledge and acquiescence of the defendant;

"Considering that the plaintiff has filed a great number of bills of costs, which include a great number of disbursements and which also include several bills of costs that are not taxed and others which are made up of disbursements alone for all of which the plaintiff has credited the defendant in his account to the extent of $603.70, leaving a balance of $1,100 for bills of costs amounting to $1,703.70;

[The two following considerants are relating to the details of the taxed bills of costs amounting to $250.50.]

"Considering that the plaintiff has proved the essential allegations of his declaration to the amount of $250.50, and has failed to establish a valid claim in excess of this sum;

"Considering that the defendant has failed to establish the essential allegations of its plea;

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"Doth dismiss the defendant's plea, and doth condemn the defendant to pay to the plaintiff $250.50, with interest thereon from May 19, 1914, date of the service of process, and the costs."

Judgment for plaintiff.

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CANADA LIFE ASSURANCE CO. v. DICKSON.

Alberta Supreme Court, Harvey, C.J. August 28, 1916.

MORTGAGE (§ VI E—90)—MORATORIUM—VOLUNTEERS AND RESERVISTS RELIEF ACT—RENTS—RECEIVER.

Though by sec. 8 of the Volunteers and Reservists Relief Act (Alta. 1916, ch. 6), the mortgagee's right to collect the rents is preserved, the remedy of enforcing that right by an action for the appointment of a receiver, particularly in connection with the foreclosure action itself, is suspended under the provisions of sec. 3 of the Act.

[*Calgary Brewing & Malting Co.* v. *McManus*, 29 D.L.R. 455, referred to.]

Statement.

APPLICATION by the defendant under sec. 3 of the Volunteers and Reservists Relief Act (Alta. 1916, ch. 6), to dismiss a mortgage action and to set aside a receiving order. Granted.

Frank Ford, K.C., for plaintiffs.

William Rae, for defendant.

Harvey, C.J.

HARVEY, C.J.:—This is an action on a mortgage begun June 27 last.

The prayer of the statement of claim is as follows:—

(*a*) Payment of $27,863.80, with interest, according to the terms of the mortgage and in default sale or foreclosure and possession. (*b*) An order for personal payment against the defendant Dickson.

The defendant on May 16 last wrote the plaintiffs informing them that he had joined the 101st Regiment and was protected against any action on the mortgage under the Relief of Volunteers and Reservists Act, as passed by the Alberta Legislature.

On July 10 the defendant wrote the plaintiffs' solicitors complaining of the action of which he had just been served with the statement of claim and explaining his willingness to let the plaintiff have all the rents over $75 a month.

On July 21 he filed with the clerk of the Court an informal statement of defence signed and sworn before the clerk claiming the protection of the Act for the Relief of Volunteers and Reservists.

On July 26 the plaintiff obtained from Taylor, J., without notice to the defendant, an order appointing a receiver "to receive the rents, profits and moneys receivable in respect of the mortgaged property." The order contains numerous

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provisions, including one providing for the payment of the costs of the application and of carrying it into effect, which is directly prohibited by Rule 25 of the Rules as to costs.

The defendant now moves to set aside the receiving order and to dismiss the action, and relies on sec. 3 of the Act referred to, being ch. 6 of 1916.

That section provides that:—

> No person shall, after the passing of this Act, bring any action to take any proceeding, judicial or extra-judicial, against any volunteer or reservist . . . for the enforcement of any mortgage . . . created or arising before the passing of this Act . . . until one year after the termination of the said state of war or until one year after the discharge of such volunteer or reservist whichever shall first happen.

The statement of claim shews that the mortgage sued on was made in 1912, and the material filed shews that the defendant is a member of the 101st Regiment of Canadian Militia. In *Calgary Brewing & Malting Co.* v. *McManus*, 29 D.L.R. 455, the Appellate Division held that such a person is a volunteer within the meaning of the said section.

The plaintiffs, however, attempt to support the action and the order for receiver by sec. 8, which provides that:—

> This Act shall not deprive a mortgagee or person having a charge or security in land of the right to collect and receive the rents or rentable value of such land.

It is apparent that this section confers no right on the mortgagee though it seems to assume a certain right to exist.

It would be most strange if it could be intended to nullify sec. 3 which it clearly would do if it authorizes this action as the plaintiff contends. It is pointed out by Hals., vol. 21, p. 261, that a mortgagee of a mortgage in default may in a proper case have a receiver appointed to collect the rents of mortgaged premises either by an independent action for that purpose or as an incident to an ordinary action on the mortgage, and the contention is that this incidental right is preserved by sec. 8, though it is clear that the incidental right can only arise when there is an action which is prohibited. A construction which would lead to such a result is one which should be adopted only if no other reasonable meaning can be given to the section.

It is to be observed that sec. 8 contains no suggestion of an action or other proceeding, which is what sec. 3 prohibits. It refers to a right not to a method of enforcing such right. If

there is a right to collect the rents which can be enforced without an action or proceeding which is prohibited by sec. 3 then the right is in no way interfered with by sec. 3, even though some of the methods of enforcing that right may be taken away.

The mortgagee's right to take possession and collect the rents in default is referred to in the same volume of Halsbury, at pp. 189 *et seq.* Inasmuch as our mortgage is not a conveyance of the legal estate as it is under the old system there may, perhaps, be some question whether that right arises out of the relationship of mortgagee and mortgagor. It is probable, however, that it is provided for in most contracts of mortgage, but it is unnecessary for the present case to consider whether that right or a right to collect the rents by an action for a receiver exists under our mortgage, or to consider what is meant by the right to collect and receive the rentable value. If, in any case, the right does not exist, sec. 8 has no application. If it does exist sec. 8 declares that it is not taken away.

The present action, however, is not an action to collect the rents, but is an action to enforce the mortgage, and as such is directly prohibited by sec. 3, and is not necessary in order to give effect to sec. 8 and therefore cannot be supported by that section.

It is not contended that if the defence of the statute had not been raised the action could not have been maintained, but, like the defence of the Statute of Frauds, once having been raised, and the facts not being in dispute, effect must be given to it.

There is no reason on the facts of the case why the plaintiffs should not pay all of the costs incurred.

The application will, therefore, be granted with costs and the action dismissed with costs, and as a consequence the receiving order set aside. *Application granted.*

MEAGHER v. MEAGHER.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. June 13, 1916.

WILLS (§ III G 2—126)—LIFE ESTATE—GENERAL POWER OF DISPOSITION—"OR OTHERWISE"—APPOINTMENT TO ONE'S SELF.

A devise by a testator of all his estate to his daughters *nominatim*, upon trust, "to hold for themselves and to make such disposition thereof from time to time among my children *or otherwise* as my said daughters decide to make, they, my said daughters, in the meantime to have all the rents and profits therefrom," creates a beneficial life interest in the property in favour of the daughters; the words "or otherwise" confer an unlimited power of disposition exercisable in favour of any person, including the appointment to themselves.

[*Meagher* v. *Meagher*, 22 D.L.R. 733, 34 O.L.R. 33, affirmed.]

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MEAGHER v. MEAGHER.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 22 D.L.R. 733, 34 O.L.R. 33, varying the judgment at the trial in favour of the respondents. Affirmed.

A. C. McMaster, and *J. H. Fraser*, for appellants.

Hellmuth, K.C., for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—The will of the testator, Thomas Meagher, commences as follows:—

For the purpose of carrying out the trusts contained in this my will I give, devise and bequeath all the estate real and personal of which I may die seised or possessed or to which I may be entitled at the time of my decease unto my daughters Mary Ann Meagher and Margaret Ellen Meagher upon trust as follows.

There follows an enumeration of the trusts so declared, of which the fifth is as follows:—

To hold all my property in lots eight and nine in the third concession from the bay in the township of York, together with all stock, crops, furniture and other goods and chattels and personal property thereon for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make, they my said daughters in the meantime to have all the rents and profits therefrom.

The dispute in the action has been narrowed down to the single question of the effect of the fifth trust declared by the testator's will. I do not think this question presents any great difficulty; such as it does, arises from the fact that the trust is not set forth in regular and settled terms the meaning of which has become well established. Where these are departed from, there is always a likelihood that some opening will be left for a doubt as to the construction to be put upon the language employed; a vast amount of ingenuity has been shewn in the suggestion of possible meanings in the present instance.

I cannot doubt that the intention of the testator was to place the disposal of the property in question among his children, both as to shares and time, at the discretion of his daughters, Mary Ann Meagher and Margaret Ellen Meagher. It has to be considered how far he has succeeded in carrying out his intention, because, though we may look to the intention to decide the meaning of any ambiguous phrase, we cannot give an effect to the words used which their meaning will plainly not bear. In my opinion, however, full effect can be given in this case to the intention of the testator without adding to or departing from the exact words used.

I do not understand that any life interest can be taken by the daughters, because there is given to them a power to dispose of the whole property at any time, and it is only in the meantime that they are to receive the rents and profits. By making no appointment, they might, indeed, continue this state of things during their lives, but I do not think this makes any difference; it is only accidental that the power of disposition and the right to receive the rents and profits are in the same hands; if the power of appointment had been given to another child, he could by disposing of the whole property have put an end at any time to the enjoyment by the sisters of the rents and profits.

The most important question is, who are the persons in whose favour the power of disposition may be exercised, and it seems to have been thought that the words "or otherwise" following the power "to make such disposition among my children" must be construed to give the daughters a general power of disposition to any one they please. I do not think this is the meaning to be placed on the words "or otherwise." I think they are to be read with reference to the word "among" in the power of disposition among the children. It is, I think, only a way of expressing a very common trust which in proper legal phraseology would be framed as a power to appoint the trust property to such one or more of the testator's children in such shares and proportions and, at such time or times as the donee of the power might think fit. There is nothing either in the particular trust or in the general scope of the will to warrant the suggestion that the testator intended to give power to appoint strangers or any other than his own children.

The power of disposition can only be exercised by the two daughters, Mary Ann Meagher and Margaret Ellen Meagher, and on the death of either of them before making any disposition of the property it will fall into the residuary estate.

I am not overlooking the words "for themselves" following the names of the testator's daughters, Mary Ann Meagher and Margaret Ellen Meagher, which may be thought to be against the construction which I have placed upon the trust. Apart, however, from the fact that they have no technical meaning, they seem, if not senseless, at any rate inapt to express any possible meaning which the testator could have intended. If they refer

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to the beneficial interest which these ladies take, it can only be such interest as they have under the trust. I am, however disposed to think that there is another explanation. It is apparent on the face of the will that it was drafted either by a lawyer who was not a very competent draftsman or by someone who had considerable knowledge of legal forms. I think it may be that the insertion of the words "for themselves" is due to some confused and mistaken idea of proper and apt legal forms. These are perhaps useless speculations and, looking to the intentions of the testator as they are to be gathered from the whole will, including the particular devise and bequest, I should have no hesitation in saying that if the words "for themselves" were repugnant to the construction which I have placed upon the trust, they ought to be disregarded.

The effect of the trust construed in accordance with the views above expressed will therefore be: Devise and bequest of all testator's real and personal estate to trustees; as to the property in the fifth enumeration mentioned—To hold the same upon trust, to make such disposition thereof to or for such one or more of his children in such shares and proportions and in such manner as his daughters, Mary Ann Meagher and Margaret Ellen Meagher, may from time to time direct or appoint, and in the meantime and until any such disposition shall have been made and so far as the same shall not extend, to permit his said daughters, Mary Ann Meagher and Margaret Ellen Meagher, to receive the rents and profits thereof for their own use and benefit and from and after the death of either of them, the said Mary Ann Meagher and Margaret Ellen Meagher, and in default of any such direction or appointment or so far as the same shall not extend, upon the like trusts as are in the will declared concerning the residuary estate.

I think by following these indications there will be no difficulty in settling the judgment varying the judgment of the Appellate Division. If necessary, the matter can be spoken to in Chambers.

The appeal must be allowed and under ordinary circumstances the costs should come out of the estate, but as it appears that all available assets have been distributed and the action is mainly at any rate concerned with the trust declared in the fifth enumeration in the will, I think the costs of all parties may fairly be paid out of the particular trust property.

IDINGTON, J. (dissenting):—This will seems to have trust written all over it except one ambiguous bit contained in clause 5. Its first clause was evidently intended to be all comprehensive and determine the general scope and purpose of the instrument. That and clause No. 5 are as follows:—

1. For the purpose of carrying out the trusts contained in this my will I give, devise and bequeath all the estate real and personal of which I may die seised or possessed or to which I may be entitled at the time of my decease unto my daughters Mary Ann Meagher and Margaret Ellen Meagher upon trust as follows:—

. . . . . .

5. To hold all my property in lots eight and nine in the third concession from the bay, in the township of York, together with all stock, crops, furniture and other goods and chattels and personal property thereon for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make, they my said daughters in the meantime to have all the rents and profits therefrom.

One thing quite clear is that everything was given these daughters for the purpose of carrying out the trusts contained in the will.

Let us take and apply the following extract from Lewin on Trusts, (12th ed.) ch. IX., p. 169, sec. 1, par. 16:—

16. Next, a trust results, by operation of law, where the intention not to benefit the grantee, devisee or legatee is *expressed* upon the instrument itself, as if the conveyance, devise or bequest be to a person "upon trust" and no trust declared, or the bequest be to a person named as executor "to enable him to carry into effect the trusts of the will" and no trust is declared, or the grant, devise or bequest be upon certain trusts that are too vague to be executed, or upon trusts to be thereafter declared and no declaration is ever made, or upon trusts that are void for unlawfulness, or that fail by lapse, etc.; for in these and the like cases the trustee can have no pretence for claiming the beneficial ownership, when, by the express language of the instrument, the whole property has been impressed with a trust.

We may assume this to be an accurate presentation of the law. For my present purpose I see no reason to labour with the manifold fine distinctions existent behind this expression thereof.

These authorities, cited in foot-notes, at pages 169 and 170, (Lewin on Trusts) in support of the text I have quoted, shew that the absence of a declaration of trust would not enable such a devisee or legatee to claim the property.

Is it not, therefore, quite clear that the first clause of this will has impressed upon the bequests and devises comprised therein a trust which would result respectively to the heirs at law or personal representative of the testator unless so far as relieved

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Idington, J.

therefrom by later clear and unmistakable language? No one will attempt to deny that such later language, so far as clearly intelligible, must govern.

This clause 5 contains all that can be invoked to aid the daughters so bound by the obligation of a trust. How can it? It is not necessary to enter upon the profitless discussion of what might have been the exact nature of the title taken by the daughters had the latter part of clause 5 been obliterated, further than to say that even in such a case it might be fairly arguable they took no more than an estate for life under the circumstances in which they had been placed by the rest of the will.

Assuming it possible to maintain in such a case that they would have taken thereby an estate in fee simple in the land, and a corresponding absolute property in the personalty, how can we say that the following language:—

and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make they my said daughters in the meantime to have all the rents and profits therefrom,

must be discarded and is of no effect?

It seems, at least impliedly, to rebut any construction of what had preceded it, as ever having been intended by the testator to transfer absolutely all title or interest he had therein.

It removes all possibility of holding, properly, that the daughters were intended to have taken all freed from any trust. It leaves them nothing but a life estate, carved out of what they got, freed by virtue of the express terms, including the nominative fashion of doing it, from the trust which otherwise would have bound them.

But how does that help us to find a general power or free the additional power over the estate given by these lines from the implication of being impressed with a trust? That additional power is not inconsistent with the trust expressed in the first clause, but quite consistent therewith and what was intended thereby to be defined later.

Either the language creates a power or it does not.

If by reason of and through inaccuracy of expression it fails to convey any meaning, save that I have just adverted to, of making clear it was only a life estate that was intended to be given these daughters, then there has been no trust declared, and the absence of either a declared trust or devise or bequest,

in clear and unmistakable terms freeing the same from the trust impressed on it from the beginning, leaves this property to the heirs at law and personal representatives subject to the life estate therein of the daughters or survivor of them.

And if the language used can be construed as giving a power, that is likewise impressed with a trust unless it can clearly be interpreted as excluding it.

The only thing in this power which lends a possibility of such exclusion is the use of the phrase "or otherwise."

When I find that used as the foundation for a process of reasoning which ends by concluding that the donees of the power are but the probable objects of its execution, I hesitate to attribute such intention to the testator, who certainly could have accomplished that result, if so intended, by using direct and simple language.

The phrase "or otherwise" may mean so much or so little that its slovenly use, so evident here, tempts me to think it would be more in accord with the scope and purpose of the whole will, and the evidence it furnishes of the testator's intention, to read it as having relation to the time when the power was to be used. It seems to me this is one of those cases where the strictly grammatical construction does not express what the writer intended. It is more in harmony with all else to be looked at and considered to read the phrase "or otherwise" as related to the question of time. Doing so would give a clear and operative effect to the whole paragraph, instead of rendering it futile.

It might obviously be expedient in the interest of those concerned to execute the trust by appointing part of the property at one time, and other parts at other times, as circumstances developed, or if occasion called for it to await a time when a final distribution might be made.

Again, if the power never could be prudently executed in its entirety, the result would be to let the children and (or) their descendants acquire the property by the direction of the Court or possibly without such direction.

One of the difficulties attendant upon its due execution might be the possibility of the donees being excluded.

The question thus raised has been dealt with in argument in a recent case of *Tharp* v. *Tharp*, [1916] 1 Ch. 142, where the cases are collected.

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Idington, J.

I do not intend herein following the inquiry thus suggested, and only mention it for the consideration of those concerned.

I conclude for the foregoing reasons that the appeal should be allowed and the judgment below varied by striking out the words

and are also entitled to a general power to appoint the corpus of the said real and personal property either to themselves, the said Mary Ann Meagher and Margaret Ellen Meagher, or to any other person as they may think fit, and doth adjudge the same accordingly,

and substituting the words

and have as trustees a power of appointment over said property in favour of the children of the testator to be executed from time to time or otherwise as prudent persons acquainted with the circumstances and conduct of the said children respectively should feel just.

It seems to me such was the desire of the testator.

It is impossible for us, without the slightest information as to the ages and conditions in life of these children or any of the surrounding circumstances which led the testator to make such a peculiar provision, to say more.

It is possible an equal distribution was not intended. It is possible that the testator expected the distribution to depend upon the conduct of the children, and undeserving ones to feel that the trustees had power of discrimination. I pass no opinion on such suggestions. They may be, even if one knew, a great deal more than presented of no value.

At present all that seems to me quite clear is that the impress of a trust is stamped on the power for whatever it is worth. If too vague to be effective as probably intended, the trust will result to the benefit of the heirs.

As to the costs, I should leave each party to pay their own costs in the Appellate Division and in this Court.

Duff, J.

DUFF, J.:—The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I know of no rule of equity which prevents a devisee of property upon trust from taking out of it a benefit which it was the intention of the testator that he should have. *Dawson* v. *Clark*, 15 Ves. 409; 18 Ves. 247, at 257; *Hughes* v. *Evans*, 13 Sim. 496. No doubt the intention to benefit the trustee personally must clearly appear. Such an intention, in my opinion, is explicitly stated in the fifth paragraph of the will here in question in favour of the testator's two daughters, in regard to the property therein dealt with, and no contrary intention anywhere appears. The concluding words of the fifth clause,

they my said daughters in the meantime to have all the rents and profits therefrom

admittedly give them a beneficial life interest in the property in question. I agree that they also preclude the construction in favour of their having an unrestricted fee simple, which was the view taken by the trial Judge. The earlier words,

for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves,

unmistakably indicate that this particular property, which the testator had included in the general devise to them in trust of his entire estate, was nevertheless to be held by the two daughters, not as trustees, but, as the testator puts it, "for themselves," *i.e.*, for their own benefit, having regard to what follows, during life, or until disposed of. The words "for themselves" I regard as at least equivalent in effect to the words "at his own disposal," discussed in *Re Howell*, [1915] 1 Ch. 241, as indicative of the testator's intention that this property was not to be subject to any obligation of trust. After devising the property to his two daughters *nominatim* "for themselves," the testator proceeds to give them the right

to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make,

i.e., not as trustees, but as individuals, with an unfettered power of disposition. I cannot find in these words any indication of an intention to benefit the testator's children exclusively. The words "or otherwise as my said daughters decide to make" distinctly exclude that idea. Should the power conferred not be exercised, subject to the life interest of the two daughters, the property would pass either under the residuary clause or as upon an intestacy.

I can find no justification for distorting the language of the testator by transposing the words "or otherwise," as contended for by counsel for the appellants, and placing them immediately after the phrase "from time to time" or for refusing to give them their ordinary signification.

In a word, this case is governed by that primary and cardinal rule of interpretation, that the grammatical and ordinary sense of the words is to be adhered to unless absurdity, repugnancy or inconsistency should result—a rule too often disregarded in order to give effect to some technical and artificial rule of construction distinctly subordinate and never meant to be invoked where the

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language is plain and ordinary and there is neither ambiguity or obscurity in it. A testator's clearly expressed intention, not unlawful or impossible of performance, must be carried out.

I would dismiss the appeal with costs.

BRODEUR, J.:—After a good deal of hesitation, I have come to the conclusion that this appeal should be dismissed with costs.

Appeal dismissed.

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ROBERTSON v. CITY OF MONTREAL.

Quebec Court of Review, Archibald, A.C.J., and Mercier and McDougall, JJ. April 15, 1916.

1. HIGHWAYS (§ IV C—210)—ACCIDENTS ON SIDEWALKS—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK.

Mere failure to keep one's eyes rivetted upon the sidewalk while walking thereupon is not proof of such contributory negligence as would preclude recovery from a municipality for damages resulting from the defective condition of the sidewalk.

2. MUNICIPAL CORPORATIONS (§ II G 5—230)—NOTICE OF ACTION—SUFFICIENCY—PLACE OF ACCIDENT.

Where the notice of action to a municipality sufficiently sets out the place of the accident, a slight variation as to the exact spot does not affect its validity.

3. JUDGMENT (§ I E 4—40)—NON OBSTANTE VEREDICTO—CONTRIBUTORY NEGLIGENCE IMPROPERLY FOUND.

Where a jury finds the damages suffered to amount to a certain sum, which sum they reduce owing to their finding of contributory negligence, the Supreme Court on appeal, considering the finding as to contributory negligence to be unwarranted upon the facts, may award to the plaintiff the full amount of damages found by the jury to have been sustained.

Statement.

Action in damages for $2,000, resulting from a fall on the sidewalk. In the notice given by the plaintiff to the defendant before the action, he described the place where he fell, as follows:

Le 12 mai 1915, vers 8 heures et demie du soir, M. Robertson passait vis-à-vis le no 56 de la rue Wellington, à Montreal, lorsqu'une pierre émergeant du niveau du trottoir, par 2 ou 3 pouces, lui fit faire une chute, etc.

The defendant pleaded: No fault on its part. But it charged negligence on the part of the plaintiff in walking on the sidewalk in a careless manner.

The case was tried by a jury, which found that the damages suffered by the plaintiff amounted to $600, but seeing that both parties were equally in fault, it gave a verdict for $300 in favour of the plaintiff.

The Superior Court on January 7th, 1916, referred the case for judgment to the Court of Review.

The Court of Review set aside partly the verdict of the jury and rendered the following judgment:—

"Considering that the notice given described the place of the

accident as being opposite No. 56 Wellington St., in the city of Montreal, and it is proved that the accident happened on the other side of the street from No. 56; but that there was no street number on that side by which the place could be particularly indicated;

"Considering that the word "vis-à-vis" or "opposite" would, by its natural meaning, include both sides of the street;

"Considering that the defendant suffered no prejudice from the description of the place of the accident, and, as matter of fact, shortly after the notice given, proceeded to the place and repaired the defect in the sidewalk at that point;

"Considering that the jury, by its verdict, found that the accident was partly caused by the negligence of the defendant and partly by the negligence of the plaintiff and that the plaintiff had suffered damages to the extent of $600, but awarded the plaintiff only $300 in consequence of the plaintiff's alleged fault:

"Considering there was absolutely no proof of negligence on the part of the plaintiff and that the jury could not reasonably find the plaintiff guilty of negligence with respect to the said accident;

"Doth set aside the verdict of the jury whereby it finds that the accident was partly caused by the negligence of the plaintiff and where it reduces the amount of the plaintiff's damages in consequence of such negligence;

"Considering that the Court may, where a jury has found a fact without evidence, and where the Court might have instructed the jury to find such a fact in the negative, disregard such finding and dispose of the case upon the other findings of fact legally made;

"Considering that the proof shews negligence on the part of the defendant and that the accident was caused by such negligence;

"Doth reject the motion of the defendant and maintain the motion of the plaintiff, and doth condemn the defendant to pay the plaintiff the sum of $600, damages found by the jury, and costs."

Greenshields and Greenshields, for plaintiff.

Laurendeau and Archambault, for defendant.

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—The notice which the plaintiff gave of the accident to the defendant described the place where the accident

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happened as being opposite (*vis-à-vis*) 56 Wellington St. The place where it actually happened was on the north side of the street. The number 56 Wellington is on the south side of the street just opposite the place. There was no number opposite this place on the north side of the street. The city took the ground that there was no sufficient notice.

The proof establishes that the city, after receiving the notice, discovered the place where the stone was out of order and repaired it. The object of giving notice to the city of these accidents is to give the city the opportunity of an early investigation so that it may be in a position to meet the evidence produced on the part of the plaintiff. It has been held over and over again that slight variations as to the exact spot where the accident happened will not be sufficient to nullify a notice providing the object of giving the notice is sufficiently accomplished—that is to say: that the city is sufficiently informed as to the place where the accident happened.

The word "opposite" or "vis-à-vis" would, by its ordinary meaning, include the whole street opposite the particular point mentioned; and when there was no number on the north side of the street, it ought to be considered sufficient to indicate that side also. It would, I think, be the duty of the city, upon receiving such a notice, to examine its sidewalks not only on the side on which the number 56 actually existed, but also on the other side of the street, especially seeing there was no number there. I am quite convinced that the city ought not to escape in this case by reason of the insufficiency of the notice.

The jury found damages to the extent of $600 which they divided in two parts owing to the alleged carelessness on the part of the plaintiff, giving the plaintiff only $300. The plaintiff alleges that there was absolutely no proof of neglect on the part of the plaintiff, and he asks that he be given judgment for $600, total amount of the damages found; alternatively, if that is not done, that a new trial be ordered.

The defendant asks that there be judgment non obstante, or alternatively, that judgment go in favour of the plaintiff for $300.

The position raised by the plaintiff is this: there was no evidence of negligence on the plaintiff's part and the jury could

not reasonably find that the accident was partly caused by the plaintiff's fault, and that, therefore, the jury having found a specific fault on the part of the defendant, which had its influence in causing the accident, and having found the total amount of damages suffered by the plaintiff at $600, the plaintiff is entitled by the judgment of the Court to have $600. The proof leaves no doubt of the negligence of the defendant. It is true that some of the witnesses of the defendant speak of the elevation of the stone in question as being much less than that proved by the plaintiff, but the plaintiff's evidence is precise, resulting from actual measurement with a rule, and is to be preferred to that of the defendant. Moreover, the jury has found in favour of the plaintiff as to the negligence of the defendant.

Now, absolutely the only proof of negligence on the part of the plaintiff which went before the jury was this: that the plaintiff stated that when he was going along the street he was looking in front of him in a general way without keeping his eyes upon the sidewalk directly in front of him to see if anything were wrong. Now, I cannot come to the conclusion that this is negligence. I think that the Judge ought to have charged the jury that there was no evidence of negligence on the plaintiff's part. If that had been done, manifestly the jury would have returned a verdict generally against the defendant for the amount of damages which the plaintiff suffered.

Upon the verdict, the Judge submitted the case to this Court on those questions: whether the notice was sufficient and whether judgment could be given for the sum of $600.

The Code of Civil Procedure contains art. 496 to the effect that the Court may, in all cases where the judgment of the trial Judge or the verdict in a reserved case is attacked, apply any remedy by which it considers that the ends of justice may be attained, even if such remedy has not been specifically demanded by any of the parties. See also art. 508.

These sections have been, by our own jurisprudence, interpreted in a liberal manner so as to enable the Court to come to final decision in a case in accordance with justice as between the parties and in a manner which, from the evidence, the jury ought to have given their verdict. Now, there is no doubt that there was fault on the defendant's part which was the cause of the

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accident. There is absolutely no proof that the plaintiff himself was in fault and there was no justification on the part of the jury in diminishing the plaintiff's damages.

Under these circumstances, I am of opinion that the Court here can award the plaintiff judgment for the total amount of the damages found. It has been distinctly held by the Court of Appeals that, notwithstanding the jury has found damages in a certain sum, the Court may reduce those damages even without the consent of all parties and give the plaintiff judgment for a smaller sum. What is proposed in this case is nothing so radical as that. It is simply to say: the jury had no right to find any fault on the part of the plaintiff. There was no proof upon which they could go. They have found that the plaintiff suffered damages to the extent of $600, and they have undertaken to diminish this in consequence of the illegal finding that the plaintiff had also been negligent. We have, therefore, in no way to alter the finding of the jury except to nullify the finding which is unsupported by any evidence. I am to give the plaintiff judgment for $600.

I find a number of decisions in the *Encyclopedia of Law and Procedure*, vol. 23, p. 820 The general rule is:—

> The judgment must follow and conform to the verdict not only as to the amount of the recovery, but also as to the nature and measure of relief and as to the parties, and it cannot go beyond the verdict in settling the rights of the parties or adjeasuring the recovery, or declaring or foreclosing liens, except that, in cases where the evidence would have authorized the Court to direct a verdict, it may in rendering judgment go further than the verdict in adjusting the equities of the parties.

Several cases are cited in support of this rule. That exception applies precisely to the case at bar. The evidence would have warranted the Judge to direct the finding on the part of the jury that the plaintiff was not in fault. *Judgment for plaintiff.*

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CANADIAN PACIFIC R. CO. v. CANADIAN BANK OF COMMERCE. McDONALD v. CANADIAN PACIFIC R. CO.

New Brunswick Supreme Court, McLeod, C.J., White and Grimmer, JJ. April 26, 1916.

CARRIERS (§ III A—370)—LIABILITY FOR WAREHOUSE RECEIPTS ISSUED BY AGENT—RELEASE OF GOODS WITHOUT PERMISSION OF HOLDER—CONTRIBUTION.

A railway company maintaining warehouses as a necessary incident to its business is bound by the act of its agent acting within the scope of the authority, which it holds him out to the world to possess, in signing warehouse receipts; it is therefore liable for shortages, in consequence of the agent's release of the goods to the shipper, without the permission

of a bank to which they were hypothecated as collateral security; the railway company, however, is entitled to contribution from the shipper to the amount recovered by the bank for such shortages.

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APPEALS by the defendant railway company from the judgment of McKeown, J., in an action tried before him without a jury at the St. John circuit in April, 1914, and by the said Frank McDonald against a judgment in favour of the said railway company in a third party action tried without a jury in August, 1915.

CAN. PAC. R. CO. v. CAN. BANK OF COMMERCE.

Statement.

F. R. Taylor, K.C., for the appellants, the C.P.R. Co.

E. P. Raymond, for the Canadian Bank of Commerce.

J. B. M. Baxter, A.G., for Frank McDonald.

GRIMMER, J.:—I am of the opinion the plaintiff is entitled to judgment. The plaintiff's claim is in respect to a shortage in goods stored in a warehouse of the defendant, the Canadian Pacific Railway (hereinafter referred to as the railway), for shipment, and of which warehouse receipts were issued by the agent of the railway, who received and stored the goods. The warehouse receipts were hypothecated by McDonald, the third party, to the plaintiff (hereinafter called the bank) to secure loans or advances made to him to carry on his business.

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After a time a large shortage in goods was discovered by the bank, and a demand for same was made by it upon the railway, under the warehouse receipts, which was refused, the railway claiming it was not liable, as it had not issued the warehouse receipts, had no knowledge of the same having been issued, and that it had not authorized its agent to issue the receipts, nor had it any knowledge he had done so, nor had he any right or power to issue the same. McDonald, the third party, carried on a business of canning clams and sardines at Fair Haven, about 9 miles from St. Andrews, New Brunswick, and was offered the use of the railway's warehouse at St. Andrews, which had been constructed and was maintained as incidental to their business as a railway company authorized by statute to carry on railway transit, for the storage of his goods pending sale and shipment. Accordingly, he shipped the same to the warehouse in quantities, where they remained until sold and were shipped out in the usual way over the railway's line.

The railway's station agent at St. Andrews, one Arthur Gove, signed warehouse receipts for all of the goods so shipped by

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McDonald to St. Andrews, some of which were signed by him as agent, and some, or perhaps more correctly a majority, of which were signed without the use of the word "agent."

To enable him to carry on his business McDonald (third party) obtained loans from the bank, and hypothecated the said warehouse receipts to the bank as security for the said loans.

It appears all the warehouse receipts upon which the bank claims, save the first one, are signed by Gove, who was station agent as aforesaid, receipt No. 1 being signed by one McQuaid, who was relieving Gove at the time. On March 28, 1913, Gove having been asked by the bank to confirm a list of warehouse receipts, notified them there was a large shortage in the goods, and also reported the same to McDonald.

After this date no further warehouse receipts were signed or issued by Gove, but by two letters in April of the same year he acknowledged the receipt of more goods. In conducting business with McDonald the bank complied with the provisions of the Bank Act as to the loan made, and arranged security therefor as therein provided. All necessary papers requiring the signature of McDonald were sent by him direct to the bank, except the warehouse receipts, which were sent to the railway's station agent, and after being signed were sent out by him to the bank.

As the receipts were received by the bank a notice of each in duplicate was sent to the said station agent, who signed and returned the original, keeping the duplicate. By this means a system of comparison and checking of receipts was provided for which was followed throughout the bank's entire dealings with McDonald. From time to time as McDonald made payments to the bank, he requested that releases be sent to Gove to authorize and justify him in shipping out the goods. If the quantity covered by the receipt was released, the receipt was surrendered and sent to Gove, if part only, the quantity released was indorsed on the receipt and Gove notified of the number of cases so dealt with. To each warehouse receipt was attached a copy of the notice of hypothecation, with the acknowledgment of Gove thereon.

From the evidence, the dealings between the bank and McDonald, in respect to which warehouse receipts were signed by the said railway's station agent, began in 1909, and continued until March 28, 1913. Gove, however, did not assume the office

of station agent until November, 1910, though he had acted previously as relief agent. He did not inaugurate the system of warehouse receipts referred to, but found it existing when he received his appointment, and he continued it. On the trial the shortage in goods proved amounted in value to the sum of $8,568.15 for which the railway disclaimed any liability.

The question is, did the railway, by its duly authorized agent, issue the warehouse receipts, and did it have knowledge of and acquiesce in the issuance thereof. There is no doubt that from November, 1910, until the trial of this suit, Gove was the duly appointed, recognized and acting station agent of the railway at St. Andrews, and as such had charge of the warehouses of the company at that place, and duly received, stored, and shipped out on bills of lading, goods of the defendant McDonald covered by warehouse receipts signed by him. He states the receipts were signed by him as a personal matter only, without instruction from the railway, and without its knowledge or consent, and that in so signing the same he simply continued in force a custom he found existing when he took charge of the office. H. E. McDonald testified he became general freight agent of the Atlantic Division of the railway in 1907, and continued in that office until May, 1910. That during this period he received communications from McDonald about warehouse receipts, and told him they could not issue the receipts, and that at this time he had no knowledge McDonald was getting warehouse receipts from one E. A. McDonald, who was then their station agent at St. Andrews. That he did not authorize either McDonald or Gove to sign the receipts, and that he was the proper authority to whom the agent should apply with reference to the issuing of the receipts. At this time Gove was not acting and the reference to him is not applicable. He further states the issuing of negotiable warehouse receipts is not within the duties of a station agent. On cross-examination he stated it was the duty of station agents to receive goods into warehouses and keep them there until they were ordered forward. Also that he knew of the railway giving warehouse receipts at Fort William and at Montreal, and that it would be proper for the railway to issue receipts for goods stored. W. B. Bamford testified he was division freight agent of the railway in charge of the Atlantic Division, which included St. Andrews. That he did not authorize the station agent at St. Andrews or any one

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else to issue warehouse receipts in this case to the bank or McDonald. That he had no knowledge the station agent at St. Andrews was issuing warehouse receipts to McDonald or any one else, that no station agent of the railway had authority to issue warehouse receipts. Also that Gove was the station agent at St. Andrews, and had charge of the freight traffic and terminal facilities there, and that his jurisdiction extended to the warehouses, freight sheds and station house and the goods therein. Also that he knew McDonald was shipping goods through the St. Andrews warehouses, and was storing goods there, sometimes for a long while, possibly for a year at a time, with a view to shipping them ultimately over the railway's line.

Gove, the station agent, stated he considered the warehouse receipts were given by him personally, and that the railway was not liable for what he did in this respect. On cross-examination he stated that having given warehouse receipts to McDonald, and knowing that they were indorsed to and held by the bank, he deliberately shipped goods for which he had given such receipts, without any order from the bank, on bills of lading from McDonald, and that it was customary to do so, and he had been doing it right along. Also that on taking charge he found his predecessor had been signing warehouse receipts for McDonald and he continued the custom.

In May, 1911, Gove was relieved by one R. V. Shaw, who took up the duties of station agent, and continued the practice of signing warehouse receipts, all of which he signed R. V. Shaw, agent, and this Gove says was done without any special instruction from him, but from following the records of the office as to the manner in which the business was done. This also seems to apply to the said McQuaid, who acted as relief agent in September, 1912. At p. 453 he states that he continued the business in respect to the receipts just as he found it when he went there, and he never dreamed he was doing anything wrong. Also, that an auditor visited his office four or five times a year to audit the same, at which times he overhauled the books and papers and made a thorough audit of the affairs of the office. That no secret was made of the warehouse receipts, that there was no concealment of anything so far as he was concerned, and that he continued the system as he found it, never supposing there was anything wrong, irregular or unauthorized about it. Without multiplying

the facts from a great mass of this class of evidence, I find it very difficult to reconcile the station agent's position with his statement that he issued the receipts in his personal capacity, and not as the agent of the railway, and am of the opinion that, in signing the warehouse receipts, he not only thought and believed he was acting as agent of the railway, but that he was in good faith signing as agent and so intended, believing he was doing what was right and proper, according to precedent and within the duties pertaining to his office.

As to the knowledge of the railway of the acts of its agent in respect to the warehouse receipts, and its acquiescence in the course he was following in respect to them, it does not appear though they had knowledge of the receipts being issued in July, 1911, that any protest was ever made, nor was the station agent ever instructed to discontinue the course he was following prior to the claim of shortage being made in 1913, but it does, on the contrary, appear that as early as July, 1911, the general freight agent, Mr. Bamford, was approached by letter by the McDonald Packing Co., the third party defendant, in respect to insurance on his goods stored in the railway's warehouse at St. Andrews, when a number of letters passed between them.

An analysis of these letters discloses that as early at least as July 26, 1911, Mr. Bamford, the general freight agent of the railway—Atlantic Division—and therefore one of its high officials, who controlled and regulated all freight traffic in his division, was notified by McDonald that "*he was carrying all his sardines in the railway's warehouse at St. Andrews*," and that he was obliged to raise loans on the goods from the bank. If nothing else had been said, this should, to say the least, if he had been careful in transacting his business, and if he had no previous knowledge of what was being done with these goods, in respect to warehouse receipts, have aroused his suspicions as freight traffic manager, in the interest of his company, and led him to enquire whether anything unusual on the part of his underlings, or agents, was being done in connection with the warehousing of the goods. Such, however, was not the case, and the letter, the purport of which was to arrange for insurance on the goods, was replied to from his office on August 1, and McDonald was notified the

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goods were fully covered. By a letter, however, of the same date to the bank, reference was made to the goods as being in transit, which, in order to clear up any question that might arise in case of fire, drew the letter of August 9 from McDonald to the general freight agent, in which he makes the plain and distinct statement that his goods "*are under warehouse receipt given by you.*" It is inconceivable the true and correct meaning of this language could be misunderstood or be passed over unnoticed, and Mr. Bamford seems to avoid it by saying he did not personally direct the correspondence, but that it was done by his head clerk in his office, and therefore he could not be held responsible for it. This seems to me too absurd and trivial a protest on the part of the general freight agent, the head of the department, and responsible to the railway for what was done in his department, to merit serious consideration or attention. It, therefore, follows that in August, 1911, the general freight agent of the railway was notified in writing by the defendant McDonald that his goods were stored in the railway's warehouse at St. Andrews and that warehouse receipts were being issued for the same, which were hypothecated to the bank to secure loans made on the goods. Notwithstanding this notice, no attention was apparently directed to the matter to change the order of conducting the business, and the station agent, Gove, was permitted without let or hindrance from the railway to continue receiving McDonald's goods, and to issue warehouse receipts for the same, until the shortage was discovered. There was, in addition, further correspondence between the parties to this suit in the month of September, 1911, in reference to the insurance on the goods of McDonald stored as stated at St. Andrews, and on the twenty-eighth of that month, the railway by letter to the bank stated it had noted and filed their letter of September 11 and affirmed that the insurance in case of loss by fire was payable to the bank.

From this accumulated evidence I am of the opinion that the railway did, by its duly authorized agent, issue the warehouse receipts in question, and did have full knowledge of the issuance thereof, and acquiesced therein. To amplify the position somewhat further, it appears from p. 463 of the evidence *et sequitur*, that after the shortage was discovered it was reported to the general freight agent, the general superintendent, and the general business agent of the railway, and one of its travelling freight

agents was sent to St. Andrews, to investigate and check up the warehouse receipts and records, and notwithstanding all these officials knew the situation, the agent Gove was permitted to and did continue to ship goods to McDonald on releases from the bank, which releases were addressed to him as agent of the railway, and no change was made in the existing relations between the bank and the railway in this respect.

It therefore seems abundantly clear to me that the railway had full knowledge of all the facts in respect to the way their agent was dealing with the McDonald goods, and there was nothing in the case to shew that the bank had any means of discovering that the person who signed the warehouse receipts had no authority to sign the same, even if it had been true.

The agent is found transacting the business of the railway, receiving goods into the warehouses, signing warehouse receipts, and shipping goods out with and without releases from the bank, over the railway's line, and apparently all this with the knowledge of the railway. It is nothing more or less than the case of a body corporate carrying on business in the ordinary way, by the agency of a person duly authorized by them and acting with their knowledge, and therefore the railway is bound by the acts of the person in this case, who took upon himself with their knowledge to act as he did in respect to the goods in question. The fundamental principle of agency as described by Story, and which is the admitted doctrine in all English Courts, pervades this case, namely, "The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess."

One other question only remains to be discussed in this case, that of the liability of the third party to the railway. From the evidence it is apparent to me the shortage in goods is substantially accounted for in the evidence of the agent Gove, who states he shipped goods from time to time upon the order of the third party, and without releases from the bank. This he probably was the more ready to do by reason of the undertaking of McDonald to make good any shortage that might occur. This promise alone would indicate that McDonald was not likely a subject of surprise when informed that it had occurred. At all events it is not disputed that goods were shipped without the

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bank's release, and with the full knowledge of, and upon the order and bill of lading of McDonald, and in my opinion the Judge was right in finding the defendant McDonald liable to the railway.

The appeals must be dismissed with costs to the respondent to be paid by the C. P. R. and the costs of resisting McDonald's appeal to be paid by said Frank McDonald to the C. P. R.

McLeod, C.J.

McLEOD, C.J.:—There does not seem to be any dispute about the shortage, that is that the railway company was unable to deliver to the bank all the goods that had been stored with it and for which the bank held warehouse receipts. The principal defence urged by the railway company is that it is not liable, because, first, under its charter it had no authority to keep a warehouse and give warehouse receipts, and, second, that Gove, the defendant company's agent, could not bind the railway company by giving warehouse receipts, that he only bound himself, and that in giving a warehouse receipt he was not acting within the scope of his authority as the station agent.

As to the first objection, it may be admitted that the railway company is not a warehousing company, and was not incorporated with express authority to carry on the warehousing business; but it was incorporated to carry on the railway business, the business of shipping goods, and in that capacity it would be obliged to have warehouses to store the goods that were sent to the station from time to time. At all its stations on all its lines it would of necessity have warehouses for the storage of goods. In this case the company put up these warehouses for the express purpose of inviting people to send goods to these warehouses for shipment over their lines, and in doing that it was acting entirely within the scope of its authority. These warehouses and the goods in them were in charge of Gove, the station agent at St. Andrews. When the goods were delivered to the railway company Gove gave these warehouse receipts for them. In my opinion he had a right to give them. The railway company claims that it had no knowledge that warehouse receipts were being given, but the evidence does not sustain that contention. It is in evidence that Frank McDonald under his agreement with the bank for advances agreed to insure all his goods in the warehouses, and on July 26, 1911, learning that the railway company was in the habit of carrying insurance on all the goods in its warehouse he wrote

W. B. Bamford, the general freight agent of the C. P. R. in St. John.

In view of these letters it seems impossible to conclude that the officials of the railway company did not know that these goods were stored there and held by the plaintiff bank. The case was argued somewhat on the ground that these goods were simply stored in the warehouse to be left there. That is not the fact. They were sent to the warehouse from time to time, warehouse receipts given to Frank McDonald by Gove, the station agent, and were shipped from the warehouse again from time to time as orders were obtained, and the bank gave releases for them as they were to be shipped. I think it cannot be successfully contended that if Frank McDonald had stored these goods in these warehouses and made no transfer of them, and the railway company had delivered them to someone else without his authority that the railway company would not be liable. The only difference between that case and the present is that Frank McDonald transferred the property and the goods that were there to the plaintiff bank, and the railway company had notice that the transfer had been made, and instead of being accountable to Frank McDonald for the goods the railway company is accountable to the bank, and if it could not give the bank all the goods that had been stored in its warehouse and transferred to it the railway company must be liable to the bank for the loss. A number of cases were cited by counsel for the railway company, but I do not think it necessary to refer to them. Gove was undoubtedly the railway company's station agent at St. Andrews, and had charge of these warehouses and the goods in them. If, however, he had given receipts for goods that he did not receive the company possibly would not be liable: *Erb* v. *G. W. R. Co.*, 5 Can. S.C.R., 179 (which was cited by counsel for the railway company), is a case of that nature. In the present case, however, I do not think that it is even claimed that the goods were not received in the warehouse, and Gove swears that he never gave receipts until he had received the goods.

The Judge found a verdict against the railway company for $8,568.15 for a shortage of 2,821 cases of sardines, 387 cases of clams, and 675 cases of tin cans. The evidence warranted that finding, and, in my opinion, the motion for the railway company should be dismissed with costs.

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The learned Judge then proceeded to try the claim of the railway company against McDonald, the third party. The railway company claims that the shortage, if any there was, was caused by Frank McDonald having goods shipped without obtaining releases from the bank. This really is simply a question of fact. If Frank McDonald induced Gove to ship these goods out without obtaining a release from the bank he would be liable over to the C. P. R. Co. for the loss. He denied generally that he had ordered any goods shipped except under release from the bank, but Gove in his evidence states that Frank McDonald did direct him to ship goods, promising to get releases, and that he did not get releases from the bank. The Judge discusses all the evidence, and declines to accept McDonald's statements, and finds as a matter of fact that this shortage was caused by McDonald ordering goods shipped without obtaining releases from the plaintiff bank. It is true that the railway company had no right to ship these goods except on obtaining a release from the bank, but if Frank McDonald induced Gove, the agent of the railway company, to ship them under a promise to obtain releases, or under an agreement—as Gove swears he did—to indemnify him, if there was any loss, he—Frank McDonald—would be liable. The Judge found as a matter of fact that he did, and that the shortage was caused by the shipments of these goods by the defendant's agent at St. Andrews on the orders of Frank McDonald, the third party. The evidence warrants that finding, and the motion by McDonald must be dismissed with costs.

The appeal, therefore, by the railway company against the verdict entered against it must be dismissed with costs, and the appeal by McDonald against the verdict entered against him in favour of the C. P. R. must also be dismissed with costs.

White, J.

WHITE, J., agreed that both appeals should be dismissed with costs. *Appeals dismissed.*

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BEDARD v. THE KING.

Quebec King's Bench, Pelletier, J. April 18, 1916.

1. SUMMARY CONVICTIONS (§ III—33)—INDEFINITE ADJOURNMENT AGREED UPON.

The indefinite suspension of proceedings in the trial under the summary convictions clauses (Part XV. of the Code), is prohibited as prejudicial to the accused in his defence; however, if the suspension is by agreement between the Crown and the accused to the effect that the trial should be delayed so long as the accused remains away from a particular place,

such suspension constitutes rather an adjournment of which the accused cannot complain, since he himself determines its duration.
[*Donahue* v. *Recorder's Court*, 18 Can. Cr. Cas. 182, distinguished.]

2. SUMMARY CONVICTIONS (§ VI—61)—WAIVING WRITTEN DEPOSITIONS.
The accused, represented by counsel at a justice's trial under Part XV. of the Cr. Code, tacitly waives the taking of the deposition in writing, if he takes part in the hearing by proceeding with the cross-examinations without objecting to the omission.
[*Denault* v. *Robida*, 8 Can. Cr. Cas. 501, distinguished; *Re Lacroix*, 12 Can. Cr. Cas. 297, referred to.]

3. CONTINUANCE AND ADJOURNMENT (§ I—4)—SUMMARY PROCEEDINGS—RESERVING JUDGMENT WITHOUT FIXING DATE.
In the absence of prejudice to the accused, a summary conviction by a justice is valid, although there had been an adjournment without any date fixed for rendering judgment, if the magistrate beforehand has given notice to the solicitor for the accused.
[*R.* v. *Quinn*, 2 Can. Cr. Cas. 153, distinguished.]

4. VAGRANCY (§ I—7)—LIVING ON AVAILS OF PROSTITUTION.
A woman who continues to have unlawful sexual relations with one man only is not a prostitute within the terms of the Cr. Code; but if she successively becomes the mistress of several men within the limitation period of six months covered by a charge of vagrancy brought under Cr. Code, sec. 238, sub-sec. (*l*), without having other means of subsistence and in such a manner as to create a public scandal in the locality where she happens to reside, she may be convicted of vagrancy by reason of her supporting herself by the avails of prostitution.
[See Annotation on Prostitute Vagrancy at end of this case.]

Statement.

APPEAL from a summary conviction made by Judge Langelier, of the Court of Sessions of the Peace for the District of Quebec, acting as a justice of the peace.

Arthur Fitzpatrick, for the appellant.

Arthur Lachance, K.C., for the Crown.

Pelletier, J.

PELLETIER, J.:—The appellant is accused of having on the 11th November 1915, and prior thereto in the city of Quebec, been a vagrant, an idle and debauched person, having no peaceable profession or calling to maintain herself by, and for the most part supporting herself by the avails of her own prostitution.

She was arrested on the 12th November, appeared before the magistrate on the same day and pleaded not guilty. She was sentenced on the 22nd of March, 1916, under sub-sec. (*l*) of sec. 238 of the Criminal Code, to six months in gaol with hard labour. Now she appeals to this Court from such conviction and submits the five following grounds:

(1) By the criminal law the suspension of a proceeding is not recognized, and if there is such a suspension, it is equivalent to an acquittal.

(2) When the proceedings are adjourned, the adjournment should not be for more than eight days.

(3) The appellant has never abandoned her right to have the

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evidence taken in writing; the abandonment of such a right should be made in express terms and the tacit consent of the party is not sufficient.

(4) The magistrate adjourned the case *sine die* in order to give judgment, which he had no right to do.

(5) A woman who lives with a married man is not a vagrant within the meaning of paragraph (*l*) of sec. 238 of the Criminal Code.

All these questions have been very ably argued before me. A great number of authorities have been cited and I have given the case a great deal of consideration.

I have had the advantage of being aided in my examination of the case by the elaborate judgment of the magistrate which is in the record, and after a careful examination of the whole case these are the conclusions to which I have arrived:—

I.

Upon the question of whether or not the suspension of the proceedings is recognized by the criminal law, I am of opinion that, strictly speaking, the appellant is right, but there is a question of fact as to whether or not there was a suspension, as the only suspension which could invalidate the conviction would be one which was indefinite and calculated to cause prejudice. What took place in this case is described as follows in the notes of the Judge of first instance:—

"On the same day, without being obliged to furnish security, she was discharged and the following entry was made on the record: 'Proceedings suspended on condition that the accused leaves the City of Quebec.' She acquiesced in this condition imposed on her own request."

We see that the record uses the word "suspended," but this suspension was really an adjournment. On reading the text of the entry made on this subject, one naturally comes to the conclusion that the adjournment was procured by the accused, and this interpretation is confirmed by the declaration of the Judge to the effect that the accused acquiesced in the condition *imposed on her own request.*

The appellant now claims, through her counsel, that she never consented to this adjournment and that all she consented to was leaving the city of Quebec, and she adds that she conformed to

that for a certain time: "which *agreement* was complied with for some time," she herself tells us.

The appellant herself admits then that she made an agreement on this matter; it appears also from the notes of the Judge that that took place before the commencement of her trial.

It is certain then that there was an adjournment to some date not fixed, and that this adjournment proved to be for more than eight days, but instead of demanding the dismissal of the information laid against her the appellant agreed that the adjournment should continue up to the time at which she broke the agreement entered into; and I conclude that there was then on her part a clear and precise consent that if she broke the agreement, the adjournment of the proceeding would come to an end.

Now she admits having broken the agreement entered into and then the trial was proceeded with, the witnesses were heard, she had the advantage of cross-examining them and of tendering evidence herself if she wished to.

The question, then, in these circumstances is whether or not the adjournment for more than eight days is valid.

There is no doubt that this adjournment was ordered in the interest of the defence, that the law forbids the magistrate to adjourn for more than eight days in order that the accused shall not suffer the inconvenience of delay in the hearing of her cause: but I believe that an accused may consent to a longer delay, and that if she does so the duration of the delay can be as long as she desires.

But here the accused not only consented, but, according to the Judge's notes, she herself demanded that this adjournment should continue up to the time when she should return to Quebec: by returning she herself has fixed the moment when the adjournment of the proceedings should come to an end.

The magistrate adds in his notes that the appellant underwent her trial and agreed to the examination of the witnesses without objection to the jurisdiction of the Court, which proceeded under the original warrant of arrest.

This objection should at all events have been made at the moment when the proceedings recommenced: it is the only irregularity in the proceedings and it was at the commencement of the trial that it should have been set up: her appearance and her con-

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sent to proceed have cured any defect that might exist on this head.

The authorities cited by the Judge of first instance appear to me to govern the question. As to the authorities cited by the appellant, I have examined them with care and here is what I find in each of them:—

In the case of *Donohue* v. *The Recorder's Court*, 18 Can. Cr. Cas. 182, the trial had been commenced and the recorder had adjourned to a day which proved to be a legal holiday; and on perceiving this he directed an adjournment to another day in contravention of sec. 722 of the Criminal Code. There is no doubt that this adjournment was illegal in the circumstances in which it was made, since the recorder had ordered an adjournment *in the absence of the accused and without giving notice of it*. The counsel for the accused only learned of this by accident. I come then to the conclusion that this precedent is not applicable in the case before us.

In the case of *The King* v. *Smith*, 16 Can. Cr. Cas. 425, there was an adjournment made in the absence of the accused and of his counsel. That is not the case which concerns us here.

In the case of *Regina* v. *Collins*, 14 O.R. 613, the only question which is in the least like this, but which is quite different, was whether or not an adjournment for a week meant until a certain hour of the seventh day rather than a certain other hour.

There is then, in my opinion, nothing in these authorities which can offset the weight of the authorities cited by the magistrate.

This disposes of the first two points submitted to me.

II.

The evidence, says the appellant, should have been taken in writing by virtue of par. 3 of sec. 721 of the Criminal Code, and to be deprived of this right an express consent on the part of the appellant is necessary. On this point, we have on the record the following declaration:—

"The parties consent that the provisions of sec. 721, par. 3, of the Criminal Code respecting the manner of taking the evidence shall not be applied in the present case."

This is not signed. Immediately below this alleged consent is found the words "the defendant appears and pleads not guilty."

Here the appellant tells us that the alleged consent was not

read to the accused and asks to be allowed to prove this fact. According to the declarations made at the hearing, I am convinced that this proof could easily be made, but can I permit here proof of a fact contradicting an official entry on the record? The question is very doubtful: happily for me, I have no need to decide it, for it is evident from the record itself that this consent was not read to the accused. In fact, consent of the accused was not considered and, moreover, according to the official entry on the record, it would appear to have been given before the appearance of the accused. To enable me to come to the conclusion that this consent formed part of the procedure in a regular manner, it would be necessary at least that the words "the defendant appeared" should precede instead of follow the alleged consent in question: in fact, any consent given—it might be asked by whom—before the defendant appeared would appear to be negligible.

I would be disposed, then, to maintain the objection made upon this head, if I did not believe, 1st, that the taking in writing of the deposition in a case such as this is prescribed in favour of the accused, and the accused has the right to waive it; 2ndly, that if the accused does not formally waive this right, he should insist as soon as the *enquête* commences that the depositions should be taken in writing, and if he does not do so he gives a complete and formal consent to their being taken otherwise than in writing.

This objection was not taken before the magistrate who heard the case and nothing in the record (*procès verbal*), shews that there was any objection to the depositions being verbal; the objections of the defence are noted in the record, and there is none upon the subject with which we are dealing and, at the argument, counsel for the accused frankly admitted that he had allowed the depositions to be taken verbally without making any objection. I believe that it is too late now to ask for something which would have been granted if demanded at the proper time.

On this point, here is the result of the examination of the authorities which have been cited to me:—

In the case of *Denault* v. *Robida*, 8 Can. Cr. Cas. 501, Judge Tait declared that the failure to take the evidence in writing was fatal, as one of the parties was absent, and his counsel, who was present, refused to plead to the charge and to cross-examine the witnesses because there was no one to take down the deposition in

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writing; it is certain, then, that in that case the depositions were taken verbally in spite of a positive objection made by the accused. That is far from resembling this case.

The case of *The King* v. *McGregor*, 10 Can. Cr. Cas. 313, does not shew whether or not there was a consent that the depositions should not be taken in writing, and it appears moreover to be based upon the case of *Denault* v. *Robida* of which I have spoken. The same remarks apply to the case of *Re Lacroix*, 12 Can. Cr. Cas. 297.

In the case of *The King* v. *Traynor*, 4 Can. Cr. Cas. 410, it was decided, I think rightly, that when the preliminary enquête is taken wihout the presence of the magistrate it is illegal, and that the fact of cross-examining the witnesses is not an abandonment of the right of the accused to invoke this irregularity: that is a case which would resemble much the one submitted to us, but it is necessary to remember that in that case the decision shews that before cross-examining the witnesses the counsel for the accused took the necessary objection on account of this irregularity and the report shews that the cross-examination was not considered an abandonment because the necesssary objection had been made at the proper time.

Here no such objection was made.

III.

The fourth objection is that the Judge adjourned the case in order to give judgment without fixing the day on which the judgment would be rendered.

On this head the record shews that the prosecution was instituted on the 17th March, that after hearing witnesses the Judge declared that he would give judgment at a later date of which notice would be given to the attorney, and that the judgment was given on the 22nd of the same month, *i.e.*, five days later.

Upon this point, as upon the former one, counsel for the appellant cites Daly on Criminal Procedure, but there is probably an error in the pages which were indicated to me, since I can find nothing at the pages in question: but I find in the same book at p. 248 that the Judge, when he adjourns in order to give judgment, is not bound by the limit of time mentioned in sec. 722 of the Criminal Code, and that he may adjourn for a longer time; here he adjourned for a shorter time, and it should be assumed that notice was given to the counsel, as the record shews was to be done.

The appellant, moreover, has not claimed before me that she did not receive this notice: Daly adds that this adjournment should be to a date fixed, but he declares that this is provided in order that the accused and his counsel may be present when the judgment is rendered, and that he would not be deprived of his right to appeal.

In a word, all this is prescribed in order to prevent any prejudice to the accused. Unless prejudice is proved, or it is alleged that no day was fixed to the knowledge and satisfaction of the party, it seems to me difficult to interfere.

I now come to an examination of the authorities cited by the defence upon this point.

In the case of *Regina* v. *Quinn*, 2 Can. Cr. Cas. 153, 28 O.R. 224, it appears that the case had been heard on the 22nd November, and that on the 13th April, nearly five months later, judgment was rendered without any notice whatever to the accused. That is far from being our case.

In the case of *Therien* v. *MacEachern*, 4 Revue de Jurisprudence 87, 4 Que. S.C. 87, it likewise appears (see in 4 R. de Jur., par. 2 of p. 91), that the judgment was rendered on a day of which no previous notice had been given to the parties. This precedent then no more applies than the other.

Crankshaw (on the Criminal Code, 4th ed.), at the place cited to me, p. 853, says that the magistrate should fix a day for giving his judgment because the defendant has a right to be present at the time of the judgment to protect his rights.

It appears to me to result from all this, that if notice has been given the spirit of the law has been followed.

Lastly, there has been cited the case of *Ex parte Pelchat*, 49 Que. S.C. 195, but in this case, as in the others to which I have referred, the judgment was rendered without notice to the parties and without their knowledge.

I am obliged, then, to dismiss this objection as I have the others.

IV.

I quote here the part of the notes of the Judge of first instance in which he refers to the authorities upon which he relied:—

"Paley on Convictions, 8th ed., 119, says:—

"But if the limitation refers only to the time within which the offence must be prosecuted, and not to the time of making the conviction, then, provided the information has been laid in due

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time, the hearing and subsequent proceeding to judgment will be valid, *though postponed to a term beyond the period mentioned in the Act.*"

"The High Court of Justice for Ontario, in a case of *The King* v. *Miller*, 15 Can. Cr. Cas. 87, has decided as follows:—

"An irregular adjournment of summary proceedings before a magistrate is waived by the accused afterwards appearing for trial without taking objection thereto and adducing evidence.

"I may also quote the opinion of Lord Coleridge in the case of *Dixon* v. *Wells*, 25 Q.B.D. 255. This is how he expressed himself:—

"In all the cases to which our attention has been directed there was no protest made by the person who appeared, and the Court said, applying a well-known rule of law expounded centuries ago, that faults of procedure may generally be waived by the person affected by them. These are irregularities, and if one who may insist on them waives them, submits to the Judge, and takes his trial, it is afterwards too late for him to question the jurisdiction which he might have questioned at the time:—

"It would be otherwise if jurisdiction had not existed *ab initio* as, for example, if the offence had been prescribed when the complaint has been sworn to: in that case, the presence of the accused would not be sufficient to give jurisdiction to the tribunal; but it is otherwise when the question is about a mere irregularity of procedure as in this case."

There is also a decision of the Court of Queen's Bench for Ontario in a case of *The Queen* v. *Heffernan*, 13 Ont. R. 616, which reads as follows:

"Held, that where an adjournment of the proceedings before the magistrate for more than one week had been made at the request of the defendant, who afterwards attended on the resumed proceedings, taking his chances of securing a dismissal of the prosecution, and urging that on the evidence it ought to be dismissed, defendant had estopped himself from objecting afterwards that such subsequent proceedings on the prosecution were on this ground illegal."

Mr. Justice Robertson, who delivered the judgment of the Court, a very elaborate judgment, ends his remarks by saying that 'the adjournment for eight days *is directory only.*'

Finally, I add that it has been frequently decided that, when the accused and the offence alleged against him are before a competent tribunal, a consent which affects only the procedure is always valid and effective: *Rex* v. *Janneau*, 12 Can. Cr. Cas. 360, 3 E.L.R. 5; *Rex* v. *Warilow*, 14 Can. Cr. Cas. 117; *Rex* v. *Degan*, 14 Can. Cr. Cas. 148, 17 O.L.R. 366; *Rex* v. *Burtress*, 3 Can. Cr. Cas. 536.

V.

The defence raises a last point, and I admit it is on that one that I had more hesitation.

It is said: A woman who lives with a married man is not a libertine, a vagrant who lives out of the proceeds of prostitution. And decisions and definitions are cited to me which seem to support that theory.

In fact, to live out of the proceeds of prostitution, one has to be a prostitute; then, is a woman a prostitute by the sole fact that she is a mistress or a concubine?

Let us first settle a preliminary point.

Art. 225 of the Criminal Code, in the form in which it was before 1907 (Cr. Code 1892, seç. 195), defined a "common bawdy-house" as a house, room, set of rooms or place of any kind kept for purposes of prostitution.

It had been decided in England, under a statute of that kind, that a house where one woman alone was receiving men for purposes of sexual relations was not a house of prostitution; and several decisions have been rendered in the same sense in Canada under our present sec. 225, as it stood before 1907.

An amendment adopted in that year has changed the state of things, and, by virtue of a new text, it is not necessary that there be more than one woman living the life of a prostitute in a house to make it a house of prostitution.

If then Blanche Bédard was or is, in the legal point of view, a prostitute—that is what I shall examine in a moment—the houses where she was receiving in turn those of whom she was the mistress, were, by virtue of such amendment, houses of prostitution.

There remains, therefore, for me to examine the question of ascertaining whether Blanche Bédard falls within the category of those whom the law calls prostitutes.

It is submitted to me as a legal proposition that if one man has had constant sexual relations with her within the six months which

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have preceded the complaint, there is concubinage but no prostitution.

Let us ascertain first what are the facts which were proved before me.

The complaint was made on the 11th November, 1915, and the accused was arrested on the next day.

McGowan, the first witness for the prosecution, admits with a remarkable unconstraint, that the accused has been his regular mistress since the 8th of October, that he keeps at his own expense since that date two houses: the one where his legitimate wife and children live, and another one where he lives himself with that mistress.

Before the 8th October Blanche Bèdard lived upon the Charlesbourg Road: she was not then the mistress of McGowan, but from the end of August and through the whole of September she had sexual relations with him. She had a room at this place. McGowan did not know who paid for this room but it was not himself. He made her some presents but cannot give their number and value. He considered it beneath his dignity to make calculations on this matter and he absolutely refuses to give any precise details. He does not know that he had any rival while she lived at Charlesbourg. He mentions facts of little importance which would shew that Blanche Bédard received also some other money from a legitimate source but he admits that he did not love his wife, that all his love was for this woman. His assertions in favour of the accused should then be accepted in the light of his love for her and of his desire of seeing her acquitted.

Lastly, McGowan himself admits that his liaisons with this woman is a public scandal in Quebec.

Reverend Mr. Godbout has twice caused the accused to be driven out of his parish on account of her immoral conduct, the first time in 1914 and the second time in September, 1915. Naturally he cannot give us many details, but it is evident that this created against the accused, thus twice driven out at the instance of the curé by the morality officers, a presumption sufficiently conclusive as to her conduct. She does not claim that she made any attempt to resist these two expulsions, the latter of which took place less than six months before this information was laid.

Then, when one submits to two expulsions so degrading with-

out trying to prove any resistence, or at least protesting, the conclusion to be drawn is that there was practically an acquiescence.

Odilon Marois, the third witness, with more of modesty than McGowan, but without seeking to conceal the truth, tells us in substance that the accused was his mistress until May, 1915, that he kept her at Charlesbourg, at Limoilou and on the Beauport Road.

A respectable person afterwards tells us that the accused boarded with her for six months with a Mr. Roy that she believed to be her husband, and that both represented themselves to her as husband and wife. Now the accused has never even suggested that she has ever been married.

Then the morality officers were heard who swear positively that the accused had no means of subsistence other than by her immoral conduct, that she was maintained in turn by five men whose names they give us. "After the one is the other," says one of them. Both know her as a woman who for several years has been guilty of immoral conduct.

The foregoing is a resumé of the evidence on the part of the prosecution.

It establishes in my opinion—at least until there is proof to the contrary—the following facts:—

(1) That the accused seeks for means of subsistence and principally finds it in her misconduct.

(2) That she is from the moral point of view an object of public scandal and that for a long time.

(3) That she inhabits in turn houses which her presence makes places of prostitution.

It falls, then, upon the accused to combat and contradict this evidence. Now, she has not even tried to do so, and the result is, in my opinion, that the accused is really a prostitute inhabiting in turn houses of prostitution.

It is said that I should not take cognizance of the evidence, so far as it exceeds the period of six months before the information.

It is not allowable to go back more than six months to found a prosecution upon actions prior to that: but one may prove her prior conduct to ascertain whether or not she was a prostitute for several years.

But if I limit myself to six months in the examination of the

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facts, it will be seen that, at the time of the information, she had been the mistress of McGowan for nearly two months, that she lived with him without being his mistress for nearly two other months, and that during four months of the six, it is evident to me —at least until there is proof to the contrary—that she lived in a house at Charlesbourg without having other means of subsistence than her immoral conduct.

Now the defendant, who has had all the facility required to rebut this evidence, does not even attempt to do so and asks me to consider as non-existent all this uncontradicted proof.

What I have said would enable me to dispense with examination of the question of whether or not a woman is in law a prostitute when she has sexual relations with one man only, but I will say a few words about it.

Mr. Justice Wurtele decided this question negatively in the case of *Regina* v. *Rehe*, 1 Can. Cr. Cas. 63. But there was in that case an important element of which the Judge speaks as follows at p. 65:—

"And in point of fact, what the article in question of the Criminal Code has generally in view by its enactments with respect to indecent exhibitions, disturbances, prostitutes, and houses of ill-fame, is the repression of acts which outrage public decency and are injurious to public morals. In the present case, however, while the appellant broke a moral law, her ill-doing was done in private and did not outrage public decency, nor violate any provisions of the criminal law of the land."

Now, as I have said above, the morality officers tell us that the case here is one of matters which have taken the proportion of a public scandal, and McGowan himself admits it.

I am led to the belief that from the legal point of view a woman previously chaste does not become a prostitute when she begins and so long as she continues to have unlawful sexual relations with one man only; but she certainly becomes a prostitute if she is in turn the mistress of several men, since she then prostitutes her body successively to whoever pays her. That is a *prostitution successive*, instead of a *prostitution alternative*. The latter is more frequent and better known but the two are made use of and are also—with very little difference—of the same degree of moral abjectness.

The judgment of first instance is affirmed.

Conviction affirmed.

Annotation—Vagrancy (§I—7)—Living on the avails of prostitution. **Annotation.**

The decision in *Bédard* v. *Rex*, *supra*, is important on a question inferentially decided thereby, although not emphasized in the opinion, namely, that a woman may be convicted under the "avails of prostitution" clause of Code, sec. 228, in respect of her own prostitution. Read separately from the other sub-sections, sub-sec. (*l*), enacts that:—

"Every one is a loose, idle, or disorderly person or vagrant who, having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime or by the avails of prostitution." The language of the Code is subject not only to the special interpretation clauses which are to be found in it, but also to the general rules of statutory interpretation applicable to all Dominion statutes and set forth in the Interpretation Act, R.S.C. 1906. Ch. 1. Sec. 31, sub-sec. (*i*), of the latter Act, declares that unless the contrary intention appears, words importing the masculine gender include females. Does sec. 238 of the Code disclose a "contrary intention?" There seems no good reason why the support by "gaming or crime" should not include both men and women, notwithstanding the use of the word "himself" in sub-sec. (*l*), unless the reference to a "profession or calling" indicates that men only were contemplated in this sub-section. As to this the corresponding English legislation is explicit that "every male person who lives wholly or in part on the earnings of prostitution is punishable as a rogue and vagabond." The Vagrancy Act, 1898 (Imp.), 61 and 62 Vict., ch. 39.

Prostitution alone is not made a criminal offence by the Code; but being a "common prostitute wandering in the public streets and not giving a satisfactory account of herself," makes the offender liable as a vagrant under sub-sec. (*i*) of Code sec. 238. See *R.* v. *Harris*, 13 Can. Cr. Cas. 393. Sub-secs. (*j*) and (*k*), both repealed in 1915 on the enactment of sec. 229A, may also be looked at for the purpose of interpreting sec. (*l*) which was left unchanged. Sub-sec. (*j*) made it a vagrancy offence to be a "keeper or inmate" of a disorderly house, bawdy-house or house of ill-fame or house for the resort of prostitutes." It was held in *R.* v. *Knowles*, 21 Can. Cr. Cas. 321, 12 D.L.R. 639, that a man cannot be convicted of being an "inmate" of a bawdy-house, and that the word "inmate" in sub-sec. (*j*), was intended to apply to female inmates only. And in *R.* v. *Misse*, 13 Can. Cr. Cas. 485, it was said that the woman must be an inmate for purposes of prostitution or she was not within the prohibition of sub-sec. (*k*).

Sub-sec. (*k*), dealing with "frequenters" (now repealed because

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of new secs. 229 and 229A), was more explicit and made it an offence to be in the habit of frequenting bawdy-houses, etc., and not giving a satisfactory account of *himself* or *herself*.

Sec. 229, enacted in 1913 (Can. Stat., ch. 13), made it a summary conviction offence for any one without lawful excuse to be *found* in any disorderly house (a phrase which by sec. 228 included a common bawdy-house). This no doubt is applicable to both men and women.

Sec. 229A (enacted by 1915 Can. Stat., ch. 12), made it an indictable offence to be an inmate of any common bawdy-house, and the amending statute, 1915 Can., ch. 12, sec. 6, provided more onerous penalties for third and subsequent convictions. The word "inmate" seems to have acquired no more extended meaning by its enactment in sec. 229A than it formerly had in sec. 238, sub-sec. (*j*).

The offence of keeping a bawdy-house or acting as the master or mistress of same is dealt with by sec. 228 as amended by Can. Stat. 1913, ch. 13, while sec. 228A, enacted by the same statute, deals with the related offences of landlords and property agents permitting rental of premises for the purposes of a common bawdy-house, common gaming-house, opium joint or common betting-house. See secs. 225 and 228. The term "common bawdy-house" has an extended statutory meaning by Code sec. 225, as amended by 6-7 Edw. VII. (Can.), ch. 8, namely, "a house, room, set of rooms, or place of any kind kept for purposes of prostitution or *occupied* or *resorted to* by one or more persons for such purpose. The keeping of a common bawdy-house is no longer punishable on summary conviction but is to be prosecuted as an indictable offence, since the repeal of sec. 238(*j*). It was held under sec. 225, as amended 1907, that a room in a hotel habitually resorted to by one prostitute and her paramour for purposes of prostitution is a "common bawdy-house" within the meaning of the Criminal Code; and that the hotelkeeper who, with knowledge of the facts, permitted the continuance of such use of the room was properly convicted as a keeper. *R.* v. *Mercier*, 13 Can. Cr. Cas., 475, 7 W.L.R. 922.

In *R.* v. *Rehe*, 1 Can. Cr. Cas. 63 (Que.), it seems to have been assumed that a prosecution for vagrancy in "being supported by the 'avails of prostitution,' " would properly be brought against a prostitute, but prostitution was negatived because the cohabitation was with one man only; and see *Gareau's* case, cited 1 Can. Cr. Cas. 66.

The "avails of prostitution" is to be the means of subsistence, thus giving the idea of a monetary consideration, a revenue received from the traffic. If nothing more is proved than the maintenance of the woman by successive paramours, it may be doubted

whether she is within the strict terms of sub-sec. (*l*), on reading into the clause the word "herself" in substitution for the word "himself." Does she support herself when she is being maintained by her paramour, and if so, can her own support be the *avails* within the meaning of the Code? The support by gaming or crime to which sub-sec. (*l*), of sec. 238 relates, would most naturally be the gaming or crime of the accused, and if the illicit concubinage of the accused female were intended to be included, it might have been more clearly expressed than by the present form of sec. 238 (*l*), as to the avails of prostitution being the means of support of one who has no peaceable *profession* or *calling* to maintain *himself* by. No doubt, what was at least primarily intended to be dealt with, was the case of a prostitute's favorite paramour supported for the most part by her earnings from others. As to other means of support, compare *R.* v. *Davidson*, 8 Man. L.R. 325, *R.* v. *Organ*, 11 P.R. (Ont.) 497; *R.* v. *Collette*, 10 Can. Cr. Cas. 286, 10 O.L.R. 718; *R.* v. *Riley*, 2 Can. Cr. Cas. 128; *R.* v. *Sheehan*, 14 Can. Cr. Cas. 119. Annotation.

"Avails" is defined by Webster as "profits or proceeds," and the common use of the word is attributed to the New England States. "Avails" means profits or proceeds, as the avails of a sale by auction. Century Dictionary. The use of the word "avail" (in the singular) as in the phrase "this is for your avail," meaning advantage in a general sense, is termed archaic by Funk & Wagnall's Standard Dictionary.

JEFFREY v. ALYEA.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. March 31, 1916.

CONTRACTS (§ I E 2—70)—ORAL PROMISE TO PAY DEBT OF ANOTHER—STATUTE OF FRAUDS.

The oral promise of a wife to pay for goods purchased by her husband, in order to avoid the seller's threat to stop the goods *in transitu*, is an undertaking to answer the debt of another within the Statute of Frauds, and unenforceable because not in writing.

APPEAL by the defendant Florence Alyea from the judgment of the Senior Judge of the County Court of the County of Hastings, in favour of the plaintiff, in an action against the appellant and her husband for a balance of the price of apples sold to the defendants, as the plaintiff alleged. Statement.

The question on the appeal was, whether the appellant, as well as her husband, was liable for the price of the apples. Judgment was given against the husband at the trial, and as to that there was no appeal.

F. E. O'Flynn, for appellant.

E. G. Porter, K.C., for plaintiff, respondent.

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Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—It seems to be needful only to state the facts of this case to make it very evident that the trial Judge erred in considering that he should hold the two defendants liable for the one debt to the plaintiff.

The defendant Alyea, who is the husband of the other defendant, bought from the plaintiff, as the trial Judge found, all the fruit of her orchard of the year 1912, for $700; and before that bought from her some other small quantities of fruit, the price of which, with the $700, make up the total amount of the plaintiff's claim, which was very considerably reduced by payments on account of it made by the defendant Alyea.

In regard to the female defendant, the plaintiff's story, given effect to, with some doubt, by the trial Judge, is: that she was unwilling to deliver the last 293 barrels of the apples under her contract with Alyea until she was paid the amount that would be then due to her from him, and refused to do so until, as she first stated it in her testimony at the trial, "Mrs. Alyea guaranteed to pay me." Subsequently she testified that Mrs. Alyea said, she would pay her, and again, that she would pay for them. On the plaintiff getting this verbal guaranty, the apples were delivered to the defendant Alyea, under the terms of his purchase of them; his wife got nothing.

Two witnesses were called in the plaintiff's behalf, and their testimony turned the scale in her favour, at the trial, and each testified that Mrs. Alyea "guaranteed" payment.

There is no contention, nor was there any suggestion at the trial, that the contract with the defendant Alyea was ever rescinded or varied; on the contrary, he received and sold all the apples, and he has hitherto been treated as a debtor liable under his contracts to purchase, as originally made, and accordingly was rendered an account, and made payments, from time to time, upon it; and in this action, after a contested trial, on the question whether he was really a purchaser from, or only a selling agent for, the plaintiff, judgment has been entered up against him for the balance of the plaintiff's account against him.

So that it is quite obvious that Mrs. Alyea's promise could have been only to pay the debt of another; and, not being in writing, cannot be enforced in this action.

It is very difficult for me to understand how the trial Judge

could consider her obligation a joint primary one; by what means she could, without the consent or knowledge of the debtor—of which there was none—assume such a character. The Judge speaks of a distinct promise on her part to pay; but there must, equally, be such a promise from a surety as well as from a principal debtor. He also speaks of a good consideration, but in either case, equally, there must be that. A promise to pay, in such a case as this, must be ambiguous until we know what it is that is to be paid. In this case it was, and could be, nothing but the defendant Alyea's indebtedness to the plaintiff. The testimony of the witnesses upon which the judgment against the woman is based was that the promise was a "guaranty;" and there is no ambiguity in that word.

The appeal must be allowed; and the action, as against Mrs. Alyea, dismissed—both with costs.

LENNOX, J.:—I agree. Lennox, J.

RIDDELL, J.:—This is an appeal by Mrs. Alyea, the female defendant, from the judgment of the Judge of the County Court of the County of Hastings which made her liable to the plaintiff for $387 and interest, as well as her husband, who is undoubtedly liable. Riddell, J.

The facts taken from the evidence of the plaintiff are, in my view, sufficient to dispose of the appeal.

Orby Alyea, the husband of the appellant, bought from the plaintiff the fruit of an orchard on terms in law equivalent to cash on delivery.

Some of the apples were delivered, and in part paid for—part had been shipped to Winnipeg, and the plaintiff became anxious about her money. The appellant telephoned to the plaintiff to ship the apples, the plaintiff asked who would pay for them, and the appellant said she would—the plaintiff went to see the appellant, and the appellant again told her to ship the apples and she would pay for them. The plaintiff thereupon delivered the apples on the dock where the others had been delivered, and later on went with witnesses to see the appellant, told her that she would "garnishee" (i.e., stop *in transitu*) the apples if she did not pay for them—the appellant said she was worth it and would pay. Thereupon the plaintiff abandoned her intention of stopping *in transitu*.

The present proceedings (whether their form be regular or

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not, we need not inquire) are in substance an action against the appellant and her husband for the price of the apples—or rather the balance of the price.

The evidence does not any where place the rights of the plaintiff any higher than as already indicated.

In my view, the case is wholly covered by such cases as *Beard* v. *Hardy* (1901), 17 Times L.R. 633. There, the defendant's husband having incurred a debt to the plaintiff in respect of dealings between them, the defendant verbally promised the plaintiff to pay the amount in consideration that legal proceedings should not be taken against her husband. The Court of Appeal held that this was a promise within the statute, and, not being in writing, was not enforceable.

From *Chater* v. *Beckett* (1797), 7 T.R. 201, to *Davys* v. *Buswell*, [1913] 2 K.B. 47, the rule had been followed that "the question whether each particular case comes within . . . the statute or not depends . . . on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise:" *per* Vaughan Williams, L.J., [1913] 2 K.B. 47, at pp. 53, 54.

The same principle has been adopted and consistently applied in the Courts of Ontario: see *Lee* v. *Mitchell*, 23 U.C.R. 314; *Rounds* v. *May*, 35 U.C.R. 367; *James* v. *Balfour*, 7 A.R. 461; *Beattie* v. *Dinnick* (1896), 27 O.R. 285; *Bailey* v. *Gillies* (1902), 4 O.L.R. 182; *Young* v. *Milne* (1910), 20 O.L.R. 366.

The debt which was to be guaranteed was the debt of the husband then existing or in contemplation, and the promise did not and was not intended to extinguish that debt, there was no release, no novation—nothing but an undertaking to pay that debt.

If there were any doubt on the facts already set out, that doubt must disappear when the other facts are made to appear—these also, I take from the plaintiff's evidence.

After the first promise by the appellant and after the delivery, the plaintiff saw Alyea, who said that he was going to Winnipeg, and that he would take up a certain note she owed one Ostrom; told her to go to his place and she would get the note; she did so, and the appellant gave her the note "on the apple deal," and, as the plaintiff admits, "on Orby Alyea's account." She wrote out

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a receipt and signed it, saying that the note was received from Orby Alyea. Later on, she received a pig from Orby Alyea, "asked him for a pair of pigs, and he sent me down one;" later still, she made out her account against Orby Alyea—this is of course not conclusive: see *Brown* v. *Coleman Development Co.*, 26 D.L.R. 438, 35 O.L.R. 219, and cases cited, especially *Lakeman* v. *Mountstephen* (1874), L.R. 7 H.L. 17; *Mountstephen* v. *Lakeman* (1870), L.R 5 Q.B. 613. She rendered no account to the appellant, and considers that Orby Alyea still owes her the balance unpaid. She has indeed sued Orby Alyea in these proceedings and obtained judgment against him on that basis—and insists on maintaining the judgment.

While agreeing with the findings of fact by the learned County Court Judge—"I think there is a good consideration and there is a distinct and separate contract between Mrs. Alyea and Mrs. Jeffrey"—I cannot agree that "it is binding upon Mrs. Alyea without any writing."

I think the appeal should be allowed with costs here and below.

Masten, J.

MASTEN, J.:—I agree.

Appeal allowed

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 19, 1916.

CROWN (§ II—20)—CLAIMS AGAINST—DAMAGE TO PROPERTY NOT "ON PUBLIC WORK."

The Exchequer Court has no jurisdiction to award damages against the Crown for injury to property not on a public work resulting from the negligence of any officer or servant of the Crown.

Statement.

APPEAL from the judgment of the Exchequer Court of Canada (16 Ex. C.R.), dismissing the suppliants' petition of right.

The appellant, H. H. V. Olmstead, is the owner of the rear half of lot 5, concession 4, of the township of Kitley, in the Province of Ontario, and the appellants, H. H. V. Olmstead and W. A. Olmstead, are the owners of the lot 4 in said concession 4 of the township of Kitley. The appellants' titles were proved at the trial, and no question as to them is involved in this appeal. The lands adjoin each other and border on Irish Creek, which empties into the Rideau Canal about 2½ miles below them.

At Merrickville, which is situate on the Rideau Canal about 5 miles below the junction of Irish Creek and the Rideau Canal, a dam was built as part of the construction of the Rideau Canal to control the waters thereof for navigation purposes.

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At the time of the construction of the Rideau Canal a depth of about 5 ft. 3 in. of water on the locksill at the Merrickville lock was established, which continued until 1890, when the depth was raised to 6 ft. The appellants' lands are not flooded when the water on the locksill does not exceed 6 ft.

During many of the years between 1890 and 1914, when the petitions of right were filed, the depth of the water on the locksill exceeded 6 ft., whereby the appellants' lands were flooded, and a large portion of them was rendered useless. The appellant, when acquiring the lands in question, acquired the rights of their grantors to claim damages for flooding which had occurred during the ownerships of such grantors.

The defences to the actions were the following:—1. Acquisition of a right to flood by reason of the purchase from one Gideon Olmstead of his rights to do so as owner of a mill and mill dam on Irish Creek. 2. Prescription under the Acts relating to the Rideau Canal. 3. Prescription under the Limitations Act of the Province of Ontario. 4. Lost grant. 5. Non-assignability of the claims for damages which belonged to the appellants' grantors. 6. Obstructions in Irish Creek impeding the flow of the water.

The Judge of the Exchequer Court held that the Crown had not established any prescriptive right to flood the appellants' lands, but he held that the appellants' rights of action were barred by sec. 26 of 8 Geo. IV., ch. I. (U.C.), this statute being the original Act providing for the construction of the Rideau Canal.

The Judge did not deal with any of the other defences raised by the Crown.

Sinclair, K.C., for the appellants.

Smellie, for respondent.

Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I think these petitions of right were properly dismissed, and, whilst agreeing with the reasons for judgment of the Judge of the Exchequer Court, I am disposed to think the judgment could be supported on more than one ground.

In particular I am of the opinion that it is a good defence to the suit that any such assignment of a right to bring it as set up is illegal. The lands were purchased by the petitioners as to part in the year 1904 and as to the rest in the year 1912, the petitioners by deeds of even date with the conveyances obtaining from the grantors what purported to be an assignment of the

latter's rights to certain claims to recover from His Majesty compensation for flooding the lands since January 1, 1890. In the petitions of right it is alleged that the:—

suppliants' said lands have during each year since and including the year 1890 been overflowed and flooded by waters of the Rideau Canal and have thereby been rendered entirely useless.

It is perfectly clear that what the petitioners purchased and intended to purchase was this so-called right to a claim to recover against the Crown.

The policy of the law has always been opposed to this trading in litigious rights and such transactions are to be discouraged in every possible way. They, of course, have nothing in common with assignments of debts and choses in action, which by statute are now permitted.

Whilst the assignment of a right to litigation is forbidden as between subjects, the rule must apply with greater force in the case of the Crown, since the subject has no right to sue the Crown, but can only present a petition of right. There being no such thing as a right to a claim to recover against the Crown, there can be no assignment of any such pretended right.

I think this constitutes not only a good legal defence, but also disposes of any merits the claims might be supposed to have.

The appellants have in the course of the proceedings set up a different claim from anything alleged in their pleadings. In their factum they say:—

The appellants' lands are not flooded when the water on the locksill does not exceed 6 ft. . . . (Again) It is established that the lockmaster at Merrickville was expressly instructed to hold only 6 ft. of water on the locksill. The instructions to the lock master shew that any flooding that occurred resulted from the disobedience of the lockmaster who did not observe the instructions given to him.

This, however, is not sufficient to entitle the appellants to claim under sec. 20 (*c*) of the Exchequer Court Act, for that section not only requires that the injury to the property should have resulted from the negligence of a Crown servant, but also that it should have occurred on a public work. According to the evidence, Merickville is 10 miles away.

DAVIES, J.:—I think this appeal must be dismissed with costs. I am unable to distinguish it from the cases of *Paul* v. *The King*, 38 Can. S.C.R. 126, and *Chamberlin* v. *The King*, 42 Can. S.C.R. 350, the decisions in which I think must govern in this case.

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Idington, J.

IDINGTON, J.:—I cannot agree with the view expressed by the trial Judge that 8 Geo. IV. ch. 1, sec. 26, furnished a bar to this action.

The point made by Mr. Sinclair that the Crown not being named in the section, and that indeed at the time when the Act was passed there could have been no relief sought against the Crown, seems well taken, and to put beyond doubt the possibility of the legislature having contemplated in passing the section in question that it should apply to anything but what it expresses.

Statutes of limitation are not to be extended beyond that which they plainly express. No case exactly in point has been cited nor have I been able to find any, but the converse cases of *Lambert* v. *Taylor*, 4 B. & C. 138, and *The King* v. *Battams*, 1 East 298, seem to illustrate the principles that should govern.

The claims seem to arise only out of isolated acts, where, through the neglect of some one acting on behalf of the Crown, the waters in the Rideau Canal were raised beyond the 6 ft. limit, which, if observed, would on the evidence produce no damage to the suppliants.

It does not appear to me that any such acts of non-continuous negligence, occurring at various times, could give any prescriptive right, especially when any claim of right in respect thereof is denied by respondent. Nor does it appear to me on the facts that the instructions of the superintendent having been disobeyed and the acts being those of others employed by respondent neglecting their duty being the cause of damage, should furnish any defence herein.

It seems to me from the evidence that the record of these results should have come under the observation of some one in authority for whom the respondent should be held responsible.

I have not observed anything put forward in the argument shewing that due care had been taken to check such objectionable irregularities and their consequences.

Even if so existent, I doubt the efficacy of such a defence.

The other members of the Court have unanimously concluded that the appeal must be dismissed, and I, seeing no useful purpose to be served by me prosecuting my researches in this voluminous record to find out and determine in regard to that and other features of the case, must be content with remaining in doubt.

It may also be that the appellants are without any remedy but that falling within sub-section (*c*) of sec. 20 of the Exchequer Court Act put forward in the appellants' factum, and the peculiarities of that sub-section may be held to be such as to give no remedy to them because the property damaged is not "on a public work."

This latter point was not taken or argued, but has been forced on our notice in the *Piggott* case* (argued this term). The case of *Chamberlin* v. *The King*, 42 Can. S.C.R. 350, might also on argument have been found a bar to this action.

Under the circumstances I can only submit these considerations without assenting to or dissenting from the judgment to be delivered.

Anglin, J.

ANGLIN, J.:—As at present advised, I gravely doubt whether sec. 26 of 8 Geo. IV. ch. 1 (U.C.), relied upon by the Judge of the Exchequer Court, applies to a claim against the Crown. The plaintiff's claim, however, is for damages for injuries sustained through the negligence of a Crown servant in carrying on a public work. The injury of which he complains did not happen on the public work. Sec. 20 (*c*) of the Exchequer Court Act, therefore, does not confer jurisdiction on the Exchequer Court: *Chamberlin* v. *The King*, 42 Can. S.C.R. 350; *Paul* v. *The King*, 38 Can. S.C.R. 126. Since these cases were decided *Letourneux* v. *The Queen*, 33 Can. S.C.R. 335, cannot be followed in such a case as this. In that case the full limitative effect of the words "on any public work" in sub-sec. (*c*) of sec. 20 would appear not to have been sufficiently considered. The suppliant points to no other provision giving him a right of action against the Crown.

Brodeur, J.

BRODEUR, J.:—This is an appeal from the Exchequer Court which dismissed the appellants' petition of right.

It is claimed by the appellants that their properties were flooded by the waters of the Rideau Canal.

Several grounds of defence were urged by the respondent but the petitions were dismissed on the ground that the appellants' rights of action were barred by the statute providing for the construction of the Rideau Canal. By sec. 26 of that statute

*[NOTE.—On the same day on which this case was decided judgment was given dismissing the appeal of *Piggott* v. *The King* on the ground that the property of the appellant was not on a public work when injured.]

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(8 Geo. IV. ch. 1, in 1827), it was provided that any suit in damages against any person for anything done in execution of the powers conferred by that law should be brought within 6 months after the act committed, or in case there shall be a continuation of damages, then within 6 calendar months next after the doing or committing of such damages shall cease and not afterwards.

When that Act was passed, the right to sue the Crown did not exist.

In 1870 a law was passed authorizing the reference to official arbitrators appointed under the provisions of the Act of 1867 (31 Vict., ch. 12), of claims arising out of any death or any injury to person or property on any public work, provided (sec. 2) that nothing herein contained shall be construed as making it imperative on the government to entertain any claim under this Act.

In 1887 the Exchequer Court Act was passed, and it was provided that those claims in damages against the Crown could be prosecuted by petition of right and exclusive jurisdiction thereon was given to the Exchequer Court.

It is contended by the appellants that the limitation enacted by the statute concerning the Rideau Canal would not apply to damages claimed against the Crown because no right of action existed against the Crown at the time the statute was passed.

At that time the action for damages suffered in respect of the canal could be instituted only against the contractors and the officers who may have caused the damages. If, later on, the liability was extended to the Crown, then the provisions of the statutes would apply to the Crown as well as to the other persons.

The limitation section should benefit the Crown as well as the others.

It has been found by the Court below that within the 6 months previous to the petitions of right no damages had been suffered by the appellants. Then they were barred from making any claim for damages against the Crown under the provisions of sec. 26 of ch. 1 of 1827.

The appeal should be dismissed with costs. *Appeal dismissed.*

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MORRISON v. MORROW.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. March 31, 1916.

SALE (§ II D—40)—F.O.B.—RIGHT OF INSPECTION—REFUSAL—LIABILITY FOR NON-ACCEPTANCE.

In a sale of goods f.o.b. subject to inspection, the seller's refusal, after the goods have been shipped, to guaranty the buyer against any loss he

might suffer on a resale owing to inferior quality, is not a refusal to permit inspection and the buyer's non-acceptance of the goods on the ground of such refusal renders him liable to the seller for damages for non-acceptance.

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Statement.

APPEAL by the plaintiff from the judgment of COATSWORTH, Jun. Co. C.J., dismissing, after trial without a jury, an action brought in the County Court of the County of York, to recover damages for non-acceptance of two car-loads of flour shipped by the plaintiff from Ingersoll to the defendant at Montreal.

The learned County Court Judge held that the defendant was entitled to inspect the flour, at the place of delivery, Montreal, before payment; that the plaintiff refused to allow the defendant to inspect; that that was the reason why the transaction was not carried out; and that, consequently, the plaintiff failed to establish his cause of action.

M. C. McLean, for appellant.

James Haverson, K.C., for defendant, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The trial Judge seems to have heard the evidence in this case three weeks before pronouncing his judgment, and in the interval must have, in some way, come into an erroneous view of the facts of the case, because, in his judgment, he states, in positive terms, that the plaintiff refused to permit the defendant to inspect the flour in question, and that because of that refusal the transaction in question fell through; whereas in fact even the defendant abstained from testifying to any refusal to permit inspection, whilst the plaintiff testified very positively that not only was there no such refusal, but that inspection was never asked for or mentioned; and the transaction in truth fell through because the plaintiff would not undertake to protect the purchaser in writing against loss if the defendant took up the bills of lading of the flour, and if his buyers—on a resale by him—would not take delivery owing to quality. As to this last mentioned fact there is no room for controversy; it is all in writing over the signature of the defendant, a writing which does not, even in the remotest way, mention the subject of inspection. This writing also, in the plainest terms, for the reason I have mentioned, and for that only, breaks the contract, informing the plaintiff, as it does, that the bank has been instructed by the defendant to return the drafts, and that the cars containing the flour are now at Montreal at the plaintiff's order. And it

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could not be, and is not, contended that the defendant had any such right to reject the goods.

The case therefore seems to me to be a very plain one for allowing the appeal and directing that judgment be entered in the Court below for the plaintiff and damages in the amount of the loss of the plaintiff upon the resale made by him following upon the defendant's breach of his contract, with costs here and there.

The question, much discussed upon the argument of the appeal, whether the defendant had a right to inspect before taking up the plaintiff's "draft" for the price of the flour and the bills of lading attached to it, was really wasted energy, on the indisputable facts of this case: but I may say that whether he had or not depended upon his contract: if that were to pay the bill of exchange at sight, provided the bills of lading were transferred to him then, it is obvious that he could not delay payment until a later arrival of the goods; whilst, if the contract were to pay only on delivery of the goods, it need hardly be said that the buyer had a right to see that he got that which he bargained for before paying and before receiving the goods offered. There is no complication of any character involved in such a question; the difficulty lies only in discovering what the contract really was. In the case of *E. Clemens Horst Co.* v. *Biddell Brothers*, [1912] A.C. 18, it was eventually held that the contract was to pay on delivery of the symbols of ownership of the goods, that s, the bills of lading: but, even in that case, the right of the purchaser to see that he got that which he bought seems to have been recognised, and to have been but shifted back to the time when he took the goods under his bills of lading. In this case, it is impossible to tell, from the evidence adduced at the trial, what the contract between the parties really was: all that I can find upon the subject is contained in these words, "subject to our terms and conditions," printed in the bought note of the goods in question; but there is no evidence of what "our terms and conditions" were, or of any other terms or conditions upon which the contract is said to have been made.

Riddell, J.

RIDDELL, J.:—This is an appeal by the plaintiff from a judgment of His Honour Judge Coatsworth, of the County Court of the County of York, dismissing the plaintiff's action for damages for non-acceptance of certain flour sold by him to the defendant.

The defendant, trading under a firm name and carrying on

business in Toronto and Montreal, sent to the plaintiff, carrying on business in Ingersoll, an order in the following terms:—

"Please ship to Montreal, subject to our terms and conditions, via G.T.R. . . . at once . . . . 2 410-bag cars 98's 90% patent Ontario winter wheat flour $6.60 per barrel, f.o.b. Montreal. . . . "Morrow Cereal Company, per Morrow."

The order was accepted, and one car went forward on the 17th February, and another on the 20th February: after certain communications between the parties, the defendant refused to accept—the plaintiff resold at a loss, and sued for the damages—but, as has been said, failed.

The ground upon which the learned County Court Judge proceeded, appears from his reasons for judgment: "The whole question turns on the right of the defendant to inspect the flour in Montreal, the place of delivery, before payment. It is quite clear from the evidence that the plaintiff refused the defendant the right to inspect to see if up to grade, and it was on that account that the transaction fell through and the plaintiff was compelled to resell; and, in these circumstances, I hold, under the authority submitted to me, that the defendant was entitled to inspect the flour. Consequently, the plaintiff must fail."

In an action such as this, for refusal to accept goods sold, admittedly the plaintiff must prove a proper tender; and, as will be seen, the learned County Court Judge found that there was no tender sufficient to saddle the defendant with liability.

Upon the appeal three points were attempted to be made: (1) that there was no right to inspect; (2) that there was no refusal of inspection; and (3) that the refusal of inspection, if it existed, was not the cause of the defendant's repudiation of the contract, and therefore the refusal to permit inspection was waived.

That on a sale of goods the rule is at the common law the same as sec. 34(2) of the Sale of Goods Act, 1893, is well established: *Isherwood* v. *Whitmore* (1843), 11 M. & W. 347; *Startup* v. *Macdonald* (1843), 6 M. & G. 593, at p. 610; Benjamin on Sale, 5th ed., p. 740; Halsbury's Laws of England, vol. 25, p. 229.

The Code thus expresses the rule: "Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examin-

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ing the goods for the purpose of ascertaining whether they are in conformity with the contract."

It is, however, argued that this law has been cut into or modified by a recent decision of the House of Lords—and it will be necessary to consider this contention.

When the facts are looked into, it is at once seen that this case, *Biddell Brothers* v. *E. Clemens Horst Co.*, [1911] 1 K.B. 214, 934, and, in the House of Lords, *E. Clemens Horst Co.* v. *Biddell Brothers*, [1912] A.C. 18, has no bearing upon the present question—it simply determines the rights of parties under the peculiar "c. i. f. contract." Where goods are sold c.i.f., the seller must: (1) "ship at the port of shipment goods of the description contained in the contract;" (2) "procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract;" (3) "arrange for an insurance upon the terms current in the trade which will be available for the benfit of the buyer;" (4) "make out an invoice in" the proper form; and (5) "tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice, and policy of insurance, which complete delivery in accordance with that agreement, the buyer must be ready and willing to pay the price:" *per* Hamilton, J., in [1911] 1 K.B. at pp. 220, 221. In such a contract, admittedly, if the goods are lost on the voyage, the loss is the purchaser's; and what the purchaser has to pay is "cost, insurance, and freight." Hamilton, J., held that, in such a contract, it was not necessary for the vendor to await the arrival of the goods at the port of destination before being entitled to his pay: the Lords Justices reversed this finding, but it was restored by the House of Lords.

The result was that the purchaser had no right to defer payment until after inspection, which would involve some delay from the time of the tender of the documents upon which his liability to pay arose immediately under the "c.i.f. contract." No doubt was cast upon the right to inspect under the ordinary contract.

In the present case, the vendor, not the purchaser, pays freight and insurance (if any), and the insurance is that of the vendor; the purchaser pays cost, only one of the triad, c., i., and f.; the liability to pay arises on the tender of the goods at Montreal f.o.b., not on the tender of the (or any) documents.

It is impossible to hold that the common law right to inspect was wanting.

2. Was the right demanded and refused?

The plaintiff swears that he had no objection to the inspection of the flour; the defendant gives this account of the conversation, which was by telephone: "I called Mr. Morrison up on the 25th, and I asked him for permission to sample the car of flour, and he told me that he would guarantee the flour to be 90 per cent., but did not say that he would permit us sampling it; but, without permission to sample it, we had no authority to go to the rai way and say to the railway: 'We have got permission to sample this car.'" (This was on the 25th February.)

Nothing further is said by the defendant—he does not repeat his request, the matter of inspection is allowed to drop; there was no repudiation of the contract on that ground—it is impossible, I venture to think, to find that this was a refusal of the right to inspect—and if the law requires an express refusal on the part of the vendor, the purchaser did not acquire a right to cancel by this conduct of the vendor.

In *Isherwood* v. *Whitmore*, 11 M. & W. 347, there was an express refusal "to allow the defendants to open the casks or to inspect their contents" (p. 348), and it is in relation to that fact that the words of the learned Barons are employed. Parke, B., at p. 350: "A tender of goods does not mean a delivery or offer of packages containing them, but an offer of those packages, under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before he is called on to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained." Alderson, B., at p. 352: "It was necessary to satisfy them (the jury) that the defendants . . . had an opportunity of inspecting the articles."

In the same case on special demurrer (1842), 10 M. & W. 757, 764, the full Court had held that to prove an allegation of tender

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of goods "the plaintiff would be bound to shew a delivery under such circumstances that the defendants had an opportunity of seeing that the article delivered to them was the one they had stipulated for:" *per* Parke, B., with whom concurred Alderson, Gurney, and Rolfe, BB.

In *Startup* v. *Macdonald*, 6 M. & G. 593 (Cam. Scacc.), the goods were tendered at 8.30 p.m. of the last day, but early enough to enable the purchaser to examine, weigh, and receive them before midnight. Rolfe, B., with whom Gurney, B., agreed, said (p. 610) that the tender was sufficient, "provided only that the tender has been made under such circumstances that the party to whom it has been made, has had a reasonable opportunity of examining the goods . . . tendered, in order to ascertain that the thing tendered really was what it purported to be"—as he says on p. 613, "under circumstances which gave him full opportunity to weigh, examine, and receive it." Much the same language is used by the other Judges; and Lord Denman, C.J., who dissented, did so on the facts, not the law.

The case of *George* v. *Glass*, 14 U.C.R. 514, cited by Mr. McLean, does not seem to be helpful—there the defendant, the purchaser, was held liable because he did not "go or send for the flour, or . . have it examined in order to prove its quality . . though he had fair opportunity given to him." See p. 520.

The right to inspect may of course be waived, and it will be considered to have been waived unless the purchaser demands it. Accordingly the rule, when put into the statutory form, reads: "The seller . . is bound on request to afford the buyer a resonable opportunity of examining the goods." I find nowhere any decision that there must be an express refusal as in the *Isherwood* case—when the request is made, it is the duty of the seller to comply with it; and, if he fail to afford the buyer the opportunity, there is no tender.

But of course this omission may also be waived, because it does not in itself and *ipso facto* put an end to the contract.

Unless there be more in the case, the plaintiff so far has made no tender, if we accept the evidence believed by the trial Judge; and I can see no reason why we should not.

3. The preceding day, the 24th February, the defendant had asked by telegraph that the plaintiff should protect him against loss—promising, if that were done, that he would take up the bills

of lading of the two cars; on the 25th February, the plaintiff telegraphed that he would guarantee the flour "ninety per cent. winter wheat patent made from good sound winter wheat." On receipt of this telegram, the telephone communication took place, and then, at 5 or 6 p.m., the defendant wrote: "As your telegram of the 25th does not comply with our request, we have to-day instructed the bank to return the drafts, and beg to advise that the cars are now at Montreal to your order."

It is perfectly plain—indeed it is not denied—that the alleged reason gave no ground for cancelling the contract. The plaintiff might have insisted on his contract—but he preferred the alternative course always open to an innocent contractor—he accepted the revocation of the contract, retaining simply the right to sue for damages for its breach: *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460; *General Billposting Co. Limited* v. *Atkinson*, [1909] A.C. 118.

The result is that he must now prove a tender within the meaning of the authorities or a waiver of it. He cannot prove a tender, and must base his action on the hypothesis that the defendant waived the right to inspect. The argument is this: the defendant had the right to say, "Since there is no tender, I shall cancel the contract," but he did not do so—he affected to put an end to the contract for an entirely different reason. So far as the opportunity to inspect is concerned, he had the right to demand it again and again as often as he pleased and as long. If he failed to demand again, he must be considered as having waived the right to inspect unless he cancelled specifically on that ground.

Or, looking at the matter from another point of view, suppose the vendor had discovered his mistake in not giving the opportunity to inspect, and had telegraphed his permission—if this were done before the repudiation of the contract, and within a reasonable time, there having been no express and unequivocal refusal, it should be considered sufficient. Accordingly, it should be assumed that there was a *locus pœnitentiæ* for him, and that he had rights in the premises until the purchaser exercised his right to rescind (if he had such right). Then, the contract being intact, the purchaser assumes to cancel it on grounds which are not justifiable and quite apart from the want of inspection—it seems to me that this is a waiver of the right to inspect.

"Renunciation of the contract . . operates as a con-

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tinuing waiver and discharge of all conditions precedent to the liability for the performance; such as . . the tender of . . goods, or the like:" Leake on Contracts, 6th ed., p. 639; *Ripley* v. *McClure* (1849), 4 Ex. 345.

Paraphrasing the language of Parke, B., delivering the judgment of the Court in that case, the conduct of the defendant here was equivalent to saying: "As you will not guarantee me against loss, you need not take the trouble to give me an opportunity to examine the flour, for I have told the bank to send back the bills of lading, and I never will take the flour."

Such a case has nothing in common with the master and servant cases in which the master has more than one cause to dismiss and fails to mention the cause which in law justifies a dismissal: *McIntyre* v. *Hockin* (1889), 16 A.R. 498; *Tibbs* v. *Wilkes* (1876), 23 Gr. 439; *Baillie* v. *Kell* (1838), 4 Bing. N.C. 638, at p. 654; *Spotswood* v. *Barrow* (1850), 5 Ex. 110. In such cases the michief had been done, and nothing the plaintiff could do could set it right.

Nor is the principle of *Cowan* v. *Milbourn* (1867), L.R. 2 Ex. 230, applicable—there a hall had been let to the plaintiff by the defendant, who, discovering that the plaintiff intended to use the hall for blasphemous lectures, wrote him "entirely refusing the use of the rooms, but not assigning any reason" (p. 231). The Court held that, whether this was the real motive operating on the defendant's mind or not, it was open to the defendant to refuse the use of the hall and to justify that refusal on the ground that the plaintiff had in fact this purpose in view. As Bramwell, B., says (p. 236): "You need give no reason at all. If you refuse to perform your contract, and the other party asks why, you may say, 'Go to law and I will tell you.' And your justification will depend on whether in fact and law he could compel you to perform." Here again there was no question of waiver—the plaintiff was not in a position to better himself by doing something he had omitted.

Nor do I think that the defendant here can be allowed to change his position and set up that the cancellation was due to the failure to permit inspection, and not to the refusal to comply with a request which the plaintiff had a right to refuse.

I would allow the appeal and direct judgment to be entered for

the amount claimed with costs—and the respondent should pay the costs of this appeal.

LENNOX, J.:—The general law that a buyer, upon tender of goods purchased, not having previously inspected them, has a right to inspect them and reasonable time allowed him for doing so, is not, I think, open to any doubt. See Halsbury's Laws of England, vol. 25, p. 228, paras. 397 *et seq.*, and cases collected in the notes. The case of *E. Clemens Horst Co.* v. *Biddell Brothers*, [1912] A.C. 18, is not in conflict with this. There, by the terms of the contract, the purchaser was bound to pay immediately upon presentation of the invoice, even though the goods were then at sea or had not reached the possession of the purchaser. The case decides nothing as to the right of inspection except as controlled by the special terms of the contract there in question.

Here, the goods were sold f.o.b. Montreal, and the case therefore comes within the ordinary law, namely, that the purchaser had the right to ascertain, before acceptance of the goods, whether they were or were not according to contract, and, if not, the right to refuse acceptance. It was argued that, before asserting this right, he requested or demanded that the seller should guarantee him against loss, or, in other words, warrant the quality of the goods sent. This is not a right that is secured to him as a matter of law; but it was not surprising, nor perhaps unreasonable, that he should request this, in view of difficulties in reference to a purchase from the plaintiff which had just gone through. The defendant asserts that the plaintiff refused to comply with this request. I can hardly think that this is accurate. The answering telegram, at all events, offers to guarantee that the shipment will turn out to be of goods of the character of the goods ordered; and the plaintiff could hardly be expected to warrant that the defendant's vendees would not set up objections. If the goods answered the description contained in the order, that would be as much as the defendant was entitled to expect. At this stage of the controversy, I see nothing, however, that would preclude the defendant from reverting to his legal rights and insisting upon "inspection" before acceptance; but there is no evidence that this demand was ever specifically made. What was demanded was the right to sample the goods, or, to be exact, to "take samples." This may or may not be a substantial difference—

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it would appear to involve a diminution of quantity—how great, I have no means of judging. Small quantities of the goods can be consumed or destroyed for the purpose of testing, examination, or inspection, where there is a right to inspect, without preventing the buyer—in some cases—from afterwards rejecting the goods. There was no definite refusal of the demand of the defendant to take samples; and if, upon this contract, the defendant had a right to take samples, as distinguished from inspection or examination, doing so would not shut him out, if the goods were found to be not of the description ordered. He could still reject them, and this even if, in the faith that they were right, he had accepted a draft or made payment. Possession of goods during the time necessary for inspection, examination, or ascertainment of quality, is not the equivalent of acceptance. He must not delay for an unreasonable time, of course. The right to inspect, simply, is what was discussed upon the argument of the appeal, and I would judge that this is the way in which the issue was presented in argument before the learned Judge of the Court below. He says: "The whole question turns upon the right of the defendant to inspect the flour in Montreal, the place of delivery and payment." With great respect, I am of opinion that this question does not arise. What the defendant insisted upon was the right to sample the flour; and this—at all events without being a good deal more specific than he was—involved a good deal more than what is usually understood by inspection or examination. At all events, if the defendant had the right to take samples, he had it without any consent of the plaintiff, and should have exercised it. If the contract did not confer this right, the defendant had nothing to complain of—and particularly has he no moral or equitable right, in view of the warranty the plaintiff actually delivered, and never recalled.

It matters not that the defendant as a matter of law did not need it. It was "a further assurance," and cogent evidence of good faith.

After some hesitation, but, upon going into the matter carefully, now without hesitation, I think the appeal should be allowed and judgment entered for the plaintiff with costs here and below.

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MASTEN, J.:—The plaintiff sold to the defendant two carloads of flour, f.o.b. Montreal. He shipped the flour to Montreal,

but the defendant, under the circumstances hereinafter stated, declined to accept it. The flour was resold, and this action is now brought by the plaintiff to recover the loss sustained by him on resale. The action was dismissed by Coatsworth, County Court Judge, who presided at the trial, and this is an appeal from his decision.

The defendant disputes the plaintiff's claim on the ground that, before accepting the flour in Montreal, he was entitled to inspect it; and that, inspection being asked by him and refused by the plaintiff, he was under no obligation to accept delivery and to pay for the flour.

Three points are presented for consideration: (1) that inspection was never asked by the defendant, and, if asked, was never refused by the plaintiff; (2) that under the decision of the House of Lords in *E. Clemens Horst Co.* v. *Biddell Brothers*, [1912] A.C. 18, the right of inspection did not obtain in this case; (3) that, by the act of the defendant in proposing a guarantee in lieu of inspection, his right of inspection was waived.

I deal with these points in order. First, on the question of fact. It appears that the defendant had had some difficulty in connection with previous shipments owing to the unsatisfactory quality of the flour received by him from the plaintiff; and, in connection with the present shipment, he insisted on his right to inspect the flour before paying the drafts which had been drawn upon him and to which the shipping bills were attached. The defendant's statement in regard to this matter appears at p. 24, line 23, of the evidence, as follows:—

"Q. What action did you take with reference to these two cars? A. I just wanted to make sure for Ogilvie's sake and for our own benefit that this flour was not going to be turned down. I would sooner see them take the flour because I had—

"Q. And it was to your interest to get rid of it without any difficulty at all? A. Yes.

"Q. Now then, what did you do? A. I called Mr. Morrison up on the 25th, and I asked him for permission to sample the car of flour, and he told me that he would guarantee the flour to be 90 per cent., but did not say that he would permit us sampling it, but without permission to sample it we had no authority to go to the railway and say to the railway, 'We have got permission to sample this car.' We were left really out of the transaction be-

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cause we could not get Ogilvie to sample it, nor could we sample it ourselves without permission of Mr. Morrison or the bank who held the bill of lading.

"Q. Now, that was what day? A. 25th of February.

"Q. Then there are two telegrams there, one from you and reply to it, in which you ask him to guarantee the flour? A. Yes.

"Q. And he replies by saying that he will? A. Yes.

"Q. Why did not that end it? A. Well, that was not sufficient to hold Mr. Morrison, because his idea of a 90 per cent. patent and Ogilvie's might be altogether different; they were expert flour people. They have a chemist there.

"Q. You wanted it sampled? A. Yes, I wanted it sampled to see we got exactly what we bought, because the other car had been refused by them. Now, without that permission we could not sample the car.

"Q. Was that the only reason you had for refusing it? A. I had no other reason because I went into the market a couple of days afterwards and paid the same price for flour."

On cross-examination the defendant says:—

"Q. That was very misleading to Mr. Morrison; you were referring to these two cars? A. No, I was not; I could not have been because he understood over the telephone the reason why we had wired him.

"The Court: Q. You say you did not have the conversation over the telephone? A. I had conversation the next day over the telephone, 25th.

"Q. Tell us exactly what took place on the 25th? A. I called Mr. Morrison up and told him that Ogilvie had refused the previous car of flour owing to the quality not being a 90 per cent. patent Ontario winter wheat flour; and, while I had taken up the bill of lading on that car, I could not take it up on the other two cars, for the reason that previous car had not been satisfactory; but, if he would permit us sampling or Ogilvie sampling, we would take delivery of the cars, providing the quality was satisfactory.

"Q. What did he say to that? A. He said that he would guarantee the flour would be a 90 per cent. winter wheat flour, but he did not say that he would permit us to sample it.

"Q. Did not you insist on sampling it? A. I did insist on sampling it; I told him that was the only reason—

"Q. Did you end that conversation in disagreement? A. No, but I told him that we could not under any condition.

"Q. You did end in a disagreement? A. Yes.

"Q. You insisted on sampling? A. Yes.

"Q. And you did not agree then that day on the telephone? A. No.

"Q. You came to no arrangement? A. Not as regarding the sample.

"Q. And then you sent the telegram next day? A. Yes.

"Q. And got his reply guaranteeing quality again? A. Guaranteed quality to be 90 per cent. patent but not permitting sampling."

The trial Judge in his judgment says: "It is quite clear from the evidence that the plaintiff refused the defendant the right to inspect to see if up to grade, and it was on that account that the transaction fell through, and the plaintiff was compelled to resell."

I see no reason, upon the evidence quoted above, for reversing the finding of the trial Judge, which, I think, should be maintained.

With respect to the second point, namely, the case of *E. Clemens Horst Co.* v. *Biddell Brothers*, it does not appear to me that that decision has any application to the facts of this case. That was a contract of sale on "c.i.f." terms. The rights under such a contract are set forth by Hamilton, J. (*Biddell Brothers* v. *E. Clemens Horst Co.*, [1911] 1 K.B. at p. 220); and the effect of it is that the price is payable against shipping documents without actual tender of the goods. See the statement of Loreburn, L.C., [1912] A.C. at the foot of p. 22 and the top of p. 23. But in the present case the goods were deliverable f.o.b. Montreal. The property in them remained in the seller; and, subject to the discussion of the third point, there was no act on the part of the seller waiving his right of inspection.

With respect to the third point, namely, substitution by consent of the parties of a guaranty for the right of inspection: the fact, as I understand it, is that the defendant proposed that the plaintiff should guarantee him against all loss. The plaintiff proposed to guarantee that the flour was "ninety per cent. winter patent made from good sound winter wheat;" so that the proposed guaranty never came to anything, the parties not being *ad idem*.

The matter is concluded by the defendant's letter of the 25th February, 1915, exhibit 5, which reads as follows:—

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"Dear Sir:—Under separate cover we are sending a sample of flour from car 112682 shipped to Montreal on January 30. As this car was refused by one of our buyers, we wired you on the 24th instant as follows: 'On receipt of telegram from you stating you will protect us against loss we will take up bills lading on 2 cars buyers won't take delivery owing to quality.' As your telegram of the 25th does not comply with our request, we have to-day instructed the bank to return the drafts, and beg to advise that the cars are now at Montreal to your order.

"Yours truly,

"Morrow Cereal Company, per G. Allen."

I am quite unable to discern anything in this that precluded the defendant from insisting upon his ordinary right to inspect the flour.

For these reasons, I am of opinion that the judgment of the County Court Judge was right and should be affirmed, and that costs should follow the event.

Appeal allowed; MASTEN, J., *dissenting.*

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Ex parte RICHARD.

Quebec Superior Court, Bruneau, J. June 5, 1916.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ I—4)—COMPLAINT REQUIRED TO BE LAID ONLY BY CERTAIN OFFICIAL UNDER SPECIAL STATUTE.

A summary prosecution under the Special War Revenue Act, 1915, can only be instituted in the name of the Minister of Inland Revenue; and where the complaint is laid by an excise officer it should specially allege the authorization of the Minister, and in default the complaint cannot be amended, as there is no power to substitute a complainant where the original complainant had no status.

[*Béland* v. *Boyce* (1913), 21 Can. Cr. Cas. 421, 13 D.L.R. 147, applied.]

2. SUMMARY CONVICTIONS (§ II—20)—DEFECTIVE COMPLAINT AND PLEA OF GUILTY.

A summary conviction, even upon a plea of guilty, must be set aside if the complaint does not set out the essential ingredient of the offence, *ex. gr.*, under the Special War Revenue Act, 1915, that the accused sold the unstamped goods to a consumer, and not merely that the accused neglected to affix the stamps to certain goods as required by the Act.

3. CERTIORARI (§ I B—12)—CONVICTION ON PLEA OF GUILTY TO AN INVALID INFORMATION—ALTERNATIVE REMEDY BY APPEAL.

Where a complaint in a summary matter was invalid as disclosing no offence known to the law and as not shewing on its face the authorization to prosecute which was an essential under the particular statute invoked, certiorari lies at the instance of the accused to quash the conviction made upon his plea of guilty to such defective complaint and this although he might have taken an appeal to another tribunal; but his failure to raise his objections before the magistrate disentitles him to costs of the certiorari proceedings.

[*Kokoliades* v. *Kennedy*, 18 Can. Cr. Cas. 495, referred to.]

4. ACTION (§ I B 3—17)—NOTICE OF ACTION TO REVENUE OFFICER—CERTIORARI PROCEEDINGS.

Certiorari proceedings to quash a summary conviction made on the

complaint of an excise officer do not constitute a "suit entered against him" so as to require a month's notice of action under the Inland Revenue Act, R.S.C. 1906, ch. 51, sec. 94, although he is made a respondent to the motion to quash.

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MOTION on certiorari to quash a summary conviction under the Special War Revenue Act, 1915 (Can.) of the applicant (P. Richard), the petitioner in these proceedings. The informant (Loranger) was made respondent and the magistrate, Mr. St. Cyr, *mis-en-cause*. The Minister of Inland Revenue was an intervening party to the motion. Statement.

L. Houle, for petitioner.

O. Gagnon, for respondent.

BRUNEAU, J., directed judgment to be entered as follows:— Bruneau, J.

"THE COURT, after hearing the solicitors of the parties on the writ of certiorari issued in said case:

"WHEREAS the petitioner alleges, in substance, in his petition, sustained by an affidavit stating the facts and circumstances of the case supporting the said writ of certiorari, by one of the Judges of this Court, that he was prosecuted, on February 21 last, by the defendant (Loranger) personally for having sold wine without having previously affixed a stamp on the bottle in conformity with law, and that he was condemned on the 24th of the same month by the *mis-en-cause* to pay $50 and costs, on his plea of "*guilty*"; and whereas the petitioner claims the *mis-en-cause* has exceeded his jurisdiction and that the proceedings contain serious irregularities in respect of the following amongst other grounds:

"1. The defendant had no right to enter the said suit in his personal name, but should have done so in the name of the Minister of Inland Revenue. 2. The complaint does not contain any element of offence, as it does not allege that the wine has been sold to a consumer or for consumption purposes. 3. The fine of $50 collected by and paid to the defendant personally belonged to His Majesty and not to the informer, and by remitting the same to the latter the magistrate has gone beyond his powers. 4. By condemning the petitioner to pay $50 and costs the magistrate exceeded his jurisdiction and the defect was not cured by payment of the fine. 5. The *mis-en-cause* has taken without any right and without any authority, in the above mentioned suit, the quality and designation of 'Judge of the Sessions

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of the Peace.' 6. The petitioner is prejudiced by this arbitrary and illegal condemnation and suffers damage from it.

"Whereas the Department of Inland Revenue has obtained leave to intervene and did intervene to contest the said petition and invoked to meet the petition of the petitioner the following:

"1. The defendant, as an excise officer, had the power to swear to the complaint in question in this case, both as such and by virtue of the general law on summary convictions (art. 710 Criminal Code). 2. The Inland Revenue Act is applicable to the present case, and, according to its provisions, the defendant could not be sued, as an officer of the excise, without a previous notice of one month. 3. The *mis-en-cause* had jurisdiction, as police magistrate, to inquire into the offence charged against the petitioner, as it falls under the provisions of part XV. of the Criminal Code. 4. The petitioner, having pleaded guilty and paid the fine immediately, does not suffer any prejudice. 5. The defendant was authorized, as an excise officer, to receive the fine from the registrar of the police court, to remit it, as he did, to the Department of Inland Revenue. 6. The petitioner should, within the 10 days of the sentence, have appealed to the Court of King's Bench, and, as he does not give any reason why he has not done so, within the prescribed delay, this Court should not grant him the writ of certiorari.

"Whereas the petitioner repeats, in his answer to the said intervention, the facts, circumstances and reasons of his petition, denies those of the intervening party, and, moreover, alleges that he could not appeal within the ten days because the *mis-en-cause* did deprive him of that right by entering said conviction of record only a long time after pronouncing it.

"Considering that the provision of the Inland Revenue Act, R.S.C. ch. 51, sec. 94, requiring that a month's notice be given to any Inland Revenue officer of any suit entered against him in connection with acts done in the discharge of his duties, does not apply to a writ of certiorari, which is one of the ways of reviewing the judgment of a justice of the peace;

"Considering that the plea of guilty and the payment of the fine could not constitute, in penal matters, a valid acquiescence or consent to an illegal sentence by default or excess of jurisdiction on the part of the justice of the peace who pronounced it:

Cardoin v. *Robitaille*, 25 Que. S.C. 444, Cimon, J.; *Re Teasdale*, 16 Can. Cr. Cas. 53; *Re Chitnita*, 16 D.L.R. 241, 22 Can. Cr. Cas. 344; *R.* v. *Long*, 5 Can. Cr. Cas. 493, Wurtele, J.; *R.* v. *Komienski*, 6 Can. Cr. Cas. 524, Wurtele, J.; *R.* v. *Harris*, 13 Can. Cr. Cas. 393; *Re Rope*, 41 Law Times 456;

"Whereas it is well-settled jurisprudence that the party injured by the condemnation is, nevertheless, entitled to the recourse of the writ of certiorari, in spite of the appeal, provided there be default or excess of jurisdiction by the justice of the peace: *R.* v. *Ashcroft*, 2 Can. Cr. Cas. 385; *Re O'Reilly*, 12 Can. Cr. Cas. 219; *Re Robida*, 8 Can. Cr. Cas. 501; *Re Ruggles*, 5 Can. Cr. Cas. 163; *Re Traves*, 10 Can. Cr. Cas. 63; *Re Pelletier*, 9 Can. Cr. Cas. 19, Lavergne, J.; *Re Mercier*, 6 Can. Cr. Cas. 44, Andrews, J.; *Re McAnn*, 3 Can. Cr. Cas 110, 4 B.C.R. 587; *Re McKenzie*, 23 N.S.R. 20; *Re Lynch*, 12 Ont. R. 372; *Re Bradlaugh*, 3 Q.B.D. 511; *Tupper* v. *Murphy*, 3 R. & G. (N.S.) 173; *Re Dowling*, 17 Ont. R. 698; *R.* v. *Major*, 29 N.S.R. 373; *R.* v. *Bigelow*, 2 Can. Cr. Cas. 367, 31 N.S.R. 436; *Re Wentworth*, 15 Que. S.C. 504, Lemieux, J.; *Re Leclerc*, 1 Que. P.R. 230, Mathieu, J.; 2 Hale 210;

"Seeing sec. 15 of the Special War Revenue Act, 1915 (5 Geo. V. ch. 8), enacting that 'every person selling to a consumer any bottle or package containing, etc., (*c*) wine of the grape, non-sparkling, or (*d*) champagne or sparkling wine,' must, at or before the date of the sale, 'affix an adhesive stamp of the requisite value as mentioned,' etc;

"Considering that the same obligation exists, by virtue of said section, for all importers and manufacturers or producers;

"Seeing sec. 14 of said Act, declaring that the word 'consumer' means a person who uses (*c*) wine of the grape, non-sparkling, or (*d*) champagne or sparkling wine, either in serving his own wants or in producing therefrom any other article of value; and that 'selling to a consumer' includes selling by retail;

"Considering that, by virtue of sec. 17 of said law, every person required to affix an adhesive stamp to a bottle or package who fails or neglects to do so shall incur a penalty of not less than fifty dollars and not exceeding two hundred and fifty dollars;

"Considering that the result of the combination of secs. 14 and 15 is that the offence provided for by the legislature consists of the fact of selling wine or sparkling wine, etc., to one

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who is a 'consumer' according to the above definition without affixing the required stamp;

"Considering that the complaint against the petitioner by the defendant is in the following terms: 'I am credibly informed and I have every reason to believe and suspect and do verily believe and suspect that in the City of Montreal, said district, on the 13th day of February, 1916, M. Richard, hotelkeeper, 2081 St. Catherine St. East, omitted and neglected to affix an adhesive stamp on bottles and barrels containing wine, as required by the War Revenue Act of 1915. Therefore I pray for justice and I sign, "'J. A. LORANGER';

"Considering that the aforesaid complaint in no way mentions the offence foreseen and defined by the above-quoted statute, since it does not mention the essential fact that the accused '*sold wine to a consumer*' without the formality of the adhesive stamp;

"Considering that an illegal complaint could not give to the justice of the peace the necessary jurisdiction to inquire into it and decide upon it: *Carriere* v. *Montreal* (1902), 5 Que. P.R. 44, Pagnuelo, J.; *R.* v. *Leschinski*, 17 Can. Cr. Cas. 199; *Re Code*, 13 Can. Cr. Cas. 372; *R.* v. *Coulson*, 27 Ont. R. 59, 1 Can. Cr. Cas. 114;

"Seeing sec. 20 of said Special War Revenue Act, 1915, enacting that the fine must be sued for and recovered in the name of the Minister of Inland Revenue;

"Considering that such special provision is derogatory from the general law;

"Considering that art. 706 of the Criminal Code, relating to the execution of summary convictions, is subordinate to the said Special War Revenue Act of 1915;

"Considering that the defendant had, therefore, no right to bring in his personal name the present suit against the petitioner;

"Considering that the authorisation of the Minister of Inland Revenue given to the defendant to bring the said suit, should have been specially alleged in the complaint, since the said defendant, as excise officer, has only a supervising power over the manufactures, operations or establishments submitted to the excise by virtue of sec. 2 of the Inland Revenue Act (ch. 51, R.S.C. 1906);

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"Considering that such a complaint was not susceptible of being amended, since the effect of such amendment would not only be to correct the name of the complainant, but to substitute as complainant another person than the one who has lodged the complaint: *Béland* v. *Boyce* (1913), Langelier, J., 21 Can. Cr. Cas. 421, 13 D.L.R. 147; *The King* v. *The C.P.R.*, 12 Can. Cr. Cas. 549;

"Considering that of all the juridical reasons invoked by the affidavit of circumstances of the petitioner one alone which is well founded is sufficient to justify the quashing of the judgment of the justice of the peace;

"Considering that the motion of the petitioner praying for the maintenance of the writ of certiorari issued in this case and the annulment of the judgment rendered against him, by the *mis-en-cause*, the 24th February, 1916, is well founded, and that the reasons invoked by the intervening party to have said writ of certiorari quashed are, on the contrary, unfounded;

"Considering that the petitioner, instead of invoking in the Court below, the want of jurisdiction of the *mis-en-cause*, pleaded guilty and paid the fine, he is entitled to no costs against the complainant: *Kokoliades* v. *Kennedy*, 18 Can. Cr. Cas. 495, Davidson, J;

"For those reasons, grants the motion of the petitioner, maintains the writ of certiorari issued in this case, and quashes and annuls, but without costs, the judgment rendered against the petitioner, by the *mis-en-cause*, on the 24th February, 1916;

"Orders that the said fine of $50 and costs, taxed at $3.50, paid to and collected by the defendant be refunded by the latter to the petitioner, under penalty of being punished according to the law." *Conviction quashed.*

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New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. February 18, 1916.

1. SALE (§ III A—50)—GOODS TO BE PROCURED FROM ANOTHER—RIGHTS AND LIABILITIES OF SELLER—PROMISSORY NOTE.

One who sells goods to be procured from another, or sells for that other, and receives in his own name a promissory note in payment, is not an indorsee for value without notice of the promissory note so given him.

2. SALE (§ II C—35)—IMPLIED WARRANTY OF FITNESS—CAVEAT EMPTOR.

There is no implied warranty of fitness in a sale of machinery not manufactured by the seller, and after the goods have been inspected, in the absence of any fraudulent concealment, the rule of *caveat emptor* applies.

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3. SALE (§ II A—25)—WARRANTY—FAILURE OF CONSIDERATION—FINDINGS. Whether there were representations by the seller from which the existence of a warranty could be deduced, or misrepresentation amounting to a failure of consideration, must be gathered from the totality of the evidence, and the jury's findings must be definite.

Statement.

APPEAL from the judgment of McKeown, J., in separate actions brought against the defendant Lorne M. Norton as the maker of two promissory notes and against James Norton as indorser or guarantor.

M. G. Teed, K.C., for plaintiff.

J. P. Byrne, for defendants.

The judgment of the Court was delivered by

White, J.

WHITE, J.:—This action, as originally brought, was to recover the principal and interest upon two promissory notes alleged to have been made by the defendant payable to the plaintiff one note being for $250, and the other for $600, both of them being overdue. In his statement of defence the defendant pleads:—

1. A denial of the making, and also of the presentment of the notes.

2. There was no value or consideration given for said notes, and there was a total failure of consideration.

3. That the defendant was induced to sign the said notes by fraud.

4. That the plaintiff, before and at the time of the making of his promises hereinafter mentioned, and before and at the time of the making of the promissory notes sued on, was possessed of a boiler and engine, rotary and saw, and shingle machine, and belting, gear and fixtures, necessary to operate the same, and the plaintiff knew that the defendant desired to purchase a boiler and engine, rotary and saw, carriage, and shingle machine, complete with all belting, gear and fixtures, necessary to set up and operate the same forthwith as a saw mill, which boiler and engine, rotary and saw, carriage, and shingle machine, the plaintiff knew to be old, and no longer safe to be operated and unfit and improper to do the work which the defendant desired to do with them, and in consideration that the defendant, at the plaintiff's request, would buy the said boiler and engine, rotary and saw, carriage, and shingle machine, complete with all belting, gear and fixtures necessary to set up and operate the same for the sum of $1,550. $100 to be paid down, and the balance to be secured by the promissory notes of the defendant and his father James Norton, as security, warranted and promised and agreed with the defendant that the said boiler and engine, rotary and saw, carriage, and shingle machine were new, and safe and sound and fit and proper to do the work which the defendant desired to do with them, and the plaintiff further promised and agreed that he would deliver to the defendant the said boiler and engine, rotary and saw, and carriage, and shingle mill, complete with all belting, gear and fixtures necessary to set up and operate the same, and that he, the plaintiff, would set up the same so that it would work satisfactory to the defendant for the said sum of $1,550 as aforesaid.

Then follows an averment that relying, etc., the defendant accordingly agreed to buy the said boiler and engine, etc., and pay the plaintiff the sum of $100 cash "and gave his three notes

with his father thereon as security, for the balance, namely, $1,450, to the plaintiff in payment thereof." Then follows a statement of the breach, and an averment of special damage.

By way of counterclaim the defendant pleads substantially the same matters alleged in paragraph 4 of his statement of defence.

No objection is taken to the sufficiency of the plea of fraud, nor indeed to the sufficiency of any of the allegations in the statement of claim or of counterclaim.

In his reply the plaintiff joins issue on the defence and counterclaim; and, as to the counterclaim, further replies:—

2. As to the defendant's counterclaim, the plaintiff further says that he was not and never was the owner of or possessed of the machinery, property and equipment mentioned in said counterclaim, but that certain machinery and property was purchased by the defendant from one William H. O'Brien, but the plaintiff does not know how many and what articles of machinery and equipment were comprised in said sale, but the plaintiff had loaned said William H. O'Brien money wherewith to purchase the machinery, so sold by him to the defendant, together with other machinery, and that at the time of the sale thereof the defendant consulted with the plaintiff and said William H. O'Brien with regard to said machinery, and was then told by the plaintiff that it belonged to said William H. O'Brien, but that said O'Brien was indebted to the plaintiff, and that said O'Brien desired that the notes to be given for the purchase price should be given to the plaintiff, and the defendant and his father, agreed that the said notes should be made by the defendant and his father and that said notes were given by the defendant and his father in consideration of part of the purchase price of said machinery so sold, and were accepted by the plaintiff and credited to said William H. O'Brien, on account of the loan made by the plaintiff to him; and further, that before said notes were given the defendant went to the Province of Quebec, where the said machinery then was, and saw the machinery, and returned to Bathurst, and told the plaintiff that he was perfectly satisfied with the machinery, and that his father would join him in giving said notes, and the defendant and his said father did thereupon make and sign and deliver said notes to the plaintiff, and the notes sued upon in this action were the notes hereinbefore mentioned; and further, that the plaintiff is not liable to pay the defendant the damages claimed or any damages.

It appearing that a second action was brought by the plaintiff against James Norton upon the same two alleged promissory notes, it was ordered upon the trial of the case against the defendant Lorne M. Norton that the two actions be consolidated to the extent that the findings of fact by the jury in the present case shall govern the issues in the case against James Norton as far as they are applicable to it. It would seem not unlikely that one or more defences would be available to James Norton which are

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not raised in this suit, but, although that be so, it is not necessary to discuss or deal with them in this action.

Upon the argument before us Mr. Teed for the plaintiff said that he doubted as to whether the $600 document sued on was in fact a promissory note, and applied to amend the statement of claim as follows:—

That in consideration that the plaintiff would agree to sell or cause to be sold and would deliver or cause to be delivered to the said Lorne M. Norton a certain second-hand steam boiler, engine, rotary saw mill and other second-hand mill machinery and outfit at certain prices, the said defendant Lorne M. Norton promised and agreed to pay the plaintiff for the same at the prices aforesaid, and for the like consideration the defendant James Norton promised and agreed to become guarantor and surety for the said Lorne M. Norton to the plaintiff for the due payment of the said purchase moneys.

And the plaintiff did agree to sell and deliver, or caused the owner of said goods, one William H. O'Brien, to agree to sell and deliver, and the plaintiff and said William H. O'Brien did deliver to the said Lorne M. Norton the said several goods and machinery, and thereupon the said Lorne M. Norton made his certain agreement in writing respecting part of said price, and the said defendant James Norton guaranteed or became party thereto as such surety, in the words and figures following:—

$600.00. BATHURST, N.B., April 8th, 1914.

On the first day of March, 1915, for value received, I promise to pay John Robertson or order six hundred dollars payable at the Bank of Montreal, Bathurst, with seven per cent. interest from date until due, and ten per cent. interest after maturity until paid. This note is given as security for the part payment of the price of an engine and boiler and saw mill outfit, and it is expressly agreed that the title and property and right to the possession of the same shall remain in the said John Robertson until this note is paid, and that the said goods are meantime only on hire until paid for, but at my risk. On any default all payment made to go as rent, and payee may repossess and sell said articles, and after giving credit for net receipts collect the balance of note and interest from said payee. (Sgd.) L. M. NORTON.

Indorsed. (Sgd.) JAMES NORTON.

Mr. Byrne objected to this amendment on the ground that he had contended upon the trial that the document in question was not a promissory note; and, further, that allowance of the amendment might involve a new trial as there was no finding as to delivery or as to failure to deliver according to the contract. The Court said it would consider the point. I think the

amendment should be allowed, but upon terms that any evidence on which defendant relies as to fraud, warranty, or total or partial failure of consideration, or in support of any other defence, shall not, in considering the present motion, be rejected or disregarded because the same is not sufficiently covered by the defence or counterclaim; and, further, that upon a new trial the defendant may rely upon any defence or counterclaim not covered by the pleadings as they stand, provided he serve the plaintiff at least 10 days before trial with a statement of the same. To any such new pleadings the plaintiff must reply within 5 days.

I will first deal with the plaintiff's contention that the relation of vendor and purchaser never existed between plaintiff and defendant; that "O'Brien was the owner of the mill machinery, and sold it to defendant, and being indebted to the plaintiff, by agreement in the nature of a novation between O'Brien and the plaintiff and defendant, the defendant was to pay the purchase money to the plaintiff and gave the notes accordingly."

As a corollary to that, the plaintiff claims that he has substantially the same rights against the defendant which he would have had as an innocent indorsee for value of the defendant's promissory note. I cannot agree with that view. If the defendant's evidence be accepted, the contract of sale was made between him and the plaintiff only. On the other hand, if we were to accept the evidence given by and for the plaintiff, and to disregard the defendant's evidence upon this point, it would be evident that the notes were given to the plaintiff simply as a matter of convenience as between him and O'Brien. There is nothing in the evidence which would support a claim that in giving these notes to the plaintiff the defendant agreed to place himself, or did place himself, in any worse position than he would have occupied had the notes been given directly to the seller. Moreover, whatever may have been said between the parties during the negotiations which led up to the sale, I think that the $600 document or note upon which the plaintiff seeks to recover shows that the agreement made was, and must be treated as, one of sale by the plaintiff to the defendant. There was no question submitted to the jury, and no finding by them upon the question.

Next in order for consideration is the defendant's claim that

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there was a total failure of consideration. This rests upon two grounds, first, that as the defendant during the negotiations which culminated in the sale had informed the plaintiff of the purposes for which he required the mill, there was an implied condition of the contract on the part of the plaintiff that the mill would answer these purposes. Secondly, that it was a condition of the contract that the plaintiff should set up the mill and see that it worked satisfactorily to the defendant.

As to the first ground stated: The sale was of a specific ascertained article, not manufactured by the plaintiff, and was inspected by the defendant before the purchase. Therefore, at least, in the absence of any fraudulent concealment, there could be no implied warranty of fitness, and the maxim *caveat emptor* applies: *Jordan* v. *Leonard* (1904), 36 N.B.R. 518. The effect of fraud upon the contract I will discuss later.

As to the second ground mentioned, the evidence bearing upon it is contradictory, and the jury were not asked to find upon the question. Moreover, the plaintiff adduced evidence apparently designed to support a contention that even if the plaintiff had contracted to set up the mill as alleged he was prevented from carrying out that part of his contract by the acts of the defendant. Under these circumstances it is impossible to hold that the defence of total failure of consideration has been established.

The jury, by their answers to questions 2 and 3, find that the defendant was induced to buy by the material misrepresentation of both the plaintiff and O'Brien, that the mill was older than it was sold for, but failed to find whether such misrepresentation was fraudulent, or made without fraud.

As this case may go to a new trial, I wish, as far as possible, to avoid reviewing the evidence. It is enough for the purposes of the present motion to state that there is, I think, sufficient evidence to have supported a finding by the jury that the sale was induced by the fraud of the plaintiff. The plaintiff argues, however that the jury must be taken to have negatived fraud by their answers to questions 3 and 4, which questions and answers are as follows:—

Q. 3. If you answer yes to the above question in what did such fraud or material misrepresentation consist? A. It was older than they sold it for. Q. 4. If such misrepresentations were made did the party making them know they were untrue? A. We are not sure.

It is clear that the jury have not found fraud; but it is, I think, likewise clear that they have not negatived it. If the plaintiff made the representations alleged as to the age of the mill and the time it had been in use, asserting thereby to be true that which he did not know to be true, and the representation was designed and intended to induce the defendant to enter into the contract which the plaintiff sought to make with him, that may be a fraudulent representation even though the plaintiff, when he made it, did not know it was untrue. For in such case the fraud consists in representing, for the purpose of effecting a sale, that the assertor knows that to be true which in fact is not true.

The plaintiff further contends that, assuming there was fraud, or such misrepresentation as would have entitled the defendant to vacate the contract, the defendant cannot now repudiate it, for two reasons; first, because by taking out a number of the boiler's tubes he has made it impossible to return the boiler in the same condition as when sold; secondly, because, after the defendant had knowledge of the misrepresentation complained of, he, by retaining the goods and remitting part of the purchase price in his letter to the plaintiff of September, must be taken to have elected to retain the mill. The jury were not asked to find whether or not the defendant had so elected. As the burden of shewing such election is on the plaintiff, it would have been for him, if he relied upon that as an answer, to have submitted a question to the jury covering such contention, unless, as is, I think, the case here, the evidence is such that the jury could not reasonably have found otherwise than that the defendant by his conduct must be taken to have elected to retain the mill. If a question upon the point had been submitted to the jury, I do not think they could reasonably have failed to find the defendant by removing the boiler tubes had rendered it impossible to return the boiler in the same condition as he had received it. The defendant gave as one reason why he did not repudiate the contract that, after McCleary had failed to set up the mill, he (the defendant) went to Bathurst, and there saw the plaintiff, who then said to him, "That the mill was all right, and to go ahead and get her going, and he would see that everything was all right." If, as the defendant claims, that statement was made by the plaintiff to induce the defendant to retain the mill, and

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the defendant, relying upon such statement, did retain the mill, then it might possibly suffice to sustain a cross-action or counterclaim against the plaintiff for damages, but I cannot see how it can be held to warrant the defendant in subsequently rescinding the contract of sale, which from his acts he must be taken to have elected to adopt. The defendant is, therefore, I think, compelled to rely upon a defence by way of counterclaim for deceit, breach of warranty, or failure of consideration. By question 6 the jury were asked:—

Did Robertson or O'Brien in any way warrant or give Norton any guarantee concerning the mill and equipment, either as to its condition or otherwise? A. Yes (6 to 1). Q. 7. "If so, who gave such warranty? A. O'Brien. Q. 8. If it was given by O'Brien was he authorized by Robertson to do so? A. We can't answer the question.

The plaintiff contends that by their answers to these questions the jury have negatived any warranty by the plaintiff; but, taking all the questions and answers together, I think it far from being clear or certain that the jury intended their answers to have any such effect as the plaintiff contends. The jury, by their answer to question 5, finds that O'Brien was "authorized by Robertson to act for him in the negotiations concerning the sale of the mill and equipment to Norton." The defendant's evidence is that the plaintiff told him "that any arrangements that I and O'Brien made would be all right to him" (the plaintiff), and, in reply to the Judge, the defendant said, "That was told to me at different times. It was talked over at the very first of the arrangement." And in this connection it must be borne in mind that Robertson throughout claimed that O'Brien, and not he, sold the mill. In view of all the evidence, and of the answers given to other questions, I think it most probable that the jury understood that by question 8 they were required to find whether or not the plaintiff had given O'Brien a particular and special authority to make the warranty in question.

Although asked by question 12 as to what damages, if any, the defendant had sustained by reason of the mill not being up to the guaranteed standard, the jury have failed to assess such damages, their reply to this question being, "He suffered the loss of the mill." In view of the evidence and of the unsatisfactory state of the findings, I think the verdict should be set aside and a new trial granted.

As to the defence of failure of consideration, if the defendant's

version of the contract is accepted as true, there would appear to have been at least a partial failure to deliver all the goods contracted for. Therefore, I think upon a new trial there might well be a finding upon that issue. Upon the new trial I think the jury should be asked by suitable questions framed to cover separately each case of warranty set up by the defendant, whether such warranty was in fact made as alleged, and, of course, as to breach and damages. In submitting the case to a new jury, the trial Judge will doubtless explain to them that a representation to constitute a warranty must appear from the evidence to have been intended as a warranty. The judgment of the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30, 82 L.J.K.B. 245, deals very fully with this question as to when a representation constitutes, or may constitute, a warranty. In that case Moulton, L.J., at p. 256, refers to the following passage, quoted with approval, from Benjamin on Sales (3rd ed., 607), in the judgment of the Court of Appeal in *DeLassalle* v. *Guildford* [1901] 2 K.B. 215:—

> In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment.

Upon that passage Lord Moulton makes the following comment:—

> With all deference to the authority of the Court that decided that case, the proposition which it thus formulates cannot be supported. It is clear that the Court did not intend to depart from the law laid down by Holt, C.J., and cited above, for in the same judgment that *dictum* is referred to and accepted as a correct statement of the law. It is therefore evident that use of the phrase "decisive test" cannot be defended. Otherwise it would be the duty of a Judge to direct a jury that if a vendor states a fact of which the buyer is ignorant they must, as a matter of law, find the existence of a warranty, whether or not the totality of the evidence shews that the parties intended the affirmation to form part of the contract; and this would be inconsistent with the law as laid down by Holt, C.J. It may well be that the features thus referred to in the judgment of the Court of Appeal in that case may be *criteria* of value in guiding a jury in coming to a decision whether or not a warranty was intended; but they cannot be said to furnish decisive tests because it cannot be said as a matter of law that the presence or absence of those features is conclusive of the intention of the parties. The intention of the parties can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true.

As it is impossible to foretell with certainty what will be the evidence upon a new trial, it would be manifestly impossible upon

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this motion to frame all the questions which it might be necessary or desirable to submit to a jury upon such trial. In referring as I have done to some questions which it may be well to have determined, I wish to be understood as merely suggesting them for the consideration of the trial Judge. Having heard the evidence and what is claimed on one side and on the other, he will then be in a much better position to frame and submit suitable and necessary questions than we are upon the present motion.

The appellant's motion was to set aside the verdict, and enter a verdict for the plaintiff, or, failing that, for a new trial. Having succeeded in obtaining a new trial, he would ordinarily be entitled to the costs of this motion, but, in view of all the circumstances, and particularly of the fact that but for the amendment applied for by the plaintiff and obtained upon the hearing of this motion he must have failed in his action upon the $600 alleged note, I think this motion should be without costs to either party.

New trial ordered.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. March 31, 1916.

CONTRACTS (§ IV E—365)—BREACH—DEFECTIVE HEATING SYSTEM—RIGHT TO FIXTURES.

Failure to perform an entire contract to instal a heating system capable of properly heating the premises, precludes recovery of the lump sum price agreed upon; the owner of the premises has a right to counterclaim for the breach of contract, but he is not entitled to retain the fixtures installed.

Statement.

AN appeal by the plaintiff from the judgment of the Judge of the District Court of the District of Temiskaming dismissing an action to enforce a mechanic's lien for $396.33 and awarding the defendant Wilson $200 on his counterclaim for moneys paid on account of the contract price.

The plaintiff's contract with the defendant Wilson, the owner in equity of certain lots, was to install a heating system in a house built upon these lots.

The District Court Judge found that the system was defective, and based his judgment upon that finding.

J. M. Ferguson, for appellant.

E. B. Ryckman, K.C., for defendant Wilson, respondent,

J. Y. Murdoch Jr., for the defendant company.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The evidence on each side is unsatisfactory; no reasonable effort seems to have been made

fairly to try out the matters in question in this action; and, if the case had been tried before me, I should have declined to deal with it on such efforts, and would have availed myself of the right, afforded by the practice, to appoint some competent person to make the necessary examination of the work in question and give an impartial report, and, if necessary, give evidence, upon the matters in question: see Rule 268. But the case must now be dealt with upon the evidence which the parties chose to adduce, and upon that evidence it is plain—indeed it is admitted by the plaintiff—that he was to put into the defendant's house a heating system that would properly heat it, and there is evidence upon which it might be found, as the trial Judge has found, that that has not been done.

The plaintiff's attempt to put the blame on the defendant for not building a better chimney was not given effect to at the trial, and cannot be here; the plaintiff knew the condition of the chimney, and should not have contracted as he did except upon the condition that better draught should be supplied by the defendant, if he then really thought the flue insufficient.

The result is, that the plaintiff has not furnished that which he contracted to supply; he has not substantially fulfilled his contract, and so is not entitled to the price that was to be paid to him on fulfilment of the contract; and to that extent the judgment is right. But the defendant is not entitled to retain the boiler, radiators, pipes, etc., put in by the plaintiff. The defendant recovers, according to his defence on which the judgment in appeal is based, on the ground that the whole work is useless, and must be, as he terms it, scrapped, which means necessarily taking out and discarding these articles. When so taken out, they must be the property of the plaintiff, not of the defendant, and the plaintiff is then entitled to them. The principle applied in such a case as *Oldershaw* v. *Garner*, 38 U.C.R. 37, adopting and following the ruling in *Munro* v. *Butt*, 8 E. & B. 738, is obviously not applicable to such a case as this, to fixtures which are to be unfixed and taken out, or, as I really think was intended by the defendant, not to be taken out, but to be utilised for his benefit under a new contract for the heating of his house.

The judgment in appeal should be varied so as to give to the plaintiff the right to remove the boiler, radiators, pipes, etc., doing no unnecessary damage, during the month of June next,

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upon paying to the defendant the amount of his judgment and costs.

The result is, that the plaintiff recovers his goods, and the defendant his money. In addition to that, the defendant has had two seasons' use of the heating system, such as it was, which is sufficient to compensate him for the plaintiff's breach of the contract.

There should be no order as to the costs of this appeal. This applies to all parties to the appeal.

Lennox, J.
Masten, J.

LENNOX and MASTEN, JJ., concurred.

Riddell, J.

RIDDELL, J.:—An appeal from the judgment of His Honour Judge Hartman, at Haileybury, in a mechanic's lien proceeding.

The plaintiff, a plumber and steam-fitter, entered into a contract with Wilson, the owner in equity of certain lots in the town of Timmins, which he held under an agreement to purchase from the Timmins Town Site Company Limited, to install a heating system in his house on these lots.

Wilson did not understand anything about what was requisite; the plaintiff went up and measured the house, and made his tender at $590. The tender states the boiler to be a 30F.; but, afterwards, Brazeau made up his mind to put in and did put in a 20F., without interference from Wilson. Brazeau knew that Wilson relied upon his (Brazeau's) expert knowledge, that he was not selling so much iron &c., but agreeing to put in a heating plant sufficient to heat the house properly and with an even temperature from room to room.

The learned Judge has found, and the evidence supports his finding, "the system defective in that the boiler is not sufficiently large to heat the system properly, nor is the heat equally or properly distributed throughout the house"—in other words, the plaintiff has not completed his contract.

I think the case is entirely governed by *Forman* v. *The Ship "Liddesdale,"* [1900] A.C. 190. The plaintiffs had an entire contract to effect certain specified repairs on a ship; they did not do exactly as specified, but what (they said) was equivalent or better—the owner of the ship would not pay, but took the ship and sold it. It was held, following *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651, that, as the plaintiffs were contractors for a lump sum and had not completed the prescribed work, they could

not recover anything—and that the defendant, by taking possession of his own property and doing the best he could with it, did not thereby acquiesce in and ratify what the plaintiffs had done.

The authority of this case is in no way shaken by *Dakin & Co. Limited* v. *Lee*, 84 L.J. K.B. 894, 900—the present case comes under Mr. Justice Sankey's second exception.

I would dismiss the appeal without costs.

By consent the plaintiff is to be allowed to remove his materials. This logically would imply his doing no unnecessary damage, and would be without prejudice to the defendant's right of action for breach of contract &c.; but, to put an end to this litigation, I agree with the disposition made by my Lord.

Appeal allowed in part.

QUILLINAN v. STUART.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. April 3, 1916.

LIBEL AND SLANDER (§ II B—15)—OPPROBRIOUS EPITHETS APPLIED TO WOMAN—EXCESSIVE DAMAGES—NEW TRIAL.

Words contained in letters written to the employer of a young woman, referring to her as "slut," carrion," "dog," "if this woman controls you body and soul," though capable of a defamatory meaning in their ordinary popular sense, were not under the circumstances capable of being understood as imputing to her unchastity or immoral conduct; an award of $15,000 as her damages for the libel is unreasonable and excessive, and ground for a new trial.

Statement.

APPEAL by the defendant from the judgment of MASTEN, J., at the trial, upon the verdict of a jury, in favour of the plaintiff, for the recovery of $15,000 damages, in an action for libel.

The alleged libel was contained in three letters written by the defendant, two of them to one Masters, the plaintiff's employer, and the third to the plaintiff herself.

Masters being absent, the defendant had transacted business with the plaintiff, acting for Masters. The defendant felt aggrieved at the way in which he was being treated by the plaintiff, and in writing a letter of complaint to Masters used the following expressions: "Call off your slut!" "Call off your carrion!" "Call off your dogs!" "If this woman controls you, body and soul, it's time I knew it." The other letters contained strong language about the plaintiff.

The trial Judge withdrew from the consideration of the jury the letter to the plaintiff, except as evidence of malice. He also in effect ruled and directed the jury that the other letters might be

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read as imputing unchastity and immoral relations to the plaintiff, and that it was for them to say whether or not that was the meaning to be given to the letters.

The appeal was on two grounds: (1) that the trial Judge should have ruled that the letters were not defamatory, and should have dismissed the action; (2) that the damages were excessive.

I. F. Hellmuth, K.C., for appellant.

Wallace Nesbitt, K.C. and *J. M. Godfrey*, for plaintiff, the respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of Masten, J., dated the 15th November, 1915, which he directed to be entered on the verdict of the jury at the trial of the action before him at Toronto on that day.

The action is for libel alleged to be contained in three letters written by the appellant, one of them on the 6th and the other two on the 8th April, 1915.

The letter of the 6th April, part only of which is alleged to be libellous, and one of the letters of the 8th April, were written to W. B. Masters, the employer of the respondent, and the other on the 8th April to the respondent herself.

The letters of the 8th April and the part of the letter of the 6th April which is complained of are as follows:—

"W. B. Masters, Esq.,

"c/o. S. M. Stowenn, Alden, N.Y. Personal.

"Dear Sir: *Call off your slut!*

"Enclosed is a specimen of the 'Beggar on Horseback' letters I have been getting from the woman who exercises authority and issues her mandates and demands in your stead while you rest in modest retirement. I ask you to return it.

"*Call off your carrion!*—And this while I am on the broad of my back, but I ask no quarter on that account.

"If you are in your senses, as I take you to be, and are cognizant of this woman's doings and permit them, let me warn you that I will not pay either of these notes under pressure, and if costs are incurred I will hold you to the extent of your responsibility in all directions. I ask you to declare yourself. I have waited three months without disturbing you. I will wait no longer. *Call off your dogs!*

"My two notes were dealt with in the usual manner, under-

stood between us, at their maturity in March last, and with the usual reasonable reductions. Your attorney refused to renew, arbitrarily as I believe. If this woman controls you, body and soul, it's time I knew it.

"*Call off the slut.* Yours truly, J. H. Stuart."

"Personal and General. Niagara Falls, Ont., April 8th, '15.

"Miss L. M. Quillinan, City.

"Dear Madam:—Your various communications shew you to be a very ill-mannered woman. I found them very offensive, and their general tone would indicate that it must indeed be seldom your privilege to address a gentleman (or better still an honest man).

"Your criticism of my motives and actions is ludicrous, while of course grossly impertinent. Your threats concerning 'Head Office' are vulgar and impotent, and I could desire no better compliment than your complete and unreserved condemnation.

"Let the above recognition be your reward. I feel it to be your due. Yours truly, J. H. Stuart.

"P.S.—Do you know the *penalty* for destroying that voucher receipt?"

Extract from letter of the 6th April, 1915:—

"From the moment of your departure, your attorney, as I told her, dealt with your affairs as if you were a bankrupt or an insolvent, grabbing everything in sight and not depositing a dollar, even of moneys pledged to come to us. . . . To conclude, our bank and staff have had forced upon them much disagreeableness and several sharp practices at the hands of Mr. Symmes' representatives."

The learned trial Judge withdrew from the consideration of the jury the letter to the respondent of the 8th April "as a separate and independent libel," but apparently let it go to the jury as evidence of malice. He also in effect ruled and directed the jury that the other letters might be read as imputing unchastity and immoral relations to the respondent, and that it was for them to say whether or not that was the meaning to be given to them.

The jury found for the respondent, and assessed the damages at $15,000, which was $5,000 more than was claimed in her statement of claim; whereupon, by leave of the trial Judge, the state-

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ment of claim was amended by increasing the claim to $15,000, and judgment was directed to be entered for the respondent for that sum with costs.

The appeal is on the grounds that the trial Judge should have ruled that the letters were not defamatory and dismissed the action, and that the damages are excessive.

The respective functions of Judge and jury in libel actions are well settled and clearly defined, and the effect of the decisions is stated, and correctly stated, in Halsbury's Laws of England, vol. 18, pp. 652, 653, 654, 655, paras. 1211 to 1215 both inclusive, to be that:—

"1211. In construing the words complained of, in order to see whether the plaintiff has made out a case to be left to the jury, the Judge must, where nothing is alleged to give the words an extended sense, consider the statement as a whole, and interpret the words in their plain and popular meaning. If the words so interpreted are reasonably calculated to defame the plaintiff, he must leave it to the jury to say whether they did, in fact, defame him; if not, he must give judgment for the defendant without leaving the case to the jury.

"1212. Where there is an innuendo or something is alleged to give the words a sense which differs from their plain and popular meaning, the Judge must consider not merely the statement complained of, and the context in which it appears or was made, but he must also take into account the manner and occasion of the publication, the persons to whom it was published, and all other facts which are properly in evidence as affecting the meaning of the statement in the circumstances of the particular case.

"If the Judge, interpreting the statement in the light of the circumstances of the particular case, is satisfied that the words are capable of the meaning ascribed to them by the innuendo, he must leave it to the jury to say whether the statement in fact conveyed the meaning ascribed to it. If he is not so satisfied, it is his duty not to leave the question raised by the innuendo to the jury.

"But the Judge, in determining whether the words are capable of the meaning assigned, ought not to take into account mere conjectures which a person to whom the statement is published might possibly though unreasonably form.

"1213. Where the words in their natural meaning are not defamatory or actionable *per se* (as the case may require), the plaintiff must at the trial satisfy the Judge of the existence of circumstances which lead to the conclusion that the words might reasonably convey the meaning assigned by the innuendo to persons to whom they were published, and if the plaintiff fails to do so, there is no case to go to the jury, and judgment should be entered for the defendant.

"If in such a case the Judge leaves the decision of whether or not the words did convey the meaning assigned to persons to whom they were published, the Court of Appeal will give judgment for the defendant. In the Court of Appeal the burden is not on the defendant to shew that the words were incapable of the meaning assigned; it is sufficient for him to shew that the plaintiff did not discharge the burden which was on the plaintiff.

"1214. The defendant is always entitled to have the question of libel or no libel, slander or no slander, left to the jury, and if he can get either the Judge or the jury to be in his favour he succeeds; whereas the plaintiff, or the prosecutor, in criminal proceedings for libel, cannot succeed unless he gets both the Judge and the jury to decide in his favour.

"1215. The proper course for the Judge to adopt in civil or criminal proceedings for libel, where there is a case to go to the jury, is to define what is a libel in point of law, and leave it to the jury to announce their opinion as a matter of fact whether the particular publication falls within that definition or not. The Judge may as a matter of advice express his own opinion as to the nature of the particular publication, but he is not bound to do so as a matter of law, and it would be wrong for the Judge to direct the jury positively that they must find that a particular publication is a libel or a slander."

What is referred to in para. 1211 as "the plain and popular meaning" of the words is by some Judges called "their proper and natural meaning, according to the ordinary rules for the interpretation of written instruments:" *per* Lord Selborne, L.C., in *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, 744; by others, their "primary sense:" *per* Brett, L.J., in the same case, 5 C.P.D. 514, 542; and by other Judges, their "natural

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meaning:" *per* Lord Shand in *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A.C. 68, 79.

By "primary meaning" is not meant the etymological meaning, but that which the ordinary usage of society affixes: *per* Coleridge, J., in *Shore* v. *Wilson* (1839), 9 Cl. & F. 355, 527.

In the case at bar there were three questions which fell to be determined by the trial Judge:—

(1) Whether, in their plain and popular meaning, the statements complained of, as a whole, were capable of a defamatory meaning.

(2) Whether, if capable of a defamatory meaning, they were capable of being understood as imputing unchastity or immoral conduct to the respondent.

(3) Whether, if these two questions were answered in the negative, in the light of the circumstances of the case the words were capable of any of the defamatory meanings ascribed to them by the innuendoes, and, if so, of which of them they were so capable.

I agree with the contention of the respondent's counsel that the first question should be answered in the affirmative.

While, for the reasons I shall afterwards state, I do not think that the letters can be read as imputing unchastity or immoral conduct to the respondent, the application to her of the epithets "slut" and "carrion" was calculated to expose her to hatred, contempt or ridicule, as it tended to lower her in the opinion of her employer, to whom the letters were written, or to induce him to entertain an ill opinion of her.

As was said in an old case, *Bell* v. *Stone* (1798), 1 B. & P. 331, 332, "any words written and published, throwing contumely on the party," are actionable.

The case, therefore, could not have been withdrawn from the jury.

In dealing with the question whether the letters were capable of being read as imputing unchastity or immoral conduct to the respondent, it is necessary to consider the circumstances in which they were written. As I have said, the respondent was in the employment of Masters, and she had the charge and management of his business. He was in bad health, and had gone to the United States for medical treatment. He was a customer of

the Niagara Falls branch of the Bank of Hamilton, of which the appellant was the manager, and had a credit there, but had overdrawn it. He had business transactions with the appellant personally, who had given him two promissory notes on account of an indebtedness, and these notes were held by another bank, which had discounted them. Shortly after Masters left Canada, disputes arose between the appellant and the respondent, principally with reference to the application of moneys of Masters which the appellant contended should be applied to reduce the overdraft at his bank, but which the respondent insisted upon depositing in a trust account in another bank; and the relations between the two were certainly not friendly. What led up to the writing of the letters in question occurred later on. The two promissory notes to which reference has been made were about to mature, and the appellant had sent renewals of them to Masters to be endorsed by him. This appears to have given offence to the respondent, who thought it was highly improper that the appellant had dealt directly with her employer instead of with her, and she wrote to the appellant on the 6th April, 1915, telling him her opinion of his conduct in the matter, as well as in reference to a previous renewal of the notes, and expressing it in not very complimentary language. The letter also stated the conditions upon which alone the notes would be renewed, and with it were returned the two notes, which the appellant had sent to Masters. On receipt of this letter, the appellant wrote to Masters expostulating with him for sending the notes to the respondent and not dealing directly with him. In this letter, after referring to a power of attorney Masters had given to him, the appellant says: "But the bank's hands have been tied ever since by the appointment of an insolent and over-zealous woman, whom we have tolerated only because we thought you would soon return and in deference to a trusted customer."

Two days afterwards, the letter to Masters of the 8th April was written, and with it was sent the respondent's letter to the appellant of the 6th April.

In applying his mind to the question whether the letter of the 8th April was capable of being read as imputing unchastity or immoral conduct to the respondent, as I have said, it was proper for the learned trial Judge to consider the circumstances in which the letter was written and the matters with which it dealt.

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It is clear that the purpose of the latter was to remonstrate with Masters against the course the respondent was taking with reference to the renewal of the notes, and that the appellant believed that he was being unfairly treated by her, and that she was, in the name of Masters, making and unduly pressing arbitrary demands upon him; and, fairly read, the request or demand to call off the respondent, though couched in vulgar and abusive language, means no more than this: "I am being hounded by your agent, call her off." In other words, "I am being pursued by her relentlessly and persistently, as dogs pursue game." "Call off your dogs." "Call off your slut."

It was argued by the learned counsel for the respondent that the expression, "if this woman controls you body and soul, it's time I knew it," suggests that there were immoral relations between the respondent and her employer. It is difficult for me to take the argument seriously, and when I heard it it brought to mind the address of counsel for the plaintiff in the celebrated case of *Bardell* v. *Pickwick*, reported only in Dickens's Pickwick Papers. What the expression plainly means is: "If this woman so entirely controls your actions that you are unable to deal with me directly, I want to know it."

If, however, the word "slut," as applied to the respondent, is not shewn by the context and the circumstances, as I think it is, to have been used in the sense I have just mentioned, a further inquiry is necessary, viz., what is the plain and popular meaning of the word "slut?" In no dictionary that I have been able to consult, and I have consulted the Imperial, the Standard, the Century, Webster's, and Murray's, except in Murray's, is a meaning implying lewdness, unchastity, or immorality given to the word. In Murray's, the second meaning given to it is "a woman of low or loose character, a bold or impudent girl, a hussy, a jade," and the authorities given for the use of the word in the sense of "a woman of low or loose character" are all, except one, writers of more than two centuries ago, and that one, Sheridan, writing in the latter end of the 18th century.

What I have said as to the Standard dictionary is subject to the observation that one of the meanings given to the word "sluttish" is "lewd, meretricious," but it is marked as obsolete.

One might as well argue that because the word "libertine" at one time meant "a freeman as of a corporate town," or because

"knave" in early English meant "a boy" or "any male servant," or because the word "villain" once meant a "country-man, peasant, or farm servant," the like meanings should be ascribed to those words when used in the present day, as to argue that, because two or three centuries ago the word "slut" was used by writers of that day as meaning "a women of low or loose character," that meaning should now be given to it.

I apprehend that the reason why some lexicographers give the old meanings of words is that it is thought desirable to provide keys for the interpretation of words which were in former times used by English writers of repute in a sense which they do not now bear, and to follow the historical method of dealing with words and their signification.

If I am right in thinking that the word "slut," interpreted according to its plain and popular meaning, cannot be read as imputing unchastity or immoral conduct to the respondent, it follows that the learned trial Judge should have so directed the jury; but, as it is alleged by the innuendo that the word was used in that sense, it was for him to consider not merely the statement complained of but the context in which it appears or was made; and "the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances:" *per* Lord Blackburn in *Capital and Counties Bank* v. *Henty*, 7 App. Cas. at p. 771.

And if, upon consideration of all these matters, the proper conclusion was that the words used were not capable of the meaning alleged in the innuendo, it was the duty of the trial Judge to have so directed the jury.

For the reasons I have already given in dealing with another branch of the case, I am of opinion that the words complained of were not capable of the meaning that the respondent was an unchaste or immoral woman, and that the learned trial Judge

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misdirected the jury in telling them, as he in effect did, that the words were capable of that meaning.

It was contended by Mr. Nesbitt that, as no objection was taken to the charge to the jury, it was not open to the appellant to object to it on the ground of this misdirection, but I am not of that opinion; and *St. Denis* v. *Shoultz* (1898), 25 A.R. 131, is a clear authority against the contention.

I am also of opinion that the damages are so excessive as to warrant interference with the finding as to them; they are, I think, so manifestly unreasonable that the jury must have been influenced by views and considerations to which they should not have given effect.

For these reasons, I would allow the appeal with costs, set aside the verdict and judgment, and direct that a new trial be had between the parties, without costs.

Garrow, J.A. Maclaren, J.A. Hodgins, J.A.

GARROW, MACLAREN, and HODGINS, JJ.A., concurred.

Magee, J.A.

MAGEE, J.A.:—The amount awarded for damages in this case is excessive, and, while serving to mark the proper sense which the jury had of the defendant's conduct, cannot be said to bear any just relation either to the circumstances or station in life of the parties or to a proper punishment of the defendant or the actual injury sustained by the plaintiff; and I agree that there should be a new trial. But I cannot accede to the proposition made for the defendant that the case should go back to a jury with a declaration from this Court that the trial Judge was wrong, or that the jury must be told that the only construction to be placed upon the writing is in effect that, because of her zeal in diligent attention to her employer's interests and in carrying out his instructions, the plaintiff was merely figuratively alluded to by his debtor as a hunting dog, with a purely proper and necessary change of gender, or that she is only entitled to damages for such a comparatively uninjurious reference, and as if the defendant had playfully written to a client of a collecting agency, "Call off your dogs." The defendant himself was not satisfied with that phrase, which he actually used.

I do not propose to enter upon any philological inquiry as to the origin or use of the expression which, with "carrion," the defendant chose to apply to a respectable young woman. Fortunately, our modern dictionaries are not given to the per-

petuating of many words and meanings which do not commend themselves to modern refinement but have yet a very vigorous life in the community—but it is noticeable that the innocent zoological sense which is pressed upon the Court for the defendant is given in some dictionaries as not of English but American use—while there is no doubt in what classes the word is placed in so recent (1888) a work as Roget's Thesaurus, where that sense does not appear at all. If a person chooses to select for its abusive character and apply to another an expression which has, amongst others, a most opprobrious meaning, it does not lie in his mouth to ask that the jury be told they must read it as having been used only in one of its possible significations.

That the defendant had not the slightest justification for using a term which might impute misconduct to the plaintiff is no ground for holding that the jury must find that he did not intend such an imputation, or that he would not in his then frame of mind have enjoyed its acceptance in its most objectionable sense. In my opinion, it would have been misdirection on the part of the trial Judge to have told the jury that the defendant's letter was not reasonably capable of the meaning charged, and I also regretfully have to admit that my experience has not led me to believe that as a fact the most discreditable meaning is quite so obsolete as has been contended. *New trial ordered.*

ROSBOROUGH v. TRUSTEES OF ST. ANDREW'S CHURCH.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and McKeown, JJ. April 26, 1916.

WILLS (§ III I—175)—EQUITABLE DOCTRINE OF ELECTION—LUNATIC LEGATEE.

Where a testator devises his property in trust to provide such sums as might be necessary for the maintenance for life of his son (a lunatic), with an additional bequest of a specific sum to the son absolutely, and by the same will he also devises to another person a mortgage which he had assigned to the son previously to the making of the will, the son, under the equitable doctrine of election, is bound to elect between the mortgage on the one hand and the benefits under the will on the other; in such instance there is sufficient "free disposable property," to the extent of the son's interest, from which compensation could be made to the disappointed devisee. Where the legatee is a lunatic the election may be exercised by his committee, who may be required to take under the will, if such appears most beneficial to the legatee and in accordance with the testator's presumed intention.

Statement.

APPEAL from the judgment of Grimmer, J., Chancery Division, in action to determine rights under a will. Affirmed.

F. R. Taylor, K.C., supported the appeal.

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ROSBOROUGH v. TRUSTEES OF ST. ANDREW'S CHURCH.

McLEOD, C.J.

J. B. M. Baxter, A.G., for the Trustees of St. Andrew's Church.

W. A. Ewing, K.C., and *M. G. Teed*, K.C., for Robert Rosborough, executor.

McLEOD, C.J. (dissenting):—This action was brought for a declaration by the Court as to whether or not the trustees of Saint Andrew's Church, in the city of St. John, take anything under the last will and testament of James Walker, deceased, and as to the respective rights of the trustee under the said will, and of the plaintiffs as a committee of the person of the said John Douglas Walker, to property conveyed or bequeathed to the said John Douglas Walker. The facts are not in dispute.

John Douglas Walker, the son of James Walker, is a person of unsound mind, and so found, and Robert S. Rosborough and Katherine Amelia Walker, mother of the said John Douglas Walker, were appointed a committee of his estate. At the time the will was made, and at the time of the death of James Walker, John Douglas Walker was living with Edith Raynes and her son Harrison Allan Raynes in Halifax. James Walker made and executed a will on January 17, 1913, by which he appointed Robert S. Rosborough sole executor and trustee of his estate. In the will he devised to his trustee certain lots of land that he had, situate in the city of St. John and in the city of Halifax, upon trust to permit his wife's sister, Edith Raynes, to occupy rent free during her lifetime the lot and buildings on Gottingen St. in Halifax, and from and out of the rents of the other properties to pay to the said Edith Raynes and her son Harrison Allan Raynes, and the survivor of them, to be expended in the support and maintenance of the said John Douglas Walker, such sums as may be necessary therefor, and to provide his son with the necessaries and comforts of life so long as he shall live, and at his death to provide a decent Christian burial, and upon the death of the said son he devised the lands and premises so conveyed to his wife, the said Katherine Amelia Walker, absolutely. In and by the will he also made the following bequest:—

> I give, devise and bequeath to the trustees of St Andrew's Presbyterian Church, in the city of St. John, the mortgage which I now hold on their property, and all principal and interest due or owing thereon at the time of my death.

After making some other bequests, he devised all the rest and residue of his estate, real and personal, to his daughter Gladys Wellwood Baker, absolutely. On September 8, 1913, he

made a codicil to the will, by which he gave his son John Douglas Walker a special deposit receipt of the Bank of New Brunswick (now the Bank of Nova Scotia) for the sum of $12,600 and all interest accruing thereon. James Walker died on January 14, 1914, and his will was duly probated in the city of St. John. The mortgage on St. Andrew's Church, which was for $30,000, was by James Walker assigned to John Douglas Walker on March 14, 1904, and at that date John Douglas Walker was of a sound and disposing mind.

The contention of the defendants, the trustees of St. Andrew's Church, is that as James Walker devised to them the mortgage which was the property of John Douglas Walker, and also made a devise to John Douglas Walker, that he (John Douglas Walker) must make an election as to whether he would take under the will or against the will, and that if he takes against the will he must make a compensation to them to the extent of the benefits he receives under the will.

The case was tried before Grimmer, J., who decided that it was a case for an election, and as John Douglas Walker, being of an unsound mind, could not himself make an election he directed that the committee elect to take under the will, and transfer and assign the mortgage to the defendants, the trustees of St. Andrew's Church. From that judgment the committee of John Douglas Walker have appealed, claiming, first, that it is not a case for an election, and second, that if it is a case of an election the only benefit that John Douglas Walker takes under the will with which they would be obliged to make compensation is the $12,600 deposit receipt.

Grimmer, J., decided that the income from the real estate that was devised to the trustee, and from which income he was to pay to Edith Raynes and Harrison Allan Raynes, or the survivor of them, to be by them expended in the support and maintenance of John Douglas Walker such sums from time to time as might be necessary therefor, and to provide him with all the necessaries and comforts of life so long as he should live, and upon his death to provide a decent Christian burial for him, vested in John Douglas Walker, so that it could be used to make compensation if he or his committee elected against the will. The case is one in which John Douglas Walker would be put to

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his election, but in directing the election the Court should direct such an election as would be most in the interest of John Douglas Walker. An election arises where a testator gives property which belongs to one person to another, and gives to the person whose property he professes to devise property that is the testator's. In that case the party whose property is so devised must elect whether he will keep his own property or keep the property devised to him under the will. If he does the latter he must perform all the conditions of the will, that is, out of the property devised to him under the will he must make compensation to the extent of what he receives to the party who has been disappointed by his election. But the doctrine of election will not be applied except where if an election is made against the will the interest that passes by the will can be laid hold of to make compensation. The doctrine is thus stated in 13 Halsbury's Laws of England, 123 (where the cases are collected):—

> The doctrine of election cannot be applied except where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate the beneficiary who is disappointed by the election. Therefore, in all cases there must be some free disposable property given by the will to the person whom it is sought to put to his election.

The question in this case is, what free and disposable property does John Douglas Walker take under the will with which he can make compensation. He does take $12,600, but I don't think that the income from the trust property vests in him so that it can be used to make compensation. The income is simply given to the trustee with the direction to pay to Edith Raynes and Harrison Allan Raynes so much as may be necessary for the support of John Douglas Walker. The trustee has a right, and in my opinion, is obliged to pay so much of the income from his real estate to Edith Raynes and Harrison Allan Raynes as may be necessary for the support and maintenance of John Douglas Walker, and no more. The words in the bequest are:

> to pay to the said Edith Raynes and her son Harrison Allan Raynes, or the survivor of them, to be by them expended in the support and maintenance of my son John Douglas Walker such sums from time to time as may be necessary therefor, and to provide my said son with all the necessaries and comforts of life so long as he shall live, and upon his death to provide a decent Christian burial for him.

Under that the trustee would, I apprehend, be obliged to pay to Edith Raynes and Harrison Allan Raynes, so much as is necessary for the support and maintenance of John Douglas

Walker. Any portion of the income that remained unexpended for his support and maintenance would become a part of the testator's residuary estate, and pass to the residuary legatee under the will. It appears in the case that John Douglas Walker had other properties outside of the mortgage, but I don't think it would be open to the trustee to say that he should be supported from the proceeds of his own property, that property could not be laid hold of to make compensation to the defendant, the trustees of St. Andrew's Church, if John Douglas Walker elected against the will. The case would seem plainer if no bequest had been made to John Douglas Walker, that is, if the bequest of $12,600 had not been made, but only the provision for the payment of this income towards his support and maintenance. I do not think he could then have been put to his election, because the will itself shews that the testator simply intended that the trustee should use this income, or so much of it as was necessary, to support and maintain John Douglas Walker. It gives John Douglas Walker no vested interest in the income, which is not disposable and cannot be used for any other purpose. In *Re Sanderson's Trust* (1857), 3 K. & J., 497, the trust was as follows:

> The devisee by his will devised and bequeathed all his real and personal estates whatsoever to trustees, upon trust (after payment of his debts, testamentary and funeral expenses) yearly, and every year during the life of his brother John Sanderson, since deceased, to pay and apply the whole or any part of the rents, issues and profits of his real and personal estate and effects for and towards his maintenance, attendance and comfort, and give him the use of his household goods and furniture, and after his decease to sell and dispose of his real and personal estate and effects.

The brother was an imbecile, not competent to manage his own affairs. After the death of his brother, John Sanderson, a question arose as to whether this income vested in John Sanderson or not, and the Court held that it did not, and Wood, V.C., in giving the judgment, says in effect that the trustees would be bound to use the income, or so much of it as was necessary for the support of John Sanderson, but he says, at p. 507:—

> At the same time I do not think it confers on him an absolute right to have the whole income applied except in the event of a case being made that the whole was wanted for the specific purposes directed by the will. It is not the whole income that is given, it is "the whole or any part," and the Court would read that in the same way as "the whole, or a component part."

Re Vardon's Trusts (1885), 31 Ch. D. 275, is a case in which the doctrine of election is discussed, and in that case it was held

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that the party was not put to an election. At p. 279, Fry, L.J., says as follows:—

> For example, if the settlement in question had contained an express declaration that in no case should the doctrine of election be applied to its provisions, there seems to be no reason why such a declaration should not have full effect given to it. The late Mr. Swanston appears to us to have correctly enunciated the law on this point when he said, "The rule of not claiming by one part of an instrument in contradiction to another has exceptions, and the ground of the exception seems to be a particular intention, denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election."

In the present case we have the testator giving absolutely to John Douglas Walker the $12,600. We have him in addition simply making provision for his support and maintenance, giving him no money, not forcing the trustee to pay to Edith Raynes and Harrison Allan Raynes the whole of the income from the real estate devised to him, but only to pay so much as might be necessary for his support and maintenance. It shews a clear intention of the testator to make a provision for his son's support and maintenance. The income was to be used for that and nothing else. The amount required might vary from year to year, but whatever the amount was, the trustee was simply to pay it to Edith Raynes and Harrison Allan Raynes, to be used for the support and maintenance of John Douglas Walker. In my opinion, as I have said, if there had been no specific bequest of the $12,600, but simply the provision that is made in the will for the support and maintenance, John Douglas Walker could not be put to an election, because he received nothing under the will with which he could make compensation: see *Re Lord Chesham* (1886), 31 Ch. D., 466. The fact that he has received $12,600 under the will does not change the nature of the direction for payment of the income from the real estate. The $12,600 can be used for compensation, but the income cannot be diverted for that purpose. Therefore, while I think that John Douglas Walker was put to his election, I think, with great respect to the Judge, that he has erred in holding that the whole of the income vested in him and could be used to make compensation, and in directing the committee of his estate to elect under the will. The election should be what is in the best interests of John Douglas Walker. The mortgage for $30,000 was undoubtedly his. All that he really gets under the will is $12,600. Therefore, it is most in his interest to elect against the will, to keep the mortgage and make

compensation so far as he receives benefits under the will, which, as I have said, is $12,600. I am aware that the word benefits is used in a great many cases involving the doctrine of election, but I think when the word benefits is used in those cases it means benefits that are disposable, that can be laid hold of to make compensation in case a party elects against the will. It may be said, it is true, that by the bequest of the real estate to the trustee with direction to use the income from it, or so much of it as may be necessary for the support and maintenance of John Douglas Walker, he, John Douglas Walker, does get a benefit, but it is not a benefit that can be laid hold of and disposed of to make compensation.

In my opinion the order of the Judge should be varied. The committee should be ordered to take against the will. The trustee or executor should be ordered to pay to the trustees of St. Andrew's Church the sum of $12,600 with any accrued interest, devised to John Douglas Walker.

As to the costs: as the bill appears to have been filed to get a declaration of the rights of the plaintiff and the defendants, the trustees of St. Andrew's Church, under the will, and as in my opinion neither of them has fully succeeded, each should bear his own costs. The costs of the defendant, Robert S. Rosborough, trustee, should be paid by the plaintiffs. There should be no costs of this appeal.

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WHITE, J.:—It is contended that John Douglas Walker cannot be required to elect in respect to the benefit to which he is, or may become, entitled under the clause in the will which makes provisions for his maintenance, and which for convenience I will refer to as the maintenance clause. This contention is put forward upon grounds which may be summarized as follows. 1. It is claimed that the will shews that the testator, by the clause in question, intended that his son should be entitled to the benefits thereby conferred, regardless of any question of election. 2. That the son takes under the maintenance clause no "free disposable property," and no benefit which he can alienate. Consequently, if he were required to elect he would be unable to make compensation, and there can be no election where there is no fund from which to compensate.

I quite agree that if by the terms of the will it was clearly apparent that the testator intended his son should receive the

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benefits provided by the maintenance clause, even although his son should refuse to renounce his rights to the St. Andrew's Church mortgage, and should thus defeat the testator's intention as to the disposition of that mortgage, the son could not in that case be required to elect in respect of the benefit of maintenance so conferred. That, I think, is beyond dispute, because in such case the son is taking the benefit of the maintenance clause, while at the same time refusing to renounce his right to the mortgage, could not properly be said to defeat the intention of the testator in any particular, since what he would do thus would be done entirely in accord with such intention.

But the intention of the testator that the son shall not be required to elect as between accepting the benefit of maintenance and renouncing his title to the mortgage, must not rest on mere presumption or inference, but must appear in the will clearly and beyond question. What is termed by Fry, L.J., in *Re Vardon's Trusts* (1885), 31 Ch. D. 275, the "presumed and general intention," and which rests on the established doctrine of election, cannot be repelled by another presumption or inference, which, however strong, falls short of establishing beyond question the real intention of the testator.

It is claimed, however, that in the present case the testator has shewn clearly his intention that his son should not be called upon to elect in respect of the benefits of the maintenance clause, because by that clause the testator provides that no part of the moneys provided for the son's maintenance are to be paid to the son himself, but that so much thereof as shall be necessary, from time to time, for his support and maintenance, and to supply him with the comforts of life, shall be paid by the trustees to Mrs. Raynes and her son, or to the survivor of them, to be applied to that purpose.

It is argued that in view of the fact that the testator's son was of weak or unsound mind, this mode, in which the testator has provided for his son's maintenance, shews clearly that the testator's intention was that the son was to have in any event the benefits thus provided, and regardless of whether or not he should allow the mortgage to go as the testator devised it, that is to say, to the St. Andrew's Church. But is such an intention thus made evident beyond question? Undoubtedly the testator intended,

since he has expressly so provided, that any benefits to which the son should be or become ultimately entitled, under the clause in question, should be applied in the mode specified in the will, but where is the conclusive evidence that his son should be entitled to these benefits absolutely and at all events and without first making his election?

If, as is quite possible, the testator, in making his will, proceeded in the knowledge that his son owned the mortgage which he devised to St. Andrew's Church, and fully intended that his son should only be entitled to take the maintenance provided in lieu of, and as compensation for, such mortgage, would it not have been most natural that in seeking to give effect to that intention, he should, having regard to his son's infirmity, have framed the provision for the son's maintenance in the very terms which he has used? In my mind that seems at least quite possible.

It is further urged that by providing for his son's maintenance in such a way that the son cannot assign or convey to any one the benefits he takes, he has made clear his intention that the son shall not be called upon to elect, and the case of *Re Vardon's Trusts* (1885), 31 Ch. D. 275, is relied upon. The facts in that case were these: In the year 1860 a marriage was in contemplation between Mr. Walker and Miss Vardon. Thereupon a settlement was executed by which Mr. Walker, the intended husband, settled certain property upon trust for himself for life, then for his intended wife for life, and then for the children of the marriage; and by the same settlement, Mr. Vardon, father of the intended wife, settled other property upon the same trusts, except that as to the £5,000 part thereof, the intended wife took the first life interest therein for her separate use, with a restraint on anticipation which provided that the income of the fund in question should be paid to Mrs. Walker for her sole separate use, that her receipt alone should be a sufficient discharge for the same, and that she should not have power to dispose or deprive herself of the benefit thereof in the way of anticipation.

The settlement contained a covenant by each of them, the intended husband and wife, to settle after-acquired property of the wife upon the trusts thereinbefore declared.

But that case is, I think, distinguishable from the one before

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us in important particulars. In the first place, that was a case of a marriage settlement, and therefore, if not a contract in the strict sense, partook more of the nature of a contract than of a will. Miss Vardon received the life interest in the £5,000 there in question forthwith upon the execution of the settlement and by virtue thereof. There could, at that time, be no question of election by Miss Vardon: but as she was then an infant, and so not bound by her covenant to bring under the settlement after-required property, all parties must be taken to have had in view the possibility that Miss Vardon, on coming of age, might disavow her covenant, or might refuse to carry it out in the event of her acquiring other property to which the covenant, if enforceable, would attach. Having that possibility in view, the donor of the life interest in question, Miss Vardon's father, in making his gift, expressly provided that his daughter should not have power to dispose or deprive herself of the benefits thereof, and it was accordingly held that she could not, by election, "do the very thing which the settlement declared she should not do."

Settlements upon married women without power of anticipation came into existence and grew up under the fostering care of equity, and that Court has always shewn them marked favour; yet, even in the case of settlements to the separate use of married women, any intention to impose restraint upon anticipation must be distinctly expressed or it will fail in its purpose. In Sugden on Powers, 8th ed., pp. 173-176, the author of that work reviews the authorities upon this point, and in concluding a reference to *Acton* v. *White* (1823), 1 Sim. & St. 429, says: "It may now be considered that express words of restriction are necessary to prevent the right of alienation." In *Acton* v. *White*, Sir John Leech, V.C., in giving judgment, says:—

> It is now too late to contend that a lady is restrained from the power of alienating her life interest, because it is given to her sole and separate use, and is to be paid into her own proper hands, and upon her receipt alone. The contrary is settled by repeated authorities.

In the case before us the testator has not expressly declared any intention that his son should be without power to deprive himself of the benefits conferred by the will, by either election, release, or otherwise; nor am I able to find in the will that clear and indisputable evidence of such intention, which is, I think, requisite to take the case out of the ordinary rule and render an election unnecessary.

As in every case where the question of election arises in respect to a bequest under a will, the devisee does not take the benefit devised absolutely and indefeasibly in the first instance, but only acquires such full and indefeasible right after he has exercised his election, therefore in every such case the question of election lies at the very threshold of his right to the devise, and must be disposed of before he can enter into full and assured enjoyment of the proffered benefit. Here, the testator's son, in the exercise of his election, is not bound to alienate, assign or convey back the benefit devised. All he has to do, in order to exercise and give effect to his election, is to abandon the benefits devised to him by the will, or if he wishes to retain these benefits, then to make compensation to the extent of their value.

In *Cooper* v. *Cooper*, L.R. 7 H.L. 53, Lord Hatherley says:—

> If you find him who is the real owner of the property, at the same time taking a benefit under the will which has erroneously endeavoured to dispose of his property, then he must give effect to that intention founded in error, and give it full effect, *by either abandoning all his interest under the will, or making compensation to the extent of the value of the disappointed intention of the testator.* (The italics are of course, mine).

And in *Codrington* v. *Codrington*, L.R. 7 H.L. 854, Lord Chelmsford says:—

> The principle is that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions and renouncing every right inconsistent with it.

I now come to the appellants' contention that John D. Walker cannot be compelled to elect in respect of the benefit he takes under the maintenance clause because he acquires thereunder no free, disposable property. I agree entirely with my brother McKeown in what he has said as to the meaning of these words "free, disposable property" as we find them employed in cases of election. They mean property over which the testator had free disposing power, and that is the sense in which these words are used in *Bristow* v. *Warde*, 2 Ves. Jr. 336, and *Re Fowler's Trust*, 27 Beav. 362, two of the three cases cited by Mr. Taylor upon this point. In the remaining case of the three, *Re Aplin's Trusts* (1865), 13 W.R. 1062, the words are not used.

But in the argument addressed to us, the words "free, disposable property" are used as meaning property which the devisee could sell or assign, and the contention is made that as the benefit which John D. Walker takes is not salable or assignable, compensation cannot be made thereout, and therefore the doctrine

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of election does not apply. The fallacy which I think underlies the appellants' contention on this point is in assuming that compensation must be made *out* of the thing devised, whereas the true view is that all that is necessary to enable the devisee to retain the specific devise is, that he shall make compensation *to the extent of the value* of the benefit which he received. The doctrine of election does not depend upon the salable or assignable character of the thing devised; it has its root in the principle stated by Lord Redesdale in *Birmingham* v. *Kirwan* (1805), 2 Sch. & Lef. 444, where he says:—

> The general rule is that a person cannot accept and reject the same instrument, and this is the foundation of the law of election.

That principle has, time and again, been recognized in the long series of cases dealing with the question of election. Different Judges have stated it in language often varying in form, but always identical in effect. Such being the principle upon which the doctrine of election is founded, it was, for some years after that doctrine was fully established in our law by *Noys* v. *Mordaunt* (1706), 2 Vern. 581, a disputed question whether the person electing against the instrument could be permitted to make compensation, or must forfeit altogether the benefit given to him by the will.

In a note to *Gretton* v. *Haward* (1819), 1 Swans. 409, at p. 433, Mr. Swanston discusses at some length the question as between forfeiture and compensation, and reviews the cases bearing upon the point. The question as he there states it is

> whether such election induces absolute forfeiture, or merely imposes an obligation to indemnify the claimants whom it disappoints. Whether a devisee asserting his right to property of which the will assumes to dispose, must relinquish the whole of the benefits designed for him, or so much only as is requisite to compensate, by an equivalent, the provision which he frustrates.

Referring to a number of cases relied upon as authority for the doctrine of absolute forfeiture, he points out

> that in none of these cases did the precise question of forfeiture or compensation arise; it does not appear, he says, that the fund relinquished was more than sufficient to compensate the disappointed claimants; there is no suggestion of the existence of a surplus in which event only the effect of compensation would differ from the effect of forfeiture.

He reaches the conclusion, which I fancy few persons to-day will be found to dispute, that under the doctrine of election as it is applied in our Courts, the party electing against the will is not bound to absolute forfeiture, but may make—indeed, where

circumstances admit of it—will be compelled to make compensation; but that having made compensation he will be entitled to retain any surplus remaining of the fund devised to him. He refers to the case of specific gifts, which he recognizes

> may indeed involve some difficulty of appreciation, by the existence of local attachments which admit neither accurate estimation nor adequate compensation; but it is, he says on the principle of appreciation that the Court interferes to transfer to one party that which is expressly and at law effectually given to another; and the difficulty has been repeatedly encountered. He adds: Should any case present impediments of this nature, practically insurmountable, the doctrine of compensation might become, in that instance, inapplicable, but would not, for that reason, cease to be the general rule of the Court.

As a reason why the Courts allow compensation instead of exacting forfeiture, he says:—

> The intention of the testator having become impracticable in the prescribed form, is executed by approximation, or, in the technical phrase, *cy pres*.

Agreeing, as I do, with Mr. Swanston when he thus states the object which the Courts sought to attain in applying the principle of compensation in cases of election, I can see no reason founded on principle, and I know of no binding authority to prevent the application of that principle here where the testator's son, not only takes, under the maintenance clause, a substantial benefit, which, although not salable or assignable, has a definitely ascertainable value in money, but also where the testator has provided a fund from which such compensation when ascertainable may be made.

There is no question but that here the testator had power to give, as he has done, the moneys provided for his son's maintenance. By the terms of the devise the son is entitled to have as much of these funds as may be requisite for the purpose applied towards furnishing him with maintenance and with all the necessaries and comforts of life. No discretion is given to the trustee to apply, from and out of the moneys in his hands, any less than, from time to time, will fully suffice to furnish such necessaries and comforts. Can it be doubted that if the trustee, having sufficient funds in his hands for the purpose, were to refuse to furnish the testator's son with suitable maintenance and comforts, that the Court would, on application of the son, compel him to carry out the provisions of the trust? In such case, the Court would, of course, have to decide what amount was neces-

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sary for the purpose, having regard to all the circumstances at the time; but, when once this amount is determined, the trustee has no power to withhold any part of it. In other words, the son takes to that extent a vested interest in the funds in the hands of the trustee. The case, therefore, is very different from *Leake* v. *Robinson*, 2 Mer. 363, cited by the appellant, where the trustees had a discretionary power to apply such part of the income as they thought fit for the support, maintenance and advancement of the infant legatees. It was because the power there given was thus discretionary, coupled with other provisions in the will which indicated the testator's intention to be, that the devisees should not be entitled to the entire fund till they attained the age of twenty-five years, that the Master of the Rolls held the devise did not vest the property there in question in any of the classes of persons mentioned in the instrument, until they attained this prescribed age. In *Re Sanderson's Trust* (1857), 3 K. & J. 497, there was devise and bequest of real and personal estate to trustees upon trust, yearly and every year during the life of John Sanderson (who was an imbecile and not competent to manage his own affairs) to pay and apply *the whole or any part of* the rents, issues and profits *for and towards his maintenance, attendance and comfort.* Sir W. Page Wood, V.C., held that under these terms of the devise and bequest, John Sanderson did not acquire such a vested interest in the entire property that any portion remaining unexpended for the purposes stated would go to his representatives. At the same time he expressly declared his opinion to be that

> if a bill had been filed on behalf of this gentleman (John Sanderson) during his lifetime, to have a sufficient part of the income drawn out for the purpose of his maintenance, attendance and comfort, it would not have been competent to the trustees to say "we in our judgment and in the exercise of our discretion do not think this is requisite, and the matter is one for our discretion and not for the judgment of the Court." The testator might have given them such a discretion, regard being had to the circumstance that his brother had other property; but that is not the trust he has created. The trust he has created is an absolute trust for his brother to have everything necessary for his maintenance, attendance and comfort.

He further said:—

> I think he had a clear right to have this fund applied for all purposes requisite for his maintenance, attendance and comfort. If, therefore, he had been left to his own funds for his maintenance, attendance and comfort, I apprehend there would have been a clear right on the part of his personal representatives to have that fund recouped.

The Attorney-General, arguing on behalf of St. Andrew's Church, contended with much force, that under the very wide meaning of the words there used, namely: "All the necessaries and comforts of life so long as he shall live," the testator's intention must be taken to have been to vest the entire income of the fund in his son, the purpose of the gift as expressed by the testator being merely the motive he assigns for making the same. But, even if I was disposed to agree with the Attorney-General in that contention, I do not think its validity is essential to sustain the decision of the Judge appealed from. All that is necessary to render election requisite is, I think, that under the maintenance clause John D. Walker shall be entitled absolutely to so much of the fund as is necessary for the purposes stated. That he is so entitled, I have no doubt. The portion of the fund to which he is thus absolutely entitled is, as I have already said, not only a substantial benefit which he takes under the will, but is one the precise amount of which is ascertainable and can be fixed by the Court from time to time when necessary. Therefore, even if we assume that, as is contended, no election is required where no compensation can be decreed, I can see no reason why the Court cannot decree compensation in this case, to the extent of the benefit devised, or why the decree may not be enforced by sequestering the benefit until such decree is complied with.

For these reasons I think that John D. Walker can only take the benefit provided for him under the maintenance clause by making compensation to the extent of the value of such benefit. I think that he must, as was said by Lord Hatherley in the passage already quoted from his judgment in *Cooper* v. *Cooper*, "either abandon all his interest under the will or make compensation."

I have not referred to the fund devised to John D. Walker by codicil to his father's will. Mr. Taylor contended that inasmuch as the testator by that codicil did not devise or attempt to devise any property belonging to his son no election can be required in respect to the fund of $12,600 devised to John D. Walker by the codicil. But I think it clear beyond argument that the fund so devised is subject to election. As evidencing the full testamentary intention of the testator the codicil and will must be taken together. It is only when we read them together that we have the last will of the testator.

It is not disputed that if John D. Walker is bound to elect

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between the mortgage on the one hand and the $12,600 devised to him by the codicil plus the benefit he takes under the maintenance clause, on the other, that the trial Judge has made that election which is the most beneficial to the testator's son, in directing that the election shall be to take under and not against the will.

In my opinion the appeal should be dismissed with costs to the trustees of St. Andrew's Church to be paid by the committee of the estate of John D. Walker out of his estate and without costs to the executor and trustee of James Walker.

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McKEOWN, J.:—The grounds embodied in the appellants' factum are that no election can be required: (1) When the property bequeathed cannot be alienated because of the nature of the property or of the bequest; (2) Where the testator so bequeathed the property that the beneficiary does not take a free, disposable interest.

It is argued that the question of election is one of intention on the testator's part, that no election should be directed where there is anything in the will to indicate a contrary view because it would defeat the testator's purpose, that restraints upon alienation are construed as manifesting an intention against election, and, coming to the case here presented, the argument is that the provisions in connection with this trust fund shew that the testator had no intention to allow its use as compensation for a disappointed legatee, that the uncertainty of the amount to be used in support of John D. Walker would make any computation impossible when considering the respective benefits of an election under or against the will, and that neither the corpus nor the proceeds of the fund are in any sense free, disposable property available as compensation to the trustees of the church if John D. Walker should elect against the will; so that, for these reasons, no election should be directed, with the result that the legatee, John D. Walker, is entitled to said mortgage as owner and assignee thereof as above set out, and he is also entitled to all the benefits reserved to him under his father's will.

I have noted the fact that the income arising from what I may call the trust fund (meaning the net rental and income from the real estate) is not the only benefit accruing to the said John D. Walker under the will. He is also the legatee of $12,600 cash

in the Bank of Nova Scotia concerning which amount no restrictions are imposed, and it is clear that this latter sum cannot be viewed in the same light as the trust fund in this regard. Mr. Taylor, the counsel for the plaintiffs, did not admit that an election is open as between this $12,600 and the $30,000 mortgage. His argument, as I understood it, was that the testator's intention, as manifested by the creation or arrangement of the trust fund, should operate in connection with the whole will; but, of course, the reasons relied upon in his argument concerning the trust fund are not applicable *quoad* the bank deposit. Assuming there must be an election as between the mortgage and the latter sum, it is evident that, looking to the interest of the legatee John D. Walker, if only the $12,600 be within the ambit of the doctrine, a Court would not direct an election in favour of the will as has been done in this case, and therefore in disposing of the matter as here presented, it is incumbent upon this Court to consider whether or not the benefits under the trust fund can be drawn into the transaction. If so, that is to say, if both the $12,600 and the benefits secured to the said John D. Walker under the trust fund are to be weighed against the mortgage, it may well be that the election decreed by the Court below is proper and right as being in the best interests of the said John D. Walker; but, on the other hand, if the choice is to be made by him, or for him, simply between the $12,600 bank deposit receipt and the $30,000 mortgage, it is, in my view, obvious that the election should be against the will.

I shall take occasion to allude to the expression "testator's intention" a little later on, but even if it be right to give full weight to plaintiff's contention that the testator's intent must prevail, it does not seem to me that the method in which the benefits from the trust fund are secured to John D. Walker can be regarded as indicative of the intention suggested by plaintiffs. The fund was arranged as we now find it, as it seems to me, because of the mental disease from which the said John D. Walker was suffering. I have no doubt that this circumstance was the real cause of the intervention of trustees between this fund and the legatee, and being of that opinion I cannot acquiesce in the view that any such intention as suggested by appellants has been manifested by the testator. On the other hand, it seems to me very plain that the testator intended to give this mortgage to

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the church. But, apart from this question of supposed intention, is it true that no election should be decreed when a beneficiary takes an interest in property in the form of the proceeds or a part of the proceeds of a trust fund? I do not think so. As the doctrine of election was first enunciated in the reported decisions, I do not read any such restriction within it. The earliest available deliverances upon the point are those of Lord Talbot in *Streatfield* v. *Streatfield* (1736), Cas. t. Talbot, 176, and of Lord Keeper Cowper in *Noys* v. *Mordaunt* (1706), 2 Vern. 581. The former says:—

> When a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take entirely, but not partially under it; as was done in *Noys'* and *Mordaunt's* case, there being a tacit condition annexed to all devises of this nature that the devisee do not disturb the disposition which the devisor hath made.

This observation was quoted with approval (p. 63) by Lord Chancellor Cairns in the House of Lords in the case of *Cooper* v. *Cooper* (1874), L.R. 7 H.L. 53. His Lordship, after stating the facts involved in that case, goes on to say (p. 62):—

> The testatrix not owning Pain's Hill, and having no disposing power over it, her attempt to dispose of it by her will clearly would raise a case of election against any person who, taking under her will, might be found to have an interest in the Pain's Hill estate.

The facts in this last case were that Mr. Cooper gave a certain estate called Pain's Hill, as well as certain personal property, to trustees upon trust after his widow's death, to sell and hold the proceeds, with his other property, in trust for any one of his children whom his widow should appoint, such appointment to be made by her before his children attained the age of twenty-five years. Before any of the testator's three sons had reached that age, their mother, by deed of appointment, gave certain property, including the proceeds of the Pain's Hill estate, to trustees in trust for all her three sons equally; and later she made a will in which she assumed complete disposing power over the Pain's Hill estate, which she gave to her eldest son absolutely; and by codicils gave benefits to her two other sons, and a special legacy of £1,000 each to the two children of one of the latter. When the will became operative, the son to whom the will purported to devise Pain's Hill filed a bill to compel his surviving brother, and the two children of his deceased brother, to elect between their claims under the deed of appointment and under

the will; and it was held that they must so elect. It was contended on behalf of the two children to whom the special legacies of £1,000 each had been given, that such legacies should not be considered in the election, and, concerning this argument, the Lord Chancellor said (p. 67):—

But, my Lords, it was then said that at all events if they elect they must only elect between that interest which they take under the codicil to the will of the testatrix made after their father had died, and need not take into account in election a legacy of £1,000 which had been given to each by the will of the testatrix made before their father died. My Lords, I can see no grounds for any such distinction. It appears to me that the rule is a rule, as it was expressed by Lord Talbot, calling on them to elect between the whole of their benefits under the two titles under which they claim, and that *no distinction is to be made founded on some supposed intention or absence of intention on the part of the testatrix when she made one or other of her two testamentary dispositions. The rule*, as was said during the argument at the bar, *does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention*, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the Court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will.

And Lord Hatherley, in his address, after summarizing the conditions which give rise to an election, says (p. 71):—

That being the simple case, you then make no inquiry as to what may be supposed to have been the view as to those particular legacies, say the £1,000, or any other specific legacy under the will, but all you may look at is this, does the person taking under the will *any benefit whatsoever, of any kind or shape*, possess the power of giving full effect to the will by releasing the interest he has in another subject-matter, which was not the property of the testator, but which was in terms disposed of by the will, and, finding that he has the power of so doing, you fix on him the obligation and duty of doing it.

I have taken the liberty of italicising some words in the above extracts as I wish to draw more particular attention to them later.

In the following year (1875), the case of *Codrington* v. *Codrington* (1875), L.R., 7 H.L. 854, was also before the House of Lords, involving a similar question. A post-nuptial settlement had been executed between husband and wife of the first part, Smith (the wife's father) of the second part, and certain trustees of the third part. It involved £10,865, three and a quarter per cents, transferred to the trustees as the husband's contribution; nine shares of bank stock, plus some addition, put in by Smith; and also the interest of the wife in a fund of 80,000 rupees held by other trustees for her benefit. These funds were to be held by the trustees as follows: To pay the income from the three and a quarter per cents to the husband for life, then to the wife

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for life; as to the bank stock, to pay the husband one moiety and the wife the other moiety, without the power of anticipation, and the whole to the survivor for life with provision for the benefit of children; and certain trusts were declared with reference to the 80,000 rupees. Now the marriage was dissolved in 1865, and the plaintiff, Lady Codrington, claimed a transfer of the rupees. Lord Selborne, with two other Lord Justices concurring, held that plaintiff was bound to elect whether she would take under the post-nuptial settlement or not, that if she elected to take against it she was entitled to the rupees subject to making good thereout, for the benefit of persons interested under the trusts, the income of the fund remaining subject to these trusts. Under the decree the plaintiff elected to take against the settlement, but brought appeal, claiming to be entitled to the trusts for her benefit under the settlement, as well as to the rupees. It was unanimously decided by the House that plaintiff could not take the benefits of the settlement without the burdens thereof. After discussing the terms of the settlement the Lord Chancellor (Lord Cairns) said (p. 865):—

> Your Lordships understand that the appellant, being put to her election, prefers to take against the settlement, and to claim the sum of sicca rupees. The decree, therefore, after declaring that she is bound to elect, ought to contain some provision indicating that the interests provided for her out of the other items of property ought to go to make good the value of what she takes away from the settlement, and that as soon as this has been done, if it should ever be done, she will then, on the principle of having made compensation, be restored to the income provided for her by the settlement.

It is instructive to note that a part of the order entered on the journals, pursuant to the opinions expressed, was as follows (p. 868):—

> That the income which has been so received by the plaintiff (appellant), or by her order or for her use, and the subsequent income which would have been payable to her if she had not elected to take against the said indenture of settlement (in the pleadings mentioned), and all other, if any, the interest to which, if she had not so elected, she would have been entitled under the same indenture, ought to be applied in making compensation to the persons disappointed by her election, for the benefits of which they respectively have been, or will be, deprived by her election, so far as the same shall extend, and until such compensation shall be fully made.

Here, then, we have two cases in which the doctrine was passed upon by the House of Lords, one arising under a will, the other under a settlement. Both involved a consideration of the rights and duties of a beneficiary under a trust fund to make compensa-

tion. No objection to the enforcement of the doctrine was made or suggested because such beneficiary had the income of such funds. Comparing the facts of the latter of the above cases with those of the one now before us, we have the fund of 80,000 rupees standing on the same footing as the $30,000 mortgage —in neither case could the settler or devisor dispose of it—and corresponding to the $12,600 and the benefits under the trust fund in the present case are the benefits under the settlement of the three and a quarter per cents and the bank stock, "without power of anticipation," and "the whole to the survivor for life, then to the children in such manner as the husband and wife jointly, or the survivor, should appoint." As above noted, Lady Codrington elected against the settlement, and it was held that her beneficial interest in the proceeds of the trust funds was disposable for the purpose of compensation, although she had, at most, only a limited power of appointment over the same.

During the argument our attention was directed to a number of cases in which it was decreed that no election was incumbent upon the legatee. In each of these it will be found, I think, that the *ratio decidendi* is that the legatee was incapable of making compensation, not because his benefits under the will were uncertain in amount, nor because such benefits were in the form of a life interest in a certain fund, or in part thereof; but for the reason that such beneficiary had no power of anticipation, or negotiation, or assignment, of the benefits reserved to him under such will or settlement. In other words, he took nothing he could transfer to a disappointed legatee in lieu of his own property which the testator affected to bequeath to such legatee. In some cases, as *Re Chesham* (1886), 31 Ch. D. 466, the testator himself had no disposing power over the bequeathed property at all, consequently his will passed no title to it. In other instances, such as *Haynes* v. *Foster*, [1901] 1 Ch. 361, there was a distinct restraint upon anticipation so that it was impossible for the one legatee to say to the other: "I am going to hold this, my own property which our common testator has bequeathed to you, but I can and will give you this other property which he has willed to me." It is evident that under such a state of affairs the predicates of the doctrine of election are wanting. In discussing the matter in the case of *Vardon's Trusts* (1885), 31 Ch. D. 275, in which the settlement declared that the income of a certain

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fund should be paid to a Mrs. Walker, for her sole and separate use, and that her receipt alone should be a sufficient discharge for the same and that she should not have power to dispose or deprive herself of the benefit thereof in the way of anticipation, Fry, L.J., said (p. 280):—

> What is the force and effect of this restraint on anticipation? It provides that nothing done, or omitted to be done, by Mrs. Walker at any given time shall deprive her of the right to receive from the trustees the next and every succeeding payment of the income of the fund as it becomes due.

In the present case the trust is, that the trustee under the will do pay to Mrs. Raynes and her son such sums as may be necessary for the support of John D. Walker, and (as may be necessary to provide him with all the necessaries and comforts of life, etc. Nothing is expressed in the will as to who shall be the judge of the standard of comfort in which John D. Walker shall be maintained. In case of a dispute no doubt the Chancery Court would pronounce in that regard, and, on application, would settle the proper amount to be supplied from the fund for the purpose which the testator had in mind, but once that is settled, no matter by whom or how, what obstacle is there in the way of the Court directing that such amount be applied as compensation in case the election had been against the will? Is there anything in the will which indicates a contrary intention? Nothing of that kind suggests itself to me. The trustee has no option in the matter, he must pay to Mrs. Raynes and to her son an amount of money from time to time sufficient to support John D. Walker in the manner indicated by the will. That such yearly sum must be a substantial one is unquestioned. Reference to the case of *Sanderson's Trust* (1857), 3 K. & J., 497, shews points of similarity between the facts of that case and the present one. There a testator gave real and personal estate to trustees upon trust, yearly and every year during the life of John Sanderson (who was an imbecile incompetent to manage his own affairs) to pay and apply the whole or any part of the rents, issues and profits, for and towards his maintenance, attendance and comforts. No case of election was involved, but a question arose as to how much the trustees should be called on to expend for the purpose named, especially in view of the fact that the beneficiary had outside property available for his support. It was held by Wood, V.C., that John Sanderson had a clear right to have this trust fund applied for all purposes connected with his maintenance, attend-

ance and comfort, and that none of his (John Sanderson's) other property should be drawn upon for that purpose, the result of the decision being that the fund in question was burdened with his entire support, and that any expenditures for that purpose out of the legatee's other funds should be recouped from the said trust fund. I do not think that decision has ever been called into question, and therefore it seems to me that in this case the amount available by way of compensation from this fund is easily ascertainable, it is the amount necessary to support John D. Walker in the way the will directs. The fact that he has other sources of income does not ease the burden upon this fund in question.

In Story's Equity Jurisprudence, 2nd Eng. ed., sec. 1096, the author says:—

> Accordingly, the doctrine is now well established, that the doctrine of election is equally applicable to all interests, whether they are immediate or remote, vested or contingent, of value or of no value, and whether these interests are in real or personal estate.

And in the next preceding section, it is stated in connection with some supposed exceptions:—

> The principle of such an exception seems extremely questionable; for (as has been well remarked) the doctrine of election is applied to interests, not in respect to their amount, but to their inconsistency with the testator's intention. And to assume their remoteness, or their value as a criterion of the existence or absence of that intention, would introduce great uncertainty, which, in questions of property, is perhaps the worst defect of the law.

Inasmuch as the expression, "the testator's intention," is used with some frequency in the citations above made, it may perhaps be as well to say that, as used in the above quotation from Mr. Justice Story's work (and in some other extracts) the "testator's intention" there referred to, is, as expressed in the judgment in *Blake* v. *Bunbury* (1792), 1 Ves. Jr., 514, "the intention (of the testator) to dispose of what was not his own." Of course if nothing but the testator's own property is disposed of or sought to be disposed of by his will, no possible question of election can arise; it is only where such intention is apparent that an election must be made. But, on the other hand, where this same expression "testator's intention" is used in Lord Chancellor Cairns' judgment in the case of *Cooper* v. *Cooper*, above quoted from, in which he remarks that

> no distinction is to be made founded on some supposed intention or absence of intention on the part of the testatrix . . . the rule does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, etc.,

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the meaning there to be attached to such expression is, I gather, an intention on the testator's part to put the legatee to an election. The law never looks to see what the testator intended in that particular, and, as far as this case is concerned, I think it is unquestionable that the testator James Walker intended "to dispose of what was not his own" in his attempt to give to the trustees of St. Andrew's Church the mortgage of $30,000, which he had given and assigned to his son John D. Walker in 1904; but as far as an election under the will or against the will is concerned, I feel perfectly safe in saying that he never had any intention whatever with respect to such thing, and I doubt whether he had any knowledge of it at all. In the present case it would be a matter of some calculation to arrive at the precise income John D. Walker would be entitled to year by year, but "*id certum est quod certum reddi potest;*" the amount is ascertainable by evidence, and inasmuch as this whole doctrine of election in our jurisprudence is the offspring of the Court of Equity, and that all parties are subject to its jurisdiction and control, it seems to me that the Court on application, would direct such inquiry, and make such order, as would carry out the purpose of the doctrine. The fund is there for the specific purpose of benefiting John D. Walker. It is available for that purpose and, as I read the will, there is no restraint imposed. Whatever part of the income of this fund is properly applicable for John D. Walker's benefit is free and disposable for that purpose, and, as it seems to me, it is disposable for the purpose of compensation if, in the judgment of the Court, it should be made use of in that way. Whether such income, together with the $12,600, would be sufficient to fully compensate the church or not, is no test as to the application of the principle. A legatee, who elects to hold his own property against a will, is under no obligation, legal or moral, to see that what he gives up is equal in value to what he retains, so I do not think that the question how much John D. Walker, or those acting for him, will receive periodically from the fund is of assistance on this point. Doubtless, it is of high importance in considering how, in the best interests of John D. Walker, the election should be made. The cases of *Re Sanderson's Trust*, (1857), 3 K. & J. 497, and *Re Andrew's Trusts* (1905), 74 L.J., Ch. 462, shew how generously such funds are administered. If the whole proceeds of the fund were necessary for the purpose

of properly supporting John D. Walker, I think, undoubtedly, they could be properly so applied; and that is what I understand the learned Judge of the Court below to mean, when he says that under the will John D. Walker is entitled to the full net income of the properties devised to the executor in trust for his benefit; but, as I view the matter, the decision as to whether the proceeds of the fund can be brought into the election cannot be influenced by consideration of the *quantum* of the proceeds thereof properly to be expended in the maintenance of John D. Walker; the point of the matter is as propounded in the judgment of Lord Hatherley in *Cooper* v. *Cooper* above in part quoted,

> all that you look at is this, does the person, taking under the will any benefit whatsoever of any kind or shape, possess the power of giving full effect to the will by releasing the interest he has in another subject-matter, etc. It is the settled doctrine of the Court of Equity, and agreed on all sides, that no man shall be allowed to disappoint a will, under which he takes a benefit.

See *Blake* v. *Bunbury* (1792), 1 Ves. Jr. 514, at p. 523.

In the case of *Re Queade's Trusts*, 54 L.J., Ch. 786, the question was whether the petitioner's inalienable life interest under a settlement ought to be sequestered by a Court of Equity, and be applied as compensation for her refusal to bring her separate estate into the settlement; and the decree of the Court, Chitty, J., was that the petitioner was bound to make compensation out of such life interest. In his decision the Judge considered himself bound by the judgment of Lord Hatherley in *Willoughby* v. *Middleton*, 31 L.J., Ch. 683. In the following December, a Court of Appeal consisting of Esher, M.R., Bowen, L.J., and Fry, L.J., in the case of *Re Vardon's Trusts*, 55 L.J., Ch. 259, dissented from the decision announced in *Willoughby* v. *Middleton*, on the ground that the inalienability of the fund made compensation impossible. But neither in this last cited case, nor in any other case to which attention has been directed, has it been held that a life interest in the proceeds of a fund cannot be made the subject of an election except when by the will or settlement such proceeds are declared, or found to be, inalienable. But where no such disability exists, the interest, whatever it may be, is free and disposable for the purpose of compensation. Now, in the present case there is, in my opinion, no restraint of this nature imposed upon those who, before the Court, represent John D. Walker; and, as before indicated, I think they are entitled to sufficient from the fund to maintain their charge, apart from any other

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funds he may possess. But, little or much, the proceeds are there available for compensation, *pro tanto*, and that is what leads me to think that an election should be made for John D. Walker between all the benefits reserved to him under the will, on the one hand, and the $30,000 mortgage on the other.

It was strongly argued for the appellant that the legatee against whom an election is urged must take from the testator some free, disposable property which he (the legatee) can set over as compensation. Now, when the term, "free, disposable property," is used in this connection, as in Halsbury's Laws of England, vol. 13, sec. 139, I think both the text and the authorities cited below shew that the writer was referring to property disposable by the testator, and, in that respect, no matter how broadly the proposition might be put, it would, of course, be true; and it would also be true on the authority of *Vardon's Trusts* to say that if the legatee has no disposing power at all over what was given him, no election can be demanded from him. But I know of no authority which says, that if the legatee in question have a life interest only, that such a benefit cannot be regarded as available for compensation. As I read the cases it has only been so held when there are distinct restraints upon alienation or anticipation.

In arriving at a conclusion in this matter I have found it necessary to keep in mind the application and meaning of the oft-used expression" free, disposable property," and, "the testator's intention." I do not think it is right to consider the former as at all times synonymous with the words, "benefit under the will," and I have before stated my idea of the meaning and application of "the testator's intention" in this connection.

The doctrine of election is broadly expressed in the cases of *Cooper* v. *Cooper* and *Codrington* v. *Codrington* in the House of Lords, and there is no doubt that the current of judicial opinion was subsequently divided when the question of restraint upon alienation and anticipation arose; some Courts holding to the application of the doctrine in such instance, others denying it. Chitty, J., discussed such difference of opinion in the case of *Re Queade's Trusts* (1885), 54 L.J., Ch. 786, at page 791, decided in May, 1885, but in December of that year the appeal in the matter of *Vardon's Trusts* (1885), 55 L.J., Ch. 259, settled the law in that regard, at least as far as any subsequent decisions have been

concerned. I have already called attention to the particular restraints connected with the fund in that case. No conditions at all are attached to the trust fund in the case before us, and I think that, the other condition concurring, a legatee is within the scope of the doctrine of election who takes a benefit under a will, whether such benefit be direct to him or to trustees for him, which benefit is not specifically inalienable or under restraint. The fact that the income is not payable to John D. Walker direct, but to others to use for him, does not, in my view, make it any the less a benefit accruing to John D. Walker under the will.

In my opinion this appeal should be dismissed with costs to be paid by the committee of John D. Walker to plaintiff out of his estate. No costs to Robert S. Rosborough, executor of James Walker's estate. *Appeal dismissed.*

REX v. LINDSAY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee, JJ.A., and Riddell and Masten JJ. March 3, 1916.

1. TRIAL (§ I D—22)—COMMENT ON FAILURE OF PRISONER'S WIFE TO TESTIFY —CAN. EVIDENCE ACT, SEC. 4.
A new trial will be ordered in a prosecution for incest if the Crown counsel in his address to the jury commented on the failure of the prisoner's wife to testify, and such comment may have affected the verdict.

2. EVIDENCE (§ II E—151)—OF MARRIAGE—CRIMINAL CHARGE—REPUTATION AND CO-HABITATION.
On the trial of a prisoner for incest with his daughter, formal proof of his marriage to the girl's mother is not essential; the marriage may be proved by evidence of reputation and of co-habitation.

3. INCEST (§ I—5)—EVIDENCE.
Evidence of penetration and emission is not essential to the proof of a charge of incest.

Statement.

CROWN case reserved by MULOCK, C.J. Ex., under sec. 1014 of the Criminal Code, R.S.C. 1906, ch. 146, as follows:—

The prisoner Sandford Lindsay was tried at the assizes holden at the city of Peterborough, commencing on the 15th day of February, 1916, before me, with a jury, on an indictment "that he, the said Sandford Lindsay, at the township of Dummer, in the county of Peterborough, in or about the month of July, 1915, and at divers other times during the year 1915, did cohabit with and did have sexual intercourse with one Lilly May Lindsay, being the daughter of him, the said Sandford Lindsay, and did thereby commit incest."

The prisoner was found guilty of the offence by the jury;

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sentence was not imposed, but postponed until the questions reserved have been decided.

In his address to the jury at the close of the case, counsel for the Crown commented on the fact that the prisoner's wife had failed to testify.

After the prisoner was found guilty, counsel for the defence requested that a question of law, with other questions of law hereinafter referred to, be reserved, as to whether the said comment rendered the trial and the conviction of the prisoner void.

During the trial no evidence was given to prove the marriage of the accused other than hearsay evidence, evidence of reputation and of cohabitation of the accused and his alleged wife.

During the progress of the trial, no evidence was given of penetration or the emission of seed in the alleged act of sexual intercourse between the accused and his alleged daughter, the evidence relating to that question being that of a witness who swore that she saw the accused having sexual intercourse with the said alleged daughter.

After the conviction of the accused, counsel for the defence asked that questions of law be reserved as to the sufficiency of the evidence relating to the marriage and sexual intercourse, upon the ground that the marriage was not strictly proved, and that no evidence of penetration or emission of seed was given, and made a further application that leave be given to the accused to apply to the Court of Appeal for a new trial, on the ground that the verdict was against the weight of evidence.

Pursuant to counsel's application, I have reserved the following questions:—

(1) Did the comment made by the Crown counsel as hereinbefore set out render the trial and conviction of the prisoner void?

(2) Was formal proof of the marriage of the prisoner with the mother of Lilly May Lindsay necessary to sustain the conviction?

(3) Was the evidence relating to the alleged sexual intercourse as hereinbefore set out, without any evidence as to penetration or the emission of seed, sufficient to sustain the conviction?

D. O'Connell, for the prisoner, argued that the comment of the Crown counsel at the trial on the fact that the prisoner's wife had failed to testify was fatal to the conviction. He also urged that no sufficient evidence had been given of the marriage of

the accused: *Rex* v. *Smith* (1908), 13 Can. Crim. Cas. 403. Nor had there been proved penetration or emission of seed.

Edward Bayly, K.C., for the Crown. Even in England, where a statute exists prohibiting such comment as that objected to, it was decided in *Dickman's Case* (1910), 5 Cr. App. R. 135, that such comment did not warrant a new trial being granted. Where no substantial wrong has been done, as here, the conviction should stand: sec. 1019 of the Criminal Code. It is not necessary to give further proof of the marriage or to shew penetration or the emission of seed.

O'Connell, in reply, said that *Dickman's Case* differed from this. There the comment had been an accidental slip, and had not affected the verdict: see p. 147 of the report.

THE COURT, at the conclusion of the argument, answered the first question in the affirmative, and directed a new trial. The second question was answered in the negative, and the third in the affirmative. *New trial ordered.*

REX v. FLEMING and WALLACE.

Police Magistrate's Court, Montreal, St. Cyr, J. August 16, 1916.

PRIZE-FIGHTING (§ I—2)—INTENT—BOXING MATCH.

To constitute a "prize fight" within the prohibition of Cr. Code sec. 105, there must have been the intention of fighting until one of the participants shall have become exhausted by blows or fatigue; it is not a "prize fight" merely because the participants were paid for the exhibition.

[See Annotation on Prize-fighting offences, 21 Can. Cr. Cas. 395, 12 D.L.R. 786.]

Statement.

TRIAL of a charge for engaging in a prize fight. (Cr. Code sec. 105).

C. M. Cotton, for the prosecution.

Peter Bercovitch, K.C., for the defence.

The following authorities were cited: Foster's Crown Cases, 260; Buller's Nisi Prius, 16; *Boulter* v. *Clark*, Dalt, 22; *Reg.* v. *Coney*, 8 Q.B.D. 538; *R.* v. *Bellinghams*, 2 Car. & P. 234, 3 R.R. 665; *R.* v. *Perkins*, 4 C. & P. 537; *R.* v. *Hargrave*, 6 C. & P. 170; *R.* v. *Murphy*, 6 C. & P. 103; *R.* v. *Lewis*, 1 C. & K. 419; *R.* v. *Hunt*, 1 Cox C. C. 177; *Christopherson* v. *Bare*, 11 Q.B. 473; *R.* v. *Young*, 10 Cox C.C. 371; *R.* v. *Taylor*, L.R. 2 C.C.R. 147, 39 J.P. 484; *R.* v. *Orton*, 14 Cox C.C. 226, 43 J.P. 72; *Seaward* v. *Patterson*, [1897] 1 Ch. 545; 61 Justice of the Peace, pp.802-804-818-820; *Steele* v. *Maber*, 6 Can. Cr. Cas. 446; *The Queen* v. *Littlejohn*, 8 Can. Cr. Cas. 212; *R.* v. *Fitzgerald*, 19 Can. Cr. Cas. 145;

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Rex v. *Pelkey*, 21 Can. Cr. Cas. 387, 12 D.L.R. 780; *People* v. *Fitzsomons*, 69 N.Y. Supp. 191.

JUDGE SAINT-CYR.:—On June 21, 1916, an encounter took place at the Gayety Theatre in Montreal, under the auspices of the Canadian Hockey Club, Incorporated, between the accused, two well-known boxers.

They are now accused of having taken part in a prize fight.

According to the Encyclopædia Britannica:—

"Boxing is the art of attack and defence with the fists protected by padded gloves, as distinguished from pugilism, in which the bare fists or some kind of light gloves, affording little moderation to the blows are employed; . . . the sport of modern boxing as distinguished from pugilism may be said to date from 1866, when the public had become disgusted with the brutality and unfair practices of the professional 'bruiser' and the laws against prize fighting began to be more rigidly enforced."

And it was then that the Eighth Marquis of Queensbury drew up his famous rules which since then have governed the encounters of boxers both in England and America.

The same work (The Encyclopædia Britannica) defines pugilism as:—

"The practice or sport of fighting with the fists."

"Prize Fighting," according to our Code, is:—

"An encounter or fight with fists or hands between two persons who have met for such purpose by previous engagement made for or by them."

Must we follow the letter of this definition and decide that each time two individuals agree to meet in a boxing match, such a meeting is a prize fight? Must we, in other terms, decree that boxing is forbidden in English countries? For there could be no boxing match without preliminary arrangements, either tacit or expressed, between the parties.

Must we, on the other hand, decide that what the law forbids is pugilism and not boxing? For the law makes no mention of the gloves which the boxers wear in these encounters. That, to my mind, would be to carry exaggeration to the other extreme.

Our Courts have applied to this law the great principle that permeates all our criminal law:—

"*Actus non facit reum nisi mens sit rea.*" (The act does not constitute a crime, unless there be criminal intent.)

Following this English principle, our Courts have decided that there was a "prize fight" whenever the parties had the intention of fighting until exhausted by blows or by fatigue. If this criminal intent be lacking, there remains but a simple boxing match which is not forbidden by law.

No matter whether the encounter be public or private, the act is not rendered criminal by the number of spectators who witness it, but by the intention of those who commit it. And if certain judgments do make reference to the presence or otherwise of the public, it is because they have in mind an offence other than that now before us.

In order to maintain the public peace, the Code has created a certain offence (unlawful assembly, riot, affray, etc.) and severely punished those that come to disturb the public peace.

But there it is a question of offences absolutely distinct and apart from that of "prize fights" and we have no concern with them.

In Justice of the Peace, volume 61, pp. 818-820, we find the following passage, which well sums up the entire English principle on the matter—

"FIGHT: prize fight, boxing or sparring competition, match or performance, are mere words. Gloves or no gloves; ring or no ring; stakes or no stakes; referee, seconds, bottle holders, or none; the question is what was the real object of the principals. If it was to inflict, if possible, such injuries upon each other as to prevent the other from carrying on the contest, the contest is illegal. We do not mean by that, that every contest in which, upon a knock-out, the knocker-out is to be declared the winner, is necessarily illegal, but it must come perilously near the line."

All of which amounts to saying that it is practically impossible to set a definite line of demarcation, and that each case must be dealt with according to its merits, and according to the facts revealed at the hearing. For the intention of the parties manifests itself either by their statements, or by their conduct.

In these cases, as in others, the judgment must be based upon the proof made, for it is always the innocence, not the guilt of the accused, that is presumed, and it is for the Crown to establish guilt.

Now, what are the facts in this case?

The "Canadian Hockey Club, Incorporated" is authorised

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by its charter to give athletic exhibitions, and to hold tournaments and meetings in all branches of sport and athletic games.

It is George Kendall, better known as "Kennedy," the manager of this club, who arranged the meeting we are discussing.

On May 20, 1916, the following contract was signed:—

"I, Charles Harvey, of New York City, hereby agree to have Eddie Wallace, of Brooklyn, appear in a boxing exhibition to be held in Montreal to be held within thirty (30) days of the date, at a place and with an opponent to be selected by George Kennedy, acting for the Canadian Hockey Club, Incorporated. Terms to be mutually agreed upon between the parties interested."

On May 29, there was an absolutely similar contract made by Robert Powell, on behalf of Frankie Fleming.

Harvey and Powell swear that, at the time of the signing of this agreement, they absolutely did not know who would be their champion's opponent, and that they only learned it through the newspapers, at the time of the announcement of the encounter.

Wallace and Fleming were paid for this exhibition, but the result thereof in no way affected their remuneration. No decision was given. The referee simply watched and enforced observation of the Marquis of Queensbury's rules. The ring was covered with a mattress and under six-ounce gloves the boxers' hands were enveloped in absorbent cotton.

In the course of the evening, Fleming fell for a moment, but immediately got up and went on more vigorously than before. This fall is attributed, by witnesses, to a slip, and not to the force of blows Fleming received from Wallace.

The latter, for his part, had scratches on one cheek. They had been caused by resin spread on the mattress and picked up on his glove by Fleming when he fell.

After ten rounds Fleming and Wallace shook hands in a very friendly manner, and in a way tried to lengthen the encounter.

The papers did, it is true, declare Fleming victor, but the newspapermen heard as witnesses declared that they were called upon by no one to give a decision, and that they merely expressed their sincere opinion of the match.

Now, what was the nature of the match?

All the witnesses who were present are unanimous in declaring that it was a very fine exhibition of boxing.

Amongst others, I would cite the evidence of the witnesses Leithead, Belanger, Ferguson and Lapointe, all witnesses for the prosecution, who have no interest in hiding the nature of the match.

Leithead tells us he was present at a "boxing match, the same as I have seen at the Montreal Amateur Athletic Association. Did they use force? Not any more than I have seen at other boxing matches at the Montreal Amateur Athletic Association."

And finally he declared that the match was not so strenuous as others he had seen in gymnasiums.

Inspector of Police Belanger, who was in charge of public order in the theatre that night, says that the exhibition given there was absolutely similar to those he has seen at the Montreal Amateur Athletic Association, the Arena, or the Shamrock Amateur Athletic Association.

The witness Ferguson, author of the Herald's articles, swears that the encounter was:—

"Not as rough as you generally see in an amateur contest in a gymnasium by a great deal" . . . and that it was "more scientific and more clean."

The witness Lapointe is of the same opinion.

These witnesses are corroborated by Messrs. Kennedy, Harvey and Powell. I only make mere mention of them, as it could be said that they are interested parties.

Morehouse was not present at the time at the theatre, and throws no light on what happened there that evening.

In the case of *Steele* v. *Maber*, 6 Can. Cr. Cas. 446, Maber plainly stated that he had to beat his opponent or lose his forfeit. He was found guilty.

On the other hand, the accused were acquitted in the cases of *The Queen* v. *Littlejohn*, 8 Can. Cr. Cas. 212, of *Wildfong* v. *Long*, 17 Can. Cr. Cas. 251, of *Rex* v. *Fitzgerald*, 19 Can. Cr. Cas. 145 and of *Rex* v. *Pelkey*, 21 Can. Cr. Cas. 387, 12 D.L.R. 780, although all these bouts were much more severe than the one under consideration; especially in the *Pelkey* case, whereo ne man died from blows he received in the ring.

Under these circumstances, I come to the conclusion that the prosecution has failed to establish its proof and I dismiss the case.

Case dismissed.

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PEARSON v. CALDER.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. April 3, 1916.

1. JUDGMENT (§ I G—55)—RECTIFICATION—POWER OF COUNTY COURT—JUDGMENT AGAINST FEME SOLE—COVERTURE.

There is no jurisdiction in a County Court to correct its own judgment, affirmed on appeal, from a personal to a proprietary judgment, where the judgment in the first instance was against the defendant as a *feme sole* and she failed to lead her coverture.

[*Prevost* v. *Bedard*, 24 D.L.R. 862, 51 Can. S.C.R. 269, *Oxley* v. *Link*, [1914] 2 K.B. 734, distinguished. See also 27 D.L.R. 478, 35 O.L.R. 524.]

2. ESTOPPEL (§ III B—50)—TO ASSERT COVERTURE—FAILURE TO PLEAD.

A married woman failing to plead coverture is estopped by the judgment from setting it up afterwards.

Statement.

APPEAL by the defendant from an order of the Senior Judge of the County Court of the County of Wentworth, in an action in that Court, made upon the application of the plaintiff to amend the judgment, directing that the judgment entered against the defendant should be discharged, with leave to the plaintiff to enter judgment in the form appropriate to a case where the defendant is a married woman.

The nature of the action appears from the report of the judgment on appeal from the judgment of the County Court: *Pearson* v. *Calder*, 27 D.L.R. 478, 35 O.L.R. 524.

W. S. MacBrayne, for appellant.

M. Malone, for plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from an order of the Judge of the County Court of the County of Wentworth, dated March 7, 1916.

The respondent brought an action in the County Court of the County of Wentworth against the appellant, who is said to have been at the time of entering into the contract sued on, and when the action was brought, and is now, a married woman.

The action was brought against her as a feme sole, and, after trial, judgment passed against her, and was entered in the usual form, nothing appearing on the face of the proceedings or in the evidence to shew that she was a married woman. An appeal was taken to a Divisional Court, and the judgment was affirmed. After the appeal was disposed of, and the result of it was certified to the Court below, the respondent made an application to the Judge of the County Court to amend the judgment that had been entered, upon the ground that it had been entered against

the appellant "by error and mistake as a personal judgment and not a proprietary judgment."

This relief was refused, but by the order now in appeal it was ordered, at the request of the respondent's counsel, that the judgment which had been entered should be discharged, "with leave to the" respondent "to enter the proper judgment against a married woman."

Why it was thought necessary to do this, I do not understand. The appellant had not pleaded coverture or set up that she was a married woman when the contract sued on was entered into, and I do not see why the respondent is not entitled to enforce his judgment as it has been entered, i.e., as if the appellant was not when the contract was entered into a married woman.

It is clear, I think, that before the passing of the Married Women's Acts, if a married women was sued as a feme sole, and either failed to plead coverture, or, having pleaded it, failed to prove her plea, she was estopped by the judgment from afterwards setting up that she was a married woman: *Beynon* v. *Jones* (1846), 15 M. & W. 566; *Newton* v. *Boodle* (1847), 9 Q.B. 948; *Scott* v. *Morley* (1887), 20 Q.B.D. 120; and there is no reason for thinking that the Married Women's Acts have made a change in the law in that regard.

It is a very different case where, as in *Oxley* v. *Link*, [1914] 2 K.B. 734, the judgment was a default judgment entered as a personal judgment, although the defendant was described in the writ of summons as "a married woman sued in respect of her separate estate."

I am unable to understand upon what principle the learned Judge proceeded in making the order appealed from. The case was not one in which the formal judgment that had been entered was not the judgment which the Court had pronounced, for it was not pretended that the judgment as entered was not in exact accordance with the judgment that had been pronounced at the trial; and I am of opinion that, even if a County Court has the same inherent power as to correcting judgments as is possessed by the Supreme Court, and there had not been an appeal to a Divisional Court, there would have been, for the reason I have mentioned, no jurisdiction to make the order; and it is an *à fortiori* case where the judgment of the County Court has been

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affirmed by an appellate Court, as the judgment against the appellant has been, that there is no such jurisdiction.

The learned Judge seems to have had in mind the order that was made in *Oxley* v. *Link* and to have followed to a certain extent what was done in that case. If that was the case, he has overlooked the fact that in that case the judgment was a default judgment, and not, as in this case, a judgment entered after trial upon issues joined between the parties and affirmed by a Divisional Court, and the further facts that the order was not made upon the plaintiff's application to amend but upon an application by the defendant to set aside the judgment, and that the plaintiff's application was dismissed and the order that was made on the defendant's application was that the judgment should be set aside and that the defendant deliver her defence within fourteen days. Besides all this, it appeared on the face of the proceedings that a wrong judgment had been entered. What has been done by the order in this case is to discharge a final judgment, properly entered after the trial of the action in accordance with the judgment pronounced at the trial and affirmed by a Divisional Court, and to substitute for it a different judgment, and that without any amendment of the pleadings having been made or any opportunity being afforded to the appellant to make her defence, if she has any, to the new case which the respondent is setting up against her.

I have not overlooked what was said by Duff, J., in *Prevost* v. *Bedard*, 24 D.L.R. 862, 51 S.C.R. 629, 631. There is nothing said by him that helps the respondent. His view was that, notwithstanding that a judgment of a Superior Court of Quebec had been affirmed by the Supreme Court of Canada, the Superior Court "must possess authority to correct errors in the record of one of its judgments to whatever extent it might be necessary to do so for the purpose of making the record conform to the judgment which the Court obviously intended to pronounce."

The case with which we are dealing is not such a case; for, as I have said, the judgment which has been entered is the judgment which the Court intended to pronounce, and indeed was the only judgment which upon the pleadings it could pronounce.

I am of opinion that the appeal should be allowed and the order appealed from discharged, with costs here and below.

Appeal allowed.

ALGIERS v. TRACEY.

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Quebec King's Bench, Archibald, A.C.J. March 11, 1916.

HUSBAND AND WIFE (§ IV—160)—NON-SUPPORT—CRIMINAL LIABILITY.

For the purposes of a prosecution under Cr. Code sec. 242A (Code Amendment of 1913), for the summary conviction offence of non-support of a wife living in destitute or necessitous circumstances, it is no answer that the wife is being provided for by her parents, if she has no legal claim against her parents for her support, and if they are little able to provide that support.

Statement.

APPEAL from the order of Mr. Mulvena, District Magistrate, dismissing the complaint of Edith Algiers against her husband Harry Tracey, for non-support brought under Cr. Code sec. 242A (Code Amendment of 1913).

Oscar Boulanger, for complainant.

R. Cloutier, for the accused.

Archibald, A.C.J.

ARCHIBALD, Acting Chief Justice:—This is an appeal from a judgment rendered by the District Magistrate in the District of Bedford dismissing the complaint of *Edith Algiers* v. *Harry Tracey*, her husband, taken under section 242A of the Criminal Code. This complaint was rejected by the Magistrate who heard the same on certain grounds which appear in the reasons of the Judge contained in one of the papers of record signed by him.

In the first place, it appears by these reasons that a judgment had been rendered at the suit of complainant against the respondent, granting her separation from bed and board and condemning the respondent to contribute $15 per month to her support. There are three children, issue of the marriage, who are left in the care of the mother, complainant.

The Judge in his reasons says that he does not consider that the proof which was made concerning these proceedings in the Civil Court was relevant to the issue and that he does not deem it necessary to go into the legal question of how far the rendering of a judgment against the respondent condemning him to pay a pecuniary amount replaces or relieves him of the obligation of providing necessaries. The Judge thereupon proceeds to say that two things must be proved:—

1. The destitute or necessitous circumstances of the wife or children.

2. That the respondent, without lawful excuse, fails to provide the necessaries.

The Judge then proceeds to discuss what necessaries are, saying that the word is relative and applies in a different way

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to people in different classes of life. Then he proceeds to point out that the complainant has been living with her parents, who are fairly well-to-do, since the institution of the action for separation as to bed and board; that she has good lodging and food and comparatively good quarters there; that she is in receipt of $10 per month from Joshua Tracey, her father-in-law, under judgment of the Superior Court, which is practically an indirect contribution from her husband, which ought to be, in her circumstances, sufficient for her clothing; that the wife must prove she is in need of food and lodging and clothing and that her husband omits to provide them.

Then the Judge takes up the question of what is meant by "without lawful excuse," and points out that the respondent is a farm labourer, who has no farm, and is in poor health suffering from asthma and lives with his father and mother, receiving no pay for such work as he does, but occasionally works for others for a dollar a day. Then he concludes that the complainant has failed to shew that she is in such destitute or necessitous circumstances as the law requires to give right to a criminal action, and that the respondent has shewn that he has a lawful excuse, finally remarking that the Criminal Code is made to punish intentional, culpable negligence, not genuine inability to comply with the law; nor is it made to be used as a lever to enforce collection of judgment in a civil action.

I have come to the conclusion that the Judge in the Court below has not given sufficient importance to the profound difference which exists, as to the nature of the prosecution in question, under section 242A as compared with section 242.

Section 242 had not to do at all with the negligence of the respondent with regard to making proper provision for his wife and family; it had only to do with the evil effects upon the health and life of the wife and family which might be produced by that negligence. But under section 242A negligence alone is made an offence. It is true that the Criminal Law is not to be used, as a general rule, for the enforcing of civil obligations; yet in the present case, it must necessarily have that effect. The section says (Code Amendment, 1913):—

"Every one is guilty of an offence and liable on summary conviction, to a fine of $500, or to one year's imprisonment, or to both, who, as a husband or head of a family, is under a legal

duty to provide necessaries for his wife or any child under 16 years of age . . . and who, if such wife or child is in destitute or necessitous circumstances, without lawful excuse, neglects or refuses to provide such necessaries."

The provision of these necessaries is equally a civil obligation and, in the present instance, has been determined by the judgment in an action of separation condemning the respondent to pay for the support of the wife $15 per month.

The judgment in question was given at the time when there was already a judgment ordering respondent's father to pay $10 a month, which judgment is still in process of execution. But the proof establishes that $10 per month is absolutely insufficient for the needs of the complainant and her three children, and even the judgment under appeal admits that, saying that this sum ought to be sufficient for their clothing; but further states that the complainant, with her children, is living with her own father and mother, who are farmers in reasonable circumstances, and that, therefore, she is not in necessitous circumstances as long as some one is providing for her food and lodging.

There is no doubt that this position that complainant could not be in necessitous circumstances as long as some one is providing for her food and lodging is in accordance with several judgments which have been rendered under the article previous to its amendment, when the gravamen of the offence was that it endangered or injured the health of the complainant. But, as I have said, that is not now the gravamen of the offence. On the contrary, the offence is complete if the respondent neglect his legal obligation to provide necessaries for his wife and if she needs such necessaries to be provided. Now the judgment in the separation action determined that question. I do not by any means say that that judgment is decisive of the matter, but it is a decisive determination that, at the date of the judgment, the present plaintiff needed from her husband $15 per month. I think the proof shews that that need still exists. To be in necessitous circumstances simply means to be in need. It is true that probably, in the event of the complainant's father and mother being either unwilling or unable to further give the complainant her food and lodging, some charitable society would do the same thing rather than see her starve in their midst. But if complainant has no legal claim upon her father and mother for the support

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which she is now receiving from them, and if, as is proved, they are little able to provide that support, it cannot be said that she is not in necessitous circumstances because she has been receiving from them her daily food and lodging. I believe the proof does disclose the fact that the complainant is in necessitous circumstances, and I think the judgment on the action of separation indicates that fact also.

I think, therefore, the judgment appealed from was wrong in saying that the complainant was not in necessitous circumstances because she was receiving from her father and mother her food and lodging.

The next question is: Had the respondent any lawful excuse?

The only excuse which is set up is that he is not in good health and is not able to do continuous work, and it is said that he has a disease called asthma.

In my judgment, the respondent's proof is wholly insufficient upon that point. A doctor who was resident in the place where this appeal was heard and would have been easily accessible as a witness, and who was examined on the trial of this complaint, was not examined in this appeal because his evidence was unsatisfactory to the respondent. The proof of the existence of such a disease as asthma is exceedingly easy if medical witnesses are examined. It is not a disease that can be concealed. The proof also shews that the respondent did work in the months of April and May for six weeks continuously and received the ordinary wages that labourers of his class do receive in that vicinity. It is true that the evidence of the father and of others would seem to indicate that his work with his father has been very intermittent. The father says he is ashamed to say at what hour in the morning he gets up.

Seeing the failure of the respondent to examine any medical witnesses as to this condition and seeing the unsatisfactory character of the evidence as to his inability to work and to earn money, an inability, which if it existed at all, existed equally at the time when the separation was heard and judged—I hold that the respondent has not proved any lawful excuse, and the judgment which has dismissed the complaint will be reversed and the respondent found guilty: but seeing that he is now contributing to the support of his wife to her satisfaction sentence is suspended *sine die*. *Defendant convicted.*

LINSTEAD v. TOWNSHIP OF WHITCHURCH.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. April 3, 1916.

HIGHWAYS (§ IV A 1—120)—DEFECTIVE BRIDGE—INJURY TO PERSON CROSSING IN NON-COMPLIANCE WITH TRACTION ENGINES ACT—LIABILITY OF MUNICIPALITY.

ED. NOTE.—In this appeal Meredith, C.J.O., and Hodgins, J.A., held that the driver of a traction engine weighing less than eight tons was not disentitled by reason of his failure to lay down planks before crossing the bridge with the engine (R.S.O. 1914, ch. 212 sec. 5, sub-sec. 4), to recover damages for injury, as the object of that section was not to strengthen the bridge, but to protect its flooring, and if such protection were not afforded, and the flooring were damaged, the owner would be liable. Garrow and Maclaren, JJ.A., were of opinion that the question had been settled to the contrary by the *Goodison Thresher Co. v. Township of McNab* case (19 O.L.R. 188, 44 Can. S.C.R. 187), which the Court was bound to follow, but that the injured person in this action, being merely a passenger, though actually driving the engine at the time of the accident, was not identified with the owner of the engine, and was not disqualified from recovering damages. Magee, J.A., "agreed in the result," without giving his reasons. Therefore it cannot be said that the judgment has established positively any point in law capable of being head-noted. The point at issue is more at sea than before the decision.

[*Linstead v. Whitchurch*, 27 D.L.R. 770, 35 O.L.R. 1, affirmed.]

Statement.

APPEAL by the defendants from the judgment of MASTEN, J., 27 D.L.R. 770, 35 O.L.R. 1. Affirmed.

James McCullough, for appellants.

T. Herbert Lennox, K.C., and *C. W. Plaxton*, for plaintiff, respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment dated the 25th November, 1915, which was directed to be entered by Masten, J., after the trial of the action before him, sitting without a jury, at Toronto, on the 2nd, 3rd, 4th, and 5th days of that month.

The respondent is the widow of the late Walter Linstead, deceased, and brings this action under the Fatal Accidents Act to recover damages for the loss she has sustained by the death of her husband, which she alleges was occasioned owing to the default of the appellants in performing their statutory duty of keeping in repair a bridge under the jurisdiction of their council.

The deceased met with his death owing to the collapse of the bridge while he was driving over it on a traction engine less than ten tons in weight, used for threshing purposes, belonging to a man named Pipher. The deceased was not the driver of the engine, but was riding on it, and was permitted by the regular driver, who was also upon it, to drive it.

The condition of the bridge and the circumstances in which

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the accident happened are fully described in the reasons for judgment of the learned trial Judge, and it is therefore unnecessary to restate them.

The appellants, besides denying the breach of duty alleged, contend that the respondent is not entitled to recover because, before crossing the bridge, planks of sufficient width and thickness to fully protect the flooring or surface of the bridge from any injury that might otherwise result to it from the contact of the wheels of the engine were not laid on the bridge, the contention being that the effect of sub-sec. 4 of sec. 5 of the Traction Engines Act (R.S.O. 1914, ch. 212) is to make the doing of this a condition precedent to the exercise of the right to cross; and that, as the direction of the statute was not complied with, the deceased was not lawfully on the bridge, and no duty towards him in respect of it rested upon the appellants.

Upon the argument before us it was contended by counsel for the appellants that in *Goodison Thresher Co.* v. *Township of McNab*, 19 O.L.R. 188, 44 S.C.R. 187, the effect of the enactment then in force, R.S.O. 1897, ch. 242, sec. 10, as amended by 3 Edw. VII. ch. 7, sec. 43, and 4 Edw. VII. ch. 10, sec. 60, was determined to be that for which they contend; that the subsequent amendments have changed the law only so far as to bring within the exception, as to the duty to strengthen bridges and culverts, engines of less than ten tons in weight used for threshing purposes and for machinery for the construction of roadways (eight tons having been the maximum weight under the former enactments); and that the decision in the *Goodison* case is binding upon us.

The trial of the action in that case took place before Anglin, J., and his reasons for judgment are reported in 19 O.L.R., commencing at p. 189. His conclusions were:—

(1) That the use of the highways and bridges by traction engines of the character of that which was being driven by the plaintiff was a lawful user, and that the statutory duty of keeping in repair their highways and bridges which rested on the defendants made it incumbent upon them to keep their highways and bridges in such a condition and state of repair as that they should be reasonably sufficient and safe for that kind of vehicle and traffic.

(2) That the duty imposed by sec. 10 (3) (now sub-sec. 4 of sec. 5) was not an absolute duty, and did not require that planks

should be laid down except where it was necessary to lay them for the protection of the surface or flooring from injury that might otherwise result to it from contact with the wheels of the traction engine.

(3) That, inasmuch as the collapse of the bridge was due, as he found, to the insufficiency of the beams and stringers to sustain the weight of the engine, and it was not necessary, as the result proved, to lay down planks for the purpose mentioned in sec. 10 (3), the defendants were liable in damages to the plaintiff for the injury he had sustained by reason of the defendants' failure to discharge their statutory duty.

He also held that the words "flooring or surface," as used in the sub-section, were interchangeable terms and did not embrace the beams and stringers which supported the planking of the bridge.

On appeal to a Divisional Court, this judgment was affirmed. The reasons for the judgment of the Court are not reported, but I have the authority of one of its members for saying that the Court agreed with the view of Anglin, J., as to the nature and extent of the duty imposed by sec. 10 (3).

The Court of Appeal reversed the judgment, my brothers Garrow and Maclaren, JJ.A., and Osler, J.A., being of opinion that compliance with the conditions mentioned in sec. 10(3) was in the nature of a condition precedent to the exercise of the right to cross the bridge; but the Chief Justice of Ontario (Moss) and Meredith, J.A., being of opinion that the view of the trial Judge as to the nature and extent of the obligation was right, dissented.

On appeal to the Supreme Court of Canada, the decision of the Court of Appeal was affirmed, the Chief Justice (Fitzpatrick) and Girouard, J., dissenting.

Davies and Idington, JJ., adopted the view of the majority of the Judges of the Court of Appeal, the latter agreeing fully with the reasoning of Garrow, J.A., and the former dissenting from the proposition that "the object of the proviso" (that is, the proviso in sec. 10(3)) "was simply and only the protection of the surface of the bridge from being injured" (p. 191).

Duff, J., was of opinion that the action should be dismissed "because . . . the findings of the learned trial Judge shew that *mishap* was caused by the failure of the plaintiffs' servants

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to perform the conditions under which alone they were entitled to take the engine upon the bridge" (p. 194). He did not agree with the view that the purpose of the proviso was only to protect the surface of the floor from defacement, and was of opinion (p. 195) that "the meaning of the word 'flooring' as applied to a bridge . . . includes such longitudinal joists as that which gave way in the accident in question here;" but it is, I think, not unreasonable to conclude that, if he had agreed with the view of the trial Judge, the Divisional Court, and the dissenting Judges of the Court of Appeal, as to the purpose of the proviso, he would have held that the plaintiff was entitled to recover.

Viewed in the most favourable light for the now appellants, the result of this conflict of judicial opinion is that (1) five Judges, Osler, Garrow, and Maclaren, JJ.A. and Davies and Idington, JJ., were of opinion that the duty imposed by the proviso was absolute, and that there was no right to enter upon the bridge unless or until the planks had been laid down, and that eight Judges, Anglin, J., the three Judges of the Divisional Court, the Chief Justice of Ontario, Meredith, J.A., the Chief Justice of Canada, and Girouard, J., were of contrary opinion.

(2) Duff, J., was of opinion that the words "flooring or surface" included not only the surface of the flooring but also the boards and the frame supporting them; and Davies, J., was of opinion (pp. 191, 192) that the proviso was "clearly intended to protect the planks of the bridge from being broken through by reason of the great weight . . . which the rear wheels, if they passed directly over the planks, would necessarily bring to bear on them . . ."

But eight of the Judges were of a contrary opinion, an opinion which was, I think, shared by the Judges of the Court of Appeal who agreed that the appeal should be allowed. As I understand their reasoning, their view was that it was immaterial for what purpose the planks were required to be laid down, that the duty of laying down the planks was imperative, and that a person who drove his traction engine upon a bridge without having performed that duty did so unlawfully, and, if he or his engine were injured or damaged by the breaking down of the bridge, the corporation was under no liability to indemnify him for the loss he had sustained.

In view of this conflict of judicial opinion, we may properly, I think, deal with the question presented for decision on this appeal as *res integra*, and I proceed so to deal with it.

In my view, the scope and meaning of the Act are reasonably plain, and are that:—

1. Traction engines weighing over twenty tons may not be used upon any highway.

2. Traction engines of not more than twenty tons' weight may be used upon any highway, subject to the provisions of the Act.

3. The provisions as to which this right is subject are contained in sec. 5.

4. Except in the case of engines used for threshing purposes or for machinery in construction of roadways, before it is lawful for a person proposing to run an engine of less than twenty tons weight over a highway whereon no tolls were levied, to run it over the highway, it is made his duty to strengthen at his own expense all bridges and culverts to be crossed by the engine and (*sic*) to keep the same in repair so long as the highway is so used.

5. In the case of engines of less than eight tons in weight used for threshing purposes or for machinery in construction of roadways this duty is not imposed, but it is made the duty of a person proposing to run such an engine or any other engine of less than twenty tons weight, before crossing a bridge or culvert, to lay down on it planks of such sufficient width and strength as are necessary to fully protect the surface of the bridge or culvert from any injury that might otherwise result to the surface from the contact of the wheels of the engine or machinery.

It is important to observe the difference between the language used as to the duty which is imposed by sub-sec. 1 and that employed as to the duty which is imposed by sub-sec. 3. In the former case it is, "Before it shall be lawful to run . . . it shall be the duty;" and in the latter, "Before crossing any such bridge or culvert it shall be the duty." There must have been some reason for this difference, and it is not reasonable to conclude that where it was intended to make entry on the bridge or culvert unlawful, if the duty imposed had not first been performed, that intention was expressed in the clear language, "before it shall be lawful," and that, while that language is not used, it was not intended to make entry upon the bridge or culvert, without hav-

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ing performed the duty imposed, an unlawful act? There are, in my opinion, cogent reasons why such a difference should have been intended.

The Legislature evidently thought that bridges and culverts should be of sufficient strength to sustain the weight of an eight ton traction engine, of the kind mentioned in sub-sec. 3, passing over them, but that it was otherwise as to traction engines weighing more than eight tons; and, accordingly, in the case of the latter the duty was imposed upon the persons who desired to run such engines to strengthen the bridges and culverts over which they were intended to pass, and it was made unlawful to run these engines upon a highway until the bridges and culverts had been strengthened.

In the case of the excepted traction engines the duty of strengthening the bridges and culverts was not imposed; but, knowing, as the members of the Legislature, or at all events those from the rural districts, knew, that the wheels of traction engines are sometimes provided with projections from the smooth surface, some in the form of corks or grippers and others of spikes, and that unless some provision was made for the protection of the plank floors of bridges and culverts the planking would be torn or otherwise injured by these projections, they therefore provided against that happening by making it the duty of persons desiring to run any traction engine, not merely the excepted ones, over a bridge or culvert, before crossing it to lay down planks to protect the surface of the bridge from such an injury.

As I have said, the duty is imposed in respect of all traction engines, and I am unable to find in the language of the proviso or in the reason of the thing any ground for the contention that the imposition of this duty had anything to do with the strengthening of the bridge or culvert either directly or incidentally. Sub-section 1 dealt with the duty to strengthen, and that duty included the strengthening of every part of the bridge substructure, beams, joists and planking, where additional strength was necessary; and it would be strange indeed if, after having in the plainest language and the most comprehensive terms imposed that duty, it should have been thought necessary in the case of all traction engines to impose the minor duty of adding strength by the planking which is by the proviso required to be laid down, and a duty

which was already imposed by sub-sec. 1 in respect of all traction engines save the excepted ones.

The section, in my opinion, deals with the strengthening of the bridge or culvert and the protection of its flooring or surface as separate and distinct matters, the former by sub-sec. 1 and the latter by sub-sec. 3.

I venture to think that in using the terms "flooring or surface" no member of the Legislature had in view the meaning which an engineer would give to the word "flooring," but used it in what is its ordinary and popular sense, i.e., as meaning the planking or other material of which the surface was formed.

The use of the disjunctive "or" also, I think, supports the view that the two words were intended to be interchangeable terms. Then the injury to be guarded against is injury from the contact of the wheels. Contact carries in it the idea of touching, not of pressure exerted. If the proviso had been intended to mean what the appellants contend and some Judges have held that it means, one would have expected that the words used would have been, not simply "contact of the wheels," but those words and the additional words "and the added weight of the engine" or words of the like import.

There is some ground also for thinking that the only consequence intended to follow upon failure to perform the duty prescribed by sub-sec. 3 was the liability to the corporation for the damage resulting to the flooring or surface from the contact of the wheels; and, at all events, the presence of that provision in sub-sec. 3 and the absence of a similar provision from sub-sec. 1 point to the conclusion that it was thought by the draftsman of the Act that such a provision was not necessary in the latter case; because, if the duty of strengthening the bridges and culverts was not performed, the engine would be unlawfully on the bridge or culvert that was being crossed, and the owner of the engine would be answerable for any damage occasioned by his unlawful act. The provision as to the consequences of default which sub-sec. 3 contains seems to indicate that it was not intended that a person who drove his engine across a bridge or culvert without having first laid down the planking should be deemed to be a trespasser, but that he should be liable to make good the damage done to the "flooring or surface."

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That a person who has laid down planking sufficient to prevent injury to the surface of the bridge or culvert caused by the contact with the wheels has done all that sub-sec. 3 requires him to do, I have no doubt; and to require him to do what the appellants contend it is his duty to do would, in some cases at all events, be productive of more harm than good, because it would add materially to the weight which the bridge or culvert would have to bear.

Upon the whole, my conclusion is, that failure to fulfil the duty which sub-sec. 3 imposed did not prevent the owner of a traction engine weighing less than eight tons, "used for threshing purposes or for machinery in construction of roadways," who suffered damage owing to a bridge over which the engine was being run not being of sufficient strength to bear the weight of it, from recovering for the loss; but, if I am wrong in this, I am of opinion that the duty imposed was not an absolute duty, and that, where it was not, in the circumstances of the particular case, necessary to lay down planks in order to protect the surface of the bridge from injury from contact with the wheels of the engine, there was no duty to lay down planks.

If my view as to the construction to be placed upon the enactment which was under consideration in the *Goodison* case is right, *à fortiori* the same construction should be placed upon the enactment in force when the accident in question occurred, now that the provision as to laying down planks, which was in the former legislation a proviso to the sub-section which provided that subsecs. 1 and 2 should not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight, is no longer, in form at all events, a proviso. Being in the form of a proviso afforded ground for the argument that compliance with the requirement of the sub-section was a condition precedent to the operation of the exemption for which it provides.

In the case at bar, on the findings of fact of the trial Judge, which are fully supported by the evidence, the judgment was, in my opinion, properly entered for the respondent.

It is found "that the bridge was in a condition of disrepair, the stringers having rotted to a considerable extent at both ends, and that the bridge in consequence was inadequate and insufficient

for the carrying of the traffic entitled to pass over it;" and that "the damages to the plaintiff arose in consequence of the disrepair of the bridge; the accident happened by reason of the stringers giving way under the weight of the engine, and this collapse was owing to the rotten condition of the stringers."

In the *Goodison* case there was a finding that the use of the planks . . . when crossing the bridge would have added to the sustaining power of the stringers sufficiently to have enabled them to carry the weight of the engine with safety; but in the case at bar the trial Judge was unable to make such a finding, and the case for the appellants is therefore weaker than was the case of the defendants in the *Goodison* case.

There is no finding one way or the other as to the necessity for laying down the planking in order to protect the flooring or surface of the bridge from injury from the contact of the wheels of the engine; but, upon the evidence, my conclusion is that no such necessity existed. The only projections beyond the smooth surface of the wheels were what are called "grippers," which ran zig-zag around the hind wheels only. These grippers when new projected an inch and a half from the surface of the wheels, but had worn down so that they projected only three-quarters of an inch, and it is manifest that contact of wheels so equipped could have done no injury to the surface of the bridge, covered as it was, according to the evidence and the finding of the trial Judge, with earth to the depth of three or four inches, which doubtless afforded ample protection of the surface from injury from the contact of the wheels of the engine. I have the satisfaction of knowing, from information I have received from the trial Judge, that, if he had been asked to make a finding on this aspect of the case, his conclusion would have been the same as that which I have formed.

For these reasons, I would affirm the judgment and dismiss the appeal with costs.

In parting with the case, I venture to suggest that in the *Goodison* case the enactment under consideration was dealt with as if it had application only to wooden bridges and culverts, but it is common knowledge that wooden bridges and culverts are fast disappearing and being replaced by structures of steel or concrete or of both. The difficulty of giving to what is now sub-sec. 3 of sec. 5 the meaning which some of the Judges who took part in

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the judgment in that case gave to the corresponding provision of the enactment which was the subject of their consideration, is certainly increased, if indeed it does not become insuperable, when the facts I have just mentioned are taken into consideration.

HODGINS, J.A. agreed with MEREDITH, C.J.O.

GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Masten, J., without a jury, in favour of the plaintiff.

The case resembles but is not identical with the much discussed case of *Goodison Thresher Co.* v. *Township of McNab*, 19 O.L.R. 188, affirmed in 44 S.C.R. 187. That case determined that a person under the statutory obligation to lay planks upon a bridge over which he proposed to pass with a traction engine, who had neglected to do so, could not be heard to complain that the municipal corporation had neglected its prior statutory duty properly to maintain the bridge.

The statute as it then was has since been revised and re-enacted and is now the Traction Engines Act, R.S.O. 1914, ch. 212. But the revision has not, in my opinion—agreeing in this respect with Masten, J.—made any substantial change in the law as it stood when the *Goodison* case was determined.

Nor should effect be given to the suggestion that, because there were, as there undoubtedly were, differences of opinion expressed in the various judgments delivered in the *Goodison* case, the matters there determined may still be regarded as open. There is no room for reasonable doubt as to what was there actually determined. And what was so determined is now, in my opinion, the law of this Province, and must remain the law until altered by the Legislature, or by the ultimate court of appeal, the Privy Council.

Masten, J., distinguished this from the *Goodison* case, upon the ground of the absence here of a causal connection between the failure to observe the statutory duty and the injury.

It may also, I think, be further distinguished upon the ground that on the facts no duty was imposed upon the deceased in connection with the laying of the planks; nor is any sufficient ground of identification of the deceased with the owner, Pipher, who was present and in charge, shewn, so as to bring the former within the culpability of the latter.

The language of the statute is (sec. 5, sub-sec. 4): "Before

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crossing any such bridge or culvert the person proposing to run any traction engine shall lay down on such bridge or culvert, planks" etc. The deceased was not a person proposing to run an engine across the bridge or culvert. He was neither the servant nor the agent of the owner, Pipher, who was present and in charge, but a person temporarily upon the engine by the invitation and with the consent of the owner, solely with the view and intention of obtaining a ride towards his home, in which direction the engine was proceeding. His position, therefore, was very much that of an ordinary passenger in a coach, the illustration most frequently used, or of a farmer getting a lift towards home in his neighbour's waggon, as in one of the cases about to be mentioned.

The old doctrine of identification between the driver and the victim as laid down in *Thorogood* v. *Bryan* (1849), 8 C.B. 115, after being frequently questioned, was finally overruled by the House of Lords in *Mills* v. *Armstrong* (1887), 13 App. Cas. 1.

Illustrations of the law upon the subject as applied in our own Courts occur in *Flood* v. *Village of London West* (1896), 23 A.R. 530, where, under peculiar circumstances, identification was held to exist, and *Foley* v. *Township of East Flamborough* (1899), 26 A.R. 43, where the opposite conclusion was reached.

I cannot but regret that this point of view, which seems to me to be one of importance, was not more fully discussed before us. It was, however, mentioned, and not, as far as I can see by my notes, abandoned, and may therefore, I think, be legitimately used at least to support the judgment.

I would dismiss the appeal with costs.

Maclaren, J.A. Magee, J.A.

MACLAREN and MAGEE, JJ.A. agreed in the result.

Appeal dismissed with costs.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., and Scott, Stuart and Beck, JJ. December 15, 1915.

1. COURTS (§ I A—2)—JURISDICTION—INHERENT POWERS—REVIEW OF JUDGMENT IN SAME COURT UNDER GENERAL ORDER—HABEAS CORPUS—ALBERTA CROWN RULE 20.

A Court of superior criminal jurisdiction has inherent power of review over an order in *habeas corpus* proceedings made by a single Judge sitting for the Court and as its delegate; and a general order providing, as does Alberta practice rule No. 20, for such review by way of appeal to the Appellate Division of the same Court either by the accused or the prosecutor in a criminal matter is not *ultra vires*, although statutory authority would be necessary were the appeal to a separate Court.

[*R.* v. *Marceau*, 23 Can. Cr. Cas. 456, 22 D.L.R. 336; *R.* v. *Stubbs*,

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24 Can. Cr. Cas. 303, 25 D.L.R. 424; *Re Sproule*, 12 Can. S.C.R. 140, applied; *Cox* v. *Hakes*, 15 A.C. 506; *United States* v. *Gaynor*, 9 Can. Cr. Cas. 205, [1905] A.C. 128 and *Atty.-General* v. *Fedorenko* (1911) 18 Can. Cr. Cas. 256, considered.]

2. CRIMINAL LAW (§ II A—49)—EXTENDED JURISDICTION OF CITY POLICE MAGISTRATE—OFFENCE COMMITTED OUTSIDE OF CITY LIMITS.

Cr. Code, sec. 577, applies to give jurisdiction to a city police magistrate to try with the consent of the accused, under sec. 777 (2) an offence committed outside of his territorial jurisdiction but within the same province, as to which the accused is found or apprehended within such territorial jurisdiction.

[*Re Seeley*, 14 Can. Cr. Cas. 270, 41 Can. S.C.R. 5, referred to.]

3. HABEAS CORPUS (§ I D—24)—EFFECT OF APPEAL BY CROWN FROM DISCHARGE ORDER—POWER TO ORDER RE-ARREST ON REVERSAL.

Where an order discharging a prisoner on *habeas corpus* has been carried out but the order is reversed on an appeal taken by the Crown, the appellate Court may direct that an order issue for the re-arrest of the accused. (Dictum per BECK, J.)

4. HABEAS CORPUS (§ I D—24)—PRACTICE IN ALBERTA—ALBERTA CROWN RULE 20.

Query whether a decision of the Appellate Division of the Supreme Court of Alberta, in a *habeas corpus* matter, reviewing under Alberta Crown rule 20 the decision of a single judge, may not itself be reviewed by the entire Court. (STUART, J.)

Statement.

APPEAL by the Crown pursuant to leave granted from an order of Hyndman, J., discharging a prisoner on habeas corpus and quashing a conviction.

W. T. Broad, for the Crown, appellant.

J. McKinley Cameron, for defendant, respondent.

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HARVEY, C. J.:—This is an appeal by leave from an order of Mr. Justice Hyndman, quashing a conviction and discharging the accused.

At the opening Mr. Cameron for the accused objects that there is no appeal from an order of discharge of habeas corpus proceedings. Mr. Patterson for the Crown meets this by contending that the objection is not open, since this Court has aleady decided in *Rex.* v. *Marceau* (1915), 23 Can. Cr. Cas. 456, 22 D.L.R. 336, followed in *R.* v. *Stubbs*, 24 Can. Cr. Cas. 303, 9 A.L.R. 26, 25 D.L.R. 424, 8 W.W.R. 902, that an appeal lies under the present rules.

It does not appear from the reasons given in the reports of these cases that the point was decided, but the first case was an appeal from a decision of a single judge on an application for habeas corpus, while the other was an appeal from an order, in an application for a certiorari. I was not a member of the Court that decided the *Marceau* case, but in the *Stubbs* case the objection was taken at the opening that there was no appeal, and the

note I have is that the objection was over-ruled, following *R.* v. *Marceau* (23 Can. Cr. Cas. 456, 22 D.L.R. 336).

It is quite true that the Court should recognize the binding effect of its former decision, and that view was expressed in the very recent case of *Sheppard* v. *Godfrey*, 24 D.L.R. 646, 9 A.L.R. 416, 32 W.L.R. 730, where it was pointed out that counsel's argument being based on a view in conflict with the court's prior decision was beside the point [24 D.L.R. at 651], but the Court is not bound by anything more than the principle decided and in the absence of reasons given it would not appear that anything more was decided by the cases mentioned than that the Court had jurisdiction to hear the applications. The one was an application by a prisoner who had been refused a discharge, and the other was an application by a person whose conviction the Judge below had refused to quash.

The present application is by the Crown to set aside an order of discharge. It is clear, therefore, that the decisions in the earlier cases are not necessarily conclusive of the right now claimed. The Rules relating to the procedure are Rules 19 and 20 of the Crown Practice Rules which are as follows:—

"19. The notice of motion for prohibition certiorari, quo warranto, mandamus, or habeas corpus shall be returnable before a judge of the Supreme Court or the Appellate Division.

"20. When the motion is made to a Judge an appeal shall be from his order to the Appellate Division, but subject to such right of appeal his decision shall be final."

These rules, as far as relating to criminal matters, were passed last year by the Judges of this Court under the authority of section 576 of the Criminal Code, which provides that:—

"Every superior Court of criminal jurisdiction may at any time, with the concurrence of a majority of the Judges thereof present at any meeting held for the purpose, make rules of Court not inconsistent with any statute of Canada, which shall apply to all proceedings relating to any prosecution, proceeding, or action instituted in relation to any matter of a criminal nature, or resulting from or incidental to any such matter, and in particular. . . .

"(*b*) for regulating in criminal matters the pleading, practice and procedure in the Court, including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto, etc."

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Mr. Cameron for the respondent contends that the judges' jurisdiction under the section quoted is limited to matters of procedure and that the right of appeal is not a question of procedure but of substantive law, that no right of appeal formerly existed and that the rule giving the right of appeal is *ultra vires* and that there is no right of appeal in the present circumstances. This raises a number of points which require examination. Whether under the terms of the section the jurisdiction of the judges to make rules is limited to matters of procedure strictly so called is not entirely clear, nor does it appear to be absolutely clear that the giving of a right of appeal may not be considered as coming under the head of procedure.

In *R.* v. *Taylor* (1876), 1 Can. S.C.R. 65, Mr. Justice (afterwards Chief Justice) Strong, at p. 98, says: "The creation of a new right of appeal is a regulation of procedure," and he was referring to an appeal from a provincial court to the Dominion court then just established. It is true that view was not adopted by all the judges but it shows that it is a matter that was not free from doubt.

In *Colonial Sugar Refining Co.* v. *Irving* [1905] A. C. 369, 74 L.J.P.C. 77, 21 L.T.R. 513, the Judicial Committee held that the taking away of a right of appeal to a superior tribunal which then existed was something more than mere procedure. It is of course not clear that the committee would have considered the giving of the right as in exactly the same class as the taking away of the right.

It is to be observed, however, that in both of those cases the question is the right of appeal from an inferior to a superior Court, and they therefore have no necessary application to an appeal within a Court which perhaps might be more correctly described as a review by the Court of a decision of one of its judges, which is the situation presented in the present case.

The case of *Attorney-General* v. *Sillem* (1863), 10 H.L.C. 703, 10 L.T. 434, well illustrates the difference I have indicated and also the difference of opinion in the question of whether the subject of the right of appeal to a superior tribunal is a matter of practice or procedure. Both in the Exchequer Chamber (2 H. & C. 581), and in the House of Lords (10 H.L. 703), the judges were divided on this point, but with a majority in favor of the

negative. On the final appeal the Lord Chancellor (Lord Westbury), at p. 719, says: "The creation of a new right of appeal is plainly an act which requires legislative authority." The court from which the appeal is given, and the court to which the appeal is given, must both be bound and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right. Suppose the Legislature to have given to either tribunal, that is to the Court of first instance and to the Court of Error or Appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the creation of a new right of appeal which is in effect a limitation of the jurisdiction of one court, and the extension of the jurisdiction of another," and Lord Kingsdown, at p. 775, says: "What the Court of Exchequer has attempted by its orders to do is to give to two superior Courts, the Exchequer Chamber and the House of Lords, jurisdiction to hear, and to impose upon them the duty of hearing, an appeal against its decisions, with which, except for those orders, those Courts would have neither the duty nor the right to interfere. Can it possibly be said that this is to regulate the practice of the Court of Exchequer? All the proceeding which leads to the other Courts when those other Courts are open, all the proceeding to error, is a step in the cause, and part of the practice of the Court, but whether the doors of the other Courts are to be open or not, surely is not a point of practice in the inferior Court."

It is apparent that if our Rule authorized an appeal from the Appellate Division of this Court which is the Court sitting *en banc* it would be analogous to the one under discussion in the *Sillem* case. Without special consideration I would not have thought that any reasonable argument could be advanced in support of the validity of such a rule, but in the case just considered a considerable number of the judges seem to have found something to say in support of that view.

The reasoning upon which the majority based their conclusions is entirely inapplicable to a rule providing for an appeal within, or review by, a Court, but on the contrary inferentially support the view that such a rule would be purely a matter of procedure.

A consideration of the practice in habeas corpus in England seems almost to warrant the conclusion that the rule is in effect

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nothing more than a declaration of the then existing rights. It has been said that a person in custody could make application after application to different judges and that each judge should consider the application without reference to the prior decision. I am not satisfied, however, that that practice was not subject to the limitation that the judges should be judges of different Courts, though I am aware that in our own Court successive applications have been made to different judges, but after a consideration of the authorities I have grave doubt as to the correctness of that practice.

It may be observed that an application for habeas corpus in order to discharge a prisoner after conviction does not come within the Habeas Corpus Act, which was passed to ensure parties obtaining bail while awaiting trial, and the rules applicable to the former are to be found in the decided cases.

In *Cox* v. *Hakes* (1890), 15 A.C. 506, 60 L.J.Q.B. 89, 17 Cox C.C. 158, Lord Halsbury, L.C., at p. 514, says: "For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return of that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody If release was refused, a person detained might—see *Ex parte Partington*, 13 M. & W. 679,—make a fresh application to every Judge or every Court in turn, and such Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed. *City of London Case* (1609), 8 Co. Rep. 121*b*."

The question under consideration was whether an appeal from an order of discharge was authorized by the Judicature Act, and although the Court of Appeal held that it was, the House of Lords by a majority held that it was not.

In argument appellant's counsel argued that "Under the old practice the applicant had a right to go to every Court one after the other, no matter how often he was refused." No other Judge stated the rule as broadly as the Lord Chancellor. Lord Watson agreed with Lord Bramwell and Lord Herschell. Lord Bramwell,

after stating that we had got on well enough in the past without appeals, says: "I say without such appeals, for, with all respect, I cannot agree that going first to a Judge of one Court, and then, on being refused by the Judge, going to a Court, and on being refused by one Court going to another, was or is an appeal. The Court applied to after refusal by a Judge or other Court was not exercising an appellate jurisdiction in entertaining the application. It was exercising a primary jurisdiction."

Lord Herschell also, at p. 527: "It was always open to an applicant if defeated in one Court, at once to renew his application to another. No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. A person detained in custody might then proceed from Court to Court until he obtained his liberty, and if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question. There was no power in any court to review or control the proceedings of the tribunal which discharged him."

In *Re Seeley* (1908), 14 Can. Cr. Cas., 270, 41 Can. S.C.R. 5, this is declared by the Supreme Court of Canada to be a proper statement of the law in Canada.

Lord Macnaghten agreed with Lord Herschell, [*Cox* v. *Hakes*, 15 A.C. 506]. Lord Morris and Lord Field, who dissented, do not discuss the former practice. It is apparent that except in the statement of the Lord Chancellor there is no suggestion of a right to go from one Judge to another in the same Court upon an application for habeas corpus, nor is there in the case which Lord Halsbury cites as authority for the proposition he lays down—*Ex parte Partington* (1845), 13 M. & W. 678—in which an application to the Court of Queen's Bench having been refused and after an application to the Lord Chief Baron of the Court of Exchequer in Chambers had also been refused, an application was made to the Court of Exchequer. Parke, B., in delivering the judgment of the Court, after mentioning the applications which had been refused, at p. 682, says: "The defendant, however, has a right to the opinion of every Court as to the propriety of his imprisonment, and therefore we have thought it proper to examine attentively the provisions of the statute, without considering

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ourselves as concluded by these decisions." The Court, however, dismissed the application.

This case is in substance exactly similar to the *Marceau Case*, *supra*, in this court, and would be authority for that decision without any resort to our Crown Office rule. It is apparent, however, that it is no authority for the view that there was a right to apply to a Judge after another Judge of the same Court had refused the application, and Lord Halsbury's statement, therefore, cannot be deemed to have been intended to include that.

In none of the earlier cases do I find any rule laid down which would warrant that practice, and I have found no English case in which such a practice has been followed.

In *R.* v. *Suddis* (1801), 1 East 306 (102 E.R. 119), Lord Kenyon, C.J., at p. 314, said: "I feel no difficulty in delivering the opinion which I entertain because the prisoner will not be concluded by it, but may if he be dissatisfied apply to the other Courts of Westminster Hall."

The jurisdiction of a Judge instead of the Court to hear an application was only a temporary one, while the court was not sitting, except in the case of the Chancery Judges.

In *Crowby's Case* (1818), 2 Swanst. 1 (36 E. R. 514), Lord Eldon, L.C., at p. 18, said: "The Court of King's Bench had always issued the writ in term time, but it appeared (I speak from memory, for I have not been able to find the papers) that there had been a practice for the Judges of that Court to issue the writ in vacation. The Courts of Common Pleas and Exchequer, being confined to civil matters, never issued the writ till empowered by statute. Many of the Judges were of opinion that, at common law, the Judges of the Court of King's Bench had no right to issue the writ in vacation; many thought that they had acquired that right by practice."

In the *Canadian Prisoners' Case* (1839), reported as the case of *Leonard Watson* and others in 9 Ad. & E. 731 (112 E.R. 1389), the Court of King's Bench declared the right of one of its Judges to issue the writ in vacation, after considering Lord Eldon's views. In this case the writ had been issued by direction of one of the Judges returnable before himself, but as the term was so near it was thought advisable to hear the argument in full Court. Lord Denman, C.J., in delivering the judgment of the

Court, at p. 780, says: "Lord Coke indeed and Lord Hale and Lord Chief Baron Comyns as text writers upon this subject appear to confine to Chancery, which is at all times open, the *officina justitiæ*, the power of issuing a habeas corpus in time of vacation. But Tremaine's Pleas of the Crown contain four precedents of writs in the exact form of that now before us, earlier than 31 Car. 2 and as early as 43 Eliz. Wilmot in his answer to the House of Lords refers to others anterior to the Habeas Corpus Act, and observes that the great men who framed it would never have left so obvious a defect without remedy. In 1758 he and the Judges consulted by the House of Lords affirmed this power; and the reforming bill which had been introduced would scarcely have been suffered to fall, had it not been in that respect deemed unnecessary."

In the case just mentioned the application was refused and a new application was later made to the Court of Exchequer, reported as *The case of Parker and others* in 5 M. & W. 31, which was also refused.

In *Ex parte Widermann* (1866), 12 Jur. N. S. 536, an application having been made to the Court of Queen's Bench and refused, a new application was made to the Lord Chancellor, which was also refused.

City of London's Case (1609), 8 Co. Rep. 121 (*b*) (77 E.R. 658), referred to by Lord Halsbury for his dictum that the legality of a discharge could not be brought in question, no writ of error or demurrer being allowed, was a case in which the Court refused to make a discharge, and which therefore as a decision is no authority for the proposition. There appears in the report, however, this dictum, which is in part a decision on an objection raised:— "It was answered and resolved that this is not on a demurrer in law, but a return on writ of privilege, upon which no issue can be taken, or demurrer joined, neither upon our award herein doth any writ of error lie, and therefore the return is no error, but to inform the Court of the truth of the matter, in which such a precise certainty is not required as in pleading."

Assuming that the Court which was dealing with this case was not a Court of last resort and that the part of the dictum which is in question was intended to be a statement that no writ of error lay from its decision, it is a little difficult to see why such a dictum,

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even if it had not been made more than three centuries ago, should be deemed to have much authoritative value.

If our Court should declare that no appeal lay from its decision, I scarcely think that either the Supreme Court of Canada or the Judicial Committee of the Privy Council would consider that the point was thereby settled. The dictum of Lord Halsbury in the *Sellem case*, [*Atty.-Genl.* v. *Sellem*, 10 H. L. 703] is of vastly more weight, in my opinion, than the authority upon which he rests it, though the latter shews just the extent of its application, and that is that the legality, but not necessarily the merits, of an order of discharge made by a Court, but not by a Judge, is not subject to question. Lord Herschell's dictum, for which he gives no authority, but in which he has the agreement of two others of the Lords, is somewhat broader in its terms, but it seems quite clear that he is only referring to an order of discharge made by a "Court" and not one made by a "Judge," and it would, therefore, not apply to the case now under consideration.

It appears clear from the cases and the dicta to which I have referred that when a Judge hears an application for habeas corpus he does so as representing the Court which for some reason cannot be reached, and as was held unanimously by this Court in *Re Yale Hotel License* (1907) 6 W.L.R. 769, when a Judge acts in that capacity his decisions are always subject to review by the Court of which he is the deputy. The principle is expressed in *Re Allen*, 31 U.C.R. 458, at 493, as follows: "The Court will always review the decision of the Judge when he is acting merely as its deputy. . . . Generally speaking, it is meant that the powers of the Judge are to be exercised subject to an appeal to (review by) the Court."

It would appear, therefore, that apart from the rule this Court would have the right to review the decision of one of its Judges on an application for habeas corpus, and in principle it would, of course, be immaterial whether his decision were favourable or unfavourable. It is urged, however, that there can be no appeal from, or review of an order of discharge because the prisoner has been given his liberty and that cannot be undone.

The view expressed by Lord Herschell in *Cox* v. *Hakes*, 15 A.C. 506, *supra*, in which on this point three others concurred, was that a person properly discharged could not be re-arrested, and that consequently there could not be an effective appeal.

This view is controverted by Lord Morris and Lord Field, and Lord Halsbury declined to consider it.

The Judicial Committee of the Privy Council has, however, in at least four cases heard and allowed appeals from orders of discharge on habeas corpus, in *Attorney-General of Hong Kong* v. *Kwok-a-Sing* (1873), L.R. 5 P.C. 179; *The Queen* v. *Mount* (1875), L.R. 6 P.C. 283; *United States* v. *Gaynor*, [1905] A.C. 128 (9 Can. Cr. Cas. 205), and *Atty.-Genl. of Canada* v. *Fedorenko* (1911), 18 Can. Cr. Cas. 256, 27 T.L.R. 541, [1911] A.C. 735. There is, therefore, authority binding on us that this is no ground for refusing to consider an appeal.

In *Dugdale* v. *The Queen* (1853) 2 El. & Bl. 129 (118 E.R. 718), a prisoner who had been improperly discharged was re-arrested, which shows that in some circumstances that may be done, though Lord Herschell states that case is in no way analogous to a discharge in habeas corpus.

I am of opinion, therefore, that this Court has jurisdiction to hear this application, both because of its inherent jurisdiction to review the decision of one of its Judges, the rule providing that the form shall be by way of appeal, and because being a matter entirely within the Court the rule is valid as being a rule of procedure in the Court and nothing more.

The only objection to the conviction and warrant of commitment that was argued before us was one going to the jurisdiction of the Magistrate as Police Magistrate for the City of Calgary. The offence was committed at or near Wetaskiwin, outside of the City of Calgary, and it is contended that the Magistrate's jurisdiction is limited to Calgary and that he has, therefore, no jurisdiction to try offences committed outside. It is also objected that the Magistrate is not a Police Magistrate within the meaning of Sec. 777 (2), so as to give him jurisdiction over the offence, which can be tried summarily only with the consent of the accused.

There appears to have been no affidavit by the prisoner, as the practice seems to require, but no objection is raised to that defect, so I do not deal with it.

As to the second point it is to be observed that both the conviction and warrant bear under the signature of the magistrate the words "Police Magistrate in and for the City of Calgary and Province of Alberta," and in the body of each document he is

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described as "one of his Majesty's Police Magistrates in the Province of Alberta, having jurisdiction in and for the City of Calgary and Province of Alberta." The Order in Council appointing the Magistrate is also in evidence, which shows that he was appointed under the authority of Chap. 13 of 1906 "to be a Police Magistrate for the Province of Alberta, with jurisdiction in and for the City of Calgary." The statute under which the appointment is made provides in sec. 1 that "The Lieutenant-Governor in Council may appoint one or more police magistrates for the Province and may define the territorial limits of their separate and respective jurisdictions. "(2). Every police magistrate appointed under the provisions of this Act shall have and exercise within the limits of his territorial jurisdiction all the powers and authority now or hereafter vested in two Justices of the Peace sitting and acting together under any law in force in Alberta. "(5) Every police magistrate shall *ex officio* be a justice of the peace for the Province."

Having regard to the words of the statute and the words of the Order in Council there is no doubt in my mind that the appointment is of a police magistrate for the City of Calgary, and the description is exact, within the terms of the statute. He is a police magistrate for the Province in the sense that all police magistrates in the Province are, but his jurisdiction as police magistrate is limited to the City of Calgary, though by virtue of sub-sec. 157 he has the jurisdiction of one justice of the peace throughout the Province outside the City.

The case is quite different from that in *R.* v. *Alexander* (1913), 21 Can. Cr. Cas. 473, 13 D.L.R. 385, 6 A.L.R. 227, where there was no limitation of jurisdiction to the city, the jurisdiction within the city being consequent upon his general jurisdiction.

The first objection to the jurisdiction appears to me to be completely answered by sec. 577 of the Code, which provides that "every Court of criminal jurisdiction is competent to try any crime or offence within the jurisdiction of such Court to try wheresoever committed within the Province if the accused is found, or apprehended, or is in custody within the juridsiction of such Court, etc."

The only Courts in this Province to which this section can give jurisdiction are the District Court Judges' Criminal Court and the Magistrates' and Justices' Court, since the Supreme Court's

jurisdiction is, apart from the section, unlimited within the Province. By virtue of this section, when the offence is committed outside the territorial limits of the jurisdiction, the mere fact that the prisoner is in custody within such limits gives jurisdiction. The section appears perfectly plain on this point.

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There are other sections from which the same conclusion may be reached as in *Re Seeley* (1908), 14 Can. Cr. Cas. 270, 41 Can. S.C.R. 5. That case appears to have been in all essentials analogous to the present, but the jurisdiction was upheld by the Supreme Court of Canada by reference to other sections than 577.

It is of interest to note that that case was likewise analogous to this, in that it was an appeal to the Court from a decision of one of its members in a habeas corpus application.

For the reasons stated I am of opinion that the order made was wrong and that the appeal should be allowed and the order reversed.

It is admitted that the accused is now out of the jurisdiction, so that the effect of the order of discharge cannot be undone, but, as already pointed out, that is no reason why the appeal should not be allowed.

Since writing the foregoing my brother Stuart has referred me to *In Re Sproule*, 12 Can. S.C.R. 140, which I agree with him conclusively establishes the right we are exercising in the case.

Scott, J.

SCOTT, J. concurred with HARVEY, C.J.

Stuart, J.

STUART, J.:—I confess without hesitation that in my consideration of this case I have been continually under the influence of what I have always understood to be a principle underlying the law as to the writ of habeas corpus *ad subjiciendum*, viz.: that the law leans towards protecting the liberty of the subject.

I agree with the result at which the Chief Justice has arrived in reference to the distinction to be observed between the creation of a right of appeal from one Court to another Court and the provision for an appeal where there is no passing from one Court to another. And I am quite convinced that if the Crown had a right before the enactment of the rule in question to ask for a rule *nisi*, calling upon the person discharged by a single Judge upon habeas corpus to show cause why the order of discharge should

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not be set aside, then the rule of court should be evoked as nothing more than the provision of a different mode of procedure which the Crown might adopt.

Substantially, as the matter appears to me, the question is this: Did the Court of Queen's Bench in England on July 15, 1870, have power to issue such a rule *nisi* on the application of the Crown and to review the action of a single Judge in discharging a prisoner in vacation who is undergoing a sentence imposed by an inferior court not upon indictment?

I have searched at great length, and, I think, with care, to see if a case could be found in which the Court of King's Bench interfered on the application of the Crown with an order, made upon the return of a writ of habeas corpus before a single Judge, for the discharge of a prisoner. No such precedent is mentioned in Halsbury. There is indeed one case in which I am sure such a precedent would have been cited if it could have been discovered. I refer to the case in *In Re Robert Evan Sproule*, 12 Can. S.C.R. 140. That was a case in which Sproule had been tried for murder in British Columbia by a Judge and a jury at the assizes and had been convicted and sentenced to death. A writ of error was brought to the full Court and the sentence was confirmed. The error alleged was that a change of venue had been ordered illegally. The prisoner then applied to Mr. Justice Henry, one of the Judges of the Supreme Court of Canada, for a writ of habeas corpus under the then section 51 of the Supreme and Exchequer Court Act. Mr. Justice Henry directed the writ to issue. The sheriff to whom it was directed refused to obey the writ on the ground that the sentence and judgment of the Supreme Court of British Columbia was paramount to the writ, and that the expenses of producing the prisoner at Ottawa had not been paid or tendered to him. The prisoner then made on notice an application for an order for the discharge of the prisoner, which order Mr. Justice Henry granted. The Attorney-General of British Columbia then applied to the Supreme Court of Canada to have the writ of habeas corpus and all proceedings thereunder quashed, as having been issued improvidently, and a special session of the Supreme Court was called to hear the application. The late Christopher Robinson, Q.C., appeared with the Attorney-General for British Columbia in support of the motion and the late Dalton McCarthy, Q.C., appeared for the prisoner. The point taken on behalf of

the prisoner which is relevant here was that the Supreme Court had no power to review the decision of Mr. Justice Henry. Mr. McCarthy directly asserted in argument that "no authority can be produced to show that an order to discharge a prisoner on habeas corpus can be reversed." In answer to this contention, so distinguished and able a counsel as Christopher Robinson was unable to cite a case. The American authorities to which he referred I have been unable to consult, but inasmuch as the point was much laboured in the judgments delivered and these were not referred to, I think we may assume that they threw but little if any light upon the subject. The majority of the Court, Sir William Ritchie, C.J., Strong and Taschereau, JJ., held that the Court had power to review the action of Mr. Justice Henry upon the general ground that every superior Court must necessarily have power to regulate and supervise its own process. And yet in no one of their judgments is there a case cited in which the Court of King's Bench ever actually reversed an order for discharge made by one of its Judges in vacation upon habeas corpus. One would have thought that in so extremely an important a case those learned Judges would have been able to cite a precedent if one existed. Sir William Ritchie was content to rest his opinion as to the Court's jurisdiction upon two civil cases, *Wiltham* v. *Lynch*, 1 Ex. 399, and *Robinson* v. *Burbridge*, 9 C.B. 289, 19 L.J.C.P. 242. He does indeed refer to *Re John Crawford*, 12 Q.B. 612. But in that case the interference of the court in term was invoked before the return to the writ, and Patterson, J., who ordered the writ to issue, offered to hear cause shewn against the writ in chambers, which not being done he directed the rule to quash the writ to be applied for; and the Court ordered counsel, Peacock, to be heard in support of the rule as if he were shewing cause against the writ issuing (page 619). From this it is clear that the case was practically treated as a motion to the full Court in the first instance to issue the writ.

There are other cases, too, in which the Court entertained motions, not to reverse the discharge ordered upon a return to the writ in chambers, but to quash the writ. But in *Carus Wilson's Case*, 7 Q.B. 984, 115 E.R. 759, the principle was clearly laid down that the writ will not be quashed on any ground which could be stated in the return. In other words, the writ is only quashed for some irregularity or impropriety in its issue, in this

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particular case an example being the case where the writ was directed to a place where it would not run at all. And this principle is laid down in Halsbury, vol. 10, p. 66, on the authority of that case.

I cannot find any real assistance in the cases in the Privy Council coming from the colonies. The authority of that tribunal rests upon the Royal perogative and its supervision of the decisions of colonial Courts is a very different thing from the authority of the Court of King's Bench to review an order of discharge made by one of its own judges in vacation, as was pointed out very clearly in *Cox* v. *Hakes*, 15 A.C. 506, by Lord Herschell, at page 535.

In *In Re Mackenzie*, 14 N.S.R. 481, the full Court of Nova Scotia refused to interfere with an order of discharge on habeas corpus, although the reasons there given do not appear to be very satisfactory, and in *Wyeth* v. *Richardson*, 10 Grey (76 Mass.) 240, Chief Justice Shaw of Massachusetts said:

"The general principles of law are opposed to the allowance of exceptions in this case. The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty. The allowance of exceptions (which was the Massachusetts form of appeal) will be inconsistent with the object of the writ. The allowance of exceptions must be either that all further proceedings be stayed, which would be wholly consistent with the purpose of the writ, or the exceptions must be held to be frivolous and the judgment rendered *non obstante* for the discharge of the party on which the exceptions would be unavailing."

Now, I am bound to say that I have been profoundly impressed with the fact to which I have referred that no case seems to be discoverable in which the Court of Queen's Bench ever exercised or was indeed asked by the Crown to exercise the power of revising an order for the discharge of a prisoner made by a single Judge in vacation. Mr. Justice Strong in *Re Sproule*, *ubi supra*, 12 Can. S.C.R. 140, at p. 209, says that no doubt cases may be found, but still no cases appear to have been found.

I think that the explanation may perhaps lie in this, that applications to the full Court in the first instance would no doubt cover a great majority of the cases in which the writ was applied for, and that in cases where the application was made to a single

Judge in vacation either the right to a discharge was so clear that the Crown could not contest it or the Judge entertaining a doubt would adjourn the case to be heard in term taking the prisoner's recognizance to appear and releasing him in the meantime, as I find was done in some cases without the propriety of that course being called in question.

But, notwithstanding the great doubt I felt on the matter, it seems to me that we are bound to follow the general principle laid down in the *Sproule* case. [*Re Robert Evan Sproule*, 12 Can. S.C.R. 140]. The majority of the judges there did undoubtedly hold that any superior Court which has and whose individual Judges have authority to order the issue of a writ of habeas corpus had power to review the decision of one of those individual Judges, even where he had ordered the prisoner's discharge. I am bound to say, however, that it seems to me very probable that the Supreme Court of Canada were astounded at the possible results to our Canadian system of administering the criminal law if one of their number could review the decision of the highest court of record in a province upon the question of that Court's jurisdiction while his decision was not itself reviewable by the whole Supreme Court of Canada itself. The case is interesting also as showing that, although the express right of appeal was given by the statute only to the person whose application had been refused, yet the rule *expressio unius est exclusio alterius* did not negative the existence of the right of review.

Yielding therefore to what I consider to be the binding authority of the *Sproule case*, I agree that there is a right of review and the putting of this right by means of the rule of Court into the form of an appeal is only a matter of form and nothing more.

In this particular case the prisoner discharged is, so we were informed, at large in the United States so that the question of the ultimate results of an order reversing the order of discharge does not come before us as a seriously practical question. And I desire to limit my opinion strictly to the point of our power to reverse the order of discharge. As to what might be done against a prisoner released on an order of discharge afterwards reversed, I do not think any opinion ought now to be expressed, and I reserve the consideration of that matter until I am faced with the necessity of deciding it.

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My own view of the course which the Crown ought to adopt in such cases is this, that the single Judge should be requested, if there is any serious ground for maintaining the validity of the imprisonment and unless he is prepared to dismiss the application entirely, to adjourn the matter to be heard by the Appellate Division and to take the prisoner's recognizance to appear before the Appellate Division and release him in the meantime. This course was adopted in several cases which I have read. The right of the Appellate Division to review the decision of a single Judge of the Supreme Court, upon the existence of which right our decision is based, raises in my mind another interesting question. The Supreme Court of Alberta consists of nine judges and these constitute the Court. Would not a decision even of the Appellate Division itself, which also merely acts for the whole Court by delegation, be reviewable by the whole Court of nine Judges on a similar principle. It seems to me it might not unreasonably be argued that this could be done. The possibility of such a thing under the present system where we have only one court is to me very attractive, because it would leave a way open in a critical case of far-reaching importance for a "calling in of the Judges" and getting the opinion of all of them when an appeal to Ottawa or the Judicial Committee might not be available or convenient.

It has also become very clear to me from a somewhat extensive examination of cases in the King's Bench that the full Court, possessing as it does all the jurisdiction enjoyed by the Queen's Bench in England in 1870, is clothed with a reserve power which may in special cases go to unsuspected lengths.

Upon the merits of the appeal, I agree entirely with the opinion of the Chief Justice.

Beck, J.

BECK, J.:—I agree that our Crown Practice Rule No. 20, giving an appeal from the decision of a single Judge in habeas corpus and other cases is not *ultra vires;* and that it authorizes an appeal on the part of the prosecutor or the Crown.

To me the principle is quite clear. It is that a single Judge is the delegate, committee, representative or mouthpiece of the Court and, that being so, his decision is always open to review and revision by the Court. This principle was accepted by this Court in the case of *The Yale Hotel License* (1907), 6 W.L.R. 769.

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The rule in question is merely one of procedure to obtain such a review and revision. Such a power is inherent in this Court, as having all the jurisdiction of the former English Superior Courts of Common Law and Equity. This principle has, of course, no application in the case of an appeal to another Court; a right to an appeal in such a case clearly must be provided for by statute.

I find no difficulty in the fact that the prisoner has been discharged. In civil cases where a judgment has been enforced and is afterwards reversed an order goes for restitution. I take it for granted that no statutory enactment was necessary to enable the Court to exercise the power of ordering restitution; that it was considered a necessary and inherent power of the Court. The Privy Council has exercised the power of setting aside an order for discharge of a prisoner on habeas corpus. I do not think that they did so on the ground that they had greater power in this respect than a superior Court.

I agree that the magistrate in this case had jurisdiction to convict.

I would, therefore, allow the appeal and direct by the order that a judge may issue an order for the re-arrest of the defendant.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. April 3, 1916.

ALIENS (§ III—19)—STAY OF PROCEEDINGS—SUSPICION THAT PROCEEDS OF ACTION INTENDED FOR ALIEN ENEMY.

Mere suspicion that the amount sued for may, if recovered, be paid to an alien enemy does not justify an order staying all proceedings until the termination of the war.

[See annotation, 23 D.L.R. 375.]

Statement.

AN appeal by the plaintiff company from an order of FALCONBRIDGE, C.J.K.B., in Chambers, made on the application of the defendant company, staying all proceedings in this action until the termination of the war.

The action was brought to recover the price of goods sold and delivered by Dickerhoff Raffloer & Company of Canada Limited to the defendant company; the plaintiff company sued as assignees of the Dickerhoff company, a company incorporated under the laws of Ontario and carrying on business and having its head office in Ontario, the plaintiff company being also an Ontario company.

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The defendant company admittedly owed the money sued for.

The order appealed from was made on the ground that the money sued for was, if recovered, to be paid to alien enemies.

I. F. Hellmuth, K.C., and *A. C. McNaughton*, for the appellants.

H. S. White, for the defendants, respondents.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from an order dated the 21st January, 1916, made by the Chief Justice of the King's Bench, on the application of the respondents, by which all proceedings in the action are stayed until the termination of the present war between Great Britain and Germany and Austria.

The action is brought to recover the price of goods sold and delivered by Dickerhoff Raffloer & Company of Canada Limited to the respondents, and the appellants claim to recover as assignees of that company. Dickerhoff Raffloer & Company of Canada Limited was a company incorporated under the laws of Ontario and carrying on business in Ontario, where it had its head office.

It was conceded by Mr. White that, if the action had been brought by that company, the respondents would have had no defence to it, and would not have been entitled to such an order as was made; but he contended that the order appealed from was properly made, on the ground that the money sued for is "intended to be paid to alien enemies."

Assuming for the purposes of the motion that it was the intention of the appellants, if the money sued for were recovered or paid, to pay it to an alien enemy, I am of opinion that the order ought not to have been made, because there was no evidence to warrant the conclusion that the money would be paid, or that the appellants intended to pay it, to an alien enemy.

The evidence establishes that the appellant company was formed for the purpose of acquiring, and that it has acquired, the business and assets of Dickerhoff Raffloer & Company of Canada Limited, and that the charter of that company has been surrendered; that that company was incorporated on the 18th May, 1906, for the purpose of buying, selling, exporting, importing, manufacturing, and dealing with goods, wares, and

merchandise, and to take over and thereafter carry on a similar business theretofore carried on in Toronto by a corporation organised and existing under the laws of the State of New York, with its principal office in New York City, under the name of Dickerhoff Raffloer & Company; that the Ontario company took over the business carried on by the American company and continued to carry it on, "conducting the business in the customary manner, that is, by purchasing goods from manufacturers in its own name and upon its own credit and thereafter selling the goods so purchased from manufacturers," and it also "acted as manufacturer's agent for several important English manufacturers, but for no others, obtaining upon samples orders for such manufacturers' goods and receiving commissions on the sales;" that the goods sold to the respondents had all been purchased by the Ontario company for its own account and were its own property; that the company acted as principal, and not as agent, factor, or commission salesman, and was "not liable for an accounting therefor to any one except its shareholders and creditors;" that the American company acted as banker for the Ontario company, receiving from time to time money from it and from time to time paying out the money for the account of the Ontario company; that the American company kept a separate account of the money so received and disbursed, and that it was the sole and exclusive property of the Ontario company; that at the outbreak of the present war all purchases of German or Austrian goods by the Ontario company, either by itself or by any one on its behalf, ceased, and all remittances to Germany or Austria, directly or indirectly, by the company or by any one on its behalf, were immediately stopped; that the consideration for the transfer of the business and assets of the company to the appellants was paid by allotting to the company all the shares in the appellant company except five, which were sold for cash; that the business so transferred has since been carried on by the appellants. Of the shares allotted to the company, a proportion equivalent to his interest in the Ontario company was apportioned to Will P. White, the president of the appellant company and former managing director of the Ontario company, and the remainding shares were sold to George Carlton Comstock, and the proceeds of the sale were divided among the shareholders of the Ontario company, all of whom

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were American citizens or American corporations; and that the appellants are the owners in their own rights of the claim sued for.

It also appears that the only shareholders in the appellant company are White, Comstock, Watson, of Montreal, who owns one share, and Rendel & Brown, of New York, who each hold one share.

Such being the state of facts, I am unable to understand upon what possible ground an order staying the action could be made.

If it had been shewn that the appellants were merely agents for, and that the money owing by the respondents was really owed to, a German or Austrian person, firm or corporation, it would have been proper to have stayed the action during the war; but that is not shewn; the contrary is proved.

The case of *Continental Tyre and Rubber Co. (Great Britain) Limited* v. *Daimler Co. Limited*, [1915] 1 K.B. 893, establishes that, even if all the shareholders in an English company and some of its directors are German or Austrian subjects, that affords no ground for staying an action brought by the company.

I am clearly of opinion that the learned Chief Justice ought not to have made the order, and that the order must be discharged.

I have had more difficulty in coming to a conclusion as to the costs of the motion and of the appeal.

If it had been that the appellants were merely agents, and that the money owed by the respondents was owed not to them, but to a German or Austrian principal, and that that was known to the respondents, it would have been not only the right but the duty of the respondents to have resisted payment during the war; and I cannot say that, in the circumstances, if, as I think, they believed, or at all events suspected, that the appellants were not principals but agents of Germans or Austrians, they should be mulcted in the costs of the application, though it has been unsuccessful, nor do I think that they should be ordered to pay the costs of the appeal, as they had succeeded in convincing the learned Chief Justice that the circumstances were such as to make it proper to stay the action.

Garrow, J.A. Maclaren, J.A. Magee, J.A.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

Hodgins, J.A.

HODGINS, J.A.:—Appeal from the order of the Chief Justice of the King's Bench staying proceedings during the war, on the ground that payment will be for the benefit of the enemy.

It was argued that the material on which the order was made was insufficient. Possibly that is so; if the matter is treated as arising in an ordinary action under normal conditions. But, in time of war, I believe that, notwithstanding such lack, it is the duty of the King's Courts, when seized of the matter, to satisfy themselves that nothing is permitted or sanctioned that may result in the smallest evasion of the legislation passed for the safety of the realm or of the Proclamations under it.

In *Rex* v. *Kupfer*, [1915] 2 K.B. 321, a case where the prisoner was convicted of making a payment for the benefit of the enemy, he having paid a sum of money (for which he himself as well as enemy subjects were liable to a neutral) to a London bank which had a branch in Holland, with instructions to credit the neutral, thus extinguishing the indebtedness of the enemy subjects to that neutral, Lord Reading, C.J., speaking for the Court, said (p. 340): "We desire to make it quite plain in this Court that the offence of trading with the enemy is a serious offence and should be dealt with seriously by those whose duty it is to try these cases."

The payment sought to be recovered will, it is here alleged, be for the benefit of the enemy; and, if the rule is stringently applied in the case of a criminal offence, it can hardly be suggested that it should not prevail in civil actions.

It is in this spirit that the matter should be looked at, and not as if it were a question of onus or presumption.

The goods in question were buttons supplied on almost every day between the 9th February and the 13th May, 1915, in comparatively small lots and to various departments; the largest item being $911.04 on the 6th May, 1915. The total, with interest, is $7,550.27. About the 6th May, 1915, the question was raised by the respondents, whether the payment to Dickerhoff Raffloer & Company of Canada Limited (referred to hereafter as the Canadian company), from whom the respondents had purchased the goods, would not be a payment to or for the benefit of alien enemies; and on the 6th May the respondents said they would pay if a satisfactory letter was given "to the effect that the money would not go to the benefit of a country at war with Great Britain." The response sent on that day contained the assurance: "We will guarantee that none of the

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Canadian company's money will be sent to Germany or Austria during the war."

This is not what was asked for, and evades the element of indirect benefit. It may or may not have any significance that on the 10th May the appellant company was formed, and a transfer of all the assets of the company offering that guaranty was made to the appellants, who are now seeking to compel payment, the guaranty being thus valueless even if sufficient in form.

Both the appellants and the Dickerhoff company are Canadian corporations, and the evidence is that they have no alien enemy shareholders. Hence, *primâ facie*, the appellants, if the claim has been properly assigned, will be entitled to judgment. But the point raised is much more far-reaching than that, and the difficulty is chiefly caused by the appellants themselves not making it clear what are the financial relations between them and the parties or corporation in New York, whose Canadian business they acquired. It is evident from Mr. White's letter of the 1st May, 1915 (exhibit A), that the Canadian company had an "account in German office," which, I presume, means either their German office or the German office of the New York Dickerhoff company. The letter states that this account was "cancelled" as soon as war was declared. Mr. White's affidavit adds the information that on the outbreak of war "all remittances to Germany and Austria, directly or indirectly, by the Canadian company or by any one on its behalf, were immediately stopped."

Mr. White further says in his letter: "A separate account is kept in New York for the Canadian company;" and in his affidavit he says (para. 5): "In the foregoing connection, the explanation of my letter to Mr. Vaughan of May 6th, 1915, referred to in Mr. Vaughan's affidavit as exhibit B, is that Dickerhoff Raffloer & Company, the predecessor of the Canadian company, and, as aforesaid, an American corporation of New York, acted as banker for the Canadian company, receiving from time to time money from it and from time to time paying out such money for the account of the Canadian corporation. The American corporation kept a separate account of the money so received and disbursed, the same being the sole and exclusive property of the Canadian company handling such money as banker and not otherwise."

As to the stock in trade of the Canadian company, the fol-

lowing is from Mr. White's letter: "All German and Austrian goods in stock were shipped and paid for prior to the declaration of war." "The remainder of our stock of German and Austrian made goods is now very limited."

In his affidavit this statement is made in reference to the goods the price of which is now sued for (para. 4): "The goods so sold had all been purchased by the said corporation of Dickerhoff Raffloer & Company of Canada Limited, for its own account, which corporation had the sole and absolute title to the same and the sole and exclusive interest therein and in and to the proceeds thereof, and as to which goods and the proceeds thereof the said corporation of Dickerhoff Raffloer & Company of Canada Limited acted as principal, and not as agent, factor, or commission salesman, and was not liable for an accounting therefor to any one except its shareholders and creditors."

From these facts, if Mr. White's letter is read as well as his affidavit, there may fairly be deduced these conclusions: that the Canadian company was at the outbreak of war buying direct from Germany and Austria, and remitting directly there; that the goods "in stock" on the date of Mr. White's letter, the 1st May, 1915, were purchased and paid for prior to the declaration of war; that these goods cannot include those delivered to the respondents prior to that date, i.e., amounting to $6,308.10; that as to all the goods sold to the respondents the appellants were the owners and solely interested therein; and that the American company acted and still acts as banker for the Canadian company, and kept and keeps a separate account for it as such banker; and that remittances to Germany and Austria, directly or indirectly, by the Canadian company or by any one on its behalf, were, on the outbreak of war, immediately stopped.

These conclusions naturally raise the question whether the goods to the amount of $6,308.10, delivered prior to the date of Mr. White's letter, as to the purchase of which no information is given, were paid for direct before the war, or whether their value still represents an indebtedness to Germany outstanding in the form of bills of exchange; why, on the cancellation of the Canadian company's account in the German office, a similar account was opened with the American firm as bankers instead of in a regular bank; and whether that firm or the Canadian

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company would, on receipt of the amount now sued for, liquidate that indebtedness, if it still exists, out of that account. The fact that the Canadian company owned the goods and were entitled to the proceeds is not inconsistent with the fact that they may still owe for them, and that payment may yet have to be made to holders of negotiable instruments for the benefit of the German vendors.

It may be that the explanations given are intended in effect to cover these matters, but they do not in terms or by necessary implication do so. The order of the learned Chief Justice will prevent any possible breach of the Proclamation. Should it be reversed, unless it is clearly established that its reversal will not change the situation in that regard?

It is well pointed out in *Rex* v. *Kupfer*, [1915] 2 K.B. at p. 336, that the prohibition is intended to prevent payments which in any way enure to the benefit of the enemy:—"The first question is, what is the meaning of the words 'for the benefit of an enemy?' In our judgment those words were deliberately introduced for the purpose of preventing devices, tactics, and various means by which mercantile houses might seek, but for those words, to make payments indirectly, notwithstanding that there is an express prohibition of a direct payment. It was doubtless considered, that in making this Proclamation it was necessary to cover that ground and to throw the net wide in order that there should not be this means of evading the law and therefore of assisting the enemy by adding to or protecting his resources. Those words are very wide, and must be construed to have a very wide application. It is not necessary or desirable to define exactly the meaning of the words. They are intended to cover the making of payments to the enemy by any device or by any recourse to indirect means."

What these indirect means may be is suggested in *His Majesty's Advocate* v. *Innis*, [1915] S.C. (J.) 40, by the Lord Justice General, who at p. 42, says: "A trader in this country who desires, or has an intention, or proposes, to trade with the enemy may well select as an intermediary any person resident in a neutral country, even though that person is not, at the time when a communication is addressed to him, a representative either of the proposed buyer or of the proposed seller. The statutory crime is that of indirectly supplying goods or procuring the supply of goods, or trading with

the enemy, and one of the ways in which a man may indirectly effect his purpose is by selecting an intermediary through whose intervention he will secure his aim; and it does not appear to me to be necessary to say that that intermediary is, at the moment when he is selected, the active agent or representative of the intending purchaser or the intending seller."

That case, and others such as *Moss* v. *Donohoe* (1916), 32 Times L.R. 343 (P.C.), *His Majesty's Advocate* v. *Hetherington*, [1915] S. C. (J.) 79, and *Rex* v. *Oppenheimer*, [1915] 2 K.B. 755 (C.A.), shew that the Courts treat the prohibition in the orders in council as absolute, universal, and subject to no exception whatsoever arising from considerations usually applied in mercantile law.

The appellants seem to have avoided meeting the exact point raised by the respondents—will this judgment result in a payment being made "for the benefit of the enemy," just as the proposed guaranty evaded it?

With two shareholders in New York who are lawyers, one of whom apparently instructed this action, it would be easy to state exactly just what the facts are with regard to payment for the goods in question. Is it outstanding in any form, and will this money, whether it is called "the Canadian company's money," or whether it becomes that of another party, be paid for the benefit of the enemy?

I am unable to see why the guaranty was not given as asked and in the terms suggested, if, as is argued, there is no possibility of the money finding its way "to the benefit of a country at war with Great Britain."

While I am not satisfied on these points, I do not think the order made is the appropriate one under the circumstances. The appellants are in strict law entitled to judgment for the claim, unless that judgment would have the effect of bringing about a payment in contravention of the Proclamation. At present, and on the material before the Court, I cannot say that it must have that result. On the other hand, I am not satisfied that the facts are fully disclosed. There is no provision at present in our law for the intervention of a public custodian, but there is jurisdiction to stay execution until fulfilment of any condition (Rule 537), or to direct the money to be paid into Court (Rule 534), with leave to the appellants to apply to issue execution or for payment out

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on satisfying a Judge of the Supreme Court that no breach of the Proclamation is intended or will occur.

In this I am practically following the course adopted by Mr. Justice Rowlatt in *Schmitz* v. *Van der Veen and Co.* (1915), 112 L.T.R. 991. See also *Guyot-Guenin & Son* v. *Clyde Soap Co.*, [1915] 2 Scots L.T. 244.

I think the appeal should be allowed, and judgment entered for the appellants, who may elect as to a stay of execution or payment into Court. The costs of the application before the Chief Justice of the King's Bench and of this appeal should be dealt with by the Judge before whom the suggested motion may be made. *Appeal allowed;* HODGINS, J.A., *dissenting.*

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CAPITAL TRUST CO. v. YELLOWHEAD PASS COAL & COKE CO. JOHNSTON & BOON, Ltd. v. CAPITAL TRUST CO.

Alberta Supreme Court, Beck, J. July 8, 1916.

CHATTEL MORTGAGE (§ III—30)—*Trust deed securing debentures—Floating charge or security—Registration.*]—Action to determine priorities of debenture holders over creditors.

J. E. Wallbridge, K.C., for Capital Trust Co.

H. H. Parlee, K.C., for Johnston & Boon.

BECK, J.:—I have to decide the question of law whether a trust deed executed for the purpose of securing the future purchasers of debentures of the Yellowhead Coal and Coke Co. and creating a floating charge upon all the assets of the company is, or is not, so far as the rights of the debenture holders to priority over the ordinary creditors depend upon the floating charge, invalid, by reason of the admitted fact that the trust deed was not registered as a chattel mortgage in accordance with the Bills of Sale Ordinance.

In my opinion the floating charge gives priority to the debenture holders notwithstanding the absence of registration. A very full account of the history and practice relating to floating securities or floating charges is to be found in the Encyc. of the Laws of England, 2nd ed., vol. vi., pp. 131, tit. "Floating Securities." Reference may be made also to Palmer's Company Law, 10th ed., pp. 309 *et seq.*, Ency. of Forms and Prec., vol. v., p. 11, and vol. vi., p. 501.

Such a charge is in England void against the liquidator of the issuing company and any creditor of the company unless it

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is registered under sec. 14, sub-sec. 1(*d*) of the Companies' Act, 1900, with the registrar of companies.

There is no similar provision in our Companies' Ordinance. Two amendments, however, were made which it is proper to mention.

By the Statute Law Amendment Act, 1907 (ch. 5, sec. 10), provision was made for the renewal of mortgages made as security for debentures by filing a copy, etc., with the registrar of joint-stock companies.

By the Statute Law Amendment Act, 1909 (ch. 4, sec. 3), it was enacted that:—

> Notwithstanding anything contained in the Bills of Sale Ordinance or in the Ordinance respecting Hire Receipts and Conditional Sales of Goods and amendments thereto, any bill of sale, chattel mortgage, etc., . . . respecting rolling stock and equipment for use on railways may be registered in the office of the Registrar of Joint Stock Companies; no other registration. . . shall be necessary and . . . no renewal shall be required.

The first amendment would seem to carry the implication that mortgages to secure debentures were within the Ordinance amended, the amendment substituting a new method of renewal.

If this implication is to be given effect to, the second amendment would seem merely to make an exception of mortgages to secure debentures for rolling stock of railways, dispensing with registration and renewal under the Bills of Sale Ordinance and substituting registration with the registrar. The legislature certainly ought to revise this legislation and make the requirements respecting this class of security clear.

But whatever may be the proper interpretation of these amendments it seems to me that they are to be interpreted equally with the Ordinance as it originally stood, in the light of the principle which has for many years been applied by the Ontario Courts to the Ontario Act, from which our Ordinance was originally taken. The same principle, I am satisfied, was applied to our Ordinance by the former Supreme Court of N.W.T. That principle is that no transaction by way of a bill of sale or chattel mortgage is subject to the provisions of the Act or Ordinance if the circumstances are of such a character that it does not fall within any of the classes of transactions specially provided for or that the statutory requirements with respect to the affidavits of *bonâ fides* are impossible to be complied with.

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For instance, though provision is made for the special case of mortgages to secure the mortgagee "against the endorsement of any bills or promissory notes or any other liability by him incurred for the mortgagor" in which case the affidavit of *bonâ fides* must "truly state the agreement between the parties and the extent of the liability intended to be created by such agreement and covered by such mortgage" it has been held that the Act providing for the case of a liability "incurred" does not apply to the case of a liability "to be incurred." *Mathers* v. *Lynch*, 28 U.C.Q.B. 354; *Turner* v. *Mills*, 11 U.C.C.P. 366; *Paterson* v. *Maughan*, 39 U.C.Q.B. 371; *O'Donohoe* v. *Wilson*, 42 U.C.Q.B. 329; *Barber* v. *Macpherson*, 13 A.R. (Ont.) 356.

The Ontario case of *Johnston* v. *Wade*, 17 O.L.R. 372, applies this principle to the case of a floating security, and in effect holds that that class of security was never contemplated by the legislature as coming within the terms of the original Bills of Sale Act. See also *Nat. Trust Co.* v. *Trusts and Guarantee Co.*, 5 D.L.R. 459, and *Imperial Can. Trust Co.* v. *Wood, Vallance*, 24 D.L.R. 241. I think that on this principle, which it is now too late to contest, the mortgage in the present case was not subject to the Ordinance.

However the amendments I have referred to may be interpreted, inasmuch as the mortgage was to secure debentures to be afterwards sold—it was not to secure a debt then existing—though there may well be a mortgage to secure debentures on which the money is actually advanced co-temporaneously with the delivery of the debentures and the making of the mortgage, and thus a debenture-mortgage to which the Ordinance may apply—it was impossible to comply with the provisions of the Ordinance, and on the principle stated, the present mortgage is, notwithstanding the ambiguous amendments, not subject to the Ordinance.

There was one other question for decision, but no sufficient material was placed before me to enable me to decide it.

In the result the proper order seems to be that the usual order in such cases should go in the plaintiff's favour in the first action and that the second action should be dismissed with costs.

Judgment accordingly.

McDEVITT v. GROLIER SOCIETY OF LONDON.

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Alberta Supreme Court, Appellate Division, Scott, Stuart, and McCarthy, JJ. June 30, 1916.

PRINCIPAL AND AGENT (§ I—2)—*Commissions—Termination of agency at will.*]—Appeal by the defendant from the judgment of the Junior Judge of the District Court at Edmonton in favour of the plaintiff, in an action for $132.50 commission upon the sale to the Alberta Department of Education of 50 sets of a work called "The Book of Knowledge."

McKinnon & Matheson, for respondent.

Bishop & Pratt, for appellant.

The judgment of the Court was delivered by

SCOTT, J.:—As no time was fixed by the agreement between the parties during which the agency should continue, it follows that either party to it could determine it at any time and, such being the case, it also follows that either party was in a position to say to the other at any time "If the agreement is to continue it must be continued upon such terms as I now dictate" and it would then be for the other party to say whether it should continue upon the terms so dictated.

Even if, under the terms of the original agreement, the plaintiff would have been entitled to a commission upon the sale made by him to the Department of Education, the fact that he was notified long before he made the sale that he would not be paid a commission upon such a sale, in my view, clearly disentitles him to recover any such commission.

I would allow the appeal with costs and direct that judgment be entered in the Court below for the defendant with costs.

Appeal allowed.

VAN AALST v. VAN AALST.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck, and McCarthy, JJ. June 30, 1916.

HUSBAND AND WIFE (§ II A—50)—*Separation agreement—Power to wife to sell land at fixed price—Mortgage—Liability of husband's surety.*]—Appeal from the judgment of Simmons, J., in an action upon a separation agreement. Affirmed.

George Ross, K.C., for London & Lancashire Acc. Co., defendants, appellants.

R. C. Burns, for defendant Van Aalst.

Malcolm R. McDonald, for plaintiff, respondent.

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The judgment of the Court was delivered by

BECK, J.:—The action involves a separation agreement the construction of which is sufficiently difficult on its face, but is made more so by the subsequent conduct of the parties. The action was commenced on October 2, 1915. I shall summarize the agreement, quoting such clauses as it is necessary to construe. The agreement is dated October 1, 1913, and is made between the husband (defendant) and the wife (plaintiff). It recites unhappy differences and an agreement to live apart. It recites that there are issue of the marriage two boys aged 5 and 2 years.

It is agreed by the husband:—

1. That the wife may live separate, etc. 2. That the husband will furnish a bond in the sum of $3,600 to secure the payment to the wife of all moneys which she may be entitled to receive from the husband under the terms of this agreement, either by way of loan or otherwise, for 3 years from January 1, 1914, and upon each yearly renewal of the bond the amount of the same shall be reduced by the amount of the payments secured by the bond during the preceding year. (The defendant, the London & Lancashire Guarantee & Accident Co. of Canada, gave the bond called for by this provision.) 3. This provides for the transfer by the husband to the wife free of encumbrances of certain lands listed in schedule "A." (This transfer was made.) 4. That the husband will pay to the wife for the maintenance and support of herself and the children of the parties hereto the sum of $100 on the 1st day of each of the months of October, November and December, 1913, and of the months of January, February and March, 1914. (These payments were made.) And will thereafter advance and loan to the wife, on the 1st day of each and every month, the sum of $100 or such lesser amount as will with the income then being derived by the wife from the properties described in schedule "A" hereto or from any other investments made with the proceeds of the sale of said properties or any of them, make a total monthly income of $175; and such monthly loans shall cease so soon as the wife is in receipt of a monthly income of $175 from said properties or any of them; and having ceased at any time at or after three years from the 1st January, 1914, shall not be revived. 5. This provides that the husband is to pay all taxes, etc., against the lands owing prior to the 1st January, 1913, and that all taxes for the year 1913 shall be apportioned as of the date hereof. 6. This provides that the wife shall have the custody of the children.

It is agreed by the wife:—

1. That she will not take any steps to compel cohabitation, etc. 2. That she will not pledge the husband's credit, etc. 3. That she will educate the children, etc. 4. That until the husband shall have received from the wife all moneys which he may hereafter become entitled to receive from her under the terms of this agreement, one-fourth part of all moneys derived by the wife from time to time from the sale of any of the properties described in schedule "A" hereto shall be applied in payment to the husband of the moneys loaned by the husband to the wife as hereinbefore provided, and such interest thereon (if any) as he may be entitled to receive; and the wife shall account there-

for every 6 months from the date of this agreement. 5. That until the wife has fully paid to the husband all moneys advanced or loaned by the husband to the wife under the terms of this agreement and such interest (if any) as he may be entitled to, and the husband has ceased to be liable for any further advances to the wife, the husband shall have a lien or charge upon the properties described in schedule "B" hereto and shall be entitled to lodge a caveat in the Land Titles Office for the South Alberta Land Registration District claiming an interest in the said lands, and will, at his own expense, withdraw such caveat when all his liability to the wife hereunder has ceased, and when repaid all advances made by him together with such interest as may be payable to him. 6. That she will proceed to sell the properties described in schedule "C" hereto so soon as she can do so at prices not less than the prices set opposite same in said schedule, and if she has not repaid to the husband all moneys advanced and loaned by him as hereinbefore provided at the expiration of 18 months from January 1, 1914, then the balance remaining unpaid to the husband, as well as all moneys advanced by him thereafter, shall bear interest at the rate of eight per cent. per annum, which shall be paid by the wife to the husband.

Then follows a general release by the wife of any claims against the husband.

The lands designated in schedules "B" and "C" are all included in schedule "A."

It is admitted that the wife used every reasonable effort to sell the lands designated in schedule "A" without success. Those in schedule "C" were admittedly not salable at the prices fixed in the schedule; those prices having been fixed when the real estate market was active and before the prices of land generally had dropped. The husband was in default in making advances under the agreement when the action was commenced. He was not, however, in default on September 11, 1914, on which date the wife placed a mortgage upon certain property designated in schedule "C" for a loan of $2,000. This money she used for the most part in paying taxes, $514, and $1,100 in erecting a house upon one of the properties, which she says is rented for $10 a month, and that being, she says, almost two-thirds of her monthly income.

It is urged against the plaintiff that in making the mortgage she was doing something in conflict or inconsistent with the terms of agreement. It seems to me that this is not so. All the lands in schedule "A" were transferred to her free of encumbrances for the sole benefit of herself and her children, subject only to this: that one-quarter share of the proceeds was to be applied in paying back to the husband any advance made by him to her by way of loan. As far as the children are concerned she was

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unrestricted as to her dealings with the lands. As far as the husband is concerned it must be taken that she was, by being made the owner—the registered owner—given absolute control of the lands except in so far as the terms of the agreement clearly restrict her control; even where there is a restriction the question may at some time arise under some aspects whether the restriction attached to the land or operated merely as an implied covenant on the wife's part.

Clause 4 of the agreement makes it clear affirmatively that the agreement contemplated that the wife might sell any or all of the lands transferred.

Clause 5 implies the wife's right to sell, if not the particular lands mentioned in schedule B, all the rest of the lands, for it expressly provides that the husband may file a caveat against the lands particularly designated in schedule "B." However, no question arises in the present action about these particular lands.

Clause 6 does put a restriction upon the price at which the wife may sell the lands designated in schedule "C."

The wife being then the absolute owner of the lands designated in schedule "C" *primâ facie* she could deal with them as she saw fit—*e.g.*, build up them, lease them, mortgage them; the only restriction placed upon her dealing with them was that she should proceed to sell them as soon as she could do so at a price not less than the prices fixed in the schedule. "Proceed" in this context can mean only "endeavour." It is possible that the obligation was fulfilled and terminated and satisfied by her admittedly *bonâ fide* attempt to sell. But if the proper meaning is that she is under obligation to endeavour to sell as often as conditions seem to make it likely that the listed prices can be obtained—and such conditions seem unlikely to arise within any measurable period of time—I think her rights as owner are not to be cut down for an indefinite period of time. She is under no personal obligation to the husband to pay the taxes on any of the lands; the agreement makes it clear enough that the only source from which it was expected she could pay such charges was the proceeds of the sale of some of the lands. As she had failed to sell any of the lands, and as taxes were accumulating against them, she, apparently hoping to make a portion of them revenue producing, was beyond question entitled to raise moneys

for either or both of these purposes by a mortgage upon some of the lands of which she was the owner. I see no ground for excluding the lands in schedule "C" from this power of the wife, unless it were shewn that so dealing with them would be a fraud upon the husband, and there is no evidence or suggestion that she acted otherwise throughout than with entire good faith.

Indeed, I am inclined to think it would have been sufficient to say that she was the owner; she was restricted at most only to this extent: that she was not to *sell* at less than fixed prices; she committed no breach of this obligation, for to mortgage is not to sell.

It was only on the ground that by placing this mortgage upon land in schedule "C" the wife had committed a breach of the agreement and prejudiced or endangered the rights of the Guarantee Company as surety for the husband that it was contended that the Guarantee Company was discharged.

As I have indicated, I think there was no breach of the agreement by the wife. The Guarantee Company is therefore, in my opinion, liable. In this conclusion I agree with the trial Judge.

There was no cross-appeal.

I think, therefore, that the plaintiff is entitled to judgment against both the defendant Van Aalst and the Guarantee Company for the amount indicated by the trial Judge. The plaintiff should have the costs of the appeal and the costs below.

Appeal dismissed.

KORCZYNSKI v. COCKSHUTT PLOW CO.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. June 30, 1916.

CHATTEL MORTGAGE (§ V—52)—*Discharge—Debts covered—Novation—Failure to insure—Discharge of surety.*]—Appeal from the judgment of the Chief Justice, in favour of plaintiff in an action asking for a declaration that a mortgage from the plaintiff to the defendant has been discharged, and a counterclaim by the defendant asking for a personal judgment against the plaintiff. Affirmed.

O. M. Biggar, K.C., for respondent.

Lougheed, Bennett & Co., for defendant, appellant.

The judgment of the Court was delivered by

BECK, J.:—There are really only three transactions in question: (1) A sum of $54, balance on notes given by one Bahry.

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(2) A sum of $100, an indebtedness incurred by the plaintiff to the defendant while acting as selling and commission agent for the company at Innisfree. This sum was paid after action brought. (3) A sum of $1,200 odd, being the balance owing by one Hartwick to the defendant on the settlement of his account as their selling and commission agent during the year 1912.

The mortgage from the plaintiff to the defendant recites that the plaintiff and one Bahry had been appointed agents for the sale of machinery supplied by the mortgagees at the town of Mundare, and that the mortgagor had agreed to execute the mortgage as collateral security to and for the payment of the indebtedness of himself and the said Bahry from time to time to the said mortgagees for said implements or stock-in-trade supplied and then contains two covenants, the one, that the plaintiff will pay the several sums of money which may remain due from time to time to the mortgagee by the said Bahry and himself on demand with interest, etc.; and the other that the taking of any collateral security shall not affect the mortgage but that it shall remain absolute and binding so long as the said firm of Bahry and "myself" (the plaintiff) "*or myself*" shall remain indebted to the mortgagee. Then follows the mortgaging clause "for the better securing of such sums or sum or such indebtedness."

The Chief Justice, the trial Judge, found that the first item —the balance of $54 remaining owing on a note by Bahry—was not covered by the mortgage; that although it was given in respect of an indebtedness for which the defendant might have looked to the firm composed of Bahry and Korczynski, yet the defendant had, during the term of the partnership, taken Bahry's individual note for the amount, Bahry as between himself and the plaintiff being really liable for it and had thereby created a novation whereby Bahry was accepted as the sole debtor and the plaintiff released. I think this was the correct view.

As to the second item—$100, beside the fact that after the commencement of the action it had been paid the trial Judge held that it was not a debt covered by the mortgage; that the mortgage covered only liabilities incurred either by the partnership or by the plaintiff alone in connection with the business at Mundare and that this was made still clearer by the fact that there was a final settlement between the defendant on the one part and

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the partnership and the plaintiff on the other part of all liability in respect of the Mundare business. I think this view was right.

The remaining item of $1,200 odd is for the same reason not covered by the mortgage; but the question remains whether the defendant is entitled to a personal judgment for the amount or any part of it.

The trial Judge held that the defendant company was estopped from recovering from the plaintiff any balance owing by Hartwick in respect of the business of 1912 by reason of the conduct of one James, and with his conclusion I agree.

There is a provision in the contract between Hartwick and the company that he should insure from loss or damage by fire by a policy in the company's name all goods in his possession.

If the insurance was effected, the company ought to have seen that it received the insurance money and credited it; if it was not effected the company was more than passively negligent and so are responsible for the loss to the plaintiff as surety. *Watts* v. *Shuttleworth*, 7 H. & N. 353.

On the same principle I think that to the extent that by the direction of James or even by his consent, moneys, the proceeds of the sale of goods comprised in the contract for 1912—which was expressly a conditional sale, reserving the ownership to the company—went to Hartwick instead of to the company, the plaintiff is entitled to have these moneys credited as against him on Hartwick's indebtedness. (See generally De Colyar on Guarantees, 3rd ed., p. 438 and Halsbury's Laws of England, vol. 15, tit. Guarantee, p. 558).

I think the company was bound by James' representations, which evidently the trial Judge interpreted in the sense in which the plaintiff took them; that it is established that the plaintiff acted upon them to his prejudice, by assisting Hartwick to dispose of his property and by refraining from taking steps to indemnify himself; and that therefore the plaintiff has established an estoppel against the company.

I think, too, that the plaintiff was released by reason of what I have said as to the insurance and the permitted receipts of moneys by Hartwick. It may be that if this were fully investigated it might appear that the loss was less than the total liability of Hartwick for which the plaintiff was liable on his guaranty and was, therefore, only a partial discharge; but, under the

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circumstances, I think the burden had shifted to the defendant to shew—what was rather within their knowledge than than of the plaintiff—what were the precise amounts of these moneys. I would affirm the judgment of the Chief Justice and dismiss the appeal with costs. *Appeal dismissed.*

HARVEY v. MITCHELL.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. June 3, 1916.

EXECUTION (§ II—15)—*Proceedings to declare debtor owner of property — Fraudulent conveyance — Family settlement — Trust — Good faith.*]—Appeal by defendants from the judgment of Walsh, J. Reversed.

Lougheed, Bennett & Co., for plaintiffs, respondents.

Laidlaw, Blanchard & Rand, for defendants, appellants.

The judgment of the Court was delivered by

BECK, J.:—This is an action by an execution creditor of Wm. Mitchell asking for a declaration that the execution debtor is the sole and beneficial owner (1) of certain horses and cattle claimed by Isabella Mitchell; (2) of certain shares in the Marshall-Mitchell Hardware Co. Ltd. standing in her name but claimed by David Mitchell, Bryce Mitchell, and Isabella Mitchell; (3) of certain shares in the Redcliff Rolling Mills Ltd. standing in the names respectively of H. A. Hunter and Harry Yuill; and (4) of certain lands standing in the name of James Mitchell. These different claimants, and they only, are defendants.

Walsh, J., before whom the case was tried without a jury, found (1) that the horses and cattle were the property of Isabella Mitchell and the execution debtor in equal shares; (2) that the shares in the Marshall-Mitchell Co. were the property of David Mitchell and Bryce Mitchell; (3) that the shares in the Redcliff Rolling Mills Co. were the property of Hunter & Yuill; (4) that the execution debtor was the beneficial owner of the land.

Items 2 and 3 were thus decided against the plaintiff and the action in these respects dismissed with costs, *i.e.*, against David Mitchell, Bryce Mitchell, Hunter & Yuill.

The defendant Isabella Mitchell appeals as to the horses and cattle; the defendant James Mitchell as to the land. There is no appeal by the plaintiff.

James Mitchell, senior, left a will whereof he appointed his

wife, Isabella Mitchell, sole executrix and guardian of his infant children, in addition, the will contained only the following disposition:—

> I give all my property unto my said wife to hold in trust for my children during her life, and at her death the said property is to be divided equally amongst my children who being sons attain the age of twenty-one years or being daughters attain that age or marry.

After a time the mother promised with the approval of all that if they all worked together she would give each "a start in life." In the course of time several of the boys were provided for, Bryce and David were given the shares already referred to in the Marshall-Mitchell Hardware Co., John, it seems, has not yet been provided for, but the Elkwater homestead has been subdivided into building lots and he is living there and has had charge of the selling of the lots. None of the girls have yet been provided for. Even as to the children who have been provided for, including Alexander who was "started" by his father, it is not absolutely clear that in each case it was intended on either side that what they received was to be taken as a complete and final settlement.

William, being in charge of the ranching business, which had been been carried on by the father as a squatter on Dominion Government lands, made a number of applications to the government for grazing leases and afterwards for the purchase of some of these and other lands. These applications extended over a number of years. They were all made by William in his own name. The regulations of the Department called for statutory declarations of the applicant shewing that he was the owner of a certain number of livestock which he was prepared to place upon the land to be leased and shewing from year to year that he was the owner of a certain number of livestock which had during the previous season been grazing upon the land.

A number of such statutory declarations were made by William from time to time, the cattle referred to therein being the cattle left by his father or their increase by issue or purchase and he stating that he was the owner. It does not appear whether or not the whole circumstances were known to, or made known by William to the agent of the Dominion Government and by him made known to the Department at Ottawa. Had they been, I feel quite satisfied that the Department would have decided

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that the spirit at least of the regulations had been conformed to and that the applications should not be refused on the ground that William was not the owner. I think, too, that it is at least quite arguable that the result of the arrangement made by the family was that William was constituted a trustee. When he sold cattle or horses was he not a trustee of the proceeds? And if of the proceeds, why not of the animals before sale? Having placed him in the position they did, I should say that it was clear that when, as he did later, he pledged or mortgaged the live stock in order to acquire more, the other members of the family could not be heard to say to the pledgees or mortgagees that he was not the owner; the ground of the estoppel would, I think, be that they had constituted him their trustee. Whether or not this view is correct there is nothing to indicate any deliberate or intentional wrongdoing on William's part or an intention to act in his own interest to the exclusion of the rest of the family. Even had there been, the property acquired by William surely would, as between himself and those for whom he was in truth acting, not be his to their exclusion.

There was an account opened in the Canadian Bank of Commerce at Medicine Hat in the name of "William and Isabella Mitchell"; the first item in which is a discount to the amount of $1,474.35 on July 22, 1906.

Notwithstanding the terms of the will it seems to have been the accepted view of all the members of the family that the mother had a beneficial interest in the estate during her life. Apart from the question of William having become a trustee of the ranch business, and having acquired property in his own name, the legal title to the property of the estate was in the mother as executrix. Asked how William's name came to be in the bank account, she said:—

> I am responsible for it you know, for I have the stock, but the banker suggested him. He thought it would give him a responsibility for looking after it, to my interest you see.

There passed through this account all the transactions relating to the ranching business which in the course of time assumed large proportions; securities on the live stock being taken under sec. 88 of the Bank Act. There also passed through this account the transactions relating to the acquiring of the shares in the Marshall-Mitchell Co., which were transferred to David and Bryce Mitchell,

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who in this connection gave the bank a bond for $15,000 and joined in a promissory note—January 24, 1912—for $14,671.77 with interest at 8 per cent. per annum signed also by William on behalf of "I. and W. Mitchell," he having a power of attorney from his mother; and this note was discounted by the bank.

Some time in 1911, apparently, William, who was in ill health, gave up being in charge of the ranch and having decided to go into the real estate business in Medicine Hat, received out of the estate in cash in 1911 or 1912 about $12,000 as his "start." This was with the approval of the mother and such of the children as she could consult. James in 1913 was given at the request of the mother a transfer by William of the ranching lands. He had already taken William's place on the ranch. This transfer was, the mother says, intended to be an absolute transfer to James as his "start," the live stock remaining the property of the estate.

Now, it was after William had left the ranch and had got his start that he entered into the transaction out of which arose the plaintiff's claim. It was undoubtedly his own personal affair in which no other member of the family had any interest whatever. It is true that the account of "I. and W. Mitchell" was used for the purposes of a part of the transaction; but I cannot see that that fact has any bearing on the question of the ownership of the live stock or of the lands which for the reasons I have indicated I think were beneficially the property of all the children in equal shares, excepting those who had already been given their "start," subject, perhaps, to some adjustments between themselves, until given to a beneficiary as his share in the property of the estate.

As to the transfer of the land to James, there is nothing to disprove the assertion that it was in good faith given him as his "start." Even if there might be a doubt about this and it were given to him owing to William having got into difficulties and for fear it might be made available for William's debts, William certainly, in my opinion, had no interest—or no ascertainable interest—in it. He had previously got his "start."

So far as the plaintiff seeks to attack any of the transactions of the members of the family on the ground of fraud, in my opinion, he fails entirely. All the transactions were, I think, *bonâ fide* transactions of the character which the Court designates family arrangements which the Court favours.

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The mere fact that a transaction is attacked on the ground of fraud does not throw any burden on the defendant. The plaintiff must prove his case as in any other case. It is only when the circumstances of the case, when they are made to appear, and the manner in which the evidence is given, raise great suspicion that an onus may be thrown upon the defendant, where it is or ought to be in his power to shew by a full and candid disclosure the righteousness of the impeached transaction. I find no such case here; and I do not understand the trial Judge to have decided the case on any such ground but on the ground, as to the live stock, that on the virtually undisputed facts William had become the beneficial owner of a half interest, and as to the land transferred to James, that it too on the virtually undisputed facts had also become the property of William and that the only fraud the trial Judge meant to find was in its transfer from William to James.

So far, therefore, as the case is based on fraud, I think the plaintiff fails.

As to the live stock, the case was rather based on the contention that William was the beneficial owner of it. For the reasons which I have indicated, I think this is not so, even as to a one-half interest.

The action as framed, in my opinion, fails both as to the live stock and the land. I do not think it open in this action for the plaintiff to ask for any declaration that William has any beneficial interest other than the whole interest remaining in any of the property—even the live stock—as being a beneficiary along with the other members of the family. To justify such a declaration, all the children as well as the mother should have been parties. Such a declaration would have to be preceded by an account involving the interests of all the members of the family and it would have to be ascertained whether the "starts" given to several of the children were or were not a full settlement of their respective interests. The four daughters are not parties and such of the sons as are parties were made parties in a different aspect.

If the present action is finally dismissed there is nothing to prevent the plaintiff as an execution creditor of William bringing an action of account against the proper parties, but in view of

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the evidence before me, I should think it quite unlikely to be successful.

For the reasons indicated I think the appeal should be allowed with costs and the action dismissed with costs. *Appeal allowed.*

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LITTLE v. HILL.

British Columbia Supreme Court, Macdonald, J. August 1, 1916.

MORTGAGE (§ VI B—75)—*Foreclosure—Default in interest.*]—Action for foreclosure of mortgage.

W. W. Walsh, for plaintiff.

MACDONALD, J.:—The registrar has referred to the Judge in Chambers the question as to whether an order for foreclosure should be granted herein. It appears the mortgage in question has no acceleration clause and does not purport to be under the Short Forms of Mortgages Act. There is no principal in arrear under the terms of the mortgage, but interest payable thereunder is overdue. In that event I think the plaintiff is entitled to judgment as there has been a breach on the part of the mortgagor in the condition upon which he held the property. The mortgage transferred the legal estate to the mortgagee but a right of redemption remained in the mortgagor subject to the performance on his part *inter alia* of the due payment of principal and interest according to the terms of the instrument.

I am supported in my conclusion by the cases cited in Halsbury, vol. 21, p. 277.

The terms of the order for judgment may require consideration especially as to the relief that might be afforded to the delinquent mortgagor. *Judgment for plaintiffs.*

GAULEY v. BANK OF MONTREAL.

British Columbia Supreme Court, Morrison, J. June 30, 1916.

FRAUDULENT CONVEYANCES (§ III—10)—*Mortgage on eve of insolvency—"Unjust preference"—Pressure.*]—Action by the liquidator to set aside mortgage given to a bank. Dismissed.

C. W. Craig, for plaintiff.

Charles Wilson, K.C., for defendant.

MORRISON, J.:—From the evidence I am of opinion that the bank exercised legitimate pressure upon the company and it was on that account that they took the various steps complained of. *Stephens* v. *McArthur*, 19 Can. S.C.R. 446. Having regard

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to the substantial advances made by the bank and its treatment of the company I do not find any trace of dealings that properly may be termed "unjust" within the meaning of the Act.

The main point arising in this case is whether the mortgage in question was taken in contemplation of the insolvency of the mortgagors and with the intent of obtaining an unjust preference over the other creditors. I do not think that the presumption created by the statute against transactions of this nature arises, having regard to all the circumstances. So that the burden lies on the plaintiff who attacks the mortgage to prove that it was fraudulent, which has not been discharged to my satisfaction. It seems to me that if ordinary banking transactions such as this was, being void of all suspicion and inadequacy of consideration, furnishing necessary financial assistance free from any underhand or secret methods either on the part of the bank or the company were to be thus impeached, there would be an end to the carrying on of trade and commerce on credit. I do not think that the statute strikes at transactions of this kind.

The statute does not provide that every security given by a debtor, when in circumstances of pecuniary embarrassment, shall be void, even though those embarrassments afterwards culminate in insolvency. Strong, J., in *McRae* v. *White*, 9 Can. S.C.R. 22 at 27.

As to the antecedent arrangement made in January, whereby the company determined to give the defendants the mortgage, I cannot do better than quote from the judgment of Jessel, M.R. in *Ex Parte Wilkinson; Re Berry* (1883), 22 Ch.D. 788 at 795, referring to an agreement by the mortgagees to make further advances:—

It appears to me that if it is a *bonâ fide* promise made not for the mere purpose of securing the existing debt, but to enable the debtor to carry on his business as before, if it is a *bonâ fide* arrangement on both sides, the mere fact that there is not a technically binding contract to make further advances is not sufficient to lay the arrangement open to the objection that it was made to defeat or delay creditors and therefore fraudulent and void as an act of bankruptcy.

Action dismissed with costs.

STAR S.S. CO. v. CITY OF VANCOUVER AND B.C. ELECTRIC R. CO.

British Columbia Supreme Court, Morrison, J. June 19, July 8, 1916.

BRIDGES (§ II—11)—*Defective condition of draw—Collision with ship—Liability—Railway and municipality.*]—Action for negligence causing damage to ship.

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J. N. Ellis, and *W. C. Brown*, for plaintiff.

MORRISON, J.:—(June 19)—The plaintiff company is the owner of the freight boat "Rapid Transit"—Myers captain. On June 9, 1914, this craft was on its way with freight consigned apparently to Messrs. Brackman & Ker, whose wharves are situate in False Creek, east of Granville St. bridge, which crosses this navigable water some 920 feet away from the Kitsilano bridge, which is to the west. Steamers intending to enter False Creek and requiring the draws to be opened, first signal to the Kitsilano bridge to open and then to the Granville St. bridge. On the occasion in question the captain of the "Rapid Transit" telephoned about noon to the bridge attender of the Granville St. bridge that he intended passing through his bridge about 2.50 that afternoon. In due course the "Rapid Transit" signalled the first or outside bridge, which responded. The Granville St. bridge "tender" heard and saw what was transpiring and took steps which turned out to be futile to open his bridge. The boat proceeded through the Kitsilano bridge, and either when passing through or very shortly after, the captain noticed that the Granville draw was not working promptly, but he proceeded and when some distance in between the bridges variously estimated at about 100 feet he realized that the bridge wasn't opening and by the time he had got as far as the Ritchie Coke Bunkers he saw he could not get through and then he put his engines full speed astern. The channel along at this point was at that time 350 feet wide. There was a strong tide running, as the evidence goes to shew, at the rate of from 2 to 4 miles an hour. The day was fine. The boat was taken by the current against the bridge and the injuries and damages complained of resulted. The Granville St. bridge is traversed by the line of B.C. Electric Railway, the third party hereto, and for some days previously to the accident that company was engaged in making certain repairs on the said bridge which necessitated cutting off the electricity which is supplied by the said company in order to promptly operate the draw. The bridge tender had previously called to the attention of the proper official of the company the fact that there was no connection sufficient to enable him to open the draw. Nothing apparently was done to remedy this defect which was known to both defendants and unknown to the

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plaintiff during the whole of the time material to the issue in question in this trial.

There is, in my opinion, a preponderance of evidence in support of the plaintiff's contention that at the time he realized the draw would not open the captain of the "Rapid Transit," an experienced navigator in those waters, could not have averted the collision with the bridge. "The duty, a breach of which gives rise to a cause of action in negligence, is to exercise due care under the circumstances." I think the captain of the "Rapid Transit" did so exercise due care. I do not think that the bridge tender on this occasion did so exercise due care. It was strongly contended on behalf of the defendants that there were three alternatives or expedients to which Captain Myers could or should have resorted. The first was to cast anchor; the second to tie up to the Ritchie wharves on the north side, or lastly to run his ship on the south side in the adjoining mud flat upon which at that time there might have been 3 or 4 feet of water. There was a half tide at the time. And, perhaps, I might add a fourth, namely, to do what he seemingly in his perplexity did, to keep his engines full speed astern.

If one places another in such a situation that he must adopt a perilous alternative, the party so acting is responsible for the consequences. *Jones* v. *Boyce* (1810), 1 Stark. 493.

I accept the evidence adduced on behalf of the plaintiff—that for the captain to cast anchor when he realised the bridge would not open would have been futile; that to attempt to make a landing on the north side of the fairway would have, in all probability, even if it could have been effected, resulted in disaster, and that in order to ground his ship on the south side it would have been necessary for him to have anticipated that the draw would not open as he was coming through the Kitsilano bridge, a point at which it appears that no one expects the Granville St. draw to open, as it would retard vehicular traffic on that bridge unnecessarily long. There is one outstanding circumstance taken with what I have already found which reconciles me to finding in favour of the plaintiff, and that is that the Granville St. tender did not intercept the opening of the Kitsilano bridge which if he had done the damages sustained would have been averted. He had ample time in which to inform that bridge tender of the condition in which his draw was. Instead

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he took chances and although he vainly tried to open up, he in reason must have known it was at least doubtful that the draw would open in time.

I find that the accident arose through the defective condition of the draw on the Granville St. bridge, as before stated, and the negligence of the bridge tender in not taking precaution to notify the captain of the "Rapid Transit" in time of such defect.

On this branch of the case there will be judgment for the plaintiff with costs. The amount of damages, if not agreed upon by counsel, to be spoken to. As to the issue between the defendant and the third party, that remains to be later spoken to, if necessary. *Judgment for plaintiff.*

MORRISON, J. (July 8):—The proximate cause of the accident I have already found to have been the negligence of the bridge tender. That was as between the plaintiffs and the city. Now, as between the city and the third party, it seems to me quite immaterial what contractual relations existed unless the latter agreed to insure the city against accidents regardless of whether the city were or were not negligent in the act which brought about the damages complained of. There is no such agreement. *Loach* v. *The B.C. Electric R. Co.*, 23 D.L.R. 4, [1916] 1 A.C. 719., does not apply to a case of this kind. The facts—characteristically—are quite dissimilar. In that case there was no intervening party upon which it was sought in the ultimate result to fasten liability. Had the builders of the tram car in question sold it to the company in a defective condition and the company knowing of the defect chose to use it, resulting in damage to the plaintiff, then there would be a chain of facts in character similar to the case at bar. In a case of that kind I would be surprised to learn that the builders could be held liable for the result of any negligent use to which the company saw fit to put it.

The city as against the B.C. Electric Railway may have different and effective remedies under their different agreements and arrangements respecting the supply of electricity, but I do not think a consideration of them can arise in this particular case.

MONTREAL TRAMWAYS CO. v. McGILL.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. May 25, 1916.

APPEAL (§ II A 1—35)—*Jurisdictional amount—Adding costs.*] —Motion to quash an appeal from the judgment of the Court

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of Review at Montreal, 49 Que. S.C. 326, affirming the judgment entered at the trial, in the Superior Court, District of Montreal, by Greenshields, J., on the findings of the jury, in favour of the plaintiff, with costs.

The action was brought to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the company and, by the conclusions of his declaration, the plaintiff claimed $5,000 with interest and "costs of suit, including costs of exhibits." Before instituting the action the plaintiff, as required by statute, served a notice on the defendants claiming compensation and it appeared that, in the event of the action being maintained, there would be a fee payable on the notice and the cost of service amounting to seventy-five cents. On the hearing of the motion to quash the appeal for want of jurisdiction, under sec. 40 of the Supreme Court Act, R.S.C., 1906, ch. 139, it was contended by the appellants that the amount of the fee on the notice and of the cost of serving it should be considered part of the *demande* and, being added to the amount of the damages claimed, would bring the amount of the controversy over the sum necessary to give the right of appeal to the Judicial Committee of the Privy Council under arts. 68 (3) and 69 of the Code of Civil Procedure and, consequently, the appeal would lie to the Supreme Court of Canada.

Callaghan supported the motion.

Meredith, K.C., *contra*.

The judgment of the Court was delivered by

FITZPATRICK, C.J.:—Apparently a nice question of jurisdiction arises in this case. The conclusion of the declaration is:—

> The plaintiff prays for judgment against the defendants for the said sum of $5,000, with interest from this date and costs of suit, including costs of exhibits.

Arts. 68 (3) and 69 of the Code of Civil Procedure give an appeal from the Court of Review to the Privy Council in every case "where the amount or value of the thing demanded exceeds $5,000." In the case of *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, the declaration seems to have concluded with much the same language, *viz.*—the plaintiff sued, on December 26, 1893, for $2,150 with interest at 8% per annum from date of action till paid, with costs. The Supreme Court held that the claim as set out in the declaration was only for $2,150 and that although

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the interest was claimed in the declaration it could not be looked at for the purpose of considering whether the amount claimed was more than £500.

The appellants here urge that we must add to the amount claimed in the conclusions of the declaration the fee on the notice of action served on the company and the bailiff's charges for making the service. But, as both these items are included in the costs taxable as between party and party, we do not think they can be considered in determining whether or not the amount claimed is within the appealable limit.

The motion to quash is granted. *Appeal quashed with costs.*

BONSCHOWSKI v. WHITLEDGE.

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C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. July 10, 1916.

BASTARDY (§ I—5)—*Filiation proceedings—Settlement—Second action—Res judicata—Accord and satisfaction.*]—Appeal from a judgment of the County Court in favour of plaintiff in an action under the Illegitimate Children's Act (R.S.M. 1913, ch. 92). Affirmed.

M. N. Doyle, for appellant, defendant.

M. Hyman, for respondent, plaintiff.

HOWELL, C.J.M.:—The plaintiff is the mother of two illegitimate children. After the birth and death of the second child she laid a charge against the defendant before Police Magistrate Bonnycastle under sec. 16 of the Act. In some way, the evidence of which is not given, the defendant in that matter deposited $100 as bail and afterwards counsel for both parties appeared before the magistrate and in some way made a settlement of five items set forth in detail amounting in all to $67, and on the information the magistrate made an entry as follows: "Settled by party accused paying total $67. A. L. Bonnycastle." and this was treated as a disposition of the matter.

Shortly afterwards the plaintiff commenced before the same magistrate proceedings under the same section and charging that the defendant was the father of the first child which was born and had died about a year and a half previously. That matter came on for hearing and was disposed of by the magistrate in favour of the defendant. He states that it

was dismissed by me on the ground that there was no evidence of corrobora-

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tion nor evidence that the said Bertha Bonschowski the said informant was not a married woman.

This matter was not appealed against.

Shortly afterwards this suit was begun in the County Court under part II of the Act, sec. 34. The claim sued on related to the paternity and liability for both children. The claim as to the first child was practically identical with the claim disposed of by the magistrate in the defendant's favour above set forth.

As to the second child, the plaintiff swears that in this suit she makes no claim to any of the five items making up the $67 above referred to, but claims that the defendant is liable for other matters not settled in the matter before the magistrate.

The County Court Judge found for the plaintiff as to both children and this appeal raises the question as to the effect of charges laid before and the dispositions made by the magistrate of these matters.

Sec. 42 of the statute is as follows:—

42. This part shall not apply to any putative father who has fulfilled the terms of any order of filiation made against him in respect to the same illegitimate child under part I, or against whom any action has been brought under the Seduction Act.

(2) If the terms of any such order have not been fulfilled the Court, in giving judgment in an action under this part, shall take into consideration any payments made under such order.

(3) In any such action an order of filiation shall be made *primâ facie* evidence of the paternity of such child.

This section declares that where the mother has proceeded under the first part of the Act, and has procured an order and the putative father has complied with it or where some other person has brought an action of seduction against the father no action can be brought against him under part II of the Act.

Reading the section with the two sub-sections, I must hold that where an order has not been made against the putative father under the first part of the Act, or where one has been made and not complied with, an action can be brought against him under the second part of the Act.

There has been no order made against the defendant under the first part as to either child. It looked as if the proceedings before the magistrate as to the second child were in the nature of a settlement between the parties of all matters as to that birth, but the trial Judge apparently did not take that view of it.

Permitting a second action to be brought for the same cause of action where a judgment has already been obtained in another Court is contrary to ordinary rules in the administration of justice. Perhaps one of the reasons for this legislation was to give a remedy against the lands and other property of the putative father which could not be reached under the procedure prescribed by the first part of the Act.

I will not disturb the judgment entered in this cause.

The appeal is dismissed with costs.

CAMERON, J.A.:—I think we must conclude from the wording of sec. 42, and a review of the Act as a whole, that the Act does not contemplate two methods of procedure, by information and by action, and that proceedings by information form no bar to proceedings by an action except that an action does not lie against any putative father who has fulfilled the terms of an order made under part I or against whom an action is brought under the Seduction Act; but if the terms of such order under part I have not been wholly satisfied by payment then an action under part II lies only to the extent to which such order has not been satisfied by payment. No such order of filiation having been made in this case the dismissal of the information forms no bar to this action.

The defence that there was a final adjudication of this claim cannot stand as there was no order of filiation. The defence of accord and satisfaction is one that must be established by the defendant.

It seems to me that the evidence is all consistent with the theory that the $67 was paid by the defendant and received by the plaintiff in settlement of the distinct items set out in the memorandum and no other. If that payment was made in full settlement of all claims capable of being adjudicated upon before the magistrate, then it lay upon the defendant to establish an agreement to that effect. There is to my mind no evidence to warrant our finding such an agreement and this defence fails. No doubt that was the view taken by the trial Judge with reference to this matter, which is one of fact.

I think the appeal must be dismissed.

RICHARDS, PERDUE and HAGGART, JJ.A. concurred.

Appeal dismissed.

N. B.

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CARTER v. The STANDARD, Ltd.

New Brunswick Supreme Court, McKeown, J. December 3, 1915.

WRIT AND PROCESS (§ II B—25)—*Service on corporation—"Office"—Notice of libel action against newspaper—Service on reporter.*]—Application to stay an action of libel against a newspaper corporation on the ground that the notice required by sec. 4 of the Libel Act, C.S.N.B. 1903, ch. 136, had not been served.

J. B. M. Baxter, A.G., supported the application.

F. B. Carvell, K.C., *contra*.

MCKEOWN, J.:—The plaintiff is suing "The Standard, Limited," for libel and the cause is now on the docket of the St. John Circuit Court ready for trial. On August 9, 1915, a notice of action was given to Mr. A. W. Thorne, one of the reporters of the staff of "The Standard" newspaper, a journal published daily by the defendant, and in the columns of which the articles complained of appeared. There is no question as to the sufficiency of the notice in form nor as to the time it was served, but it is claimed that giving the notice to Mr. Thorne does not constitute service upon the defendant and that there has been no service upon defendant at all, because the place where the notice was delivered to Mr. Thorne was not the office of defendant. Sec. 4 of the Libel Act, C.S.N.B. 1903, ch. 136, says:—

> No action shall lie for a libel contained in any newspaper unless and until the plaintiff shall have given to the defendant notice in writing, distinctly specifying the language complained of, for at least 5 clear days in the case of a daily newspaper, and for at least 14 clear days in the case of a weekly or other newspaper, in order to give the defendant an opportunity to publish a full apology for such libel. The notice mentioned in this section may be served in the same manner as an ordinary summons.

Service of process upon a corporation is regulated by O. 9, r. 6, of the Supreme Court rules, whereby it is provided that service shall be good

> if made upon the mayor, warden, president or other head officer, or on the cashier, treasurer, manager, secretary, clerk or agent of such corporation, etc.

In my view a reporter of a daily newspaper is neither a clerk nor an agent of the corporation which publishes such paper in the sense contemplated by the Libel Act, and the sufficiency of the service in the present case cannot be upheld from that standpoint.

But plaintiff also claims that the service is good and sufficient by reason of a provision of the New Brunswick Joint Stock

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Companies Act, ch. 85, C.S.N.B. 1903, which regulates the mode in which service is to be made upon companies incorporated under its authority, as is the case of the present defendant. Two sections of that Act are involved in considering this phase of the matter. Sec. 79 of the Act says:—

> The company shall at all times have an office in the locality in which their chief place of business shall be, which shall be the legal domicile of the company in New Brunswick, and notice of the selection of that office and of any change therein, shall be advertised in the *Royal Gazette*, etc.

And sec. 80 provides that:—

> Any summons, notice, order or other process or document required to be served upon the company, may be served by leaving the same at the office so advertised as aforesaid, with any grown person in the employ of the company, or on the president or secretary of the company, etc.

The effect of these two sections is to permit service of process, etc., upon any grown person in the company's employ, provided such person is at the time of service at the office of the company; but service upon such person made elsewhere than at the company's office would not be effective, unless, of course, he were an officer upon whom service can be made anywhere—and I think the question as to the validity of the service in dispute here must depend on whether Mr. Thorne was at the office of the company at the time he was served. It is manifest that he was a grown person in the defendant's employ, and it is also clear, to me at least, that he is not such an officer or clerk of the company as could be served with process at any place he might happen to be.

From the affidavits used on the application it appears that at the time he was served, Mr. Thorne was in a room on the fourth floor of the building occupied by the defendant, which room is used as a library for the newspaper. The third floor of the building is occupied by persons employed in typesetting and in other mechanical work connected with the issue of the "Daily Standard," and on the second floor is the business office occupied by the manager and his staff, with none of whom Mr. Thorne has any connection except to receive his pay. The plaintiff argues that the entire building must be considered as the office of the defendant, or, at the very least, that the part thereof where Mr. Thorne was, at the time he received the notice, constituted or was a part of defendant's office to all intents and purposes and within the wording of the Act, and if plaintiff is right in such contention, his service is good and sufficient. On the

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other hand, it is claimed for the defendant that the office means the business office and not the whole buliding nor any part of it, except what is in actual occupation for office work where the manager and his staff conduct the company's business.

In giving a meaning to the term "office" I think it is proper to construe it in accordance with the ordinary popular use of such word, and to my mind there can be no mistake as to its significance. A man who comes into a building and asks to be shewn to the office is never misunderstood. Each employee knows where such visitor wants to go and whither to direct him. A person going to the defendant's office, if acquainted with the building, would never find his way to the library or to the composing room, but would seek the place occupied by the manager and his staff, and it is there, in my opinion, that the notice in this case should have been served under the circumstances. The section in question makes easy the way of the party seeking to effect service, once he finds his way to the office. Any grown person there is liable to be served, provided he is in the company's employ, and such service is good.

But the very breadth of the expression "any grown person" seems to me to make it imperative to strictly construe the words which indicate the locality in which such person must be at the time of the service. To hold that such service in any part of the building outside of the actual office is sufficient compliance with the Act would, I think, lead to consequences never contemplated. If the office be the whole building, then it would be sufficient to serve the notice on the man who tends the furnace, or upon the night watchman if in the building; and if the term "office" can be construed to mean two floors above the actual office, it should by parity of reasoning include two floors below, which, in this case, is the basement. There are business and manufacturing establishments in the city covering acres of land. In my judgment it would not be right to hold that a document necessary to be served upon a person at the office of such establishment was properly served by delivering it to a workman while employed some distance from the office, and who may never go near the office in his daily work and who might be wholly unaware of the effect and importance of such paper. The only proper and safe way to construe the statute, in my judgment, is to confine the meaning of the term "office" to what is ordinarily

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meant by that expression, *i.e.*, the place where the central management emanates and where the manager and his staff do their work.

It was contended by plaintiff's counsel that the question of the sufficiency of the service of this notice and as to whether defendant was served with such notice is for the jury, and consequently the action should not be summarily stayed or dismissed in an application of this kind. I agree that in many conceivable cases the question of notice is for the jury, but when the facts are all admitted and the whole question is "what is the legal effect or result of such facts?" then if it appear that no notice at all was given, the defendant is entitled to claim the benefit of the statute until such notice is given and the action should not be allowed to proceed, for the Act unequivocally says that "no action shall lie until such notice is given." If such suit cannot be brought, I think it is open to a Judge of the Court to exercise his prerogative to supervise and suppress actions which are contrary to law. The reasoning of the present Chief Justice in the case of *Empire Cream Separator Co.* v. *The Maritime Dairy Co.* (1907) 38 N.B.R. 309, seems to me applicable here: See the judgment of McLeod, J., at p. 313.

The present application is to stay the action, but in my view the proper order would be to set aside the writ and all proceedings in the present suit so as to leave it open to plaintiff to give the statutory notice and re-commence his suit if he desires to do so. I therefore order that the writ and all proceedings in this action on the part of the plaintiff be set aside. *Writ set aside.*

AMHERST PIANOS, Ltd. v. ADNEY.

New Brunswick Supreme Court, Appeal Division, White, Crocket, and Grimmer, JJ. February 18, 1916.

JUDGMENT (§ I E 4—40)—*Non obstante veredicto—Verdict on counterclaim in replevin action previously adjudicated.*]—Appeal from the judgment of McKeown, J., refusing to set aside judgment for plaintiff, entered *non obstante veredicto*, in a replevin action. Affirmed.

W. P. Jones, K.C., for plaintiff.

Defendant, in person.

The judgment of the Court was delivered by

GRIMMER, J.:—This is an action of replevin, which was tried

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before McKeown, J., and a jury at the Victoria County Circuit in September, 1915.

The jury found a general verdict for the defendant for the sum of $300. On motion on behalf of the plaintiff company, the Court, notwithstanding the verdict, directed judgment to be entered for the plaintiff for the recovery of the piano in question.

The defendant in person moved to set aside the verdict for the plaintiff, and to enter a verdict for the defendant, or for a new trial. The facts, shortly stated, are that the plaintiff, a corporation aggregate, entered into a contract with the defendant, a music teacher, under which she was to handle, advertise and sell upon commission the company's pianos, which were to be placed under her control, for this purpose, in certain parts of this province. The company was to pay freight and cartage on the pianos shipped the defendant, and a commission of 10 per cent. on instruments of which a satisfactory sale was made by or through her. The defendant was to do the advertising without charge against the company. It was also provided the agreement could be terminated at any time by notice by either party to the other, and that upon the termination of the contract, or when requested, the defendant would deliver to the plaintiff any goods of theirs she might have in her possession, and give them her assistance and help to re-possess any goods belonging to them. Also in cases of sales turning out badly, or when pianos had to be re-possessed, the commission, if paid, should be charged back to the defendant. The contract was dated May 13, 1913.

Acting upon the contract, the plaintiff shipped pianos to the defendant at McAdam Junction, Woodstock, Hartland and Florenceville, all in this province, and in her assigned territory. In the summer or fall of 1914, the plaintiff became dissatisfied and took steps to terminate the contract. It was finally terminated by notice to the defendant on December 1, 1914, and the plaintiff's authorized agent demanded possession of the pianos in her territory and under her control. The defendant refused to deliver a piano known as style 10, mahogany, which she had at Andover, in the county of Victoria, and this suit was brought to recover the same. The writ was issued on December 4, and the defendant, by her solicitor, entered an appearance and filed a statement of defence and counterclaim. Upon the trial it was

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proved on behalf of the plaintiff that a suit for the recovery of two pianos had been tried between the parties hereto, in the Carleton County Circuit Court, in the preceding month of April, in which the defendant had also counterclaimed against the plaintiff. The following judgment was at that time delivered by the Court:—

By consent of the parties I find that the plaintiff is entitled to the two pianos mentioned in the statement of claim, and a verdict is accordingly entered for the plaintiff without damages and without costs. Pars. 1, 2 and 3 of the defendant's counterclaim are dismissed with costs. On par. 4 of the counterclaim I find a verdict for the defendant for the sum of $150 without costs, and direct the entering of the above on the minutes.

The amount of this judgment was afterwards paid to and received by the defendant, as it was claimed by the plaintiff, in full satisfaction of all her claims against them.

The defendant, who appeared in person upon this trial and conducted her own case, did not supply any evidence to support her counterclaim, nor did she give any evidence on her own behalf, nor shew in any way that the company was indebted to her under the contract, nor that she had a right to the possession of the piano for the recovery of which this suit was brought. In his charge the learned Judge, speaking of the counterclaim, said:—

I may say to you, gentlemen, as you have heard from Mr. Jones, this same counterclaim was put forward in another suit which was brought by the same plaintiff against the same defendant: that is to say Mrs. Adney has already entered in Court and pressed against the plaintiff the very things which are set out in this counterclaim here. Having brought it forward in another suit it is not open to her to retry it again, and therefore it is my duty to say to you there is nothing for you to consider at all.

The facts in respect to the counterclaim are so plain, and shew the nature of its origin and intent so clearly, that no one who examines them can doubt that the whole was a trick and contrivance on the part of the defendant, to enable her to obtain damages to which she was not entitled, or perhaps by putting the same forward to so influence the minds of the jury that they might give her the possession of the piano. The subterfuge was so apparent, however, that, upon evidence being furnished of the counterclaim having been used in a previous suit to the advantage of the defendant, she did not care or dare to urge it in this suit, and so gave no evidence to support it, but, on the contrary, entirely dropped it. The Judge, having reviewed the facts presented to the jury on the trial, further said:—

It is my duty to say to you that the plaintiff has connected up the links of

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proof which it was necessary for him to do to entitle him to the piano, and you can bring in a general verdict for the plaintiff. There is no evidence which I could point out, upon which you could base a verdict for the defendant.

Upon this charge the jury found as follows:—"This jury unanimously agree to a verdict in favour of the defendant in the sum of $300."

The Judge thereupon, on motion of counsel for the plaintiff, ordered as follows:—

Notwithstanding the verdict of the jury, I direct that judgment be entered for the plaintiff for the recovery of the piano in question, and also for the plaintiff in respect of defendant's counterclaim, with costs of suit, with leave reserved for the defendant to move in the Court above to have a verdict entered for her for the sum of three hundred dollars or for whatever sum the Court above might think she should be entitled to.

Under any circumstances, the verdict of the jury is perverse, and if the Judge had directed a verdict to be entered for the defendant, this Court, on motion, would have set the same aside and entered a verdict for the plaintiff, and, while the jury might have been sent back to the jury room and directed to find a verdict according to the instructions of the Court, it was proper and right the learned Judge should allow the motion and direct the verdict to be entered for the plaintiff, *non obstante veredicto*.

The motion must be dismissed with costs. *Motion refused.*

DALHOUSIE LUMBER CO. v. WALKER.

New Brunswick Supreme Court, Appeal Division, White, Crocket and Grimmer, JJ. February 18, 1916.

REPLEVIN (§ II A—20)—*Sufficiency of affidavit—Means of knowledge of agent of corporation—Omission of word "Limited."*]—Case referred by Landry, C.J.K.B., on his order *nisi* upon a motion to set aside a seizure under a writ of replevin.

A. T. LeBlanc, for defendant.

J. J. F. Winslow, for plaintiff.

The judgment of the Court was delivered by

GRIMMER, J.:—This is an action of replevin, which was commenced by writ of summons issued July 19 last, and served upon the defendant the same day, together with the affidavit of one William H. Priest, upon which the writ was based.

The defendant, by his solicitor, entered an appearance to the suit on July 19, and the said writ and affidavit were duly filed on July 26 last past. Afterwards a summons for directions was taken out, and an order made on August 17. On August

19 a summons was granted by Landry, C.J., of the K.B. Division, for the purpose of setting aside the seizure and replevin of the logs, etc., which was made returnable on August 31, and upon the hearing was referred by the Chief Justice to this Court.

The grounds upon which the summons was granted are as follows:—

1. The affidavit of William H. Priest on which seizure is based does not comply with O. 63 and amendments. 2. Said affidavit does not shew that said William H. Priest made affidavit on behalf of the plaintiff. 3. Said affidavit does not shew deponent had knowledge of facts sworn to. 4. Said affidavit does not shew W. H. Priest had authority to make same. 5. The affidavit does not disclose that William H. Priest is the agent of the plaintiff. 6. The said affidavit does not shew deponent's means of knowledge of facts deposed to. 7. The action does not purport to be brought for the recovery of any personal property. 8. The action does not purport to be brought for the recovery of any personal property claiming that such property was "unlawfully taken, or is unlawfully detained." 9. The affidavit of the defendant clearly shews that the said William H. Priest, *de facto*, had no knowledge of the facts mentioned in his affidavit. 10. The affidavit does not state that the plaintiff claims the property. 11. The affidavit does not state that the plaintiff has the right to the possession of the property seized, it stating "that the Dalhousie Lumber Company has" and not "The Dalhousie Lumber Company, Limited," 12. The affidavit does not shew that the plaintiff is an incorporated company.

So far as these grounds except numbers 3, 6, and 11 are concerned, I do not think they merit much consideration.

O. 63, r. 1, provides that no writ of replevin shall be issued, but that an action brought for the recovery of any personal property, and claiming that such property was unlawfully taken, or is unlawfully detained, the plaintiff, or some person on behalf of the plaintiff having knowledge of the facts, may at the time of, or at any time after, the issue of the writ of summons, make an affidavit, which may be in the form in the appendix K, No. 53, or to the like effect, therein stating: (*a*) That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof and that it is unjustly detained from

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him, and describing the property, and (*b*) The value thereof to the best of his belief.

The affidavit which was served with the writ is properly entitled in the Court and cause, therein describing the plaintiff as "The Dalhousie Lumber Company, Limited," and is made by a person who deposes he is the resident manager of "The Dalhousie Lumber Company" and has a personal knowledge of the matters desposed to.

This, I think, is sufficient to comply with the rule. In *Halifax Banking Co.* v. *Smith*, 25 N.B.R. 610, an affidavit to hold the bail was made by an agent. It was sought to set the recognizance of bail aside on the ground, among others, that the affidavit having been made by an agent, should have shewn his means of knowledge of the defendant's indebtedness. The Court held (1) That it was not necessary the agent should state his means of knowing the existing of the debt. (2) That without stating the suit was brought by his direction the affidavit did not sufficiently negative that the arrest was made for the purpose of vexing or harrassing the debtor, as required by Con. Stat., ch. 38. That the omission to make such a statement in the affidavit is an irregularity only and is waived by putting in special bail, if the bail might have known of the irregularity by examining the affidavit in the clerk's office. In this case the manager of the company makes the affidavit with, as he states, a personal knowledge of the matters deposed to, and that the company has the right to the possession of the goods. Under the authority quoted above this affidavit sufficiently states it was made on behalf of the plaintiff, and it is not necessary the deponent should state more fully than he has done his means of knowledge of the facts.

As to the eleventh ground, the omission to use the word "limited" after the company name in the body of the affidavit, is an irregularity only and created no difficulty for the defendant, as it is not set up in his affidavit, nor is it claimed that he was in any way misled or deceived by the omission, as to the nature or import of the action, nor the personality of the plaintiff, and he had every opportunity to know of the irregularity by examining the affidavit which was served with the writ of summons.

Unless the affidavit is to be treated as a nullity, this motion

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must be refused. Admitting that the omission to use the word "limited" in the body of the affidavit is an irregularity, it does not by any means follow that it renders it void and makes it a complete nullity, and as no apparent trouble or difficulty was caused the defendant in this respect, and as by entering an appearance after having an opportunity of knowing the contents of the writ and affidavit, he identified himself with the action, I think it is now too late to object that the affidavit is insufficient, or is a nullity. There are cases which hold that a man cannot waive an irregularity if he does not know of it, but the rule is that when he does know of it he must apply promptly. This means that he is bound to come promptly after he knows of the proceeding in which the irregularity exists, and not after he knows of the irregularity itself. A man is bound to know of every proceeding taken against him and if there is an error in it, he ought to ascertain that error; he cannot be heard to say that he did not know of it: *Esdaile* v. *Davis* (1838), 6 Dowl, 465.

The case of *Muirhead* v. *Arbo* (1876), 3 Pug. 283, was cited on the argument in support of the application on the ground of the insufficiency of the affidavit, in which it was held, that if the affidavit (for attachment) was made by an agent of the plaintiff, it should shew that he had the general management of their business, and was fully acquainted with the facts. But as pointed out in *Halifax Banking Co.* v. *Smith, supra,* there is one material difference between that case and this. The plaintiff here is a corporation aggregate and cannot make an affidavit, and therefore when an affidavit is required it must be made by an agent as was done in this case, and as before stated it is not necessary he should shew his means of knowledge of the facts.

In view of all the circumstances surrounding this case as presented in the affidavits before the Court, I am unable to hold the affidavit for the seizure is a nullity, but I am of the opinion the omission to use the word "limited" in the body thereof is an irregularity which did not occasion or create any difficulty for the defendant, and is a mere technicality which does not deserve and should not be given serious consideration.

I think the motion should be refused with costs.

Motion refused.

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GEORGE v. LANG.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. March 13, 1916.

MORATORIUM (§ I—1)—*Mortgage—Mortgagors and Purchasers Relief Act—Exception as to Interest—Onus.*]—Appeal by the plaintiff from an order of Clute, J., in Chambers, setting aside the writ of summons and dismissing the action, which was brought (without the leave of the Court) to enforce by foreclosure a mortgage made before August 4, 1914.

The mortgage-deed contained these provisions:—

"The said mortgagors, for themselves, their heirs, executors, administrators, and assigns, covenant with the said mortgagee, his executors, administrators, and assigns, that they will keep the said lands and buildings and improvements thereon in good condition and repair according to the nature and description hereof respectively; and that the mortgagee, his executors, administrators, and assigns, may, whenever he or they deem necessary, by his or their surveyor or agent, enter upon and inspect the said mortgaged lands, and the reasonable cost of such inspection shall be added to the mortgage-debt; and that, if the mortgagors or those claiming under them neglect to keep the said premises in good condition and repair or commit any act of waste on the said lands or *make default as to any of the covenants or provisoes herein contained*, the principal hereby secured shall, at the option of

The following provisions of the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22 (O.), are applicable to the case in hand:—

Sec. 2.—(1) No person shall:—

(*a*) take or continue proceedings by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of, any judgment or order of any Court, whether entered or made before or after the passing of this Act, for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the fourth day of August, 1914; * * * * * * *

except by leave of a Judge granted upon application as hereinafter provided.

Sec. 4.—(3) Where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor, his assignee, or personal representative shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same as if this Act had not been passed, but where such interest, rent, taxes or other disbursements are paid into court or tendered to the mortgagee, vendor, assignee or personal representative he shall not continue any proceedings already commenced by him without the order required by section 2 or by section 3, as the case may be.

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the mortagee, his executors, administrators, or assigns, forthwith become due and payable; and, in default of payment of same with interest, as in the case of payment before maturity, the powers of entering upon and leasing or selling hereby given may be exercised forthwith; and the mortgagee, his executors, administrators, or assigns, may make such repairs as he or they deem necessary, and the cost thereof shall be a charge upon the land prior to all claims thereon subsequent to these presents."

"Provided that the mortgagee may distrain for arrears of interest. Provided that, in default of the payment of the interest hereby secured, the principal hereby secured shall become payable."

Frank Arnoldi, K.C., for appellant.

A. J. Reid, K.C., for defendants the Glenlavon Land Co.

MEREDITH, C.J.C.P.:—I think the Judge below was quite right in dismissing this action. It seems to me to be brought in the teeth of the Mortgagors and Purchasers Relief Act, 1915. The Act left it open to mortagees to enforce payment of the incidentals of a mortgage, the interest, taxes, and so forth; but not to enforce, by action, payment of the principal without the leave of a Judge. "Interest" means the interest which the mortgagor has covenanted to pay. If he pay that, he is not to be prosecuted in any action upon the mortgage for principal money, without the leave mentioned. It is against the spirit, as well as the letter, of the Act to commence an action of this kind without such leave. The Act takes away the right of action for principal money due on the mortgage, then makes an exception of the interest etc. The onus is upon the plaintiff of shewing that his claim comes within the exception. In my judgment, the exception applies only to interest contracted, in the ordinary manner, to be paid. I do not think it applies to interest such as Mr. Arnoldi contends is payable *de die in diem* under the clause of the mortgage relied upon by him. Nor do I think that the case comes within the provisions of that clause. There are the usual clauses in the mortgage, dealing with payment of principal and interest, one of which provides that, in default of the payment of interest, the principal secured shall become payable. I decline to give to the obscure words of this clause an effect differing from the plain effect of the words of the mortgage dealing directly and solely with such

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payments. They may very well be applicable only to the default dealt with in it.

MASTEN, J.:—I agree, and will add only one word. If the contention of Mr. Arnoldi on behalf of the plaintiff were maintained, it would practically nullify the effect of the statute whenever the mortgage contained a covenant to pay interest on overdue principal. Most well-drawn mortgages contain such a covenant, and this customary form was well known to exist when the statute was passed. The statute ought not to be construed in such a way as to nullify its effect. If the construction contended for were maintained, the result would be that, whenever principal falls due (for which no action can be instituted without leave), the mortgagee only has to wait until the close of the next day, when one day's interest would fall due and be payable under the covenant, and he could launch his action without leave, because that interest was due under a covenant.

For this reason, my opinion is, that the statute is to be construed as relating only to the regular gales of interest falling due at the periods mentioned in the mortgage.

RIDDELL and LENNOX, JJ., concurred.

Appeal dismissed with costs.

Re GEORGE and LANG.

Ontario Supreme Court, Middleton, J. March 30, 1916.

APPEAL (§ I A—1)—*From discretionary orders under Moratorium Act—Mortgagors and Purchasers Relief Act.*]—Application by John K. George, mortgagee, under Rule 507, for leave to appeal to a Divisional Court of the Appellate Division from an order of MULOCK, C.J.Ex., in Chambers, dated the 28th March, 1915, dismissing a motion by the applicant, under the Mortgagors and Purchasers Relief Act, 1915, for leave to bring an action upon a mortgage made before the 4th August, 1914, by Herman H. Lang, John C. Stevenson, and William Meen, to the applicant, for $3,000 principal money past due upon the mortgage and a larger sum due by acceleration.

The application was made after judgment had been given in *George* v. *Lang*, 30 D.L.R. 502, 36 O.L.R. 180, the mortgage being the same one that was sought to be enforced in that action.

Frank Arnoldi, K.C., for the applicant.

R. H. Parmenter, for the mortgagors, the respondents.

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MIDDLETON, J.:—Motion for leave to appeal from an order of the Chief Justice of the Exchequer dismissing a motion under the Moratorium Act* for leave to proceed for some $3,000 principal money past due upon a mortgage and a larger sum due by acceleration.

The motion is, by the Act, to be upon originating notice and returnable in Chambers; and, as it does not finally dispose of the matter, there cannot be an appeal save by leave.

But I am of opinion that the statute does not contemplate any appeal, and my view has been confirmed by several of my brethren to whom I have spoken.

The statute makes the leave of a Judge a condition precedent to the bringing of an action: upon the application for leave the Judge is given certain powers to be exercised "in his absolute discretion" and "subject to such conditions as he thinks fit."

The scheme of the Act is to intrust to the Judge, in this time of financial stress, the right to interfere with the contractual rights of the parties and to give to him an "absolute discretion" in so doing; and, in the absence of any provision in the Act itself giving the right of appeal, I think I should not be warranted in importing the provisions of Rule 507,† simply because the motion

*The Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22 (O.) Section 2 provides: "(1) No person shall,—(*a*) take or continue proceedings by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of any judgment or order of any Court . . . for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the 4th day of August, 1914 . . . except by leave of a Judge upon application as hereinafter provided.

"(2) The application shall be upon originating notice in accordance with the practice of the Supreme Court . . . . ."

Section 5 provides: "(1) On any application the Judge may grant the leave applied for, or if he is of opinion that time should be given to the person liable to make any payment on the ground that he is unable immediately to make the same by reason of circumstances attributable directly or indirectly to the present war, the Judge may, in his absolute discretion, after considering all the circumstances of the case and the position of all parties, by order refuse to permit the exercise of any right or remedy, or may stay execution . . . for such time and subject to such conditions as he thinks fit."

†"507. (1) A person affected by an order or judgment pronounced by a Judge in Chambers which finally disposes of the whole or part of the action or matter may appeal therefrom to a Divisional Court without leave.

"(2) Except in cases in which a right of appeal is specially conferred no appeal shall lie from any judgment or order of a Judge in Chambers which does not finally dispose of the whole or part of the action or matter, unless

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is authorised to be made on an "originating notice." The relief intended to be given to unfortunate mortgagors would be illusory indeed if the only effect was a preliminary hearing subject to the expense of an appeal to the Appellate Division.

Even if there is the right of appeal, the appellate Court would not be likely to interfere—an "absolute discretion" cannot be reviewed merely by the suggestion that the appellate Court would not have made the same order. This has been well established by many cases under enactments relating to costs, where a discretion is given to a Judge or taxing officer. There is no warrant for substituting, for the good judgment and discretion of the Judge or officer applied to, the good judgment and discretion of the appellate Court.

If Rule 507 does apply, there does not appear to be anything in the case to bring it within the provisions of that Rule.

In the exercise of my "absolute discretion," I give no costs of this motion.

TOWNSHIP OF EUPHRASIA v. TOWNSHIP OF ST. VINCENT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. March 17, 1916.

HIGHWAYS (§ III—100)—*Boundary road between townships—Deviation—Liability for maintenance.*]—Appeal from the judgment of Clute, J., in favour of plaintiff, in an action for a declaration of the opening of a deviation road and to establish the defendant township corporation's liability for maintenance and repair. Reversed.

G. A'berry, for appellants.

W. E. Raney, K.C. and *W. D. Henry*, for plaintiffs, respondents.

MEREDITH, C.J.C.P.:—At the close of the argument, it is said, on behalf of the defendants, that this litigation is carried on, on their part, to avoid only a judgment that would

by leave of a Judge other than the Judge by whom the judgment or order was pronounced.

"(3) Such leave shall not be given unless:—

"(a) There are conflicting decisions . . .

"(b) There appears to the Judge to be good reason to doubt the correctness of the judgment or order . . . and the appeal would involve matters of such importance that in the opinion of the Judge leave to appeal should be given."

make the road in question permanently part of the town-line; whilst, in the plaintiffs' behalf, it is said that all they now seek is a judgment which will make it part of the town-line only until the original allowance is opened up; and so it is difficult to understand why there should have been any litigation upon the subject, or why it should be continued. It seems reasonable that the place in question should be treated as if it were part of the town-line, by the parties to this action, so long as the unopened part of the original allowance in question remains unopened; because, unquestionably, this road takes largely the traffic that would go over the unopened part of the town-line if it were open; whilst it would be very unreasonable to say that this road for all time to come must be deemed part of the town-line.

Difficulties arise whichever way the question of permanency or not is looked at; difficulties which must arise so long as there is no separate provision for each case. There may be cases in which the deviation must be permanent, in the sense of a permanent change of location; but ordinarily the deviation is perhaps of a more or less temporary character, as in this case, in which no one could ever have thought that the opening of the original allowance would be always practically impossible; it must always have been evident that some day it should be opened, and the owners of lots abutting upon it, as well as the travelling public, benefited. And that day seems to have come; at all events the defendants have made efforts to open, and are desirous of opening, it.

The 468th section of the Municipal Act provides for the determination by the county council of the character of the work to be done in opening, repairing, or maintaining a township boundary-line, or the proportions in which the cost of the work is to be borne, when the townships concerned fail to agree as to these things; and it also provides for the ratepayers interested applying to the county council to compel the townships to open it, if they are unwilling to do so; but it may be that, if the deviation is a permanent substitution of one place for the other, the original allowance part ceases to be a town-line; and, if so, there does not seem to be any method by which it can be opened and made a public road; for which township would have jurisdiction over it? And both could, only if a town-line.

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The result seems to be this, that, if the legislation refers to a permanent change of locality, then the road in question cannot be a deviation; for no one ever had any such intention; it is out of the question: whilst, if the legislation embraces temporary deviation, there might be much to be said in favour of the finding of the learned trial Judge that the case is really one of a deviation; but there is that which is conclusive against the plaintiffs: that time has come to an end; within their rights the defendants insist upon opening the original allowance and ending the temporary deviation. There is not power to prevent that; all that can be done is to require the county council to determine as to the character of the work to be done, or as to the proportion of the cost of the work to be borne, by each township, if they cannot agree between themselves as to such things.

The result works no injustice to the plaintiffs. For many years they have gone on improving and repairing the road as if it were entirely under their control, and they alone bound to keep it in repair; no claim of any character having ever been made, until recently, upon the defendants, in respect of it.

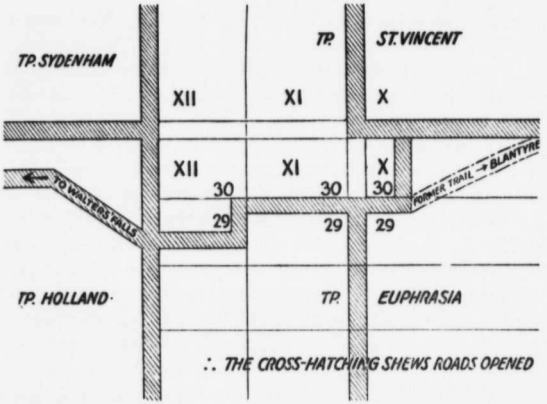
There is a bridge upon the road which now needs rebuilding, and the need for the payment of a considerable sum of money for that purpose has caused some research for a means of putting the burden on other shoulders; and the way grasped at was to make it in law part of the town-line, the bridges of which the county must maintain; hence all this litigation. The burden of the bridge-building, and of opening and maintaining the original allowance as the town-line road, may be unexpected and heavy, but the plaintiffs cannot esacpe it in the way they have sought in this action.

The appeal must be allowed; and the action must be dismissed.

LENNOX, J.:—I agree.

RIDDELL, J.:—An appeal from the judgment of Mr. Justice Clute, by the defendants the Corporation of the Township of St. Vincent.

Of the *locus in quo* I give a rough plan, sufficiently accurate for the purposes of this appeal.



In the county of Grey, the townships of Euphrasia, St. Vincent, Sydenham, and Holland, corner south-east, north-east, north-west, and south-west respectively, St. Vincent being north of Euphrasia. That part of the town-line between Euphrasia and St. Vincent from the four corners at the west, east past concessions XII. and XI., has never been opened; in front of concession X. the town-line is open; about half way (east and west) of concession X. of Euphrasia runs a road south through lot 30; then it turns and runs at right angles along and on the northern part of lot 29 west through concession XI., then at right angles a short distance south through the north part of lot 29 in concession XI. (and perhaps XII.), then at right angles west through lot 29 of concession XII. to the town-line of Euphrasia and Holland. This is the road concerning which this litigation is brought—but, after crossing the town-line of Euphrasia and Holland, the road continues in a north-westerly direction through Holland to a hamlet, Walters' Falls.

The Township of Euphrasia have maintained the road (within its limits), and claim in this action that it is a "deviation" for the town-line between it and St. Vincent, and that St. Vincent should assist in maintaining it. The learned Judge has given effect to this claim; and St. Vincent now appeals.

Euphrasia was surveyed in 1826, St. Vincent in 1835, Sydenham in 1835, and Holland in 1846; no trace appears of any

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road in the position of the present, in the filed notes or plans in the Crown Lands Department.

About 1858, John Walters built a mill, a saw-mill, grist-mill, and carding-mill, on a small stream on lot 30, con. X., Euphrasia, but left it after two years and went to what is now Walters' Falls, in Holland. There, on the 17th September, 1860, he received a patent of the south half of lot 1 and the whole of lot 2, con. XII. of Holland. He built a mill at Walters' Falls about 1860, and of course desired an easy way of access thereto for intending customers. There was a trail through the bush not very different topographically from the disputed highway, and running from what is now Walters' Falls to Blantyre, a place a short distance north-east of the turn (west of lot 30, con. XII., Euphrasia) of the present road—at Blantyre was a store to which the settlers resorted. This trail seems to have existed till 1865: it is not at all unlikely that this trail was used because the town-line was not open; but no one who is at all acquainted with the customs of a newly settled part of Upper Canada would venture to say so positively. At all events it does not appear to have been laid out by any municipal authority or to have been made in any way a township road, remaining a bush trail, "a trail through the bush —no established road."

Some time about 1865, John Walters had the present road surveyed or blazed out by Squire Carr, gave a great deal of land for it, and practically built the road. So say the plaintiffs' own witnesses—and the road was known by some at least as "the Walters road." A witness for the defence says that Walters bought land on purpose to give people a way through to his mill, and it is certain that he gave a connecting road in Holland.

From all the evidence, it is reasonably plain that Walters, wanting custom for his mill, made, at his own expense, a better road at about the same place as the old trail, on land mostly, if not wholly, given by himself—without reference to township or other authority. He selected the best available route and approximately the old established way—it is not at all unlikely that he would not have gone to all this expense and trouble had the town-line or other suitable road been open.

At some time, precisely when does not appear, the plaintiffs adopted that part of the road within the borders of their township as a township road, and have had statute labour done on it, re-

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paired it, laid it in part with road metal, &c., and made a reasonably good road of it—much better than many even in older settlements.

It would cost a considerable sum, from $2,500 to $4,000, to open the town-line, and even then there would be divergences from the original road-allowance, of some extent longitudinally, if trifling laterally.

The question whether this can be called a deviation of the town-line depends on the wording of the statute 3 & 4 Geo. V. ch. 43, sec. 458—R.S.O. 1914, ch. 192, sec. 458.

This section first appears in 1885, 48 Vict. ch. 39, sec. 22, introducing a new section, 535, in place of the former sec. 535 of (1883) 46 Vict. ch. 18. This referred solely to the duty of county councils to erect and maintain bridges over rivers forming or crossing boundaries between two municipalities—and (sub-sec. (2)) "a road which lies wholly or partly between two municipalities shall be regarded as a boundary-line within the meaning of this section, although such road may deviate so that it is in some place or places wholly within one of such municipalities, and a bridge built over a river crossing such road where it deviates as aforesaid shall be held to be a bridge over a river crossing a boundary-line within the meaning of *this section*," i.e., solely for the purpose of defining the duty of the county. This next appears (unchanged) as R.S.O. 1887, ch. 184, sec. 535 (1), (2); again with some slight changes in R.S.O. 1897, ch. 223, sec. 617(2); and then 3 Edw. VII. ch. 18, sec. 131, introduced the proviso, "provided that such deviation is only for the purpose of getting a good line of road."

The change made by 3 & 4 Geo. V. ch. 43, sec. 458, is substantial: (1) the provision is made "for the purposes of the Act," and no longer "within the meaning of this section;" and (2) it is no longer "a road which lies wholly or in part between two municipalities" where the *deviation is*, to get a better line of road, which is provided for; but only "where, on account of physical difficulties or obstructions existing on a boundary-line . . . and in order to obtain a better line of road, a road has been heretofore or is hereafter laid out and opened which does not follow the course of such boundary-line throughout," does the section apply. The law is now more inclusive in that the provision is effective for all purposes of the Act and not simply of the section;

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less inclusive in that only such roads are provided for as have been or may be (*a*) "laid out and opened" (*b*) on account of physical difficulties or obstructions and (*c*) in order to obtain a better line of road. Formerly it was wholly immaterial why the "deviation" came into existence so long as the road "lies . . . between two municipalities" and the deviation "is . . . within one of the municipalities" "only for the purpose of getting a good line of road"—and that is why so little is said or made of the origin of the road in *Township of Fitzroy* v. *County of Carleton*, 9 O.L.R. 686, although not wholly disregarded (see p. 692)—and why it is "the present condition of the deviation, and not its past history or origin," which "is to be regarded," because "the getting of a good line of road seems *now* to be the sole purpose of this deviation" (p. 694). At that time there must have "come a time when it is no longer a question of origin" (p. 697)—now the origin is all-important.

So too in *County of Wentworth* v. *Township of West Flamborough*, 3 D.L.R. 479, "its origin and history are of less consequence that the facts existing when the question arises, when the main inquiry must be, is the road now a public highway, and is it in fact serving the public purposes which a road upon the original road allowance would have served?" (p. 481).

We are untrammelled by authority and we have no assistance from decisions of the Courts on the interpretation of the present section.

It seems to me that the section necessarily implies that some competent authority must be laying out and opening a road intended to follow in the main the course of the boundary-line; that, in the course of such laying out and opening, the road "does not follow the course of the boundary-line throughout," but, "physical difficulties or obstructions" appearing on part of the boundary-line, "in order to obtain a better line of road," it is laid out and opened so as to deviate, so "as to lie wholly within one of the municipalities." "It is *the road* that may deviate . . that is to say, the road that was intended to run on the line may (accidentally by reason of inaccurate surveying, or) purposely in order to shun some obstacle (or for some other cause), get off the line:" *per* Patterson, J.,* quoted by Boyd, C., in *County of Went-*

* In the Supreme Court of Canada, *County of Victoria* v. *County of Peterborough* (1889), Cameron's Supreme Court Cases 608.

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worth v. *Township of West Flamborough*, 23 O.L.R. 583, at p. 589 (the words in parenthesis are inapplicable here).

Looking now at the all-important matter, i.e., how the road was "laid out and opened," it is plain that it was not "laid out and opened" with the intention of following the boundary-line even in part; that it did not and was not intended "in some place or places" to deviate from the boundary-line. It was not a deviation, whatever else might be said for it, even assuming that the adoption of the road by the township could be considered a ratification of Walters' actions.

I pay no attention to the other questions which were raised, thinking these considerations sufficient for the disposal of the case.

The appeal should be allowed and the action dismissed, both with costs.

MASTEN, J.:—I agree. *Appeal allowed.*

REX ex rel STEPHENSON v. HUNT.

Ontario Supreme Court, Riddell, J. March 31, 1916.

ELECTIONS (§ IV—90)—*Proceedings to unseat alderman for disqualifications—Time.*]—Motion by the relator for a mandatory order directing the Senior Judge of the County Court of the County of Middlesex to grant a fiat under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, for the service of a notice of motion for an order declaring that the respondent "hath unjustly usurped and still doth usurp the office of Alderman for the City of London."

The County Court Judge granted a fiat when first applied to by the same relator; but, by mistake, the notice of motion was not served in time; and, when the motion came on, the Judge dismissed it.

The relator made a second application for a fiat, which was refused by the learned County Court Judge, who gave the following reasons for judgment:—

MACBETH, Co. C.J.:—In *Rex ex rel. Morton* v. *Roberts* 4 D.L.R. 278, 26 O.L.R. 263, 273, Riddell, J. points out that 3 Edw. VII. ch. 18, sec. 32, made a most important change. Before that time it was only the validity of the election which could be challenged in the statutory method—thereafter the right to hold a seat could be attacked in the same way.

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(The amendments introduced by 3 Edw. VII. ch. 18 are carried into the Consolidated Municipal Act of 1903, passed in the same session.)

By sec. 33 of 3 Edw. VII. ch. 18, R.S.O. 1897, ch. 223, sec. 220, is amended by inserting therein, after the word "councillor" in the 8th line, "or in case at any time the relator shews by affidavit to such Judge reasonable ground for supposing that any member of the council . . . has forfeited his seat or has become disqualified since his election."

And the section so amended becomes sec. 220 of the Municipal Act of 1903, the effect being as follows: In case, within six weeks after an election, or one month after acceptance of office by the person elected, the relator shews by affidavit to such Judge, reasonable ground for supposing that the election was not legal, or was not conducted according to law, or that the person declared elected was not duly elected, or for contesting the validity of the election of any mayor, etc., or in case at any time the relator shews by affidavit reasonable ground for supposing that a member of the council has forfeited his seat or become disqualified since his election, the Judge shall grant his fiat, etc.

To contest the validity of the election the relator must apply within six weeks or one month after the election.

An application may be made at any time to attack the right to the seat on the ground of forfeiture or disqualification since the election. By 7 Edw. VII. ch. 40, sec. 5, sub-sec. 1 of sec. 220 of the Consolidated Municipal Act, 1903, is amended by adding after the word "time" in the eighth line thereof the words "within six weeks after the facts come to the knowledge of" and in the ninth line the word "he" after the word relator. And the subsection so amended is now sub-sec. 1 of sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192.

In the case above cited, Riddell, J., held that by omitting to file a proper declaration of office an elected member of a council forfeited his right to hold his seat, and that proceedings to unseat him might be taken within six weeks after the relator knew of the defect in the declaration.

In the present case I am asked to grant a fiat to determine the right of Ansom M. Hunt to sit in the city council. It is alleged that he was at the time of his election and still is disqualified, as

being a salaried employee of the Western Fair Association, which has contractual relations with the city.

The time for contesting the validity of the election is past; and I am of opinion that I cannot now entertain any application to unseat the respondent, except on the ground that he has forfeited his seat or become disqualified *since his election*.

The relator deposes that he did not know before the 12th February last of certain facts which (it is alleged) rendered Mr. Hunt ineligible for election to the city council on the 1st January last, and still render him ineligible. The real question sought to be raised *is the validity of the respondent's election;* it is now too late to raise it. *There has been no change in his status since the election.*

The jurisdiction under sec. 161 *et seq.* is purely statutory.

It is not necessary for me to express any opinion as to whether, on the facts stated, there is reasonable ground to suppose that Mr. Hunt's connection with the Western Fair Association disqualified him from sitting in the city council.

J. M. McEvoy, for relator.

G. S. Gibbons, for respondent.

RIDDELL, J.:—An application was made on behalf of the relator, Stephenson, to His Honour the Judge of the County Court of the County of Middlesex, for a fiat under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, and the relator obtained a fiat which authorised him to serve a notice of motion asking "for an order declaring that Ansom M. Hunt, of the city of London, in the county of Middlesex, secretary of the Western Fair Association, hath unjustly usurped and still doth usurp the office of Alderman for the City of London, notwithstanding that the said Ansom M. Hunt has an interest in contracts by or with or through the Western Fair Association, which association has contracts with the Municipal Corporation of the City of London, and for an order declaring that the said relator hath an interest in the said election, and for such further or other order as may be deemed proper, upon the following among other grounds:—

"1. The said Ansom M. Hunt is and has been for some years past under contract with the Western Fair Association, the paid secretary and chief and almost sole paid administrative and executive officer of the said association, and is required by the by-laws of the said association to give his whole time to the work of the

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association, and the said Ansom M. Hunt is paid an annual salary of $1,700 or thereabouts for his services as such secretary.

"2. By statute, the Municipal Council of the City of London may grant money or land in aid of the said association, and may lend or grant aid by way of bonuses to the said association out of any moneys belonging to the said municipal corporation, and may effect such loan or grant such aid upon such terms and conditions as may be agreed upon between the said association and the council of the said municipal corporation.

"3. The municipal corporation annually contributes large sums of money, more or less according to the needs of the said association, of which the said municipal council is the judge, usually about $5,000 per annum, to enable the said association to carry on its fair, and the said secretary, with a committee of the board of the association, prepares the material shewing what are the needs of the association for the year.

"4. The said association has a contract with the said municipal corporation whereby the said municipal corporation contracts to give the said association a license to use and occupy a large part of the buildings and grounds in and upon which the said association carries on its business, which grounds are conveyed to and are now held by the Municipal Corporation of the City of London, upon certain terms and conditions set out in the said agreement, whereby, if the said association make default in the terms of the said license, the corporation may, if the municipal council see fit, acquire the interest of the said association upon payment of a certain sum of money, and whereby the said association has a right to have the said lands sold, and the said municipal corporation is to be repaid any moneys expended, and upon other terms and conditions set out in the said agreement and license and the by-laws of the said corporation dealing therewith; and, according to the terms of the said contracts, by-laws, licenses, and agreements, the said association has contracted and agreed to keep the buildings on the said lands in repair, and the question of the sufficiency of the repair is left to the decision of the city engineer or servant of the said municipal council; and, in default of sufficiency of repair according to the said contracts, licenses, and by-laws, the control of the said lands and buildings reverts back to the said corporation; and the said Ansom M. Hunt has an interest in all the said contracts and dealings of the said

association with the said municipal corporation by, with, or through the said association."

By some mistake the notice of motion was not served in time, and the motion was dismissed by the County Court Judge.

In no way discouraged, the relator again applied to His Honour for a fiat to serve a notice of motion for an order declaring (as before and in the same words) on grounds Nos. 1, 2, 3, the same as before; No. 6 the same as former No. 4; No. 4, "The said Ansom M. Hunt, as the relator now learns from the records of the City of London, has repeatedly, in his capacity as secretary of the Western Fair Association, appeared before the Council of the Municipal Corporation of the City of London requesting grants and assistance from the funds of the said city;" No 5, "It further appears as aforesaid that the said Council of the said City of London is this year raising $10,000 in debentures for the assistance of the said Western Fair Association."

It will be seen that the grounds of the applications are really only two: (1) the respondent is the secretary of the Western Fair Association; (2) the city has such relations with the Western Fair Association, by helping it with money, making contracts with it, etc., as to make it unlawful for the servants of the Western Fair Association to be members of the council of the city.

That the respondent is such servant is not denied; and much colour is given to the second contention by such cases as *Greville-Smith* v. *Tomlin*, [1911] 2 K.B. 9, read in connection with the legislation (1887) 50 Vict. ch. 89 (O.)*, the by-laws of the city, No. 2439 etc.

This application for a fiat was refused by His Honour; and an application was made before me for a mandatory order directing him to grant the fiat asked for. I declined to hear the application unless and until the respondent should be served with notice of it—that was done, and the matter has been argued before me with great candour and ability by both counsel.

The ground upon which the learned County Court Judge proceeds, if I rightly apprehend his written reasons, is that the alleged disqualification, if it exists at all, existed at the time of the election and of the first application—a judgment of my own, *Rex ex rel. Morton* v. *Roberts*, 4 D.L.R. 278, is cited as indicating

*An Act to Incorporate the Western Fair Association.

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that the statute cannot be applied in a case like this, except where there is a change in position after the election. I did not intend so to hold, and it seems to me that my language does not bear that interpretation.

That, however, in my view, is here of no moment—the relator must make his application "within six weeks after an election, or one month after the acceptance of office," unless the facts upon which he relies did not come to his knowledge until after the election, when he has six weeks after the facts came to his knowledge: R.S.O. 1914, ch. 192, sec. 162 (1). The "facts" are the "ground;" and, if the "facts" which form the real ground for the application are known at the time of the election, the time will not be extended simply because the relator afterwards becomes aware of facts which are mere evidence of such ground, mere evidentiary facts of no significance except as proving another fact or other facts.

The only new "facts" alleged in the second application are two: (No. 4) that the respondent has frequently appeared before the Council of London to solicit aid for his association; and (No. 5) that the city is going to give the association $10,000 this year.

As to No. 4, that simply is evidence to prove the relationship of the respondent to the Western Fair Association, already known, as appears from No. 1 above—and that he did what was to be expected of him in such relationship.

As to No. 5, that is simply saying that this year is no exception from the rule of the city annually contributing large sums of money—but that, instead of contributing about $5,000 as usual, the city this year will contribute $10,000. A contribution of $5,000 is as obnoxious to the statute as one of $10,000.

I cannot see that any new case is made out.

The impropriety, gross and palpable, of this secretary and chief officer of the Western Fair Association occupying a seat at the council-board of the city, under the circumstances, should be manifest to the most obtuse. But this relator is not *rectus in curiâ*.

I dismiss this motion; but it must be borne in mind that the dismissal does not in any way prevent an application by another relator, unless the respondent prevents it by vacating his seat.

There will be no costs.

Motion dismissed.

COLLERAN v. GREER.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. March 17, 1916.

NEW TRIAL (§ V B—40)—*Motions for, on appeal—Relief against default judgment—Insufficiency of proof of claim.*]—Appeal by the defendant Dunn from the judgment of the District Court of the District of Thunder Bay, in favour of the plaintiff, in an action to recover a balance of the price of goods sold to the defendant. The judgment was given in the absence of the appellant, and he asked to have it set aside and a new trial ordered.

J. H. Spence, for appellant.

The plaintiff was not represented.

The judgment of the Court was delivered by

MEREDITH, C.J.C.P.:—The only doubtful question in this case is the question whether this application could not have been made in Port Arthur as well as here; if so, there would be no justification for the greater expense and greater delay in making it here, in so plain a case as this.

The application is one to have a judgment at a trial—given in the absence of the applicant and now entered up formally—set aside and a new trial had between the parties; and so in olden days would have been a County Court motion in term. But for a number of years past the practice in England has provided a better method, and that practice has been adopted here, and, as amended, is now contained in Rule 499: which provides that, where a party does not appear at the trial, the judgment may be set aside and a new trial ordered by the Judge presiding at the sittings, or by a Judge. By Rule 3(*d*), "Judge" shall mean a Judge of the High Court Division of the Supreme Court.

The question is, whether that practice applies to a County Court case, which this case is.

Rule 768 provides that the Rules, and the practice and procedure in the Supreme Court, shall, so far as the same can be applied, apply and extend to actions in the County Court: but again the provisions of the County Courts Act cover the subject of appeals from those Courts; and of course the provisions of the

39. Any party to a cause or matter may appeal to a Divisional Court from any judgment directed to be entered at or after the trial or from a refusal to enter a judgment.

(2) A motion for a new trial shall be deemed an appeal, and shall be made to a Divisional Court.

Section 40 specifies a number of instances in which an appeal shall lie.

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special enactment prevail if there be conflict between them and the general Rules.

The plain purpose of the provisions regarding appeals, contained in the County Courts Act, was to make all appeals, from such Courts, appeals to a Divisional Court; and no provision is made for any kind of an appeal or application to a County Court Judge: although under the earlier County Court enactments an appeal might have been so made; and a motion for a new trial must have been so made. So that the purpose of the Legislature, to remove all such motions and appeals from the local Courts and to require them to be made here, is plain; and must be given effect to, even if Rule 499 were not so ill-fitted to cover County Court cases as it is.

This case is plainly within both sec. 39 and sec. 40 of the County Courts Act; and so the motion is regularly here and must be dealt with.

Upon the facts disclosed in the affidavits and papers filed, the case is one in which, as a matter of indulgence, the judgment in question should be set aside and a new trial granted: and, beside that, the papers disclose an irregularity in the proceedings at the trial which vitiates the judgment.

At the trial, judgment was apparently given for the plaintiff for $559.60 and costs, without evidence of any kind: it seems to have been based "upon hearing what was alleged by counsel for the plaintiff" only: that is in some cases permissible in Division Courts: see sec. 108 of the Division Courts Act, R.S.O. 1914, ch. 63: but proof of the plaintiff's claim must be given, at the trial, in the higher Courts.

The application is allowed; there will be no order as to costs, nor any terms imposed, because of the fatal irregularity at the trial; as well as because the respondent was not represented here.

REX v. BENDER.

Ontario Supreme Court, Sutherland, J. March 27, 1916.

INTOXICATING LIQUORS (§ III A—55)—*Canada Temperance Act —Information failing to disclose facts shewing causes of suspicion—Order quashing—Conditions.*]—Motion by the defendant to quash an information taken and a search-warrant issued by a Police Magistrate, in the circumstances stated below. The information

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was sworn to by an Inspector under the Canada Temperance Act, R.S.C. 1906, ch. 152, sec. 136.*

L. E. Dancey, for the defendant.

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

SUTHERLAND, J.:—A motion to quash an information and search-warrant, upon the grounds following:—

(1) That the information upon which the search-warrant was issued herein was not sufficient to give the Police Magistrate jurisdiction to issue it, because it did not disclose the facts and circumstances which went to shew the just and reasonable cause the informant had to suspect that liquor, in respect of which an offence was committed, was on the defendant's premises; and the said Police Magistrate, in the taking of the said information and the issuing of the said search-warrant, acted entirely without jurisdiction.

(2) That the search-warrant issued on the said information was illegally and improperly obtained for the sole and only purpose of securing evidence against the defendant upon which afterwards to found a charge for a breach of the provisions of the Canada Temperance Act and amendments thereto.

(3) That the taking of an information for the issue of a search-warrant is a judicial act, and evidence should have been adduced before the said Police Magistrate for the purpose of enabling him to judge of the sufficiency of the causes of suspicion to justify him in issuing the said warrant herein, which was not done.

The information was laid by John Torrance, an Inspector in the county of Huron, before S. J. Andrews, the Police Magistrate at the town of Clinton, in the said county, and the information sworn to by Torrance states that he "hath just and reasonable

*Section 136 of the Act provides as follows: "If it is proved upon oath before any judge of the sessions of the peace, recorder, police magistrate, stipendiary magistrate, sitting magistrate, two justices of the peace, or any magistrate having the power or authority of two or more justices of the peace, that there is reasonable cause to suspect that any intoxicating liquor is kept for sale in violation of Part II. of this Act, or of the Temperance Act of 1864, in any dwelling-house, store, ship, warehouse, outhouse, garden, yard, crodt, vessel, or other place or places, such officer may grant a warrant to search in the day time such dwelling-house . . . or other place or places for such intoxicating liquor, and if the same or any part thereof is there found, to bring the same before him.

"2. Any information to obtain a warrant under this section may be in form Q, and any search-warrant under this section may be in form R."

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cause to suspect and doth suspect that intoxicating liquor is kept for sale, in violation," etc.

The search-warrant thereupon issued recites that: "Whereas John Torrance, Inspector, of Clinton, in the said county of Huron, hath this day made oath before me, the undersigned S. J. Andrews, Police Magistrate, one of His Majesty's Justices of the Peace in and for the said township of Hay, that he hath just and reasonable cause to suspect and doth suspect that intoxicating liquor is kept for sale," etc.

In *Regina* v. *Doyle* (1886), 12 O.R. 341, it was held that a search-warrant under the Canada Temperance Act, 1878, was a proceeding to sustain a charge made for an offence committed against the Act, and not a proceeding taken upon which to found a charge to be made in case liquor were found on the premises; and in *Regina* v. *Walker* (1887), 13 O.R. 83, it was held that "secs. 108 and 109 of the Act were intended to provide process *in rem* for the confiscation and destruction of liquor in respect of which a use prohibited by the statute was being made, and not to provide a means of obtaining evidence on which to found a prosecution or support one already begun."

In *Rex* v. *Kehr* (1906), 11 O.L.R. 517, it was held that "the information necessary to justify the issuing of such warrant must disclose facts and circumstances shewing the causes of suspicion, which tended to the belief of the commission of the alleged offence, with regard to which the warrant is deemed essential. The information herein being defective in this respect, the warrant was directed to be quashed." This was a decision of the Exchequer Divisional Court.

In a New Brunswick case, *Ex p. Coffon* (1905), 11 Can. Crim. Cas. 48, it was held, in connection with a charge of keeping liquor for sale contrary to the Canada Temperance Act, where the accused had been arrested and brought before the magistrate to answer the charge, the sworn information merely stating "that the complainant has just cause to suspect and believe and does suspect and believe that the defendant has committed the offence charged," and the magistrate having made no inquiry into the grounds of suspicion, that the magistrate acquired no jurisdiction to proceed with the trial; and the conviction was quashed.

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In the Supreme Court of Nova Scotia, in the case of *The King* v. *Townsend* (*No. 2*) (1906), 11 Can. Crim. Cas. 115, it was held that an information for a search-warrant under the Canada Temperance Act sufficiently stated the causes of suspicion and the particulars of the offence, if it stated that the informant had just and reasonable cause to suspect and did suspect that intoxicating liquor was kept for sale in violation of the statute in a specified hotel, and the reason for such suspicion was that persons who had there purchased liquor from the hotel-keeper had told the informant that such hotel-keeper was keeping liquor for sale.

In the present case, it is urged on this motion on behalf of Bender, the suspected person, that *Rex* v. *Kehr* is precisely in point, and that, following it, I should determine that the information on which the search-warrant was issued was defective in that it did not disclose the facts and circumstances which went to shew the just and reasonable cause which led the informant to suspect that liquor was on the defendant's premises.

There was an appeal in the case of *The King* v. *Townsend* to the Judicial Committee of the Privy Council, which appeal was dismissed: see *The King* v. *Townsend* (*No. 4*) (1907), 12 Can. Crim. Cas. 509. It had been contended in the Supreme Court of Nova Scotia that with respect to search-warrants it had been decided that a warrant could only issue "as ancillary to a prosecution already commenced." It was contended, on the other hand, that the Act had been amended by striking out the words on which the Courts had founded their opinion that the commencement of the prosecution was a condition precedent to the issue of a search-warrant. The decision of the Privy Council dealt only with this latter question on the appeal, Lord Collins saying, as reported at p. 520 of 12 Can. Crim. Cas.: "Their Lordships cannot doubt that the Legislature by this simple and artistic amendment intended to make it impossible to ground a similar contention on the amended sections. Without, therefore, inquiring further into the reasons which have been urged against the granting of special leave in these cases, their Lordships are content to rest their decision upon the authority above cited."

By reference to the case in the Supreme Court of Nova Scotia, it appears that Sir Robert L. Weatherbe, C.J., in a dissenting judgment, considered that no particulars of the offence required

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by the informant had been given in the information laid in that case. Graham, E.J. (11 Can. Crim. Cas. at p. 143), was of opinion that the causes of suspicion were quite sufficiently set out in the information and it set forth enough to give the magistrate jurisdiction; and Russell, J., at p. 146, said that the information complied "with the additional requirements contained in the italicised parenthesis in the form, by stating the causes of suspicion, and also setting out, though in another part of the form, the particulars of the offence." And Longley, J., at p. 150, says: "The reasons or particulars of this case are not very strong, but relating as they do to the offence charged, it seems to me they are about as explicit as could reasonably be demanded."

Torrance, the Inspector, made an affidavit filed in these proceedings and was cross-examined thereon, and it appears that certain information had been communicated to him, which, if set out in the information sworn to by him, might have been held to be, to some extent at least, a setting out of the "causes of suspicion." The magistrate was also examined, and said upon his examination that certain letters were shewn to him by the Inspector, and certain information communicated, which he could not very well recall or swear to, but which was of such a kind that he was satisfied there was just ground for issuing the warrant. Even if this somewhat hazy statement on the part of the magistrate could now properly be considered by me on this motion, it would not, I think, assist very much.

It seems to me that I am bound by and should follow *Rex* v. *Kehr*, and hold that, as the information did not disclose "facts and circumstances shewing the causes of suspicion," the warrant issued thereupon must be deemed to have been improperly issued, and must be quashed.

The order quashing will contain a condition similar to that in *Rex* v. *Kehr*, to the effect that no action shall be brought against the Police Magistrate or against any officer acting on the search-warrant to enforce the same.

Motion granted.

[See *Rex* v. *Swarts* (1916), 10 O.W.N. 231, and *Rex* v. *Bedford* (1916), *ib* 233.

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REX v. GAGE.

Ontario Supreme Court, Appellate Division, Garrow, J.A., Riddell, Lennox and Masten, JJ. March 17, 1916.

INTOXICATING LIQUORS (§ III A—55)—*Sufficiency of conviction for unlawful sales—Jurisdiction of Magistrate—Place and time of offence—Judicial notice—Amendment—Right of appeal.*]—Appeal from the judgment of Latchford, J., dismissing a motion on the return of a writ of *habeas corpus* for an order discharging the defendant from custody in the common gaol of the county of Hastings. Affirmed.

The judgment appealed from is as follows:

Motion on return of a writ of *habeas corpus* for the discharge from the common gaol of the county of Hastings of one Joseph Gage, who is there imprisoned under a warrant issued on the 10th August, 1914, by S. Masson, who describes himself as "Police Magistrate in and for the City of Belleville and one of His Majesty's Justices of the Peace in and for the said County of Hastings," and as "Police Magistrate for the southern part of the County of Hastings."

Gage was convicted before Mr. Masson on the 10th August, 1914, of two breaches of the Liquor License Act—selling liquor without a license on the 31st July, 1914, and keeping liquor for sale without a license on the 1st August, 1914. The prisoner was not present, but was represented by counsel, who, on his behalf, entered a plea of "not guilty" to each charge. It was agreed, according to the memorandum made by the magistrate, "that the evidence shall be taken in both cases at once and used in both."

After evidence had been given of a sale, not, as stated in the information, on the 1st August, but on the 31st July, an application was made to change the date in the information so as to make it conform to the evidence. Counsel for Gage did not consent to the amendment, or "shew any cause why it should not be made, beyond saying it may prejudice his client." He did not, however, ask for the adjournment, which the magistrate was bound to accord, under sec. 92 of the Act, if the amendment really prejudiced the accused, and must, in my opinion, be taken to have waived the right granted him by the statute.

The prisoner was found guilty upon both charges, upon ample evidence, and a fine of $250 and costs was imposed in each case. Gage had left the vicinity of Belleville at the time of the trial.

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Warrants for his arrest were immediately issued, and under one of such warrants he was arrested on the 7th February, 1916, at Orillia, by the Chief of Police of that town, and on the 9th February delivered by him to a Belleville constable, who conveyed Gage to prison and handed to the gaoler the warrant of commitment returned to the writ. According to Gage, a second warrant of commitment, in default of payment of the fine and costs imposed for illegally keeping liquor for sale, was handed to the gaoler at the same time. Such warrant was undoubtedly issued and is produced, but it is not the warrant under which the prisoner is stated by his gaoler to be detained.

The principal objections urged on behalf of the prisoner are: that the jurisdiction of the convicting magistrate is not shewn by the commitment, or in the conviction which it recites; and that costs of commitment, as well as of conveyance—costs other than costs of prosecution—have been wrongfully inserted in the warrant.

The information, conviction, and warrant state that the offence of which the prisoner was found guilty was committed at the township of Thurlow, in the county of Hastings. The conviction upon its face states that Gage was convicted before "Stewart Masson, Police Magistrate in and for the City of Belleville and the southern part of the County of Hastings and one of His Majesty's Justices of the Peace in and for the County of Hastings."

The township of Thurlow is in the county of Hastings: The Territorial Division Act, R.S.O. 1914, ch. 3, sec. 2 (15); and I think I can take judicial knowledge of the undoubted fact that it is in the southern part of the county of Hastings. In England, where the boundaries of towns and parishes are determined by ancient usage, and not as here by legislative or departmental acts, the excessive particularity of the Courts obliged them to reject what is obvious in Ontario in our day. An example of this refinement may be found in *Rex* v. *Burridge* (1735), 3 P. Wms. 439, at p. 496. A similar case is *Deybel's Case* (1821), 4 B. & Ald. 243.

But recourse to judicial knowledge is unnecessary, in view of the fact that in both the conviction and the warrant the magistrate is described as Police Magistrate for the City of Belleville.

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By sec. 24 of the Police Magistrates' Act, R.S.O. 1914, ch. 88, Mr. Masson was *ex officio* a Justice of the Peace for the whole county, and, acting as such *ex officio* Justice, had, under sec. 28, power to do alone whatever was authorised to be done by two or more Justices of the Peace. Acting as a Justice of the Peace for the county and exercising the jurisdiction of two Justices, he had power to convict the prisoner as he did convict him, and his jurisdiction is manifested on the face of the proceedings. The unreported case of *Rex* v. *Collins* (decided by the Court of Appeal for Ontario, May 29, 1901), to which I have been referred, has therefore no application.

Jurisdiction to convict gave jurisdiction to commit in default of payment of the fine and costs: sec. 65 of the Liquor License Act. The form (No. 11) of the warrant of commitment prescribed by sec. 91 of the statute was followed by the magistrate. He, however, stated the "costs and charges of carrying him (Gage) to the said common gaol" to be $4.41, and in the margin set out the following items: "Arrest $1.50, mileage 0.91, rig to convey him to gaol $2.00."

While the costs and charges of conveying Gage from Orillia to Belleville must have been greatly in excess of $4.41, the magistrate was not, in my opinion, justified in stating or estimating the amount of such costs and charges on the face of the warrant of commitment. But, under sec. 1121 of the Criminal Code, incorporated by reference into the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 4, "No warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted, and there is a good and valid conviction to sustain the same."

In this case the commitment alleges the conviction of the prisoner, and there is a good and valid conviction to sustain the commitment.

Section 1124 of the Code is also made part of the Ontario statute, and applies in the circumstances disclosed in the depositions and conviction. There can be no possible doubt of the guilt of the prisoner. The punishment imposed on him was not in excess of what might lawfully be imposed. The warrant therefore is not to be held invalid for the irregularity.

Section 94 of the Liquor License Act declares that no convic-

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tion or warrant enforcing the same shall be held invalid by reason of any defect in form or substance, if it can be understood, as here, that the conviction or warrant was made for an offence against some provision of the Act, within the jurisdiction of the magistrate who made or signed the same; and if, as here, there is evidence to prove the commission of such offence.

Sub-section 2 of the same section gives me power, in the circumstances existing in this case, to amend the warrant. I do so by striking out the words and figures stating the costs and charges of conveying the prisoner to gaol.

The objections as to the arrest of the prisoner at Orillia are untenable. His right to discharge does not depend on the legality or illegality of his caption, but on the legality or illegality of his detention: *Rex* v. *Whitesides* (1904), 8 O.L.R. 622.

The application fails and is dismissed. No costs.

J. B. Mackenzie, for defendant.

J. R. Cartwright, K.C., for the Crown, was not called upon.

THE COURT held that, in the absence of a certificate from the Attorney-General, as provided in the Liquor License Act, R.S.O. 1914, ch. 215, sec. 113 (1), the appeal could not be entertained—approving *Rex* v. *Graves* (1910), 21 O.L.R. 329.

Appeal dismissed.

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RADLEY v. GARBER.

Quebec Superior Court, Greenshields, J. October 25, 1915.

ALIENS (§ III—15)—*Trading with enemy—Recovery by indorsee of drafts not payable to enemy.*]—Action on two bills of exchange and costs of protest amounting to $2,367.75 drawn by one Schaller per Fritz Janscke on the defendant and by him accepted. Schaller endorsed them to the plaintiff.

The defence is that the plaintiff is a *prête-nom* of Schaller who is a person resident in, or carrying on business in an enemy country, to wit, in the Empire of Germany, in war with this country; and by reason of the order-in-council of September 12, 1914, the defendant is forbidden to pay the sum claimed to an enemy; that the drafts were given for merchandise shipped to the defendant by Schartz & Co., carrying on business in Germany, represented in New York by Schaller, and the proceeds of the drafts, if paid, will be for the benefit of the above firm in Germany.

The Court dismissed this plea and gave judgment for the plaintiff.

Fleet, Falconer, Phelan & Bovey, for plaintiff.

Jacobs, Hall, Couture & Fitch, for defendant.

GREENSHIELDS, J.:—Considering that it results from the proof made that one Otto Schaller, a citizen of the United States, resident in New York City, was, under contract with a German manufacturer of the goods for which the drafts sued on were given, bound and obliged to pay for the same, and did before the declaration of war between Great Britain and the German Empire settle and pay for said goods;

Considering that the order-in-council relied upon by the defendant herein, under the circumstances, has no application;

Doth dismiss defendant's said plea. *Judgment for plaintiff.*

BEAUDETTE v. STEAMER "ETHEL Q."

Quebec Admiralty Court, District of Montreal, Dunlop, J.A.C. June, 1916.

ADMIRALTY (§ II—11)—*Garnishment—Other Courts.*

DUNLOP, J.:—A very important question is in this cause, to wit, is the Admiralty Court, sitting in Quebec Admiralty district, bound to recognize garnishee proceedings taken in the Superior Court? The facts are as follows: The plaintiff obtained judgment for $1,500 and costs in the Admiralty Court against the defendant, the steamer "Ethel Q.," of which the opposants are the owners, as was established in said cause. This judgment on appeal to the Exchequer Court at Ottawa was confirmed with costs.

Subsequently the plaintiff issued an execution against the Guarantee Co. of North America, the bail of the SS. "Ethel Q." The opposants, as owners of the "Ethel Q.," filed an opposition to said execution, in which they alleged that they were quite ready to pay the amount of the said judgment to whoever was entitled thereto, but as there were rival claimants for the amount of the judgment, they had paid the plaintiff all his costs, and they declared—as they did not wish to be compelled to pay the amount of the judgment twice—their readiness to deposit the moneys in the hands of the treasurer of this province, under the provisions of art. 1416 of the R.S.Q., so that it might be ultimately decided to whom the money should be paid, and by their opposition, asked that all proceedings should be stayed.

On October 5, 1915, the execution was stayed by order of this Court. On October 26, 1915, the plaintiff contested the opposi-

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tion, invoking the different statutes establishing the Admiralty Court, and alleging that the Superior Court had no legal right to interfere in this matter, as it was one exclusively under the jurisdiction of the Admiralty Court.

The claimants for the moneys were, first, the plaintiff; second, Dame Eugenie Labelle, who had seized the moneys in the hands of the opposants, also in the hands of the Guarantee Co. of North America, the bail of the SS. "Ethel Q.," by garnishment in a case No. 5787 of the records of the Superior Court for the district of Richelieu, wherein she was plaintiff and the present plaintiff was defendant, and this seizure was declared tenante by said Court on September 19, 1915, and judgment subsequently given by said Court maintaining her seizure by garnishment and ordering the payment of her claim out of the said moneys seized; third, W. A. Sheppard, who took a second seizure in garnishment in the hands of the said opposants and also in the hands of the Guarantee Co. of North America, bail of the SS. "Ethel Q.," in case No. 5747 of the records of the Superior Court for the district of Richelieu, wherein he was plaintiff and the plaintiff herein was defendant, and which seizure was on September 24, 1915, declared tenante by said Court and judgment was subsequently given maintaining her seizure in garnishment and ordering the payment of plaintiff's claim out of the moneys seized in the hands of the opposants on October 5, 1915. That the amounts due by plaintiff to the intervenants and for which the intervenants obtained judgment against plaintiff were included in plaintiff's claim against defendant and on which claim plaintiff obtained judgment for $1,500.

When the case was heard before me, before giving judgment on the merits, I ordered that the said Dame Eugenie Labelle and A. W. Sheppard should be made parties to this cause, which was done and both appeared and filed interventions claiming that the amount of their respective claims should be paid out of the moneys seized in the hands of the opposants.

The plaintiff contested both these interventions on the broad ground that the Admiralty Court had no right of jurisdiction to recognize garnishee proceedings taken in the Superior Court and his contestation invoked the different statutes defining the jurisdiction of this Court. The opposants filed an elaborate factum in which the different statutes affecting the jurisdiction

of this Court are cited and referring to the conflict of jurisdiction which existed in England for many years between the Admiralty Court and the other Courts. It would appear, however, that such questions are not likely to arise in future in England, owing to the fusion of all the Courts under the Judicature Act now in force in England.

It would appear from many of the cases cited that the Admiralty Court in England did recognize garnishee proceedings taken in other Courts. It would also appear that the jurisdiction of the common law Courts in England has practically always prevailed over that of the Admiralty Court. This was admitted by Lord Gorell in the B.C. case of *Bow, McLachlan & Co. Ltd.* v. *S.S. "Camousun,"* [1909] A.C. 597, who declared:

The history of the long contest between the civilians of the Admiralty Court and the Courts of the common law is well known and need not be gone into now. It resulted in the Admiralty jurisdiction being confined within certain well defined limits, which were, however, extended by the legislature in more modern times, but not sufficiently to include a suit to enforce such a claim as that made by the respondent.

Reference might also be made to the case of the *"Olive,"* 5 Jur. (n. s.) p. 445.

In this case the Court of Admiralty on March 16, 1859, held that payment under a garnishee order of a common law Judge was a valid satisfaction of a judgment of the Admiralty Court and, furthermore, that such an order was not subject to review by the Court of Admiralty.

Reference might also be made to the case of the *"Jeff Davis,"* 17 L.T. (n. s.) 5, where Sir R. Phillimore, in rendering judgment, recognized garnishee proceedings and ordered payment to the garnishee of the balance of a judgment after the satisfaction of the protector's lien for costs. In other words, he found that in spite of a garnishee order, the costs of the proceedings were privileged and should be paid, just as has been done in the present cause, and in other cases cited in the opposants' factum it was held that the plaintiff's solicitors had a lien for their costs, but subject to this lien, the garnishee proceedings were held good.

In upholding, in the different cases, the right of plaintiff's solicitors to be paid their costs before the garnishee pays the judgment of the creditors of the plaintiff, these cases clearly

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indicate that the Admiralty Court of England considered that a garnishee order of the common law Courts was to be respected and that its payment was a satisfaction of the judgment of the Admiralty Court.

What lends force to these decisions is the fact that they all occurred when the Court of Admiralty in England was a Court distinct from the common law, exchequer, and equity Courts. The common law Courts of Great Britain have always maintained that the Courts of the colonies had the right to restrain, if necessary, the local Admiralty Courts. Previous to the Colonial Courts of Admiralty Act there were in the different colonies of Great Britain—when the colonies were less self-governing than they are now—certain Vice-Admiralty Courts. The common law Courts of Great Britain have always held that the early colonial Courts had the same right to restrain the Vice-Admiralty Courts as the common law Courts of England had to restrain the Admiralty Court of England.

In the case of *Key* v. *Pearce*, referred to in *Le Caux* v. *Eden*, 2 Dougl. 595, at 619, Lord Chief Justice Lee is reported by Lord Mansfield to have declared that the colonies take all the common and statute laws of England applicable to their situation and condition. The Courts of law prohibited the Courts of Admiralty just as the Courts of Westminster had here.

In the Province of Quebec, the Courts which are not concerned with Admiralty matters never formerly hesitated to issue prohibitions against the Vice-Admiralty Courts. In the case of *Hamilton* v. *Fraser*, 1 R. de L. 509, it was held that a prohibition may issue from the Court of King's Bench to stay the proceedings in the Court of Vice-Admiralty.

These cases shew the principle that a Vice-Admiralty Court is not of itself independent of the restraining orders of the civil Courts. The exclusive jurisdiction, if any, of the Admiralty Court flows from the subject matter of the suit, and not from the constitution of the Court itself. This was decided in the case of *Key* v. *Pearce*, referred to in 2 Dougl. 606, in regard to the jurisdiction of the Vice-Admiralty Courts in questions of prize money.

The contention that the Exchequer Court of Canada is superior to any provincial Court is not supported either by the Acts of

Parliament relating to the Exchequer Court, or by the decisions of the Privy Council. The jurisdiction of the Exchequer Court in Admiralty matters is limited by the Colonial Courts of Admiralty Act.

As the Imperial Courts of Admiralty Act allows the Dominion Parliament to only confer upon the Exchequer Court the same jurisdiction which the Imperial Parliament has conferred upon the Admiralty Division of the High Court of Justice, and as the English Admiralty Courts were and are obliged to respect the garnishee orders of the other divisions of the High Courts of Parliament, in my opinion this Court is bound to recognize garnishee proceedings taken in the other Courts in this province.

In the present case, there does not appear to be any real conflict of jurisdiction, inasmuch as the Exchequer Court has ordered the S.S. "Ethel Q." to pay to the plaintiff a certain sum, and the Superior Court has ordered Beaudette to pay it or part of it to certain other parties, who had seized the money in the hands of the opposants. The plaintiff might have contested the different garnishee suits, which he never did. The opposants were bound to recognize the garnishee orders and they could not have taken justice summarily in their own hands. To have paid over the moneys to the plaintiff-contestant and disregard the judgments in the garnishee suits would have rendered the opposants guilty of contempt of the Superior Court for the district of Richelieu. The opposants were, therefore, justified at the time of the issue of the writ of execution, in taking the stand that they, as owners of the S.S. "Ethel Q.," could not pay the debt, and as the judgment of this honourable Court was being executed against the Guarantee Co. of N. America, the bail of S.S. "Ethel Q.," the only recourse open to the opposants was to make their opposition.

As the plaintiff did not contest the writ of garnishment at the proper time at this issue, he lost all his right to contest them, as regards the opposants and their ship the steamship "Ethel Q."

I am of opinion that the deposit paid by the opposants in the hands of the treasurer of this province was legal and valid. On March 17, 1916, I rendered judgment ordering the amount of the deposit to be withdrawn from the custody of the treasurer and deposited in the Admiralty Court. This was done, and on

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the 11th March, 1916, the full amount of the deposit, to wit, $1,548.48, was deposited in the hands of the deputy registrar of this Court, and is now subject to the orders of this Court for distribution.

Having very carefully considered the arguments of counsel and especially the factum in this cause fyled by the opposants, I have arrived at the following decision:

I maintain the opposition of the opposants, with costs, payable out of the deposit, and dismiss the contestation of the plaintiff, and quash the seizure in this cause made in the hands of the bail of the steamship "Ethel Q." to wit, the Guarantee Co. of North America, and grant main-levee to said company of the articles seized.

I maintain the intervention of the intervenants and reject the contestation of the plaintiff, with costs payable out of the said deposit, and I order the deputy-registrar of this Court, after verification of the different claims, to distribute the amounts deposited in this Court, as follows, to wit:—1. To pay any Court and Judge's fees. 2. To pay to the opposants the amount of their costs. 3. To pay to the intervenants D. Eugenie Labelle and William A. Sheppard, judgment creditors of the said plaintiff, the amounts of their respective claims for debt, interest and costs, as set forth in their said interventions, and in the judgments maintaining the seizure in garnishment taken by them and also the amount of their costs on said interventions, according to the sufficiency of the moneys before this Court, and to pay to the plaintiff any balance of the deposit remaining in this Court after payment of the claims hereinabove mentioned, reserving to this Court the right to make such order and further orders in the premises respecting the distribution of said moneys as to law and justice may appertain.

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AMSDEN v. ROGERS.

Saskatchewan Supreme Court, Lamont, J. July 14, 1916.

EVIDENCE (§ XII L—985)—*Corroboration of accomplice—Detective—Offence under Liquor License Act—Place of offence.*]—Appeal by the informant Amsden from an order of the police magistrate at Moose Jaw dismissing an information under the Liquor License Act (Sask. Statutes 1913, ch. 64). Affirmed.

C. E. Armstrong, for appellant.

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McCurdy, for accused.

LAMONT, J.:—The information charged the accused, a brakeman on the C.P.R., with selling liquor contrary to the Act. Amsden was a special constable in the employ of the government, and his duties were to detect and prosecute infringements of the Act. The accused frankly admitted that he procured a quantity of whiskey and gave it to Amsden, who represented himself as being too sick to go to the buffet car for it himself; but, he says, when he gave the liquor to Amsden and collected payment therefor, they were not in this province at all, but in the Province of Alberta between the stations of Irving and Walsh. Amsden says it was between Maple Creek and Swift Current in Saskatchewan. The police magistrate dismissed the case on the ground that Amsden was an accomplice and his evidence therefore required corroboration, of which there was none. In my opinion, the magistrate erred in holding that Amsden's evidence required corroboration before he could convict the accused.

In *R.* v. *Mullins*, 3 Cox C.C. 526, a woman was employed by the police for the detection of crime, and there as here it was contended that she was an accomplice and that her evidence required corroboration. In that case Maule, J., says:—

> Now, as to spies, I know of no rule of law which declares that their evidence requires confirmation, nor any rule of practice that says that juries ought not to believe them,

and in *Rex* v. *Bickley* (1909), 73 J.P. 239, the Court of Criminal Appeal in England held that a police spy or *agent provocateur* is not an accomplice, and the practice that a jury should not act on the uncorroborated evidence of an accomplice does not apply to the case of such a person.

The rule is stated in Wigmore on Evidence, vol. 3, at p. 2756, as follows:—

> When the witness has made himself an agent for the prosecution before associating with the wrongdoers, or before the actual perpetration of the offence, he is not an accomplice; but he may be, if he extends no aid to the prosecution until after the offence is committed. A mere detective or decoy is therefore not an accomplice.

See also Taylor on Evidence, 10th ed., at p. 691, Phipson on Evidence, at p. 471.

The evidence of Amsden, therefore, does not require corroboration. We have now to examine the evidence to see if the prosecution has established the guilt of the accused.

The only point in dispute is whether or not the liquor was

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sold in Saskatchewan. If it was not the Liquor License Act has no application. The onus of establishing that it was sold in this province is on the prosecution. The only evidence that it was is that of Amsden, who swears positively that he purchased it between Maple Creek and Swift Current. The accused swears just as positively that it was in Alberta. Amsden was on the train from Medicine Hat in Alberta to Swift Current in this province. The accused gave his evidence in a straightforward and convincing way, and the testimony of independent witnesses establishes that prior to this charge he has always borne an excellent character.

For the prosecution it is urged that but little weight could be given to the evidence of the accused, as he was so vitally interested in the result. On the other hand, Amsden admitted that in order to get the accused's name he had made a false statement to him. Amsden also admitted that, on another occasion, he had made false statements to a druggist in order to ascertain if he were selling liquor contrary to the Act. He was suspended by the government, but for what does not appear. For the defence it is urged that a witness who admits he makes false statements cannot be credited.

I do not say that in their efforts to secure evidence in cases where crimes have been committed the officers of the law are not sometimes entitled to resort to pretence and even false statements. There may be cases where that is necessary in the interests of justice to enable them to secure the evidence, and the fact that an officer has resorted to subterfuge may not cast discredit upon the evidence which he discovers by means thereof. But, in my opinion, it is a different matter where the false statements are made, not for the detection of crime committed but for the purpose of inducing its commission, and inducing its commission in order that the person making these statements may be able to prefer a charge for the offence committed at his solicitation. The evidence of such a witness must, in my opinion, be scrutinized with great care.

In *Connor* v. *People* (1893), 36 Am. State R. 300, the Court said:—

> When in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime or instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be the

capture of old offenders, their conduct is not only reprehensible but criminal, and ought to be rebuked rather than encouraged by the Courts.

While I am not prepared without further consideration to adopt the above as a rule of universal application, there is a great deal of force in what the Court there said. Every case must be determined in the light of its own particular facts, which will not be without bearing on the credit that is to be given to the testimony of the witnesses called. I have, however, no hesitation in saying that where the zeal or otherwise of an officer of the law leads him to make false statements to secure the commission of an offence in order that he may be able to prosecute the offender, his evidence must be weighed in the light of the possibility that the same motives might have a tendency to induce him to colour his testimony in order to secure a conviction.

In this case there is no doubt that either Amsden or the accused has stated what is not true. On the evidence, I am unable to say which. The onus is on the prosecution to establish the commission of the offence in this province, and it has not discharged that onus. The appeal will, therefore, be dismissed with costs. *Appeal dismissed.*

Re RUSH LAKE ASSESSMENT AND FARES.

Saskatchewan Supreme Court, McKay, J. August 3, 1916.

[See also *Fares* v. *Village of Rush Lake*, 28 D.L.R. 539.]

TAXES (§ III D—135)—*Assessment—Appeals from Extension of time.*]—Application to set aside an order quashing the judgment of the District Court in an assessment appeal. Dismissed.

P. H. Gordon, for respondent.

H. Y. MacDonald, K.C., for applicant.

MCKAY, J.:—On April 1, 1916, on an *ex parte* application made on behalf of the applicant, and upon it being made to appear to me that no extension of time had been granted for the hearing and determining appeals as directed by me, (see case reported 28 D.L.R. 539.) I granted an order quashing the judgment of the District Court Judge herein without costs and without the actual issue of a writ of *certiorari*, and ordering that the moneys paid into Court by the applicants herein as security for costs be returned to them.

The present application is now made, by way of notice of motion, on behalf of the respondents, for an order setting aside

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the said *ex parte* order I made on April 1, 1916, and dismissing the applicants' application for writ of *certiorari* with costs, on the ground that my said *ex parte* order was issued without notice to the respondent, and in suppression of the fact that an order had been granted on December 23, 1915, by the Acting Deputy-Minister of Municipal Affairs, extending the time for completing the assessment until January 31, 1916.

It appears from the affidavit of Mr. Gordon, counsel for the respondent, that on March 7, 1916, he received instructions from his principals herein that an order had been granted on December 23, 1915, by the acting Deputy Minister of Municipal Affairs, extending the time for completing the assessment for the year 1915 until January 31, 1916, and that on February 1, 1916, a further order was obtained from the deputy of said Minister extending the time until February 29, 1916.

On March 8, 1916, Mr. Gordon advised Mr. H. Y. MacDonald, counsel for the applicant, that said orders had been issued, and on March 18, 1916, he sent to Messrs. Mackenzie, Brown & Co., of which firm Mr. H. Y. MacDonald is a member, a copy of the said order dated December 23, 1915, and advised them that it was his intention to bring the matter up in chambers before me.

Counsel for the respondent evidently considered that these orders of December 23, 1915, and February 1, 1916, were a sufficient extension of time to validate the hearing of the appeal by Smyth, J., and his judgment thereon, hence did not obtain an order in the terms of my decision above quoted.

The question for me now to decide is, had these facts—that these orders had been issued—been brought to my notice at the time I granted the said *ex parte* order, should I have granted said order, and, if not, what order should I have granted?

The first of said orders is as follows:

GOVERNMENT OF THE PROVINCE OF SASKATCHEWAN.

Department of Municipal Affairs, Regina.

It is hereby ordered, under the provisions of sec. 6 of the Village Act, that the time for the making of the assessment and the levying of the taxes for the village of Rush Lake for the year 1915, be and hereby is extended until January 31, 1916.

Dated at Regina this 23rd day of December, 1915.

(Signed) J. J. SMITH, *Acting Deputy Minister.*

Certified a true copy: J. N. BAYNE.

The other order is in the same language, except that the time is further extended to February 29, 1916.

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So far as these orders refer to the making of the assessment, I take them to mean, that the time for completing the making of the assessment, such as alterations as result of appeals, the completion of the additions to be made under sec. 205 of the Village Act and the entering of the certificate referred to in sec. 207 of the said Act, is extended to the time mentioned in the orders. I do not think they mean that the time for the preparation of the assessment roll only, referred to in sec. 179 of the Act, which is to be prepared by July 1, is extended, because it is to be noted that the orders also extend the time for levying the taxes to the like date, and the taxes cannot be levied until the assessment or assessment roll is finally completed.

Sec. 5 of the Act (ch. 86 R.S.S. 1909) reads as follows:—

Where in this Act a certain date is fixed on or by which certain things are to be done or proceedings had if it appears that such date was fixed having regard to an earlier date fixed on or by which certain things are to be done or proceedings had then notwithstanding anything herein contained if default be made in respect of the earlier date a like delay shall be allowed in respect of the later date.

The additions, if any, made under sec. 205, would have no bearing on the appeals in question, and the time when alterations would be made as the result of an appeal would be later than the judgment thereon, and the time when the assessment roll would be finally completed (referred to in sec. 207) would be later than the dates referred to in sec. 204 for hearing and giving judgment on appeals, and the extension of these later dates would not extend the earlier dates by virtue of said sec. 5.

In my opinion, therefore, the orders produced are not a sufficient compliance with my direction, and they do not extend the time limited under sec. 204, sub-sec. 2 of the Village Act, for hearing and determining appeals, so as to validate the hearing of the appeals in question and the judgment thereon.

Application dismissed without costs.

RUR. MUN. OF SHERWOOD v. WILSON.

Saskatchewan Supreme Court, Elwood, J. July 26, 1916.

TAXES (§ III D—135)—*Assessment—Revision—Powers of Board—Finality.*]—Action for taxes.

H. F. Thomson, for plaintiff.

H. E. Sampson, for defendant.

ELWOOD, J.:—On December 27, 1915, the Local Government Board of this Province made an order dealing with the assessment

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of the lots, the taxes on which form the subject matter of this action; that order reduced the assessment from $200 a lot to $50 a lot on some of the lots and from $150 to $35 a lot on other of the lots.

By ch. 9 of the statutes of 1914, sec. 1, sub-sec. 4, power is given to the Board to name the date at which the order shall come into effect, and where no such date is named the order shall come into effect immediately; therefore, in the case at bar, the order came into effect immediately.

The plaintiff further contends that the Local Government Board had no power to make this order so as to affect the assessment for the year 1915. It was contended on behalf of the plaintiff that once the notice of assessment was sent out the taxes became due and nothing further could be done. It was urged on behalf of the plaintiff that to allow an amendment, after the rate for the year had been struck, would cause a very great inconvenience, and possibly loss, to any municipality whose assessment was affected.

Sec. 1 of the above ch. 9 seems to me to be sufficiently wide to give the Local Government Board power at any rate during the year to revise and adjust the assessment as made in that year, as was done in this instance.

It will be noticed by sub-sec. 5 of sec. 1 that orders of the Board under this section shall be final, without appeal, and the assessor shall make the necessary changes in the assessment roll in accordance therewith.

It seems to me, therefore, that effect must be given to the order of the Local Government Board. That would have the effect of reducing the amount of the 1915 taxes to $112.36.

It was admitted before me that the 1914 taxes for which the defendant was liable amount to $541.72. The 1915 taxes for which the defendant is liable amount to $112.36, and the supplementary revenue tax and penalty amount to $171.72, making a total of $825.80, for which the plaintiff is entitled to judgment, together with the costs of the action down to but not including the filing of the statement of defence. The defendants will be entitled to their costs of the action from and including the filing of the statement of defence. The amount so taxed to the defendants for costs will be deducted from the amount of the plaintiff's judgment. *Judgment for plaintiff.*

THE KING v. CORDRAY.

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Saskatchewan Supreme Court, Haultain, C.J., Brown and McKay, JJ. July 14, 1916.

INTOXICATING LIQUORS (§ III A—55)—*Unlawful sales—Membership fee—Contributions gathered from members.*]—Appeal from a conviction under the Saskatchewan Sales of Liquor Act (1915, ch. 39). Affirmed.

H. F. Thomson, for defendant, appellant.

Arthur Frame, for informant, respondent.

MCKAY, J.:—This is an appeal by way of a stated case from a conviction made by the police magistrate in and for the city of Saskatoon, whereby the appellant was, on April 8, 1916, at the city of Saskatoon, convicted of having between March 1, 1916, and March 29, 1916, at Saskatoon, in the said province, unlawfully kept liquor for the purpose of sale, barter or exchange, contrary to the provisions of the Sales of Liquor Act of the Province of Saskatchewan.

The case stated shews that:—

At the time of the alleged offence the accused was the occupant of premises known as 218 19th St. East, in the city of Saskatoon, the same being similar in appearance to a small dwelling-house;

That a book known as a register was kept by the accused in which was entered the names of certain persons who were entitled to enter the said premises; and that the said register contained the names of eighty-nine men, all being soldiers, and that each person whose name was registered paid, or was expected to pay, to the accused the sum of $1 for the privilege of frequenting the premises;

That a keg of beer containing four gallons was purchased by the accused from a government liquor store in the city of Saskatoon and delivered to the said premises almost every day, Sundays excepted, between the dates mentioned in the information; that the beer was served by the accused and consumed upon the premises by the persons privileged to enter the premises; and that the said beer was liquor under the provisions of the Sales of Liquor Act; that a large number of empty whiskey and beer bottles were upon the premises, the contents having been consumed by the same persons;

That for a considerable time a placard was hanging upon the outside of said premises in such position that it might be easily seen by persons passing along the public street, upon which the following words were displayed: "The Home of Farmer Hines. Come in and get acquainted."

That in a room inside the house an iron pot was kept upon a window sill, said pot having a cover which was kept closed and locked and the key kept by accused, who alone had control of the contents; that in the cover was an opening into which money was placed; and that upon the pot was a metal sign bearing the following words: "Keep the pot a-boiling, every man accordingly as he purposeth in his heart so let him give, not grudgingly or of necessity, for God loveth a cheerful giver: 2 Cor. 9: 7. So does Farmer Hines."

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That no record was kept of the amount of money deposited in the pot nor by whom deposited; that money deposited in the pot was deposited by such persons as were privileged to enter the premises; and that at about 8.30 p.m. on March 29, 1916, the pot contained 86 cents;

That liquor was kept upon said premises by the accused for the purpose of being furnished to and consumed by such persons as were privileged to enter.

The question submitted is, whether, upon the facts above set out, the defendant should have been convicted of the offence charged.

In addition to the facts above stated, this Court was furnished with a copy of the evidence taken at the hearing before the police magistrate.

And it appears from this evidence that a Mr. D. W. Hines, commonly known as "Farmer Hines," originally had control of the premises where the beer and other liquors were consumed, and in March last, during his absence, the appellant took charge of the same, and during his control some 20 kegs of beer were purchased by him and furnished to and consumed by the soldiers on the premises.

The appellant's evidence is, in part, as follows:—

All the beer that came in kegs was paid for. I paid for it by money that I got out. If there was not enough money in the pot there would be some money from that which was paid as membership fees. I did not have to pay any money myself, there was always enough to pay for the liquor. Between the money that was placed in this pot and the dollar that they paid when they signed their name, there was always sufficient to pay for the beer, there was never any short, though it came near being short towards the end. One day I didn't have enough money to buy beer so I didn't get any.

It appears from the facts as stated in the case, that the payment of the $1 membership fee and the contributions to the pot were not compulsory, but were paid at the indirect request of the appellant by means of the membership register kept by him, and the sign or notice on the pot. And all these moneys, when paid or contributed, were under the sole control of the appellant, and, in my opinion, became his property or that of Mr. Hines. It certainly ceased to be the money of the soldiers, the contributors. They had no control of these moneys after paid or contributed, and no say in their disposal.

The appellant, then, purchased the beer with part of this money. And, in my opinion, this beer, so purchased and furnished to the soldiers, was either his or that of Mr. Hines. And appellant says he would not buy another keg of beer after this

was consumed, unless there were enough contributions to the pot, or in membership fees and to the pot, to buy another keg of beer. To my mind this means that, although there was no specific charge for the beer the soldiers were then consuming, yet, before, during or after its consumption, they had to pay or contribute at any rate enough money to pay for it. The appellant, therefore, in my opinion, was keeping this beer for sale, and was actually selling it to the soldiers. And, in my opinion, under the circumstances of this case, it is immaterial whether it was his beer or that of Mr. Hines. He was the one who was keeping it there for sale, as he had sole charge during Mr. Hines' absence.

I would, therefore, answer the question submitted in the affirmative.

HAULTAIN, C.J.:—I have some doubts as to whether the facts in this case establish a sale, and should have liked more time to look into the question. But, as the majority of the Court are in favour of dismissing the appeal and my opinion would not affect the decision, I am not prepared to dissent from the judgment of the Court.

BROWN, J.:—The question submitted is: Did the accused keep liquor on the premises *for the purpose of sale, barter or exchange?*

To briefly summarise the facts: The liquor was kept on the premises by the accused for the purpose of being furnished to and consumed by those privileged to enter. Those who did enter were expected to drop money into the pot from time to time. Many of those who drank the liquor—though not necessarily all of them—did drop money in the pot, and undoubtedly did so with the knowledge that, unless they did so, the liquor would not be supplied. The liquor was furnished with the intimation indirectly, if not directly, given that it was not furnished gratis, but, on the contrary, that it was to be paid for by the indirect method of dropping the money in the pot. The liquor was bought and paid for by the proprietor, and, until consumed, was undoubtedly his property; and the money dropped in the pot was also his property immediately it was so placed.

No matter what feelings of patriotism or good-fellowship may have prompted the action, this whole business was, it seems to me, an attempt to evade the express provisions of the Sales of

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Liquor Act. In my opinion, the circumstances are such as to justify a conviction, and I would, therefore, answer the question submitted in the affirmative. *Conviction affirmed.*

BEAN v. ECKLIN.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., and Newlands, Lamont and Elwood, JJ. July 14, 1916.

APPEAL (§ VII I—375)—*Review of discretionary matters—Disposition of action—Counterclaim.*]—Appeal from the order of a master. Reversed.

W. T. Kinsman, for appellant.

P. M. Anderson, for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—I am in favour of allowing this appeal, and the only question to be considered is whether the Court of Appeal should interfere with the discretion of the master.

R. (S.C.) 147 makes the whole question a question of convenience:—

> Now the question how a claim can be most conveniently disposed of is for the discretion of the Judge—a judicial discretion indeed, but still a discretion, the exercise of which is not lightly to be interfered with. The Court of Appeal, in a strong case, would interfere with the exercise of this discretion, but I think that it ought to do so only in a strong case where injustice is likely to be done if it does not interfere: *Huggons* v. *Tweed*, 10 Ch.D. 359, *per* Jessel, M.R., at 363.

This, in my opinion, is a "strong case," and injustice is likely to be done if the order appealed from is allowed to stand.

The plaintiff resides in the State of Minnesota. All the witnesses in connection with both claim and counterclaim reside in the vicinity of Melville, where the action will be tried. The plaintiff's claim for grain and accounting for grain is obviously connected with the subject matter of the criminal proceedings in respect of which the counterclaim is made. All the matters in dispute between the parties can be disposed of conveniently at the same Court. If necessary, the counterclaim can be determined by a jury, and the other issues by the presiding Judge. *The Cheapside* (1904), P. 339, *Kinnaird* v. *Field*, [1905] 2 Ch. 361.

Whatever course may be taken by either of the parties with regard to a jury trial, the whole matter can be settled most conveniently to all parties at the same Court.

The case of *Macdonald* v. *Logan*, 7 Terr. L.R. 423, relied on by the master, only decided that a counterclaim against the plaintiff and another person who was not a party to the action and where the relief claimed was not connected with the original subject of the cause or matter, was not authorized by the Judicature Ordinance. (C.O. 1898, ch. 21, sec. 8 (3)).

I think, therefore, that the appeal should be allowed with costs. The plaintiff will also pay the defendant his costs of the motion before the master and of the appeal to the Judge in chambers. *Appeal allowed.*

CROWN FRUIT CO. Ltd. v. LYONS.

Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ. July 14, 1916.

PRINCIPAL AND AGENT (§ II A—5)—*Customs brokers—Liability of nominal principal for rebate cheques received from agent—Estoppel.*]—Appeal by plaintiff from a judgment dismissing an action for customs rebates. Reversed.

H. F. Thomson, for appellant.

T. J. Blain, for respondent.

NEWLANDS, J.:—The defendant financed one McLanders in the business of a customs broker. The business was carried on in defendant's name, and an account was kept in the bank in his name called the "J. H. Lyons customs account." He did business for plaintiffs as their customs broker. This business was done by McLanders. The plaintiffs made out cheques for their customs' duties to J. H. Lyons, and in the course of this business certain rebates became payable to plaintiffs. These rebates were paid by cheque payable to the plaintiffs, and were handed by the customs authorities to McLanders as defendant's clerk. McLanders endorsed these cheques with the plaintiffs' name "per J. H. Lyons, attorney," and deposited them in the bank to the credit of the J. H. Lyons customs' account. Defendant could draw cheques on this account. McLanders did not repay to defendant the amount of money he advanced to him to conduct this business by about $400, and, although it was carried on in his name, defendant says he had no interest in it. Under these circumstances the trial Judge held that the defendant did not get this money and is therefore not liable to the plaintiffs. The amount in question is $69.90, for which plaintiffs sue.

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As the defendant was the man with whom plaintiffs dealt, and as the rebate cheques were endorsed by McLanders as defendant's agent and deposited to defendant's account, an account which defendant opened in his own name and over which he had control, I am of the opinion that the moneys in question were paid to the defendant, and, as this money belongs to plaintiffs, defendant is liable to pay them the same. The appeal should be allowed with costs.

BROWN, J.:—The case of *Jacobs* v. *Morris*, [1902] 1 Ch. 816, cited on behalf of defendant, does not in my opinion apply. In the case at Bar, McLanders was, to the knowledge of defendant, carrying on business in the defendant's name. He had authority to get the cheques from the collector of customs on behalf of the plaintiffs. This money of the plaintiffs was deposited to the defendant's credit in the bank and in that sense the defendant got the benefit of the same. It cannot be said here, as in the case of *Jacobs* v. *Morris*, *supra*, that the plaintiffs were in any way to blame or that they are estopped by any conduct on their part. If the defendant had lost this money which was deposited to his credit, he has, it seems to me, himself to blame, and not the plaintiffs, I am therefore of the opinion that the plaintiffs are entitled to recover their claim from the defendant as money had and received, and that the appeal should be allowed with costs, and the plaintiffs should have judgment for the amount of their claim with costs.

MCKAY, J., concurred with BROWN, J. *Appeal allowed.*

CANADIAN NORTHERN R. CO. v. GREEN et al.

Saskatchewan Supreme Court, McKay, J. July 29, 1916.

[See also *Green* v. *C.N.R. Co.*, 22 D.L.R. 15.]

ARBITRATION (§ II—11)—*Costs—Arbitrators' fees—Railway expropriation.*]—Application for costs of arbitration under sec. 199 of the Railway Act (R.S.C. 1906, ch. 37). Refused.

Ferguson, for C.N.R. Co.

McMorran, for Ouseley, J., arbitrator.

Rutherford, for Chisholm, arbitrator.

MCKAY, J.:—This is an application on behalf of the Canadian Northern R. Co. for an order directing the taxation of the arbitrators' costs herein, which said application was referred to me

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by the Chief Justice, I having taxed the costs of the owners of the lands dealt with by the arbitration herein.

The C.N.R. Co. offered to pay the sum of $15,480 as compensation for the lands taken by it and lands injuriously affected. This was refused and arbitration proceedings were held under the Railway Act.

The arbitrators made their award, fixing the amount of compensation at $43,802.75, and their fees at $6,750, which they included in the award.

In order to take up the award, the C.N.R. Co. paid these fees, namely $6,750, under protest, and appealed from the award to the Supreme Court of Saskatchewan *en banc*, and the said Court by judgment dated January 9, 1915, reduced the said award to the sum of $23,566.60, and struck out the arbitrators' fees therefrom in the following words:—

> So far as the arbitrators' fees are concerned, the arbitrators, in my opinion, had no right to include them in and make them part of the award. Their fees are governed by sec. 199 of the Railway Act, and, in the event of the parties not agreeing upon the amount of costs, those costs will have to be taxed by the Judge as provided by the Act. Therefore, the portion of the award which fixes the amount of the arbitration fees and adds that to the award must be struck out. (22 D.L.R. 18).

Counsel for the arbitrators contend that the fees of the arbitrators are not subject to taxation as between the arbitrators and the C.N.R. Co.; that the arbitrators' fees would be subject to taxation only when made part of the costs of either the land owners or the railway company, and even then such taxation would not be binding upon the arbitrators, but only on the land owners and the railway company, and that the railway company's remedy is to bring an action at law to recover the amount it claims to have overpaid the arbitrators. I find that this is the view laid down in 1 Hals., pp. 270-72, and Russell on Arbitration, 9th ed., pp. 298 and 299.

In view of the authorities therein, in my opinion, I have no power to grant an order to tax the arbitrators' fees on this application, unless that power is given to me by sec. 199 of the Railway Act.

In my opinion this section simply deals with the taxation of the costs as between the railway company and the land owners, and does not contemplate the taxation of the arbitrators' fees as between the arbitrators and either the railway company or land owners.

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The first part of the section deals with the payment of costs as between two parties, namely, the railway company and the opposite party, that is, the other party to the arbitration, the land owners. The words "opposite party" cannot possibly mean the arbitrator or arbitrators. Then subsection 2 says these costs, if not agreed upon, may be taxed. If not agreed upon by whom? In my opinion this means if not agreed upon by the two parties previously referred to, who may be interested in the amount of the costs; and if not agreed upon the costs may be taxed as between them.

In view of the law as to arbitrators' fees, as above quoted from Russell, I think if it was the intention of Parliament to change this, it would have used clear and unequivocal language in doing so.

It was also argued by counsel for the railway company that, by the judgment of the Supreme Court *en banc* above quoted, these costs were directed to be taxed, and that in pursuance of this judgment I should make the order applied for.

In my opinion this part of that judgment does not amount to a direction to have these costs taxed as between the arbitrators and the company, but it is simply drawing the attention of the parties to that judgment, to the provisions of sec. 199, and that the costs as between them are to be dealt with under that section in so far as it applies. *Application dismissed.*

WESTERN TRUST CO. v. CITY OF REGINA.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, Elwood and McKay, JJ. July 17, 1916.

[*Western Trust Co.* v. *Regina*, 24 D.L.R. 27, affirmed by a divided Court.]

MASTER AND SERVANT (§ V—340)—*Workmen's compensation —Dismissal of common law action—"Immediate" motion for assessment—Liability of municipal street railway.*]—Appeal from an award of Newlands, J., under the Workmen's Compensation Act (Sask. Stat. 1910-11, ch. 9, amended by 1915 ch. 43, sec. 28), against a municipal corporation. Affirmed. Court divided.

G. F. Blair, for appellant.

P. M. Anderson, for respondent.

LAMONT, J.:—The plaintiff company, as administrators of the estate of Thomas Cook, brought an action at law against the defendants to recover damages for the death of the said Cook while in the defendants' employ.

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The action was tried before Newlands, J., with a jury, in May, 1915. The jury brought in a verdict for the plaintiff. A motion for judgment was subsequently argued, and the Judge reserved his decision. On July 24 he handed out his judgment, which was in favour of the defendants, dismissing the action with costs. Almost immediately he went on his vacation and did not return to the city until October. On learning that judgment had been given dismissing the action, and that the Judge had gone on his vacation, the plaintiff served a notice of appeal. As soon as the Judge returned the plaintiff abandoned his appeal, and made an application to have compensation assessed under the Workmen's Compensation Act. This was granted, and the plaintiff was awarded $2,000 damages. From that award the defendants now appeal.

For the defendants it was contended that the award was wrong, because (1) no claim for compensation under the Act was made in the plaintiff's statement of claim; (2) The plaintiffs' right to compensation is conditioned upon the determination in the common law action that the defendants are liable under the Act, and that in this case there was no such determination; (3) That the application for assessment was not made *immediately*, as required by the Act, and that, the appeal having been abandoned, the plaintiff lost the right to apply which the statute gave him in case of an unsuccessful appeal; (4) That the defendants' street railway was not a railway within the meaning of the Act.

The first contention cannot be supported. To allow a claim under the Act to be embodied in an action brought independently of the Act would be contrary to sec. 12 thereof.

The second objection requires a little more consideration. Sec. 8 of the Act reads as follows:—

> If within the time limited for bringing an action under this Act an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under this Act, the action shall be dismissed; but the Judge before whom such action is tried shall, if the plaintiff so chooses, either immediately or in case of an unsuccessful appeal upon notice to the opposite party within thirty days after the disposition of such appeal, proceed to assess such compensation and to adjudge the same to the plaintiff, and he shall be at liberty to deduct from such compensation all or part of the costs which, in his judgment, have been caused by the plaintiff bringing his action independently of this Act instead of proceeding under the same, and also, in cases where there has been an appeal, the costs of the appeal.

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It was argued that in order to entitle the plaintiff to have compensation assessed, there must have been an expressed finding by the trial Judge when he dismissed the common law action that the defendants were liable under the Act.

I am of opinion that where the Act provides that the trial Judge shall dismiss a common law action if it is determined that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the Act, and where we find that the trial Judge did dismiss the common law action and subsequently assessed compensation under the Act, it must be presumed that he made—when dismissing the common law action—the findings of fact necessary to support the assessment. It is not necessary, in my opinion, as it was contended, that he endorse those findings upon the pleadings. The assessment by him of damages under the Act shews that in his opinion the facts necessary to give the Act application had been established.

The next objection was that he did not apply "immediately," and in support of this contention the plaintiff cited the case of *Slavin* v. *Train*, 49 Sc. L.R. 93, where it is held that the motion for assessment must be made before the verdict is applied. While the rule there laid down would be a guide in cases where the judgment dismissing the common law action is given in open Court, it cannot in my opinion apply where the trial Judge instead of announcing his judgment in Court merely hands his written reasons therefor to the registrar. If judgment dismissing the action had been made in open Court, the plaintiff could, and undoubtedly would have, at once moved that damages under the Act be assessed, and he would have been within his right in so doing. Of that right he cannot be deprived because the trial Judge simply files his reasons for judgment with the registrar. As the application was made as soon after the filing of the judgment as was practically possible, I think it was in time. If, however, this view should not be correct, the plaintiff's right, in my opinion, is preserved to him by the statute which gives him thirty days after the disposition of an unsuccessful appeal to apply to have the compensation assessed. The plaintiff served a notice of appeal, then abandoned it, and applied within the 30 days to have the compensation assessed. An abandoned appeal,

in my opinion, is an unsuccessful appeal, and is disposed of when it is abandoned. The plaintiff therefore had 30 days from the abandonment to apply to have compensation fixed.

The last ground of appeal is that the Workmen's Compensation Act does not apply to a municipal street railway, because the municipal corporation was neither a private person nor a public company. The following provisions of the Act are material:—

2. This Act shall apply only to employment by the principal on or in or about a railway, factory, mine, quarry or engineering work; or in or about any building which is either being constructed or repaired or being demolished.

3. (1) "Railway" means a road used by a private person or public company on which carriages run over metal rails, and shall include railways or tramways worked by the force and power of steam, electricity or of the atmosphere or by mechanical power or any combination of them;

(6) "Principal" in the case of a railway means the person or company owning or operating the railway.

What we have to determine, therefore, is: was the defendants' street railway a road on which carriages were run over metal rails and was that road "used" by a private person or public company? The learned trial Judge held that it was. He held that the word "used" did not mean owned or operated, as contended for by counsel for the defendants. I agree with the trial Judge. To use a road does not ordinarily mean to own it or operate it. It means to make use of it, to make it serve one's purpose. If the legislature had intended to define a railway as a road owned or operated by a private person or public company, one would have expected them to say so. That they did not say so, but used other language, compels us to apply the recognized rules of construction in the interpretation of the enactment. It is a rule of construction that we must give to the language used in an enactment its plain, ordinary English meaning, unless that meaning would lead to an absurdity or contravene the objects of the enactment. To give the word "used" in the definition of its ordinary meaning, does not in any way contravene the objects of the Act, or lead to an absurdity. Its effect is to widen the definition of "railway" beyond that contended for by the defendants, so as to include all roads on which carriages run on metal rails, if either a private person or public company make use of the road.

It may be that the legislature adopted this word for the purpose of preventing certain employers from escaping liability

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on technical grounds, such as have been advanced in this case on behalf of the defendants. That they could have accomplished this object by using other language in the definition is immaterial. They have used language which, in its ordinary meaning, takes in the defendants' railway, and, in my opinion, we cannot restrict that meaning without violating the recognized canons of construction.

The appeal should, therefore, be dismissed with costs.

McKAY, J., concurred.

HAULTAIN, C.J.:—The only point which I consider necessary to be dealt with in this appeal is the question whether the Workmen's Compensation Act (statutes of 1910-11, ch. 9), applies to employment in or about a municipal street railway.

By sec. 2 of the Act it is made to "apply only to employment by the principal on or in or about a railway, etc."

Sec. 3 provides that "unless the context otherwise requires the expression 'railway' means a road used by a private person or public company, etc." As to the word "used," I think it must be taken to mean "owned" or "operated," as by sub-sec. 6 of sec. 3: "principal" in the case of a railway means the person or company owning or operating the railway."

The juxtaposition of the expressions "private person" and "public company" excludes the broad interpretation given to the word "person" by clause 11 of sec. 6 of the Interpretation Act. A similar distinction, only in happier language, is made in sub-sec. 14 of sec. 2 of the Railway Act (R.S.S. ch. 75).

Up to 1913, the Railway Act, except in one unimportant particular, did not apply to a street railway, and the word "company," as used in that Act, did not include a municipal corporation. By the railway amendments of 1913 (stat. 1913, ch. 33), the word "company" as defined in the Railway Act, sec. 2 (14), is made to include "municipality" and "railway" is made to include "street railway."

According to the ordinary meaning of the expressions, "public company" does not, in my opinion, mean or include "municipality" or "municipal corporation," and a consideration of the railway legislation in force in 1911 leads me to the opinion that at the time the Workmen's Compensation Act was passed there was no legislative recognition of a municipal street railway, other than that contained in the City and Town Acts.

If the railway amendments of 1913 had been part of the statutory law in 1911, I should be inclined to interpret "public company," in the Workmen's Compensation Act, as including a municipal corporation; but I think that we should interpret the meaning and intention of the legislature in the light of the law and conditions of the time. I, therefore, come to the conclusion very reluctantly that the defendants' street railway is not a railway within the meaning of the Act in question.

On the other points raised in this case I agree with my brother Lamont.

The appeal must therefore be dismissed with costs.

ELWOOD, J.:—I concur.

Appeal dismissed; Court divided.

JOHNSON v. CHOMYSZYN.

Saskatchewan Supreme Court, Lamont, Elwood and McKay, JJ. July 24, 1916

[*Johnson v. Chomyszyn*, 27 D.L.R. 786, affirmed.]

COSTS (§ I—2c)—*Re-hearing of appeal of remitted case.*]—Appeal by plaintiff from a judgment for defendant (see 27 D.L.R. 786). Affirmed.

W. B. Scott, for appellant.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

MCKAY, J.:—The District Court Judge found in favour of the defendant on the question of fraud, and the plaintiff appealed therefrom. At the hearing of the appeal thereon at this sittings, this Court was unanimous in dismissing the appeal, but reserved judgment on the question of costs.

It is to be noted that the question of fraud was argued at the first hearing of this appeal, (27 D.L.R. 786), and the appeal was allowed to stand over. It is therefore the same appeal, which we have dealt with at this sittings, on which the respondent succeeds. Furthermore, the appellant was charged with fraud, and the respondent has established it, and succeeds on this ground.

I do not think, therefore, the appellant should be allowed any costs of appeal. It is not the fault of the respondent that this appeal had to be heard twice, and I do not think he should be saddled with any costs when he has established fraud and succeeded in the appeal. *Appeal dismissed.*

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SIM v. GOOD.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Brown and Elwood, JJ. July 14, 1916.

PRINCIPAL AND AGENT (§ II A—5)—*Sale—Proof of agency—Principal's liability for breach of warranty as to fitness for breeding.*]—Appeal from a judgment in an action on a promissory note. The defence is a counterclaim, the plaintiff's claim on the promissory note being admitted.

The counterclaim alleges that the plaintiff and one Theodore Cook in the month of June, 1912, sold the defendants a stallion for $2,400, secured by three promissory notes for $800 each in favour of said Cook. That on or about June 6, 1912, the plaintiff and Cook executed a guarantee in favour of defendant, Alexander Good, as agent for defendants, which provided that if the stallion did not get 60% of the mares in foal with proper care and handling

I agree to replace him with another stallion of the same price upon delivery to me of the said stallion in as sound and as good a condition as he is at present.

That defendants used said stallion and he failed to produce 60% of colts; that they notified the plaintiff, and Cook offered to re-deliver to them the stallion and demanded another stallion in his place. That plaintiff and Cook neglected and refused to replace the stallion, so they claimed $2,400 damages.

The plaintiff replied to this counterclaim by denying that he ever sold any stallion to defendants, and alleged that Cook sold the same alone. Cook was not made a party. At the trial, the only question that occupied the attention of the Court was whether plaintiff had sold the stallion to Cook, or whether Cook sold him to defendants as plaintiff's agent.

The Judge decided this question upon three documents put in by the defendants, which were, as follows:—

EXHIBIT 1.

Theo. Cook, Importer of Belgians, Percherons, Clydes and High-class Standard Bred Road Stallions.

Stallion "Silver Pearl," Guarantee and Bill of Sale.

Deyoe, Sask., June 6, 1912.

In consideration of the sum of twenty-four hundred dollars, the receipt whereof is acknowledged.

If the stallion, "Silver Pearl," No. 13751, does not get sixty per cent. of the producing mares with foal, with proper care and handling, I agree to replace him with another stallion of the same price upon delivery to me of the said stallion in as sound and as good condition as he is at present.

ROBERT SIM, THEO. COOK, Owner. ALEXANDER GOOD, Buyer.

EXHIBIT 2. Jan. 27th, 1912.

Agreement of sale between Robert Sim, of Moosomin, Sask., and Theodore Cook, of Winnipeg. Robert Sim agrees to take one thousand dollars in notes for his 6 year old grey Clyde stallion when sold by Cook if the notes are good and approved by the bank, and it is further agreed that T. Cook pay all expenses in making sale and that all money over and above one thousand to go to Cook to pay him for making the sale.

THEO. COOK, ROBERT SIM.

EXHIBIT 4. CANADIAN NATIONAL RECORDS.

Clydesdale Horse Association of Canada.

Incorporated under the Act respecting Live Stock Records Association at the Department of Agriculture, Ottawa, Canada.

Application for transfer of ownership:

I hereby certify that on Jan. 29, 1912, I sold to Alexander Good, P.O. Deyoe, Sask. County, Prov. Sask., the following described Clydesdale: Name of animal "Silver Pearl," Stud Book No. 13751.

I hereby authorize the transfer of ownership as above on the records of the Clydesdale Horse Association of Canada.

Signature of Seller, ROBERT SIM.

Upon his construction of these documents he held the plaintiff liable, but allowed him to substitute another horse, and if this was not done judgment was to go against him for $2,400. From this judgment both parties appeal: the defendants, because plaintiff was allowed to substitute another horse, and the plaintiff because he was held liable.

W. F. Dunn, for appellants.

T. J. Blain, for respondents.

ELWOOD, J.:—I am of the opinion that the trial Judge was correct in finding that there was no sale from Sim to Cook of the horse in question, and that it was not intended that there should be any sale.

If it were a sale from Sim to Cook then it would be unnecessary to have made any reference to Cook paying the expenses of the sale, and the concluding words "to pay him for making the sale," in my opinion only have reference to the understanding that Cook was merely acting as agent for Sim. The letter of June 9, 1912, (ex. 12) from Cook to Sim, seems also to shew that Cook was merely an agent and not the owner.

The guarantee was signed in blank and I am of the opinion that it was so signed to enable Cook to make a sale.

The trial Judge found that the horse did not come up to the guarantee and that he was worth nothing for any purpose, but he held that the plaintiff ought to be allowed to now replace him with another one, fulfilling the guarantee. The evidence

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shews that a demand was made both on Cook and on Sim to have the horse replaced, and that Sim in effect repudiated his liability. Under these circumstances I am of the opinion that the trial Judge erred in allowing the plaintiff to replace the horse, and that there should be judgment for the defendants on their counterclaim for $2,400. The statement of defence admitted the plaintiffs' claim and merely submitted that there should not be judgment until the counterclaim were disposed of. I am, therefore, of the opinion that the judgment of the plaintiff against the defendant should be varied by directing that in taxing the plaintiff's costs of the action, the costs of the trial should be limited to those of a motion for judgment and the counsel fee at the trial allowed only on such basis. The defendants should have judgment for their counterclaim for $2,400 damages, and the costs of the counterclaim. One of the judgments should be set off against the other, and the one in whose favour the balance is should have execution. The defendants should have their costs of this appeal.

BROWN, J.:—There can be no doubt, under the evidence, that Cook in selling the horse to the appellants represented him as his own property and represented Sim simply as a previous owner. Cook also, when complaint was made to him, agreed under certain conditions to replace the horse, again indicating that he, Cook, acted as, and assumed responsibility of, owner. Sim, in his evidence given at the trial, states very positively that according to his understanding of the transaction there was a sale of the horse to Cook. Under such circumstances I am of opinion that it should be held that there was a sale as between these two parties if it is at all possible to construe the documentary evidence on that basis. To so hold cannot possibly work any injustice to the appellants because they admit that Cook, in selling them the horse, represented himself as the owner, and ex. A shews that the appellants regarded Sim not as their vendor but simply as a previous owner. During the argument I was disposed to think that the documentary evidence was conclusive on the point and that it must be held that there was only an agency and not a sale as between Sim and Cook. Further consideration of the matter has, however, caused me to change my mind. I see no special difficulty in construing the document ex. 2 to be what it purports to be, namely an "Agreement of Sale." It is capable

of being construed as authorising Cook to sell the horse, not as Sim's property but as Cook's own property, and the "Agreement of Sale" as between Sim and Cook becomes absolute at the moment Cook sells to a third party. The terms are that Cook, when he sells to the third party is to pay for the horse by furnishing Sim with good and approved notes in the amount of $1,000 free of all expense. This document, being capable of such construction should, it seems to me, be so construed, as being in harmony with the evidence of Sim and the attitude of Sim and Cook throughout the transaction. It is necessary, also, to consider the effect of the documents, exs. 1 and 4. It seems clear that these documents were executed by Sim in blank in order to assist Cook in making the sale. There is nothing unnatural in Sim's attitude in this respect as it was to his advantage that Cook should succeed in making the sale. Sim was the registered owner of the horse, and Cook, instead of having a transfer made direct to himself, had the purchaser's name in ex. 4 left in blank so that he could fill in the name of his purchaser and thus save the necessity of double transfer and double registration. Such, apparently, being the case, this document should not be construed as establishing a sale direct from Sim to Good. Likewise as to ex. 1; Cook, being a horseman, knew that to effect a sale he would have to give some undertaking as to the breeding qualities of the horse. He himself could not give an undertaking that would satisfy an intending purchaser as he had no personal knowledge of the horse. That, it seems to me, fully explains why Cook, instead of taking a guarantee direct to himself from Sim, took this document in blank form. He could then fill it out to meet the terms of the sale to his intended purchaser. In my view, therefore, there is nothing in any of these documents, or all of them together, which does not harmonise with the evidence of Sim and the attitude of Sim and Cook throughout. The question still remains, however, as to Sim's liability under the document, ex. 1, which is described throughout as a guarantee. This document does not, as a matter of fact, guarantee that the horse is a 60% foal getter, it simply amounts to an undertaking that if the horse should fail in that respect he would be replaced by another. As already indicated, I am of opinion that Sim gave this document to enable Cook to effect a sale to a third party,

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The wording of the document and the fact that it was signed in blank and the further fact that Cook filled it up and delivered it to Good all points to such a conclusion almost irresistibly.

The respondent is, therefore, in my opinion, liable to the appellants under this document. The trial Judge found that the horse was of no value to the appellants and allows the respondent an opportunity of replacing him with another, fulfilling the undertaking. As the plaintiff has repudiated all liability in the matter and broken his contract, I am of opinion that the appellants are entitled to their remedy in damages. In the results, therefore, the respondent should have judgment for the amount of his claim and costs, his costs of trial being allowed only on the basis of a motion for judgment and the appellants should have judgment on their counterclaim for $2,400 and costs of the counterclaim, and they should also have their costs of this appeal.

NEWLANDS, J.:—In the purchase of the horse in question, defendants had no dealings with plaintiff. They bought the horse from Cook. Cook told them that he was the owner, the plaintiff was not mentioned as the owner but only as a previous owner of the horse. There is no attempt made to hold plaintiff by way of estoppel; there being no allegation, and no attempt to prove, that he be allowed Cook to hold himself out as his agent, and, as a matter of fact, Cook did not hold himself out as plaintiff's agent but sold the horse as his own. The real question, therefore, is whether or not Cook was the agent of the plaintiff in making the sale. Apart from the documents in question, the evidence is that plaintiff sold this horse to Cook and Cook sold him to defendants.

The defendants put in some questions from the plaintiff's examination for discovery, in which plaintiff says he signed these documents on the day he sold the horse to Cook. Plaintiff, in his defence to the counterclaim, says he sold the horse to Cook and that he never sold it to defendants. When asked by the trial Judge whether he intended that Cook should fill in the blanks with the true owner's name when he sold the horse, he said: no, he understood that he had made a complete sale of the horse to Cook.

When another horse was demanded from Cook in place of the horse sold, he wrote the defendants, as follows:—

Alex. Good, Esq., Buttress, Sask. April 14, 1914.

Dear Sir,—I have before me a letter from Dan. Osborne, of Moosomin, Sask., in which he says you are making a demand for another stallion in exchange for "Silver Pearl," the stallion I sold you and compy. I don't understand why he has not proved good as he was good the year before, and is right if handled right, but if he is used rough gets excited, his per cent. is not so good. The guarantee I gave with the horse is if he does not get fifty per cent. of the *producing* mares with foal, with *proper care* and handling, and not too many per day or week. Then is he as sound and in as good condition as when you bought him. If he is and you have lived up to the guarantee and the horse has not proved to be a fifty or sixty per cent. foal-getter, I am ready to make my part of the guarantee good. What horses I have are here, you can ship "Silver Pearl" here, or come here first and look the horses over and if we can arrange, then have your horse shipped.

Yours truly, THEO. COOK.

From the plaintiff's evidence, and this letter of Cook's which was put in at the trial (Cook not being a witness), it is clear that both plaintiff and Cook understood the transaction between them as a sale of this horse from plaintiff to Cook. It is equally clear that plaintiff never intended to appoint Cook his agent, nor did Cook understand that he was selling the horse as plaintiff's agent, but as his own property. Now, it seems to me to be a question to be decided between Cook and plaintiff as to whether Cook was plaintiff's agent, there being—as I have said—no allegation nor evidence of any holding out of Cook as such agent. Was the trial Judge therefore justified in so construing the documents in question as to make Cook plaintiff's agent, when the parties had no such intention? I think not. Cook can be plaintiff's agent in only one of two ways; either by actual appointment or by estoppel. He was not appointed such agent and there is no evidence to make him an agent by estoppel. Where two parties enter into an agreement which is evidenced by a written document, upon the meaning of which they both agree, it is not open to the Court to put a different construction upon it and thereby make a new agreement between the parties which they never intended to enter into. If this had been an action between the plaintiff and Cook, and they had disagreed as to the interpretation to be put on "Exhibit 2," then it would have been open to the Court to have construed it; or if defendant had been misled by this document and estoppel had been pleaded, then, again, it would have been the duty of the Court to have decided what their written agreement meant. But this is neither of the above cases; plaintiff and Cook are, apparently, in agreement

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as to the meaning of ex. 2, and defendants have not been misled by it and have not pleaded estoppel.

The actual question is: did Cook sell this horse as agent for plaintiff? Both plaintiff and Cook, in effect, say no. Is it, therefore, open to the Court to make Cook plaintiff's agent against the will of both plaintiff and Cook? I am of the opinion, under the facts in this case, that it is not.

The guarantee under which plaintiff is held liable is signed by both himself and Cook. This guarantee was signed by plaintiff in blank, and filled up by Cook when he sold the horse to defendants. This guarantee was not shewn to defendants before the transaction was completed.

The mere handing over to defendants of a guarantee signed by the plaintiff would not make him liable if he were not a party to the transaction. If plaintiff gave Cook a guarantee he could not, by merely handing it to a purchaser from himself, make plaintiff liable to his—Cook's—purchaser. The plaintiff would only be liable on this guarantee if Cook was his agent, and, as Cook was not his agent, plaintiff is not liable to Good.

The defendants' claim on the guarantee is, in my opinion, against Cook and not against Sim, and plaintiff's appeal should be allowed and judgment entered for plaintiff on the counterclaim with costs, and defendants' appeal should be dismissed with costs.

HAULTAIN, C.J., concurred with NEWLANDS, J.

Appeal dismissed; Court divided.

WEYBURN SECURITY BANK v. KNUDSON.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, Brown and Elwood, JJ. July 14, 1916.

[*Weyburn Security Bank* v. *Knudson*, 27 D.L.R. 789, varied.]

MORTGAGE (§ VI E—90)—*Foreclosure order—Variation.*]—Application to vary the judgment of the Court given herein on March 18, 1916 (27 D.L.R. 789). Granted.

Johnson, for appellant.

No one *contra*.

The judgment of the Court was delivered by

ELWOOD, J.:—Application to substitute in the final order of foreclosure the following clause, namely:—

Subject to any execution registered prior to the registration of the caveat of the Weyburn Security Bank as number T. 2350 in the Land Titles office

for the Moose Jaw Land Registration District in force and affecting the above lands.

I am of the opinion that the substitution asked for should be allowed as it affects what was the intention of the former judgment. As my recollection of the matter is that the clause objected to was more or less the result of the statement of counsel on the argument as to what would be sufficient. I do not think there should be any costs to any party of this motion. *Application granted.*

KELSEY v. VARCO.
KELSEY v. KLEIN.

Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ. July 14, 1916.

GIFT (§ III—16)—*Insufficient proof of delivery—Invalidity of unattested will.*]—Appeal from the judgment of a District Court Judge dismissing two actions for wrongfully depriving the plaintiff of the possession of certain animals. Affirmed.

D. Buckles, for appellant.

H. Y. MacDonald, K.C., for respondents.

MCKAY, J.:—These two cases were tried together and argued together in appeal on the same evidence. The actions were brought against the defendants by the plaintiff for wrongfully depriving the plaintiff of the possession of certain animals; in the *Varco* case a mare, and in the *Klein* case a cow, heifer, calf and 39 chickens.

At the trial before the District Court Judge, at the close of the plaintiff's case, the actions were dismissed, and from this judgment the plaintiff appeals.

The plaintiff's evidence is to the effect that, some 2 years before his death, her deceased husband gave her the mare and cow in question and that the heifer and calf are the offspring of this cow. There is absolutely no evidence as to the chickens.

There is no evidence of delivery of the mare or cow, and according to the plaintiff's evidence they remained on the premises of the deceased Samuel Kelsey. The plaintiff and her husband do not appear to have lived very happily together, and she was away from their home one winter, apparently in the winter of 1913 and 1914, down in the States on a visit.

On January 5, 1915, the day he was taken ill with his fatal illness, the plaintiff claims the deceased signed the following

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document, which she wrote at his request and read to him before he signed it:—

> This is for to shew that my wife shall have all the personal property and if I should die I want her to have one-third and you children the rest of the real estate. Please don't have no misunderstanding as I have no witnesses for this, but you see my name signed. S. KELSEY.

Some corroborative evidence was given as to the alleged gifts.

The District Court Judge found against the plaintiff as to these chattels in question being gifts to her, and from my reading of the evidence I cannot find anything therein that would force me to the conclusion that he was wrong in this finding and will not disturb it.

As to the above document, I think it was intended for a testamentary document and, as it is not witnessed, it fails.

Plaintiff's counsel also urged that, in any event, the plaintiff was in possession of these animals in question when taken from the deceased's premises and she is now entitled to them as against the defendants. I do not think the evidence shews this. The animals were in possession of the deceased on his farm where he was living with plaintiff when he was taken ill and removed to the Weyburn Hospital in the month of January, 1915. The plaintiff continued to live there after the deceased was removed until about January 19, 1915, when she went to see her husband at the Weyburn Hospital. During this time, in my opinion, the chattels in question being his property were still in law in his possession. If anybody had received them during that time he could have brought an action in his own name for their return.

The fact that, according to the plaintiff's evidence, she employed a man to look after this stock does not, in my opinion, take them out of the possession of the deceased. She was in my opinion simply acting for the deceased.

The appeal in both cases should be dismissed with costs.

NEWLANDS, J., concurred.

BROWN, J., agreed that the appeal should be dismissed.

Appeal dismissed.

NORTHERN CROWN BANK v. ELFORD.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont and Elwood, JJ. July 14, 1916.

GUARANTY (§ I—2)— *Substitution — Consideration.*]—Appeal from a judgment for the plaintiff in an action by a bank on a guarantee. Affirmed.

J. F. Frame, K.C., for defendant, appellant.

H. Y. MacDonald, K.C. for plaintiff, respondent.

The judgment of the Court was delivered by

LAMONT, J.:—The facts relevant to this appeal are all admitted.

On November 28, 1911, the plaintiff bank loaned $200 to one McKie on his promissory note, the payment of which was guaranteed in writing by the defendant. This guarantee was in the form of a letter. After the note became overdue some objection seems to have been raised by one of the bank's inspectors because the guarantee was not upon the bank's regular form, with the result that the manager of the bank which advanced the money went to the defendant and asked him to put his guarantee upon the bank's form. The defendant did so, and the manager then handed back to him the guarantee he had previously signed. The note not being paid, the bank sued the defendant upon both guarantees.

The only ground of defence advanced before us was that the plaintiff bank was not entitled to recover on the first guarantee because the bank had voluntarily given it back to the defendant, and that it was not entitled to recover on the substituted guarantee because no consideration had been given therefor.

The District Court Judge, before whom the matter was tried, held that the giving back of the first guarantee was a sufficient consideration to support the one substituted therefor, and he gave judgment for the plaintiff. In doing so, I think the Judge was right; although, in my opinion, the consideration supporting the substituted guarantee was not the mere handing back of the original guarantee, but was the advancing of the money to McKie. The transaction between the manager and the defendant amounted to nothing more than the substitution of the bank's form of guarantee for the more informal one given by the defendant. Had the bank's form been signed in the first place, no question as to the defendant's liability could have arisen. The defendant agreed to put the guarantee he had given in the language of the bank's form, there was no question of altering in any way his liability on his promise to pay if McKie did not. The transaction amounted simply to the substitution of one form for the other and the consideration supporting the original guarantee is, in my opinion, consideration for the one

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substituted therefor. But if this were not so, if the substituted guarantee was invalid for want of consideration, there would then be no consideration for the giving back by the plaintiff of the original guarantee, and, as the plaintiff sues also on that guarantee, the defendant would be liable thereon.

Appeal dismissed with costs.

YAGER v. CITY OF SWIFT CURRENT.

Saskatchewan Supreme Court, Newlands, Lamont, Elwood and McKay, JJ. July 14, 1916.

[See also *Yager* v. *Swift Current*, 22 D.L.R. 801.]

ARBITRATION (§ III—16)—*Validity of award for land injuriously affected—Municipal expropriation—Injunction.*]—Appeal by plaintiff from a judgment dismissing an action to recover moneys awarded under arbitration and for injunction. Affirmed.

H. Y. MacDonald, K.C., and *D. Buckles*, for appellant.

G. E. Taylor, K.C., and *C. E. Bothwell*, for respondent.

The judgment of the Court was delivered by

ELWOOD, J.:—In the year 1913 the city completed a dam for municipal purposes on land the property of the city. At the time of the erection of the dam the plaintiff Yager was chairman of the committee of the council which had charge of its erection. In consequence of the erection of the dam the water in the creek flowing through Yager's lands was raised and the council in May, 1914, after the completion of the dam, by resolution, resolved that the solicitor be instructed to take the necessary steps to expropriate the land required for dam purposes. Following this, in June, the city clerk gave notice to Yager that there had been deposited with him on June 8, the plans and specifications of the dam constructed and that the council intended to enter upon, take and use the lands necessary to be used in connection with the said dam, being those shewn in red upon the said plans, and also stating that the owners, occupiers, and all persons interested in any lands so to be entered upon, taken or used for the said work, must within 15 days from June 8, 1914, file their claims for compensation. In consequence of this an appointment was taken before a District Court Judge and the arbitration proceeded with.

From a perusal of the award it would appear that the amount allowed by the award was for lands taken or to be taken and not

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for damages for lands injuriously affected. The award was never adopted by the city by by-law. At the trial, the trial Judge held that as the award had not been adopted as provided for in sec. 258, ch. 84 of the R.S.S., it was not binding upon the city, and that as Yager was a member of the council and on the committee which had in charge the improvements, and knew of the probable damage to his property at the time of the erection of the works that he could not enjoin the city. From this judgment the plaintiffs appealed. Counsel for the plaintiffs urges that sec. 258 above referred to is not applicable to this case as the arbitration was apparently taken under sec. 30, R.S.S. 1909, ch. 91. That section in part is as follows:—

> And in case of disagreement, the compensation or damages shall be ascertained as provided in like cases in the municipal law in force in respect of the particular municipality concerned.

It was urged on behalf of the plaintiff that sec. 258 was not part of the means for ascertaining the damages; and that the arbitration and the award made in consequence thereof were the means provided in the municipal law for ascertaining the damages.

In my opinion the damages are not ascertained until they are conclusively ascertained, and under secs. 244 to 258, both inclusive, of ch. 84 above, these damages are not conclusively ascertained until the award is adopted by the city by by-law. If the award is not adopted the property as mentioned in sec. 258, stands as if no arbitration had been held. I am also of the opinion that there was no expropriation by the city. All the city did was to pass a resolution authorizing the proceedings to be taken to expropriate the lands. There appears to be no authority for the notice given by the clerk to the plaintiff Yager, but assuming that the clerk had authority, that merely gave notice of intention to enter upon, take and use the land. The dam was constructed, and the damage, if any, occurred prior to both the resolution and notice above referred to, and there was nothing done by the city after the resolution above referred to, in the way of exercising rights of ownership to the plaintiff's lands. Sec. 10 of ch. 26 of the statutes of Saskatchewan of 1912 is in part as follows: (183*b*)—

> Every city shall have power to acquire and hold real property situated within or without the city and to dispose of the same to individuals or corporations for the erection of industrial or manufacturing establishments, provided that no expenditure shall be made by the council under this section until a by-law providing for the same has received the consent of a two-

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thirds majority of the burgesses voting thereon, in accordance with the provisions of secs. 210 to 240 hereof.

It was contended that the by-law which was originally passed authorizing the construction of the dam was broad enough to cover the expropriation or acquisition of these lands. I am of the opinion that that contention cannot be given effect to. The by-law was clearly passed to provide for the cost of the construction of the dam and not for the acquisition of property, and it is quite clear that it was never in the contemplation of the city or of the plaintiff Yager, at the time of the passing of that by-law, that the plaintiff's lands would be in any way affected.

No other by-law having been passed I am of the opinion that before the city could acquire the plaintiff's lands a by-law would have to be passed, under the above quoted section. The plaintiff Yager having actively taken a part in the construction of the dam, and having been aware during its construction of the probability of water backing up on his land in consequence thereof, and having in effect concurred therein, cannot now, in my opinion, be allowed to enjoin the city from using the dam and backing up the water. If the city does not expropriate his land, then, in my opinion, he must rely upon his claim, if any, for damages.

There were a number of objections to the award raised on the appeal but in view of the conclusion I have come to above, it is unnecessary that I should express any opinion on these objections.

Appeal dismissed.

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SCHINK v. WHITE PASS & YUKON ROUTE, etc., CO.

Yukon Territorial Court, Macaulay, J. August 29, 1916.

PLEADING (§ IS—145)—*Striking out scandalous allegations.*]—Application made on behalf of the defendants, under r. 127 of the Judicature Act, to strike out pars. 4, 5 and 6 of the statement of claim herein on the ground that they are unnecessary and scandalous, and that they tend to prejudice, embarrass and delay the fair trial of the action; also, for a further order permitting the defendants to amend their statement of defence by adding thereto the paragraphs mentioned in the notice of motion, and for the postponement of the trial of this action from September 1, next, to September 14, next.

J. P. Smith, for motion.

F. T. Congdon, K.C., *contra*.

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MACAULAY, J.:—I am of opinion that the matter alleged to be scandalous would not be admissible in evidence to shew the truth of any allegation in the pleading which is material with reference to the relief prayed for by the plaintiff. The allegations are of illegal transactions carried on between the defendants and others not parties to this action, and are not relevant to the issue between the parties to this action, and are, therefore, scandalous matter which should be struck out; the Court having a general jurisdiction to expunge scandalous matter from any record or proceeding. *Re Miller* (*Love* v. *Hills*), 54 L.J. Ch. 205; *Cracknell* v. *Janson*, 11 Ch. D. 1, 13.

If I considered the said paragraphs to be only frivolous or vexatious I would, in my discretion, decline to exercise my jurisdiction at this stage of the proceedings under the authority of *Cross* v. *Howe*, 62 L.J. Ch. 342, because the application has not been made promptly; but being scandalous matter and, in my opinion, in no way affecting the issue between the parties in the present case, I feel it to be the duty of the Court to order that the said matter be expunged from the record; the plaintiff to be permitted to make any amendment necessary in his statement of claim by reason of this order.

On the hearing of the application the order was allowed for the amendment of the statement of defence and for the postponement of the trial, as asked.

By reason of the delay in making this application to strike out the said paragraphs of the statement of claim I am of opinion that the defendants, although successful on the motion, should not be allowed the costs of the motion. Costs of the whole application will, therefore, be costs to the plaintiff in any event.

Application granted.

NORTHERN COMMERCIAL CO. v. NORTHERN LIGHT, POWER & COAL CO.

NORTHERN COMMERCIAL CO. v. DAWSON CITY WATER & POWER CO.

Yukon Territorial Court, Macaulay, J. August 21, 1916.

PAYMENT (§ I—9)—*Draft given "in settlement"—Withdrawal—Effect of non-presentment—Application of payments—Liability for price.*]—Action for the price of goods sold and delivered to defendant upon his credit and request.

F. T. Congdon, K.C., *C. W. C. Tabor*, and *J. P. Smith*, for plaintiff.

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J. A. Fraser, *J. A. W. O'Neill* and *C. B. Black*, for defendant.

MACAULAY, J.:—These are two actions brought by the plaintiff against the Northern Light, Power & Coal Co. Ltd. (hereinafter called the Power Company), and against the Dawson City Water and Power Co., Ltd. (hereinafter called the Water Company) for goods and merchandise sold and delivered by the plaintiff to the said respective defendants, and which actions were, by consent, consolidated for the purposes of trial.

On applications made by the respective defendants, the Power Company and the Water Company, before the trial of these actions, Joseph Whiteside Boyle and Yukon Exploration, Ltd., were added as defendants in each action, and the said last named defendants duly filed statements of defence in each of the said actions.

On the application of counsel for the last mentioned defendants at the trial that the actions be dismissed as against the said defendants on the ground that the statements of claim in each case alleged no cause of action and claimed no relief against the said defendants, the said actions were dismissed as against the said defendants with costs as against their co-defendants the said Power Company and the said Water Company respectively.

The evidence shews that all the said companies were chartered companies and duly licensed or otherwise entitled to carry on business in the Yukon Territory.

By an Indenture of Lease dated February 15, 1913, the said Power Company and the said Water Company, and other companies controlled by the said Power Company, demised and leased unto the Canadian Klondyke Mining Co. Ltd. (now the Yukon Exploration, Ltd.), for the term of 9 years, all the undertakings, property and rights of the said respective companies, for the consideration therein mentioned, and the said Joseph Whiteside Boyle, who was the president and general manager of the said Canadian-Klondyke Mining Co. Ltd., became a party to the said lease as a guarantor on behalf of the said Canadian-Klondyke Mining Co. Ltd., for the due performance by it of the covenants entered into by it in the said lease.

The said lease, among other things, provided that all contracts and engagements entered into by the respective lessor companies should be entered into in the respective names of the said companies, and all actions instituted on behalf of the said com-

panies, or any of them, might be instituted in the name of any of the said lessor companies.

In addition to the said lease each and every of the said lessor companies duly executed powers of attorney to the said Joseph Whiteside Boyle under which said powers of attorney they and each of them delegated to the said Boyle all the powers, authority, privileges and rights of the said respective companies and each and every of them, and of their respective directors, including absolute power of administration, control and management of the said companies and each and every of them, and the said Boyle under the said instruments and lease duly assumed control and management of the said lessor companies, and continued in such control and management under the said lease and said instruments, and under a further instrument dated May 13, 1914, and duly executed, whereby the said Boyle was appointed general manager of the said lessor companies, until August 31, 1914, when the said powers were duly cancelled.

July 29, 1914, upon an application made unto this Court by one Oscar Newhouse, a shareholder in the Northern Light, Power & Coal Co. Ltd., at the suit of the said *Newhouse* v. *Northern Light, Power & Coal Co.*, 29 W.L.R. 249, it was declared that the said lease so entered into by the said lessor and the said lessee companies was *ultra vires*, and it was accordingly ordered that the defendants in that action be restrained from further acting under the said lease, but the said Boyle under his said appointment dated May 13, 1914, continued to act as aforesaid as general manager of the said lessor companies until and including August 31, 1914.

It is admitted that the said lease was never registered. It is also admitted that customers of the Water Company were supplied with water during the period of the lease and were billed for the same and paid for the same in the name of the said company.

The present actions are instituted by the plaintiff against the said defendants the Power Company and the Water Company respectively, to recover from them respectively the sums of $40,700.74 and interest and $8,598.03 and interest, for goods and merchandise sold and delivered by the plaintiff to the said defendants respectively at the request of the said defendants respectively, including therein the respective amounts of $2,590.29

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and $2,493.10 for lumber furnished by the Yukon Saw Mill Co. to the said defendants respectively and at the request of the defendants respectively, which said debts, with interest thereon, were by instrument in writing dated October 7, 1915, assigned by the said Yukon Saw Mill Co. to the plaintiff.

The evidence shews that the goods were delivered by the plaintiff and the said Yukon Saw Mill Co. to the respective defendants as claimed, and the balances claimed by the plaintiff in each case respectively, exclusive of interest, are admitted by the present general manager of the defendant companies to be correct, and to correspond with the books of the respective defendants.

The defendants, however, contend:—1. That the said goods were sold and delivered to, at the request, and upon the credit of the Canadian-Klondyke Mining Co. Ltd., and that the defendants respectively are not liable therefor: 2. That the amounts claimed for the said goods so supplied and sued for in these actions have been paid and satisfied.

After considering the whole evidence I can only conclude that the said goods were supplied to the said defendants respectively, at the request and upon the credit of the said respective defendants: That the balance claimed in each case is correct, and that the plaintiffs are entitled to interest at the rate of 6% per annum as agreed upon, and I so find as a fact.

The evidence shews that a draft for $92,667.13, dated June 30, 1914, and payable 30 days after date, was drawn either by said Boyle on the Canadian-Klondyke Mining Co. Ltd., at its New York office, or by the Canadian-Klondyke Mining Co. Ltd., on said Boyle at its New York office, or by the said company at Dawson on the said company at its New York office, the said draft itself, according to the evidence, having been lost or mislaid, and, in consequence, not produced at the trial; the draft having been given, according to the evidence of the said Boyle, to cover all the indebtedness of all the companies controlled by him to the plaintiff, including the accounts of the respective defendants in these actions.

The draft is taken by the plaintiff and entered with the following entry thereunder written:—

As per draft on Canadian-Klondyke Mining Co., New York, signed C.K.M. Co., Dawson, dated June 30, due New York, Aug. 1, 1914, for collection of the above accounts to June 1, 1914.

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This memo would indicate to me that the said draft was drawn by the said Canadian Klondyke Mining Co. Ltd. on the said Canadian-Klondyke Mining Co. Ltd., New York.

On examination of the said memo, it would appear that the words "in settlement" had first been entered in the said memo, and afterwards erased and the words "for collection" written in place thereof. The writing is all done in the same handwriting and with the same kind of ink, and by its appearance looks as if it had all been done at the same time, and the evidence also shews that the clerk who made the entry left the Yukon Territory shortly after that date and has not since returned.

From the appearance of the writing on the journal, and upon the evidence, I am of opinion that the change in the entry must have been made at the time of the entry of the memo. I am unable to see that the change in the words make any considerable difference in this case, but as counsel for defendants argued that the words "in settlement" should be construed as "in payment" I have decided to refer to it in my reasons for judgment.

When the said draft was delivered to the plaintiff the different companies above mentioned were credited with the respective amounts above mentioned. Afterwards, when the draft was cancelled, the said amounts were charged back in the books of the plaintiff to the accounts of the respective companies above mentioned.

The said Boyle then paid the plaintiff $50,000 to be credited to the Canadian Klondyke Mining Co. Ltd. account, which amount was duly credited, and afterwards, during the latter part of the month of August, 1914, gave two separate cheques for $25,000 each to plaintiff, which cheques were paid in the early part of September following and, at the request of the said Boyle, were placed in a suspense account pending the settlement of his (Boyle's) difficulties with the said defendants.

The said Boyle's appointment as general manager of the defendant companies having been cancelled on August 31, 1914, and negotiations for settlement between him and the new manager of the defendant companies having been carried on for over one year and failing to effect a settlement, the plaintiff, at the request of the said Boyle, about October 12, 1915, took the amount of $50,000 out of the suspense account and placed it to the credit

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of the Canadian Klondyke Mining Co. Ltd., and, on October 13, 1915, instituted these actions against the said defendants.

Counsel for defendants now contends that the draft dated June 30, 1914, for $92,000 was accepted by plaintiff in payment of the various accounts mentioned, and in payment of the accounts of the respective defendants in these actions. I do not think the evidence offered supports that contention.

Counsel further contends that the draft should have been presented for acceptance and by reason of the laches of plaintiff in not presenting the draft for acceptance and payment when due, as required by law, the indebtedness of these defendant companies is wholly extinguished, and in support of his contention cites many cases, among them the following: *Bickerdike* v. *Bollman* (1786), 1 Term. R. 405, sec 79, sub-sec. 2, Bills of Exchange Act; Chalmers Bills of Exchange, 305; *Hill* v. *Heap*, 25 R.R. 791; *Keith* v. *Bushe*, vol. 2, Digest English Case Law, p. 1559; *Peacock* v. *Purssell*, 14 C.B., N.S. 728; *Bishop* v. *Rowe*, 3 M. & S., 362; Maclaren on Bills, 268-9.

In my opinion this case does not fall within the line of authorities cited. In the case before me the drawer and the drawee are one and the same person, and at the request of the drawer, and before maturity of the bill, and with the consent of the drawer, the drawee and the holder of the bill, and, it must also be taken with the knowledge and consent of the respective defendants, because the said defendants were, at the time, represented by the said Boyle, the bill was withdrawn. See Byles on Bills, p. 263-4-5.

The parties to a bill can always cancel it by consent, as was done in the case before me.

Mr. Corbett, the manager appointed to succeed Boyle, also shews by his conduct that he acquiesced in the withdrawal and cancellation of the draft, although in my opinion such acquiescence was unnecessary.

The evidence shews that after the cancellation of the draft Mr. Corbett, the then manager of the said defendants, in adjusting and reconciling the said accounts, admits the amount sued upon to be correct, and, according to the evidence of Mr. McGowan, agreed to pay the same.

As to the contention made by counsel for said defendants

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that in any event the said accounts had been paid by the $50,000 paid into suspense account by Mr. Boyle, I am of opinion that such contention is untenable. The letters, exs. "Q" and "R," written by Boyle to Corbett at the time the said $50,000 was paid into suspense account clearly shew that it was not made as a payment of the accounts sued upon, but was placed in suspense account by agreement made between said Boyle and Corbett pending a possible settlement between them, upon which negotiations were then pending, and in letter exhibit "R," Boyle notified Corbett that unless settlement was completed on October 5, 1914, negotiations would cease and the money would be withdrawn.

Whatever rights these defendants may have against the said Boyle and the Canadian Klondyke Mining Co. Ltd., in an accounting as between themselves, these defendants are, in my opinion, liable to the plaintiff for the amounts sued upon in this action.

There will, therefore, be judgment for the plaintiff in each action for the amount claimed with interest as claimed and costs of action. *Judgment for plaintiff.*

GREAT WESTERN SECURITIES AND TRUST CO. v. McDONALD.

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Saskatchewan Supreme Court, McKay, J. February 3, 1916.

BILLS AND NOTES (§ III C—75)—*Liability of indorser—Discharge—Sufficiency of defence—Failure to take action—Impairment of security.*]—Appeal from an order of the Master in Chambers refusing to strike out par. 8 of the defence, and the counterclaim.

Jonah, for plaintiffs.

Samples, for defendant McAvoy.

MCKAY, J.:—The defendants McAvoy and Moffatt were sued as indorsees of several promissory notes, and par. 8 alleges that they indorsed as sureties for their co-defendant McDonald, and that because the plaintiffs refused or neglected to take sale or foreclosure proceedings under the mortgage given to them by defendant McDonald, which was by them assigned to plaintiffs, although requested so to do by defendant McAvoy, the said defendants McAvoy and Moffatt are thereby discharged from all liability under their indorsement.

I do not think this is a defence in law. The effect of this

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defence is simply that the plaintiffs delayed to press the defendant McDonald by legal proceedings. No loss of security is alleged.

De Colyar on Guarantees, 3rd ed., at p. 426, states:—

> Since, in order to discharge the surety, there must be a binding agreement by the creditor to give him time, it follows that mere passive inactivity, or omission to press the debtor, as distinguished from an agreement giving further time, will not discharge the surety, even when the debtor has become insolvent during the time thus suffered to elapse.

And cites a large number of authorities, among them *Price* v. *Kirkham*, 3 H. & C. 437.

I am, therefore, of the opinion that this paragraph should be struck out.

The counterclaim repeats pars. 7 and 8 of the defence, and alleges that the mortgage in question covers a hotel, situate in the Province of Saskatchewan, which lost its right to retail liquor by an Act of the Legislature of the Province of Saskatchewan: The Sale of Liquor Act, ch. 39 of the Statutes of Saskatchewan, 1915, and had the plaintiffs complied with the said defendants' request to sell under the mortgage, at the time such request was made, a much better price could have been secured than can be obtained now that its license has been cancelled, and that, as a result of such neglect or refusal by plaintiffs, he has been greatly damaged and claims $10,000 damages.

I do not think this counterclaim shews any cause of action against the plaintiffs. In order that the plaintiffs should be liable in damages to the defendants the damages should be caused by the act of the plaintiffs, but in this counterclaim the defendant alleges depreciation of the securities held by the plaintiffs, and that this depreciation was caused by the action of the Legislature, for which, in my opinion, the plaintiffs are not in any way responsible, and therefore I think this counterclaim should also be struck out. *Appeal allowed.*

Re THE CITY COLD STORAGE CO. LTD. IN LIQUIDATION.

Saskatchewan Supreme Court, McKay, J. September 18, 1916.

CORPORATIONS AND COMPANIES (§ V F 3—270)—*Liability as contributory—Stock at discount or by way of bonus—Winding-up as discharge of persons in employ.*]—Application to settle what amount, if any, is due by J. A. Goth on 168 shares which he holds in above company to bring them paid up to 50 per cent. the

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shares being $100 shares; or what amount, if any, is due by the said company to J. A. Goth, after paying 50 per cent. on said shares.

P. H. Gordon, for liquidator.

J. A. Goth, in person.

MCKAY, J.:—In his claim filed, Mr. Goth claims after paying 50 per cent. on his 168 shares there is due to him from the company $3,048.74.

On the other hand, the liquidator contends that the company does not owe Mr. Goth anything, and that he has not paid 50 per cent. on his said shares, but is short $1,364.38.

After hearing the evidence of Mr. Goth and Mr. Rooke, chartered accountant, who made an audit of the books of the company, some of the matters in dispute have been cleared, but still leaves the following in dispute:—

1. $500 claimed by Goth as paid to Marshall & Knight on shares 209 to 228 inclusive.

2. $525 claimed by Goth paid on shares 26-45 inclusive. $525 claimed by Goth paid on shares 309-328 inclusive.

3. Two cheques, one for $500 and another for $900, claimed by the liquidator to have been paid to Goth.

4. Goth claims salary at $250 per month from August 15, 1912, to November 15, 1914. The liquidator contends salary should be allowed only to September 25, 1914, date of originating summons to wind up the company in liquidation.

As to No. 1. Shares 209 to 228.

Mr. Goth stated that he bought 100 shares (209 to 308) from the company through Marshall & Knight at a discount of 5 per cent., which discount would amount to $500, and it is this discount of $500 that he claims as paid on shares 209-228 on January 10, 1912.

In the 1909 edition of Palmer's Company Law, at 113, the author gives instances of issuing fully paid shares of a greater nominal value in exchange for property of less value, and continues: "But except in this way it is not practicable or permissible to issue shares on a cash basis at a discount or by way of bonus."

And the following cases: *Ooregum Gold Mining Co.* v. *Roper*, [1892] A.C. 125; *Re Eddystone Marine Insce. Co.* (1893), 3 Ch.D. 9; *Welton* v. *Saffery*, [1897] A.C. 299, are authority for the foregoing statement.

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[Reference to sec. 112 of the Companies Act (R.S.S. 1909, ch. 72)].

No evidence was produced before me that the company in liquidation was authorized by its articles of association to pay any commission or that such authority was disclosed in its prospectus.

On the above authorities, therefore, I am of the opinion that Goth is not entitled to be credited with the discount he claims, and I disallow it.

As to No. 2. The evidence shews that these items, together amounting to $1,050, were not paid in cash, but these were credits allowed to Mr. Weir on his shares which he transferred to Goth, and, according to the evidence of Rooke, on the understanding that this sum of $1,050 was to be charged to Goth, which Goth denies.

I find that this was the agreement, namely, that this sum of $1,050 credited to Weir on his shares was to be charged to and assumed by Goth. This amount, therefore, is due by Goth to the company.

As to No. 3. Goth admitted having received the $500 cheque for his personal use, the endorsement of which he admitted. He also admits the endorsement of the $900 cheque as his signature, which shews he cashed it, but says he does not recollect it.

I find that he received the benefit of both these cheques and that he is chargeable therewith.

As to No. 4. The order for winding-up the company herein was made on November 5, 1914, and I hold on the authority of *Chapman's* case, L.R. 1 Eq. 346, and *In re Oriental Bank Corpn., MacDowall's* case, 32 Ch.D. 366, that Goth's salary ceased on November 5, 1914.

Goth, therefore, is entitled to salary up to and inclusive of November 5, 1914.

Goth is also chargeable with the $442 note made in his favour by the company, dated September 30, 1914, as of the date of the note.

As with the above findings, and what the parties admit, the question of amount due on the shares is matter of detail, there will be a reference to the local registrar to ascertain the amount due, with leave to either party to apply to me for further directions. *Judgment accordingly.*

SHACKLETON v. EDMONDSON.

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Quebec Superior Court, District of Montreal, Allard, J. October 27, 1916.

MARRIAGE (§ IV B—59)—ANNULMENT—PRIOR EXISTING MARRIAGE.

A prior valid marriage, which has not been legally dissolved, existing at the time a marriage is contracted, renders the second marriage void and it will be annulled by the Court.

ACTION to annul a marriage. Statement.

Surveyer & Ogden, for plaintiff.

The Court having heard the plaintiff by her counsel upon inscription for judgment by default against defendant, and having examined the proceedings, the proof of record and having deliberated;

Whereas plaintiff, duly authorized to institute the present action to annul her marriage with defendant, alleges that on March 31, 1916, she was married to defendant at Montreal; that no anti-nuptial contract was entered into between the parties; that in the certificate of said marriage defendant is falsely described as a bachelor; that defendant was previously married in the City of Winnipeg, in the Province of Manitoba, on February 26, 1908, to Eileen Muriel Lloyd; that said Eileen Muriel Lloyd is still living, and that defendant has never been divorced from her by the Senate of Canada or any lawful authority; that on March 31, 1916, defendant was not free to marry the plaintiff who has a right to demand that said marriage be declared null.

Considering that defendant has made default to appear.

Considering that the substantial accuracy of plaintiff's allegations is established by the proof of record.

Seeing art. 118 of the Civil Code.

Considering a second marriage cannot be contracted before the dissolution of the first.

Considering that the marriage between plaintiff and defendant, contracted and solemnized on March 31, 1916, at Montreal, is illegal, null and void.

Doth annul and void said marriage for all purposes of law, *a toutes fins que de droit*, with costs against defendant.

Judgment for plaintiff.

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ENRIGHT v. LITTLE.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. August 18, 1916.

LANDLORD AND TENANT (§ IIID 3—110)—DISTRESS—CHATTEL MORTGAGE—INTERPLEADER.

Under sec. 5 of the Distress Act, R.S.M., 1913, ch. 55, "crops and grain" are not excepted from distress for rent in favour of a person claiming under execution or attachment against the tenant; nor are goods and chattels other than crops and grain on the premises of a tenant excepted in favour of a person whose title is derived from the tenant; but such goods and chattels on the premises subject to a mortgage given by a third party, from whom the tenant has acquired the equity of redemption, are excepted from distress, in favour of the mortgagee.

Statement. APPEAL from judgment of Dawson, Co.Ct. Judge, in an interpleader action. Reversed.

The judgment of the Court was delivered by

Perdue, J.A. PERDUE, J.A.:—This is an interpleader issue concerning money in Court. Mrs. Brad, a lessor, distrained on her tenant for rent. The goods, which consisted of hotel furniture, were claimed by a chattel mortgagee, one Little, against whom Enright, the plaintiff in the action, had recovered judgment. Enright had issued a garnishee order against Dowswell, an auctioneer, who by arrangement between the parties had sold the goods. It is admitted that Mrs. Brad has a valid claim against the tenant for $225 rent and $40 for costs of seizure. Little, it is admitted, has a valid chattel mortgage for $1,015. The amount in Court is $389.50. An order was made in the County Court for payment of $275 to Mrs. Brad.

The whole question in the issue turns upon the construction of sec. 5 of the Distress Act (R.S.M. 1913, ch. 55). The section is as follows:—

> A landlord shall not distrain for rent on goods and chattels the property of any person except the tenant or person who is liable for the rent, although the same are found on the premises; but this restriction shall not apply to crops or grain in favour of a person claiming title under or by virtue of an execution or attachment against the tenant, or in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise, nor to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase or by which he may or is to become the owner thereof upon performance of any condition, nor where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of, or the right

of distress by, the landlord; nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law or son-in-law of the tenant, or by any other relative of his in case such other relative lives on the premises as a member of the tenant's family; nor shall such restriction apply in favour of any person whose title is derived by purchase, gift, transfer or assignment, whether absolute or in trust, or by the way of mortgage or otherwise, from the wife, husband, daughter, son, daughter-in-law or son-in-law of the tenant, or from any other relative of his in case such other relative lives on the premises as a member of the tenant's family.

In order to entitle Mrs. Brad to distrain on the goods it is necessary for her to bring herself within one of the exceptions mentioned in the section. It is claimed by the chattel mortgagee and his judgment creditor that all the first part of the exception, beginning with the words, "but this restriction," down to the words, "by way of mortgage or otherwise," where they first occur in the section, relate only to "crops or grain."

Sec. 5 was first passed in 1896 except that the last clause, commencing with the words "nor shall such restriction," was added by a subsequent amendment. The section was adapted from sec. 2 of ch. 23 of the Ontario statutes passed in 1887. The above sec. 2 was the same as sec. 5 of the Manitoba statute down to the word "premises" where it is first found in the section. The exceptions that follow, omitting the last, are the same in both enactments, only that the Manitoba section contains the words, "to crops or grain," which are not found in the Ontario section. The framer of the Manitoba statute took sec. 2 of the Ontario Act and inserted the words "to crops or grain," with the intention in his mind that these commodities should, under certain conditions, be excepted from the operation of the general clause. It is argued that all that follows down to and including the words "mortgage or otherwise" refer only to "crops and grain." But I think that the history and form of the section are opposed to this interpretation. I think the meaning of the words as they stand is that the restriction upon the landlord's right of distress contained in the first part of the section "shall not apply to crops of grain in favour of a person claiming title under or by virtue of an execution or attachment against the tenant," and that the first exception stops there. Then the section proceeds, "or in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant, whether

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absolute or in trust, or by way of mortgage or otherwise," as the second exception. I cannot believe that the words last quoted were intended to refer to "crops or grain only." I think that the meaning of the above is that the landlord may distrain on crops or grain on the premises claimed under execution or attachment against the tenant, and may distrain on goods and chattels on the premises belonging to a third person whose title is derived by purchase, gift, transfer or assignment from the tenant whether absolute or in trust or by way of mortgage or otherwise. The rest of the section provides other exceptions which do not concern this case.

But it appeared from the admissions of fact that the chattel mortgage had been made by one Lots to Little and that the tenant Gandy merely assumed the mortgage when he took over the hotel and furniture. The statute applies an exception to the general restriction in the case of a gift, transfer or assignment from the tenant, whether absolute or by way of mortgage, but this exception does not extend to a case where the mortgage had been made by a third person and his equity of redemption had been acquired by the tenant. It is true that the tenant in this case assumed the mortgage when he bought the goods, but he did not make it, and the statute does not apply the exception where the mortgage was not made by the tenant himself.

I think the appeal should be allowed and that the money directed to be paid to Mrs. Brad be paid to Enright.

Enright is entitled to costs against Mrs. Brad both in the County Court and in this Court.

Richards, J.A. Haggart, J.A.

RICHARDS and HAGGART, JJ.A. dissented.

Appeal allowed.

DREWRY v. DREWRY.

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Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Atkinson, Lord Shaw, and Lord Parmoor. August 1, 1916.

1. DESCENT AND DISTRIBUTION (§ I E—20)—MARRIED WOMEN'S RELIEF ACT—RIGHTS OF WIDOW—DEFENCES.
A wife's separation from her husband, unjustifiable by her, and such as would be a complete defence to an action for alimony, disentitles her to any allowance out of her husband's estate under the Alberta Married Women's Relief Act (1910, 2nd. sess., ch. 18).
[*Drewry* v. *Drewry*, 27 D.L.R. 716, reversed.]
2. STATUTES (§ II A—96)—EXPRESS LANGUAGE—LEGISLATIVE INTENT
Violence must not be done to the express language of a statute in order to comply with a view entertained as to the intention of the legislature which enacted it.

Statement.

APPEAL from an order of the Appellate Division of the Supreme Court of Alberta (27 D.L.R. 716), which order dismissed an appeal from the judgment of the Supreme Court of Alberta, dated January 17, 1916.

The judgment of the Board was delivered by

Lord Shaw.

LORD SHAW:—The question in the case depends upon the view which is taken of certain provisions of the Married Women's Relief Act of the Province of Alberta.

The late John Climie Drewry, whose executors are the appellants, and the respondent, Mrs. Drewry, were married on June 6, 1883. They lived together till June 9, 1890. On that day Mrs. Drewry left her husband. She remained separate from him during the remainder of his life. He died on December 28, 1914. It appears from the facts as set out in the judgment of Walsh, J., that the wife's separation from and declinature to live with her husband were without legal justification. The separation lasted for over 24 years. The wife was possessed of certain means of her own, and made no claim for alimony or otherwise upon her husband during his life. Apart from certain requests by the husband for her return and from certain letters by her to him, the parties led entirely separate and independent lives. After the separation he acquired a certain fortune; and he died leaving a will in which no provision was made for his wife.

By the law of Alberta there is a certain invasion of the unlimited power of testacy. Under the law of Scotland, and of those nations which have followed the principles of the law of Rome, such a limitation is definite, and in certain countries, particularly in Northern Europe, is very large. The limitation has not been adopted by the law of England, and the power of dis-

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inherison both of wife and children there remains to a testator. By the law of Alberta a middle course is adopted. As the appellants state in their case: "Prior to the passing of the Married Women's Relief Act a husband could by his will omit to leave any part of his estate to his wife, and she would have no relief whatever. This occasioned some hardship, and relief was thought advisable."

Such relief was conferred by the Married Women's Relief Act of Alberta (1910, 2nd sess. ch. 18), the material sections of which are these:—

2. The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the Judge before whom the application is made, receive less than if he had died intestate may apply to the Supreme Court for relief.

8. On any such application, the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.

10. Any answer or defence that would have been available to the husband of the applicant in any suit for alimony shall equally be available to his executors or administrators in any application made under this Act.

It is admitted that under the law of Alberta—there being no issue of the marriage—the widow would have succeeded to all the property of her deceased husband had he died intestate. The facts accordingly bring the situation within the scope of sec. 2 as one in which the widow "may apply to the Supreme Court for relief," and in which, under sec. 8, the Court might make a just and equitable allowance to her, if her claim was not open to and excluded by the answer or defence set forth in sec. 10.

It is this last-mentioned section which raises a question of construction not free from difficulty. The Courts below have held that the circumstances are not such as would have permitted alimony to be granted. But they have, notwithstanding this, reached the conclusion that it is open to them to make an allowance under the statute, although sec. 10 thereof already stated expressly makes available to the executors any defence which would have been open to the husband in any "suit for alimony." It is suggested that, although this result appears to do violence to the language of the Act, that language must be construed according to, and if necessary must give way to, the view entertained as to the intention of the legislature in passing this statute.

This result is startling, and their Lordships are not prepared to hold that it is justified by law. Their view of the Act is this:

The facts as to the situation and relations of the married persons must be taken just as they were. It is to be observed that the defence, which is to be open to the husband's executors, is a defence which would have been open to the husband himself, upon the figurative case that a suit for alimony had been brought against him, but this figurative case involves that the parties had been separated from each other. The difficulty, accordingly, which is raised in the Courts below, does not arise, namely, that the defence to a "suit for alimony" would have been complete if the parties had been living together, and that, accordingly, the innocent and disinherited wife could obtain no allowance from the Court. It is not so; in the case which is thus figured there would have been no defence, because there would have been no suit, and it is a contradiction of ideas to suppose such a suit by the wife or defence by the husband when the facts of the case were that they were living together without any cause of action having arisen.

When, however, the parties are separate, and when they have been living independent lives, it is then that the figurative situation has arisen, when a suit may be imagined to have been brought by the wife and the husband may be imagined to have been defending it.

So judged, the present case is clear. Had Mrs. Drewry, on the day of or immediately before her husband's death, brought a suit against him for alimony, it appears to their Lordships that his defence would have been complete. In this the Board is in entire agreement with the Judge who tried the case, and who observes: "I would have to dismiss her action for alimony if that was what I was trying." There is no suggestion upon the facts that on the day of or immediately before his death Mrs. Drewry's attitude towards her husband had altered, and it does not, in the view of the Board, appear to be open to the Courts to make an allowance out of the estate of a husband, upon whom during his life a wife separated from him and declining to adhere could have obtained no decree of alimony. In the present case it would be, in their Lordships' opinion, a reversal of the express provision of the statute to permit the respondent, after 24 years' separation—unjustifiable upon her part—from her husband, to make a claim upon his estate such as could be made by a wife

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living in family with him or having a just right to alimony from him.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgments of the Courts below should be reversed, and that the action should be dismissed; the respondent to pay the costs here and in the Courts below.

Appeal allowed.

B. C.

C. A.

REX v. RILEY.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, and McPhillips, JJ.A. October 3, 1916.

GAMING (§ I—2)—BONA FIDE CLUB—"KEEPER"—WANT OF PERSONAL GAIN.

A *bonâ fide* club where the members frequently play games of chance and skill, and form a pool from the money staked to expend for refreshments and for the upkeep of the club, is not a common gaming house within the definition of sec. 226 of the Code, and the steward cannot be convicted as a "keeper" under sec. 228 of the Code.

Statement.

APPEAL by way of case stated from judgment of Murphy, J. Conviction quashed.

Moore, for appellant.

Moresby, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The case reserved for the opinion of the Court is:—

Whether the premises 434 Pender St. West is a house, room or place kept by a person for gain to which persons resort for the purposes of playing at a mixed game of chance and skill.

The question is not well framed, but I will assume that by "a person" is meant the accused.

The facts certified are that the premises 434 Pender St. W. are kept and used by the "Pender Club," incorporated pursuant to the provisions of the Benevolent Society's Act. At the time in question it had a membership of 97 persons. The accused was the steward of the club, appointed to that office by the directors, and *appeared* to be a person *assisting* in the management of the club.

The game of poker, admittedly a mixed game of chance and skill, was frequently played there by some of the club's members, and a "rake-off" of 5c. or 10c. was taken by the players from *nearly* every "pot" of money staked on the game and expended for refreshments for themselves, which the steward furnished from the club's stock at fixed prices, which were in excess of

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the first cost of the articles to the club. The annual revenue of the club was a small fee payable by each member, quite insufficient to defray the club's general expenses, and the money received in payment for the refreshments as aforesaid.

It is not certified that the accused received any part of the rake-off for himself.

The magistrate found the accused guilty under sec. 226 A of the Code, but reserved the question above set out for the opinion of the Court.

While the accused has been found guilty as keeper, I think, on the true meaning of the findings of fact above summarized, he was found to be the keeper as defined by sec. 228 (2), which reads:—

> Anyone who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house, shall be deemed to be the keeper thereof.

The facts certified, I think, clearly shew that, in the real sense of the word, the club was the keeper, and, if the object was the acquisition of gain, the gain would be the club's gain. The accused could only be held liable to prosecution by virtue of said sub-sec. (2) of sec. 228.

It would have avoided any embarrassment if the magistrate had found specifically that the club was the keeper and the accused the manager, but I think that is, in effect, what his finding amounts to.

The place in question was furnished with a pool table, and there was a reading room and reading matter for use of the members, and some of the other equipment usually to be found in social clubs.

Eliminating the question of gain for the moment, on the facts stated, this was a social club.

In Halsbury's Laws of England, vol. 4, p. 406, a club is defined as:—"A society of persons associated together for social intercourse, for the promotion of politics, sport, art, science, or literature, or for any purpose *except the acquisition* of gain."

There is no finding that the Pender Club was not a *bonâ fide* club; there is no suggestion that the accused conducted the house under the name of the Pender Club for personal gain, and, apart from the finding as to the "rake-off," it is not suggested that the Pender Club was conducted by the members thereof for gain.

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The real question involved in the submission, therefore turns on whether or not the receipt by the club of moneys for refreshments, in the manner above set out, proves a keeping of the club premises for gain.

The rake-off was not compulsory—that was merely the method adopted by the players of paying for their refreshments. Instead of each one paying for his own refreshments, or treating in turn, they took from their common store, from time to time, sufficient money to pay for all the refreshments which they consumed.

I see a very clear distinction between this case and *The King* v. *James* (1903), 7 Can. Cr. Cas. 196, in which it was held that the sale by the keeper of a cigar store of cigars to his customers, who played a mixed game of chance and skill in a room on his premises, thus enhancing the profits of his business, was a contravention of the section in question here.

I think the section is aimed at the keeping of a house for gain to which persons come by invitation, express or implied. The members of a *bonâ fide* club come as of right.

This case is analogous to the case of *Downes* v. *Johnson*, [1895] 2 Q.B. 203, where it was held that members of a *bonâ fide* club were not to be considered persons who resorted to the club.

On the facts stated, I am of opinion that the Pender Club was not a house kept for gain, and that, therefore, the accused was wrongly convicted.

Martin, J.A.

MARTIN, J.A.:—On the facts set out in the case, I am of opinion that the question reserved should be answered in the negative, with the result that the appeal should be allowed.

It cannot properly be said on such facts that the house or place in question, conducted by the hundred members of the social club, all equally interested (*cf.* vol. 4 Hals. 405, par. 862), was "kept . . . for gain" within the meaning of the section and as defined by, *e.g.*, *R.* v. *James* (1903), 7 Can. Cr. Cas. 196. The nearest case against the accused is *R.* v. *Brady* (1896), 10 Que. S.C. 539, but there the "rake-off" was distributed among four certain persons, who were, as I understand the judgment, deemed by the police magistrate to be, in reality, proprietors. I think the conviction could have been supported if it had been found that the club was a sham one, but, while it appears from a stenographic report handed in after the argument that, in his

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oral reasons given at the time of conviction, his Worship stated that the club was "not a genuine social club," yet there is no finding of that kind in the case which he later stated for our opinion and to which we are restricted: *R.* v. *Fortier* (1904), 13 Que. K.B. 308, 313, 7 Can. Cr. Cas. 417, 423; *R.* v. *Angelo*, 16 D.L.R. 129, 19 B.C.R. 261. His Worship has found that this benevolent club is only enabled to be kept open because of the gambling that is admittedly going on there, its revenue being otherwise very insufficient, but the correction of such an evil is for the legislature, and, in the circumstances, the Courts can do nothing to stop it.

McPhillips, J.A.

McPHILLIPS, J.A.:—I have arrived at the same conclusion as my brother Martin, J.A., and that the appeal should be allowed.

Appeal allowed.

B. C.

C. A.

REX v. SMITH.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. October 3, 1916.

GAMING (§ I—6)—AUTOMATIC MACHINE—ELEMENT OF CHANCE.

ED. NOTE.—The Court was equally divided in this case upon the question whether an automatic vending machine which indicates in advance exactly what the receipts from each drawing will be is a "contrivance for unlawful gaming," within the meaning of the Criminal Code.

[*R.* v. *O'Meara* (Ont.), 25 D.L.R. 503 and *R.* v. *Stubbs* (Alta.), 25 D.L.R. 424, considered. See also *R.* v. *Gerasse* (Man.), 29 D.L.R. 523.]

Statement.

APPEAL by way of case stated from Magistrate Shaw, of Vancouver, dated March 30, 1916. Affirmed.

Sir Charles H. Tupper, K.C., for appellant.

R. L. Maitland, for Crown.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This case is not, in my opinion, distinguishable from *R.* v. *O'Meara*, 25 D.L.R. 503, 34 O.L.R. 467. The gambling machines in question in these cases are of precisely the same type.

The facts certified by the magistrates are not materially different in the two cases; they are quite as specifically found in favour of the Crown in this case as in that, and I entirely agree with the unanimous decision of the Ontario Court of Appeal, and the reasons therefor of Magee, J.A. I would answer the questions submitted by saying that, in my opinion, the game complained of was a game of chance, played in a place kept by accused for gain, and hence the conviction ought to be affirmed.

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MARTIN, J.A.:—There is, unfortunately, a conflict of authority on the point raised for our decision, arising from the fact that the Ontario Court of Criminal Appeal, in the case of *R.* v. *O'Meara*, 25 D.L.R. 503, 34 O.L.R. 467, has refused to follow the decision, on identical relevant facts, of a Court of like jurisdiction in another province, *viz.*, the Alberta Court of Criminal Appeal, in *R.* v. *Stubbs* (1915), 25 D.L.R. 424, 24 Can. Cr. Cas. 303. This is contrary to the long-established practice of this Court of Criminal Appeal, as has been lately again pointed out in *R.* v. *Sam Jon* (1914), 20 B.C.R. 549, wherein the weighty reasons, as they seemed to us to be, for making the criminal law uniform all over Canada are given. Moreover, the decision of the Alberta Court gives effect to the same interpretation of the law in Quebec as shown by *R.* v. *Langlois* (1914), 23 Can. Cr. Cas. 43, and in Manitoba in *R.* v. *O'Connor*, unreported. The case at bar is, I think, on all fours with *R.* v. *Stubbs*, and I see no good reason why that decision should not be followed. With all due respect to other views, and apart from the paramount consideration above mentioned, I feel that it contains a sound exposition of the law, and that a conviction based on the necessary element of chance can only be secured in this case by transforming what is, in itself, a detached, complete and certain play, game, or operation of the machine into a continuous series of plays, games or operations, something which is not warranted. The element of hazard, which must be present before there can be a mixed game of chance and skill, is entirely absent here—*R.* v. *Fortier* (1904), 13 Que. K.B. 308, 313, 7 Can. Cr. Cas. 423; a decision of the Quebec Court of Criminal Appeal. The fact that there is an inducement to make a subsequent play or operation because the combination for the next play may be more favourable than the fixed and certain one about to be played does not introduce the element of hazard in the true sense. When the next combination is indicated for the next play, it is just as fixed and definite in its indication and results as the preceding one. In each case the player knows exactly what he will get when he puts his money or token in the slot and pulls the lever. If the rule of the proprietor of the machine provided that no one person should make two successive plays, the matter would be too clear for argument. And the element of hazard cannot depend upon succession.

There is an additional reason for our not giving effect to the decision of the Ontario Court of Appeal as applied to this case, and it is that it may be distinguished on the facts, because that Court bases its judgment upon its belief in the existence of certain facts in *R.* v. *Stubbs*, *supra*, which are admittedly absent in the case at bar. At the conclusion of the judgment of the Court, delivered by Magee, J., he gives his reason for refusing to follow the Alberta Court of Appeal thus (25 D.L.R. 508):—

With much respect, I am unable to agree with this conclusion, as I consider that the fact was overlooked that there was not the element of certainty, except as to the minimum to be received; there was no certainty as to the maximum, as, it seems clear to me, the statement of the working of the machine at once discloses. The reasoning of Harvey, C.J., and that of Stuart, J., appear to me to be much more consistent with the plain facts.

But in the case at bar that fact has not been and cannot be "overlooked," for there is no such element of uncertainty whatever between the maximum and the minimum receipts, because the case stated, to the facts of which we are strictly confined (*R.* v. *Riley*, 30 D.L.R. 580, decided by us this day), shews beyond all doubt that the machine now in question indicated definitely in advance what the exact receipts would be from the result of each play or operation, and, therefore, the element of chance was entirely excluded, and the decision of the Ontario Court does not apply.

And, in any event, I feel constrained to add that, in my opinion, the brand of criminality, and the life-long social stigma of a conviction under the Criminal Code, should not be placed upon any citizen where the law is in such a state that a reasonable doubt exists as to whether or no the accused has done an act which brings him within the four corners of a penal statute under which his conviction is sought. He is entitled to the benefit of any reasonable doubt as to the law from the hands of the Court just as much as he is entitled to it as to the facts from the hands of a jury. People ought not to be sent to jail upon reasonable doubt, but upon reasonable certainty. This accused, in my opinion, ought to go free, as others similarly accused have gone free in Quebec, Manitoba and Alberta. And in this connection I entirely agree with the following opinion of Meredith, J. (in which three other Judges concurred), taken from his judgment in the Ontario Court of Appeal in *Rex* v. *Lee Guey* (1907), 15 O.L.R. 235, at 240:—

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The question arises under federal legislation applicable alike to all the Provinces of Canada: it obviously follows that the interpretation of such legislation should be the same in all parts of the Dominion. It would be unseemly, if not intolerable, that one view of it should be adopted in one province, and the opposite view in another; that the same person, for the same offence, should, under the same law, be deprived of his right of trial by jury on one side of an imaginary inter-provincial line, and yet, on the other side of it, be accorded that right—not through any fault in legislation, but solely by reason of a false interpretation of the enactment in one or other of the provinces.

In the interests of justice, I cannot refrain from expressing regret that this opinion (which sets out the principle which this Court has hitherto been guided by, as above noted) was not brought to the attention of that same Court when *Rex* v. *O'Meara*, *supra*, and *Rex* v. *Stubbs*, *supra*, were under its consideration.

Galliher, J.A

GALLIHER, J.A.:—I am in accord with the judgment of the Court of Appeal in Ontario in *Rex* v. *O'Meara*, 25 D.L.R. 503, 25 Can. Cr. Cas. 16, and would dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I am in entire agreement with my brother Martin, J.A. *Conviction affirmed.*

IMP.
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CITY OF TORONTO v. CONSUMERS' GAS CO. OF TORONTO.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Atkinson, Lord Shaw, and Lord Parmoor. August 1, 1916.

1. MUNICIPAL CORPORATIONS (§ II G 3—235)—LIABILITY FOR COSTS OF LOWERING GAS MAIN—INJURIOUS AFFECTION OF "LAND."

Space occupied by gas mains, and the mains themselves, are of the nature of "land," as defined by sec. 321 (b) of the Municipal Act, R.S.O. 1914, ch. 192, and the lowering of a gas main, necessitated by the municipality constructing a sewer, is an "injurious affection of land" in respect of which the Gas Company, as "owner," is entitled to compensation from the municipality under sec. 325(1) of the Act. The cost of the lowering operation is the measure of compensation.

[*Toronto* v. *Consumers Gas Co.*, 19 D.L.R. 882, 32 O.L.R. 21, affirmed.]

2. MUNICIPAL CORPORATIONS (§ II G 3—235)—PARAMOUNT POWER AS TO HEALTH—SEWERS—VESTED RIGHTS.

There is, in English law, no doctrine of "paramountcy" in the abstract, with respect to the duty of a municipality in providing sewers on their streets, and, in the absence of legislative authority, the vested rights of parties must not be displaced or withdrawn except by legislative authority; it is not permissible to have any preferential interpretation or adjustment of rights flowing from statute.

Statement.

APPEAL from the judgment of the Supreme Court of Ontario (Appellate Division), 19 D.L.R. 882, 32 O.L.R. 21. Affirmed.

The judgment of the Board was delivered by

Lord Shaw.

LORD SHAW:—The action out of which this appeal arose was brought by the appellants, the city of Toronto, against the respondents, the Consumers' Gas Co., to recover the cost of

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lowering a 20-inch gas main belonging to the defendants on Eastern Ave., at or near the intersection of that avenue with Carlaw Ave., both avenues being public streets of Toronto. There is no question of the propriety of the construction by the city of the public sewer on Carlaw Ave., nor of the fact that such construction necessitated the lowering of the gas main. These operations were not brought about in the interest or for the purposes of the gas company, but of the corporation, which, however, was acting undoubtedly in the public interest. Upon whom—the city or the gas company—is the expense of the displacement and replacement of the gas-pipes to fall? This is the question in the case.

The trial Judge gave judgment in favour of the appellants. Upon an appeal by the respondents to the Supreme Court of Ontario that Court allowed the appeal and dismissed the action (19 D.L.R. 882). Although the amount involved is small, the question is of importance, and its settlement will regulate the general point of liability as between the city and the gas company for the cost of operations of a similar nature.

The Board entertains no doubt that the Judges of the Supreme Court have come to a correct conclusion. In the opinion of their Lordships, it is within the right of the city, in constructing a drain, to order the lowering of the gas main, but it is the duty of the corporation to pay the cost of the operation.

The gas company was incorporated in the year 1848 by 11 Vict. ch. 14. Under sec. 1 of the statute it was given power to purchase, take, and hold

> lands, tenements, and other real property for the purposes of the said company.

By sec. 13 it was made lawful for the company, after two days' written notice to the city,

> to break up, dig, and trench so much and so many of the streets . . . as may at any time be necessary for the laying down the mains and pipes to conduct the gas . . . or for taking up, renewing, altering or repairing the same.

Provision was made by the same section against unnecessary damage being done and uninterrupted passage being kept through the streets, the work having to be finished and the replacing of the streets accomplished without unnecessary delay. By sec. 15 of the statute the location of the gas-pipes was dealt with, and it was provided that they should be 3 feet from any other gas-

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pipes; and, with regard to their situation, if any differences arose on that point, these were to be settled by the surveyor.

Once the pipes were laid by statutory authority, then they, in fact, became *partes soli*. There seems little reason to doubt that in the year 1848, when the gas company thus laid down its pipes, the freehold of the ground was in the Crown. Whether this was so or not would not appear to make any difference as to the exact right acquired under the Gas Company Act of 1848; but it is a circumstance worthy of note that the present demand by the corporation is a demand founded upon a right which vested in it or its predecessors subsequent to those rights which were created by statute in the gas company itself.

In the *Metropolitan R. Co.* v. *Fowler*, [1893] A.C. 416, 425, Lord Watson thus dealt with the legal position in reference to a tunnel constructed by that railway company under part of the city of London, and he observed:—

> The tunnel has become *pars soli* in the strictest sense of the words. If it had been constructed by one who was proprietor *a centro usque ad cælum* it would have passed, in the absence of exception, with his conveyance of the land. As matters stand the owners of the soil, whoever these may be, are practically divested of interest in that part of it which has been converted into tunnel. They have no right to occupy or to interfere with it in any way whatever: and their exclusion is not for a period limited, but for all time.

And in another portion of his judgment he said, "I think the tunnel is as much 'land' as the highway itself or any other part of the soil beneath." The same principle would appear to apply to the gas main in the present case, laid down as it was by virtue of the authority of the Act of 1848.

It is now expedient to see what are the powers relied upon by the appellants as entitling them to charge upon the gas company the cost necessarily incurred by them of lowering the pipes of that company. One ground is thus stated by the trial Judge, whose opinion is that the corporation

> has the paramount duty of providing for the health of the citizens with reference to the construction of sewers on their streets, and that the defendants have only the rights to use the streets for their own benefit, subject to that paramount authority.

Certain decisions of Courts in the United States Reports in support of this doctrine of paramountcy are quoted.

Their Lordships are of opinion that there is no such doctrine of paramountcy in the abstract, and that unless legislative

authority, affirming it to the effect of displacing the rights acquired under statute as above described by the respondents, appears from the language of the statute book, such displacement or withdrawal of rights is not sanctioned by law. In this, as in similar cases, the rights of all parties stand to be measured by the Acts of Parliament dealing therewith; it is not permissible to have any preferential interpretation or adjustment of rights flowing from statute; all parties are upon an equal footing in regard to such interpretation and adjustment; the question simply is: What do the Acts provide?

Before dealing with the statute specifically founded upon as justifying the position and claim of the city, namely, that of 1913, it may be convenient to state that in 1834, by 4 William IV. ch. 23, the limits of the town of York were extended, and the town was erected into a city under the name of the city of Toronto. Under sec. 22 of that statute, it was given full power with regard to the surface of the streets and with regard to the repair, etc., thereof. There was in that statute no vesting with regard to the soil.

In the year 1849, by the Act 12 Vict. ch. 80, re-enacted by ch. 81, it was provided by sec. 31 that the corporation had power to make by-laws for the erection, construction, or repair of such drains as the interest of the inhabitants required to be erected, etc., at the public expense. This Act was subsequent in date to the gas company's statute. It was repealed by 22 Vict. ch. 99, but under the latter statute power was given to make regulations for "sewerage or drainage that may be deemed necessary for sanitary purposes." It was, however, not until that date, namely, 1858, that by that statute all roads, streets, and highways were vested in the municipality.

This brief historical sketch has been ventured upon in order to make it clear that the position of the gas company cannot in any sense be looked upon as having been in the nature of encroachment upon existing rights, statutory or otherwise, of the city of Toronto.

The Act put forward, however, in support of the respondents' case is the existing Municipal Act of 1913. By sec. 325 (1) of that Act it is provided:—

Where land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation or of the

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council thereof, under the authority of this Act, or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected.

It is, however, extremely important to ascertain what the word "land" here mentioned embraces. Unless a careful attention be given to this point the danger might be incurred of applying principles laid down in England, which extend and were meant to apply solely to land with the specific limitations of definition in the English Lands Clauses Act to cases where these specific limitations are not found or where the definition is different.

Under the English Lands Clauses Act, sec. 3, the definition is: "The word 'lands' shall extend to messuages, lands, tenements, and hereditaments of any tenure." In the present case the definition of "land" is contained in sec. 321 (*b*). The whole of that section dealing with not only land, but the terms "expropriation" and "owner" is important. The section reads in this way:—In this part:

(*a*) "Expropriation" shall mean taking without the consent of the owner, and "expropriate" and "expropriating" shall have a corresponding meaning.

(*b*.) "Land" shall include a right or interest in, and an easement over, land.

(*c*.) "Owner" shall include mortgagee, lessee, tenant, occupant, and a person entitled to a limited estate or interest in land, a trustee in whom land is vested, a committee of the estate of a lunatic, an executor, an administrator, and a guardian."

The reasons have already been assigned for holding that the space occupied by the gas mains and the gas mains themselves of the appellants are of the nature of land in its ordinary sense. It must, however, be added that, in any view, the definition of "land" in the Municipal Act unquestionably includes them. For it can hardly be denied that the words "a right or interest in, and an easement over land" would embrace the right of the gas company to have their pipes remain, and to have the interest and use of them, and the space occupied by them undisturbed; nor can it be doubted that the company falls within the definition of "owner" as just cited. It thus appears plain that the taking, without the consent of the owner, of this right or interest becomes subject to those provisions contained in sec. 325.

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One of these provisions is that compensation is to be made where the land (thus including a right or interest in the land) is injuriously affected by the exercise of such powers. The corporation is accordingly liable in respect of such injurious affection. All that is asked in the present case is that the displacement and replacement of the pipes shall be paid for. Without compensation the city would not be empowered to make such displacement, and the measure of injurious affection, namely, the cost of the operation, would seem to be fully covered accordingly by the terms of the Act of Parliament.

Their Lordships will humbly advise His Majesty that the appeal should be disallowed. The appellants will pay the costs.

Appeal dismissed.

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Re GEFRASSO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. April 19, 1916.

INFANTS (§ I C—13)—CUSTODY—RIGHT OF MOTHER OF ILLEGITIMATE CHILD —WELFARE OF CHILD.

In awarding the custody of an illegitimate child, the desire of the mother is a primary consideration, but the child's welfare, in view of all surrounding circumstances, is the determining factor.

[See also *Re Maher* (Ont.), 12 D.L.R. 492; *Re C.*, 25 O.L.R. 218; *Re Scarth* (Ont.), 26 D.L.R. 428; *Re Castle* (B.C.) 20 D.L.R. 955; *Smith* v. *Reid* (Sask.), 17 D.L.R. 59; *Re Evans* (Man.), 15 D.L.R. 218, 16 D.L.R. 851; *Re Kenna* (Ont.), 11 D.L.R. 772, 15 D.L.R. 844; *Re Chisholm* (N.S.), 13 D.L.R. 811; *Re Baylis* (Alta.), 13 D.L.R. 150; *Re Phillips* (Ont.), 12 D.L.R. 854; *Re Ney* (Ont.), 12 D.L.R. 248; *Re Hutchinson* (Ont.), 5 D.L.R. 791, 11 D.L.R. 827; *Re Hart* (Ont.), 4 D.L.R. 293; *Woolven* v. *Aird*, 14 Que. P.R. 165.]

Statement.

APPEAL from the judgment of Sutherland, J., refusing an application by the mother of an illegitimate child, for an order awarding the applicant the custody of the child, who, a few months after her birth, had been placed by the applicant with the respondents, in whose custody the child was at the time of the application. Affirmed.

T. C. Robinette, K.C., for appellant.

W. A. Henderson, for William and Jennie Warwood, the respondents.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by Millicent Ratcliffe from an order made by Sutherland, J., dated the 20th March, 1916, dismissing the application of the appellant for an order that she should have the custody of her infant daughter Millicent Catharine Gefrasso.

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The infant is the illegitimate child of the appellant, by a man named Gefrasso, and is now six years of age. When the child was three or four months old, the appellant, who was in indigent circumstances, placed the child in the custody of the respondents. There is a conflict of testimony as to the terms of the arrangement then made. According to the testimony of the appellant, it was that the respondents were to take care of the child until the appellant could arrange for a home for her. This is denied by the respondents, who say that the arrangement was that they were to rear the child as if it were their own, and that the appellant should give up its custody and control to them. There is also a conflict of testimony as to the interest which the appellant has evinced in her child and her welfare. According to the testimony of the respondents, she never, before last December, except for two months shortly after the child was taken by the respondents, during which the appellant was employed to nurse a son of the respondents, who was ill with scarlet fever, visited their residence or made any inquiries of them as to the child. This is denied by the appellant, but her affidavit on this point is not satisfactory.

There is also a conflict of testimony as to the care that the respondents have taken of the child. The appellant deposes that she saw the child at the respondents' house on the 20th December last, and that she was then dressed in rags and filthy, and that the house also was in a filthy condition. Catharine Rudd, who accompanied the appellant on this occasion, deposes that the child was found to be in a dirty and neglected condition. This is denied by the respondents in their affidavits; and, according to the affidavit of Rogina Ellis, a neighbour of theirs who has known them for ten years, and has had an opportunity of observing the child from day to day ever since she has lived with the respondents, she has had the best care and attention and has been well provided for.

The child was baptized into the Roman Catholic Church, and the respondents are Protestants.

The appellant is now in service as a housemaid in a "rooming-house" kept by Catharine Rudd, and her wages are $20 a month, and there are nine roomers in the house, but whether men or women or both does not appear. The appellant proposes to take the child to this rooming-house to live with her there, and Mrs. Rudd is

willing that she should do so, and says that she has a little girl of her own, eight years of age, and is in a position to provide a comfortable home for the appellant and her child, and that she will take an interest in the child and see that she is properly cared for and attends school as if she were her own child.

The proper conclusion upon the evidence, in my opinion, is that the respondents have properly cared for the child and that they will do so in the future, if she is allowed to remain with them, and that the interest of the child will be better subserved if she remains a member of the respondents' family, than if she is entrusted to the care and custody of the appellant. I doubt whether a "rooming-house" is a desirable place in which to bring up a young female child, and at best there is no certainty that the home which she purposes to provide for the child will always be available to her. She is a monthly servant, and her engagement with Mrs. Rudd is therefore of uncertain duration. If she and Mrs. Rudd should part, the appellant will have no home to which to take her child, and she has no means for providing one. She says that she can always find employment, but it is at least doubtful whether there are many who would permit her child to live with her; and it is obvious that, even if she were permitted to do so, the child would not have the care and attention she ought to receive and the inestimable benefit of having a place which she could call "home." In addition to this, if she remains with the respondents, and bears, as she now does, their name, the stain of illegitimate birth, of which she is guiltless, will be forgotten or effaced, and there will be less danger of her having to undergo the humiliation of being pointed at as a "bastard," a humiliation which will be the greater as her years increase. The question for decision then is, do these considerations affecting the welfare of the child outweigh the claims of the appellant?

It is settled law that the desire of the mother of an illegitimate child as to its custody is primarily to be considered and must be given effect to, unless it would be prejudicial to the child's interests if it were delivered into the custody of the mother: *Barnardo* v. *McHugh*, [1891] A.C. 388.

The remarks of FitzGibbon, L.J., in *In re O'Hara*, [1900] 2 I.R. 232, 240-1, appear to me to be directly applicable to the facts of this case. He was there dealing with the rights of the mother

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of her legitimate child, whose father was dead, and, speaking of what is sufficient to displace her *primâ facie* right to its custody, said: "It appears to me that misconduct, *or* unmindfulness of parental duty, *or* inability to provide for the welfare of the child, must be shewn before the natural right can be displaced. Where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities, in the rank and position to which the child by birth belongs—i.e., the rank and position of the parent—the Court is, in my opinion, judicially bound to act on what is equally a law of nature and of society, and to hold (in the words of Lord Esher) that 'the best place for a child is with its parent.' Of course I do not speak of exceptional cases—of which this, fortunately, is not one—where special disturbing elements exist, which involve the risk of moral or material injury to the child, such as the disturbance of religious convictions or of settled affections, or the endurance of hardship or destitution with a parent, as contrasted with solid advantages offered elsewhere. The Court, acting as a wise parent, is not bound to sacrifice the child's welfare to the *fetish* of parental authority, by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over its head, or provide it with the necessaries of life."

If these exceptions warrant an interference with the *primâ facie* right of a parent of a legitimate child, they *â fortiori* do so where the child is illegitimate.

The case at bar comes, I think, within the exceptions mentioned by FitzGibbon, L.J. It is not unfair to say that the appellant has been, in the years during which her child has been maintained by the respondents, unmindful of her parental duty. This is shewn by the fact, which is, I think, established, that during all that time until she was about to launch her application she had evinced no interest in her child and not even seen it except during the two months in which she was in the service of the respondents. She has also failed to satisfy the Court that she is able and willing to provide for the child's material and moral necessities, and she is seeking to force it from a comfortable and happy home to share her fortunes when she is unable to provide for it a permanent home or even a temporary one that is a suitable one in which to bring up a female child of tender years.

My brother Sutherland, in the exercise of his discretion, has

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decided against the appellant. I cannot say that his discretion was wrongly exercised, or that it proceeded upon a misapprehension of the facts or a mistaken view of the law, and it follows therefore that his order must be affirmed and the appeal be dismissed.

The respondents expressed their willingness that the child should be brought up in the Roman Catholic faith if the appellant so wishes. If the parties desire it, the case may be spoken to as to this and as to making provision for the appellant seeing the child, but it is to be hoped that these matters may be arranged between the parties without further discussion before the Court.

I have not referred to the Infants Act, R.S.O. 1914, ch. 153, sec. 2. It may be that under it the right of the mother may not be as ample as it was held to be in the cases to which I have referred. No costs. *Appeal dismissed.*

Re OLIVER KING.

MAN.

K. B.

Manitoba King's Bench, Mathers, C.J.K.B. September 18, 1916.

INCOMPETENT PERSONS (§ IV—20)—DETENTION OF DANGEROUS INSANE IRREGULARLY COMMITTED.

The Court has a discretion to refuse the discharge of a person from an insane asylum, if he appears dangerous to be at large, however irregular the proceedings under which he is detained.

Statement.

APPLICATION by Oliver King, at present confined in the asylum for the insane at Brandon, for an order discharging him from that institution. Refused.

Matheson, for Crown.

J. F. Kilgour, for applicant.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—By agreement between counsel for the Crown and the applicant, the matter was dealt with as though a writ of *habeas corpus* had been issued and a return made thereto producing the warrant of commitment and proceedings before the police magistrate. Counsel for the applicant moved for his discharge upon the ground that the proceedings relating to his confinement in the asylum were irregular and not in accordance with the Insane Hospitals Act. For the Crown it was contended that, even if the proceedings under which the applicant was confined were irregular, he should not be discharged if he is now insane and dangerous to be at large. Upon this latter point Mr. Matheson, for the Crown, said he had medical testimony to submit which would go to shew that the applicant was at the time of his confinement and still is a dangerous lunatic.

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The authorities shew that the Court has a discretion to refuse an application such as this if satisfied that the applicant is at the time of the application insane and dangerous to be at large, however irregular the proceedings under which he is held may be. In *Re Shuttleworth*, 9 Q.B. 651, Denman, C.J., said, at 662:—

> If the Court thought that a party unlawfully received, or, detained, was a lunatic, we would still be betraying the common duties of members of society if we directed a discharge. . . . Therefore, being satisfied in my own mind that there would be danger in setting her at large, I am bound by the most general principles to abstain from so doing; and I should be abusing the name of liberty if I were to take off a restraint for which those who are most interested in the party ought to be most thankful.

With this statement Coleridge, Wightman and Earl, JJ., agreed. In a subsequent case, in *Re Greenwood*, reported in 24 L.J.Q.B. 148, Coleridge, J., discharged a patient from an asylum because of the irregularity of his confinement, being of opinion that, although possibly insane, the applicant was not dangerous. But, in the course of his judgment, he makes this observation:—

> I still feel that in such cases where on the affidavits it appears clear that the party confined is in such a state of mind that to set him at large would be dangerous either to the public or himself, it becomes a duty and is within the common law jurisdiction of the Court, or a member of it, to restrain him of his liberty until the regular and ordinary means can be resorted to of placing him under permanent legal restraint.

In *Re Gibson*, 15 O.L.R. 245, the Court of Appeal of Ontario held, upon the application of an alleged lunatic for his discharge upon *habeas corpus*, that the Court has no jurisdiction to direct an issue to try the question whether the applicant is at the time of the inquiry of unsound mind and incapable of managing himself and his affairs and whether, if being found insane, he is dangerous to be at large. If as the result of such inquiry he is found to be sane, or, if insane, not dangerous to be at large, he should be discharged whether the proceedings under which he is held be regular or irregular: *Re Davidson*, 8 O.W.N. 481.

Following the practice laid down in *Re Gibson, supra*, I, with the consent of counsel for both the applicant and the Crown, directed an issue to try the question of whether or not the applicant was, or was not, now insane and dangerous to be at large, and forthwith proceeded to try the issue so directed.

I heard the evidence of Dr. McFadden, who was superintendent of the asylum when King was first admitted and who had him under observation for about 6 weeks; the evidence of

Dr. Hicks, the present superintendent, who has had him under observation for over 3 months; and the evidence of Drs. Cundell and Matheson, who examined him prior to his commitment. In the opinion of all of them he is now insane and dangerous to be at large. I also heard the evidence of a number of lay witnesses and that of the applicant himself. I have also perused a great many letters written by Mr. King to a great many people, covering the period between August, 1914, and August, 1916. In one or two of them he expressed most disloyal sentiments and uses the most vulgar and scurrilous language with respect to the present British Sovereign and his predecessor, Edward VII.; he also expresses pro-German views and speaks in most disparaging terms of British soldiers and institutions generally. All, or nearly all, of them complain of some alleged injustice and contain vague, but none the less vigorous, threats of vengeance unless his wishes are complied with. His mind is completely obsessed with the idea of the existence of a conspiracy to injure himself, and he threatens all and sundry that, unless he can get redress of the kind and in the manner demanded, he will take the law into his own hands. He appears to have committed no acts of physical violence, but in some of his letters he directly threatens to do so.

The medical testimony classified the mental disease of which the applicant is suffering as "paranoia"—meaning a mental unsoundness specially characterized by delusion. Persons afflicted with this disease are, they say, frequently able to direct their minds with reason and propriety to the performance of their social duties, so long as these do not involve the subject of their delusions. This testimony describes the applicant's condition with accuracy. On subjects not connected with his delusions he appears to be rational. I was at first inclined to the view that he might be classified as merely an eccentric, but the evidence points out this difference between a merely eccentric man and a man afflicted with delusional insanity. An eccentric man may be convinced that what he is doing is absurd and contrary to the general rules by which those in the community where he resides regulate their conduct, but he professes to set these rules at defiance. A monomaniac cannot be convinced of his error; he thinks that his acts and conduct are consistent with reason

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and propriety. There is no doubt Oliver King thinks his conduct is in all respects reasonable, and he cannot by any argument or process of reasoning be convinced that his conduct is wrong and absurd.

It is very apparent that the man is afflicted with insane delusions, but that is not enough to justify his detention in an asylum; his being at large must involve a danger to either himself or other members of the community. That he contemplates resorting to violence is apparent from his numerous letters, and with a man in his mental condition it cannot be foreseen what form that violence may take. I, therefore, find that he is insane and dangerous to be at large. I must decline to set him at liberty because of any alleged irregularity in the proceedings under which he is detained. If his present detention is not in accordance with the statute, the defect should be remedied.

I may say, in conclusion, that if he was not insane, I should have recommended his arrest and prosecution for sedition.

Application refused.

CAN.

S. C.

CORPORATION OF WEST VANCOUVER v. RAMSAY.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 24, 1916.

1. HIGHWAYS (§ V B—255)—MUNICIPAL POWERS AS TO NARROWING.
A municipality, empowered by statute (Municipal Act, R.S.B.C. 1911, ch. 170, sec. 52, sub-secs. 176, 193) to alter, divert or stop up public thoroughfares, has power to close up a portion of a highway for the purpose of narrowing it.

2. EMINENT DOMAIN (§ III C II—143)—NARROWING OF HIGHWAY—COMPENSATION TO ABUTTING OWNERS.
The narrowing of a highway under municipal powers entitles abutting owners to claim compensation from the municipality for consequential injuries to their property.
[*Ramsay* v. *West Vancouver*, 22 D.L.R. 826, 21 B.C.R. 401, approved.]

Statement.

APPEAL, *per saltum*, from the judgment of Murphy, J., in the Supreme Court of British Columbia, maintaining the plaintiffs' action to enforce an award of arbitrators appointed under the compulsory provisions of the B.C. Municipal Act (see also 22 D.L.R. 826, 21 B.C.R. 401). Affirmed.

Lafleur, K.C., and *R. M. Macdonald*, for appellant.

James A. Harvey, K.C., for respondents.

Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The principal question on this appeal involves the validity of a by-law passed in the following circumstances by the municipality appellant:—

The Pacific Great Eastern R. Co., a provincial company, authorized by the legislature to be carried along any existing highway, subject to leave having first been obtained from the Minister of Railways and to the consent of the municipality within the limits of which the highway is situate—the consent of the municipality being evidenced by a by-law—located its line along the north shore of English Bay. The appellant, being of opinion that, in the best interests of the municipality, it was desirable to change that location, proposed that

instead of being carried along the foreshore, the railway should be carried along a more northerly location as shewn on a plan submitted to the corporation.

The railway company accepted the proposal, and made the change upon the following, among other, conditions. The council of the municipality was to give its consent to the company carrying its line or lines of railway upon, along or across the southerly 46 ft. of an unnamed highway, with full and exclusive right to the company forever to use and enjoy the same for the purposes of its undertaking. The company also undertook to purchase two strips of land, and out of those strips to dedicate 20 ft. in width to the municipality, to be used as a highway, so that there would be on either side of the railway right-of-way two highways, each 20 ft. in width, available for traffic. It has not been contended that by this bargain the municipality did not get ample consideration for the privileges granted the company. To give effect to this agreement a by-law was passed conferring on the council of the municipality power to "stop up and close from traffic as a highway" the said southerly 46 ft. of the highway, and to indemnify the company against claims or suits arising out of that proceeding. The effect of the by-law was to narrow the highway somewhat and to relieve the company of its statutory obligation to restore it after the rails were laid.

Actions were brought against the municipality by the plaintiff respondent and some 16 others to enforce awards of arbitrators appointed to fix the compensation due them as owners of adjoining lands by reason of the narrowing of the highway, and the question for decision is: Had the corporation power by by-law to close a section of the highway in the circumstances set forth? The provincial Court of Appeal, on a previous appeal in these proceedings, 22 D.L.R. 826, 21 B.C.R. 401, maintained the by-law on the

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ground that by sec. 52, sub-sec. 176, of the Municipal Act power is given to municipal corporations to pass by-laws "for establishing, opening, making, preserving, improving, repairing, widening, altering, diverting or stopping up" public highways, and that those powers, read in the light of sub-sec. 193 of the same section, are sufficient to authorize the closing to traffic of the strip of the highway in question. I am of the same opinion, and would suggest that sub-sec. 190, referring to bicycle-paths, might also be considered in this connection. It may be that, in certain aspects, the by-law is of doubtful validity, but the only objection urged here and in the Court below is thus stated in the appellant's factum:—

> The municipality defend this action on the same point of law as previously taken before Clement, J., and before the Court of Appeal, viz., that the council of 1913 had no power to stop up the strip of highway, that the assuming to do so was an *ultra vires* act, and, hence, no case existed for compensation, and the appointment of arbitrators was invalid.

It is not suggested that there was misconduct on the part of the council or that any of its members were moved by improper motives, and the provincial Courts, which are necessarily more familiar with local conditions than we are, maintained the validity of the by-law. The arrangement made appears to be a reasonable one and in the public interest. In any event, as Chancellor Boyd said in *Re Karry and City of Chatham*, 1 O.W.N. 291:—

> The Court is not to sit in judgment upon the propriety or alleged unwisdom of the by-law if it admits of reasonable justification.

See also *Rogers* v. *City of Toronto*, 21 D.L.R. 475, 7 O.W.N. 600, 33 O.L.R. 89, and in *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, at 99, it was said that by-laws of public representative bodies ought to be supported if possible.

The broad language of sec. 52, sub-sec. 176, read with 193 and 190, is sufficient to justify the action of the municipality in stopping up the strip of highway in question in the special circumstances of this case.

I would dismiss the appeal with costs.

Davies, J.

DAVIES, J. (dissenting):—This is an appeal, *per saltum*, from the judgment of Murphy, J., which involves a previous decision in these proceedings by the Court of Appeal for British Columbia, 22 D.L.R. 826, 21 B.C.R. 401, the effect of which was to declare that power was vested by sec. 52, sub-sec. 176, of the Municipal Act to "narrow" a public highway, so that a railway

company might have, when approved of by the Minister of Railways and the consent of the municipality, the right to run its line along a public highway, a question not in dispute, but a right to the *exclusive* possession of a strip of the highway.

The facts are stated in the judgment of Macdonald, C.J., as follows:—

> The appellant, a municipal corporation, entered into an agreement with the Pacific Great Eastern Railway Company, giving the company liberty to carry its line of railway along a public highway within the boundaries of the municipality, together with the exclusive right of possession of a strip of the highway 46 feet wide, which strip the appellant by by-law closed to public traffic. This left still open to traffic a strip of 20 feet in width of the original road allowance along the northerly side of the portion which had been so closed.
>
> The railway company, on its part, agreed to purchase and dedicate as a highway a strip of land 20 feet wide on the southerly side of the said closed strip, so that the result of the by-law and agreement combined was that highways 20 feet in width were provided for traffic on each side of that portion of the original highway which was stopped up as aforesaid.

The sole question, apart from one of *res judicata* mentioned later, is whether the said sub-sec. 176 gave the municipality the power to narrow as well as to widen highways.

If they had such power, then the by-law purporting to give the exclusive right of possession to the railway company of a strip of the highway 46 ft. wide which the respondent corporation closed to public traffic cannot be impeached.

I am of opinion that the section in question does not give them such power. It was evidently carefully drawn and gave power to municipal corporations to pass by-laws "for establishing, opening, making, preserving, improving, repairing, widening, altering, diverting or stopping up public highways."

No express power to "narrow" such highways is given, and when such care seems to have been taken to expressly confer so many intended powers, it does not seem that a fair construction of the expressed powers would justify the inclusion of other powers very largely affecting the public rights and interests and not expressly given. Power to "widen" is given, also to "alter" or "divert" or to "stop up," and the use of these several powers and phrases seems to me to indicate the length to which the legislature thought it desirable to go.

The general policy of the Legislature of British Columbia seems, from the Highways Act and the Land Registry Acts, that these highways should not be less than 66 ft. wide.

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Davies, J.

If the legislature intended to give municipalities power to narrow a highway 66 ft wide to one of 20 ft—a power which might so largely affect the general public—they surely would have expressed that intention by the use of the word "narrow" or some equivalent word.

The power to "alter" does not, I think, include the power to narrow; if it did, it would also include the powers to "improve, repair, widen and stop up," which are each expressly given, and would be surplusage if "alter" included them. I think that, as contended for, the word alter should be limited to such acts as are not inconsistent with the highway as such.

If my construction is right, the by-law is void, and that disposes of the the question of *res adjudicata*. *Toronto R. Co.* v. *Toronto Corporation*, 73 L.J.C.P. 120, [1904] A.C. 809.

I would allow the appeal and declare the by-law in question void.

Idington, J.

IDINGTON, J.:—This is an action to enforce an award for compensation allowed to proprietors of lands adjoining a highway on account of the closing of part thereof.

The contention of the appellant herein is that its council had no power by virtue of sec. 53 of the Municipal Act, enabling it to make by-laws, and pursuant to one of the objects of such power expressed in sub-sec. 176, which reads as follows:—

> For establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads, streets, squares, alleys, lanes, bridges or other public thoroughfares,

to close the part of the highway in question.

The by-law in question closed a strip 46 ft. wide of the southerly side of a street 66 ft. wide.

An agreement was entered into with a railway company whereby it was provided that the railway should occupy and use the part so closed, and secure for appellant a new road 20 feet wide on the southerly side of the said 46-ft. strip. The effect of the agreement being carried out would be that the respective proprietors and the public would have, in lieu of the old road allowance, two roads of 20 ft. wide, one on each side of the railway, and that the railway company would abandon its application pending before the proper authority to construct its proposed railway along the adjacent foreshore.

The cross streets were not to be closed. The neat point is

whether or not the council acted *ultra vires* in closing part of the street.

The sub-section in question evidently was copied substantially from Ontario legislation tracing back to the origin of municipal institutions in that province when known as Upper Canada.

Beyond all manner of doubt the power to close or "stop up" cross sectional parts of streets has been exercised in scores of cases, and, so long as not depriving people of ingress and egress to their properties, has been treated as within the power of the respective municipal councils having jurisdiction over their highways. I am unable to distinguish as a matter of legal construction the power to close a cross-section from that to close a longitudinal section of a street. The occasion for exercising the former class certainly will, in number, far exceed those likely to happen in the latter class. I should be loath to cast a possible doubt upon the titles of those, in Ontario, for example, resting upon such an exercise of municipal power conferred by said language.

The words "alter" and "stop up" comprehend the whole, if need be, and surely as descriptive of a bare power must be held to cover the part in either class of cases.

I think that the closing of part of the street was, as held by the Court of Appeal, on a previous appeal in these proceedings, 22 D.L.R. 826, 21 B.C.R. 401, *intra vires* the council, and hence the appeal should fail.

The question of whether or not the motive for doing so was proper is one that, if impeachable, should have been attacked by way of a motion or action to quash. So long as the by-law stands, and is *intra vires*, I do not think it can be treated as void and proceedings thereunder held null.

We heard much argument on the illegality of the bargain and the impropriety of it. It may be, when due regard is had to secs. 332 and 333 of the Act, that the effect of closing the street was to leave the land vested in the Crown, and the acts of the Minister authorizing the railway company may turn out to have been rested on the right of the Crown to so appropriate the land so abandoned by the exercise of the council in closing the street. Indeed, that may have been part of the scheme for meeting a complicated situation arising out of a desire to save the foreshore from railway invasion.

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Idington, J.

I express no opinion on the subject of the right in law to do so. I only desire to point out that others not parties to this proceeding ought to be before the Court and be fully heard before we should pass upon such an inquiry as started thus.

To allow the appeal and dismiss the respondent's action, which seems well founded, would possibly leave the maintenance of this application and use of part of the highway to continue and respondent without a remedy, for the judgment could not bind the Crown or the railway company.

The decision of the Judicial Committee of the Privy Council in the case of the *B.C. Electric Railway Co.* v. *Stewart*, 14 D.L.R. 8, [1913] A.C. 816, and the *United Buildings Corp.* v. *City of Vancouver*, 19 D.L.R. 97, [1915] A.C. 345, seem to render untenable the objection to the by-law by reason of its not having the sanction of the ratepayers.

I do not overlook the principle that what cannot in law be done directly cannot properly be accomplished by an indirect and improper method.

If there was anything done for the mere purpose of evading the salutary provision requiring submission to the electorate, then it should have been developed by bringing all concerned before the Court as already suggested.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I am not prepared to overrule the unanimous judgment of the British Columbia Court of Appeal, in the previous appeal in these proceedings, 22 D.L.R. 826, 21 B.C.R. 401, holding that, under the powers conferred by sec. 53, sub-sec. 176, of the Municipal Act (R.S.B.C., 1911, ch. 170), the appellant municipal corporation has power to partially stop up a highway, as was done in this case. It may be that the circumstances under which the by-law in question was passed and the motives that prompted it were such that in a proper proceeding it might have been quashed. But in this action, brought to recover the amount of compensation awarded in consequence of the partial closing of the highway, upon the issue as to the validity of the by-law the only question open is the power of the municipal corporation to pass it. I express no opinion upon the estoppel invoked by the respondent alleged to arise out of the proceedings on the application for the appointment of arbitrators.

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Brodeur, J.

BRODEUR, J.:—This is an appeal, *per saltum*, from a judgment rendered by the Supreme Court of British Columbia confirming the award of arbitrators appointed under the provisions of the Municipal Act of British Columbia. The corporation appellant, in its statement of defence, claims that the appointment of arbitrators was *ultra vires*, and that its own by-law, which has given rise to the claim for compensation, was *ultra vires*.

When the application was made by the present respondents for the appointment of the arbitrators, the questions now raised in the statement of defence were also raised before the Judge of the Supreme Court to whom the application had been made, and he decided that he had jurisdiction, that he could appoint the arbitrators, and his judgment was unanimously confirmed by the Court of Appeal, 22 D.L.R. 826, 21 B.C.R. 401.

I agree with the Court of Appeal in the construction they have made of sec. 53, sub-sec. 176, of the Municipal Act, and I concur in the reasons which have been given by the Chief Justice of the Court of Appeal on that question.

It was claimed by the appellant that the by-law in question in this case should have been submitted to the electors.

I find, however, a decision of the Privy Council in the case of *United Buildings Corp.* v. *City of Vancouver*, 19 D.L.R. 97, [1915] A.C. 345, in which it was decided that a by-law stopping up part of a street did not require the sanction of the municipal electors.

For these reasons I am of opinion that the appeal should be dismissed with costs. *Appeal dismissed with costs.*

McKAY v. McDONALD.

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Nova Scotia Supreme Court, Harris, J. September 19, October 5, 1916.

1. LANDLORD AND TENANT (§ III D I—95)—DATE OF RENT—MEMORANDUM.
The words of a writing creating a tenancy prevail over any contrary indication afforded by the dates for the payment of rent.

2. LANDLORD AND TENANT (§ III E—117)—WRIT OF POSSESSION—WRITTEN DEMAND
Under sec. 3 of the Overholding Tenants Act (R.S.N.S. 1900, ch. 174) a written demand for possession must be made on the tenant before the County Court can have jurisdiction to grant the landlord a writ of possession; mere notice to quit is not sufficient.

3. COSTS (§ I—1)—UNSUCCESSFUL ACTION BY LANDLORD FOR WRIT OF POSSESSION.
The failure of a landlord in a proceedings under the Overholding Tenants Act (R.S.N.S. 1900, ch. 174), for want of a written demand required by the statute, renders him liable for costs, although the tenant's possession was illegal.
[*Russell* v. *Murray*, 34 N.S.R. 548, distinguished.]

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APPLICATION to a Judge of the Supreme Court for an order under sec. 6 of the Overholding Tenants Act, R.S.N.S. 1900, ch. 174, commanding the Judge of the County Court to send up the proceedings for a writ of possession by landlord. Granted.

F. J. Tremaine, K.C., for plaintiff.

James Terrell, for defendant.

Harris, J.

HARRIS, J.:—The plaintiff applied to the Judge of the County Court for an order for a writ of possession against an overholding tenant under the Overholding Tenants Act (R.S.N.S. 1900, ch. 174), and the Judge, after hearing the parties, made an order upon which a writ of possession has been issued. An application has been made to me for an order to remove the proceedings into this Court, under the provisions of sec. 6 of the Act. The first question is as to the day of the week upon which the present tenancy began. The defendant's mother was the tenant under a memorandum in writing, which said that she was to take the premises from May 1, 1908, Friday, at a weekly rental of $5 per week. It appears that, in collecting and keeping an account of the rent, the landlord made the first charge under date June 1, 1908, 4 weeks' rent. As a matter of fact, 4 weeks' rent from May 1 would have been due on May 29, so there was a period of 2 or 3 days not charged for. June 1, 1908, was Monday, and ever since the rent has been charged up in periods of 4 weeks, always on Monday. The contention is that the tenancy is to be regarded as weekly from one Monday to the next. I do not agree with that. I think the tenancy began on Friday, and that the weeks begin and terminate on Friday. The words of the writing prevail over any contrary indication afforded by the dates for payment of rent: *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378, at 382, and Halsbury's Laws of England, vol. 18, p. 447. I accordingly decide that the mother's tenancy began on Friday.

On May 1, 1913, the mother gave up one room and continued the others, the rent being reduced to $4 per week. The rent continued to be charged and paid as before. I do not think the beginning of the weeks of the tenancy was changed by what then happened.

On March 8, 1915, the mother died, and the defendant continued in occupation, the rent being charged and paid as before. I am told that March 8, 1915, was Thursday. There was no

new arrangement with the son. I think the week of his tenancy, which is a continuation of his mother's, begins on Friday, and I so decide.

On July 12, 1916, the defendant was notified by Mr. Tremaine to quit by the end of the next week. He did not go.

On July 21 the defendant claimed to be a monthly tenant, and that he had not received a proper notice to quit, and Mr. Tremaine says:—

"I then and there told him he must be out by the end of the following week or I would apply to the Court for a writ of possession.

On August 2, 1916, which was a Wednesday, a written notice to quit at the expiration of 1 week from the service of the notice was served on defendant.

On August 4, 1916, a notice was served reading as follows:—

Notice is hereby given you that you are required to quit and deliver up possession of the premises, etc. (describing them) occupied by you as a tenant of Mary J. McKay on Friday the eleventh day of August instant.

And further take notice that unless you vacate such premises on or before the aforesaid time proceedings will be taken before the Judge of the County Court for a writ commanding the sheriff to deliver possession of said premises to the said Mary J. McKay, the owner.

Under sec. 3 of the Overholding Tenants Act a demand in writing must be made on the tenant after his right of occupation has been determined, and the contention of the defendant is that this has not been done, and, therefore, the County Court Judge had no jurisdiction. The plaintiff's contention is that both of the notices of July 12 and July 21 were good and terminated the tenancy, and that the notice of August 4 is to be regarded as a good demand in writing as required by sec. 3. The two notices of July 12 and July 21 were both to quit by the end of the next week. That would, I suppose, mean Saturday.

It is familiar law that a notice to quit should be given to expire at the end of the tenancy, and if it is given for a later date it is bad.

There is an Irish case, *Harvey* v. *Copeland*, 30 L.R. Ir. 412, in which a weekly tenancy began on Thursday, and the notice was to quit "on or before Friday," and it was held by at least one Judge that it was sufficient. Perhaps a notice to quit "by Friday" is equivalent to "on or before Friday," and if the Irish case was correctly decided, perhaps these notices may be good. I am happily relieved from having to decide the question because

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I have reached the conclusion that, even if these two notices were good, they do not assist the plaintiff.

It is, I think, obvious that the plaintiff's solicitor was not relying upon either of the verbal notices as sufficient. We find him giving a written notice on August 2, and another on the 4th. He says:—

There was a notice W.B.C. (*i.e.*, the one of August 2), which on consultation with counsel I was advised might be possibly insufficient, so I gave the notice in August (*i.e.*, the one of August 4).

Of course, what he thought is not conclusive, but it is important as shewing the intention with which he gave the notice of August 4.

The law seems well settled that giving a second notice to quit will generally waive one previously given: Clarke on Landlord and Tenant, p. 392.

As Bayley, J., said, in *Doe d. Brierly* v. *Palmer*, 16 East. 53, 56, the new notice

gives the defendant to understand that if he quits at the time mentioned in that notice he will not be considered as a trespasser.

Or, as Lord Ellenborough, C.J., put it:—

It is generally considered as an acknowledgment of a subsisting tenancy.

In *Re Grant and Robertson*, 8 O.L.R. 297, Street, J., said:—

This notice had the effect of extending the tenant's right of occupation until March 23. Upon the tenant's failure to give up possession on the day named the landlord took proceedings under the Overholding Tenants' Act without any further demand of possession. . . . Upon this state of facts . . . the case is not brought within sec. 3 of the Act for the landlord did not, after the tenant's right of occupation had expired, make a demand of possession.

With much regret I feel myself obliged to hold that the notice of August 4, 1916, extended the defendant's right to occupy the premises until Friday, August 11, and, in the absence of a notice or demand in writing after August 11, the County Court Judge had no jurisdiction. I think the application must succeed.

I think I have jurisdiction under O. 63, r. 1, of the Judicature Act. Unless I am to say that I will not allow a party who succeeds on a technical objection, costs in any case—which I am not prepared to do—I think I must allow costs here. The case of *Russell* v. *Murray*, 34 N.S.R. 548, differs in many respects from this. There the trial Judge thought the plaintiff had testified falsely and each side was entitled to some costs upon issues on which they had succeeded, and these features are absent in this

case. While I think the defendant was retaining possession illegally after the notice to quit was given, yet I do not consider that sufficient to justify me in withholding costs made necessary by the plaintiff's failure to give the notice in writing required by sec. 3 of the Act. The rent due, $56, will be offset against the costs.

Application granted with costs.

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, J.J. April 14, 1916.

1. LIBEL AND SLANDER (§ III C—110)—FAIR COMMENT—TRUTH.
In a libel action, where "fair comment" is pleaded, the defendant must prove the truth of the alleged facts commented upon, and show that the comment was fair.

2. APPEAL (§ XI—720)—LEAVE—FROM ORDERS IN EXAMINATION FOR DISCOVERY.
Leave should not be granted to appeal to the Appellate Division from an order by a Judge in Chambers requiring a witness to answer certain questions in an examination for discovery.

APPEAL by the plaintiff from an order of Boyd, C., directing certain questions to be answered on examination for discovery. Affirmed. Statement.

I. F. Hellmuth, K.C., and *W. J. Elliott*, for appellants.

G. M. Clark, for defendants, respondents.

MEREDITH, C.J.C.P.:—The plaintiffs are an incorporated company, and, in this action, have sued the defendants for libel in having said of them in print, in substance: that their stock is worthless because the rotary engine which they were formed to make and sell is of no value. Meredith, C.J.C.P.

The alleged libel was contained in a long article published in the defendants' weekly newspaper, an article mainly commenting upon the plaintiffs' president personally, in an extremely severe manner; and asserting that the formation of the plaintiff company was only part of a fraudulent scheme on his part to make money by false pretences regarding the engine, of which he is the patentee; and a confusion of the attack upon him with that which was said regarding the plaintiffs has led to an interminable examination of him, for discovery in this action, out of which examination the points involved in this appeal have been made, and much discussion has ensued, most of which might have been spared if the difference between the defendants and their presi-

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dent, and between what was said of him and what was said of them, had been borne in mind.

The appeal is from an order requiring the plaintiffs' president, who is individually in no way a party to the action, to attend again for examination for discovery and to answer 25 questions which, on the advice of the plaintiffs' solicitor, he did not answer on his former examination—25 questions out of the 960 then asked, all of which were answered except the 25.

The first two of these 25 questions relate to the number of shares of the witness in another company, formed for the same purpose as the plaintiff company, but in no way connected with it, sold by the witness; questions, plainly I should have thought, irrelevant to the real questions involved in this action.

The next three were aimed at shewing that the witness had said that which was untrue when, in his testimony, he stated that one of the engines in question had not been brought to Toronto, from Buffalo, to be tested at the School of Practical Science, because he had not the means to bring it. But how could that be evidence against the plaintiffs? Whether the engine is really only a "toy engine" or not is not to be determined on the witness's veracity or want of veracity, or confidence or want of confidence in any particular test: if he were the plaintiff in this action, it would be different.

The remaining questions all relate to matters affecting the plaintiff company, their finances, their prospectus, and some dealings with the City of St. Thomas with a view to obtaining a bonus for the establishment of a factory there, things which are not relevant to the substantial questions in issue between the parties to this action. This seems to me to be the more abundantly plain because, although in the newspaper which contained the alleged libel in respect of which this action is brought, the plaintiff company are attacked in statements of fact such as: that their stock is "almost worthless," that it is "worthless paper," and that the "whole flotation scheme is a yellow calcium glare;" the defendants have not attempted to plead the truth of any of these things, or of anything else aimed at the financial standing of the plaintiff company. To contend that the defendants may attempt to prove any of these things without pleading the truth of them, I should have thought a waste of words. Equally so, indeed

more so, if more so be possible, to contend that because the plaintiffs have, unnecessarily and inconveniently, set out in their statement of claim the whole article, instead of the parts relating to them, they are therefore alleging that everything said in it is libellous of them.

I am therefore of opinion that the witness was quite within his right in refusing to answer all of these 25 questions; but I am quite as clearly of opinion that this appeal should be dismissed, on a very different and much more important ground; and I have expressed my views upon the question of the relevancy of the questions, only because I am not in agreement with all of the other members of the Court upon that question, and desire, as far as is possible, to prevent the hands of the trial Judge being tied on any question of admissibility or inadmissibility of evidence, at the trial.

The ground upon which I hold that this appeal should be dismissed, is: that appeals to this Court on matters of practically no consequence should not be brought, that they should be discouraged and stopped. Whether the witness did or did not answer these questions was and is a matter of no substantial consequence; he had answered scores of questions quite as irrelevant; and, if he had answered these, they would have remained, like the others, unused and for all substantial purposes useless. The value and the purpose of these examinations is, I fear, seldom kept in mind; often the object of the examiner seems to be only to keep on asking questions; no aim; no definite object. And in this case there was less excuse for waste of words than usual, because no part of the evidence could be used upon the trial. Anything that tends to save time and costs of the trial, and everything that tends to prevent surprise and consequent disadvantage at the trial, may well be thoroughly gone into; but it must always be remembered that the examination is not part of a trial; that it is for the purpose of discovery; and that it should be kept to the point and within reasonable bounds.

This appeal, causing considerable delay and involving a very considerable sum of money in costs, for no substantial purpose, seems to me to be unwarrantable; indeed it is difficult to imagine any case of the kind in which an appeal to this Court is really likely to be needed in the interests of justice, or in any

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substantial interests of the parties. No principle in involved; there are but 25 questions out of nearly the inexcusable number of a thousand; and those 25 questions, answered or unanswered, cannot really make a jackstraw's difference to either party, at the trial.

Although the cases are not quite alike, because in this case the question is, whether the questions should or should not be answered, and in the other, to which I am about to refer, the question was, whether or not the questions should be asked, the principle involved is much the same; so I wish to quote, for the benefit of all concerned in such appeals as this, the words of one of the Lords Justices who dismissed the appeal in the case of *Peek* v. *Ray*, [1894] 3 Ch. 282, 288: "I say, speaking for myself, most emphatically, that where a Judge has, under these new Rules, had interrogatories brought before him, and has determined whether he will allow them or not, or which of them he will allow, or what part of them he will allow, if any one chooses to appeal from that allowance, I hope he will never be allowed to succeed unless he can shew some serious question of principle in which the Judge, in the leave he has given, has made a material error. To say that this Court is to look through the interrogatories which the learned Judge of first instance has allowed, and to see whether this, that, or the other part of an interrogatory has been properly allowed or not, is to my mind a total mistake as to the functions of the Court of Appeal. The allowance of interrogatories is a matter very largely in the discretion of the learned Judge before whom the interrogatories are brought, and from such discretion the rule is that although an appeal may be brought, no appeal shall be allowed to succeed unless it shall be shewn that in the exercise of that discretion a material mistake has been made. . . . I confess that I think this kind of appeal should be discouraged in every way possible" (p. 290). Another of the Lords Justices used these equally firm words (p. 286): "I protest altogether against settling interrogatories. I admit the right to appeal, and it is our duty to entertain the appeal and say whether there is any substantial injustice done by the order appealed from." And the third, these (p. 287): "I think no appeal ought to be brought, and no appeal I am certain will be allowed by this Court in a case like this, unless

there is some error on a question of principle involved, or some substantial injustice has been done."

It should be laid down now, in equally unmistakable words, that no appeal such as that in question should be brought unless something really substantial depends upon the points involved in it. There is nothing of that sort in this appeal; indeed it, and all the long delay in bringing this case down to trial, a delay filled up with at most not very important interlocutory applications, carried, whenever the opportunity could be grasped, to this Court, seems to have been prompted more by excessive resentful personal feelings than any desire to get to a just end of this litigation. It may be that those concerned in this case think it a matter of transcendent importance, whether the one or the other solicitor was the more correct in his contentions as to the admissibility of answers to the few questions involved, but I do not, and that really is the "most important" question involved in this appeal, for all present substantial purposes.

My firm opinion regarding the case is therefore this: that, unless the parties now get to trial promptly, they had better get out of Court altogether.

I would, for these reasons, dismiss the appeal.

My brother Masten has found some difficulty in considering the case because we have not been furnished with the reasons of the learned Chief Justice for giving leave to appeal, and I add these few words merely to point out that, if the solicitors have been remiss in that respect, they have been at least quite impartially remiss, for neither have they furnished us with the reasons of the learned Chancellor for ordering the witness to attend again for examination and to answer all of these 25 questions.

RIDDELL, J.:—This is an appeal by the plaintiff company from an order of the Chancellor directing their manager to answer certain questions put to him on his examination for discovery as an officer of the company, leave having been given to appeal by the Chief Justice of the King's Bench.

The plaintiffs are a company exploiting a certain "new and improved" engine: the defendants, a company publishing in Toronto a weekly periodical, "Saturday Night," so called from being issued on Thursday.

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The plaintiffs brought an action of libel, claiming that the defendants "falsely and maliciously printed and published of the plaintiffs and of and concerning their business and mode of conducting the same the words following, that is to say" (here follow six foolscap pages of closely typed writing).

Then, without particularising, innuendoes are added: "meaning thereby that the engine, the manufacture and sale of which is the plaintiffs' business, was not what it was represented to be; that it was not a *bonâ fide* engine, but was a mere toy or plaything, and that the plaintiffs' enterprise of building and selling the said engine was nothing but a fraudulent device and was being used by the plaintiffs for fraudulent purposes; that the plaintiffs were about to defraud the Corporation of the Town of Chatham in connection with a . . . contract . . . ; that the capital stock of the plaintiffs was worthless, or all but worthless; and that the flotation or business of the plaintiffs was a wholly fraudulent business, and was being carried on for the purpose of defrauding the public and any one who would buy shares of the plaintiffs' capital stock."

To this, the defendants plead: (1) did not publish; (2) words not defamatory; (3) "if they did publish, etc., the said words, in so far as they consist of allegations of fact, are true in substance and in fact, and, in so far as they consist of expressions of opinion, they are fair and *bonâ fide* comments made in good faith and without malice upon the said facts, which are matters of public interest, and the publication of the same was for the public benefit."

This is one of the defences which mean that the defendant had the right to say of the plaintiff what he did. Where a defendant conceives he is right, he may: (*a*) "justify," i.e., plead that all he said was true; or (*b*) say, "What I said of you was of two classes, facts and comments—I had the right to say the former because the facts alleged are true, the latter because the comments are fair." Either method of pleading is a justification, but it is only the former that receives the name in our technical teminology, the latter is technically called the plea of "fair comment."

But, under either plea, the defendant is bound to prove the truth of the facts.

However unsatisfactory the nomenclature may be or the practice—see *per* Vaughan Williams, L.J., in *Peter Walker & Son Limited* v. *Hodgson*, [1909] 1 K.B. 239, at p. 247—it is well established.

The plaintiff, by the pleading of fair comment being put on notice that the defendant undertakes to prove the truth of some facts, naturally desires to know what these are, and accordingly he demands particulars.

In the present case particulars were ordered and furnished.

When we remember that a charge with an innuendo is in our practice equivalent to two charges, one without and one with the innuendo: *Watkin* v. *Hall* (1868), L.R. 3 Q.B. 396, 402; and that, while the plaintiff cannot throw overboard his innuendo and adopt a new one, he may rely upon the natural and primary sense of the words themselves: *Hunter* v. *Sharpe* (1866), 4 F. & F. 983; *Simmons* v. *Mitchell* (1880), 6 App. Cas. 156; *Ruel* v. *Tatnell* (1880), 29 W.R. 172; *Fisher* v. *Nation Newspaper Co.*, [1901] 2 I.R. 465; we see what burden is cast upon the defendant—he has to meet (after publication proved): (1) the charge that the words employed have the special meaning alleged in the innuendo—he may if he is so advised give evidence as to this: Folkard, 7th ed., p. 498; (2) the charge that the words are actionable in themselves. So much for the statement of claim and the matters contained therein which the defendant has to consider.

Then, in the defence, he must (3) prove to be true all the alleged facts, and (4) that his comment is fair, always bearing in mind that an allegation of fact is not comment, and, however thoroughly believed by the defendant and honestly stated, it must be proved to be true.

With these issues in mind, it seems to me that this appeal cannot succeed except in some minor and unimportant matters.

It will be necessary to take up the various questions which were objected to and directed by the Chancellor to be answered:—

Questions 142, 143, 146. The plaintiffs allege that all that was contained in the article was a libel on them—not on their manager. One of the statements in the article is: "Augustine . . . . is peddling almost worthless stock to persons in Canada. . . . He sells stock instead of selling engines. . . ." The particulars of fact contain this: "Augustine . . .

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Riddell, J.

was . . . endeavouring to sell stock in the Augustine Automatic Rotary Engine Company of Canada . . . of which he was promoter." These questions relate to the sale of stock in a Buffalo company, and I cannot see how they come within the particulars—the defendants do not undertake to prove that Augustine is selling "stock instead of engines," but only that Simon said so: particulars (*c*), (*d*). I think these need not be answered.

Questions 640, 641, 644, 646, 647. The witness was being asked about the sale of stock of the Canadian company—the allegation that he was doing so is complained of by the plaintiffs as a libel upon them; the defendants undertake to prove the truth of the allegation. Moreover, the defendants claim as fair comment: "Augustine . . . proceeds to scatter his worthless paper through Ontario and Quebec;" and also, "His whole flotation scheme is a yellow calcium glare," etc., etc. I see no reason why these questions should not be answered.

Question 730 is covered by the same principle—the manager was selling for the company.

Questions 738, 739. An objection is made to giving the financial status of the company. The article charged that the stock was almost worthless, but the defendants do not undertake to prove that as a fact; had they done so, I think these questions should have been answered. The defendants do plead comment "in good faith and without malice;" and the truth or falsity of the statement that the stock was almost worthless might go toward shewing the good faith and absence of malice: *McKergow* v. *Comstock*, 11 O.L.R. 637; *Jenoure* v. *Delmege*, [1891] A.C. 73. See also *Watt* v. *Watt*, [1905] A.C. 115, at p. 118. The questions should be answered.

Question 740 is too broad and need not be answered in that form.

Questions 787-790 are not quite intelligible. What purports to be a prospectus of the plaintiff company is produced: the witness is asked if that is a copy of the prospectus issued by the company, but is not allowed to answer—why, does not appear Finally, counsel for the plaintiffs takes the position that the witness must not answer any question "as regards the contents of the prospectus." As regards exhibit 1, the alleged copy not being put in before us, we have no means of knowing its contents. I

think that here we cannot interfere with the order of the Chancellor. We have more than once spoken of the omission to put in documents that are considered material.

Question 798. The witness was asked "to look at that document . . . and tell . . . is that a document . . . got out by the plaintiff company;" he thought it was. Question 798: "Then is the statement contained in this true?" The witness declined to answer—why, we do not know, nor what the statement was. Without some information, we cannot interfere with the Chancellor's order.

Question 849 is equally unintelligible, with the same result.

Questions 862, 865. The witness employed a man by the name of Thomas W. Brown to sell stock—he refused to say whether a photograph produced was of this Mr. Brown, although he expressed his ability to identify. It is to be presumed that the defendants intend to shew something of the sales through Brown, the plaintiffs' agent, employed by the plaintiffs' manager—and desire to know whether the Brown that sold is the Brown employed. I can see no objection to the questions.

Question 867 is immaterial in the present form, but the witness could be asked if the plaintiffs caused the document to be printed.

Question 872 is covered by what is said as to questions 862, 865.

Question 873 can only go to shew that the witness is manager of the plaintiff company, and that elsewhere appears—it is only repetition, but there can be no reason for refusing to answer.

Question 874 may or may not be of importance: we have not the exhibit—it may be quite proper to ask the question, or it may be that the question is an endeavour to have the witness interpret a written document—we cannot tell. We should not interfere with the order below.

Questions 910-912. Certain propositions were submitted to the industrial committee at St. Thomas, but the witness swears that they were not submitted by the plaintiffs. Nothing more appearing, I cannot see why he should be compelled to state from whom they were submitted. It might be, at some other stage and after other evidence, that such questions were proper, but not here and now.

With the few and trifling exceptions noted, I think the appeal should be dismissed with costs.

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Masten, J.

LENNOX, J.:—I agree.

MASTEN, J.:—This is an appeal from an order of the Chancellor, reversing in part an order of the Master in Chambers and directing that Augustine, the president of the plaintiff company, do attend for examination for discovery and do answer certain questions, particulars of which are set forth in the notice of motion, he having previously refused to answer such questions.

The action is an action for libel, and arises out of a somewhat lengthy article alleged to have been published by the defendants concerning the plaintiffs and concerning D. F. Augustine, president of the plaintiff company, and particularly concerning the rotary engine manufactured by the plaintiff company.

In this case, speaking for myself, I would have been glad to have had before the Court a statement of the reasons upon which an appeal was permitted to this Court. By Rule 507 it must appear to the Judge permitting such an appeal that there is good reason to doubt the correctness of the judgment or order from which the applicant seeks leave to appeal, and that the appeal involves matters of such importance that in the opinion of the Judge leave to appeal should be given.

A perusal of the material filed on this appeal leads me to the conclusion that the questions to which answers have been refused relate to issues in this action. If I am right in that view, the questions should be answered.

Confusion, difficulty, and expense will be unending if in every case the opinion of a court of appeal has to be taken as to whether, as a matter of discretion, questions should or should not be answered. The only solution under our present practice seems to be to require questions to be answered whenever they relate to a matter in issue.

Of the practical value of this discovery one may have grave doubts. It may prove a valuable education to the plaintiffs, but such matters are for the determination of counsel in the action and not of the Court. The only principle that can be applied is such as I have indicated above.

It may be suggested that such proceedings tend unwarrantably to delay the trial of the action; but, if such delay occurs, it is always in the power of the party desiring to bring the case on for hearing, to set it down and force it to trial, and on any motion to postpone on the ground that discovery has not been

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completed very different considerations from those which govern the present motion will be applicable. Personally I would have dealt with the matter simply by dismissing the appeal, but my brother Riddell has gone seriatim through the questions to which answers were refused, and I concur in his conclusions, only protesting again that I do not apprehend on what grounds the leave to come to this Court was granted. *Appeal dismissed with costs.*

LOGAN v. GRANBY CONSOLIDATED MINING CO.

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C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ.A. October 3, 1916.

PLEADING (§ I S—145)—STRIKING OUT DEFENCE—LEAVE TO SIGN JUDGMENT.

A local Judge has jurisdiction, under the B.C. practice rules (r. 363), to make an order striking out a defence and giving the plaintiff liberty to sign interlocutory judgment; once the judgment has been entered the plaintiff may proceed with the assessment of damages.

[*Loomis* v. *Abbott*, 25 D.L.R. 759, distinguished.]

Statement.

APPEAL by defendant from the judgment of Hunter, C.J.B.C., of November 15, 1915. Affirmed.

E. V. Bodwell, K.C., for appellant.

Alex. MacNeill, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appeal turns on questions of practice and procedure. A local Judge of the Supreme Court ordered the statement of defence struck out. It was within his powers as such local Judge to do this. By the same order he gave the plaintiff liberty to sign interlocutory judgment.

Whether the Judge was within his powers in doing this is, I think, of no consequence in this appeal. It was merely surplusage. After the statement of defence had been struck out the defendants were in the position of being in default in delivering their statement of defence, and by virtue of O. 27, r. 4, the plaintiff could enter interlocutory judgment without the order of a Judge. Interlocutory judgment was in fact entered, and thereafter the plaintiff proceeded to assess damages before a Judge presiding at the regular sittings of the Supreme Court. I can find no grounds for interference.

Martin, J.A.

MARTIN, J.A.:—In my opinion the local Judge had, in a case of this class, jurisdiction under r. 363 to make the order striking out the defence and giving liberty to sign interlocutory judgment: *Loomis* v. *Abbott*, 25 D.L.R. 759, does not apply to this case. And further, I have no doubt that where as here the claim is for pecuniary damages only the plaintiff may, under r. 299, "enter

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interlocutory judgment for . . . the damages" (to be finally ascertained as directed by r. 297 and sec. 53 of S. C. Act), where default has been made in the delivery of a defence, and the position is the same under r. 363 where a defence has been struck out as though it had never been duly delivered, and the defendant is by that striking out inevitably "placed in the same position as if he had not defended," and it is not necessary to insert a special direction in the order to obtain that result. The words in the rule "the party interrogating may apply to the Court or a Judge for an order to that effect" are not easy to construe, and I can find no decision upon them in the English Rule. But whatever state of circumstances they may apply to they do not apply to these, so far as defining the defendant's "position" is concerned, after his defence has been struck out. In my opinion the words in the order complained of giving the plaintiff "liberty to sign interlocutory judgment forthwith," after directing the defence to be struck out, are in any event superfluous, because it was the right of the plaintiff to sign that judgment without any special direction immediately after the defence was got rid of. Other proceedings may have to be adopted in other kinds of actions, *e.g.*, under r. 304—*cf. Salomon* v. *Hole* (1905) 53 W.R. 588; and *Young* v. *Thomas*, [1892] 2 Ch. 134, but I am only now speaking of what is before me.

Once the validity of the judgment is established the appeal presents no difficulty, because no evidence could properly be given before the Judge on the assessment of damages except on that head. Even in the case of motions to obtain judgment under said r. 304, Bowen, L.J., said in *Young* v. *Thomas*, *supra*, p. 137:—

> There is no doubt that, in determining the rights of the parties in the action, the statement of claim alone is to be looked to, and the reason of this rule is obvious, namely, that the facts stated therein are taken to be admitted by the defendant; and, as has been decided by Lord Justice Kay in *Smith* v. *Buchan*, 36 W.R. 631, no evidence can be admitted as to those facts.

The statement of claim herein disclosed two causes of action, one at common law and the other under the Employers Liability Act, and the Judge stated that he intended to assess the damages under the first cause, which was not only open to him to do, but was his duty as judgment had been entered establishing that case and the plaintiff had a right to have the damages assessed on the cause of action which would most adequately compensate him for the injuries he had sustained.

Therefore the appeal should be dismissed with costs. B. C.

C. A.

McPHILLIPS, J.A.:—I am of the same opinion as my brother Martin, J.A., and would dismiss the appeal. *Appeal dismissed.* McPhillips, J.A.

BEAUVAIS v. GENGE.

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S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. May 2, 1916.

APPEAL (§ II A 1—35)—JUDGMENTS OF COURT OF REVIEW—JURISDICTIONAL AMOUNT.

The judgments of the Court of Review (Quebec) are appealable to the Supreme Court of Canada under sec. 40 of the Supreme Court Act (R.S.C. 1906, ch. 139) and arts. 68 and 69, C.C.P. (Que.), as amended by 8 Edw. VII. ch. 75, where the amount or value *claimed in the declaration* exceeds $5,000.

MOTION to quash an appeal from the judgment of the Court of Review, sitting at Montreal, affirming the judgment of Martineau, J., in the Superior Court, District of Montreal, by which the plaintiff's action was maintained with costs. Statement.

The plaintiff, by his declaration, prayed that the defendants should be condemned to pay him the sum of $5,017.20, for damages claimed under several specified items which, however, when correctly added together, did not amount to $5,000, and, by the judgment in the Superior Court, he was awarded $2,303. The Court of Review, by the judgment appealed from, confirmed this award. In the circumstances, the respondent moved to quash the appeal to the Supreme Court of Canada on the ground that the true amount of the *demande* was less than $5,000; that the controversy on the appeal involved merely the amount of the condemnation ($2,303), and that, under sec. 40 of the Supreme Court Act, no appeal could lie.

Louis Coté, supported the motion.

A. Lemieux, K.C., *contra*.

FITZPATRICK, C.J.:—This is a motion to quash an appeal for want of jurisdiction. The facts, as disclosed by the material filed, appear to be that an action was brought by respondent Genge to recover from the defendant (as stated in his declaration) the sum of $5,017.20. Certain affidavits are filed shewing that the particulars attached to the claim had been incorrectly added up, and that, in fact, the only amount, even on the plaintiff's shewing, was $4,978.20. Fitzpatrick, C.J.

In my view, the question of jurisdiction must be concluded by the prayer of the plaintiff in his declaration, where he says:—

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Fitzpatrick, C.J.

Wherefore the plaintiff prays that the defendants may be jointly and severally condemned and adjudged to pay to the plaintiff the sum of $5,017.20, with interest from that date, etc.

This appeal is taken from the judgment of the Superior Court of the Province of Quebec, sitting in review, which confirmed the judgment of the Superior Court awarding damages in favour of plaintiff for the sum of $2,303.00. The jurisdiction of this Court depends upon the interpretation to be given to sec. 40 of the Supreme Court Act which reads as follows:—

In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that Court confirms the judgment of the Court of first instance, and its judgment is not appealable to the Court of King's Bench, but is appealable to His Majesty in Council.

This section of the statute had its origin in 54 & 55 Vict., ch. 25, sec. 3, and was passed to meet certain decisions of this Court in which it had been held that no appeal lay from the Court of Review of Quebec, but only from the Court of King's Bench.

To determine our jurisdiction it is also necessary to consider the provision for appeal to His Majesty in Council from the Court of Review in the Province of Quebec.

Art. 68 (3) of the Code of Civil Procedure provides as follows:—

An appeal lies to His Majesty in His Privy Council from final judgments rendered in appeal by the Court of King's Bench:

(1) In all cases where the matter in dispute relates to any fee of office, rent, revenue or any sum of money payable to His Majesty;

(2) In cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected;

(3) In every other case where the amount or value of the thing *demanded* exceeds five thousand dollars.

Art. 69 provides as follows:——

Causes adjudicated upon in review, which are susceptible of appeal to His Majesty in His Privy Council, but the appeal whereof to the Court of King's Bench is taken away by arts, 43 and 44, may, nevertheless, be appealed to His Majesty.

The present case is one in which an appeal to the Court of King's Bench is taken away by arts. 43 and 44. We have, therefore, simply to determine whether this appeal is in a case where the amount or value of the thing demanded exceeds $5,000.

Previous to 8 Edw. VII., ch. 75, art. 68 (3) of the Code of Civil Procedure read as follows: "In all other cases where the matter in dispute exceeds the sum or value of five hundred pounds sterling." The question came up for determination under this sub-section of the article as to the interpretation to be placed

upon the words "matter in dispute," and the history of the decisions is somewhat curious.

Previous to the case of *Allan* v. *Pratt*, 13 App. Cas. 780, it had been held in this Court and in the Courts of Quebec that this language must be interpreted in the light of a provision of the Consolidated Statutes of Lower Canada which provided as follows:—

> Whenever the jurisdiction of the Court or the right to appeal from any judgment of any Court is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different;

but in *Allan* v. *Pratt*, 13 App. Cas. 780, it was held that, in determining the right of appeal, the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal, and, therefore, it is not the amount claimed by the declaration, but the amount actually in controversy which determines the right to appeal.

Subsequent to this decision, this Court, in *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, and *Citizens Light and Power Co.* v. *Parent*, 27 Can. S.C.R. 316, refused to follow *Allan* v. *Pratt*, 13 App. Cas. 780. All these earlier decisions, however, have no application to the present case. They were predicated upon the fact that the language of the Code was "the matter in dispute exceeds, etc.," but now by the amendment, 8 Edw. VII., ch. 75, the matter is made clear, and it is "*the amount or value of the thing demanded*" which governs. The jurisprudence, both in this Court and in the Province of Quebec, can now be made harmonious and uniform.

In the present case, therefore, the amount demanded in the declaration being over $5,000, although the judgment is only for the sum of $2,303, this Court has jurisdiction to hear the appeal.

It has been decided here that the amount "demanded" is the amount claimed in the conclusion of the declaration. See *Town of Outremont* v. *Joyce*, 43 Can. S.C.R. 611; *Dominion Salvage and Wrecking Co.* v. *Brown*, 20 Can. S.C.R. 203.

If I were free to deal with this motion without reference to our previous decisions, I would unhesitatingly come to the same conclusion on the literal construction of arts. 68 and 69 of the Quebec Code of Procedure.

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The general principle applicable to appeals in the French system of procedure is thus expressed in Dalloz, Repertoire Pratique vo. "Appel," No. 50:—

Pour déterminer si une affaire excède ou non le taux du dernier ressort il faut se référer en principe au chiffre de la *demande* exprimée dans les conclusions.

And Rousseau, Lainé, vo. "Appel," No. 64:—

En principe, et cela ne se conteste plus aujourd'hui, c'est la somme *demandée* et non le somme adjugée que détermine le premier ou dernier ressort.

And at No. 73 the same author says:—

On ne peut prendre pour base du dernier ressort que la somme *réclamée*. Elle seule fait l'objet de la contestation.

Fuzier-Herman, vo. "Appel," No. 182:—

Le taux de l'appel se calcule sur la *demande* en instance et non sur la *condamnation*.

As I read arts. 68 and 69 of the Quebec Code of Civil Procedure, an appeal is allowed to His Majesty in His Privy Council from final judgments rendered in appeal by the Court of King's Bench or the Court of Review: (1) In every case where the *amount* or value of the thing *demanded* exceeds $5,000; (2) in cases where the *matter in dispute* relates to any fee of office, *etc.*, (3) in cases concerning titles to lands or tenements, etc.

In (1) the right to appeal depends upon the *amount demanded* in the case in which judgment is rendered. In (2) and (3) appeals are allowed where the *matter in dispute* relates to titles to lands, *etc.*, fees of office, *etc.*, irrespective of the amount demanded.

In (2) and (3) the matter in dispute must of necessity relate to the matter in dispute *in the case*. The judgment is appealable clearly because the matter in dispute in the case relates to titles to lands, *etc.*, fees of office, *etc.* Why should the same interpretation not apply to (1)?

It is said that the word "*demanded*" does not mean "demanded in the action" or "demanded by the declaration." With all deference, I submit that, when the appeal is contingent upon the amount demanded, articles 68 and 69 fix the appealable limit by reference to the amount demanded in the "case" or "cause." Article 69 refers to "causes" adjudicated upon in review which (causes) are susceptible of appeal to His Majesty in His Privy Council, and art. 68 (3), omitting the unnecessary words, provides in every other "case" where the amount demanded exceeds

$5,000. This must surely mean the amount demanded in the "case" or "cause." The word "case" is synonymous with "cause," "suit" or "action." Those words are used as convertible terms all through the Quebec Code of Procedure, *e.g.*, arts. 44 and 51, which deal with appeals to the Court of King's Bench and the Court of Review.

It is all made abundantly clear when we consider the French version of art. 68. The language is:—

Il y a appel à Sa Majesté en son conseil privé de tout jugement final rendu par la cour du banc du roi:

(1) Dans tous les *cas* où la matière en litige se rapporte à quelque honoraire d'office, etc.;

(2) Lorsqu'il s'agit de droits immobiliers, rentes, etc.;

(3) Dans toute autre *cause* où le *montant ou la valeur de la chose réclamée excede la somme ou la valeur de cinq mille piastres;*

What is the grammatical construction of this last sentence (3), if not "Dans toute autre cause *dans laquelle*"; "où"—adverbe de lieu—remplace "lequel" précédé d'une proposition.

The language is not perhaps very aptly chosen, but the meaning is clear.

Reference to the Code will shew that the jurisdiction of the different Courts in the province is regulated by the amount demanded in the action. For instance, art. 52 provides for an appeal in suits in which the sum claimed or value of the thing demanded is less than $500. It is not the amount of the judgment that regulates the appeal, but the appeal is from the final judgment *in all suits or actions* which are appealable. The action must involve an appealable claim, whatever may be the amoun of the judgment.

As to the meaning of the word "demand," I again submit that it has, in the Quebec Code, a well-settled meaning when used in the connection in which we find it in art. 68 (3), and connotes the claim of redress which the plaintiff makes against the defendant for or by reason of the facts which constitute the cause of action.

By the writ the defendant is summoned to appear and to answer to the *demand* of the plaintiff contained in the annexed declaration.

Reference to the notes of Sewell, C.J., in *Pacquet* v. *Gaspard*, Stu. K.B. 106, in 1817, shews that the Code in art. 68 (3) uses language which had previously acquired a technical meaning.

Let me also refer at random to some of the articles of the Que-

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bec Code of Civil Procedure where the word is used, for instance, under the captions:—

JURISDICTION, arts. 54 and 59(2); JOINDER OF ISSUE, art. 214; INCIDENTAL PROCEEDINGS, art. 215; CONFESSION OF JUDGMENT, art. 527; FILING OF EXHIBITS, arts. 155, 157 and 174(5); OBJECT OF THE DEMAND, art. 124.

The motion should be dismissed with costs.

Davies, J.

DAVIES, J.:—The only doubt which has been raised in my mind as to the proper disposition to be made of this motion to quash this appeal arises out of the decision of the Privy Council in the case of *Allan* v. *Pratt*, 13 App. Cas. 780.

As, however, was pointed out by Taschereau, J., who delivered the judgment of this Court in *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, the attention of the Judicial Committee does not appear to have been drawn in that case to art. 2311, R.S.Q., which provides that

> Whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different.

I agree with the construction placed upon this article of the Code by this Court in the case last cited, and I cannot but conclude that, had the attention of the Privy Council been called to this article of the Code, their decision in *Allan* v. *Pratt*, 13 App. Cas. 780, would have been different.

I would, therefore, reading the article of the Code and the decision of this Court above cited, in conjunction with sec. 46, sub-sec. 2, of the Supreme Court Act, affirm our jurisdiction and dismiss the motion.

Idington, J.

IDINGTON, J.:—I think, if for no other reason than out of consideration due to the probable reliance placed by those, including the Legislature of Quebec, concerned in such questions as involved herein, upon the decisions of this Court in the cases of *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, and *Citizens' Light and Power Co.* v. *Parent*, 27 Can. S.C.R. 316, we should feel bound thereby and dismiss this motion to quash with costs.

Duff, J.

DUFF, J., agreed that the motion to quash the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J. (dissenting):—The respondent (plaintiff) moves to quash an appeal by the defendants to this Court from the judgment of the Court of Review, affirming, on an appeal by the de-

fendants the judgment at the trial for $2,303, on the grounds that the amount demanded by the plaintiff's declaration was less than $5,000 and that the sum "demanded" is that now in dispute, viz., the amount of the judgment in the trial Court, against which the plaintiff did not appeal.

By the conclusion of his declaration the plaintiff demanded $5,017.20 as damages for loss sustained by him through a fire, for which he asserts defendants were responsible. He now alleges that it is apparent on the face of an itemized statement of damages, filed with his declaration, that the sum of $5,017.20 was inserted in the conclusion of the latter as the result of mistake in computation or clerical error, and that the true amount sought to be recovered has always been $4,874.20. But at the trial he made no modification or reduction in the amount of his demand as stated in the conclusion to his declaration and he has not seen fit then or since to ask any amendment to correct this alleged error. For the purpose of this motion, the amount demanded in the action must, I think, be taken to be that stated in the conclusion of the declaration.

There remains the more important and difficult question whether the right of appeal is governed by the amount so demanded or by the amount of the judgment recovered, which alone is now in controversy, the plaintiff not attempting to appeal against it, and his claim for any larger sum being concluded against him by his failure to appeal from the judgment at the trial.

The Court of Review not being "the highest Court of final resort" (Supreme Court Act, sec. 36) in the Province of Quebec, the right of appeal from it to this Court depends upon sec. 40 of the Supreme Court Act:—

> 40. In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that Court confirms the judgment of the Court of first instance, and its judgment is not appealable to the Court of King's Bench, but is appealable to His Majesty in Council.

Under this provision, assuming that the decision is not appealable to the Court of King's Bench (arts. 43 and 44 C.P.Q.), which is conceded, in order to establish a right of appeal from it to this Court the only other condition prescribed is that it should be appealable to the Privy Council. Upon this question sec. 46(2) of the Supreme Court Act, which deals with appeals to this

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Court from the Court of last resort in the Province of Quebec, has no bearing.

By art. 69 (formerly 1178(*a*)) of the Quebec Code of Civil Procedure, it is enacted that:

Cases adjudicated upon in review, which are susceptible of appeal to His Majesty in his Privy Council, but the appeal whereof to the Court of King's Bench is taken away by articles 43 and 44, may, nevertheless, be appealed to His Majesty.

Since 1908, by art. 68 C.P.Q., a right of appeal to His Majesty in Council is conferred "(3) in every other case where the amount or value of the thing demanded exceeds five thousand dollars."

Art. 68 C.P.Q. (formerly 1178 C.P.Q.), as it stood prior to 1908, by clause 3 conferred a right of appeal to the Privy Council "in all other cases wherein the matter in dispute exceeds the sum or value of £500 sterling."

Art. 2311 of the R.S.Q., 1888, was as follows:—

Whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different.

In the C.S.L.C. (1860), ch. 77 (the Act respecting the Court of Queen's Bench), which, by sec. 52 (afterwards art. 1178 C.P.Q.), prescribed the conditions of the right of appeal to the Privy Council, this provision (first enacted by 12 Vict., ch. 38, sec. 82), appeared as sec. 25, in the following terms:—

Whenever the jurisdiction of the Court, or *the right to appeal from the judgment of any Court*, is dependent upon the amount in dispute, such amount should be understood to be that demanded and not that recovered, if they are different.

The same provision is also found in sec. 2 of ch. 82 of the same Consolidated Statutes, which has general application to the administration of justice.

2. Whenever the jurisdiction of *any* Court, or the right to appeal from any judgment of *any* Court, is dependent upon the amount in dispute, such amount shall be understood to be that demanded, and not that recovered, if they be different; . . .

In *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, in 1896, it was unanimously held by this Court that art. 2311 of the R.S.Q. (1888), applied to appeals to the Privy Council. The same view had been taken by Dorion, C.J., in *G.T.R. Co.* v. *Godbout*, 3 Q.L.R. 346, in 1877, in regard to sec. 25 of ch. 77 of the C.S.L.C., and whatever might be thought had the provision been found only in that chapter (Queen's Bench Act), its presence in ch. 82 of the Consolidated Statutes would seem to put it beyond doubt

that this view is correct, although Gwynne, J., expressed the contrary opinion in *Citizens' Light and Power Co.* v. *Parent*, 27 Can. S.C.R. 316, at 318. In the revision of 1888 the portion of sec. 2 of ch. 82, C.S.L.C., above quoted, was dropped (vol. II., app. C, p. cxix.), no doubt because, in view of what Dorion, C.J., had said as to the scope of sec. 25 of ch. 77 in *G.T.R. Co.* v. *Godbout*, 3 Q.L.R. 346, and in *Stanton* v. *Home Ins. Co.*, 2 L.N. 314, in 1879, it was thought unnecessary to duplicate the latter provision. With the law in this state, the Privy Council, in *Allan* v. *Pratt*, 13 App. Cas. 780, in 1888, held that

> The measure of value for determining a defendant's right of appeal is the amount which the plaintiff recovered; when this falls short of the appealable amount, the Court below cannot give leave to appeal;

and on that ground the Judicial Committee dismissed the appeal in that case, where, upon a claim for $5,000, the recovery had been $1,100, notwithstanding that leave to appeal had been granted by the Court of King's Bench. The Board followed its prior decision in *Macfarlane* v. *Leclaire*, 15 Moo. P.C. 181, in which the basis of the right to appeal to the Privy Council had been held to be not the amount demanded in the action (in that case £417 0s. 8d.), but the extent to which the judgment affected the interest of the party prejudiced by it and seeking to relieve himself from it by appeal.

In *Richer* v. *Voyer*, 2 R.L. 244, the plaintiff's claim was for $2,061.67 with interest. By the judgment, interest and costs being added to capital, he recovered a sum in excess of £500 sterling. The Court of King's Bench refused to allow an appeal to the Privy Council on the ground that the amount demanded in the action was less than £500 sterling, although it had apparently taken the contrary view in *Bellerose* v. *Hart*, 1 R.L. 157. The Privy Council, however, granted a petition for leave to appeal to it. The ground upon which it did so does not appear in any report of the case that I have been able to find. But in *Stanton* v. *Home Ins. Co.*, 2 L.N. 314, Dorion, C.J., says that leave was granted on the ground that, by adding interest and costs (which were included in the judgment), the amount in dispute was over £500 sterling. He adds that, in his opinion, that was contrary to the course of decisions in this country and to the statute (C.S.L.C., ch. 75, sec. 25). See, too, Beullac, Code of Civil Procedure, p. 84, No. 24.

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In *Quebec Fire Assurance Co.* v. *Anderson*, 7 L.C.Jur. 150, in 1860, the Privy Council granted leave to appeal on an allegation that, with interest and costs added to the principal sum recovered on an insurance policy, a sum amounting to £635 currency, which exceeded £500 sterling, was in issue. But, upon the respondent shewing an error in this calculation, the leave was discharged, 7 L.C.Jur. at p. 151. In this case the petition for leave expressly stated that "By the Lower Canada Act, 12 Vict. ch. 38, sec. 82, the right of appeal depended upon the amount demanded and not the amount recovered."

The whole report shews that leave was granted, not as an exercise of the royal prerogative, but because, in the opinion of the Board appealability *de plano* depended on the amount involved in the appeal.

In *Boswell* v. *Kilborn*, 12 Moo. P.C. 467, in 1859, the claim was for £600 currency (less than £500 sterling), and the Court of Queen's Bench refused leave to appeal to the Privy Council on that ground. But the Judicial Committee granted leave to appeal "first, because by the law of Canada interest ran with the judgment, which would bring the subject-matter within the appealable value."

No direct allusion is made in the *Macfarlane* case, 15 Moo. P.C. 181, or in *Allan* v. *Pratt*, 13 App. Cas. 780, either to sec. 25 of ch. 77 or to sec. 2 of ch. 82 of the C.S.L.C., 1860, and we are asked to assume that in both these cases this statutory provision escaped the notice of the Judicial Committee itself as well as that of counsel. In view of the decisions in *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, *G.T.R. Co.* v. *Godbout*, 3 Q.L.R. 346, and *Stanton* v. *Home Ins. Co.*, 2 L.N. 314, we can scarcely suppose that it was regarded as wholly inapplicable to appeals to the Privy Council. In *Stanton* v. *The Home Ins. Co.*, 2 L.N. 314, Dorion, C.J., in delivering judgment in the Court of Queen's Bench, referring to *Richer* v. *Voyer*, 2 R.L. 244, said that in that case

> The attention of the Privy Council perhaps had not been drawn to the statute (C.S.L.C., c. 77, s. 25), and it might be well that it should be put before them on the next occasion.

How this statute could have escaped attention in *Richer* v. *Voyer*, 2 R.L. 244, it is difficult to conceive, since in that case leave to appeal to the Privy Council had been refused by the Court

of King's Bench on the ground that the amount demanded by the declaration and not that recovered determined the right of appeal. The same observation may be made upon *Boswell* v. *Kilborn*, 12 Moo. P.C. 467. In *Quebec Fire Ins. Co.* v. *Anderson*, 7 L.C.Jur. 150, the statute 12 Vict. ch. 38, sec. 82 (re-enacted by C.S.L.C. (1860), ch. 77, sec. 25, and ch. 82, sec. 2) was expressly brought to their Lordships' attention; and, having regard to what was said by Dorion, C.J., in *Stanton* v. *Home Ins. Co.*, 2 L.N. 314, it is scarcely credible that if the statute had escaped attention in *Richer* v. *Voyer*, 2 R.L. 244, in *Boswell* v. *Kilborn*, 12 Moo. P.C. 467, and also in *Macfarlane* v. *Leclaire*, 15 Moo. P.C. 181, it was again entirely overlooked in *Allan* v. *Pratt*, 13 App. Cas. 780.

Although Taschereau, J., made that assumption in *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, at 220 (wrongly, Gwynne, J., suggests, in *Citizens' Light and Power Co.* v. *Parent*, 27 Can. S.C.R. 316, at 318), the Quebec Court of Appeal, in *Glengoil S.S. Co.* v. *Pilkington*, 6 Que. Q.B. 292, in 1897, with the judgment in *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, at 220, before it, and with art. 2311, R.S.Q., 1888, in mind, holding itself bound by the decisions of the Privy Council in *Macfarlane* v. *Leclaire*, 15 Moo. P.C. 181, and in *Allan* v. *Pratt*, 13 App. Cas. 780, refused to allow an appeal to the Privy Council because the amount of the judgment was less than £500 sterling, although the plaintiff's demand in his declaration exceeded that amount. The Court evidently thought that it should not assume that two statutory provisions, one of them at least (sec. 2 of ch. 82, C.S.L.C.) unquestionably bearing upon this much debated question, had been entirely overlooked on each occasion when that question was before the Judicial Committee. If those statutory provisions were brought to the attention of the Board, as they undoubtedly were in the *Anderson* case, 7 L.C.Jur. 150, and as I think we should assume they were in the other cases, unless they were deemed wholly irrelevant, which we cannot assume in view of the decisions to the contrary here and in Quebec and of what took place in *Anderson's* case, 7 L.C.Jur. 150, and in *Richer* v. *Voyer*, 2 R.L. 244, its decisions must mean that, notwithstanding the declaration of the provincial legislature (which it was competent to make), *Cuvillier* v. *Aylwin*, 2 Knapp. 72, that the amount in dispute

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shall be understood to be that demanded and not that recovered, if they are different,

the right to appeal *de plano* to the Privy Council shall, in the case of an appeal by a defendant, be determined by the amount recovered, because the amount demanded may, and should be, held to mean that demanded on the appeal, *i.e.*, the amount or value of the matter in controversy in the appeal, and in such a case the only relief sought is from a condemnation for the amount of the judgment. On an appeal by a plaintiff, on the other hand, from a judgment of dismissal, the whole sum claimed in the declaration may be demanded on the appeal, and, unless the claim is modified, is in fact the amount in dispute. Where a plaintiff merely seeks to increase the amount of a judgment in his favour, the case may be different. A similar view of the construction of the like provision of the Supreme Court Act (sub-sec. 4 of sec. 29 of ch. 135, R.S.C., 1886, added by 54 & 55 Vict., ch. 25, sec. 3; now sub-sec. 2 of sec. 46) was unanimously taken by this Court in *Beauchemin* v. *Armstrong*, 34 Can. S.C.R. 285, in 1904, where an appeal by a defendant against a judgment for $631 of costs in an action in which the original claim was for $2,217 was quashed on the ground that "the interest of the party appealing was less than $2,000," the Court expressly following *Allan* v. *Pratt*, 13 App. Cas. 780, and *Monnette* v. *Lefebvre*, 16 Can. S.C.R. 387, in 1889. This judgment was delivered by Taschereau, C.J., who had delivered the judgment of the Court in *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, and of the majority in *Citizens' Light Co.* v. *Parent*, 27 Can. S.C.R. 316.

In *Dufresne* v. *Fee*, 35 Can. S.C.R. 8, at 11, the same Chief Justice would distinguish *Beauchemin* v. *Armstrong*, 34 Can. S.C.R. 285, on the ground that "it was not a case where there was a difference between the amount demanded and that recovered."

The decision in *Allan* v. *Pratt*, 13 App. Cas. 780, would also appear to have been followed by this Court in *Kennedy* v. *Gallagher*, Cam. S.C. Prac. (2nd ed.), 183, decided on October 6, 1908. The claim in that case was for $10,400; the recovery, $1,800. The defendants appealed from the judgment of the Court of Review. Their appeal was quashed. Mr. Cameron suggests a possibility that the case may have proceeded on another ground.

It seems difficult to escape the conclusion that in the foregoing cases (with the exception of *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, in which, although the question as to the right of appeal was the same as that in *Richer* v. *Voyer*, 11 R.L. 244, the allowance of an appeal by the Privy Council in that case was apparently not brought to the attention of the Court, *Citizens' Light and Power Co.* v. *Parent*, 27 Can. S.C.R. 316, which followed *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, and *Dufresne* v. *Fee*, 35 Can. S.C.R. 8, at p. 11), the word "demanded" in art. 2311 of R.S.Q. (1888), (sec. 25 of ch. 27 and sec. 2 of ch. 82 in the C.S.L.C., 1860), was construed as meaning "demanded or in controversy on the appeal." In *Came* v. *Consolidated Car Heating Co.*, 4 Q.P.C. 256, in 1901, the Court of King's Bench again recognized the rule that the quantum of the interest of the appellant determines the value of the matter in dispute for purposes of the appeal to the Privy Council. In this case leave to appeal was afterwards granted by the Privy Council apparently on the ground that the value of the rights in dispute, apart from the claim for damages, exceeded £500 sterling. (Note, p. 258.)

The rule in *Allan* v. *Pratt*, 13 App. Cas. 780, was also accepted by the Court of Review in *Marchand* v. *Molleur*, 4 Que. S.C. 200, in 1893.

With the law in this state, the Quebec Legislature by 8 Edw. VII., ch. 75, substituted for clause 3 of art. 68, C.P.Q., which had formerly read as follows:—

(3) In all other cases wherein a matter in dispute exceeds the sum or value of £500 sterling (the following):—

(3) In all other cases where the amount or value of the thing demanded exceeds the value of $5,000.

In the revision of the Quebec statutes in 1909 art. 2311 of the R.S.Q. (1888), is not found, having been repealed by ch. 37 of the statutes of 1908.

The question now presented is whether, as a result of the substitution in clause 3 of art. 68, C.P.Q., of the words, "the amount or value of the thing demanded" for "the matter in dispute," appealability to the Privy Council no longer depends upon the amount of the interest of the appellant, but is to be determined, alike in the case of plaintiff and defendant, solely by the amount claimed in the declaration, regardless of the value of the matter in controversy on the appeal—with the result that

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in an action in which $5,001 has been claimed, the defendant would be entitled to appeal *de plano* to the Privy Council, although judgment had been recovered for some very trifling sum and the plaintiff had acquiesced therein.

In the only reported case since 1908 that I have found, although in his reasons for judgment, Jette, C.J., says: "The sum demanded by the action determines the jurisdiction . . . ," in the formal judgment the refusal of leave is based upon the fact that "*the amount in controversy* does not exceed $5,000." Contrary to the view of the Privy Council, in *Richer* v. *Voyer*, 2 R.L. 244, and *Quebec Fire Ins. Co.* v. *Anderson*, 7 L.C.Jur. 150, in 1860, the Court refused to take costs into account in considering the amount in controversy for purposes of appeal. The judgment also rests, however, on the ground that the proceeding had been taken under the Winding-up Act, and that it does not authorize an appeal to the Privy Council: *Lapierre* v. *La Banque de St. Jean*, 12 Que. P.R. 152, in 1910.

But if the proper inference from the earlier cases is that, for purposes of appeal to the Privy Council, the word "demanded" in sec. 25 of ch. 77 and sec. 2 of ch. 82 of the C.S.L.C. (1860), (R.S.Q., 1888, art. 2311) had been construed to mean "demanded or in controversy on the appeal," so that under that provision the value of the interest of the appellant determined the right to appeal, the same construction should be put upon the word "demanded" in the new clause 3 of art. 68 C.P.Q., there being nothing in the context to forbid it. *Greaves* v. *Tofield*, 14 Ch.D. 563, at 571; *Avery* v. *Wood*, [1891] 3 Ch. 115, at 118; *Jay* v. *Johnstone*, [1893] 1 Q.B. 25, at 28; *Joyce v. Hart*, 1 Can. S.C.R. 321, at 328; *Casgrain* v. *Atlantic and N.W.R. Co.*, [1895] A.C. 282, at 300. If by the change made in 1908 the legislature meant to enact that the right of appeal should for the future depend upon the amount claimed in the declaration, in view of the existing jurisprudence we should have expected to find it make use of some unmistakable phrase to express that intention, such as "demanded in the action," or "demanded by the declaration," instead of the bare and equivocal word "demanded," shorn even of the words which formerly accompanied it, "and not that recovered, if they be different," which were at least indicative, one would have thought, of an intention to use "de-

manded" in the sense of "demanded in the action or by the declaration," but were apparently deemed insufficient to warrant giving that construction to it in view of the unsatisfactory basis of appeal to the Privy Council which would result.

Having regard to the reasons assigned by the Judicial Committee in *Macfarlane* v. *Leclaire*, 15 Moo. P.C. 183, and *Allan* v. *Pratt*, 13 App. Cas. 780, for holding that the right of appeal to the Privy Council should depend upon the amount of the appellant's interest, I would not be prepared to give to the word "demanded" in clause 3 of art. 68 C.P.Q. the meaning "demanded in the action," even if I were satisfied that the predecessors of art. 2311 of the R.S.Q. (1888), had been entirely overlooked in those cases or had been deemed inapplicable, because, to do so, would overturn well-settled jurisprudence with revolutionary consequences, and because that is not the only meaning of which "demanded" is reasonably susceptible.

In *Macfarlane* v. *Leclaire*, 15 Moo. P.C. 183, the statute 34 Geo. III., ch. 6, sec. 30, upon which the right of appeal depended, declared final the judgment of the Court of Appeals

> in all cases where the matter in dispute shall not exceed £500 sterling; but in cases exceeding that sum or value . . . an appeal shall lie to His Majesty in his Privy Council *though the immediate sum or value appealed for be less than £500 sterling* . . .

Nevertheless their Lordships said:—

> In determining the question of the value of the matter in dispute upon which the right to appeal depends, their Lordships consider the correct course to adopt is to look at the judgment as it affects the interests of the parties who are prejudiced by it, and who seek to relieve themselves from it by an appeal. If their liability upon the judgment is of an amount sufficient to entitle them to appeal, they cannot be deprived of their right because the matter in dispute happens not to be of equal value to both parties and, therefore, if the judgment had been in their favour, their adversary might possibly have had no power to question it by an appeal.

The right of appeal was maintained, although the original claim had been only for £417 0s. 8d. currency, because "the effect of the judgment was to place in jeopardy" goods for which £1,642 currency had been paid, "and it is the immediate effect of the judgment which must be regarded."

The principle of this decision, their Lordships held, governed *Allan* v. *Pratt*, 13 App. Cas. 780.

If (as I think they should) the decisions of the Judicial Committee above mentioned should be taken to have put upon the

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word "demanded" used in the sections of the Consolidated Statutes to which I have referred the meaning "demanded or in controversy in the appeal," as was understood by the Court of King's Bench in *Glengoil S.S. Co.* v. *Pilkington*, 28 Can. S.C.R. 146, and apparently also by our own Court in *Beauchemin* v. *Armstrong*, 34 Can. S.C.R. 285, and *Kennedy* v. *Gallagher*, Cam. S.C.Prac. (2nd ed.) 183, a contrary intention not being clearly apparent, the legislature should be deemed to have used the same word in a subsequent statute dealing with such appeals with the meaning thus attached to it.

I am, for these reasons, of the opinion that unless the interest of the appellant—the amount demanded or in controversy in the appeal—exceeds $5,000, no right of appeal to the Privy Council is conferred by arts. 69 and 68(3), C.P.Q., and that the respondent's motion to quash should therefore be granted.

Motion dismissed.

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HARMER v. A. MACDONALD CO. LTD.

Saskatchewan Supreme Court, Elwood, J. July 26, 1916.

CONSTITUTIONAL LAW (§ II A 2—194)—"DIRECT TAXATION WITHIN PROVINCE"—LICENSE ON FOREIGN CORPORATIONS—DOMINION COMPANIES.

The license fees imposed on corporations by the Companies Act of Saskatchewan (1915, ch. 14, Pt. II.), for carrying on business within the province, are "direct taxation" within the powers conferred upon the province by sec. 29(2) of the B.N.A. Act, 1867, and may be made to apply to Dominion companies; the penalties prescribed by the Act, for carrying on business without being registered or licensed, do not interfere with the status of a corporation, or prevent it from exercising the powers conferred upon it by its Dominion letters patent.

[*John Deere* v. *Wharton*, 18 D.L.R. 353, distinguished; *Haug Bros.* v. *Murdoch*, 26 D.L.R. 200, referred to; *Smith* v. *Mawhood*, 14 M. & W. 450, applied. See also *Bonanza Creek* v. *The King* (P.C.), 26 D.L.R. 273; *The Insurance Case* (P.C.), 26 D.L.R. 288; *The Companies Case* (P.C.), 26 D.L.R. 293; *Alberta Drilling Co.* v. *Dome Oil Co.* (Alta.), 27 D.L.R. 118, 28 D.L.R. 93; *Mickelson* v. *Mickelson* (Man.), 28 D.L.R. 307; *Treasurer of Ont.* v. *Can. Life Assur. Co.* (Ont.), 22 D.L.R. 428; *Willett Martin Co.* v. *Full* (P.E.I.), 24 D.L.R. 672.]

Statement.

ACTION by shareholder for injunction and mandamus in alternative.

E. B. Jonah, for plaintiff.

F. L. Bastedo, for defendant.

P. S. Stewart, for Attorney-General.

Elwood, J.

ELWOOD, J.:—The questions involved in this case are the result of the following stated case, namely:—

This action was commenced on May 6, 1916, by writ of sum-

mons wherein the plaintiff claimed, as a shareholder of the defendant company, an injunction against the defendant company restraining the defendant company and its directors, agents and representatives from continuing to carry on business in the Province of Saskatchewan without being registered or licensed as required by the Companies Act of Saskatchewan, Sask. Stats. 1915, ch. 14.

The plaintiff claimed in the alternative a mandamus commanding the said defendant company and the directors thereof to cause the said defendant company to be registered under sec. 23 of the said Companies Act of the Province of Saskatchewan, and to maintain such registration and to maintain licenses as required by sec. 25 of the said Act so long as the defendant company shall carry on business in the said Province of Saskatchewan.

The parties have concurred in submitting the following statement of facts, and the questions of law arising thereon, for the opinion of the Court:—

1. The defendant company is a company incorporated by letters patent dated December 7, 1912, issued by the Secretary of State for Canada under the authority of the Companies Act of Canada (R.S.C. 1906, ch. 79), with head office at the city of Winnipeg, in the Province of Manitoba, and empowered *inter alia* to carry on throughout Canada the business of wholesale and retail merchants.

2. In pursuance of the powers under the said letters patent, the defendant company has been and is at the date of this action, maintaining at Moose Jaw and other places in Saskatchewan branch offices for conducting its business in general merchandise through the Province of Saskatchewan and part of the Province of Alberta.

3. On or about January 15, 1913, the defendant company made application to the registrar of companies of the Province of Saskatchewan for registration under the Foreign Companies Act of Saskatchewan (R.S.S. 1909, ch. 73), and received from the said registrar a document purporting to be a certificate of registration dated January 20, 1913.

4. On or about December 8, 1914, the defendant company received from the said registrar of companies a notice dated December 1, 1914, accompanied by a schedule of fees and calling

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for a remittance of $85 on account of annual license fee, to which the defendant company replied by letter dated December 8, 1914, and received in turn a reply from the said registrar of companies a letter dated December 12, 1914.

5. On or about March 3, 1916, the defendant company received from H. E. Sampson, one of His Majesty's counsel, acting as crown prosecutor for the Government of Saskatchewan, a letter dated February 28, 1916, whereupon there ensued between the defendant company and the said H. E. Sampson and the said registrar of companies the correspondence embodied in the copies of letters thereto annexed.

6. The defendant company was struck off the register of joint stock companies on September 15, 1915, and no application has been made to restore the said company on the said register.

7. The defendant company claims by way of defence that the said defendant company has in virtue of its letters patent and of sec. 29 of the Companies Act of Canada, (R.S.C. 1906, ch. 79), full authority and right to exercise in the said Province of Saskatchewan the status and functions of a corporation for the purpose of carrying out in the said province the objects and undertaking set forth in the said letters patent; and that the provisions of the said Companies Act of Saskatchewan in so far as they purport to apply to the said company are *ultra vires* of the legislature of the Province of Saskatchewan.

8. The questions for the opinion of the Court are:—(1). Whether the provisions of the said Companies Act of Saskatchewan in so far as they purpose to apply to the defendant company are *intra vires* of the legislature of the Province of Saskatchewan.

(2). Whether the defendant company is precluded by reason of not being registered or licensed under the said Companies Act of Saskatchewan from carrying out its objects and undertaking in the Province of Saskatchewan.

(3). Whether the defendant company is subject to penalties prescribed by the said Companies Act of Saskatchewan for carrying on business without being registered or licensed.

9. If the Court shall answer any of the above questions so as to sustain the validity of the plaintiff's claim, then judgment shall be entered for the plaintiff for an injunction, or in the alternative, for a mandamus, as claimed by the plaintiff, upon such terms as the Court may deem just.

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10. If the Court shall not sustain the validity of the plaintiff's claim, the action shall be dismissed on such terms as the Court may deem just.

The sections of the Companies Act of the Province of Saskatchewan being ch. 14 of the statutes of 1915, material to this case, are secs. 23, 24, 25, 26, 27, 28 and 30.

In considering the questions raised, it seems to me in the first place important to determine whether or not the effect of the legislation above referred to is to impose direct taxation or whether it interferes with the status of Dominion companies or prevents them from exercising the powers conferred upon them by the Parliament of Canada. Dealing with the question as to whether or not the legislation is direct taxation I am unable to distinguish this case from the cases of the *Bank of Toronto* v. *Lambe*, 56 L.J.P.C. 87, and the *Brewers' and Malsters' Assn.* v. *A.-G. of Ontario*, 66 L.J.P.C. 34, [1897] A.C. 231, and it seems to me from what is held in those cases that I must hold in this case that the fees imposed are direct taxation within the powers conferred upon the province by the provisions of the B.N.A. Act. The next question to determine is whether or not, in view of the penalties imposed by the Act, there is an interference with the status of the defendant company preventing it from exercising the powers conferred by the Dominion incorporation. The following cases were cited by counsel for defendants: *Brown* v. *Moore*, 32 Can. S.C.R. 93; *N.S. Construction* v. *Young*, 13 B.C.R. 297; *Haug Bros.* v. *Murdoch*, 26 D.L.R. 200; *John Deere* v. *Wharton*, 18 D.L.R. 353, 84 L.J.P.C. 64; *La Compagnie Hydraulique* v. *Continental Heat Co.*, [1909] A.C. 194; *Russell* v. *The Queen*, 7 App. Cas. 829; *Union Colliery* v. *Bryden*, [1899] A.C. 580, 587; *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96.

In all of the above cases it will be found that there was apparent in the legislation an interference with the corporate powers of the company, attacking the legislation, or a prohibition from carrying on business. For instance, in *Brown* v. *Moore*, *supra*, there was a statutory prohibition of the sale of intoxicating liquors, and it was held that a contract entered into in face of the statutory prohibition was void, and that the imposition of a penalty for the contravention of the statute avoided a contract against the statute. In *John Deere* v. *Wharton*, *supra*, there was a pro-

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hibition against carrying on business until the extra provincial company was licensed or registered. In the case at bar there is no such prohibition. It seems to me that this case comes within what was held in *Learoyd* v. *Bracken*, [1894] 1 Q.B. 114, and *Smith* v. *Mawhood*, 14 M. & W. 452. The latter case seems to me to be particularly applicable to the present. In that case, secs. 25 and 26 of the Excise License Act, 6 Geo. IV. ch. 81, subjected to penalties any manufacturer of or dealer in or seller of tobacco, who should not have his name painted on his premises in manner therein mentioned. At p. 464 of the above report Alderson, B., is reported as follows:—

> The question is, does the legislature mean to prohibit the act done or not? If it does, whether it be for the purposes of revenue or otherwise, then the doing of the act is a breach of the law, and no right of action can arise out of it. But here the legislature has merely said, that where a party carries on the trade or business of a dealer in or seller of tobacco, he shall be liable to a certain penalty, if the house in which he carries on the business shall not have his name, etc., painted on it in letters publicly visible and legible, and at least an inch long, and so forth. He is liable to the penalty therefor, by carrying on the trade in a house in which these requisites are not complied with, and there is no addition to his criminality if he makes fifty contracts for the sale of tobacco in such a house. It seems to me therefore, that there is nothing in the Act of Parliament to prohibit every act of sale, but that its only effect is to impose a penalty, for the purpose of the revenue, on the carrying on of the trade without complying with its requisites.

It is quite true that the Saskatchewan Act does provide a penalty for each day on which the business is carried on in contravention of the Act. If the legislation had provided a penalty for each contract made while the company were unlicensed or unregistered, then, following what Alderson B. said above, it might possibly be held that the intention to prohibit the act was evidenced. But that is not the case here. Any number of contracts may be made during the same day and there is the one penalty for each day the company fails to register or to take out a license. I am, therefore, of the opinion that the imposition of the penalty does not interfere with the status of the defendant company or prevent it from exercising the powers conferred on it by its Dominion incorporation. It was urged that the effect of the legislation complained of was to make the defendant company subject to the provisions of the Companies Act. Sec. 25, sub-sec. 3, it will be noticed, provides that:—

> a company receiving a license from the registrar may, *subject to the provisions*

of its charter, Act, or other instrument creating it, carry on business to the same extent as if it had been incorporated under this Act.

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It seems to me, therefore, that the defendant company, though registered or having got a license, has preserved to it all its corporate capacities and powers conferred by its Act of Incorporation. I would, therefore, answer the questions as follows: 1. Yes. 2. No. 3. Yes.

Elwood, J.

The result will be, according to the above submission, that there will be judgment entered for the plaintiff for a mandamus as prayed for in the statement of claim. The defendant will pay the plaintiff his costs of this action, and as I understand there is to be an appeal, there will be a stay of proceedings pending the appeal. *Judgment for plaintiff.*

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Alberta Supreme Court, Scott, Stuart and McCarthy, JJ. May 16, 1916.

APPEAL (§ I C—25)—RIGHT OF APPEAL—RE-HEARING UNDER CR. CODE 797 IN DISORDERLY HOUSE CASE—TRIAL BY TWO JUSTICES.

The intention of Cr. Code 797, as amended 1913, ch. 13, is to limit the right of appeal by way of re-hearing in respect of summary trial convictions for keeping a disorderly house so that there should be no such appeal where a police magistrate or other functionary having the powers of two justices had made the conviction; and the right of appeal given by sec. 797 is limited to cases where two persons who are justices of the peace are sitting together as a summary trial Court under Part XVI. for the trial of an offence within sub-secs. (*a*) or (*f*) of Cr. Code sec. 773, *i.e.*, theft or receiving where under $10 or keeping a disorderly house.

ACTION on behalf of the defendant for an order of mandamus directing the Judge of the District Court Judges' Criminal Court, to enter and hear an appeal brought by the defendant against a conviction entered against him by a Police Magistrate on a charge of keeping a common gaming house.

Statement.

E. B. Cogswell, for the Crown.

J. A. McCaffry, for the defendant.

The judgment of the Court was delivered by

STUART, J.:—It appears that the defendant, after his conviction, served a proper notice of appeal within the prescribed time. When the District Court Judge opened his criminal Court and application was made by counsel for the accused to have the appeal entered for hearing, objection was made to the entry of the appeal by counsel for the Crown on two grounds: first, that under sec. 797 of the Code, as amended by sec. 28 of ch. 13 of the Dominion Statutes of 1913, there was no appeal provided for, and second,

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that there was no proper recognizance filed by the proposed appellant as provided by sec. 750 (*c*) of the Code.

The learned District Judge gave effect to the first objection, while expressing, so we are informed, some grave doubt as to the validity of the second objection, because of his impression that the recognizance as filed should be treated as sufficient.

Under sec. 797, as it stood before the amendment, an appeal was given for the offences specified in paragraphs (*a*) and (*b*) of sec. 773, without any restriction as to the character of the tribunal by which the conviction had been made. But by the section as amended the right of appeal is given only where the conviction has been made by "two justices sitting together."

The contention of the applicant is that inasmuch as by the provincial Act, ch. 13 of 1906, sec. 1, sub-sec. (2), a police magistrate shall have all the powers by any law vested in two justices of the peace sitting together, therefore the words of sec. 797, giving a right of appeal from two justices must be interpreted as also giving a right of appeal when the conviction has been made by a police magistrate.

In my opinion this contention cannot be sustained. It is true that sec. 771 of the Code interprets the word "magistrate," where it is used in part XVI., as including in Alberta "two justices" but it does not follow that because this is so the words "two justices" must be interpreted as including a police magistrate having the power of two justices. It seems to me that sec. 797 means simply what it says. A police magistrate, no doubt, has the power of two justices, but he certainly is not "two justices." It will be observed that in Saskatchewan and Alberta by sec. 771 (*a*—IV.) a "magistrate" under part XVI. includes a Judge of any district Court as well as a police magistrate having the power of two justices. As sec. 797 originally stood, there would have been an appeal from a District Court Judge to himself or to another Judge of the same Court. It was, it seems to me, quite plainly the intention of Parliament to withdraw the right of appeal when the conviction had been made by a district Judge or a police magistrate and to retain it only, as the section says—where the conviction had been made by two justices of the peace.

I think that the application must be dismissed on this ground and that it is therefore unnecessary to deal with the sufficiency of the recognizance. *Mandamus refused.*

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ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. April 19, 1916.

DEATH (§ IV—28)—COMPROMISE OF CLAIM—SUFFICIENCY—PROXIMATE CAUSE.

An unconcluded settlement by a plaintiff with a party sued cannot be set up as a defence by another defendant in an action by the same plaintiff.

In an action for negligence, in the absence of positive evidence as to the cause of the mishap, the verdict of a jury will be upheld, if there is no other reasonable explanation than the negligence charged and found.

[*McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, applied.]

Statement.

AN appeal by the defendants from the judgment of SUTHERLAND, J., at the trial, upon the findings of a jury, in favour of the plaintiff in an action under the Fatal Accidents Act. Affirmed.

Peter White, K.C., for appellants.

R. V. Sinclair, K.C., for plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment, dated the 21st January, 1916, which was directed to be entered by Sutherland, J., on the findings of the jury at the trial of the action at Ottawa on the 19th and 20th days of that month.

The action is brought, under the Fatal Accidents Act, by the widow of Napoleon St. Denis, who met with his death owing, as she alleges, to the negligence of the appellants.

The deceased was killed owing to the explosion of a boiler which was in use for heating a building in which the appellants were holding an exhibition, and it is admitted that the appellants are liable if the explosion was due to their negligence or that of any person entrusted with the superintendence of the boiler and its operations, unless the respondent is bound by an agreement made by the solicitors for the defendants in an action brought by the respondent against the Corporation of the City of Ottawa, with Mr. Lemieux, the former solicitor for the respondent in that action, for the settlement of the respondent's claim for $3,000, that action being against the corporation, who were charged with negligence to which the explosion was alleged to have been due.

The learned trial Judge ruled that, in the absence of express authority from the respondent to the solicitor who made the agree-

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ment, to make the settlement, she was not bound by it, and he left it to the jury to find whether the respondent had authorised Mr. Lemieux to settle, and the finding was that she had not.

It was argued by counsel for the appellants that this ruling was erroneous, and that the learned Judge should have ruled that Mr. Lemieux had authority to make the settlement, it not being shewn, as was contended, that the solicitor's authority had been, to the knowledge of the defendants the Corporation of the City of Ottawa, withdrawn, and Mr. Lemieux forbidden to make the settlement.

It is unnecessary to consider this aspect of the case, because I am of opinion that, assuming that this contention is well-founded, the appellants must fail on this branch of the case, because there was never a concluded bargain binding on the Corporation of the City of Ottawa for the settlement of the respondent's claim.

There was no corporate action by which the settlement was agreed to, and the only corporate action was the passing of a by-law on the 21st December, 1914. By this by-law the sum of $7,800 was set aside and appropriated for the purpose of making provision for the payment of certain death and personal injury claims filed in respect of the boiler explosion at Howick Hall, i.e., the boiler explosion which caused the death of the respondent's husband; these claims are set out in the by-law, and the payment to "the widow and seven infant children of Napoleon St. Denis, deceased," of $3,000, is provided for.

The by-law, however, contains a provision that no part of the $7,800 "shall be paid out or disbursed to the respective claimants therefor until the Board of Control . . . shall have been first satisfied that all damage claims of every kind and nature, including all claims arising as well from loss of life and from personal injuries, as from loss of, or damage to, stock, or for damages sustained by exhibitors, made as a result of the said boiler explosion at Howick Hall, have been released and discharged as well against the Corporation of the City of Ottawa as against the Central Canada Exhibition Association and the Eastern Ontario Live Stock and Poultry Association."

The by-law also provides that "neither the passing of this by-law nor the payment of the said sum of money, or of any part

thereof is to be, or is to be construed to be, an admission that the corporation of the said city are in anywise liable in law to make payment to any of the said claimants."

When Mr. Lemieux accepted, as he says he did, the offer of $3,000 in settlement of the respondent's claim, is not shewn, and there is nothing to indicate that he accepted it subject to the qualification which the by-law contains, and there was not therefore, I think, at any time a concluded bargain "that the claim should be settled for $3,000" binding on both parties. It is somewhat singular that, although later letters referring to the settlement were put in at the trial, the letter which Mr. Lemieux says he wrote agreeing to take $3,000 in settlement of the claim of the respondent was not put in, nor was any reason assigned for not putting it in.

In addition to this, no settlement could properly be made without the sanction of the Court, because the rights of the seven infant children of the deceased were involved.

In my view, therefore, the appellants failed as to the alleged settlement.

It was further argued for the appellants that the deceased was a servant or employee of the association, and that, the negligence found being, as was contended, that of a fellow-servant, the action did not lie. No such defence is set up by the appellants in their pleading, and no question as to it was put, or asked, at least specifically, to be put, to the jury. The proper conclusion upon the undisputed evidence is, that the deceased was a partner of a man named Hilliard with whom the appellants had entered into a contract for the killing and dressing of such cattle as the appellants desired to have dressed, and who was in no sense the servant of the appellants, and that the deceased met with his death while engaged in carrying out this contract.

There remains to be considered the question whether the findings of the jury mean that, in their opinion, the appellants or their superintendent, Davitt, were guilty of negligence which caused the death of the deceased; and, if that is their meaning, there was evidence to warrant the findings.

In order to determine this question, four of the findings have to be considered.

The first finding is, that "the explosion which resulted in the

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death of the plaintiff's husband was the result of negligence and not of pure accident."

The third finding is, that the negligence which caused the explosion was the negligence of the appellants.

The fourth finding is, that that negligence consisted "in the fact that the Eastern Ontario Live Stock and Poultry Association continued to operate the boiler knowing that the safety valve was not working properly."

And the eighth finding, in answer to the question, "Did the defendant association, the Eastern Ontario Live Stock and Poultry Association, employ a competent superintendent?" is: "Yes. However, we believe that Mr. Davitt made an error of judgment in allowing the engineer to continue to operate the boiler after the second steam gauge had been applied for a test, and there was still shewn a serious discrepancy between the safety valve and the steam gauge."

In order to understand these findings, it is necessary to mention some of the facts.

It is not disputed that the engineer in charge of the boiler found that there was a serious discrepancy between the indications of the steam gauge and the working of the safety valve, and that the same discrepancy existed when a new steam gauge was substituted for the one that had been in use. There was also evidence that the explosion occurred through a very high pressure being on, and that this was indicated by the result of the explosion. It is true that a witness who said this, and other witnesses, say that the explosion might have occurred with a pressure of only forty pounds if there had been some other defect in the boiler. Of this there was no evidence, and, according to Mr. White's argument, an examination of the boiler or the remains of it after the explosion failed to disclose anything in the condition of the boiler that would account for it. The case is not unlike *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72. In this case, as in that, there was no other reasonable explanation of the mishap than that it was occasioned by the negligence charged, and found by the jury.

Inasmuch as the deceased was not a servant of the appellants, no question of common employment arises, and the appellants are liable if the explosion was caused by the negligence of their servant, acting in the course of his employment, and not only for

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the negligence of the superintendent Davitt, but also for that of the engineer who had the immediate charge of the boiler when the explosion occurred.

The jury's answers, taken together, amount, I think, to a finding of negligence on the part of Davitt, and there was evidence to warrant that finding. The fact that the safety valve and the indication on the steam gauge did not correspond was brought to his attention by the engineer, as well as the fact that there was the same result when the new steam gauge was substituted, and the jury may well have come to the conclusion that Davitt should have known from this that there was something wrong with the boiler and have taken steps to find out what it was, and to remedy the defect, and that he was negligent because he did not do this, but permitted the boiler to be operated in its defective condition.

If the finding of negligence does not include a finding that the engineer was negligent, we ought to supplement the findings of the jury by making that finding.

It is warranted by the evidence, and is the necessary corollary of the finding as to Davitt, because what was notice to him of a defect in the boiler was notice also to the engineer, who evidently thought the matter serious, and called Davitt's attention to it, and, though the defect was not remedied, continued to operate the boiler. If the engineer was a fit man to be entrusted with the operation of it, he must have known that it was dangerous to operate it in the condition in which it was.

I would, for these reasons, affirm the judgment and dismiss the appeal with costs. *Appeal dismissed.*

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B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. October 3, 1916.

TAXES (§ III E—140)—LOCAL IMPROVEMENT ASSESSMENTS—AS DEBT—VALIDITY—"INSTALMENTS."

Rates levied on land under the Municipalities Local Improvement Act (B.C. Statutes 1913, ch. 49) are recoverable as a debt, and may be counterclaimed in an action on an award for land taken under the Act; any defects in the by-law or assessments are cured by secs. 38 and 44(2), and cannot therefore be set up. The expressions "number of instalments" in sec. 30(e) and "annual instalments" in sec. 42(2) mean *one* or more instalments.

Statement.

APPEAL by defendant from the judgment of McInnes, Co. J., of February 25, 1916. Reversed.

E. P. Davis, K.C., for appellant.

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Macdonald, C.J.A.

R. L. Reid, K.C., for respondent.

MACDONALD, C.J.A.:—The plaintiff sues on an award of $250 for land taken under ch. 47 of the statutes of 1913, known as the Municipalities Local Improvement Act.

Defendant counterclaimed for the rates levied on plaintiff's land under by-laws under which the local improvements in question were made.

The County Court Judge gave judgment for the plaintiff for the amount of the award and dismissed the plaintiff's counterclaim. The plaintiff's defence to the counterclaim may be divided into two parts: (1) defects in the by-law and assessments, and (2) that the rate is against the land and not against the owner, that there is no right of personal action against the plaintiff.

As regards the first of these defences, it is in my opinion not open to the respondent to set up the alleged defects in view of secs. 38 and 44 of the said Act.

With regard to the second defence, sec. 43 of the above Act makes all the provisions of the Municipal Act "as to the collection and recovery of taxes and the proceedings which may be taken in default thereof" applicable to the rates imposed under this Act, and sec. 275 of the Municipal Act gives the municipalities power to recover taxes and rates by suit.

The appeal should be allowed and judgment should be entered below for the defendants on their counterclaim.

Martin, J.A.

MARTIN, J.A.:—Several points were raised on this appeal. That as to double taxation we disposed of at the argument in favour of the appellant.

As to the meaning of "number of instalments" in sec. 30(*e*) I am of opinion that language taken in regard to the subject matter is satisfied by the payment of one instalment. The expression is not free from doubt, but by sec. 25 (2) of the Interpretation Act words importing the singular number import more than one, and also the converse, the greater including the less. It would be strange if the statute were to be held to require that a small total assessment on a work for, say, $50 should inexorably have to be extended over more than one year. Different meanings are, in law particularly, attached to the same word in different circumstances. In the case of a mortgage, for example, Maclennan, J.A., in *Biggs* v. *Freehold L. & S. Co.* (1899),

26 A.R. (Ont.) 232 at 240, referring to the expression "instalments hereby secured" said:—

"Instalment," no doubt, primarily signifies a part of a larger sum. But I think it is here used in the sense of "payment," and was intended to mean every sum which by the deed the mortgagor was to pay, every sum hereby secured, and to include liens, taxes, rates charges, insurances and incumbrances mentioned in paragraph 5. It is as if it said the whole of the payments, or the whole of the money, hereby secured, shall become payable. It would not be incorrect to say that the principal money of a mortgage was all payable in one instalment. That would plainly mean in one sum or in one payment, and not in several.

Martin, J.A.

And see Moss, J.A., on p. 247, who, after pointing out the difficulties, nevertheless comes to the same conclusion, the other Judges concurring.

I have not overlooked the fact that in sec. 42 (2) the expression "annual instalments" is used in relation to these special assessments, but the result of the best consideration that I am able to give a point of some difficulty is that I think the council has the power to assess for one or more instalments.

As to the right of the municipality to sue for these taxes, I am of the opinion that sec. 43 which is sweeping in its terms introduces the provisions of the Municipal Act to such an extent as to render the plaintiff liable to an action. I would allow the appeal.

GALLIHER, J.A.:—I would allow the appeal.

Galliher, J.A.

I think any defects in the special assessment roll or the by-law are cured by the provisions of sec. 38 and 44 (2) of the Local Improvements Act, statutes of B.C., 1913, ch. 49.

There only remains the question as to whether the corporation could sue for the special rates as a debt.

Sec. 43 of the above Act says:—

All the provisions of the Municipal Act as to the collection and recovery of taxes, and the proceedings which may be taken in default of payment thereof, shall apply to the special assessments and the special rates imposed for the payment of them.

This, taken with sec. 275 of the Municipal Act of 1914, makes it clear that these rates can be recovered in an action.

McPHILLIPS, J.A. (dissenting):—I find myself unable to agree with the majority view of the Court—with great respect, I would dismiss the appeal. The ground upon which I would dismiss the appeal is that by-law No. 161, 1915, and the assessment thereunder for a work of local improvement is illegal—it

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was contrary to the plain reading of the statute to make the payment of the cost of the work payable in one instalment. Sec. 42 of the Local Improvement Act, ch. 49, 3 Geo. V., B.C. Stats. 1913, in part reads as follows:—"The same shall be payable in such annual instalments as the council shall prescribe."

In Dr. Murray's New English Dictionary (1901) "Instalment" is defined to be:—

> The arrangement of the payment of a sum of money by fixed portions at fixed times (also) the payment or the time appointed for payment of different portions of a sum of money which by agreement of the parties, instead of being payable in gross at one time is to be paid in parts at certain stated times.

(Tomlin's Jacobs Law Dict., 1797.) In Wharton's Law Lexicon (10th ed. 1902) we read:—

> Instalment—a portion of a debt. When a debt is divided into two or more parts payable at different times each part is called an instalment and the debt is said to be payable by instalments. Where in a County Court judgment has been obtained for not more than £20, exclusive of costs, the Court may order payment by instalments—County Courts Act (1888) 51 & 52 Vict. c. 43, s. 105. As to delivery by instalments of goods sold see s. 31 of the Sale of Goods Act 1893 by which "unless otherwise agreed the buyer is not bound to accept delivery by instalments."

Unless it be that there is statute law which absolutely inhibits the question of illegality being raised—the Court may declare the by-law illegal—a great body of authority can be found to support this proposition. I only refer to two recent cases in the Supreme Court of Canada where the question of illegality was considered: *Anderson* v. *Municipality of South Vancouver* (1911), 45 Can. S.C.R. 425, Duff, J., at p. 446; *District of West Vancouver* v. *Ramsay* (1916), 30 D.L.R. 598, 53 Can. S.C.R. 459.

Sec. 38 of the Local Improvement Act is relied upon as being a statutory validation of the special assessment, but it is to be observed that the validation is after all limited in its nature "notwithstanding any defect, error or omission therein or any defect or error in the by-law for undertaking the work or in any notice given or proceeding taken or the omission of any proceeding or thing which ought to have been taken or done before the passing of the by-law for undertaking the work or thereafter down to and including the completion of such revision." I would apply the language of Duff, J., in *Anderson* v. *Mun. of South Vancouver, supra,* at p. 446, to the position of matters we have to deal with on this appeal:—

It (Duff, J., is referring to sec. 126 (3) of ch. 33 Municipal Act 1892, R.S.B.C. (1897) ch. 144, sec. 86 (2), and the application here is to sec. 38 of the Local Improvement Act, ch. 49, B.C. 1913) has, I think, nothing whatever to do with proceedings so fundamentally defective as those we have to consider in this appeal.

Further, the Local Improvement Act itself shews that the question of illegality will always be open—this is seen to be set forth in the clearest terms, sec. 44 (2) reading as follows:—

In the case of a work undertaken after the passing of this Act if the special assessment in respect of it has become confirmed under the provisions of sec. 38, no by-law for borrowing money to defray the cost of the work or for imposing the special assessment shall be quashed, set aside or adjudged to be invalid by reason of its illegality or of any defect in it; but the Court in which any proceeding for quashing, setting aside or declaring to be invalid the by-law is taken shall on such terms and conditions as to costs and otherwise as may be deemed proper, direct the council to amend or to repeal such by-law, and, where a repealing by-law is directed, to pass a new by-law in proper form in lieu of the repealed by-law, and it shall be the duty of the council to pass such by-law or by-laws accordingly.

In that the judgment of the Court does not adjudge the by-law for imposing the special assessment to be invalid—no order to carry out this enactment is required. In my opinion the by-law imposing the special assessment is illegal and the assessment cannot be supported—it would therefore follow that in my opinion the trial Judge was right in dismissing the counterclaim which was suit brought by way of counterclaim in respect of what was an illegal assessment—it was at least necessary that there should have been two annual instalments—and I think, according to the decisions, they should be equal annual instalments; had there been no illegality, my opinion is that special assessments may be sued for, as taxes may be sued for. Mr. Davis, counsel for the appellant, referred to *Biggs* v. *Freehold L. & S. Co.*, 26 A.R. Ont. 232, Maclennan, J.A., at p. 240, as being authority for the proposition that although the statute reads "annual instalments" it is satisfied by making the assessment in one instalment. With deference I cannot adopt the argument advanced, nor do I think that the Court of Appeal so decided. Maclennan, J., said:—

It would not be incorrect to say that the principal money of a mortgage was all payable in one instalment. That would plainly mean in one sum or in one payment and not in several.

With this statement of that distinguished Judge I quite agree, but when we turn to the statute we have to construe we

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are confronted with very different language—"Annual Instalments—" the language is intractable; it is plain; it cannot be misunderstood—to construe it otherwise is to run counter to the patent meaning of the legislature. I would therefore dismiss the appeal. *Appeal allowed.*

MAN.
K. B.

BURNS v. ROGERS.

Manitoba King's Bench, Mathers, C.J.K.B. September 18, 1916.

REPLEVIN (§ I A—1)—MORATORIUM—WAR RELIEF ACT—REMOVAL OF GOODS BEFORE ENLISTMENT—POSSESSION.

The words "now in his possession" in the War Relief Act, 1915, (Man. 5 Geo. V., ch. 88, as amended by 6 Geo. V. ch. 122), referring to property exempted from recovery in any action or proceeding, mean in the possession of a volunteer when he enlists, and becomes entitled to the benefit of the Act; not property which he possessed at the date of the Act, but has ceased to possess at the time of his enlistment.

Statement.

APPEAL from the order of the local Judge at Brandon setting aside an order of replevin. Reversed.

J. F. Kilgour, for respondent.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—The replevin order was issued on *præcipe*, pursuant to r. 859, sub-clause (*b*), and the order to set it aside was made under r. 861. The facts as disclosed by the affidavits filed are as follows:—On August 14, 1914, the defendant purchased from the plaintiff a threshing outfit, and gave lien notes therefor. These lien notes, or agreements, provided that the title, ownership and right to possession of the property should remain in the plaintiff until the notes and all renewals thereof were fully paid and, if default should be made, the plaintiff had full power to declare the notes due and payable and to take possession of the goods, and hold, or sell by public auction or private sale. The defendant was given possession of the threshing outfit and used it during the seasons of 1914 and 1915. At the close of the season 1915 the outfit was upon the farm of one Roy Smith and, with Smith's consent, the defendant left it there. The defendant made default in paying the lien notes or agreements, and the plaintiff determined to re-possess the outfit. On May 22, 1916, he went to Mr. Smith's farm, upon which the machinery had been left, and took possession of and removed the separator to his son's farm; later in the day he returned to Smith's farm, and, with a number of teams of horses, endeavoured to remove the engine to the same place. He moved it a short distance, but was unable to take it further, and he then asked

and obtained Smith's permission to leave it there. On May 31, the defendant enlisted in the 209th Overseas Battalion. On June 19, 1916, the plaintiff's solicitors wrote a letter to Mr. Smith, stating that the plaintiff had resumed possession of the engine and machinery and that no person other than the plaintiff must be allowed to take it away. On August 23, 1916, the defendant went to the farm of the said Smith for the purpose of removing the engine, but, before he did so, Smith delivered to him the letter referred to above, dated June 19. He, nevertheless, removed the engine, and took it to the city of Brandon. On August 25, 1916, this action was commenced and the order of replevin in question was issued. Subsequently an application was made, on behalf of the defendant, to the local Judge to discharge the said order, and upon such application the order appealed from was made.

The defendant relies upon sec. 2 of the War Relief Act, ch. 38 5 Geo. V., as amended by ch. 122 of 6 Geo. V. This section, as amended, provides that, during the continuance of the war, and for a year thereafter, it shall not be lawful for any person to bring any action, or take any proceedings either in any of the civil Courts of this province or outside of such Courts, against any person who is, or has been at any time since the 1st of August, 1914, a resident of Manitoba, and has either enlisted and been mobilized as a volunteer in the armies raised by the Government of Canada in aid of His Majesty in the said war, or has left Canada to join the armies of His Majesty in the said war as a volunteer or reservist,

for the enforcement of payment by any such person of his debts, liabilities and obligations existing or future, or for the enforcement of any lien, encumbrance or other security, whether created before or after the coming into force of this Act, or for the recovery of possession of any goods and chattels or lands and tenements *now in his possession* or in the possession of his wife or any dependent member of his family, and, if any such action or proceeding is now pending against any such person, the same shall be stayed until after the termination of said war.

If the defendant was in possession of the engine at the time he became entitled to the benefit of the Act, the plaintiff had no right to replevin it from him. On the other hand, if the defendant was not at the time in possession, he is not protected by the Act. This is a question of fact to be determined at the trial, and should not be disposed of on affidavits in Chambers: *Gilchrist* v. *Conger*, 11 U.C.Q.B 197; *Ryan* v. *Fraser*, 2 O.W.N. 1386.

MAN.

K. B.

BURNS v. ROGERS.

Mathers, C.J.K.B.

It is quite clear, I think, that, apart from this statute, the plaintiff was, under the terms of the agreement with the defendant, entitled to the possession of this threshing outfit. The undisputed fact disclosed in the affidavits is that from the close of the season of 1915 until May 22, 1916, the whole outfit remained on the farm of Smith. It was not in the actual possession of the defendant, but was, no doubt, constructively in his possession. On May 22 the plaintiff, with the intention of reducing the outfit into his actual possession, took and removed the separator to his son's farm; he then attempted to similarly remove the engine and actually did remove it for a short distance. Failing to remove it the entire distance, he asked for and obtained Smith's consent to leave it where it was. His intention was to take possession of the entire outfit. From May 22 until August 23 following, the engine remained without change of custody where the plaintiff left it.

The wording of the Act is peculiar. It says, "now in his possession." Does that mean in his possession at the date the Act came into force, namely, April 1, 1915? Undoubtedly the engine was in the defendant's possession on that date, but he had no right to the protection of the Act until May 31, 1916. Prior to that the plaintiff had lawfully resumed possession of the separator and had attempted to remove the engine, with the intention of taking actual possession of it. At that time the plaintiff had a lawful right to take possession. It could hardly be contended that possession, if lawfully taken on May 22, should become unlawful because the defendant subsequently enlisted. If the plaintiff was in lawful possession of the engine on May 22, then the defendant was not in possession at the time of his enlistment, and the plaintiff was entitled to the possession of the engine at the time the order of replevin was issued. Upon this ground alone, I think the local Judge erred in discharging the replevin order. Even if the merits be gone into, the material filed, in my opinion, fails to make a *primâ facie* case in favour of setting the order aside, but I do not want to say anything further, as by doing so I might prejudice the trial of the action.

The appeal is allowed, the order of the local Judge discharged, and the order of replevin restored with costs in the case to the plaintiff in any event. *Appeal allowed.*

Re DALTON.

N. S.

S. C.

Nova Scotia Supreme Court, Drysdale J. March 10, 1916.

1. SHIPPING (§ IV—20)—OFFENCES UNDER SHIPPING LAWS—DESERTION.

Where a summary conviction of a seaman for desertion under the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 287, as amended by 1907, Canada Statutes, ch. 46, does not show that the ship was registered in one of the provinces at the time of the offence, the defendant will be discharged in habeas corpus proceedings from custody under the commitment following such conviction.

2. SHIPPING (§ IV—20)—DESERTION AND REFUSAL TO DO DUTY—SINGLE OFFENCE.

It is not a ground for discharge on habeas corpus that the summary conviction and commitment purported to include as one offence the desertion of a seaman and also his refusal to do duty which are declared to be offences by the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 287, as amended 1907.

Statement.

MOTION in habeas corpus proceedings on behalf of James Dalton confined in the Sydney jail under a warrant of commitment based on a summary conviction for "desertion" and "refusing duty" in violation of sec. 287, ch. 113 R.S.C. The applicant had been sentenced to eight weeks' imprisonment and to pay the prosecution costs, $10. The prosecutor and the Crown prosecutor for the County of Cape Breton were notified of the motion.

The applicant's discharge was asked on the following grounds:

1. The warrant and conviction did not show that the offence was committed by a seaman on a ship, "registered in one of the provinces at the time of the offence."

2. Two offences, viz., "desertion" and "refusing duty" were included in the conviction and warrant.

3. The words "due process of law" in the commitment impose an unlawful condition of discharge.

W. J. O'Hearn, K.C., for the applicant:—As to the first ground, see ch. 46, Canada Acts, 1907, as amending sec. 287, ch. 113 R.S.C. The language of the amendment constitutes a necessary element of the offence. As to the second ground see Code, sec. 110 (3) *R.* v. *Mabey*, 37 U.C.Q.B. 248, Paley, 8th ed., 291, 2. It is uncertain as to which offence imprisonment has been inflicted. If for "refusing to do duty" under 287 (*d*), eight weeks is excessive. As to the third ground, no form is provided by statute, and the inclusion of the words "due process of law" make an illegal condition of discharge, *Ex parte O'Donnell*, 7 Can. Cr. Cas. 367.

Drysdale, J.

DRYSDALE J.:—Suppose I give effect to the first ground,

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Drysdale, J.

can I not remand the prisoner and direct a new warrant to be lodged with the gaoler?

O'Hearn :—No. The conviction is before you and it is equally defective, being minus the same allegation.

DRYSDALE, J., by an oral judgment discharged the prisoner on the first ground, but stating that, in his opinion, the motion could not prevail on the second and third grounds above set forth. *Prisoner discharged.*

ONT.

S. C.

LATIMER v. HILL.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. March 21, 1916.

PARENT AND CHILD (§ I—4)—LIABILITY OF PARENT FOR MAINTENANCE—AGREEMENT—BREACH—DAMAGES.

Where a parent arranges that his minor child shall reside with a relative, without charge, and give the relative his services free, the parent is liable to damages if he induces the child to leave the relative while yet a minor; the value of the child's keep while with the relative, above his value as a labourer, is the measure of the damages.

[*Latimer* v. *Hill*, 26 D.L.R. 800, affirmed except as to damages.]

Statement.

APPEAL by the defendant from the judgment of BOYD, C., 26 D.L.R. 800, 35 O.L.R. 36.

J. H. Rodd, for appellant.

R. L. Brackin, for plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—It is clear that it was not intended that the appellant should have to pay for the support and upbringing of the boy in money; but it is equally clear that it was in the contemplation of the parties that the respondent should be compensated by having the benefit of the boy's services after he became old enough to render useful service to the respondent.

I have no doubt that a jury might properly infer from all that took place an agreement that the respondent should be compensated in that way, and that the appellant would do nothing to prevent the respondent from getting the benefit of the boy's services after he had attained an age when he would have become useful to him; and, if that be the case, the Chancellor, as judge of the fact as well as the law, might properly draw that inference, and having drawn it his finding ought not to be disturbed. It is also, I think, a fair inference that, if the appellant should take the boy away from or induce him to leave the respondent, he was to be compensated for his care of the boy and bringing him up.

The respondent doubtless took the risk of the boy dying before reaching an age when he would have become useful to the respondent, and also the risk of his proving useless when he had reached the age when he should have been useful; but, in my opinion, he did not take the risk of the boy, under the persuasion or compulsion of his father, leaving the respondent when he had become useful and his services would have been of value to the respondent.

The Chancellor found that the boy was induced by his father to leave the respondent. The basis for the finding was an offer the father had made to the boy to give him $2,000 "if he would come back and stay with him" until he reached the age of 21. It was argued that that was not the real cause of the boy's leaving, and that the offer of $2,000 was not made seriously but jokingly, and it was also argued that the time which elapsed between the making of the offer and the boy's leaving was so great that i was unreasonable to conclude that the offer was the inducing cause of his leaving.

All these considerations were doubtless urged upon the Chancellor, but without effect; and it is impossible for us to say that his conclusion was clearly wrong or one that might not reasonably be reached, especially as it is clear upon the evidence that the appellant was anxious to get the boy back to work on his farm, and that, ever since he left the respondent, he has been doing for his father what he ought to have been doing and what it was contemplated he would do for the respondent.

Much stress was laid by the appellant's counsel on the fact that about two years after his wife's death the appellant asked the respondent what he was going to "tax him," and that the reply was "nothing." There was nothing in this inconsistent with the arrangement having been what the Chancellor found that it was. If the boy had been taken away at that time, the respondent would have been saved the expense of bringing him up, and he might well say that under such circumstances he expected nothing for the two years' care that the boy had been given.

The remaining question is as to the damages. The Chancellor assessed them on the basis of reasonably remunerating the respondent for his care of the boy and bringing him up. He allowed nothing for the first two years, or the last three years, of the boy's stay with the respondent—for the first two years because of what was said in answer to the question as to how much the ap-

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pellant was to be "taxed," and for the last three years because he thought the boy's services were sufficient compensation for those years. This left seven intervening years, for which he thought it would be fair to allow at the rate of $1.50 per week; and, after striking off the fraction over $500, he assessed the damages at $500.

I think that the damages were assessed upon too liberal a scale, and that, under the circumstances, $40 a year on the average would be adequate compensation for the care and bringing up of the boy during the seven years for which the Chancellor thought that compensation should be allowed; and I would, therefore, vary the judgment by reducing the damages to $280, but I would not disturb the disposition that was made of the costs of the action, which should be to the respondent on the County Court scale without set-off, and I would leave each party to bear his own costs of the appeal. *Judgment below varied.*

QUE.

K. B.

RAGUSZ v. HARBOUR COMMISSIONERS OF MONTREAL.

Quebec King's Bench, Sir Horace Archambeault, C.J. and Trenholme, Lavergne and Pelletier, JJ. September 23, 1916.

ALIENS (§ III—15)—WHEN DEEMED ENEMIES—HOSTILE ACTS.

The subjects of enemy nations residing in Canada are not necessarily "alien enemies." Residence in the enemy's country is the deciding factor. They cannot be deprived of civil rights and privileges until some definite act of hostility by them is proven.

[*Canadian Stewart* v. *Perih*, 25 (Que.) K.B. 158, distinguished; *Viola* v. *Mackenzie Mann & Co.*, 24 D.L.R. 208, followed. See annotation in 23 D.L.R. 375.]

Statement.

APPEAL by the plaintiff from a decision of the Superior Court suspending adjudication until after the war. Reversed.

Archambeault, C.J.

SIR HORACE ARCHAMBEAULT, C.J.:—The appellant in this case is suing the defendants in damages owing to an accident which happened in the course of his work. He is an Austrian residing in Montreal. He alleges in his declaration that he was inscribed as a subject of the double monarchy of Austria-Hungary and that he has conformed himself to the rules and regulations which govern the subjects of enemy nations residing in Canada.

The defendants have encountered this action by a plea in which they allege, among other things, that the appellant being an Austrian subject cannot prosecute any right or any claim before the civil Courts of this province.

The appellant has inscribed in law against this paragraph of the defendant's plea.

The Court of the first instance has neither maintained nor rejected the inscription in law, but suspended the adjudication on this inscription as long as the war between Austria-Hungary and Great Britain will last. In the judgment it is declared that a subject of a nation which is at war with Great Britain is unable, during the war, to prosecute any instance before our Courts.

The Court in the first instance relied on the judgment which we rendered on the 16th of December last, in the case of the *Canadian Stewart Co.* v. *Perih*, 25 Que. K.B. 158.

There exists an essential difference between the case of Perih and the present litigation. Perih was an Austrian residing in Austria, and describing herself as such in the writ and declaration. In this case, the appellant resides in Montreal. This difference in the place of residence entails with it a dissemblance of rights. Any person residing in an enemy country is an alien enemy. He, on the contrary, who resides within the limits of the British Empire is an alien friend. The summary in the case of Perih is incomplete. It is sufficient to read the Judge's notes to convince ourself. The notes of the Judge say in effect:—The defendant is an Austrian and is so described in the writ and declaration in this case as residing in Galicia, in the Austrian Empire. There is, therefore, no doubt but that she is an alien enemy and she is, therefore, unable to proceed in justice in our country as long as the hostilities between Austria-Hungary and the British Empire will not have ceased. This question of residence is the reason of this decision. It is not the fact that the plaintiff was an Austrian which prevented her to prosecute; it was the fact that she was residing in Austria.

In the present case, I repeat it, it is not an Austrian residing in Austria, but an Austrian residing in Canada. We should, therefore apply to him the rule which this Court has sanctioned in the case of *Viola* v. *Mackenzie & Mann*, 24 D.L.R. 208. It was judged therein that an alien who resides in this province is not necessarily an enemy because he is born in a state which is at war with the British Empire; and that he has the enjoyment of his rights and privileges, providing he does not render himself guilty of any hostile acts. It is the person who alleges an hostile act who must prove it.

It is useless for me to repeat here the arguments which give

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rise in favour of this decision. I am satisfied to refer the interested parties to the report of this case.

In the present instance, the defendants do not invoke any act of hostility on the part of the appellant. Their allegation of incapacity is, therefore, not well founded.

It is evident that the difference which exists between the case of the *Canadian Stewart* v. *Perih, supra*, and the present case has not been understood. From thence, the error into which we have fallen. The judgment should, therefore, be reversed.

The appellant complains of another interlocutory judgment which was also suspended during the war, to wit, a petition for a provision during the present instance. This judgment, based on the same reason of the nationality of the appellant, is also unfounded. However, we cannot adjudge on the petition of the appellant for a daily allowance. It is for the Superior Court to decide on this matter (art. 7343, R.S.Q., 1909). *Appeal allowed.*

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S. C.

TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK R. CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. February 14, 1916.

1. APPEAL (§ VII A—290)—BY CONSENT OF PARTIES.

Where an appeal would lie from the decision of an intermediate tribunal, the appeal Court, with the consent of the parties to an action, may hear and determine an appeal from the Court of first instance, and subsequent proceedings will not be affected by the departure from the practice of the appeal Court.

2. APPEAL (§ II A 1—35)—ASSESSMENT MATTERS—JURISDICTION OF CAN. SUPREME COURT.

Appeals from the Court of Revision under sec. 80 of the Assessment Act (R.S.O. 1914, ch. 195), taken by consent of the parties direct to the Railway and Municipal Board and later heard and decided by the Appellate Division (Ont.) in the ordinary way, may be taken to the Supreme Court of Canada under sec. 41 of the Supreme Court Act (R.S.C. 1906, ch. 139).

3. TAXES (§ III B 2—132)—ASSESSMENT—RAILWAY PROPERTY — BRIDGE — EXEMPTION.

A railway bridge, constructed under Dominion authority and resting on Crown soil, is not assessable as railway property under sec. 47 of the Assessment Act (R.S.O. 1914, ch. 195); if it were included, sec. 47(3) would exempt it from taxation.

[*Re Ottawa & N.Y. R. Co. and Cornwall*, 23 D.L.R. 610, 34 O.L.R. 55, affirmed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 23 D.L.R. 610, 34 O.L.R. 55, reversing the ruling of the Ontario Railway and Municipal Board and quashing the assessment of the respondents' bridge over the St. Lawrence.

Two questions arose on the appeal. (1) Had the Railway and

Municipal Board jurisdiction to deal with the matter except on appeal from a decision of the County Court Judge? (2) Had the Township of Cornwall a right to assess the respondents for the Canadian portion of their bridge over the St. Lawrence? The Appellate Division decided against the right to assess.

Watson, K.C., and *Gogo*, for appellant.

Ewart, K.C., and *W. L. Scott*, for respondents.

FITZPATRICK, C.J.:—I think this appeal must be allowed on the ground that the Ontario Railway and Municipal Board had no jurisdiction to hear the appeal from the Court of Revision of the Township of Cornwall. The judgment of the Board was a complete nullity and the Appellate Division could not vary it.

The Assessment Act, R.S.O. 1914, ch. 195, sec. 72(1), 79, 80(1) (2) (6).

At the opening of the proceedings before the Ontario Railway and Municipal Board the Chairman said:—

> The Board has already held that it has no jurisdiction to entertain an appeal from the Court of Revision; an appeal only lies to the Board from the County Judge.

Nevertheless the Board by consent of the parties proceeded to hear and adjudicate upon the matter.

It is perfectly clear that no consent of the parties can give to the Court a jurisdiction which it does not possess. In the case of *Re Aylmer*, 20 Q.B.D. 258, at 262, Lord Esher, M.R., said:—

> If, on the other hand, it is an attempt to give to the Court a similar power resting on the consent of the parties, the well known rule applies that the consent of parties cannot give the Court a jurisdiction which it does not otherwise possess.

In the American and English Encyc. of Law and Practice, vol. 4, under the title "Appeal," is is said in a note on p. 44:—

> When an appeal should have been taken to an intermediate appellate Court, consent cannot give the Supreme Court jurisdiction of it.

The statute having ordained the means by which an appeal may be brought against an assessment and prescribed the Courts which shall have power to entertain such appeal, the parties cannot at their own pleasure agree on a different procedure. This is no mere question of formality or abbreviation of procedure. In every legal proceeding it would certainly be simpler to go *per saltum* direct to the final Court of appeal. If this course had been permissible the parties need never have gone to the Railway and Municipal Board at all, but might have carried an appeal

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direct from the Court of Revision to the Appellate Division or even this Court if we had been willing to entertain it.

If the Court has no jurisdiction to hear a cause, its proceedings cannot, of course, be in any way validated by an appeal from the judgment, neither can the Court to which the appeal is carried entertain the same. Encyc. of Law and Practice, vol. 4, p. 46:—

> Though an appeal will lie to the Supreme Court from a decision of an appellate Court in a case in which the Court has no jurisdiction by reason of any of the questions involved, the appeal cannot be entertained by the Supreme Court for the purpose of passing upon the merits of the case, but only for the purpose of reversing or vacating the judgment of the appellate Court and remanding the cause to that Court with direction to dismiss the appeal.

I think it is only necessary to point out in addition that the rules which would ordinarily govern in cases between private individuals do so with greater force in one in which the public has an interest. In the present case we have a Court without jurisdiction undertaking to direct the alteration of a municipal assessment roll. This it certainly can obtain no authority to do from any consent of parties.

Davies, J.

DAVIES, J.:—The competency of this Court to entertain this appeal was first challenged on the ground that the parties had agreed during the course of the litigation to skip the statutory appeal to the county Judge from the Court of Revision and appeal directly from the latter Court to the Board of Railway Commissioners.

At the hearing, the Board called attention to this deviation from the course of the statutory proceedings, but as it would appear to have been then the desire of both parties, in order to abbreviate procedure and save expense, went on and heard and dismissed the appeal.

On that hearing after some discussion between counsel on the question of the necessity of an appeal to the county Judge before coming to the Board of Railway Commissioners, Mr. Scott for the railway company said:—

> Then this appeal will be taken as if it had gone before the county Judge and we are appealing against an adverse decision of the county Judge.

which apparently was accepted as the correct statement of the fact, whereupon the chairman said:—"Your contention is that under the provisions of the Assessment Act the property is not assessable."

There is not anything, however, in the proceedings before the Railway Board indicating any intention upon the part of either party to treat the proceeding as one *extra cursum curiæ* and to ask the Board to act as arbitrators merely. On the contrary, it was to be treated

> as if there had been an appeal to the county Judge and the railway company was appealing against an adverse decision of his.

The question both parties desired to have decided was that stated by the chairman: Was or was not the bridge over the St. Lawrence River assessable property?

It is only fair to say that counsel for the municipality followed the chairman's statement with a claim that counsel for the railway should admit that the bridge "was not on railway lands," apparently to exclude a claim that it was exempted under sub-sec. 3 of sec. 47 of the Assessment Act, which admission counsel for the railway company, evidently acting upon an understanding which had been reached, immediately made qualifying the admission afterwards with the statement that "some portions of the bridge might be on railway lands, but the whole bridge is over the St. Lawrence River."

As a fact, the bridge is one known as a cantilever bridge which crossed the St. Lawrence, an international public river. It was contended at bar that this admission, when read with the concurrent statements, was a concession as to the facts only, leaving the broad question open as one of law whether such a bridge "not on the lands of the railway," but crossing the St. Lawrence River came within the provisions of the Assessment Act.

It is well to note that while sec. 48 of the Railway and Municipal Board Act, ch. 186, R.S.O., gives an appeal from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law, sub-sec. 6 of sec. 80 of the Assessment Act, ch. 195, R.S.O., enacts:—

> An appeal shall lie from the decision of the Board under this section to a Divisional Court upon the question of law,

omitting any reference to questions of jurisdiction. Under both Acts, the appeals are dependent upon leave being obtained from the Divisional Court, but under the Assessment Act they are confined to appeals "upon questions of law," while under the Board Act they expressly embrace questions of jurisdiction as well as of law. I conceive the legislature intended that in all

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Davies, J.

cases where the Board had original jurisdiction under the Act constituting it, leave to appeal might be granted either on questions of jurisdiction or of law while such leave could only be granted from the Board's decisions when acting under the Assessment Act as a Court of Appeal, on questions of law.

Leave on this appeal was only granted as it could only be granted under the provisions of the Assessment Act on a question of law, which in this particular case was whether the particular bridge was or was not within the Assessment Act and liable to be assessed.

On the question of jurisdiction I have reached the conclusion that the Divisional Court of Appeal had jurisdiction to grant leave to appeal from the judgment of the Railway Board and to hear and determine the question of law raised, and that the appeal to this Court from their judgment is competent.

I so hold upon the broad grounds that the parties to the appeal were within the jurisdiction of the Railway Board, that the subject matter of the appeal was one within the competence of that Board to decide upon and that while the agreed departure by the parties from the regular procedure to bring the matter before the Board was, it is true, a deviation from the *cursus curiæ*, it was not an attempt to give the Board a jurisdiction over the subject matter and the parties it did not possess, or such a departure from the ordinary practice by consent as would deprive either of the parties of the right of appeal from the Board's decision. No objection was taken to the jurisdiction of the Appellate Division to grant leave to appeal to that Court. No objection to the Appellate Division's jurisdiction was raised before that Court on the argument of the appeal. It is clear that all parties thought such an appeal would lie, and it hardly seems to me open to argument that the Court of Appeal acted as arbitrators only and not as a competent Court believing it had full jurisdiction over the subject matter and the parties.

The judgments of their Lordships of the Judicial Committee in the appeal of *Pisani* v. *A.-G. for Gibraltar*, L.R. 5 P.C. 516, in which Sir Montague Smith reviews *Bickett* v. *Morris*, L.R. 1 H.L. Sc. 47, and other cases upon the question I am discussing seems to me to lay down at p. 522 the true principle upon which deviations from the *cursus curiæ* should be determined,

It is true that there was a deviation from the *cursus curiæ*, but the Court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of everyday occurrence; but unless there is an attempt to give the Court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of Appeal cannot properly review the decisions such departures have never been held to deprive either of the parties of the right of appeal.

As to the merits, I have had much difficulty in construing and reconciling the several provisions and sub-sections of sec. 47 of the Assessment Act, but I agree that the language of sub-sec. 3, beginning with the words: "*Notwithstanding anything in this Act contained*," makes it clear that the superstructures, etc., "on railway lands" (outside of the specified exceptions named in sub-sec. 2 within which this bridge does not admittedly come) "shall not be assessed."

This railway cantilever bridge spanning the St. Lawrence, it was claimed by respondent was admitted by Mr. Scott before the Board "not to be on railway lands" and so it was claimed not to be within the exemption of sub-sec. 3. Apart from such admission, I would feel strongly inclined to hold that as a matter of law this bridge was on railway lands and was exempt.

For me, however, a larger and broader question arises than the meaning of the exempting clause read in connection with the admission referred to or irrespective of that admission and that is whether such a bridge as this comes within sec. 47 at all.

It is not enough to satisfy the Court that under the circumstances and in view of the admission of Mr. Scott the bridge does not come within the exempting clause of the Act. The appellant must go further and shew that it comes with reasonable clearness within the provisions authorizing the assessment of railway property.

Where is the language to be found evidencing an intention on the part of the legislature to authorize the assessment of such a bridge or that part of it within Dominion territory? The soil of the river to the international line is in the Crown, the abutments supporting the bridge are built in and upon the soil. The river is a public international river, and I agree with the Divisional Court that the bridge over that soil authorized to be so constructed by the Dominion Parliament should be held, as the

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Divisional Court held, to be in one sense a part of the soil itself. It is a unique structure not provided for by the clauses of the Assessment Act authorizing the assessment of property.

Built under the authority and with the license of the Dominion Parliament over a public international river the soil of which to the boundary line is in the Crown, with supporting piers in this Crown soil, this "superstructure" is then licensed by legislative authority for railway purposes and, as I have said, is part of that soil. I am unable to conclude that the word "highway" used in connection with the words "street or road" in clause (*c*) of sub-sec. 2 of sec. 47 includes this public international river. I am not able to find any words in the clauses authorizing assessments of bridges or superstructures on railways which would include such a unique structure as this and being unable to find language authorizing with reasonable clearness such an inclusion I must, of course, hold the bridge not be assessable. As was said by Lord Chancellor Loreburn in *Banknock Coal Co.* v. *Lawrie*, [1912] A.C. 105, at 110-11, quoted at p. 737 of Mr. Chartres's Book on the Judicial Interpretations of Workmen's Compensation Law:—

> We are not at liberty to amplify an enactment so as to include within its ambit matters which upon the plain meaning of the language are not included, even if convinced that the omission was inadvertent and undesigned.

I would, therefore, dismiss the appeal with costs.

Idington, J.

IDINGTON, J. (dissenting):—It is quite clear to me not only that the whole submission to the Board was irregular and a something never contemplated by the Act, unless and until the matter had been passed upon by the county Judge, after a proper trial which should have elicited and made clear all the relevant facts, but was also a limited submission proceeding upon the elimination of any claim to exemption on the ground of the bridge being on or over railway lands as provided for in sec. 47, sub-sec. (3) of the Act.

It puzzles one to understand why such a course should have been pursued. Assuming the Board had decided the other way I am at a loss to understand how such a proceeding and possible judgment could have overridden the plain terms of sec. 70 of the Assessment Act, making the roll as certified by the clerk, after the Court of Revision, final and binding upon all concerned.

The five gentlemen composing the Court of Revision are the

same who presumably chose to make that submission. They had no power thus to interfere with the legal product of their own work thus validated by sec. 70.

A judgment of the Board under such circumstances was clearly not appealable to the Appellate Divisional Court.

It would be difficult to conceive of its being appealable, even if the language providing for an appeal from the Board to the Appellate Division had been much more comprehensive than it is; unless for the limited purpose of having it declared to have been made without jurisdiction.

Moreover, the appeal provided in assessment cases coming before the Board to the Appellate Division is of a very limited character. It is somewhat analogous to that provided in the way of appeals to this Court from the Board of Railway Commissioners for Canada. It is limited to questions of jurisdiction and questions of law. [Sec. 80 (6) of the Assessment Act.]

The next sub-section provides for the practice and procedure on such appeals following that prescribed in county Court appeals.

The whole jurisdiction rests entirely upon sec. 80 restricted by sub-sec. 6 unless, as may be arguable, aided by sec. 48 of the Ontario Railway and Municipal Board Act, ch. 186, R.S.O., 1914.

Sub-sec. 1 of that section seems to give the Divisional Court express power to hear appeals from the Board upon any question of its jurisdiction as well as upon any question of law.

As the appeal in any case is only upon leave being given one might have expected the order giving leave to define what is to be dealt with. We get no aid in that regard from the order made herein giving leave. [Sec. 48 (3) aforesaid.]

I shall assume for our present purposes that these two sub-sections are applicable to such appeals as contemplated and provided for by sub-sec. 6 of sec. 80 of the Assessment Act.

It is possible by doing so to give that some wider meaning than it might otherwise have in itself, and hence due to the Appellate Division, possibly taking that view to so consider it.

In view of the course of the argument herein before us I should not express any definite opinion as to their applicability. I only desire, for argument's sake, to assume that as far as jurisdiction of the Board came in question that may have been appealable

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and that inferences of fact, from facts found by the Board, might on such an appeal be drawn.

The Appellate Division seems not only to have set aside, or at all events overlooked, the terms of the submission, and proceeded as if the whole of the questions of both law and fact possible to have been originally raised were open for it to deal with, as might be done in an ordinary appeal and that notwithstanding the express concession of counsel as quoted above, emphasized by the express statement of the Board, also quoted above, and by the meaning evidently attached by him at the time, as the course of his argument before the Board indicates, to the concession he had made.

I am unable to understand why, under the circumstances, the matter should have been again agitated, or permitted to be so, before the Appellate Division.

Not only that but further evidence was introduced, a plan was filed, and correspondence between the Registrar of the Court and counsel had, explanatory thereof. As the result of doing so the Appellate Division has discarded the ground taken by respondents, when before the Board as appellants, and adopted the ground deliberately abandoned before the Board, as the basis of an opinion which should, if competent, lead to the Board reversing its judgment.

We have not been helped much by anything appearing upon the record to understand such a result as springing from a mere submission by the parties concerned to a tribunal chosen by them and acting entirely beyond the course defined by statute for such a tribunal to follow, when discharging its statutory duties.

I am driven to the conclusion that the Appellate Division must have inadvertently overlooked the fact that the Board was acting and could not properly act in any other way than as the result of such a submission, and in such a case its deliverance was not appealable.

In such explanation as Mr. Scott offered us he frankly stated that at some stage in the proceedings before the Appellate Division, Mr. Gogo, as counsel for respondent, called attention to the limiting effect of the concession which had been made, and something ensued as result which is not clear. The Court has not dealt at all with that aspect of the case.

Mr. Ewart properly declined to enter upon any discussion of the disputed facts upon or in regard to which a misunderstanding (to which he was no party) had evidently arisen, but submitted to us in argument that the question was only one of law and involved no matter of fact.

For two reasons I cannot accede to that view. In the first place, as already stated, both questions of law and fact were taken and treated by the Board as taken out of the case submitted to them. It is their understanding of what it was they complaisantly had undertaken to decide, which must govern, and I respectfully submit ought to have governed all concerned.

In the next place it is impossible as the Appellate Division found, to treat the whole question involved as one of law. The course of calling for evidence of fact upon which to proceed puts aside Mr. Ewart's submission on that head. The basic facts upon which to found and frame any opinion of the law to govern are disputed unless confined to what the Board expressly states was admitted and acted upon by it. There is no room left therein to draw inferences of fact found in the lease and plan filed in the Appellate Division.

Indeed, the lease alone now appearing in the case, presents many arguable questions of law as to the legal result thereof before applying the provisions therein as fact to the determination of the rights of the parties hereto under the Assessment Act.

The lease to the holding company is for 99 years and it is by the terms thereof that company which must bear the burden of taxation. And the assessment roll, but for the curative clause already referred to is, I incline to think, defective in form in that connection.

Whether the contracting parties sought to avoid by the form of the provision in the lease relative to taxes, the claims of direct taxation of the holding company as being more favourable for all concerned than a taxation of the reversions, I know not.

Then, again, evidently there was in contemplation some improvements and additions to the structures to be made by the holding company and respectively become the respective properties of the leasing companies at the expiration of the term.

Are such improvements and additions taxable, and if so against whom?

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I am not concerned with all these things further than to point out the involved nature of the facts to be determined before the Assessment Act can be properly applied. And I express no opinion upon their effect in that regard.

I may be permitted, however, most respectfully to suggest, from what appears in the case, that if the Appellate Division had refused, as I submit it should have done, to entertain such an irregular appeal, the facts might have been better ascertained by the investigation in due course of law before the county Judge and then and thereafter fully considered and given due effect to.

These considerations, moreover, suggest to me that the Appellate Division so far as it did go into an examination of the facts, went beyond its jurisdiction which was confined by the very terms of the Act enabling it to entertain any appeal to mere questions of law, even if the case could otherwise have been held appealable.

The case thus presented for our consideration in appeal is clearly one in which we cannot deal with the merits.

It falls in principle within what the House of Lords had to consider in the case of *Burgess* v. *Morton*, [1896] A.C. 136. There the Court had determined, at the request of the parties, upon a submission to the said Court of an imperfectly stated case, and thereupon an appellate Court had heard an appeal from such determination on the like material and the House of Lords declined to go into the merits and confined irself to declaring that the appellate Court had no jurisdiction and to reverse it accordingly.

There are numerous cases upon the subject, but this one seems in principle, in its essential features, as nearly on all fours, as one might expect to find, with what happened and is involved herein.

But the question that has puzzled me most and in which we have not been able to elicit assistance from counsel is whether or not this Court can be said to stand in relation to the Courts below in the same position as the House of Lords stood in that case and numerous others to the Courts appealed from.

We must never forget that we are not, as the Court of Queen's Bench formerly in England was, and its successors still are, possessed of an inherent jurisdiction in many ways to keep other Courts within the limits of the jurisdiction assigned them.

Our duties in this case are confined within the terms of sec. 41 of the Supreme Court Act.

It is quite clear that the Appellate Division is a Court of last resort and answers all the requirements of the section in any ordinary case involving an assessment of not less than $10,000.

Do the words, "in cases where the person or persons presiding over such Court is or are by provincial or municipal authority authorized to adjudicate," eliminate such a case as this?

At first blush it seems incongruous for us to hold by virtue only of this section that the Court appealed from had no jurisdiction and that we are entitled not only to so hold as a matter of opinion, but also to reverse on that ground.

Though counsel were invited to consider the section and aid us in regard to its construction no one has remarked upon this difficulty, and I, therefore, am content to assume the difficulty I suggest as possibly in our way does not exist. Indeed, we have heard no argument on the section, though it was invited.

I have also observed since the argument the use in said section of the words "or municipal" therein which suggest the possibility of municipalities in some of the provinces being empowered by statute to submit to the Court of last resort in the province a question needing determination. I know of none in Ontario and assume if any other power given than what I have referred to it would have been cited.

I may also add that I have considered whether the mere power to express an opinion can be held an authority "to adjudicate" within the meaning of the words of the section. I conceive so, if the opinion is intended to be imperative when confined as it ought to be to a question of law, and hence there may be herein an adjudication within the meaning of the section.

Moreover, on due reflection, the authorization dealt with in these words is that over the subject matter involved in the section as a whole, and not only over such merely incidental matter as arising in its application. Many variations of that which has occurred herein or of an accidental excess of the jurisdiction of the Court might in course of time arise. It would seem as if to give effect to any of the objections I suggest might be too much in line with the microscopical method of analyzing a statute and thereby laying a foundation for frittering it away instead of fitting the whole to what it was intended for. In this case the attempting to do so would disappoint what I think was the evident

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purpose of parliament in assigning to us the jurisdiction it has by the enactment in sec. 41.

Assuredly neither the formal judgment nor the opinion judgment gives us any right to assume that the Appellate Division imagined it was acting upon or pursuant to a submission by consent to obtain its opinion, or doing anything but determining as the Court of last resort in a province what it supposed it had power to determine.

I do not see how we can escape from declaring our opinion that it is because of the incompetency of the Appellate Division to review and in effect reverse the Board that we are debarred from examining the case on its merits and as a logical result must give as far as we can effect to such opinion.

Such a mode of dealing with appeals calling in question the jurisdiction of the Court appealed from by merely expressing an opinion that the Court below had no jurisdiction was in vogue in Ontario (then Upper Canada) at an early date. See the remarks of Hagarty, C.J., speaking for the Queen's Bench in *Ferguson* v. *Township of Howick*, 25 U.C.Q.B. 547, at 553, in the year 1866.

The later development of the law in Ontario appears in *Howard* v. *Herrington*, 20 A.R. Ont., 175, aided, I think, then by legislative enactment.

It seems to me that we should not only declare the Appellate Division incompetent to pass upon the judgment of the Board, but also give the judgment that Court should have given. To do so is to reverse its judgment.

There is a question suggested by the case of *Bickett* v. *Morris*, L.R. 1 H.L. Sc. 47, and the course of appellant in the Court below. In that case the Judge ordinary deviated from the *cursus curiæ* and the party against whom he had decided appealed and succeeded, whereupon the unsuccessful party appealed to the House of Lords when the objection of assent was taken. The Court held it was not disabled from pronouncing judgment. Though it was intimated that if the pursuer had been appealing his doing so might have been an answer to him, but not to one who had not acquiesced.

I cannot say that appellant acquiesced for its counsel raised the objection, though perhaps he did not take as determined a

stand as some others might have done. Indeed, I doubt much if it ever was competent for the present appellants to acquiesce in anything depriving or tending to deprive the municipality of its taxes to which its legal right was established by the Assessment Act until the liability of appellant therefor had been got rid of by due course of law.

In view of both parties having pursued the course taken in this case, I do not think costs should be allowed.

The only justification for such litigation as has been followed herein might be the hope of a final and binding decision upon the questions raised and that was hopeless from the start if due regard had been had to the recognized state of the law.

In any result got or likely to be got it would not bind either party in future years. Indeed, even as to the year involved herein such a decision as either the Board or Appellate Division or this Court might render as against the appellant might be tested by litigation rested upon the prior validation of the roll by the Assessment Act and the result in the Court of Revision.

I, therefore, think the appeal should be allowed on the ground that the Court appealed from had no jurisdiction to pronounce the judgment it did or award the costs awarded.

Duff, J.

DUFF, J.:—This appeal concerns the assessability under the provisions of the Ontario Assessment Act (R.S.O., ch. 195, secs. 47 and 48) of part of a railway bridge owned and occupied by the respondents, the Ottawa and New York Railway Co., crossing the St. Lawrence River near Cornwall. Part of this bridge is within the territorial limits of the Township of Cornwall and was entered in the assessment roll for the year 1914 of the appellant township and assessed at the sum of $300,000.

Before coming to the merits of the question of the legality of the assessment there are two technical points which it will be convenient to consider together. The first concerns the competence of the present appeal, or, as I prefer to put it, the appealability of the judgment of the Court of Appeal; and the second is the question whether assuming that judgment to be appealable to this Court, it ought to be reversed on the ground that in the particular circumstances in which it was pronounced, the Court of Appeal had no authority to give judgment on the validity of an assessment under the statutory enactment or enactments, sec.

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80, Assessment Act, ch. 95, R.S.O., 1914; sec. 48, Railway and Municipal Board Act, ch. 186, R.S.O., 1914, under which it professed to act because the essential statutory prerequisites of that authority were wanting.

The proceedings must be briefly noticed. The respondent gave notice of appeal from the assessment to the Court of Revision, and on that appeal the assessment was confirmed. No notice of appeal to the County Court Judge was given under sec. 72 of the Assessment Act, but on May 25, 1914, the respondent gave notice of appeal direct from the Court of Revision to the Ontario Railway and Municipal Board, and on October 7 of the same year judgment was pronounced dismissing the appeal. On December 4, 1914, leave was obtained by the respondent to appeal to the Appellate Division under sec. 80 of the Assessment Act, and on this appeal judgment was pronounced on April 26, 1915, declaring the assessment to be invalid. Both parties appear to have concurred in the view that as the right of appeal expressly given by the Assessment Act to the Railway and Municipal Board was a right of appeal from a decision of a County Court Judge pronounced under the authority of sec. 72, and that the respondents could not without the consent of the appellant municipality bring the question disputed between them before the Board by way of direct appeal from the Court of Revision; at the same time they appear also to have concurred in the view that the objection to the competence of such an appeal direct could be effectively waived by the appellant municipality.

The objection was waived and the Board acting obviously on the view of the parties that the effect of the waiver was to bring the provisions of sec. 80 of the Assessment Act into play just as if there had been a judgment by the County Court Judge and they were hearing an appeal from that judgment, heard the appeal and pronounced judgment in favour of the municipality dismissing the appeal on the merits.

It is now said against the appellant municipality that this order was not an order of the Board pronounced in exercise of its statutory jurisdiction and consequently that it was not appealable to the Court of Appeal under sec. 80 of the Assessment Act, or sec. 48 of the Ontario Municipal and Railway Board Act; and that in consequence the judgment of the Court of Appeal

must be deemed to have been a judgment pronounced in an appeal heard pursuant to a *directio personarum* and not in exercise of any authority given by law with the result, of course, that it is not appealable to this Court on the authority of *Burgess* v. *Morton*, [1896] A.C. 136, and the decisions referred to in the judgments of the Law Lords in that case. While on behalf of the appellant municipality it is said that the judgment of the Court of Appeal declaring the assessment in question invalid was a judgment which the Court of Appeal had no legal authority to pronounce; because the authority of the Court of Appeal in respect to such matters arises only when there is an appeal before that Court from an order made by the Board in a proceeding in which the Board itself would have had authority to deal with an assessment by pronouncing it valid or invalid, and that the Board in this instance had no such authority because the objection referred to above going to the statutory conditions of the Board's authority was an objection of the kind that cannot be waived. The judgment of the Court of Appeal nevertheless, it was argued on behalf of the appellant municipality, is a judgment of a Court of general jurisdiction having *inter alia* authority—certain conditions being satisfied—to pronounce a judgment of the character of that now appealed from; that the judgment necessarily involves a decision that the conditions of jurisdiction existed, a decision appealable to this Court as being a judgment of a Court of last resort in an assessment matter within the meaning of sec. 41 of the Supreme Court Act.

I have no difficulty in holding that the appeal lies. The judgment of the Court of Appeal is *ex facie* a judgment pronounced in an appeal regularly before the Court after leave given under sec. 80 of the Assessment Act. There is not a suggestion in the formal judgment, in the reasons for judgment, in the order giving leave to appeal that the Court was acting otherwise than in the normal course. It must, therefore, be taken in the absence of evidence to the contrary, and there is none, that the appeal was heard and judgment was pronounced in the ordinary course of jurisdiction.

That being so, the point as to the appealability of this judgment is, I think, disposed of by the judgment of the Court of Appeal in an appeal from a winding-up order made in exercise of the

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jurisdiction given by the Companies Act, 1862. *In re Padstow Total Loss and Collision Assurance Association*, 20 Ch. D. 137. At p. 142, Sir Geo. Jessel, M.R., puts the matter in a sentence:—

> The first point to be considered is whether, assuming that the association was an unlawful one, and that the Court had no jurisdiction to make the order, an appeal is the proper mode of getting rid of that order. I think that it is. I think that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous.

In this connection three other decisions may usefully be referred to. In *Pisani* v. *A.-G. for Gibraltar*, L.R. 5 P.C. 516, it was in substance held that even where there was a deviation from the *cursus curiæ* unless there was an attempt to give the Court a jurisdiction which it did not possess or a strain upon its procedure putting it so entirely out of its course that the decision could not properly be reviewed, such a departure does not deprive either party of the right of appeal. I refer particularly to the judgment of Sir Montague Smith at p. 522.

Then there is *Morris* v. *Davies*, 5 Cl. & F. 163, the effect of which is summarized in Sir Montague Smith's judgment at p. 524. A new trial having been ordered, Lord Lyndhurst instead of sending the case back to a jury by consent of the parties heard and disposed of it himself. In the House of Lords the objection taken to the competence of an appeal from Lord Lyndhurst's decision was rejected by their Lordships on the ground that it was never intended that Lord Lyndhurst should try the case otherwise than as a Judge or that it was not to go on subject to all the incidents of a cause regularly heard in Court, including an appeal, if the parties so desired.

In *Low* v. *General Steam Fishing Co.*, [1905] A.C. 523, at 528, the House of Lords had to consider the appealability of a judgment by the Second Division of the Court of Session, in these circumstances. On the hearing of a claim under the Workmen's Compensation Act by a sheriff substitute, the sheriff substitute refused to state a case upon a question which was afterwards held to be a question of law. On appeal, the Second Division after intimating their view that the arbitrator was bound to state a case suggested that counsel should concur in a minute, the effect of which was that the case should be disposed of by

the Second Division as if upon a case stated by sheriff substitute in terms of the statute, which was accordingly done. On appeal it was held by their Lordships that what was done merely amounted to an abbreviation of procedure and was not such a departure from the *cursus curiæ* as to deprive the parties of their appeal. In the first and fourth of these cases it may be noted that the jurisdiction in dispute was a special statutory jurisdiction.

The contention of the appellant municipality presents a more difficult question. The first step is to consider the character of the order of the Board. There is sufficient evidence in the form of the order itself and in the reasons for judgment that the order was intended to be and was pronounced in exercise of the corporate authority of the Board. The members of the Board were not as individuals arbitrating in a matter before them by consent; the order was pronounced upon a matter in respect of which it must be assumed they held themselves to have jurisdiction by reason of the fact that the objection above referred to had been waived.

The view of the Board and of the parties was that waiver by the appellant municipality of the objection that no appeal lies to the Board from the Court of Revision *per saltum* and consent that the appeal should be treated as an appeal from the county Judge was sufficient to give the Board power to grant the relief asked in exercise of its statutory authority; and it is manifest that the Court of Appeal treated the appeal before them as an appeal in the ordinary course, and that they had no thought of exercising a jurisdiction resting upon consent alone.

In the view I take it is unnecessary to say whether or not the Board rightly decided that the objection to the appeal could be overcome by waiver. I have no difficulty in holding that by its conduct in concurring with the respondent company's invitation to the Board to hold that the objection could be waived and in taking part in the appeal to the Court of Appeal which followed without objection the appellant municipality has precluded itself from contending on this appeal that the decision of the Board upon the point of competence was erroneous.

Two considerations weighing against this view have to be examined. (1), it is said to be a case for the application of the maxim "consent cannot give jurisdiction." This, of course, simply

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begs the question. Consent can give jurisdiction when it consists only in waiver of a condition which the law permits to be waived, otherwise it cannot. Where want of jurisdiction touches the subject matter of the controversy or where the proceeding is of a kind which by law or custom has been appropriated to another tribunal then mere consent of the parties is inoperative. No consent, for example, could give the Supreme Court of Ontario jurisdiction to hear a petition for determining the right to a seat in parliament. But the question before us is not whether the consent of the municipality did in point of law give the Board jurisdiction, but whether the municipality having concurred with the respondents in asking the Board to hold that such was the effect of consent, and the Board having so held and acted upon its holding, and the municipality having taken chances of a favourable decision by the Board, and by the Court of Appeal on that footing, can now, on appeal, dispute the Board's decision on the point of jurisdiction. Generally speaking, where the proceeding is of a character appropriate to a tribunal which has, in given conditions, jurisdiction over the subject matter and is competent to decide the question whether such conditions can be waived, it is competent to the parties to agree to recognize the validity of the tribunal's judgment and thereby (if the tribunal decide that it may act upon such an agreement and do so) to preclude themselves from raising afterwards the objection that, in the particular case, some condition of jurisdiction was wanting in fact.

Reverting to the case before us, the question brought before the Board was in itself precisely the kind of question which it would be the Board's duty to determine under sec. 80 of the Assessment Act, and the object of the parties in omitting what in the circumstances they no doubt, without any disrespect regarded as the formality of an appeal to the County Court Judge was, to use an expression taken from a reported case to which I have referred, merely the abbreviating procedure and saving expense. The effect of such an agreement has been considered in a number of cases, to some of which it will be useful to refer. In *Forrest* v. *Harvey*, 4 Bell App. Cas. 197, the House of Lords had to consider the effect of a defendant appearing before the magistrates of Leith in answer to an application under a statute conferring

jurisdiction with respect to small debts. It was admitted that the jurisdiction of the magistrate might have been successfully objected to on the ground of non-observance of certain essential formalities, and the principal question their Lordships had to consider was whether this defect had been cured by waiver. Lord Brougham appears to have taken the view, although it was not strictly necessary to the decision that the defect could not have been cured by any agreement to waive the objection, and Lord Cottenham agreed that the mere failure to take the objection at the earliest moment was not an answer to it. Lord Cottenham and Lord Campbell, however, concurred in holding that the parties might contract together in such a way as to prevent them disputing the competence of a tribunal which had assumed jurisdiction, although some otherwise essential statutory condition of jurisdiction were wanting. In *Ex parte Pratt*, 12 Q.B.D. 334, at 341, the same principle, the primary Court being a superior Court, is expressed by Bowen, L.J., in these words:—

> There is a good old-fashioned rule that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards when he finds that it has decided against him, to turn round and say, "You have no jurisdiction." You ought not to lead a tribunal to exercise jurisdiction wrongfully.

It is not disputed that there was an express agreement between the municipality and the respondents to submit the point of competence to the judgment of the Board; to invite the Board to hold that it had jurisdiction; and I think the proper conclusion is that it is not open to the appellant municipality to raise by way of appeal this objection which I am now considering.

The second point touches the effect of the Ontario Assessment Act and the Railway and Municipal Board Act. It is said that the effect of sec. 70 of the Assessment Act is that the assessment roll is binding as finally passed by the Court of Revision except as altered on appeal to the Judge of the county Court and that this provision in fact forbids any exercise of jurisdiction by the Board or the Court of Appeal in the absence of an appeal to the county Court.

I agree that if on the true construction of those statutes an agreement not to dispute the jurisdiction of the Board in the circumstances in question here is in conflict with the policy of the law, effect cannot be given to such an agreement. I do not think such is the effect of the statutes.

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The provisions of the Railway and Municipal Board Act and the Assessment Act relating to the powers and character of the Board as a tribunal evidence an intention on the part of the legislature that the Board should have jurisdiction, subject to review, to pass upon any question whether as regards any appeal touching a subject-matter within its competence the conditions precedent of its authority had been fulfilled. [R.S.O. ch. 186, 1914, sec. 5, sub-sec. 4; sec. 5 sub-sec. 5(*b*); sec. 7; sec. 21, sub-sec. 3; sec. 21, sub-sec. 4; sec. 22; sec. 38 (1) (2); sec. 43; sec. 48(1) (8); Assessment Act, ch. 195 R.S.O. 1914, sec. 80 (5) (6)].

Sec. 21, sub-sec. 4, indicates an intention on the part of the legislature that it should be the duty of the Board to decide whether or not the conditions essential to its jurisdiction as regards any subject-matter within its competence have or have not been fulfilled, and I think the proper conclusion having regard to the quoted provisions as a whole, is, for all relevant purposes, independently of sec. 48, sub-sec. 8(*b*), that a decision of the Board upon such a question is equivalent to a decision of a superior Court. In so far as the decision relates to a question of fact it is final, in so far as it depends upon questions of law, then an appeal lies under sec. 48. It is not necessary to decide whether sec. 48, sub-sec. 8(*b*) applies to orders made by the Board in professed exercise of the jurisdiction given by some statute other than the Railway and Municipal Board Act. It is clear to my mind that a decision of the Board that the conditions of the jurisdiction under sec. 80 of the Assessment Act have been observed, in so far as it is not a decision upon a mere question of fact, is a decision upon a question of law within that section and appealable as such. In these circumstances I see no reason why the parties to an appeal may not competently contract to accept the judgment of the Board on any such question as final; and, if so, it would follow that a party inviting the Board to find on a certain state of facts that it had jurisdiction to deal with a subject-matter which is in given conditions within the cognizance of the Board and having had the advantage of the Board's decision that it had jurisdiction by getting a hearing on the merits of a question which it desired to have disposed of, could not afterwards be heard to say by way of appeal that the facts did not exist which were necessary in point of law to give the Board jurisdiction.

Gandy v. *Gandy*, 30 Ch. D. 57, at 82; *Roe* v. *The Mutual Loan Fund*, 19 Q.B.D. 347. See Everest & Strode, Estoppel.

Is the bridge assessable under secs. 47 and 48 of the Ontario Assessment Act?

These provisions are, perhaps, a little wanting in precision, but one thing is not doubtful, and that is that "structures, substructures and superstructures" on "the roadway or right-of-way" are not assessable; it being understood that this does not apply to "structures, substructures and superstructures . . . upon, in, over, under or affixed to any highway, street or road" except in the case of a mere crossing. It is also clear that all such "structures, sub-structures and superstructures" which are on "railway lands" and are used exclusively for railway purposes or incidental thereto are (with certain exceptions not material at present) not assessable. By sub-sec. 5(*h*) of the interpretation section (sec. 2), all structures and fixtures "erected or placed upon, in, over, under or affixed to any highway, lane or other public communication or water," are comprehended under the word "land." It was admitted on the hearing before the Board by the respondents that the part of the bridge, the assessment of which is now in question, is supported by piers resting on the bed of the St. Lawrence River, which is the property of the Crown; and I propose to consider the construction and application of the Act in view of this admission of fact and afterwards to discuss the point made on behalf of the appellant municipality that the admission was of such a character as to preclude the respondent from invoking sub-sec. 3 of sec. 47 for any purpose whatever. I should add, however, that it seems to me to be perfectly clear that both parties intended that the hearing before the Board should proceed and that the hearing did proceed upon the assumption that the bridge is lawfully where it is.

In these circumstances, I have reached the conclusion that on this question of the assessability of the bridge the appellant municipality must fail. It is a long settled rule that a given subject is not to be held to be a subject of taxation unless the intention to include it among the subjects of taxation is expressed in "clear and unambiguous language."

Oriental Bank Corp. v. *Wright*, 5 App. Cas. 842, at 856; *Simms* v. *Reg. of Probates*, [1900] A.C. 323, at p. 337.

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Duff, J.

The rule is so well settled and so well known that it is right to read every taxing Act on the assumption that it has been framed in view of the rule. I am not disposed to go so far as to say that the intention to exclude such property as that in question is clearly expressed in sec. 47. But on the other hand "railway" in my judgment in sub-sec. 2(*a*) is capable of being read as including a viaduct resting by piers upon land occupied solely under authority of a licence to occupy, and if it be right to read it in that broad sense there can be no question that this bridge is excluded by the last sentence of that clause. Nor have I any doubt (having regard to the part of the interpretation section quoted above) that sub-sec. 3 of sec. 47 can reasonably be read as extending to structures such as this bridge.

These views of these provisions are not free from objection; but it is sufficient to find that, on a reasonable construction of the enactment upon which the appellant municipality relies, the bridge is excluded. That is sufficient on the principle above indicated for holding it to be non-assessable. And that is the conclusion to which, I think, effect should be given.

I must add a word upon the effect of the admission made before the Board. Counsel who appeared for the respondent company assumed that sub-sec. 3 had no application to the question before the Board and said so. In this he was a little precipitate. But reading the proceedings as a whole I am quite convinced that it would be doing him an injustice to construe what was said during the course of the argument by him as amounting to an agreement (as one of the terms of the consent for the hearing of the appeal) that consideration of sub-sec. 3 should be entirely eliminated.

It is quite plain, I think, that the admission went to the point of fact and to that only, that the piers supporting the bridge rested on the bed of the river which was public property. I do not think that anybody was misled by that admission into thinking that counsel was conceding that the bridge was wrongfully there or that he was consenting to a hearing of the appeal upon that footing; and I see no reason to suppose, and I cannot suppose that counsel for the appellant municipality assumed that any such consent was being given.

I entirely agree with Mr. Watson that the Court ought not

to tolerate any attempt, if such an attempt were made, to recede from the admission of fact which undoubtedly was given whatever the consequences might be; but giving full effect to that admission fairly construed from the point of view of both parties, I can see nothing which precludes us from considering and giving effect to sub-sec. 3 upon the basis of fact above indicated.

In the result I think the appeal fails and should be dismissed with costs.

ANGLIN, J.:—At the threshold of this appeal we are confronted by two questions of jurisdiction—one a question of the jurisdiction of the Appellate Division raised by the appellants; the other a question of the jurisdiction of this Court, raised not by the respondents but by the Court itself.

In *Re Ontario and Minnesota Power Co. and Town of Fort Frances*, 22 D.L.R. 701, 32 O.L.R. 235, the Appellate Division on November 27, 1914, held that the Ontario Railway and Municipal Board had no jurisdiction to entertain an appeal brought to it directly from a Court of Revision. In that case the question of jurisdiction arose on an application for leave to appeal, made under R.S.O., 1914, ch. 195, sec. 80, sub-sec. 6 (then 3 & 4 Geo. V., ch. 46, sec. 13), from the decision of the Board that an appeal did not lie to it directly from the Court of Revision.

In the present case, decided in the Appellate Division on April 26, 1915, leave had been sought and obtained for an appeal, and, although the fact that the appeal to the Railway Board had been taken directly from the Court of Revision appeared on the face of the order of the Board and cannot conceivably have escaped the attention of the Appellate Court, it proceeded to hear the appeal and to deal with it, so far as the certificate of its judgment shews, in the ordinary course, as from a decision of the Board made in the exercise of its jurisdiction under sec. 80 of the Assessment Act. Why? Certainly neither because the Court had forgotten that within six months it had affirmed the decision of the Railway Board that no appeal lay to it directly from the Court of Revision, nor because it meant to reverse that recent judgment without alluding to it. That is to me inconceivable. Then why? Either because the Court regarded the consent or waiver upon which the Board had proceeded as involving an agreement that its decision should be subject to an appeal to the

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Appellate Division—that Court thus itself proceeding by consent or because, applying the ratio of the decision in *Morris* v. *Davies*, 5 Cl. & F. 163, and giving effect to the consent or waiver according to the intention of the parties, it allowed it to operate so as to make the decision of the Board regular and subject to the right of appeal conferred by the statute. That such a consent may be given that effect was the basis of the decision of the Judicial Committee in *Pisani* v. *A.-G. for Gibraltar*, L.R. 5 P.C. 516, at 521 *et seq.*

If the Appellate Division proceeded upon the former assumption its opinion as certified would not be a "judgment of the Court of last resort" within sec. 41 of the Supreme Court Act. Its validity and binding effect would depend wholly upon the consent on which it was based; it would not be for any purpose appealable to this Court; and this appeal should be quashed.

But if the Appellate Division had proceeded by consent that fact would almost certainly have appeared on the face of the certificate of its judgment. The certificate is silent as to consent and is in the form usual upon appeals from the Railway Board. It would, therefore, seem to me more probable that the Court dealt with the order of the Board as appealable to it under sec. 80 of the Assessment Act. As already pointed out, it cannot have made the mistake of considering that the Board had jurisdiction apart from consent or waiver to entertain an appeal directly from the Court of Revision. It follows that, if the Appellate Division did not itself proceed by consent, it must have deemed the question of jurisdiction concluded.

But, it may be said, the jurisdiction of the Appellate Division was purely statutory and the principle of the judgments in *Morris* v. *Davies*, 5 Cl. & F. 163, and *Pisani* v. *A.-G. for Gibraltar*, L.R. 5 P.C. 516, is inapplicable. Without at all acceding to that contention, if it be sound, the parties having both acquiesced in that Court hearing and disposing of the appeal to it in the exercise of its curial function, and not as a body proceeding by consent only and discharging the function of quasi-arbitrators, upon the principle of the decision in *Bickett* v. *Morris*, L.R. 1 H.L. Sc. 47, there is a personal bar against either of them taking the ground, whether for the purpose of entirely precluding an appeal to this Court, or of preventing an appeal upon the merits,

that the decision of the Appellate Division is not a final "judgment of the Court of last resort in the province," made in the exercise of its jurisdiction under sec. 80 of the Assessment Act, and, therefore, appealable to this Court under sec. 41 of the Supreme Court Act. That this Court has jurisdiction to entertain this appeal, if only for the purpose of determining that the judgment of the Appellate Division was pronounced without jurisdiction, is the appellants' contention. But, upon the authority of *Bickett* v. *Morris*, L.R. 1 H.L. Sc. 47, they cannot be heard to urge that ground of appeal. If the Appellate Division proceeded by consent, there would be no appeal whatever from its order; if it did not proceed by consent, its judgment is subject to appeal and, its jurisdiction not being open to question, the appeal must be disposed of on the merits.

Sec. 48 of the Ontario Railway and Municipal Board Act, in my opinion, has no application to appeals under sec. 80 of the Assessment Act. If it had, its 8th sub-section would have concluded against the appellants the question of jurisdiction raised by them.

On the merits I agree that the authorization by parliament, in the exercise of the paramount jurisdiction conferred upon it in regard to railways extending beyond the limits of a province, of the construction of the bridge in question not only renders the occupation by it of the land upon and over which it is erected lawful, but vests in the railway company owning the bridge such an interest in that land that it may be deemed for the purpose of sub-sec. 3 of sec. 47 of the Assessment Act (R.S.O., 1914, ch. 195), railway land upon which a superstructure is erected, and that such superstructure is, therefore, exempt from assessment.

It is very strongly argued either that it was made a condition of the consent of counsel for the municipality to the Railway Board hearing the appeal to it from the Court of Revision, that the appeal should be dealt with on the footing, or that there was an admission of counsel for the railway company binding upon his clients, that the bridge in question does not stand on railway lands. So far as such a condition can be established, it must be strictly observed; so far as any such admission is an admission of fact it is undoubtedly conclusive. But a mere admission upon a matter of law is equally clearly not binding, and, if erroneous, may, and should, be ignored by the Court.

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An examination of the record makes it clear that counsel for the municipality did not ask for, and counsel for the company did not assent to, any such admission being made as a condition of the Board proceeding to hear the appeal as if it had been brought from a decision of the county Judge.

The only admission that is binding is that the bridge is over the St. Lawrence River and is there with the permission of the Crown. The statements that it is not on railway lands and that sub-sec. 3 of sec. 47 does not apply are merely mistaken admissions of legal consequences which were not asked for as conditions of the Board being allowed to assume jurisdiction and are, therefore, not binding upon the company.

If I had not reached the conclusion that the respondents' bridge is exempt under sub-sec. 3 of sec. 47, and that there is nothing to preclude their invoking that sub-section, I should be prepared to sustain the judgment of the Appellate Division on the ground that a bridge situated as is that in question, is not declared by the statute to be a subject of taxation with sufficient clearness and certainty to justify its being assessed.

I would, for these reasons, dismiss this appeal.

Appeal dismissed.

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STONEY POINT CANNING CO. v. BARRY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. April 14, 1916.

1. PRINCIPAL AND AGENT (§ II D—25)—AUTHORITY TO PURCHASE—GENERAL OR SPECIAL—RATIFICATION.

A person originally employed as a "special agent" for purchasing certain goods may by the subsequent conduct of the parties become a "general agent" for purchasing that class of goods; such purchases being within the scope of the business intrusted to him, and a number having been ratified by his employer, parties with whom he deals have a right to assume that he has full authority to make such purchases.

2. PRINCIPAL AND AGENT (§ II C—20)—SPLITTING COMMISSIONS—FRAUD—REPUDIATION BY PRINCIPAL.

The fact that the "general agent" of a buyer arranges to "split" a commission with the seller's broker, in accordance with a practice "common in that class of business," does not of itself entitle the buyer to subsequently repudiate the purchases on the ground that they have been secured by fraud and collusion.

Statement.

APPEAL by the plaintiff from a judgment of Middleton, J., in an action to recover the difference between the contract price of goods, and the price realized on a resale, the defendant having refused to accept delivery.

The judgment appealed from is as follows:

This is one of those unfortunate cases in which a serious loss must be borne by one of two innocent parties, owing to the misconduct of a third person, who is financially worthless.

Mr. Desmarais, who is really the plaintiff, acted, I think, in perfect good faith throughout—supposing that he had in truth made the contract sued upon with Mr. Barry, who was carrying on business under the name of John Barry & Son. On the other hand, Mr. Barry acted, I think, throughout, with perfect honesty, and I accept his evidence without question.

The real issues in the action relate to two supposed contracts for the purchase of canned tomatoes. There is a minor issue arising out of an earlier contract, concerning which there is no dispute, and this may as well be first cleared up. Upon this contract tomatoes were sold, but the purchaser was unable to accept delivery. He requested the vendor to arrange for storage. There was no place readily available, and the vendors finally arranged to have the tomatoes cared for in the basement of the Roman Catholic Church at Stoney Point. Naturally this has occasioned a good deal of expense, greater than the ordinary charge for warehousing canned goods. The ordinary charge would amount in round figures to $100. The claim made amounts to $400. I cannot say that this is unreasonable, and the plaintiffs should, in any event, have judgment for this amount.

The first transaction concerning which there is dispute relates to the purchase on the 12th October, 1914, of eleven thousand cases of canned tomatoes, three dozen to the case, at the price of $16,879.50. The second transaction relates to the purchase of twelve thousand cases of tomatoes by the acceptance of an option dated the 1st October, 1914, at the price of $18,000, the acceptance said to have been by letter of the 7th November, 1914. The controversy in both cases is as to the authority of one Durocher, who purported to make the contract in the name of the defendant. It may be taken for granted, I think, that Durocher had not in fact any authority to make the contracts; and the question really is, whether the defendant is precluded from denying Durocher's authority because of having held him out as his agent under such circumstances that authority would be presumed.

The whole story is extraordinary. Durocher is a comparatively young man, who had failed in his own business. Barry

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had succeeded to the business carried on for many years by his father, and is a successful business man of considerable means. As a mere act of friendship towards Durocher, Barry had given him office room in his office. He allowed him to bring his desk there and make it his business headquarters. While there, Barry had permitted Durocher to avail himself of the services of Barry's stenographer, and Durocher had, for his own purposes, used Barry's stationery.

Last summer there was a good deal of talk of crop failure. When war was declared, there was much conjecture as to the demands that would be made upon the goods available on the market. Durocher and Barry naturally were much thrown together, although Barry was a great deal away from the office. Durocher talked to Barry of the possibility of making money by purchasing canned goods, and finally Barry sanctioned the purchasing of $15,000 or $20,000 worth. In the meantime, Durocher had been making inquiries from different persons as to the market price of these commodities. Barry learned that Durocher, in making these inquiries, had used his (Barry's) trade name, but he did not regard this as a matter of any particular significance, thinking it was in line with Durocher's suggestion that profitable contracts could be made, and in none of the letters was there anything more than mere inquiry as to price and terms. When Barry gave Durocher the authority to buy the quantities specified, he knew that Durocher went on the market to buy; and, when drafts for the price came in, he accepted them, upon Durocher's assurance that they were all right. The purchases so made exceeded the amount authorised, but the excess was trivial, and none of these purchases are in controversy here.

It should be also mentioned that Barry had aided Durocher financially to a very considerable extent. Durocher's remaining business consisted almost entirely of some vinegar works in Montreal. Barry financed him in connection with this; and, at the time of the transactions now involved, Durocher was hopelessly indebted to Barry. The question of remuneration of Durocher for the services rendered in the purchasing of these goods does not appear to have been discussed. It was understood that some remuneration would be allowed, but Durocher's debt was so great that this remuneration would at most be a small credit upon the large total.

The Stoney Point Canning Company had placed their output in the hands of W. B. Millman & Sons, who acted as brokers for the Independent Canners. Durocher, without Barry's authority, on the 5th August, 1914, made a contract to purchase in Barry's name fifty thousand cases of tomatoes. This was supposed to be made up by allocation of portions among the different canners represented by Mr. Millman. Millman, on the 5th October, 1914, made an allocation, and asked the assent of Durocher to this. The Stoney Point Canning Company were given as their share eleven thousand cases. Durocher assented in the name "John Barry & Sons, per A. Durocher;" and, on the 12th October, the usual bought and sold notes were sent by the broker.

On the 23rd November, a draft was made for the purchase-price, accompanied by an invoice. This draft was not presented to Barry until the 28th, when it was not accepted; Mr. Barry telling the banker that no such draft was authorised.

The second contract in controversy arose in this way. Durocher, at the time of making the contract already referred to, had conceived this scheme of cornering all the goods which were not controlled by the Dominion Canners Association, and then forcing the situation with the Dominion Canners in such a way as to inure to his own benefit. Following out this scheme, he procured options from the different canners for the whole of their prospective output for the year 1914; the earlier contract relating to the 1913 pack. These options he took in the name of John Barry & Sons, the option to remain open until the 1st November, 1914. The option was not exercised within the time; but, on the 7th November, Durocher purported to exercise the option, signing the documents in the name of John Barry & Sons "per A. Durocher." The time for acceptance had been in some way informally extended, and the plaintiffs recognised the right to accept by their letter of the 19th November, when they said they were drawing for the price under both contracts.

Turning now to the real relations between Durocher and Barry: there never was any relationship of master and servant. Durocher never had any general authority from Barry. He had been authorised to purchase certain goods for Barry, and the transaction had grown to much larger bulk than originally con-

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templated. Two letters, of the 7th November and the 8th November, respectively, are of importance. At this time Barry was finding himself most seriously embarrassed by the large quantity of goods which he was carrying. He had been led into this by Durocher. He was looking to Durocher to help him out of the situation. The bank which held Barry's notes was pressing. The market was poor. On the 7th October, Durocher wrote from Toronto stating that, as the result of a meeting of Canned Foods Limited—i.e., of a combination opposed to the Dominion Canners—he had secured an option till the next Monday on the balance of their pack, one hundred and twenty-five thousand cases. He suggested that he could not see any way out except to try and gobble up all the tomatoes left unsold in the hands of these packers, and also those outside, about seventy-five thousand cases additional, and then to approach the Dominion Canners. Durocher said he would not commit himself to any further purchases, but was getting options on the best terms possible, and suggested to Barry to see the bank and ascertain what could be done, as they might have to "swing these goods" until spring.

To this Barry replied on the 8th, stating that he already owed the bank over $140,000, covering payments falling due on Durocher's purchase, and he did not wish to incur any further liability or to borrow any more money; he had all he could carry, and he would not attempt to purchase the two hundred thousand cases, assuming a liability of approximately $300,000, single-handed. He then urges an effort to sell, so that he may be in funds to meet his notes. He hoped for some report of progress in the negotiations with the Dominion Canners.

Negotiations were continued by Durocher, and on the 15th he wired Barry asking him if he would give an option on his interest in the deal—that is, as I understand it, upon the tomatoes he had already purchased—for $10,000 profit. Apparently this was assented to, as on the 19th Barry wrote Durocher stating that he hoped he would succeed in turning the deal over at 85 cents, "with the division we discussed."

On the 20th, this was followed by another letter, stating: "We are heavily overdrawn in the bank, and if you do not make a deal with the parties you are negotiating with it will be necessary to sell, to realise enough to cover these drafts."

On the 21st, Barry again writes, giving Durocher a list of payments falling due, $174,775, and advising "the bank will make no further advances, and there must be a sale to enable the drafts to be met"—again referring to the $10,000 coming to him on the basis of a sale at 85 cents—and suggesting a mode of approach to those with whom Durocher was negotiating.

Again, on the 26th, Barry wrote urging realisation. About this time an interview took place with the representatives of the Dominion Canners, at which Barry was present, but nothing was accomplished.

About the 4th November, Barry again wrote from New York: "If deal goes through, we must get some money quick; if deal does not carry, we must sell some goods quick by wire to realise."

The next document of importance is an undated letter, exhibit 14, probably written on the 19th November. A telegram had been sent on the same day, asking for funds to cover expenses. The letter first refers to this. Durocher appears to have been fairly well convinced that his negotiations with the Dominion Canners would be abortive, unless through some masterpiece of strategy he could change the situation. He had prepared a telegram which he proposed sending to the trade, offering to undersell the Dominion Canners' prices, and this he had placed before the officers of that association. He then promised to turn all his effort to the selling of the goods irrespective of the Dominion Canners or any organisation. His threatened telegram was sent with this letter. This telegram was to be in the name of Barry & Sons, advising that that firm had purchased from the Independent Canners and controlled all unsold goods of 1914 pack. To this Barry replied next day, by wire: "Not losing nerve, but bank insists covering overdraft and meeting payment. Must sell or arrange to get fifty or sixty thousand, December 1st. Wire fully collect." The reply to this is not produced. It was probably a request for a meeting, as Barry wired Durocher on the 21st November: "Impossible: have to go to New York Monday; think you had better come down tonight."

On the 23rd, Barry wired, apparently in response to some other message, that he was leaving for New York, but would go to Toronto, "if you wire me to-day that you will then be in a posi-

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tion to conclude definite arrangement without further delay." Barry went to New York, returning to Montreal on the 27th; and on the 28th the draft already mentioned was presented, which was the first intimation Barry received that Durocher had been exceeding his authority. He wired that day to Durocher: "Everything stopped; you must come down to-night and bring all contracts and documents with you." Mr. Barry attempted to see his solicitor, but the latter was out of town. Next day was Sunday. On the 30th, after consulting his solicitor, Barry wired Durocher: "You must not sign our name to any correspondence or document unless authorised;" and also, by another wire, "Must repudiate option you exercised without authority," and instructing notice to be given to Flynn, a merchant who also had an unauthorised contract, and stating that Barry would himself send such a notice. A third telegram appears to have been sent on the same day, "Have you received any definite offers?" Durocher's reply, sent, as stated by Mr. Thomas, when Durocher was intoxicated, was, "Cannot repudiate contracts and will not do so." Barry then sent out letters, dated the 1st December, to all those with whom he thought Durocher might have had dealings, repudiating any authority in Durocher. From that time on there were communications, but in none of these was there any ratification of what had been done by Durocher.

The situation seems to me plain upon the facts. Durocher never had any authority; there never was any ratification; and there never was any holding out by Barry. This being so, the plaintiffs must fail.

In scrutinising the documents produced, the real question must be kept clearly in mind. The correspondence between Barry and Durocher may justly be looked at carefully to ascertain whether credence should be given to the statements made by both that Durocher had no authority; but documents which were never communicated to the plaintiffs must not be looked at with a view of seeing whether possible inferences might be drawn if these were evidence upon the holding out branch of the case. That branch of the case must rest on holding out to the plaintiffs, either directly or indirectly.

Upon another branch of the defence the plaintiffs must, I

think, also fail. Mr. Millman, who says that he regarded Durocher as Barry's broker or agent, agreed to divide with Durocher the commission which he as vendor's broker would be entitled to receive. Mr. Millman seeks to shew that that division was not to be with Durocher, but between Millman and Barry & Sons. I cannot so find upon the evidence.

In *Hitchcock* v. *Sykes* (1913), 29 O.L.R. 6, I stated my view (p. 14) that the payment of any sum to any person occupying any fiduciary position, by way of secret commission, is fraudulent and cannot be permitted to be explained away, and that, as held in *Panama and South Pacific Telegraph Co.* v. *India Rubber Gutta Percha and Telegraph Works Co.* (1875), L.R. 10 Ch. 515, any surreptitious dealing between one party to a contract and the agent of the other party is a fraud in equity, and invalidates the agreement. Although this was said in a dissenting opinion, that view was subsequently sustained (see the judgment of the Court of Appeal, 13 D.L.R. 548 *et seq.*, and *Hitchcock* v. *Sykes*, 23 D.L.R. 518, and I am informed by counsel who presented a petition to the Privy Council for leave to appeal, that their Lordships expressly assented to this view.

The action therefore fails, save as to the $400 for storage. This forms a very small portion of the controversy, and ought not substantially to affect the incidence of costs. The plaintiffs will have judgment for $400 and costs fixed at $75. The defendant will have the costs of the action, save any that relate solely to the $400, these amounts to be set off *pro tanto*.

At the trial I gave leave to amend by setting up the payment of the commission. This amendment ought to be made before the judgment issues.

I. F. Hellmuth, K.C., and *J. G. Kerr*, for appellants.

R. McKay, K.C., for respondent.

MEREDITH, C.J.C.P.:—The trial Judge said that this is a case in which one of two innocent parties must suffer from the wrongdoing of a third person: if so, the word "innocent" must be a very elastic one, and in its use, or misuse, may sometimes cover a multitude of sins. The plaintiffs' innocence in this case consisted of entering into an ordinary contract of sale of goods, to the defendant, in the usual manner of merchants' dealings the one with the other; the whole correspondence between them having been carried on directly through His Majesty's post offices. The

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innocence of which the defendant was guilty was in placing in the hands of his "dear" friend and associate, the witness Arthur Durocher, the weapons by which, if the judgment in appeal stand, the plaintiffs shall have been "bled" to the extent of about $8,000, largely in the defendant's own counting-house.

The plaintiffs, in ordinary mercantile methods, by correspondence, conveyed in the public mails, and properly directed to the defendant, entered into negotiations with him—in answer to a letter from him so conveyed to them, which letter was the beginning of all the business between the parties to this action—which ended in the contracts in question being made: and these simple indisputable facts make, as it seems to me, a strong *primâ facie* case of a legal right to enforce those contracts in this action. Then how is that case met? Not by evidence that the plaintiffs' letters were stolen, and the answers to them forged, by the writer of them for his own gain. On the contrary, it is admitted: that the plaintiffs' and their brokers' correspondence came, in due course, to the defendant's office, and that, under his directions, but during his absence, they were given to the witness Arthur Durocher, to be dealt with and answered by him; in the defendant's office, where his office desk, and work, was, and was done, and had been for some considerable length of time; that such correspondence was so dealt with there, the defendant's answers to the plaintiffs' and their brokers' letters being either written by the witness Arthur Durocher, or written by the defendant's stenographer upon his dictation, all upon the defendant's business stationery, and in all things, even to the postage stamps, dealt with as the business letters of the defendant; and that all were signed in the firm name in which the defendant was carrying on business—some with only his rubber stamp signature, kept for that purpose—but some having in addition the word "per" and the letter "D." or the signature "A. Durocher" following it.

A number of contracts were thus made, for the purchase of goods such as those in question, all signed by Durocher in the firm's name per himself; and most of them have been carried out by the defendant as his contracts, although the authority for making most of these seems to be now denied by the defendant in the same manner as the authority to purchase those in question is. Among the contracts so made was one, at least, with the plaintiffs, the validity of which was never questioned, and

which has been carried out, and that was the first contract between these parties. But it is now said: that the making of the contracts in question, which were parts of larger ones "split up" among several other manufacturers as well as the plaintiffs, was not authorised by the defendant, and that, although made in substantially the same way as all the contracts which have been carried out, the defendant is not liable upon them.

The circumstances under which it was made are these. Until some time in the earlier half of the year 1914, the defendant had not dealt in such goods as those in question—commonly called "canned" or "tinned" goods. His friend and associate, the witness Arthur Durocher, had; and, when the defendant did enter into this branch of trade, he did so evidently depending upon Durocher and his knowledge and skill in it. The defendant's story is, that he authorised the purchase of only twenty thousand cases, but Durocher bought, according to the defendant's testimony, ninety-four thousand, for all of which the defendant accepted and admits liability. The market was stagnant, and, if nothing were done to avert it, there would be great loss upon the goods thus purchased; and, besides that, the defendant was not in a position financially to carry so large a load of stagnant stock.

In these circumstances, there seems to have been but one of two things to be done: submit to the loss, which is always a hard thing to do; or else "corner the market," which being interpreted means get substantial control of some particular marketable produce in such a way as to be able to control its market price and then sell to great advantage, an heroic remedy as well as an alluring and exciting undertaking: the witness Arthur Durocher naturally preferred this course; and his familiar and confiding friend, the defendant, assented to and took part in an effort to relieve the situation and make much money in this way; and, as in all the "canned goods" transactions, this one was left in the hands of the witness Arthur Durocher; and, more than that, all the defendant's letters upon the subject were handed over to him, because the operations were intrusted to him. Much negotiation took place; an office was opened in Toronto in the defendant's name, with money supplied by the defendant; twice, I think, the defendant came to Toronto solely about, and took part in, these operations; and was fully advised by letter and telegram of them. After varying fortunes, and earnest efforts to

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make the heroic remedy a success, it ended in failure, leaving on the defendant's hands, if the contract in question binds, him, one hundred and seventy thousand cases more of "canned goods" than he had before, of which the twenty-three thousand in question in this action formed part.

The loss is a very considerable one: and the failure of the heroic remedy, a very serious one: so serious that naturally the defendant is extremely anxious that the loss should fall upon any one rather than upon him. But how can he escape? The means adopted for that purpose, and very forcefully urged by Mr. McKay in his behalf throughout this action, is: that really he had nothing to do with this attempted remedy for his overstocked condition, and coup by which he was to be so much enriched: that it was entirely an affair of the witness Arthur Durocher, carried on against the defendant's wishes and without any kind of authority from him.

But how can such a contention succeed, in the face of the indisputable main facts of the case? The whole thing began, and was carried on throughout, with his knowledge and consent, in his business name, a name long used by his father before him as well as himself, and a name well known and trusted in and by the business community: and which began, and was carried on to conclusion, in connection with correspondence addressed and sent, in the manner I have already mentioned, to the defendant, and correspondence in answer to such correspondence, coming in all things as if in due course from the defendant. The new office, in Toronto, was opened in the way and with the means I have mentioned, and the defendant in person went from his place of residence or from New York to Toronto once or twice for the sole purpose of seeing about the buying up operations, and in person took some part in them.

Among the many evidences in writing making it impossible to come to any other conclusion, let me refer to two only: the heart-courageous telegram: "Not losing nerve, but the bank insists . . . ," sent by the defendant to the witness Arthur Durocher more than a month after the purchase of eleven thousand cases of the goods in question: and the telegram of the 26th November, sent somewhat broadcast in the defendant's business name, announcing the purchase of all the Independent Canners'

goods, and fixing prices, of which telegram the defendant had knowledge, but never in any way repudiated.

It is not a question whether the defendant assented to, or did not assent to, any particular sale: that narrow view of the case seems to have led to some serious misconceptions of the parties' rights: there was the general power, and the authority, to use the defendant's name in these operations; they could not have been carried on without that; no one would have wasted an hour upon any scheme that had no more than the credit, financially, of the witness Arthur Durocher behind it: the defendant knew this; no one concerned in the matter could help knowing it; and, in view of the manner in which the correspondence began and was carried on throughout, the purchases made by Durocher and treated by the defendant as binding upon him, the opening of the office in Toronto, and the defendant's personal participation in the negotiations for the purchase of a controlling interest in the output of the "independent" factories, with a full knowledge that all had been done and was being done in his name and on his credit, how is it possible for him to escape liability on the contract in question merely because he did not give any specific authorisation respecting it? It is idle to contend that all that was done and authorised by the defendant was done and authorised merely for the purpose of selling his goods on a stagnant and impossible market.

The trial Judge took quite too narrow a view of the evidential purposes to which the correspondence between the defendant and the witness Arthur Durocher might be put; it is helpful, very helpful, on the question of estoppel, in so far as it contains admission of facts and circumstances relied upon by the plaintiffs as having led them into the contract as being one really made with the defendant.

I agree with my brother Lennox in the view expressed in the the observation, made by him during the argument, that there was sufficient evidence, adduced at the trial, to put upon the defendant the onus of proof that the goods in question are not part of the ninety-four thousand cases regarding which the defendant admits liability: the knowledge and the proofs, upon that question, are altogether with him; and, not having been given, or until given, it should be held that they were. But I do not put

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the now admitted liability of the defendant for the seventy-four thousand cases, which he would have us believe were bought without his authorisation, upon the ground of ratification: it is much better put upon the ground of the previous general and undisputed authority.

Another circumstance, whatever may be its weight, supports that view of the case; the defendant and the witness Arthur Durocher were in such confidential and familiar relations the one to the other that some of the defendant's letters, although dealing altogether with business matters, begin "Dear Arthur" and end with the signature "Dick;"whilst some of the letters of the witness Arthur Durocher to the defendant begin with the words "Dear Richard" and are signed only "Arthur;" and, as I have mentioned, the witness Arthur Durocher had his place of business in the defendant's counting-house, made use of the defendant's stationery and postage stamps, had writing done by the defendant's stenographer; and, by the defendant's order, was given all the defendant's correspondence relating to "canned goods" to be read, attended to, and answered by the witness Arthur Durocher for the defendant: and, as the defendant was much away from his office during the summer, and there appears to have been no one else put in charge of it, it is but a short step to the conclusion that the witness Arthur Durocher was.

So, too, when failure became evident to the defendant, he hastened to relieve himself if he could from his liability. His telegram to the witness Arthur Durocher to repudiate the contracts as unauthorised and the latter's blunt refusal and denial of right to do so; the long lesson by telegraph given by the former to the latter regarding excess of authority and so forth and what to say and do; and the other circumstances attending this period of the transaction are all quite unlikely if the case were one of no liability because of no authority, very likely in a case such as this was of authority, unwisely given and ending in loss, the consequence of which it was sought to be got rid of.

And so, too, of the defendant's denunciation in unmeasured terms, through his counsel, of his familiar friend and associate; denunciations to the extent of accusations of robbery and perjury; and assertions that the man ought to be in the penitentiary; the dramatic effect of which, however, was spoiled by the subse-

quent assertion of counsel for the plaintiffs, not contradicted, that "dear Richard" and "dear Arthur" are still carrying on business in the same way and the same Montreal counting-house, protected and comforted by the judgment in appeal.

I cannot but find, upon the whole evidence, that the purchases in question were purchases within the authority of the witness Arthur Durocher, acting for and in the name of the defendant, carrying on business as John Barry & Sons: and that, if that were not so, the defendant is plainly estopped from denying that the contracts in question are his contracts.

But, after being asked to swallow the camel of the defendant's "innocence," involving more than $8,000, we are urged to strain at the gnat of the divided commission, amounting to a few hundred dollars, and upset this whole transaction on the ground of fraud in it.

The commission transaction was this: Millman & Sons have by some means become the sole brokers for the "independent" canning factories, of which the plaintiffs own one; a commission of two cents the hundred is allowed to them upon sales made by them; and it is quite usual, according to the witness Millman's testimony, and there is nothing to the contrary, for them to divide that commission with the purchaser or purchaser's broker; a thing that seems to be quite well known in the trade. Millman & Sons agreed with the witness Arthur Durocher, who was treated by them as representing with authority the defendant, representing him, as it was put in some of the defendant's correspondence, as "our Mr. Durocher," to divide the two per cent. commission in the usual way, and that was done, and "our Mr. Durocher" received, I understand, the half commission on the transactions carried out by the defendant.

And in the correspondence between Millman & Sons and the defendant, carried on in the way I have more than once mentioned, the arrangement for the "splitting" of the commission was very plainly stated. It is said that the letter in which it was so stated had upon the envelope the words "Attention personal Mr. Durocher;" but I cannot think that that detracts from its effect as notice to the defendant of this arrangement. There is nothing to shew, but the contrary should be found on the whole evidence, that this letter was not dealt with under the defend-

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ant's general direction, that is, opened by his clerk and handed to the witness Arthur Durocher as a letter dealing with that branch of the defendant's business which he had put in the charge of Durocher, or so handed to him unopened. The words "Attention Mr. So and So," or "Attention personal Mr. So and So," written on the envelope of business letters, have come into common use, in some business communities, in recent years, the purpose being to direct the attention of the person or concern to whom or which the letter is addressed to the fact that it relates to a matter which has had, or is having, the personal attention of Mr. So and So. But it is none the less the post letter of the person to whom it is addressed and not of Mr. So and So, who, without the authority of the person or concern to whom or which it is addressed, has no right to, or in, it any more than if it had not had upon it the words referring to him.

The trial Judge seems to have been carried away by the notion that, if the purchaser's agent receive a commission from one who is not his employer, the transaction in which the commission was received cannot stand. It need hardly be said that that is not the law. In such cases it is fraud, and fraud only, that has that effect: the defence on this ground, added by leave at the trial, puts it thus: that the contracts in question were "procured by fraud, bribery, and improper dealing." The payment may or may not be fraudulent: the payment of a commission is nothing more than evidence of fraud. If a seller bribe an agent, of a buyer, to buy from him, the seller is guilty of fraud and cannot ordinarily enforce the contract: that is obvious: though at one time it was ruled that the contract was not vitiated unless "the operation of the gratuity was to influence the mind of the agent in a manner favourable to the party offering it"—in other words, unless the fraudulent act bore fruit: and that whether it had such effect or not was of course a question for the jury: *Smith* v. *Sorby* (1875), 3 Q.B.D. 552 (note); but, soon afterwards, that ruling was modified, and the existing rule established, namely: that where a person in the employment of another is bribed with a view to inducing him to act otherwise than faithfully to his employer, the agreement is a corrupt one and unenforceable at law, whatever the effect produced on the mind of the person bribed might be: *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549: and of course all questions involved in such a defence of fraud are

questions of fact to be found by the jury in cases tried by a jury. One must not confuse, as is sometimes done, the right to set aside a transaction, on such a ground of fraud, with the right of the employer to recover from his agent the commission or other benefit, which the agent had a right to receive only for his master's benefit. The case of *Hippisley* v. *Knee Brothers*, [1905] 1 K.B. 1, affords an illustration of this: there the "secret profit" was received by the agent in good faith; and accordingly it was held: that, though the principal might recover from the agent the "secret profit;" the taking of it, and the making of the agreement between principal and agent with the intention of taking it, did not vitiate that agreement, or prevent, in any way, the agent from recovering from his principal the commission he had agreed to pay the agent. And the case *Great Western Insurance Co.* v. *Cunliffe* (1874), L.R. 9 Ch. 525, affords an instance not only of the receiving the secret commission not being a fraud vitiating anything, but indeed of the agents being held entitled to retain the "secret commission;" and the dismissal of an action brought by the principal to recover it from them. I quote these words from one of the judgments, because they are the words of a Judge who was temperamentally so opposed to commissions, gratuities, and presents, to servants and agents, that in reading some of his judgments it is impossible to quite keep out of mind the proverbial "red rag:" "I believe that the principle is correctly laid down in the case of *Queen of Spain* v. *Parr* (1869), 39 L.J. Ch. 73, 76, but the questions here are, whether the agent has been otherwise reimbursed and whether he has received a gratuity which his principal is supposed to be ignorant of."* The case of *Baring* v. *Stanton* (1876), 3 Ch.D. 502, is another case of that kind; and it also contains observations applicable to this case, for instance (p. 505): "If a person employs another, who he knows carries on a large business, to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated not by him but by the other persons—which is very common in mercantile business— and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging;" in that case the commission was received from the principal's customer.

*James, L. J., at p. 536.

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Now, what are the circumstances in this case? The defendant neither paid, nor agreed to pay, "our Mr. Durocher" anything for his services: the defendant paid his expenses out of pocket in the "canned goods" business, including the expenses of the Toronto temporary office: the defendant knew that the man could not live upon air alone; the "splitting" of the commission was one of those things that are "very common in mercantile business:" the men are on most familiar and confidential terms with one another; it is impossible to believe that the commission received was a secret one or that there was anything like fraud in its payment, made, or to be made, or bad faith in any way: and, as I find, the defendant had formal notice of it in the communication I have referred to. Whatever else may be said against the witness Arthur Durocher, and a great deal may be said, no man can truthfully say that he was disloyal, that from first to last he has been anything but very loyal—in his testimony quite too loyal—to his friend and associate, the defendant. And, in addition to all that, it is very plain to me that this defence to the action is in truth only a solicitor's defence, and a solicitor's defence raised only at the eleventh hour—at the trial: I should not have given leave then to plead it, because admittedly the plaintiffs were entirely without part in or knowledge of it.

The cases referred to by the trial Judge are extremely unlike this case: in the case of *Panama and South Pacific Telegraph Co.* v. *India Rubber Gutta Percha and Telegraph Works Co.*, L.R. 10 Ch. 515, the defendants, having contracts with the plaintiffs for the doing of work costing about a million and a half of dollars, bribed, as it was found, the chief engineer of the plaintiffs, upon whose certificate the price of the work was to be paid.

The other case, *Hitchcock* v. *Sykes*, 13 D.L.R. 548, 23 D.L.R. 518, was one in which there was a good deal of conflicting judicial finding; and was one in which vendors had paid, or agreed to pay, a secret commission to the agent of one of two purchasers, the agent being the other purchaser. Eventually an application for leave to appeal to the Privy Council, made by the party who had appealed to the Supreme Court, was unsuccessful: but how could it be otherwise; how could any one reasonably expect that it could? The question was one of fact only; whether the sellers were guilty of fraud against the one purchaser; a question in which

the parties themselves alone were concerned; and a case which, being decided on its facts, could not govern any other case.

And yet there is another ground upon which, in my opinion, the trial Judge erred on this branch of the case: no one suggests that the plaintiffs were in any manner connected with, or had any kind of notice or knowledge of, the splitting of the commission transaction; on all hands it is admitted that they are quite innocent, really innocent in that respect: so the question arises whether they would be answerable for their brokers' wrong-doing, if the brokers had done wrong, in splitting the commission. Millman & Sons unquestionably would: but it by no means follows that the plaintiffs would: the rule governing the liability of a principal for the fraud of an agent is thus stated by Willes, J., in delivering the judgment of the Court in the case of *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259, 265: "But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong:" see also *S. Pearson & Son Limited* v. *Dublin Corporation*, [1907] A.C. 351.

Assuming that Millman & Sons had bribed the witness Arthur Durocher, and every one else with whom they divided commission on independent factories' goods sales, how can it be found that that was in the course of the independent factories' business and for their benefit? Why not in the course of their own business and for their own benefit, to make their own half of the commission? And, if it be put on the ground that the plaintiffs cannot take advantage of their brokers' fraud; what evidence is there that they obtained the contracts or any kind of advantage by it? The witness Arthur Durocher was not hunting for gnats: it was very large game only that he sought: nothing less than controlling the market and winning a fortune, or that which would be a fortune to some men; and all this, in a legal sense, solely for the benefit of his dear friend and associate, the defendant, relying upon such friendship and the moral right involved in it only for any share, in the fortune, to come to him.

One more circumstance I mention, though of no great moment: the trial Judge, apparently through a lapse of memory, said that the witness Millman had testified that he regarded the witness Arthur Durocher as the defendant's broker. I can find nothing

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in the evidence to support that; on the contrary, the witness Millman firmly denied that he ever knew that the witness Arthur Durocher was a broker; denied that he had ever, before these transactions, had any dealing with him, except on one occasion, when he bought for himself.

I would allow the appeal, and direct that judgment be entered for the plaintiffs and damages in such amount as the parties may agree upon, or, if unable so to agree, as the proper local officer may, on inquiry, find that the plaintiffs have sustained by reason of the defendant's breach of his agreement to buy the twenty-three thousand cases of "canned goods" in question: the successful parties are entitled to their costs here and below.

It is hardly needful to say that I recognise the hardship of the load falling altogether upon the defendant; that it would have given greater satisfaction if it could be a divided loss; but justice must be done: and it is only just to add that, having taken the chances of winning all, all rules of all games require that the defendant should bear all loss.

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LENNOX, J. (after referring to and quoting from the judgment of MIDDLETON, J., *supra*):—With very great respect, it is not quite clear to my mind that "it may be taken for granted . . . that Durocher had not in fact any authority to make the contracts" in question, or that "general authority" is always the equivalent of "general instructions." If a dealer in merchandise commits to an agent, say Durocher, the sole management of one branch of his business, constitutes him the purchaser of all goods of a certain class, houses him at his place of business, leaves him in control during frequent and long absences of the employer, commits to him the inspection, purchase, storage, insurance, sale, and management incident to the carrying on of this branch of trade, and authorises him to conduct the negotiations and carry on correspondence in the name of the employer and without his intervention, if the alleged limitation upon quantities to be purchased from time to time has been invariably exceeded by the agent and as invariably disregarded by both, if the employer adopts these *unauthorised* contracts, accepts and pays for the goods, and, without complaint and conscious of his agent's methods, sends him out again and again to purchase more, and if this is all part of a premeditated scheme to form a combine, force the hands of the Dominion Canners, control and "boost" the market, and

enhance prices—a huge gambling deal, involving secrecy, risk, prompt action, and financial obligations of uncertain limit—and all to be brought about by the sagacity, strategy, and daring of the employer's confidential representative, Durocher, his hitherto unrestrained and unrestrainable wizard of finance—if this is the effect of the evidence, and it is very like it, I am unable to see how it can be unhesitatingly affirmed that "there never was any relationship of master and servant" (or principal and agent or partnership) or that "Durocher never had any general authority" (actual or ostensible, or to be implied) "from Barry" to enter into the contracts in question. What had Durocher the right to infer, after a number of "excesses," from the general course of dealing? I am for the moment only referring to the out and out, direct purchases—not to the option, if any distinction is to be made.

On the 19th November, 1914, the plaintiff company wrote John Barry & Sons that they were drawing upon them to cover the two sales. It is not shewn, I think, that this letter was posted on that day, or in fact that it was posted at all. On the 23rd, the company appear to have made out bills or invoices charging the defendant with the amounts of these two purchases, $16,879.50 and $18,000.

On the 28th November, the plaintiff company drew upon the defendant for these two sums. I do not find any specific evidence either way as to the letter of the 19th November, but the trend of Barry's evidence is to shew that he knew nothing whatever of either of the contracts sued upon until the 28th November, when he returned to Montreal, after an absence beginning on the 23rd.

There are three questions to be determined:—

(1) Was Durocher in fact authorised to enter into the alleged contracts?

(2) Is the defendant estopped from denying that Durocher was authorised?

(3) Was there a secret commission invalidating the contracts?

I will deal with the last question now, as, if it can be answered affirmatively, there is no need to go further. It is so much a question of fact that no nice point of law arises; and the reliable evidence in this case is documentary. That the divided commission was not intended as a dishonest or fraudulent inducement, or to be kept from the knowledge of the defendant, is manifest

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from the correspondence. The contracts ought not to be avoided upon this ground.

The first branch of the claim, for eleven thousand cases contracted for on the 5th October, 1914, can, I think, be safely determined by a careful examination of Mr. Barry's letter to Durocher of the 8th October, 1914, in reply to Durocher's letter to him of the day before, the admitted confidential relations, common purpose, and course of dealing established between these two men, and Barry's total inability to account for a liability for ninety-four thousand cases of tomatoes mentioned in his letter, without including in the ninety-four thousand the fifty thousand cases purchased by Durocher on the 5th October, and of which the eleven thousand cases sued for is the part allotted to the plaintiff company.

In this letter Mr. Barry says: "Yours of the 7th received and noted. I already owe the bank over $140,000, to cover payments falling due on your purchases up to November 5th, and I do not wish to incur any more liability, or borrow any more money, as I have all I can carry, and have not the Bank of Montreal at my back. Now, in addition to this, you have made purchases of a total of ninety-four thousand cases tomatoes, twenty thousand cases of which, at 77½ cents to 80 cents, are payable thirty days from date of shipment, and seventy-four thousand cases are payable net sixty days from date of shipment. You have also contracted for five thousand cases pease at 67½ cents and eighteen thousand five hundred cases at 90 cents less 10 per cent., payable in ten days, and, in order to carry out *our* contracts, it will be necessary to sell most of the goods already paid for. It is all very well for you to say *at this stage* that the only way is to try and gobble up all the tomatoes left unsold in the hands of the Canned Goods Limited, and also those outside, a total of two hundred thousand cases, a liability approximately $300,000; but it is impossible for me to do this single-handed, as I am already tied up for more than I can carry. If you can obtain an option from Canned Goods Limited, and then make a deal with Dominion Canners, well and good. Failing this, I cannot see where you can figure out on making any money. In any case, you will have to make an extra effort to sell some of this stuff, as I will have to meet my notes as they become due, and uphold my credit with the bank."

In this letter Barry goes minutely into his purchases and

liabilities through the agency of Durocher. He points out that, in addition to owing more than $140,000 to the bank, there are other purchases of tomatoes made by Durocher, aggregating ninety-four thousand cases, seventy-four thousand of which are payable "net 60 days from date of shipment," and a lot of other minute details.

I cannot read this letter, full of figures and dates as it is, without coming to the conclusion that Mr. Barry is possessed of an exceptionally good memory, or that it was compiled from records of purchases then in his possession. The theory of a good memory is completely dispelled upon reading his examination for discovery and his evidence in Court. Assuming that he is honest, and was anxious to make full disclosure, I would judge that he has a very defective memory indeed. The alternative is inevitable, namely, that he consulted records, and from them obtained the detailed statements contained in his letter, including the ninety-four thousand there spoken of as a liability to be provided for. The very pertinent question necessarily arises, what purchases created this liability? And this question became an acute issue as early as the defendant's examination for discovery. There was no room left for doubt, then or thereafter, as to the attitude of the plaintiff company—the contention that the ninety-four thousand cases included a fifty thousand case purchase, of which the eleven thousand sued for is the company's allotment. This was followed by a statement of the defendant's liabilities for stock purchased by Durocher; and, if the fifty thousand cases are not included, counting as of the 5th or 8th October, there is a huge discrepancy somewhere. But neither during that examination, in the first instance, nor after it was adjourned and resumed, nor at the trial, was the defendant able to account for this ninety-four thousand purchase and liability, even approximately, without including the fifty thousand cases in dispute. His books and office records, if produced, however meagre they may be, would have gone a long way towards settling this question either for or against the defendant; but they were never produced. Why not? Nobody could be in doubt as to the incidence of this question. It is impossible to believe that the defendant, or his solicitors or counsel, could fail to appreciate its relevancy and importance. Why was this matter allowed to remain hazy and indefinite? As to twenty thousand cases included in the ninety-

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four thousand, the parties seem to be in agreement that they were purchased from E. B. Smith, and the terms mentioned for the twenty thousand, I think, coincide with the Smith terms. Millman swears that he sold Barry, through Durocher, the fifty thousand, another lot of twenty thousand, and two lots of two thousand each, making just the unaccounted for seventy-four thousand cases. Millman's evidence is perhaps none of the best; but there was nothing to prevent Mr. McKay, if he deemed it advisable, from putting the matter to the test by asking this witness, "Who were the vendors in the three transactions aggregating twenty-four thousand cases?" And the defendant, subsequently called, was not asked if the three transactions aggregating twenty-four thousand cases were entered into as a matter of fact. Again why?

"Net 60 days from date of shipment" is, I understand, one of the most favourable alternative terms of the fifty thousand case contract, and it is to be presumed that Millman, representing Canned Foods Limited, if he sold the twenty-four thousand he speaks of, complied with the provisions of his patron's agreement by selling the goods of all upon the same terms. Barry's letter speaks of twenty thousand (Smith's), on one set of terms, and seventy-four thousand, on other terms as above. Why were the lots mentioned in the letter grouped in this way? Barry suggests that his estimate of liabilities may not have been accurate, but does not shew that it was not, and seventy-four thousand cases, or $100,000, is not a trifling discrepancy. Durocher, who knew of every purchase, and would naturally be anxious to minimise liabilities, made no correction.

This letter was written just three days after the date of the fifty thousand case contract.

With very great deference for the opinion of the trial Judge, and realising, too, that he had opportunities for judging of the character of the verbal testimony which I have not, I feel compelled, upon a careful examination of the undisputed facts, the admitted relationship of Barry and Durocher, this unexplained discrepancy, and the documentary evidence generally, to conclude that, whether Durocher had actual antecedent authority to purchase the fifty thousand cases, or not, Barry knew and approved of it and included it as a liability when he wrote the letter of the 8th October; and the defence fails upon this item of claim.

I had greater difficulty in reaching a conclusion, either way, founded upon the option of the 12th October, and accepted by Durocher, in the name of the defendant, on the 7th November, 1914. If Mr. Barry's letter of the 8th October was more than cautionary as to the future—if it could be read as an abandonment of the scheme he and Durocher were engaged in, a cancellation of the authority which unquestionably continued up to that time, it would aid the defendant in his defence, though it would not be conclusive as to liability. But it must be read in the light of conditions as they then existed in relation to the vendors, the enterprise which John Barry & Sons had launched, the transactions already consummated with these vendors, through Durocher as the accredited medium, and in the light of the antecedent and subsequent communications—as far as they can be ascertained—between the principal and the now repudiated agent. Did Barry turn his back upon the enterprise, and sever the connection on the 8th October? "If you can obtain an option from Canned Foods Limited," says Mr. Barry, "and then make a deal with the Dominion Canners, well and good. Failing this, I cannot see where you can figure out on making any money." But the man whom he foolishly regarded as a financial giant is to keep on and in some way get the money so urgently needed, and lose no time in getting it. Just as well as if he had personally conducted the bargaining, Barry knew what was going on, and that Durocher was regarded as his buyer and general representative, without limit, by Millman and his patrons; and, knowing this, Barry does not even tell his agent to break off; on the contrary, the *status quo* is to be maintained, and was maintained, as the subsequent correspondence shews, until the crisis on the 28th November; and then he says, for the first time, "Everything is stopped." Can Barry now say that everything was stopped on the 8th October? And why does he wire, on the 30th, "You must not sign our name to any correspondence or documents unless authorised?" What was stopped on the 28th, and what had been going on, to the knowledge of Barry, until then? The principle determining the question of liability upon this item of claim is not in all respects identical with that to be applied to the sale of the 5th October—here the ostensible authority of the agent becomes important—but it is impossible to divorce the second transaction from the first, or either of them from the

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earlier undisputed purchases from the same parties, through the same agency, in determining what sellers would have a right to imply and rely upon. If this condition was to be put an end to, there was a legal duty to notify the vendors.

On the 26th November, with Barry's knowledge and approval, Durocher sent a night letter to the wholesale trade of Canada, signed John Barry & Sons, stating that they had purchased the entire stock of the Independent Canners (the one hundred and twenty-five thousand cases, which includes the 12,000 sued for) and solicited wired contracts for the goods, at prices named. Was Mr. Barry not aware of the twelve thousand case purchase at this time? He was offering to sell them as the property of John Barry & Sons. If acceptances had been wired, what would be the position of the firm?

Year after year, our great departmental stores send out their buyers to European capitals, and all of them with more or less specific instructions. If upon occasion after occasion the agent exceeds his instructions, but time after time the goods are accepted and paid for without question or complaint, can the company, after a connection and a course of dealing has been established, suddenly and without notice, repudiate the contract and resist payment simply upon the ground that the old excess has been repeated—can they even refuse to pay their buyer his customary remuneration? Would not the answer in both cases be: "It is not what you said but what you have sanctioned time and again." And these agents are not acting in pursuance of a comprehensive scheme to corner the market and enhance prices. I cannot help feeling sorry for Mr. Barry—I would prefer that the producers should each be confined to the actual value of his goods rather than that an enormous loss should be borne by Barry alone—and the damage here is only a tithe of a possible total liability—but it must sometimes happen that the gamester is beaten at his own game.

I think the appeal should be allowed and judgment entered for the plaintiff company, upon both branches of the claim, with costs here and below; but a part of the incidental expense claimed is not recoverable, and there should be a reference as to this if the parties cannot agree.

Masten, J.

MASTEN, J.:—In his reasons for judgment the learned trial

Judge says: "Mr. Barry acted, I think, throughout, with perfect honesty, and I accept his evidence without question."

Turning to Barry's evidence, at p. 198, line 26, he is asked:—

"Q. Then, speaking with reference to both contracts, the eleven thousand cases and the twelve thousand cases, the exercise of the option, had you any knowledge at all of them as existing for any definite amount prior to November? A. No, sir.

"Q. Had you given any authority? A. No, sir, none whatever.

"Q. To Mr. Durocher to enter any such contracts? A. No, sir."

In view of the statement of the learned trial Judge which I have just quoted, this evidence is conclusive to my mind: (1) that Barry gave no express authority to Durocher to pledge his credit; and (2) that Barry never had any intention of doing or saying anything to authorise Durocher to pledge his credit in the purchase of "futures," as they are called in the evidence.

Further, there is no doubt in my mind that originally in connection with the first purchase the position of Durocher was that of a special agent, and not of a general agent.

The definition of a special agent given in Bowstead on Agency, p. 4, is as follows: "A special agent is an agent who has only authority to do some particular act, or represent his principal in some particular transaction, such act or transaction not being in the ordinary course of his trade, profession, or business as an agent."

Durocher was not a regular broker in canned goods, and in fact had been engaged, so far as he had been engaged at all, in entirely different lines of business. Barry's regular business was that of a wholesale importer of and dealer in green tropical fruits. The house was a well-known house, of excellent reputation, but confined to that branch of trade. He had never dealt in canned tomatoes or other like merchandise. That was not his business. He had no organisation for the purpose. Durocher was not a permanent employee of his, was not obliged to devote any particular part of his time to the business: and this was in fact a special and separate venture, just as the parties might have gone into the stock market to buy shares for purposes of speculation.

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The beginning of all was that Barry specially authorised Durocher to buy for him canned tomatoes at from 70 to 72½ cents, on what were characterised as "spot purchases," which I understand to involve an immediate draft by the purchaser on Barry at thirty days, covering the purchase-price. The amount to be invested was not to exceed $20,000. Under those circumstances, I think there can be no doubt that in the beginning Durocher was a special agent, within the definition which I have quoted; that he had not authority to pledge Barry's credit; and that, if the plaintiffs were suing on a contract made through Durocher at that time, they must fail.

A careful perusal of the evidence and of the exhibits has compelled me to the view that, at some subsequent time prior to the date of the contracts here sued on, the business changed, and that Durocher became in fact the general agent of Barry in the buying and selling of canned tomatoes, pease, and other like merchandise. This conclusion rests on a general course of dealing rather than on any specific act or occurrence. Just precisely when this change took place, I think it is impossible to say. It is sufficient that it took place, in my opinion, before the contracts now sued on were entered into.

In reaching this conclusion, I do not for a moment differ from the learned trial Judge in his estimate of the evidence given by the witnesses. The only point in which I differ is the proper inference to be drawn from the admitted facts, and from the correspondence and documents which are in evidence. While Barry was away, throughout July and August, he was giving almost no attention to this business, leaving it entirely in the hands of Durocher, and carrying it on to an extent greatly in excess of the specific and narrow limits of $20,000 originally proposed; and, I think, the result was that, so far as the public was concerned, and so far as these plaintiffs were concerned, Durocher was in fact authorised to conduct this particular trade or business, to act generally for Barry in connection with it, and that he had implied authority to do whatever was incidental to the ordinary conduct thereof. It seems to me that the contract here in question was within the ordinary scope of the business so intrusted to Durocher.

I prefer to put it upon that ground rather than on the ground

of "holding out," because I doubt whether there was any actual holding out to these plaintiffs of such a character as to make a basis for the liability here claimed; but I do think that, Durocher being a general agent and representative of Barry, the plaintiffs were entitled to deal with him on that basis, and were not put upon inquiry as to the extent of his authority. His authority, in fact, as between him and Barry, was such that he had, according to his instructions, no right to buy these "futures" on credit; but that was a circumstance into which it was not the duty of the plaintiffs to inquire; and, Durocher being a general agent, the plaintiffs were entitled to assume that he had full authority to do what was done.

With respect to the question of commission paid by Millman to Durocher, I have felt great difficulty, but I have reached the conclusion that the truth is that the splitting of commission with Durocher by Millman was not, under the circumstances here shewn, done with the view of influencing Durocher to purchase more canned goods or to pay an enhanced price.

I think Durocher expected to gain personally to a large extent by carrying through the transaction in a profitable manner.

His interest was immeasurably greatest in the direction of doing the best he could for Barry, and the commission receivable from Millman was not such, I think, either in amount or in the way in which it was received, as to be a bribe: *Rowland* v. *Chapman*, 17 Times L.R. 669.

While I do not think that Barry ever had actual knowledge that Durocher was getting a commission, the manner in which the correspondence regarding the commission passed indicates that no effort was made to conceal it from him.

I am quite unable to adopt the view that there was anything in the nature of a conspiracy to defraud, between Barry and Durocher. In the circumstances, Barry finds himself in the unfortunate position of being liable for the loss in question without any impropriety on his part.

I think the appeal must be allowed.

RIDDELL, J., agreed in the result.

Riddell, J.

Appeal allowed.

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WATERS v. CAPE.

Quebec Superior Court, Greenshields, J. September 27, 1916.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—AMOUNT —PRAYER.

A plaintiff suing under the Workmen's Compensation Act (Que.) cannot obtain a condemnation for general damages, but the Court may on a proper prayer by him, fix and determine the annual rent to which he is entitled.

Statement. ACTION under the Workmen's Compensation Act, Que.

Greenshields, J. GREENSHIELDS, J.:—Seeing the plaintiff alleges in his principal demand, in effect: that while in the employ of the defendant, on or about November 13, 1914, he met with an accident during the course of his employment, and as a result of said accident his ribs were fractured, and he received a severe shock to his nervous system; that he has been ever since totally incapacitated from work, and will be unable to work for some time; that he was earning 40 cents per hour, or an average yearly wage of $950; that he has suffered damages in pain and suffering, loss of enjoyment of life, loss of wages and medical attendance in the sum of $400; that the said injuries resulted from the inexcusable fault of the defendant: wherefore the plaintiff concludes for a judgment against the defendant for the sum of $400.

Seeing the defendant pleads; denying the essential allegations of plaintiff's demand, but admits the plaintiff was employed by the defendant and was earning 40 cents per hour; that the plaintiff is able to work;

Seeing the plaintiff answers the said plea generally;

Seeing on June 14, 1915, the plaintiff produced an incidental demand, in which, in effect, he alleges: that he desires to add to his principal demand something that he omitted in making it, and which is due to plaintiff upon the same cause of action; that the plaintiff's injuries are more serious than he anticipated; that ever since the said accident the plaintiff has been totally incapacitated from working, and will be totally incapacitated up to September 15, 1916; that the loss of wages from November 13, 1914, the date of the accident, up to September 15, 1916, amounts to the sum of $1,742; that, further, plaintiff will suffer a permanent disability of one-half his earning capacity from September 15, 1916, and the damages resulting therefrom amount to at least the sum of $2,500: wherefore the plaintiff concludes

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by his incidental demand for a condemnation against the defendant for the sum of $4,242;

Seeing the defendant pleads to the incidental demand of the plaintiff denying the essential allegations thereof, and alleging, that the plaintiff has no right to recover by way of an incidental demand, and the same is unfounded in law and in fact;

Considering the plaintiff's action is taken under the statute known as the Workmen's Compensation Act and amendments thereto;

Considering the plaintiff alleges, that the accident was due to the inexcusable fault of the defendant, and he has suffered as a result of said accident permanent and partial incapacity.

Considering even if inexcusable fault on the part of the defendant is established, the plaintiff cannot obtain a condemnation in his favour for general damages as claimed by the plaintiff's declaration;

Considering the Court must fix and determine the annual rent to which the plaintiff is entitled, if any, the capital of which rent the plaintiff may at his option compel the defendant to pay to an insurance company designated by the Lieutenant-Governor in Council, or obtain payment thereof to himself;

Considering there is no prayer that the Court do fix the annual rent to be paid to the plaintiff;

Considering the plaintiff's action in the manner and form as brought cannot be maintained;

Considering, however, the plaintiff should be permitted to amend his demand and the conclusions thereof;

Doth discharge—d th grant the plaintiff shall have a delay of ten days within which to apply for an amendment to his demand and conclusions if he sees fit so to do. *Judgment accordingly.*

AMAR SINGH v. MITCHELL.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ.A. October 3, 1916.

1. VENDOR AND PURCHASER (§ I C—10)—BREACH OF COVENANT OF TITLE.

The limited statutory covenant of a right to convey (Real Property Conveyance Act, R.S.B.C. 1911, ch. 47), does not constitute a warranty of title; only that the vendor has done no act to derogate from his title. If he had no title whatever, there is no breach of the covenant by failure to give one.

[*Thackeray* v. *Wood*, 6 B. & S. 766, followed; *Greig* v. *Franco-Can. Mortgage Co.*, 29 D.L.R. 260, referred to.]

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2. EVIDENCE (§ VI I—566)—PAROL EVIDENCE—CONDITIONAL DELIVERY OF DEED—ESCROW.

Parol evidence is inadmissible to shew that a deed delivered to a purchaser was done conditionally or in escrow.

APPEAL by defendant from judgment of Macdonald, J., of February 25, 1915. Reversed.

F. J. Stacpoole, K.C., for appellant.

D. S. Tait, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The parties to this action agreed to exchange lands. At the time of the agreement the plaintiff was in a position to give a deed, but the defendant was not in a like position, he being a purchaser merely under an agreement with his vendor. The plaintiff was informed of this fact, but nevertheless deeds were delivered by each to the other. The defendant has not succeeded after a long delay in getting a deed from his vendor, and the plaintiff brings this action for breach of the covenants of right to convey and for further assurances. The deed upon which the plaintiff relies is in the statutory short form. The covenant for further assurances has, in my opinion, no application to the facts of this case.

Evidence was adduced by defendant and objected to by plaintiff to the effect that the deeds were delivered conditionally; that the defendant should withhold the deed he received from registration; and that neither party should deal with the lands in question until defendant should have obtained title from his vendor. The Judge admitted the evidence tentatively, but in his reasons for judgment gave it as his opinion that that evidence was not admissible on the ground that it contradicted the deed.

If the parol evidence aforesaid was inadmissible, then this is the situation: the plaintiff has accepted a deed containing a limited covenant, only, for title of land in which the grantor had only an equitable interest, and which at best operates only as an assignment of that interest. If the defect in the title is attributable to the grantor's own act, the action will lie, but in this case the defect was, in my opinion, not brought about by "any act, deed, matter or thing by the said covenantor so executed committed or knowingly or wilfully permitted or suffered to the contrary."

As Erle, C.J., said in *Thackeray* v. *Wood* (1865), 6 B. & S. 766, 773, if the vendor had no title at all to the property there would be no breach of such covenant.

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On the whole evidence I have come to the conclusion that the deeds were delivered as that term is understood in the law.

I would understand from what the witnesses say that no difficulty was apprehended in getting the deed from Macalister to the defendant Mitchell, and hence no precautions were taken against the event which afterwards happened—failure without fault on defendant's part to obtain the deed.

Now, whatever may be the plaintiff's remedy for the unfortunate position in which he finds himself by reason of what passed between himself and the defendant verbally at the time of the delivery of the deeds, this much appears to me to be true in law, that what was then said or agreed upon cannot be imported into the covenants in the deed, and as this action is for breach of those covenants, I am concerned with that only.

The defendant has acted honestly, as the Judge has found; he has offered to make a re-exchange, or to give other lots of equal or greater value, he says, to which he has good title, in lieu of the ones to which his title has failed.

The appeal should be allowed.

Martin, J.A.

MARTIN, J.A.:—In my opinion this appeal should be allowed. The difference between the qualified statutory covenant in the deed under consideration and an absolute covenant, and the obligations they import, is so well pointed out in Williams on Vendor and Purchaser (2nd ed. 1910-1) at pp. 647, 652-3, 1136-7, where the leading authorities are collected in the notes, and the vendor's remedies set out at pp. 1034 and 1050, that it would be superfluous to repeat them here. A recent illustration of the length to which an absolute covenant "upon payment of the purchase price in full to give a good title in fee simple free from incumbrances" will go is *Greig* v. *Franco-Canadian Mortgage Co. Ltd.*, 29 D.L.R. 260. It was there held that in such case the purchaser not only need not search the title but could rely upon the covenants to protect him from known defects. In *Howard* v. *Maitland* (1883), 11 Q.B.D. 695, a covenant against the acts of the vendors' "ancestors or predecessors in title" as well as his own did not cover a general right of common over the land declared, after conveyance and possession taken, by a decree in Chancery to exist, which was not shewn to be occasioned by said predecessors or ancestors.

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McPhillips, J.A.

McPHILLIPS, J.A.:—I would allow this appeal. The Judge though, in my opinion, was right in holding that no *escrow* was established—the conveyance must be deemed to have been delivered upon the facts as disclosed at the trial.

Foundling Hospital (Governor's) v. *Crane*, [1911] 2 K.B. 367, 80 L.J.K.B. 853, is a case in which the Court of Appeal recently passed upon the rules relating to escrows.

It is with regret that I find myself fettered by binding authority in the present case—but it has been the law for years that the limited covenant for the right to convey, *i.e.*, implied covenant in pursuance of the Real Property Conveyance Act (ch. 47, R.S.B.C. 1911) in no way constitutes a warranty of title. It is only operative as to the vendor's own acts. The leading case upon the point is *Thackeray* v. *Wood* (1865), 6 B. & S. 766, the judgment of the Court—Exchequer Chamber—was delivered by Erle, C.J., and concurred in by Willes, Keating and Smith, JJ., and Channel and Pigott, BB. at p. 773. Erle, C.J. at p. 771, said:—

> The operation of a qualified covenant for title is well known and has been established by a series of cases and I do not feel myself justified in departing from the construction established by those decisions. Upon a sale of real property it is for the purchaser to ascertain what the title of the vendor is and to satisfy himself that he has a good title. The vendor then makes a conveyance and usually covenants that he has done no act to affect or derogate from his title. If the vendor had no title at all to the property conveyed there would be no breach of such a covenant.

This case makes it very clear that in all conveyancing work a solicitor should be called in—as the non-professional man may be deluded into the belief that the vendor has warranted the title when such proves not to be the case. The words "notwithstanding any act, deed, matter or thing by the said covenanter done, executed, committed or knowingly or wilfully permitted or suffered to the contrary" which are contained in the implied covenant have the effect, according to the decided cases, to read out and render nugatory the later language "the said covenanter now hath in himself good right, full power and absolute authority to convey"—so that, without title, the vendor may execute a conveyance in the statutory form and escape liability if it turn out that the vendor is absolutely without title (this is, of course, leaving out of consideration any right of action for fraudulent concealment and misrepresentation if any facts support

such a case: *Thackeray* v. *Wood*, *supra*, at p. 773), the acceptance of a conveyance by the purchaser executed by the vendor under the provisions of the Real Property Conveyance Act without the interposition of a solicitor to examine the title before the acceptance thereof is fraught with great danger—and a statutory pitfall for the unwary—a cursory reading of the covenant would not lead the non-professional person to so limit the meaning of the language used.

If the matter was *res integra* I would have been strongly impelled to so read the covenant as to impose liability upon the appellant upon the facts of the present case, where no title of any nature or kind is shewn in the lands, but constrained and fettered as I am by authority full effect must be given to the decided cases—it is a case of *stare decisis*.

I have carefully examined *David* v. *Sabin*, [1893] 1 Ch. 523; *Page* v. *Midland R. Co.*, [1894] 1 Ch. 11; *Turner* v. *Moon*, [1901] 2 Ch. 825; *G. W. R. Co.* v. *Fisher*, [1905] 1 Ch. 316; *Stait* v. *Fenner*, [1912] 2 Ch. 504; and *Eastwood* v. *Ashton*, [1915] A.C. 900, but all these cases can be readily distinguished, and it would not appear that *Thackeray* v. *Wood*, *supra*, has been in any way disturbed and is still good law. *Appeal allowed.*

FRY AND MOORE v. SPEARE.

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S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 21, 1916.

ADVERSE POSSESSION (§ I F—25)—TENANTS IN COMMON—POSSESSION BY ONE—GUARDIANS OF CO-TENANTS—BREAK IN POSSESSION—LIMITATIONS ACT—EQUITABLE RIGHTS.

The relationship of a widow as bailiff of her husband's property for her husband's children may be dissolved by circumstances; where the widow pays all taxes, improves the property and clears it of encumbrances at her own expense, and the children put in no adverse claim for several years after they come of age, such facts are sufficient to warrant a finding that the relationship of bailiff had ceased, and the widow was justified in treating the property as her own.

[*Fry and Moore* v. *Speare*, 26 D.L.R. 796, affirmed.]

Statement.

APPEAL by the plaintiffs from the judgment of MEREDITH, C.J.C.P., 26 D.L.R. 796, 34 O.L.R. 632. Affirmed.

J. H. Spence, for appellants.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment dated the 19th November, 1915, which was directed to be entered by the Chief Justice of the Common Pleas, after

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the trial before him, sitting without a jury, at Walkerton, on the 9th day of that month, of an issue which was directed by an order dated the 4th day of May, 1915.

The issue was directed in a proceeding taken by the appellants for the partition or sale of a lot in the town of Southampton, which at the time of his death belonged to their father George H. McNab; and the claim of the appellants is that each of them is entitled as one of his heirs at law to an undivided interest in the lot.

The question which was directed to be tried was, "whether" the respondent "has acquired a title to the lands . . . under and by virtue of the statute known as the Limitations Act."*

That the appellants are the owners of the undivided interests which they claim, unless by the operation of the Statute of Limitations their title has been extinguished, as the respondent asserts that it has been by her possession of the lot, is not disputed.

McNab died intestate on the 30th day of June, 1892, leaving the respondent, his widow, and four children by a former wife and one by the respondent, his heirs at law surviving him. Duncan John, the eldest of the children, was born on the 19th October, 1876, Victoria Elizabeth on the 23rd September, 1878, Bolena Ann, or Dollena, as she is called in these proceedings, on the 5th December, 1880, Mary Irene on the 15th December, 1883, and Barbara Jane on the 15th April, 1891.

Bolena Ann and Mary Irene are the appellants.

When McNab died, he was living with his wife and his five children in a log-house on the lot in question, and there was another house on the lot, partly finished, and the lot was mortgaged.

The respondent subsequently paid off the mortgage, completed the unfinished house, and made improvements to the other house.

No one obtained letters of administration of the estate of McNab, but the respondent took upon herself the administration of it, sold the household furniture, and paid her husband's debts.

At the time of McNab's death, the unfinished house was rented. The respondent continued to live with her children, except Bolena Ann, in the log-house until April, 1893, when she moved with them to Kincardine and lived there with her mother until the following June. She then removed to Dubuque, Iowa, taking the children with her, and she and they, except Bolena Ann, lived

*See R.S.O. 1914, ch. 75, sec. 5.

there, with her mother-in-law, brother-in law, and sister-in-law, until March, 1895. The two eldest children were "out earning their living," and Bolena Ann lived with her grandmother. In March, 1895, the respondent returned to Kincardine to her mother's house and remained there until 1896, when she went to keep house for a Mr. Sang. She then married her present husband, Speare, and the two lived together in Hamilton, the husband going there in September, 1896, and the respondent in the following April. In 1899, they came to Southampton and occupied the log-house, in which they lived until the spring before the trial. While the respondent was away from Southampton, the two houses were rented at times, but were idle for sometimes a month, sometimes two months, and sometimes three months, and the rents were collected by the respondent.

From 1900 the lot has been assessed either in the name of the respondent or her husband, as owner, and one or other of them has paid the taxes.

When the respondent left Dubuque, she left there furniture worth more than the furniture of her husband which she had sold, and while in Dubuque she paid out of her earnings debts of her husband McNab to the amount of nearly $200. She also expended in making improvements on the property between $700 and $800. The mortgage was partly paid by $200 of insurance money, which belonged to the respondent, and she "scraped to get the rest," and her present husband gave her $66 "to finally clear it off."

That the possession of the respondent after her husband's death was, as respects the interests of the five children, that of bailiff for the children, cannot be and is not disputed; but it is argued for the respondent, and was held by the Chief Justice, that, in the circumstances of the case, that relationship was put an end to more than ten years before the proceedings for partition were begun.

The view of the Chief Justice was, that this relationship came to an end in 1897, when the respondent returned to Canada from Dubuque, leaving there all the children except her own daughter Barbara Jane, or at the latest in 1899, when, after her marriage with her present husband, he and she went to reside on the lot.

The question to be determined is one of fact; and, in my

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opinion, the fact that the respondent and her husband have for nearly twenty years been in occupation of part and in receipt of the rents and profits of the remainder of the land, and during all that time until quite recently no claim to or assertion of any right in the land or to an account of the rents and profits of it has been made by the children, is an important fact leading to the conclusion that the relationship of bailiff had come to an end and that that was recognised by the children.

That view is strengthened when there is added to the fact I have mentioned the further facts that, during all that time, the respondent has treated and dealt with the land as her own, has had it assessed in the name of herself or of her husband as owner, has paid the taxes, has made the improvements on the property at a cost of $700 or $800—very nearly three-quarters of the present value of the property—and has, mainly by using her $200 of life insurance money and from the proceeds of her own labour, and partly with money obtained from her present husband, paid off a mortgage on the property which existed when McNab died, as well as paid the interest on it for many years; and that at no time has she kept any account of her receipts and expenditures, believing, as she did, that what she was receiving was her own and what she was expending was being expended for her own benefit.

The facts of the case in *In re Maguire and M'Clelland's Contract*, [1907] 1 I. R. 393, referred to by the Chief Justice, bear a close resemblance to the facts of the case at bar, though there is the difference between them that in the Irish case the children left the parental roof, one of them to go into a convent and the others to go to the United States of America; while, in the case at bar, the children were taken by the mother to Dubuque and left there when she returned to Canada in March, 1895. The appellants had not then attained their majority, but one of them arrived at the age of twenty-one on the 5th December, 1901, and the other on the 14th December, 1904. It is not stated in the report of the Irish case whether, when the children left the parental roof, they or any of them had attained their majority.

I was much struck with the observations of the Chancellor (Sir Samuel Walker) that "according, however, to the argument of Mr. Horner" (i.e., the counsel for the purchaser who was objecting to the title), "a title never could be made, even after the

lapse of fifty years or more, under the Statute of Limitations, because the children were minors at the date of the father's death. There is no case that so decides; the cases shew that the relationship of principal and agent will be dissolved by circumstances; the attaining of twenty-one years of age by the children is not enough in itself to dissolve the relationship, provided there is no break; but here the children left the place a long time ago; no claim has ever been put forward by any of them; and I am of opinion that those facts constitute a sufficient break in the possession to dissolve the relationship of principal and agent or guardian and ward" (p. 400).

Accepting, as I do, this as a correct statement of the law, I am of opinion that there was, on the facts of this case, a sufficient break in the possession to dissolve the relationship of principal and agent, bailiff, or guardian and ward, that existed between the respondent and the appellants, and that the judgment of the Chief Justice should be affirmed and the appeal be dismissed with costs.

The judgment may be supported on another ground. The right of the appellants to treat the respondent in respect to her possession as bailiff for them rests upon equitable principles; and, in the circumstances of the case which I have mentioned, they are, I think, precluded by their acts and conduct from invoking the equitable doctrine upon which they rely. They all along, at all events after having arrived at years of discretion, knew that the respondent was treating and dealing with the property as her own, that she was at her own expense improving it, and that she was paying off the incumbrances upon it with her own money, and they made no objection to her doing all this, although they must have known that she was doing it under the belief that she was the owner of the property and doing it not for the benefit of the children but of herself.

The principle which was applied by the Judicial Committee of the Privy Council in *Snider* v. *Carleton*, 25 D.L.R. 410, 35 O.L.R. 246, [1916] A.C. 266, *sub nom. Central Trust and Safe Deposit Co.* v. *Snider*, is, in my, opinion, applicable, and the appellants cannot be heard in a Court of Equity to say that the respondent's posesssion was, in the eye of that Court, their possession.

In parting with the case, I cannot refrain from expressing my regret that a very expensive litigation has been entered upon about

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FRY AND MOORE v. SPEARE.

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a piece of property which, with the improvements the respondent has made, is not worth more than $1,200, and the interest of the appellants in which is not worth, after deducting the respondent's share, more than $360, to say nothing of the long and expensive inquiry that, if the appellants had succeeded, would have been necessary to ascertain the state of the account between them and the respondent after allowing to her the value of the improvements she has made and the money she expended in paying off the mortgage, the result of which probably would have been to give to the appellants but a barren victory over their stepmother, owing to whose struggles and exertions, and to them alone, is due the fact that any part of her first husband's property remains to be fought over. *Appeal dismissed.*

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The KING v. FIELDS.

Alberta Supreme Court, Hyndman, J. September 27, 1916.

MANDAMUS (§ I B—5)—JUDICIAL ACT—PENALTY ILLEGALLY IMPOSED.

Mandamus does not lie to compel a magistrate, acting within his judicial capacity, to reverse his decision as regards a penalty he imposed not in accordance with statute.

[*R.* v. *Wong Tun*, 28 D.L.R. 698, 26 Can. Cr. Cas. 8; *R.* v. *Case*, 7 Can. Cr. Cas. 204, followed.]

Statement.

APPLICATION by D. W. McDonald registrar-treasurer of the Pharmaceutical Association of Alberta, for a mandamus to compel P. C. H. Primrose, Police Magistrate for the City of Edmonton, to impose upon the defendant Fields a fine of $20 instead of $5 already imposed by the said magistrate. Dismissed.

J. K. McDonald for applicant.

S. A. Dickson, for defendant.

Hyndman, J.

HYNDMAN, J.:—As disclosed in the affidavit of the said D. W. McDonald, on July 12, 1916, three charges under the Alberta Pharmaceutical Association Act, being ch. 38 of the statutes of 1910 (2nd sess.), were laid against the defendant, namely for (a) selling poison to a person unknown to him, and (b) selling poison without making any record thereof, and (c) advertising as a druggist without being registered as such. The three charges were tried together and after hearing the evidence and arguments of counsel, the defendant was convicted and fined $5 and costs. That immediately after the said police magistrate announced his decision his attention was called by counsel for the association

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to the provisions of sec. 33 of said Act, but the magistrate refused to alter his decision as to the amount of the penalty.

It will be noticed that the informant in the prosecution was W. M. Campbell and not Mr. McDonald. Mr. Dickson took the preliminary objection that the applicant for the mandamus was not the prosecutor and therefore had no *locus standi* in the prosecution.

Sec. 33 of said Act reads as follows:—

Any person violating any of the provisions of this Act, shall for the first offence incur a penalty of twenty dollars and costs of prosecution, and for each offence committed subsequent to such conviction, a penalty of fifty dollars and costs of prosecution, to be recovered in a summary manner under the provisions of the Criminal Code of Canada.

The applicant says that the police magistrate should have imposed a penalty of $20 instead of $5, and he asks that a mandamus do issue calling upon him to do what applicant contends it was his duty to do.

Mr. Dickson argues that this is not a proper case for mandamus inasmuch as the magistrate throughout, including the fixing of the penalty, was acting in his judicial, not ministerial capacity. The decision seems to bear out this contention. The case of *The King* v. *Case* (No. 1), 7 Can. Cr. Cas. 204, is entirely similar to this one. In that case the magistrate imposed a penalty of $50 and costs or 6 months in goal with hard labour, and the prosecutor applied for a mandamus to compel the magistrate to impose a penalty of $400 and imprisonment for one year. The judgment of Britton, J., is very enlightening on the subject, and it is unnecessary for me to repeat what he has said.

See also *King* v. *Wong Tun*, decided in our own Appellate Division, February 19, 1916, 28 D.L.R. 698, 26 Can. Cr. Cas. 8, referring to *Reg.* v. *Adamson*, 1 Q.B.D. 205; *R.* v. *Justices of Kingston* (1902), 86 L.T., N.S. 591.

On the authority of the above decisions I think this application should be dismissed with costs. *Application dismissed.*

Re ELLIOTT v. McLENNAN.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. April 14, 1916.

CERTIORARI (§ I A—1)—MINISTERIAL IRREGULARITIES—RIGHT OF APPEAL.

Certiorari will not lie to remove a ministerial act; consequently it will not be granted to quash an examination for discovery where the issue is irrelevant, and the special examiner has neither jurisdiction nor authority; if the examination be used in an action, the remedy is by

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appeal; any irregularity in County Court proceedings should be brought to the notice of that Court, not to the Appellate Division.

APPEAL from the judgment of Britton, J., dismissing a motion by solicitor, in an action in the County Court, for a writ of *certiorari* to remove into the Supreme Court of Ontario the examination of the plaintiff taken for discovery in that action. Affirmed.

The judgment appealed from is as follows:

I am of the opinion that *certiorari* will not lie upon the facts now presented. The case of *Rex* v. *Woodhouse*, [1906] 2 K.B. 501, where the whole subject is fully dealt with, is not authority for *certiorari* in a case like this.

The object of the motion for a *certiorari* is to get rid of the judgment. The argument is that, the answers to the questions put to the plaintiff by counsel being the only evidence, there will be nothing upon which the judgment can rest, and the plaintiff will be at liberty to go to trial.

The learned County Court Judge dismissed the action. It is said he did so for alleged reasons that were none in fact. It is said there was no power on examination for discovery to elicit, and particularly by the defendants' solicitor, in the absence of the plaintiff's solicitor, the alleged fact that the plaintiff did not authorise the bringing of the action. Upon principle, I see no difference, apart from collusion between the plaintiff and the defendants' solicitor such as is alleged, and which, if proved, cannot be too strongly censured—I see no difference from the case of deciding upon improper evidence.

The rejection of proper evidence and the admission of improper evidence are grounds of appeal. The law is quite clear that the plaintiff had the right of appeal subject to complying with the law as to time, notice, and other prescribed terms. Where there is such right of appeal, the *certiorari* ought not to be granted.

Certiorari is prohibited in cases of summary conviction where the right of appeal is granted.

J. B. Mackenzie, the appellant, in person.

J. M. Ferguson, for defendants.

Riddell, J.

RIDDELL, J.:—This is an action *qui tam* in the County Court of the County of York.

The plaintiff was examined before John Bruce, Esq., Special Examiner, for discovery: on his examination he said he had not

instructed the action to be brought. At the trial, this statement was read, whereupon the learned County Court Judge dismissed the action: no appeal has been taken from this decision.

Mr. Mackenzie, who acted as solicitor for the plaintiff in the County Court, is naturally indignant at the plaintiff's statement reflecting as he thinks upon his professional honour; and he moved before Mr. Justice Britton for a *certiorari* to bring into the Supreme Court the obnoxious examination "for the purpose of being quashed."

My learned brother refused the motion, and Mr. Mackenzie appealed to this Court, joining in his motion a substantive motion for a *certiorari*. As the same considerations govern this additional motion as the appeal, I treat them together.

There is no pretence that our legislation, the County Courts Acts, etc., is of assistance to the applicant—these Acts might hamper, they cannot assist—and the application is merely as at the common law.

The two grounds alleged in the original notice of motion are: (1) that the examination dealt with an irrelevant issue; and (2) Mr. Bruce (the Special Examiner) had no jurisdiction to take the examination, as the plaintiff resided in the county of Ontario, and his solicitor had not given consent to an examination in this county.

For the purpose of this judgment, I propose to take it for granted that both grounds express a correct view of the law, i. e., that the examination was on an irrelevant issue (though I am appalled when I think of the percentage of examinations for discovery which might be quashed were this a good ground for quashing), and that Mr. Bruce had no authority for holding the examination: Rule 345 (1); *Maclean* v. *James Bay R. W. Co.* (1905), 5 O.W.R. 440; *Dryden* v. *Smith* (1897), 17 P.R. 500.

Yet I cannot but think that the application has been made without full consideration of the real functions of *certiorari* and the rules which the Court has laid down for its own guidance and the limitation of its activities. The writ is a most valuable one, and the power to grant it could not be abdicated without danger to the administration of justice; but the power is not to be exercised in every case in which an applicant thinks it would or might advantage him.

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The nature and objects of "*certiorari*" are so fully discussed in the judgment of the Appellate Division in *Rex* v. *Titchmarsh* (1914), 22 D.L.R. 272, 32 O.L.R. 569, that it is unnecessary again to dilate upon them—it is sufficient to quote one sentence: "The theory is that the Sovereign has been appealed to by some one of his subjects who complains of an injustice done him in an inferior Court; whereupon the Sovereign, saying that he wishes to be informed—*certiorari*—of the matter, orders that the record etc. be transmitted into a Court where he is sitting."

That Court at the common law is the Court of King's Bench—all the powers of the English Court of King's Bench were for this Province vested in the Court of King's Bench for the Province of Upper Canada by the Provincial Act of 1794, 34 Geo. III. ch. 2, sec. 1—and by several Acts of the Legislature these powers were continued and are now in the Supreme Court of Ontario.

There are many difficulties in the applicant's way—more than one, in my view, most serious. I do not propose to go into all of them; it will suffice here to mention one which lies at the threshold and is fatal.

The jurisdiction to grant *certiorari* is and always has been jealously preserved; but the Court, while insisting on its power, has been careful to observe the limits within which it will be exercised.

As early as 1751, in Michaelmas Term, 25 Geo. II., it was decided by the Court of King's Bench that nothing but a judicial act will be removed by *certiorari*. The remedy against an offender for a wrongful ministerial act is by action: *The King* v. *Lediard* (1751), Sayer 6.

This was followed in *Rex* v. *Lloyd* (1783), Caldecott 309, in which Mr. Justice Buller (than whom there never was a greater master of the common law) says: "It is settled in the case of *The King* v. *Lediard* that a *certiorari* does not lie to remove any other than judicial acts." That the examination was wholly illegal in the present case is shewn by *Rex* v. *Lloyd* to be immaterial—"Bower (counsel for the applicant, who had obtained a rule to shew cause) urged that this act of the Sessions was clearly illegal . . . The Court admitted this . . . but did not change the determination to discharge the rule."

These cases are considered and followed in *Rex* v. *Woodhouse*, [1906] 2 K.B. 501, by Vaughan-Williams, L.J., p. 512. It is

true that the decision of the Court of Appeal was reversed in Dom. Proc., *sub nom. Lord Mayor, etc., of Leeds* v. *Ryder*, [1907] A.C. 420, but it was not suggested that the law in these cases was not sound. All the cases of importance are considered in one or other of the judgments in the case just cited—and the result is plain that *certiorari* will not lie to remove any but a judicial act.

In the present case what is to be removed is a mere ministerial act of an officer of the Court—that he had no authority to do this act (if such is the case) is immaterial.

It may be contended that we have power to remove the record with the judicial act of dismissal of the action, and that on such removal the obnoxious examination will be transmitted also to this Court. That the examination would come up with the record I do not determine—but, granting that this is the case, the applicant is not advanced.

Aside from other difficulties, the Court will not remove a record upon which it cannot proceed.

There has only been one instance in which a contrary rule was followed, and that in the evil days when the King was actually a ruler, when he took a personal interest in his Courts, and when a *supersedeas* might be confidently expected by a Judge bold enough to act contrary to His Majesty's wishes. James, Duke of York, afterwards James II., King of England (James VII. of Scotland), was, in the reign of his brother Charles II., presented by the Grand Jury at the Quarter Sessions under the statute 3 Jac. I. ch. 4, for not going to church (i.e., the established Church of England, for he attended his own, the Roman Catholic, church faithfully enough.) This was part of the long and violent struggle to exclude him from the succession to the Crown, which failed through the firmness of the King. The presentment was removed on *certiorari* into the King's Bench, and nothing more was heard of it—this order of the Court was rather political than judicial, and has been uniformly and consistently condemned.

The first reported case in which this decision was considered is *Dr. Sands' Case* (1690), 1 Salk. 145, in which Holt, C.J., speaking for the Court, expressly disapproves the Duke of York's Case and indicates the rule I have stated.

We could do nothing with the judgment if we had it before us

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—there is no appeal taken, and the judgment is the judgment of a Court of competent jurisdiction, properly seized of the case.

It would be impossible for us to order this record to be removed, and we cannot bring up the examination by itself.

There is another consideration which should be weighed, even if other difficulties were out of the way.

It is pointed out in *Re Aaron Erb* (1908), 16 O.L.R. 597, that after judgment there is always a judicial discretion to grant or refuse a *certiorari*. In the present case I cannot understand what advantage there would be to have the examination before this Court. Everything is in the County Court of the County of York; and that Court has the same power over the proceedings now as we should have were they here. Any application which could be made in the Supreme Court can be made in the County Court—and I venture to think the latter the proper tribunal.

Nor am I able to see any advantage to be gained by an application to quash the examination, even if successful.

So far as the judgment is concerned, the examination has done its work, and that cannot be undone—if it is proposed to punish the examiner for his alleged excess of power, the examination in existence will be more useful than the examination quashed—or at least as useful.

Mr. Mackenzie contends or suggests that it might hamper him in his efforts to recover his costs from the plaintiff—but I cannot follow that argument. If the plaintiff is sued, his evidence before the examiner cannot be used for him: if Mr. Mackenzie wishes to make use of it, he may use it as a statement of his client, but he need not—his rights would not become greater by quashing the examination.

The dispute by client of retainer is too common to call for remark—so common is it that a general rule has been adopted by the Courts to cover the case. It is rare that there is a direct contradiction of fact, often there has been a misunderstanding, between the solicitor and his supposed client, and not seldom a view occasioned by the desire of an unsuccessful litigant to get out of paying the costs. Paying for a dead horse is proverbially unpleasant. The Courts have laid down the rule that, if there be nothing more in the case than the word of the solicitor against the word of the person he alleges to be his client, the word of the latter is to be taken—accordingly the prudent solicitor takes his

retainers in writing. Most of those who would refuse to sign a written retainer either do not have much wish to go to law or intend to beat the solicitor out of his costs if they should be called upon to pay them.

Erskine is said once to have told a jury "the reputation of a cheesemonger in the city of London is like the bloom upon a peach. Breathe on it—and it is gone for ever!!" In view of the frequency of clients repudiating their retainers, it cannot be said that the evidence of the plaintiff will produce any appreciable damage to the solicitor, however exasperating it may be.

I think on all grounds the appeal fails, and it, with the substantive motion, must be dismissed with costs.

Lennox and Masten, JJ., concurred.

Lennox, J.
Masten, J.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.—Mr. Mackenzie's indignation, as a solicitor, at having his retainer, in a County Court action, repudiated, has got the better of his judgment as a member of the Bar, and brought him into the wrong Court seeking redress; that I quite understood him, at the conclusion of his argument of this appeal, to admit; but, whether admitted or not, it is quite too plain to be the subject of any kind of doubt, that is, as to his being in the wrong Court.

If there were any irregularity or impropriety in any of the proceedings in the action in the County Court, any motion respecting them should be made in that Court, which is a court of record, having the same practice, and, generally speaking, the same power, in all cases within its jurisdiction, as the High Court Division of this Court has in cases within its jurisdiction, with ample right of appeal, from each Court, directly to this Court.

Whether the proceedings in the County Court were regular or irregular, and whether either solicitor was or was not retained in it, the action is the action of the parties, not of the solicitor, and they may discharge, or repudiate, solicitors, and carry on, or end, the action as they see fit, subject to this: that, if there be collusion between them, for the purpose of defeating a solicitor's right to costs, the Court can, at the instance of the solicitor, interfere to prevent that purpose being carried into effect.

The solicitor's way is a plain one, leading not to this Court, but to the Division or the County Court. He may render his bill of costs, and, in due course, sue for the amount of it in the proper Court, no doubt the Division Court; or, if he charge

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collusion, by the defendants with the plaintiff, to deprive him of his costs in the action, he may apply to the County Court, in a summary manner, for an order for payment of them by them.

Britton, J., properly dismissed the application to him, a writ of *certiorari* being out of the question; and this appeal must meet with the same fate. *Appeal dismissed.*

B. C.

C. A.

BUSCOMBE v. STARK.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ.A. October 3, 1916.

LANDLORD AND TENANT (§ II B I—11)—COVENANT TO RESTORE IN ORIGINAL CONDITION—BREACH—MEASURE OF DAMAGES.

Breach of covenant by a lessee to restore the demised premises to their original condition, after structural changes had been made by him, renders him liable to the lessor for the estimated costs of restoration regardless whether the costs were or ever will be actually incurred.

[*Joyner* v. *Weeks*, [1891] 2 Q.B. 31, followed.]

Statement.

APPEAL by defendant from the judgment of Hunter, C.J.B.C., dated December 17, 1915. Affirmed.

Harris, K.C., for appellant.

Douglas Armour, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This case is not distinguishable in principle from *Joyner* v. *Weeks*, [1891] 2 Q.B. 31, referred to with approval by Haldane, L.C., in *British &c.* v. *Underground &c.*, [1912] A.C. 673 at p. 691.

There is, in my opinion, no real distinction, in so far as it affects the particular matter, between a covenant to repair and one to replace. In this case the lessee was permitted to change the shop front, but covenanted to put it back into its original condition at the end of the term if requested by the landlord to do so. The only contention made by appellant's counsel, which is not covered by the authorities above referred to, is this: they say the defendant was not notified to replace the shop front until after the expiration of the term. They concede only respondent's right to elect before the expiration of the term, and say that as she did not do so her right of election was lost. It is not necessary in this case to decide that question of law as it is plain from the correspondence that an arrangement was made between the parties that the shop front should be left as it was until it should be seen whether the new tenant would be satisfied with it. The time for election was by this arrangement enlarged, and the right was not lost.

I would dismiss the appeal.

MARTIN, J.A.:—In my opinion this covenant is in principle one to repair by restoring. The alterations authorised by the lease involved the partial destruction of the premises, which is waste at common law, and I regard the covenant as equivalent to a special one to repair and the damages for breach thereof come within *Joyner* v. *Weeks*, [1891] 2 Q.B. 31. The case is quite distinct from *Wigsell* v. *School for Blind*, 8 Q.B.D. 357, which was an action on a covenant to build a new wall round a piece of property purchased by the defendant corporation. In certain cases, where the lease contemplates them, the making of such alterations as enlarging windows, opening external doors and removing partitions do not amount to a breach of covenant to repair, *Doe d. Dalton* v. *Jones* (1832), 4 B. & Ad. 126, 110 E.R. 403, but here acts of that nature are specially provided for. The position is analogous to a covenant to leave in repair under which the landlord is entitled to the cost of repairs, and, as Cave, J., said, "none the less so because in fact the landlord ultimately resolved to pull the house down," *Inderwick* v. *Leech* (1884) 1 T.L.R. 484; and *cf. Rawlings* v. *Morgan*, 18 C.B.N.S. 776.

Martin, J.A.

McPHILLIPS, J.A.:—This is a case between lessor and lessee—and an action for the breach of a covenant by the lessee. The covenant being that the lessee would at the expiration of the lease—if required by the lessor—restore the gallery and show windows to their condition as at the date of the demise. Structural changes were made in the shop premises and although the request was made the restoration to the original condition was not carried out. The action went to trial before Hunter, C.J.B.C., and judgment was entered for the respondent (the lessor) for the amount which would affect the restoration called for by the covenant. The appellant's (the lessee's) counsel very ably advanced the argument that the true measure of damages was not what it would cost to restore the shop premises in their original condition but what (if any) depreciation to the shop premises there was by the non-performance of the covenant. That in fact the premises were improved in value rather than depreciated, that the rentable value was increased rather than decreased, and pointed to some observations of the Chief Justice upon this head. Upon careful consideration of the law governing in the matter and in particular the case of *Wigsell* v. *School for the Blind*, 8 Q.B.D. 357, upon which the counsel for the appellant amongst other cases relied,

McPhillips, J.A.

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I am of the opinion that the decision in the Court of Appeal in *Joyner* v. *Weeks*, [1891] 2 Q.B. 31, is conclusive.

With respect to the argument advanced that it is improbable, in fact, may almost be taken for granted that the respondent will not restore the shop premises as called for in the covenant—that in my opinion in no way meets the breach of covenant. The covenant was made and it is to be performed; in the present case there are no facts to enquire into which would entitle consideration or relief from the terms of the covenant.

In the present case the respondent is the freeholder and she is entitled to have the covenant performed; what she may do with the shop premises it does not occur to me matters: *Conquest* v. *Ebbetts*, [1896] A.C. 490, 65 L.J. Ch. 808, at 810; *British Westinghouse Electric* v. *Underground Electric R. Co.*, [1912] A.C. 673, at 691, *Joyner* v. *Weeks*, *supra*.

Were it open to view the appeal unfettered by authority, it is indeed questionable if complete justice would be accomplished in saying that no damages have been proved, *i.e.*, that the shop premises have by the changes made been increased in value rather than depreciated. There is no certainty that this is the true situation—the shop premises at the time of the trial were unlet and it might result that the restoration of the premises to their previous condition or other equally onerous changes may be necessary to bring about the reletting thereof. It is preferable that the principles of law be adhered to and that there be as much certainty as possible in exacting compliance with matters of contract. It is true that in the application of principles, in what is after all the inexact science of law, there may be at times seeming instances of injustice, yet to enter into fields of speculation as to the probable subsequent happenings is to render nugatory the solemnity and responsibility of contract. Parties to contracts (where there is no fraud or misrepresentation) cannot complain if they are held to them.

I would dismiss the appeal. *Appeal dismissed.*

QUE.
K. B.

McDONALD v. THE KING.

Quebec King's Bench, Sir Horace Archambeault, C.J., and Lavergne, Cross, Carroll and Pelletier, JJ. March 6, 1916.

1. DEPOSITIONS (§ III—14)—AUTHENTICATION—PRELIMINARY ENQUIRY.
It is not necessary that the deposition of each witness on a preliminary enquiry should be separately certified; all may be included in one certificate.

2. DEPOSITIONS (§ III—14)—PRELIMINARY ENQUIRY—APPOINTING A STENOGRAPHER.

The fact that the stenographer appointed by the justice to take down the depositions on a preliminary enquiry was duly sworn (Cr. Code sec. 683, as amended 1913), may be proved by the justice's certificate, although the stenographer did not sign the oath.

3. DEPOSITIONS (§ III—14)—CRIMINAL PROCEEDINGS—READING SHORTHAND NOTES OF DEPOSITIONS TO ACCUSED.

The reading of the depositions on the part of the prosecution to the accused on the preliminary enquiry in conformity with Cr. Code sec. 684, may be proceeded with from the shorthand notes without the delay incident to transcribing them.

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McDONALD v. THE KING.

MOTION for leave to appeal from a conviction on indictment for setting fire to a railway car. The various grounds on which the motion was based are set out in the following opinion handed down by Cross, J. Statement.

An indictment was found by the Grand Jury for the district of St. Francis against the appellant, on October 5, 1915, for having unlawfully and wilfully set fire to a railway car, the property of the Grand Trunk Railway Company. Before any plea was produced, a motion was presented by the accused to quash this indictment. On the 13th of October following, this motion was dismissed by the Court of King's Bench for the district of St. Francis. The accused was found guilty.

The trial Court having refused a reserved case, the accused presented a motion to the Court of King's Bench, at Montreal, for leave to appeal.

J. C. Walsh, K.C., for the accused.

J. Nicol, K.C., and *A. C. Hanson*, for the Crown.

The opinion of the Court was delivered by

CROSS, J.:—The grounds for the petition for leave to appeal, not abandoned at the hearing, are in substance that the indictment should have been quashed on the petitioner's application before trial because he had not been lawfully committed for trial, inasmuch as, firstly, the stenographer was not duly sworn; secondly, the transcript of each deposition of the evidence was not signed by the justice; thirdly, that the accused was not lawfully called upon for voluntary statement under sec. 684, inasmuch as the evidence had not yet been transcribed when he was so called upon. Cross, J.

Upon the first objection, the certificate of the justice establishing that the oath was taken by the stenographer was shewn to us at the hearing and establishes that the oath was taken.

That certificate makes proof notwithstanding that the steno-

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grapher did not himself sign the oath. The first ground of objection is consequently not made out.

The second objection rests upon the pretension that there should be a certificate signed by the Justice on each deposition. That however is unnecessary. Provision is in fact made for a form of certificate applicable to a number of witnesses whose names can all be put in the heading. That course—a common one in practice—was followed by the justice in this case. The second objection is therefore not well taken.

The third objection rests upon the pretension that an accused person cannot be asked if he wishes the depositions to be read again unless the depositions have then already been signed.

In our opinion, when the evidence has been taken in shorthand, the accused party can lawfully be asked if he wishes the depositions to be read again before the stenographer's transcript has been made. In such a case, sec. 684 is sufficiently complied with, if when the justice asks the accused whether he wishes the depositions to be read again, he has the stenographer in attendance with his note-book ready to do the reading, even if the depositions have not yet been transcribed, though of course we do not say that the accused may not ask to have the transcript made before he is called upon for the statement. I consider (speaking in this regard for myself) that the accused party can dispense with the entire proceeding of preliminary inquiry. The third objection is also unfounded.

It appears that the defendant was indicted for commission of the offence described in the commitment, and, though we have passed upon the merits of the objections above mentioned, we are not to be understood as holding that, even if these objections had been founded in fact, the indictment ought in such a case to have been quashed.

The preliminary inquiry must no doubt be conducted in the prescribed way, but it is not part of the trial. The object of it is to provide against vexatious indictment. The petition is dismissed. ——— *Leave to appeal refused.*

MAN.

C. A.

TAYLOR v. STEELE.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron, and Haggart, JJ.A. July 10, 1916.

PLEADING (§ I T—150)—RIGHT TO DISMISSAL—IRREGULARITIES IN SERVICE—"FRESH STEP"—WAIVER.

A demand for particulars by defendant is not a "fresh step" within the meaning of rule 364 (King's Bench Act, R.S.M. 1913, ch. 46), and,

therefore, does not operate as a waiver by the defendant of his right to have the action dismissed for any irregularities in service of the statement of claim.

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APPEAL from an order of Curran, J., reversing the order of the Referee in Chambers. Affirmed.

H. A. Bergman, for appellant.

E. Bailey Fisher, for respondent.

HOWELL, C.J.M., RICHARDS, and PERDUE, JJ.A., concurred with CAMERON, J.A.

Howell, C.J.M. Richards, J.A. Perdue, J.A.

CAMERON, J.A.:—This is an appeal from an order made by Curran, J., May 16, 1916, setting aside an order of the Referee, made April 4, 1916, dismissing a motion of the defendant to set aside the statement of claim and the service thereof and allowing a motion of the plaintiffs to renew the statement of claim and extending the time for the service thereof until June 1, 1916.

Cameron, J.A.

The point was taken that the demand for particulars was a "fresh step" within r. 364, and therefore a waiver of the irregularity. I agree with the view taken by Curran, J., that it was not so. The decision cited by him of Kekewich, J., in *Ives* v. *Willans*, [1894] 1 Ch. 68, seems directly in point. See also Stroud, Judicial Dictionary, 2nd ed., p. 1935, and the authorities there referred to

With reference to the application to extend the time to serve and homologating the service already made, inasmuch as the effect of an order made allowing it would be to deprive the defendant of the right to plead the Statute of Limitations, I can see no reason for differing from the conclusion of the Judge. The plaintiffs have entirely failed to make out a case for relief. The fact is they deliberately allowed the time to pass by because they thought that from a financial point of view, it was inadvisable or altogether useless to go to further trouble or expense in the action. In my opinion the appeal must be dismissed with costs.

HAGGART, J.A.:—An application was made by the defendant for an order setting aside the statement of claim and the service thereof on the ground that the service was not effected within six months from the date of the statement of claim as required by r. 176 of the King's Bench Act. A cross application was made by the plaintiffs asking for the renewal of the statement of claim, the extension of time for service and for the homologating and validating of the service theretofore made. The referee heard

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both motions together and ordered that the defendant's motion should be dismissed, that the time should be extended, and that the service already made should be homologated and validated. Curran, J., allowed the appeal, set aside the order of the referee and ordered that the service of the statement of claim should be set aside. The plaintiffs now appeal to this Court asking for the reversal of the Judge's order and the restoring of that of the referee.

There is no dispute as to the material facts. The note sued on became due on February 4, 1909. The statement of claim was issued on February 1, 1915, and served on the defendant on February 11, 1916.

If the statement of claim and service is set aside and the plaintiffs are compelled to commence a new action their cause of action becomes barred by the Statute of Limitations.

The plaintiffs urge that the demand made for particulars by the defendant a few days after the service of the statement of claim and the complying with such demand was a step in the cause within the meaning of r. 364; that the service was merely an irregularity and that such irregularity was waived and further that the referee in making the order exercised a discretion and that the Judge erred in interfering with that discretion.

As to the plaintiffs' contention that the service of the demand was a fresh step in the cause, I agree with the conclusion arrived at by Curran, J. The step taken must be an operative and effective one: An. Pr. 1916, p. 1344.

In *Rein* v. *Stein*, [1892] 1 Q.B. 753, 66 L.T.R. 469, Cave, J., says:—

> With regard to the application here to see the documents which were mentioned in the affidavit, that is the affidavit upon which leave to issue the writ was obtained, it would be impossible to say that an application for leave to see these documents amounted to any indication that there had been a waiver of the objection to the writ. On the contrary, it rather leads to shew the reverse. . . . He did no more, it seems to me, than he had a right to do, that is to say, take steps to procure a sight of the affidavit which he had got to answer and upon which the leave to issue the writ had been obtained.

Here the defendant wanted to see the note which was the cause of action. Here no papers were filed. No official of the Court had anything to do with the proceeding directly or indirectly. There could be no inference drawn from this action

that it was the intention of the defendant to waive any right. There was not even a paper put upon the files of the Court. The suit was no nearer the issue than it was before the request was made.

I do not think the demand and the compliance therewith was a step in the cause within the meaning of the rule.

I also agree with Curran, J., when he refuses the relief asked by the plaintiffs which would cut out the defence of the Statute of Limitations. Judicial opinions as to the ethics of using the Statute of Limitations are not along the same line. Lord St. Leonards, in *Trustees* v. *Dugald* (1852), 1 Macq. H.L. at p. 321, says:—

> All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost, and in all well regulated countries the quieting of possession is held an important point of policy.

Lord Kenyon describes them as "statutes of repose." Bramwell, B., spoke of them as "statutes of peace."

There are judicial intimations, however, of a contrary opinion. In *Re Baker*, [1890] 44 Ch. D. 262, at 270, Cotton, L.J., went so far as to say that the plea of the statute was never looked upon with any favour, and Lindley, J., in *Stamford Banking Co.* v. *Smith*, [1892] 1 Q.B. 765, spoke of the case before the Court as "one of the few cases in which the Statute of Limitations comes in aid of an honest defence."

I do not think it is necessary to say more than that both parties when they entered into the obligation which is here sought to be enforced knew that after the lapse of a certain time Courts were not open to either of them.

In *Hewett* v. *Barr*, [1891] 1 Q.B. 98, it was held by the Court of Appeal that the rule of practice is not to extend the time for renewal of a writ of summons after the expiration of the 12 months from the date of the writ where the plaintiff's claim would, in the absence of such renewal, be barred by the Statute of Limitations. It is intimated, however, that there might be a discretion to extend the time under very exceptional circumstances. And Lord Esher, M.R., at p. 99, thus discusses the proposition:—

> It has been laid down in *Weldon* v. *Neal*, 19 Q.B.D. 394, as a general rule of conduct with regard to the granting of amendments, that they ought not to be granted where they would have the effect of altering the existing rights of the parties. This being the rule with regard to amendments of pleadings,

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the same principle applies still more strongly to the case where we are asked to allow the renewal of a writ, though by so doing we should deprive the defendant of his existing right to the benefit of the Statute of Limitations.

In Ontario, in the case of *Mair* v. *Cameron*, 18 P.R. (Ont.), 484, it was held that where orders were made from time to time renewing a writ of summons, and it appeared that the plaintiff all the time knew, but did not disclose, where the defendant could be served, and the Statute of Limitations had, but for the renewals, barred the plaintiff's claim, the orders were rescinded upon an application by the defendant after the orders had come to his notice.

It is possible the Court may have an inherent power to validate and homologate the service, but the facts do not bring this case within r. 274 of the King's Bench Act. That rule authorizes the Judge to order substitutional service or other service "in such manner as shall seem just and right," and then the rule goes on to say, "and any previous service *so made* may be homologated by a subsequent order." What the referee assumed to homologate was not under any previous order.

I think Curran, J., was right in allowing the appeal and discharging the order of the referee. *Appeal dismissed.*

ONT.

S. C.

KENNEDY v. SUYDAM.

Ontario Supreme Court, Middleton, J. April 13, 1916.

1. EXECUTORS AND ADMINISTRATORS (§ II A 2—30)—POWER OF SALE—RULE OF PERPETUITIES—DEVOLUTION OF ESTATE.

The power given to an executor by the Trustee Act, R.S.O. 1897, ch. 129, sec. 16, to sell real estate to pay a legacy for payment of which no express provision is made, is not cut down by the Devolution of Estates Act, R.S.O., 1914, ch. 119.

A power of sale expressly conferred by a will does not fail merely because the use to which the fund is to be put offends against the rule as to perpetuities; in such an event the fund goes to those who would take upon an intestacy.

2. JUDGMENT (§ II D 5—130)—RES JUDICATA—CONCLUSIVENESS AS TO EXECUTOR'S POWER OF SALE.

A judgment determines every right, question, or fact distinctly put in issue as a ground of recovery or defence, and all matters which ought to have been brought forward as part of the controversy. A judgment by which an executor was ordered to make a sale is conclusive as to his power of sale though not expressly adjudicated.

[*Kennedy* v. *Kennedy*, 3 D.L.R. 356, 11 D.L.R. 328, 13 D.L.R. 707; *Kennedy* v. *Kennedy*, 24 O.L.R. 183; *Foxwell* v. *Kennedy*, 24 O.L.R., 189, referred to.]

Statement.

ACTION to set aside a sale of land by an executor to the defendant company. Dismissed.

J. H. Fraser, for plaintiff.

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Middleton, J.

I. F. Hellmuth, K.C., for the defendants Henry Suydam and the Suydam Realty Company Limited.

E. D. Armour, K.C., and *W. H. Clipsham*, for the defendants the Toronto Development Company.

MIDDLETON, J.:—This action is the last of a long series in connection with the estate of the late David Kennedy. The question raised is of importance, and it is singular that in none of the numerous judgments that have been pronounced is there any clear expression of opinion concerning the precise matter which is now raised.*

David Kennedy died on the 17th February, 1906. By his will, dated the 4th July, 1903, he appointed his son James H. Kennedy, his granddaughter Gertrude Foxwell, and Annie Hamilton, executors. The two last named having renounced, probate was granted to James H. Kennedy alone.

By the will the testator gave to James H. Kennedy his dwelling-house; and, after making certain provisions for different members of his family, which are not now material, he directed that out of his estate there should be paid to his son David the sum of $400 per annum during the term of his natural life, adding: "I hereby charge my estate with this annuity in favour of my said son David." This provision is followed by a number of further provisions for other members of the family, which are also now immaterial. Then follows the residuary clause, which has given rise to much controversy:—

"The rest residue and remainder of my estate both real and personal I give devise and bequeath to my executor executrices and trustees aforesaid to be used and employed by them in their discretion or in the discretion of a majority of them in so far as it may go to the maintenance and keeping up my house and premises herein bequeathed to my son James Harold Kennedy with full power and authority to them to make sales of any real estate upon such terms and conditions and otherwise as may be expedient and to execute all deeds documents and other papers necessary for the sale of same and to make title thereto to any purchaser thereof and the proceeds of such sale to devote as in

* See *Kennedy* v. *Kennedy*, 3 D.L.R. 536, 11 D.L.R. 328, 13 D.L.R. 707, *Kennedy* v. *Kennedy* (1911), 24 O.L.R. 183; *Foxwell* v. *Kennedy* (1911), 24 O.L.R. 189.

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their discretion or in the discretion of a majority of them may seem meet and necessary to keep up and maintain my said residence in the manner in which it has been heretofore kept and maintained and if for any reason it should be necessary that the said residence should be sold and disposed of I direct upon such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will."

After the death of the testator, there was litigation as to the validity of this will and as to the validity of certain deeds, covering a large portion of the testator's property, made by his son James in assumed pursuance of powers conferred upon him by a power of attorney executed by his father. These contentions were disposed of by Mr. Justice Anglin, who set aside the conveyances, upheld the will, and directed that the lands conveyed should be reconveyed to the executor.

Robert Kennedy, the present plaintiff and one of the testator's sons, having failed to obey the direction to reconvey the land which had been conveyed to him, a vesting order was made, vesting the lands in the executor.

Assuming that he had power to do so, James H. Kennedy executed a deed poll bearing date the 20th January, 1911, by which he appropriated the entire proceeds of the residuary estate for the maintenance and upkeep of the residence which had been devised to him.

In the meantime, on the 26th September, 1910, James H. Kennedy had entered into an agreement with the Suydam Realty Company Limited to convey certain property, forming the bulk of the residuary estate, to that company for the price of $97,000.

An action was brought by Gertrude Maud Foxwell, attacking the right of the executor to sell and the validity of the residuary clause. A preliminary objection to the status of the plaintiff was taken, and argued as a point of law. The decision upon this was adverse to her, and her action was dismissed.

In that action, however, James H. Kennedy counterclaimed, asking for specific performance of the agreement entered into by the Suydam company, and claiming damages against the plaintiff by reason of the carrying out of the sale being obstructed by the registry of a caution in the Land Titles office. To this

counterclaim Robert Kennedy entered a defence in which he denied the right of the executor to be recorded in the Land Titles office as the absolute owner of the land and his right under the will to sell, and further alleged that the sale was an improvident one, made at a gross undervalue.

This counterclaim came on for trial before the present Chief Justice of Ontario, then Chief Justice of the Common Pleas, and a good deal of discussion took place as to the issues that were really open for determination in that action. It was then pointed out that, after the failure of the plaintiff to obtain the redress she sought in the main action, another action had been brought by David Kennedy for the purpose of obtaining construction of the will, and that this action had not yet been heard. Evidence was given at some length upon the value of the land, with a view to shewing the improvidence of the sale, and judgment was reserved, without the question of construction of the will having been argued; his Lordship stating that he would let this matter stand to allow the parties to take such course as they might be advised.

On the 30th January, 1912, judgment was given; it is said upon the application of James H. Kennedy and the Suydam Realty Company, and upon the statement of the purchaser that he did not desire a reference as to title. This judgment declares that the sale was not improvident, directs specific performance, and further directs that the balance of the down payment of purchase-money be made to the purchaser, the conveyance and mortgage to secure the balance to be executed, such conveyance and mortgage to be settled by the Master if the parties differ.

It is to be noted that this judgment, which was not accompanied by any reasons, does not expressly deal with the question raised by Robert Kennedy and his co-defendants as to the power of the plaintiff to sell under the will, and does not in any way reserve the rights of the contesting defendants.

On the 3rd March, 1911, David Kennedy brought his action asking for the construction of the will, and in it he set out his contention that the devise in the residuary clause of the will above quoted was void, and that the residue should be divided as upon an intestacy; and finally, in clause 13 of the statement of

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claim, submitted a series of questions upon which the opinion of the Court was asked, *inter alia*: "(a) Is the devise of the said residue for the purpose of maintaining and keeping up the house and premises bequeathed to the defendant James H. Kennedy void for remoteness? (b) If it is void, has the said James H. Kennedy power to sell the said lands, as to which there would therefore be an intestacy?"

Robert Kennedy, by his defence filed in that action, made common cause with the plaintiff. The action came on before Mr. Justice Teetzel on the 5th March, 1912, and he delivered judgment on the 28th March, holding that the provisions found in the residuary clause for the upkeep of the house were void as tending to create a perpetuity and that there was an intestacy as to the whole residue; but nothing was said either in the reasons for judgment or in the formal judgment expressly dealing with the question which had been clearly enough raised concerning the right of James H. Kennedy to dispose of the lands under the power of sale also found in the residuary clause, or otherwise.

An appeal was had by Robert Kennedy from the judgment of the Chief Justice of the Common Pleas. This came before a Divisional Court on the 6th May, 1912 (see *Foxwell* v. *Kennedy*, 3 D.L.R. 703), but the appellant seems to have failed to present his case in any very intelligible manner, and the Court affirmed the judgment without in any way dealing with the real question involved, namely, the existence of any right on the part of James H. Kennedy to sell the lands at all.

James H. Kennedy, dissatisfied with the judgment of Mr. Justice Teetzel (*Kennedy* v. *Kennedy* (1912), 3 D.L.R. 536), appealed from it to the Court of Appeal. In that action the Suydam Realty Company had been made parties defendant, and the plaintiff had contended that the sale ought not to be carried out, even if Kennedy had authority to sell, as the sale was improvident and at a gross undervalue. As to this defendant, the action had been dismissed with costs. The appellant, being contented with the sale to the Suydam company, did not make that company respondent upon the appeal, his contention being that the residuary clause was valid.

Robert Kennedy and his brothers, by their reasons against appeal, sought not only to uphold the judgment of Mr. Justice

Teetzel, declaring the invalidity of the residuary gift, but sought to cross-appeal in so far as the action was dismissed as against the company; asserting, in clauses 7 to 9 of their reasons, the alleged error in the judgment under review; clause 9 reading: "The disposition of the residue being void, the power of sale for the purposes thereof was and is also void and should be so declared."

The cross-appeal came to nothing, because no notice of it was given to the Suydam company; the certificate of the Court of Appeal reciting that no effective appeal had been launched as to it.

The reasons for judgment of the Court of Appeal (*Kennedy* v. *Kennedy* (1913), 11 D.L.R. 328), deal with the gift only, and do not discuss the question of the validity of the power of sale. The judgment of Mr. Justice Teetzel was varied by directing James H. Kennedy to pay into Court the proceeds of the sale to the Suydam company and by directing an administration of the estate of the testator, and referring the action to the Master for that purpose.

Upon this reference the Master proceeded to deal with the matters referred to him, and by an interim report found that certain moneys in Court, including the proceeds so far realised of the Suydam sale, could safely be divided among the heirs, there being $27,000 thus available; and, upon this report being confirmed, it was ordered that the share of each of the nine persons entitled should be paid out to him. Robert Kennedy was represented before the Master and upon the motion for distribution. It is said that before the Master he protested, but his objection was overruled, and he did not appeal from the report. He has not taken his $3,000 out of Court, but he was party to his wife receiving a certain sum out of one of the other shares, and also to an adjustment of the costs of litigation by which a certain sum was paid out of the share of one of the other brothers.

The decision of the Court of Appeal was taken to the Privy Council, and there the decision was affirmed without qualification: *Kennedy* v. *Kennedy*, 13 D.L.R. 707. Their Lordships dealt with the only question which was argued before them, namely, the validity of the residuary gift, and did not in any way discuss the question of the power of sale.

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The Suydam company were not parties to the appeal.

In the action tried before Teetzel, J., and ultimately taken to the Privy Council, *res judicata* by reason of the decision in the earlier litigation was set up; but, as pointed out in the decision of the Court of Appeal, the matter then in litigation had not been passed upon in any of the earlier decisions, and the statement of their Lordships in the Privy Council must be read in the light of the facts pointed out in the Court of Appeal, and cannot, I think, be regarded as in any way interfering with the well-established principles underlying this plea.

In the action before me, the plaintiff's fundamental contention is, that there is no power of sale which James H. Kennedy could rightly exercise, and that therefore the sale falls to the ground. To this contention the defendants make several answers, which I think are well-founded.

First, it is claimed that there is a valid power of sale; secondly, that, by reason of the litigation which I have outlined, the matter is *res judicata*; thirdly, that, by reason of the proceeds of the sale having been dealt with in the way that I have stated, Robert Kennedy cannot now claim to be entitled to the land; fourthly, that, by reason of the registration of the conveyances under the Land Titles Act, the title of the Suydam company and the title of the Toronto Development Company, to which it has now sold the land, is absolute; and, lastly, that a large portion of the land having been sold and conveyed to purchasers who have registered their conveyances under the Land Titles Act, and who are not parties to this litigation, their title should not be interfered with. A small portion of the land is not in the Land Titles office, has been sold, and the right of these purchasers also ought not to be interfered with.

Dealing with these matters in order, I think that there is, quite apart from the residuary clause, a statutory power of sale vested in the executor. By the Trustee Act, R.S.O. 1897, ch. 129, sec. 16, which was the statute in force at the time, if a testator charges his real estate with the payment of any legacy, and devises the estate so charged to any trustee, without making express provision for the raising of the legacy, notwithstanding any trust actually declared, the trustee may raise the legacy by sale of the land, and (sec. 19) purchasers are not bound to inquire whether the power conferred has been duly exercised.

Applying that to this case, the testator, having charged the $400 per annum legacy upon his estate, and having devised his estate to his executor by the clause in question, gave to the executor an implied power of sale, and this power might be exercised without the purchaser being put on inquiry to ascertain if it was being duly exercised.

It was argued that this power had been cut down by the provisions of the Devolution of Estates Act. With this I cannot agree. That Act, I think, confers upon the executors an additional power to sell, where the sale is authorised by it, during the limited period of three years, which may be prolonged by the registration of a caution; but this power in no way derogates from the powers which are expressly given either by the will itself or by any statutory implication from the words used in the will: 2 Edw. VII. ch. 17, sec. 1 (amending the Devolution of Estates Act, R.S.O. 1897, ch. 127; see now sec. 14 of the Devolution of Estates Act, R.S.O. 1914, ch. 119).

Further, I think the power expressly conferred by the will did not fall merely by the direction given to the executors to use the fund for a purpose which offends against the rule as to perpetuities. The executor held the fund to be distributed among those who would take upon an intestacy. Frequently this is spoken of as an intestacy as to the property, but this is not, I think, strictly accurate.

Then it seems to me that the plea of *res judicata* has been satisfactorily made out; not so much because of any clearly expressed adjudication upon the precise point, as because the adjudication which has taken place is necessarily predicated upon a determination adverse to the plaintiff of the very point in issue. Both before the Chief Justice and Mr. Justice Teetzel, the sale to the Suydam company was upheld. It was directed to be carried out. The proceeds were directed to be paid into Court and to be divided among those entitled. This could not have been found and directed save upon the antecedent finding that the executor had the power to sell. The power to sell was necessarily in issue in both cases.

This was known to Robert Kennedy, for in the pleadings and in the reasons for appeal that I have quoted it is plainly brought in issue. That, through some mischance, the question was not

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investigated and discussed in a way that would be satisfactory to Robert Kennedy, does not prevent the actual adjudication having its conclusive effect.

A judgment determines every right, question, or fact distinctly put in issue as a ground of recovery or defence. It also determines all matters which ought to have been brought forward as part of the controversy. In both these issues a substantive part of the controversy was the validity of the sale now in question.

Two grounds were put forward as shewing its invalidity, and the judgment is conclusive as to both. The judgment would have been equally conclusive if in the litigation one ground alone had been maintained: *Henderson* v. *Henderson* (1843), 3 Hare 100; *Bake* v. *French*, [1907] 1 Ch. 428; *Humphries* v. *Humphries*, [1910] 1 K.B. 796, [1910] 2 K.B. 531; *Re Ontario Sugar Co., McKinnon's Case* (1910), 22 O.L.R. 621; and *Southern Pacific R.R. Co.* v. *United States* (1897), 168 U.S. 1.

I am also of opinion, as far as the land registered under the Land Titles Act (R.S.O. 1914, ch. 126) is concerned, that the registration has been sufficient to confer an absolute title upon the purchaser. I do not feel called upon to go through the different sections of the Act at length on this occasion.

Since the above was dictated, my attention has been drawn to the fact that, while the sale was agreed upon before the Trustee Act (R.S.O. 1897, ch. 129) was amended in 1911 (by the Trustee Act, 1 Geo. V. ch. 26), it was not carried out until after the new Act came into force, and that this Act (sec. 46) makes the provision found in sec. 16 of the earlier Act "subject to the provisions of the Devolution of Estates Act."

I do not think this in any way changes the result; for, as I have pointed out, the Devolution of Estates Act expressly preserves the express and implied power of sale found in the will; and, further, the right of the purchaser is based upon the contract, which was made before the amendment. See sec. 14 of the Interpretation Act.

The action fails, and must be dismissed with costs.

Action dismissed.

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Saskatchewan Supreme Court, Elwood, J. January 18, 1916.

MUNICIPAL CORPORATIONS (§ II C 3—62)—LICENSE—UNREASONABLENESS—QUASHING CONVICTION.

A summary conviction under a municipal by-law imposing a license tax on commercial travellers selling direct to the consumer will be quashed on certiorari if the Court is satisfied by evidence that the license fee sought to be imposed is prohibitive.

[R.S.S. ch. 84, sec. 184 and City Act 1915 (Sask.) ch. 16, sec. 204, considered.]

Statement.

APPLICATION for an order for a writ of certiorari to issue to remove a certain conviction into this Court and for an order to quash the conviction without further order.

F. L. Bastedo, for applicant.

Robinson, for magistrate, the City of Saskatoon and the informant.

Elwood, J.

ELWOOD, J.:—The conviction in question is on an information charging the applicant:

"For that he did, being a commercial traveller, sell goods, wares or merchandise, or offer the same for sale by sample, cards, specimen or otherwise for or on account of a wholesale or retail merchant, manufacturer or other person or corporation, selling direct to the consumer, and not having a place of business in the City, without having license therefor from the City of Saskatoon, contrary to the provisions of By-law Number 890 of the said City."

A portion of the by-law in question is as follows:—

"*Commercial Travellers.* A license shall be taken out by every commercial traveller selling goods, wares or merchandise or offering the same for sale by sample, cards, specimens or otherwise for or on account of any wholesale or retail merchant, manufacturer or other person or corporation selling direct to the consumer, not having a place of business in the City; and by every commercial traveller whether acting for himself or as agent for another person, firm or corporation, who takes orders for goods which are to be manufactured, made, grown or completed in part or in whole in any place outside the City by any wholesale or retail merchant, manufacturer or other person or corporation not having a place of business in the City, and selling direct to the consumer.

"(2) The annual fee to be paid for every license issued to a commercial traveller shall be three hundred dollars ($300.00)."

The by-law in question appears to have been passed on Decem-

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ber 29, A. D. 1914, and therefore, prior to the coming into force of the City Act assented to June 24, 1915. The power to make the by-law in question is contained in sec. 184 of ch. 84 of the R.S.S. as amended. In my opinion the above sec. 19 of the by-law in question is *ultra vires* in that it discriminates between those who have and those who have not a place of business in the city of Saskatoon.

In *Jonas* v. *Gilbert*, 5 Can. S.C.R. at p. 365, I find the following:—

"This Act, in my opinion, only contemplated and authorized the establishment of a uniform rate to be paid by persons to be licensed under it, to do business in the said city. I think this general power to tax by means of licenses involved the principle of equality and uniformity and conferred no power to discriminate between residents and non-residents; that this is a principle inherent in a general power to tax; that a power to discriminate must be expressly authorized by law and cannot be inferred from general words such as are used in this statute; that a statute such as this must be construed strictly; and the intention of the legislature to confer this power of discrimination, must, I think, explicitly and distinctly appear by clear and unambiguous words."

See also *Rex* v. *Pope*, 7 Terr. L.R. 314, 4 W.L.R. 278; *Regina* v. *Pope*, 1 O.R., 43; *Regina* v. *Flory*, 17 O.R. 715. I am also of the opinion that the by-law is *ultra vires* in that the license fee of $300 is, in fact, prohibitive. There is no finding of the magistrate of whether or not the license fee is prohibitive, but I am satisfied from the evidence that it is prohibitive, and being so, it is *ultra vires*. See *Virgo* v. *Toronto*, 22 Can. S.C.R. 465; *Merritt* v. *Toronto*, 22 A.R. 208; *Roland* v. *Collinwood*, 16 O.L.R. 672.

It was contended on behalf of the city that sub-sec. 62 of sec. 204 of ch. 16 of the statutes of 1915 gave the city power to pass a by-law similar to that objected to, and that the power having been given the by-law in question was good. I am of opinion and hold that the by-law passed in 1914 being *ultra vires* is not made *intra vires* by the subsequent legislation, but requires a positive enactment of the city following the passing of the subsequent legislation by the legislature. In any event, I am of the opinion that sub-sec. 62 does not give the power to the city to

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impose a prohibitive fee, such as I hold this to be; and, therefore, that even if sub-sec. 62 did have a retrospective operation upon the by-law it was otherwise bad because it was prohibitive.

The result will be that the conviction in question will be quashed without the necessity of issuing a writ of certiorari; and any monies paid by the applicant shall be restored to him; and the informant will pay to the applicant his costs of this application. *Conviction quashed.*

QUE.

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PATENAUDE v. THIVIERGE.

Quebec Court of Sessions, Langelier, J.S.P. March 17, 1916.

CRIMINAL LAW (§ I A—3)—INTENT—MENS REA—REVENUE LAWS.

Criminal intent is not an essential element in the offence of vending a patent medicine without affixing the revenue stamp required under the War Tax Act 1915 (Can.); and the dealer is liable to conviction in respect of the failure of his salesman to affix and cancel the stamps at the time of sale as the law required and as he had been instructed to do by the defendant.

[See also *R.* v. *McAllister*, 22 Can. Cr. Cas. 166, 14 D.L.R. 430.]

Lucien Morand, for the prosecution.

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LANGELIER, J.:—The defendant is prosecuted for having illegally sold to a customer a bottle containing a patent medicine as described in sub-sec. 4 of sec. 14 of the War Tax Act 1915 (Can.), that is a bottle of "Dr. Thomas' Eclectric Oil," without having affixed the war stamp required by law.

Section 15 compels every person selling to a consumer a bottle or a parcel containing patent medicine to affix upon it a war stamp of the value mentioned in the schedule of the said Act, and, in default of his doing so, sec. 18 declares the seller liable to a fine not less than $50.00 and not to exceed $250.00.

Section 20, sub-sec. 3, declares that these actions may be instituted for the fines levied under Pt. III. of the Act in the name of the Minister of Inland Revenue. The fine recorded in the present case comes under the direction of Pt. III. of the above statute.

The complaint was sworn by Mr. Alex. LaRue, Deputy Collector of Revenue, duly appointed by order-in-council.

The defendant swore that he had instructed his clerks to affix the stamps required by the law, and that he had no intention to violate the law. In other words, he stated he had no criminal intention and evoked his good faith.

There are some offences to which a criminal intention—*mens rea*—is requisite; but that rule is not inflexible. A statute may be

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framed in such a manner as to make an offence of an act without the one who committed it having any intention of violating the law or of doing any wrong. In such a case the infringement of such a law constitutes an offence the moment it has been committed.

It is the opinion expressed by Judge Brett in the case of *King* v. *Prince*, L.R. 2 C.C.R. 154, and quoted from Endlich on Interpretation of Statutes, p. 137, No. 136, as follows:—

"The enactments which by their form seem to constitute the prohibited acts into crimes and by virtue of these enactments persons charged with the committal of the prohibited acts may be convicted in the absence of the knowledge or intention supposed necessary to constitute a *mens rea*."

Russell on Crimes expresses the same doctrine on page 102:—

"In some cases enactments by their form seemed to constitute the prohibited acts into crimes, even in the absence of the knowledge and intention necessary to constitute a *mens rea*. Few, if any, such enactments relate to indictable offences, and usually they prohibit such an act in the interest of the public revenue."

It is exactly the case in the present action. The moment the law has been infringed by any person the good faith of the accused is not to be considered and he must be condemned. In consequence the defendant is fined $50 and costs.

Defendant convicted.

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Re CARRIE BRADBURY.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Russell, Longley, and Drysdale, JJ., and Ritchie, E.J. August 25, 1916.

1. INTOXICATING LIQUORS (§ III G—87)—PENAL PROVISIONS OF TEMPERANCE ACT—PLACES APPLICABLE.

Part 2 of the N.S. Temperance Act, 1910, is in force under Acts 1916, ch. 22, in the city of Halifax; the penalties provided thereunder are applicable to offences in the said city against Part 1 of that Act.

2. CONSTITUTIONAL LAW (§ II A 5—233)—CANCELLING LIQUOR LICENSES IN FURTHERANCE OF TEMPERANCE.

A provincial statute cancelling all existing liquor licenses, in furtherance of its temperance laws, is not unconstitutional. (*Obiter dictum*).

Statement.

APPLICATION to discharge defendant, convicted by the stipendiary magistrate for the city of Halifax for having unlawfully kept liquor for sale in said city contrary to the provisions of Parts 1 and 2 of the N.S. Temperance Act, under *habeas corpus* proceedings. Refused.

H. Mellish, K.C., and *W. J. O'Hearn*, K.C., for applicant.

A. Cluney, K.C., and *R. H. Murray*, K.C., for Crown.

SIR WALLACE GRAHAM, C.J.:—The defendant has been imprisoned under a conviction of the stipendiary magistrate for the city of Halifax for violation of Parts 1 and 2 of the N.S. Temperance Act 1910.

The question in short is whether under the legislative provisions Pt. 2 of that Act applies to and is in force in the city of Halifax.

The provisions of that Act are grouped in 5 parts and sometimes a group is referred to by its number. And it may be said in a general way that it was contemplated that these parts were not all in the first instance to be applicable to all areas in the province, or to come into force all at the same time.

In the first place the Canada Temperance Act was already in force in some of the municipalities. The N.S. Temperance Act was only to apply to other areas and to some of those on the happening of contingencies.

Pt. 1 sec. 3 is as follows:—

> This part shall apply to every part of Nova Scotia in which the Canada Temperance Act is not in force, excepting the municipality of the county of Halifax, the county of Richmond and the city of Halifax; and at and after the expiration of any licenses for the sale of intoxicating liquors existing in the municipality of the county of Halifax this part shall apply to and be in force in the said municipality; and at and after the expiration of any license for the sale of intoxicating liquor existing in the said county of Richmond this part shall apply to and be in force in the said county of Richmond; and upon and after the day fixed and appointed in that behalf by the proclamation in this Act provided for this part shall also apply to and be in force in the said city of Halifax.

It is not necessary to say anything about the county of Halifax or the county of Richmond where the licenses had expired or to refer again to the Canada Temperance Act areas.

Part 2 is entitled "Offences and Penalties." There have been a great many amendments and additions made in the different years since. But there is this peculiarity about Pt. 2, that there are sections which especially provide penalties for breaches of certain provisions of Pt. 1, referring to them specifically. There are, also, among other provisions some for seizing and destroying liquors when found under circumstances which would constitute illegality, as keeping them for sale, or that they are likely to be used for that purpose.

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Pt. 3 applies to those municipalities in which the Canada Temperance Act is in force, principally to aid in its enforcement. Pt. 4, secs. 62 to 80 inclusive, applies to the city of Halifax. It makes provisions for licenses, and the Liquor License Act, R.S. 1900, ch. 100, previously in force, is to remain in force in Halifax.

But there is a provision for a plebiscite of the citizens as to whether the Temperance Act of Nova Scotia is to be brought into force there and if it resulted favourably to prohibition there was to be a proclamation:—

That this Act shall be in force and take effect in the city of Halifax from and after the day on which the licenses . . . then in force will expire.

As a fact the plebiscite failed and there was no proclamation. Pt. 5, which is a repealing provision in respect to the liquor licenses, has this closing section:—"This Act shall come into force on July 1, 1910."

There were, as I have said, many amendments in 1911. Ch. 33 of the Acts of 1911, passed March 31, 1911, sec. 2, provides as follows:—

Section 3 of the said Act is amended by striking out the words "This Part" in the first line of the said section and substituting therefor the words "Parts one and two of this Act.

I may say in passing that this lends countenance to the contention now made on behalf of the defendant.

Then, in 1916 (ch. 22), another Act was passed which was to come into force on June 30, 1916. These are the important provisions, 1916, ch. 22:—

1. Ch. 2 of the Acts of 1910, the N.S. Temperance Act, is hereby amended by striking out sec. 3 thereof and substituting therefor the following:

"3. This part shall apply to every part of Nova Scotia in which the Canada Temperance Act is not in force."

2. Part 4 of the said ch. 2 of the Acts of 1910 is hereby repealed.

3. Sec. 81 of said ch. 2 of the Acts of 1910 is hereby repealed, and the following is substituted therefor:

"81. The Liquor License Act, being ch. 100 of R.S.N.S. 1900, and all the amendments thereto are hereby wholly repealed and all licenses issued under the provisions of said ch. 100 shall immediately upon this Act coming into force become and be null and void and of no force and effect.

By the General Interpretation Act, R.S. 1900, ch. 1, sec. 3, it is provided that:—

The day of the assent (of the Lieutenant-Governor) or signification, as the case may be, shall be the date of the commencement of the Act, if no later commencement is therein provided.

Then, of course, a later commencement is provided. Sec. 8 of ch. 1, R. S., the Interpretation Act, is as follows:—

> The repeal of any enactment shall not revive any Act or provision of law repealed by such enactment, or prevent the effect of any saving clause therein.

Now it is contended that inasmuch as in the amendment of 1911 there is express provision that:—

> Parts 1 and 2 of this Act shall apply to every part of Nova Scotia, *excepting the city of Halifax*.

And inasmuch as sec. 1 of ch. 22, 1916 (while repealing all of sec. 3 of ch. 2 of 1910, exceptions and all) enacts that "This Part," that is Pt. 1, "shall apply to every part of Nova Scotia," therefore Pt. 2 is not applicable to the city of Halifax.

The result of such a contention, if successful, would be that the Criminal Code of Canada and procedure by indictment would have to be resorted to to enforce its provisions, which would not be convenient, and that the provisions for seizure and destruction of liquors would not be available in Halifax as they are in other places.

Nothing is said expressly that Pt. 2 is to come into force there when Pt. 1 does and there is express provision that Pt. 1 is to be in force.

I think that there are so many express provisions about the date or contingencies on which different provisions of this Act are to apply to or to come into force in different places that one looks for such a provision when it is really not necessary, and there is a tendency to confusion.

We are frequently passing Acts which come into force when the Lieutenant-Governor signifies his assent or the date fixed transpires, and in those Acts there are provisions which are by the terms of the legislative provisions suspended in effect until some preliminary provisions are worked out. Take the Towns Act. There are long provisions for a plebiscite as to whether there is to be incorporation of the town. Then there are also provisions for governing the affairs of the town if it becomes such a town. But the legislature did not expressly divide the Act into parts and say that the later sections meanwhile in suspense should come into force after the citizens decided in favour of incorporation. That is the effect of the legislation. It was not necessary to say it expressly. So in the Canada

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Temperance Act, which the Temperance Act of N.S. followed in this respect, Pt. 2 is a prohibition provision in one section, a contingent provision which is only to come into force automatically after a municipality has under Pt. 1 decided by a plebiscite that it shall come into force and there is a proclamation to that effect. Nothing is said about when Pt. 3, relating to offences and penalties and prosecutions, is to come into force. But it has never been successfully contended that it is not in force in municipalities in which Pt. 2 has been automatically brought into force—in effect, that it required an express provision to make it effective there.

One cannot expect decisions to be cited on such a subject, but I refer to American dicta which seem to me to have some bearing as to the suspension of certain provisions of an Act until a contingency happens while the Act as a whole is in force on a fixed date. I refer to *Warren* v. *Charlestown*, 2 Gray, at 91, Shaw, C.J.; *State* v. *Perry Co.*, 5 Ohio St., at 504; *Clarke* v. *Rochester*, 24 Barb. 446, at 490.

Looking at this Act of 1910 as it was between July, 1910, and March, 1911, I think it might be fairly said that the whole Act came into force July, 1910. It was a valid Act. It took effect as an entirety at one and the same time, but in respect to particular localities certain provisions were suspended. In respect to the city of Halifax Pt. 1 was in effect deferred until the contingency of the plebiscite and proclamation happened. When it would happen Pt. 2, which was always immediately in force in respect to some areas of the province, and contingently in force in respect to Halifax, but in suspense by the terms of the Act, then would become operative and would apply as in the case of the two legislative enactments I have just mentioned by way of example.

The amendment of 1911 was, no doubt, a provision passed *ex abundanti cautelâ*. Some cautious draftsman thought it necessary to express in plain words that Pt. 2 was to take effect whenever and wherever Pt. 1 took effect. They were put on the same plane. I must confess I sympathize with the good intention of that draftsman. I see no good reason for having these 2 parts in separate groups when one was quite sufficient. In the provisions of Pt. 1 and Pt. 2 subdivision was carried to

excess. And it was no harm to put them on the same plane and in effect to say that Pt. 2 should come into force with Pt. 1.

But I think it was not necessary to make that amendment of 1911. Pt. 2 always applied. It was of no use and had no aim other than supplying penalties and procedure for Pt 1.

Graham, C.J.

In 1916 the whole of sec. 3, ch. 2 of the Acts of 1910 as amended, the exceptions and all, was repealed. A fresh section was substituted. It, like the original section of 1910, made express provision for Pt. 1 only applying and nothing is said about Pt. 2. It was not and it could not be contended by the prosecutor that the repeal of the amendment of 1911 revived sec. 3 of ch. 2, 1910, for two reasons. First, there is the Interpretation sec. 8 already quoted. Then, in 1916, there is a section substituted for it. But, if I am correct in the first point, I have endeavoured to make in respect to sec. 3 as it was in 1910, and that Pt. 2 then applied, I think the same thing may be said of the sec. 3 of ch. 22, 1916, namely: Pt. 2 was always in force and to be resorted to wherever and whenever Pt. 1 became operative. There could be no breach of Pt. 1 in any place unless and until it was in force there and now being in force in Halifax the general provisions of Pt. 2 apply. The repeal of the exception in the case of Halifax was repealed. The repeal of an exception in a former Act makes that Act that much larger. I think because the legislature in 1911 thought that something had better be expressed that was not absolutely necessary to be expressed is not a sufficient reason for us to say it is necessary now if it is not so. Inasmuch as this defendant had not obtained and did not hold a license I forbear to express any opinion on the validity of sec. 3 of 1916 destroying the current licenses in Halifax, that is, whether it is *ultra vires* the provincial legislature or not. In my opinion the defendant is not entitled to be discharged. No costs.

Russell, J.

RUSSELL, J.:—By the Act of 1916 the N.S. Temperance Act of 1910 is amended by striking out sec. 3 and substituting the following:—

> This part shall apply to every part of the Province of Nova Scotia in which the Canada Temperance Act is not in force.

The part referred to by the words "This Part" is, of course, Pt. 1, and there is nothing anywhere in the Act of 1916 to say that Pt. 2 is in force in the city of Halifax. The conviction under which the defendant is held was made in the city of Halifax

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under the provisions of Pt. 2 and if those provisions are not in force in the city of Halifax the conviction is bad and the prisoner must be released.

But why is it contended that Pt. 2 is not in force in the city of Halifax? It is simply because in 1911 an amendment was made to sec. 3 of the Act of 1910 under the operation of which it could be fairly contended that the city of Halifax as well as the county of Richmond and the municipality of the county of Halifax were excepted from the operation of Pt. 2. I say nothing as to the contention that after the expiration of licenses in Richmond and the municipality of Halifax Pt. 2 was not in force in those places. As to the city of Halifax the provisions of Pt. 2 were not needed because the city continued to be governed by the Liquor License Act in the Revised Statutes. When the provisions of Pt. 1 were made applicable to the city, whatever difficulties and doubts had been created by the Act of 1911 were removed by the repeal of the section by which they had been created. Sec. 2 of the Act of 1911 was a part of sec. 3 of the Act of 1910, and when sec. 3 was repealed in 1916, sec. 2 of 1911 was repealed with it. This answer to the contention of counsel for the prisoner seems obvious and conclusive. If one had kept his statute books posted up by means of paste and scissors, or better still with pen and ink, he would have substituted for the words Pt. 1 in cl. 3 of the N.S. Temperance Act the words Pts. 1 and 2 in the first line. When the Act of 1916 had been passed he would have scored out sec. 3 altogether and with its disappearance as amended would have utterly vanished every possible basis for the contention so strenuously urged that Pt. 2 was not applicable to the city of Halifax.

The question of *ultra vires* is not necessarily involved in the decision upon this application, but I should not like it to be assumed that there is any doubt as to the validity of the Act. The objections urged by counsel for the prisoner would be appropriate for an application for disallowance, but in view of the plenary legislative authority of the provincial legislature when acting within its powers I do not think it will ever be held that the Act is *ultra vires*. This, however, is merely *obiter dictum* and the point must for the present remain open for discussion and decision.

Longley, J.

LONGLEY, J.:—By the Act of 1916 the Act is amended by striking out sec. 3 and substituting the following in its place:—

This Part shall apply to every part of Nova Scotia in which the Canada Temperance Act is not in force.

The effect of this would be to make the first part of the Act applicable to Halifax. The only question remaining is the amendment of 1911 which substituted for this part the words "Parts 1 and 2 of this Act." It is perfectly plain that this Act was repealed by the Act of 1916. All the laws of interpretation are to this effect, and all the laws of interpretation embraced in large volumes on the subject are simply what one's common sense would suggest. Consequently, I find now that the N.S. Temperance Act of 1910 has been amended by making Pt. 1 applicable to all parts of Nova Scotia not under the Canada Temperance Act, and the application for a *habeas corpus* must be refused.

An objection was raised to the Act on the ground that it was unconstitutional, since it had the effect of making all liquor licenses in the city of Halifax cease on June 30, 1916, whereas they ran until the end of March, 1917. I do not think that the claim that the legislature had passed an Act that was contrary to good morals or good faith is any ground for disallowance whatever. The city of Halifax has no power at the present time to appropriate any money to the paying back to the licensees the amount of the license fees which are of no effect on account of the Act going into force. It may obtain power to do this at the next session of the legislature, but in any case the Court has no power in such a matter to intervene.

DRYSDALE, J. (dissenting):—Counsel for the prosecution allege that "this Part" in the 1916 Act ought to be read as "this Part and Part 2" but I think fail to give any sound reason for such contention. Drysdale, J.

In my opinion the proper construction of the Acts in question leaves Pt. 2 as affecting Halifax as it stood before the passing of the 1916 Act. It was not then applicable to Halifax city; it is not now in force in Halifax city. Consequently a conviction under it as against the applicant is bad in law and she is, I think, entitled to her discharge. I do not deal with the *ultra vires* point raised by counsel because I think it is only open to a licensee and the applicant does not bring herself within that position.

RITCHIE, E.J.:—[Reference to sec. 164 of the Criminal Code]. Ritchie, E.J.

Counsel for the prosecution argued that, assuming that Pt. 2 was not operative in the city of Halifax when ch. 22 of the

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Acts of 1916 was passed, it was made so operative by that chapter. They admitted that "This Part" meant Pt. 1. It was not possible with any show of reason to contend otherwise. This Court was asked to hold that when the legislature said "Part 1" it meant "Parts 1 and 2." That is to go directly in the teeth of plain, clear unambiguous words.

The contention carries with it the answer. Of course it cannot be done unless the Court assumes legislative functions, which it has no jurisdiction to do.

But there is another ground upon which I am of opinion that the N.S. Temperance Act can and ought to be upheld.

Pt. 1 of the Act is in force in the city of Halifax. As to this there is no dispute. The sale of intoxicating liquors has been made an offence. Pt. 2 does not have to be brought in force in the city in any special way. It is part of the general law of the province. It stands on the statute books ready to be used when an offence created by Pt. 1 has been committed.

I think the whole difficulty has been caused by sec. 2 of ch. 33 of the Acts of 1911, which strikes out the words "This Part" (*i.e.*, Part 1) in the original Act and substitutes the words "Parts 1 and 2." The gentleman who drafted this section evidently did not realize that Pt. 2 was the general law of the province, applicable and ready for use whenever an offence was committed against Pt. 1. This section gave colour to the very able argument of Mr. Mellish, but it has been repealed and it is as though it had never been enacted, except in so far as it may be an aid to construction as a statute *in pari materia*.

Under sec. 8 of our Interpretation Act the repeal of an Act does not revive an Act repealed by it, but the Act of 1911 does not repeal the original Act, it merely intercepts its operation and when an intercepting Act is gone the law is as it stood before.

In Endlich on Statutes (1888), p. 680, it is said:—

> So where a statute merely intercepts a particular class of cases from a prior general law which continues in force, a repeal of the intercepting statute returns that class of cases to the operation of the general law.

I also refer to *Mount* v. *Taylor*, L.R. 3 C.P. 45; *Mirfin* v. *Attwood*, L.R. 4 Q.B. 330; *Bank for Savings* v. *Collector*, 3 Wallace 495 at 513.

It is clear that the intention of the legislature was that the

prohibition should be uniform throughout the province. This I need not elaborate.

Part 2 of the N.S. Temperance Act (when by repeal we get rid of sec. 2 of ch. 33 of the Acts of 1911) stands in the same relation to Pt. 1 as Pt. 3 of the Canada Temperance Act stands to Pt. 2 of that Act. Ritchie, E.J.

Pt. 2 of the last mentioned Act creates the offence and Pt. 3 is the general law applicable to all parts of Canada where Pt. 2 is in force. Much ingenuity and great legal ability has from time to time been displayed in attacks upon the Canada Temperance Act, but I think it has never been suggested that Pt. 3 is other than general law applicable where Pt. 2 is in force. It was contended that the cancelling of licenses by the Act of 1916 made the legislation *ultra vires*. I am of opinion that it did not have that effect. At all events, so far as the defendant is concerned, as she did not have a license.

In my opinion the application for discharge should be refused.

HARRIS, J.:—It is perfectly obvious from a perusal of the legislation that the sole object and intent of the legislature was to repeal the Liquor License Act and bring the city of Halifax under the provisions of the N.S. Temperance Act. Harris, J.

But it is said that this has not been done so far as Pt. 2 of the Act is concerned, and the argument is that the legislature having in 1911 amended sec. 3 and said that Pt. 2 should not apply in the excepted areas, it was necessary in the Act of 1916 to expressly bring Pt. 2 back into force again and that this had not been done. I am absolutely unable to agree with this view. In my opinion Pt. 2 of the Act is in force in the city of Halifax, and I think no other meaning can reasonably be given to the Act of 1916.

Before proceeding to give my reasons for so deciding, it is, perhaps, worth while to point out what the effect of the opposite view is.

If Pt. 2 is not in force in the city of Halifax, then, while the selling of intoxicating liquor is prohibited by Pt. 1, which admittedly is in force, there is no punishment prescribed for a violation of the Act and no mode of enforcing the Act. The Act becomes practically a dead letter so far at least as the city of Halifax is concerned. The Act of 1916 has cancelled all the

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licenses in the city of Halifax and all machinery for issuing further licenses has been repealed, and it is therefore obvious that if the contention now set up prevails any one and every one can now sell intoxicating liquor in the city of Halifax without fear of consequences so far as the N.S. Temperance Act is concerned.

But it is said that under sec. 164 of the Criminal Code of Canada, any person violating a provincial statute for which no punishment is expressly provided, can be punished by indictment. Assuming this section of the Code to apply, it does not need any argument to shew that it is absolutely and entirely inadequate as a remedy. To any one familiar with the course of legislation upon the subject and its enforcement here and elsewhere, it is laughable to suggest indictment as the method of enforcement of a so-called Temperance Act. The summary trial, the right to search for and destroy liquor, and other provisions found necessary for the enforcement of such an Act would not exist, and in their place there would be only the right to go before a grand jury twice each year. It is unthinkable that the legislature intended such a departure from the whole theory upon which the Act was framed.

It is also to be noted that the contention involves the conclusion that either Pt. 2 of the Act is no longer in force in any part of the Province of Nova Scotia, or that it is in force in every other part except the city of Halifax. It was put both ways by the different counsel for the defendant. The first alternative attributes to the legislature an intention to absolutely emasculate and destroy a workable Act; and the second is only consistent with the idea that the legislature deliberately intended to provide a different mode of punishment in the city of Halifax from that provided in other parts of the province for the same offence, and, because of the difficulty of enforcing the Act with no remedy other than by indictment, to permit the indiscriminate sale of liquor in an area where theretofore there had been restrictions upon the numbers permitted to sell and the methods of selling.

It will be conceded by everyone that such a construction of the legislation is not to be favoured.

Now let us look at the Act and see what the legislature has said and done. It was argued that we must look at the whole history of the legislation and I agree that the history of the Act is one of the things which has to be considered.

It will not be disputed that an Act of the legislature *primâ facie* applies to the whole province. In the original Act in question Pt. 2 was general and applied to the whole province. There was no specific restriction upon the application of Pt. 2 in sec. 3. The restriction there applied only to Pt. 1. But in 1911 Pt. 2 was included specifically in the restriction. In 1916 the legislature did two things:—(a) It repealed or cut down the excepted areas; and (b) it repealed the amendment of 1911 to sec. 3 which specifically restricted the general application of Pt. 2.

It is apparent that the immediate object and intent of the legislature was to bring the whole Act into force in the city of Halifax. Sec. 3 was found to contain certain excepted areas to which the Act did not apply. The counties of Richmond and Halifax as well as the city of Halifax were still mentioned as excepted areas although they had subsequently come under the Act. What the legislature did was to redraft sec. 3 to make it applicable to the new conditions and in redrafting it they first of all left out the excepted areas. In the second place, finding that Pt. 2 of the Act which as originally passed was not specifically restricted in its application, had been specifically restricted by the amendment of 1911, they repealed the Act of 1911 and thereby restored Pt. 2 to the position which it occupied under the original Act.

If we take the various sections of the original Act as now amended, and codify or consolidate them by substituting the new sections for the old, without altering a single word, we find that the Act forms a perfectly reasonable and sensible code which can be understood only in one way, so far as the question under consideration is concerned.

We find that by the new sec. 3 of 1916 Pt. 1 is made applicable to the whole Province of Nova Scotia except where the Canada Temperance Act is in force, and that all restrictions upon the application of Pt. 2 contained in the old sec. 3 as amended by the Act of 1911 have been repealed—that specific restriction upon the application of Pt. 2 is no longer in force and Pt. 2 stands as it was in the original Act, applicable to the whole province generally whenever there is an offence coming within its provisions or whenever its provisions are applicable.

I cannot understand what the legislature did in any other

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way, nor can I understand that there was any necessity for it to declare otherwise than it has done that Pt. 2 of the Act was in force. The legislature has repealed the specific restriction of 1911 upon the application of Pt. 2, and indicated clearly its intention to restore that section to its original position under the Act. I do not see why this Court should be asked to read into the Act what is not there, *i.e.*, words repealing or restricting the application of Pt. 2 of the Act, particularly when it leads to such a manifest absurdity and such deplorable results as I have referred to.

I am unable to find any repeal of Pt. 2, or anything restricting the general application of it, and if the legislature intended the Act of 1916 to have any such effect I should have expected it to say so definitely and clearly as it did say with regard to Pt. 1 of the Act. The fact that Pt. 1 is expressly repealed is, I think, a clear indication that Pt. 2 was not intended to be repealed or its general application restricted. If Pt. 2 is so affected it can only be by implication and as I understand the authorities we ought not to hold it repealed in whole or in part by implication.

Maxwell on Statutes, 5th ed. 1912, pp. 268 and 269.

See also *Endlich*, 280.

In *Great Western R. Co.* v. *Swindon and Cheltenham R. Co.*, 9 A.C. 787 at 809, Lord Bramwell said:—"We ought not to hold a sufficient Act repealed not expressly as it might have been, but by implication, without some strong reason."

There is not only no strong reason why we should hold Pt. 2 to be repealed or restricted in its operation, but, as I have endeavoured to shew, there is every reason why we should hold otherwise.

But it is said that sec. 8 of ch. 1 of the Revised Statutes, the Interpretation Act, prevents the adoption of the construction I have indicated. That section says that: "The repeal of any enactment, shall not revive any Act or provision of law repealed by such enactment, or prevent the effect of any saving clause therein."

It is said that this Act prevents us from saying that the repeal of the Act of 1911 revived or restored Pt. 2 of the Act.

27 Halsbury's Laws of England, p. 198, sec. 397.

In *Endlich* on Statutes, at p. 680, in referring to Lord

Brougham's Act, from which the above section of our Interpretation Act is taken in a modified form, the learned author says:—

> But it seems not to apply where the first Act was only modified by the second by the addition of conditions and the enactment which imposed these was itself afterwards repealed. In such a case the original enactment would revive. So where a statute merely excepts a particular class of cases from a prior general law which continues in force, a repeal of the excepting statute returns that class of cases to the operation of the general law.

See also Maxwell on Statutes, 5th ed., 671; Craies' Statute Law, pp. 310, 311, 347; *Mirfin* v. *Attwood*, (1869), L.R. 4 Q.B. 330 at 340; *Bank for Savings* v. *Collector*, 3 Wallace, 495,

The cardinal rule, or rather the end and object of all construction of statutes, is the ascertainment of the intention of the legislature, and, in this case, I think the intention of the legislature is clear and unmistakable.

In my opinion Pt. 2 of the Act of 1910 applies to and is in force in the city of Halifax, and I would therefore dismiss the application.

Chisholm, J.

CHISHOLM, J.:—I concur in the result. The rule of construction which counsel for the prisoner invoke is sec. 8 of the Interpretation Act, R.S.N.S. 1900, which is as follows:—

> The repeal of any enactment shall not revive any Act or provision of the law repealed by such enactment, or prevent the effect of any saving clause therein.

I do not think that the rule can be applied to the facts of this case. The argument on behalf of the prisoner, as I understand it, is, to state it briefly, that ch. 33, sec. 2 of the Acts of 1911 (passed March 31, 1911) repealed Pt. 2 of the N.S. Temperance Act, so far as the city of Halifax is concerned; that this enactment of 1911, or, if you prefer it, sec. 3 of the N.S. Temperance Act, as altered by the Act of 1911, is in turn repealed by ch. 22 of 1916; and that the Act of 1916 must be interpreted in the light of the rule above quoted, that is to say, it shall not prevent the effect of what they claim to be a saving clause therein, namely, the clause which states that Pt. 2 shall not apply to the city of Halifax.

I think this argument starts out with a false premise. The Act of 1911 does not in fact repeal Pt. 2 so far as the city of Halifax is concerned. It is not contended—it cannot be successfully contended—that Pt. 2 from the time of its enactment down to March 31, 1911, when the Act of 1911 became law, was in force in or applied to the city of Halifax. How, then, can it

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be said that the Act of 1911 repealed Pt. 2 so far as the city of Halifax is concerned? The N.S. Temperance Act did not require the aid of the Act of 1911 to make Pt. 2 inapplicable to the city of Halifax; and the conditions in that respect, as they existed before March 31, 1911, were in no way different from what they were between that date and June 30, 1916.

In my opinion there is, therefore, no repealing statute in the sense intended by sec. 8 of the Interpretation Act, and consequently no "saving clause" therein the effect of which must according to the rule be preserved. *Application dismissed.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. April 3, 1916.

CONSTITUTIONAL LAW (§ II A 1—154)—DENOMINATIONAL SCHOOLS—PROVINCIAL REGULATION AS TO MANAGEMENT—COMMISSION.

To establish and maintain Separate Schools, an exemption from contributing to the support of Common Schools was the only right or privilege with respect to denominational schools which the Roman Catholics had by law at the Union.

The Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the city of Ottawa, 5 Geo. V. ch. 45, providing for the suspension of powers of a denominational school board and for conferring such powers upon a commission, is within the legislative powers of the province, and does not prejudicially affect any right or privilege with respect to denominational schools guaranteed by sec. 93 of the B.N.A. Act, 1867, particularly where the statute aims to suspend a body because it persists in managing these schools contrary to law.

Per Magee, J.—The province having constitutionally the exclusive powers to make laws in relation to education, relief against such laws must be sought from parliament, and not from the judiciary.

[*Ottawa Separate School Trustees* v. *Ottawa*, 24 D.L.R. 497, 34 O.L.R. 624, affirmed. See also *Mackell* v. *Ottawa Separate Schools*, 24 D.L.R. 475 (annotated), 18 D.L.R. 456.]

Statement.

APPEALS by the plaintiffs from the judgment of MEREDITH, C.J.C.P., 24 D.L.R. 497, 34 O.L.R. 624. Affirmed.

A. C. McMaster, for appellants.

A. R. Clute, for the defendants the Corporation of the City of Ottawa, respondents.

J. D. Bissett, for the defendants the Quebec Bank, respondents.

J. A. McEvoy, for the Attorney-General for Ontario.

Meredith, C.J.O.

MEREDITH, C.J.O.:—These are appeals by the plaintiffs from the judgment dated the 18th November, 1915, which was directed to be entered by the Chief Justice of the Common Pleas, after the trial of the action before him sitting without a jury at Ottawa on the previous 13th day of October; and the reasons for judgment are reported in 24 D.L.R. 497, 34 O.L.R. 624.

The sole question for decision is as to the validity of an Act of the Legislature of this Province passed on the 8th day of April, 1915, intituled "An Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa," 5 Geo. V. ch. 45.

The contention of the appellants is, that this Act contravenes the following provision of sec. 93 of the British North America Act:—

"93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

"1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union."

Prior to and at the time of the passing of the Act in question, the Separate Schools of Ottawa were under the management of the appellants, who are a corporation created and existing under the authority of the Separate Schools Act, R.S.O. 1914, ch. 270, or the Acts which were consolidated in that Act.

Questions having arisen as to the validity of two regulations made by the Minister of Education as to the teaching of the French language in the Public and Separate Schools of the Province, regulation number 17 of 1912 and regulation number 17 of 1913, as they are called, an action was brought by a supporter of the Separate Schools in Ottawa named Mackell, on behalf of himself and other supporters of these schools, for the purpose of obtaining a declaration that these regulations were "*ultra vires* the Province under the British North America Act, and that the Province had no legislative authority under that Act to regulate the use of French as a language of instruction and communication in the Public and Separate Schools of the Province or the teaching therein of the French language;"* and pending that action the Act in question was passed.

The preamble to the Act recites the bringing of the action and its objects; that the appellants had failed to open the schools under their charge at the time appointed by law or to pay qualified teachers for the schools and had threatened at different times to close the schools and to dismiss the qualified teachers duly

*See *Mackell* v. *Ottawa Separate School*, 24 D.L.R. 475, 34 O.L.R. 335.

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engaged for them; and that the statements of the preamble were true was admitted by counsel for the appellants at the trial.

By the first section it is declared that, subject to the question of the legislative authority of the Province under the British North America Act which I have mentioned, the regulations that were questioned were duly made and approved under the authority of the Department of Education and became binding according to their terms and provisions upon the appellants and the schools under their control.

By sec. 2, certain duties in respect of the schools under the control of the appellants are imposed upon the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa (the appellants) and the members thereof.

The duties which were thus imposed were already imposed by the Separate Schools Act, and sec. 2 was but an affirmance of the provisions of that Act as to the matters with which sec. 2 deals.

By sec. 3 it is provided that:—

"If, in the opinion of the Minister of Education, the said Board fails to comply with any of the provisions of this Act, he shall have power, with the approval of the Lieutenant-Governor in Council—

"(*a*) To appoint a commission of not less than three nor more than seven persons;

"(*b*) To vest in and confer upon any commission so appointed, all or any of the powers possessed by the Board under statute or otherwise, including the right to deal with and administer the rights, properties and assets of the Board and all such other powers as he may think proper and expedient to carry out the object and intent of this Act;

"(*c*) To suspend or withdraw all or any part of the rights, powers and privileges of the Board, and whenever he may think desirable to restore the whole or any part of the same and to revest the same in the Board;

"(*d*) To make such use or disposition of any legislative grant that would be payable to the said Board on the warrant of any inspector for the use of the said schools or any of them as the Minister may in writing direct."

And the provisions of sec. 4 are that:—

"Nothing in this Act shall be construed to relieve the Board or any of its members from the discharge and performance of any duties imposed upon it or them by law or by any judgment in the said action, or from any liability to any supporter of the said schools or other person interested that has been or may be incurred by reason or on account of the failure or neglect of the Board or any of its members to discharge or perform any of the said duties."

The result of the action of Mackell was that it was determined that the Legislature had the authority which was challenged, and that the regulations in question were valid, and the action was dismissed.

After the dismissal of the action, the acting Minister of Education decided that the appellants had failed to comply with the provisions of the Act, and, with the approval of the Lieutenant-Governor in Council, put into execution the powers conferred upon the Minister of Education by sec. 3, and the respondents the Ottawa Separate School Commission are the Commission appointed under the provisions of the section.

The argument of the appellants' counsel is based on the proposition that at the time of the Union it was the right or privilege of Roman Catholics to establish Separate Schools for the education of their children; to control and manage these schools by means of Boards of Trustees elected by themselves; and to have for the support of them a share of the public grants for public school purposes, ascertained in the manner provided by the Separate Schools Act; and that the Act in question prejudicially affects this right or privilege, because it takes from the supporters of the Roman Catholic Separate Schools in Ottawa the right to control and manage their schools through the medium of their elected representatives, and vests the control and management of them in a Commission appointed by the Crown.

A brief reference to the history of the legislation as to public elementary instruction or common school education and the genesis of the Roman Catholic Separate School will, I think, assist in reaching a conclusion as to the question involved in the present litigation.

At the time of the Union of the Provinces by the British North America Act, the law relating to Separate Schools in

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Upper Canada (now Ontario) was contained in the Act 26 Vict. ch. 5, which came into force on the 31st December, 1863.

Prior and up to the time of the passing of this Act, there had been bitter controversies on the subject of Roman Catholic Separate Schools, the policy of engrafting on the Common School system provision for the separate education of the children of Roman Catholics being vigorously opposed by a large part and probably a considerable majority of the people of Upper Canada, and the right to this separate education being as vigorously demanded by the Roman Catholic minority.

Provision for the establishment of these Separate Schools was made in the School Law of 1841, 4 & 5 Vict. ch. 18, the first of such laws passed after the union of the Provinces of Upper and Lower Canada, and in the School Laws passed between 1841 and 1863: 7 Vict. ch. 9, 12 Vict. ch. 83, 13 & 14 Vict. ch. 48, 14 & 15 Vict. ch. 111, 16 Vict. ch. 185, 18 Vict. ch. 131.

These provisions varied from time to time the privileges of Roman Catholics as to the establishment, control, and maintenance of the schools. Sometimes they were enlarged beyond those conferred by the School Law of 1841, and sometimes they were abridged; and it was in consequence of the existing legislation having abridged the privileges conferred by previous legislation that the Act of 1863 was intituled "An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools," and that its preamble recited that "it is just and proper to restore to Roman Catholics in Upper Canada certain rights which they formerly enjoyed in respect to Separate Schools." It is important also to notice the remainder of the recital: "and to bring the provisions of the law respecting Separate Schools more in harmony with the provisions of the law respecting Common Schools."

The ground upon which was based the claim of the Roman Catholics to Separate Schools was the injustice of compelling them to contribute to the support of schools to which, owing to the character of the instruction given in them, they could not for conscientious reasons send their children, because in their view it was essential to the welfare and proper education of their children that religious instruction according to the tenets of the Roman Catholic Church should be imparted to them as part of their educational training.

This injustice, it was claimed, was greatly aggravated when, by the School Law of 1850, a system of compulsory free primary education in schools, supported partly by Government grants, but mainly by taxation, to which all ratepayers were liable, was established.

The Act of 1863 provided for the establishing and maintenance of Roman Catholic Separate Schools, which were, with their registers, to be subject to such inspection as might be directed from time to time by the Chief Superintendent of Education, and to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada.

The initial step for bringing into existence a Roman Catholic Separate School was the convening, by not less than five heads of families, being freeholders or householders resident within any school section of any township, village, or town, or within any ward of a city or town, and being also Roman Catholics, of a meeting of persons desiring to establish a Separate School for Roman Catholics in the school section or ward, for the election of trustees for the management of the school. A majority of the persons present at the meeting thus convened, being freeholders or householders and Roman Catholics, were authorised to elect trustees for the management of the school; and, after the trustees had been elected and certain formalities had been complied with, the trustees became a body corporate.

The support of these schools depended upon the voluntary action of the Roman Catholic ratepayer, and provision was made as to the manner in which his intention to be a supporter of the Separate School was to be signified, and provision was also made for the manner in which a supporter of the school might withdraw from it his support.

Provision was also made that every Separate School should be entitled to share in the fund annually granted by the Legislature for the support of Common Schools, and in all other public grants, investments, and allotments for Common School purposes then or thereafter made by the Province or the municipal authorities on the basis of school attendance.

The provisions of the Common School Act relating to the mode and time of election, appointments and duties of chairman and secretary at the annual meetings, term of office and

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manner of filling up vacancies, were made applicable, and the trustees were to perform the same duties and be subject to the same penalties as trustees of Common Schools, and the teachers were to be liable to the same obligations and penalties as teachers of Common Schools.

The trustees were empowered to impose, levy, and collect school rates or subscriptions upon and from persons sending children to or subscribing towards the support of the school, and were invested with all the powers in respect of Separate Schools which the trustees of Common Schools had and possessed under the Common School Acts; and the Act contained other provisions to which, for the purpose of the present inquiry, it is unnecessary to refer.

It will be seen from this summary of the main features of the Act that the Roman Catholic Separate Schools were part of the Common School system of the Province, and as much Common Schools as those schools which bore that name. The terms "Common School" and "Roman Catholic Separate School" or "Separate School" were adopted as a convenient mode of distinguishing between the two classes of Common Schools; and they were all State Schools, the Separate Schools as well as the Common Schools.

Having regard to these facts and the course of the legislation, it is clear, I think, that the only right or privilege with respect to denominational schools which the Roman Catholics had by law in this Province at the Union was the right or privilege, so long as a system of compulsory free primary education existed, to establish, manage, and maintain Separate Schools for the education of their children and to be exempt from contributing to the support and maintenance of the Common Schools while they continued to be supporters of the Separate Schools; and I agree with the trial Judge that, if it should ever become the policy of the Province to abolish the existing system of primary education—I mean by that the system of State Schools—it would be competent for the Legislature to repeal the Separate School Law without contravening the provisions of sec. 93 of the British North America Act.

However, be that as it may, I am of opinion that the Act in question does not, within the meaning of sec. 93 (1), prejudicially

affect any right or privilege with respect to denominational schools which the class of persons called Roman Catholics had by law at the Union.

The right or privilege which that class, as a class, had at the Union, is not prejudicially affected by the legislation, or even interfered with. All that is done is to suspend the right of a particular body of persons of the class to manage its schools, because it persistently refuses to obey the law and insists upon managing them contrary to law and in open defiance of it.

The right or privilege which the Act of 1863 conferred upon Roman Catholics and the persons chosen by them to carry on and manage their schools was not to manage and conduct them according to their own will and pleasure, but only to do so in accordance with the law and the regulations; and, in my opinion, a body of Roman Catholics which is managing and conducting its schools as the appellants were doing, and insisted upon doing, is not exercising any right or privilege which sec. 93(1) was intended to preserve; and it would be, in my judgment, an extraordinary thing if the Legislature were powerless to intervene and to put an end to the state of things which existed and was the moving cause for the enactment of the legislation in question.

It is in the highest interest of the State that its children should be educated, and it cannot surely be, when the body whose duty it is to provide for that education and to carry on the schools under its charge abnegates its functions, refuses to perform its duties, and insists upon carrying on the schools not in disregard only, but in defiance of, the law, that it cannot be displaced and the powers and duties which it should have exercised and performed be vested in a body which is willing and able to obey the law and to provide the needed instruction for the children whose welfare is jeopardised by the action of the unfaithful stewards to whom the Legislature has committed the care of their education. It is, to my mind, a monstrous proposition that the effect of sec. 93(1) is that the State, whose creature the appellants and the schools under their charge are, is powerless to act where a body it has created flouts its authority and disobeys its laws.

It was argued that the remedy which the Legislature has applied is too drastic, and that, if the members of the present

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Board are disobeying the law, there are means by which they can be removed from office and others be elected in their stead. The alternative suggested would, in the circumstances, be no remedy at all. It is not only the members of the Board or a majority of them that defy the law; they are supported in their action by a majority of their constituents; and to remove them from office would only result in the election of another set of men which would follow the course they have taken.

The contention of the appellants' counsel ignores the fact that the minority of the Board and of the ratepayers is desirous of obeying the law and conducting the schools in accordance with it, and the further fact that the minority of the supporters of the schools, owing to the action of the appellants, are deprived of the privilege the enjoyment of which is guaranteed to them by sec. 93 (1), and that one of the purposes and the effect of the legislation in question is to enable them to enjoy that privilege.

For these reasons, I am of opinion that the actions of the appellants were rightly dismissed, and that the appeals should be dismissed with costs.

Garrow, J.A. Maclaren, J.A. Hodgins, J.A.

GARROW, MACLAREN, and HODGINS, JJ.A., concurred.

Magee, J.A.

MAGEE, J.A.:—Fully concurring in the reasons and conclusion of my Lord the Chief Justice and in the dismissal of the appeals and actions, I merely desire to say that it is not necessary in this case, nor has it been in any of the recent cases relative to these Ottawa Schools necessary, to decide that it was ever intended in the British North America Act that the question of the prejudicial effect of legislation in any Province upon the existing rights or privileges of any class as to education or the validity or invalidity of such legislation in that respect should be dealt with by the Courts of law—or otherwise than in the mode provided in the third and fourth provisions of sec. 93 of that Act.

I see no reason to believe that the Imperial Parliament intended that the subject of education should be less fully and completely within the control of some legislative body or bodies in the new Dominion than any of the many other subjects which had to be distributed between the Provincial and Federal jurisdictions, or that any residuum of legislative power on that sub-

ject, more particularly than others, was intended to be withheld for exercise only in the United Kingdom. Within the vertical lines of division, as full powers were conferred upon the respective legislative bodies as were possessed by the Imperial Parliament itself. No ground presents itself to me on which to base a supposition that the new Union and its component parts were not considered fully capable of doing justice to all its citizens as much with regard to education as to trade, marriage, or civil rights.

If such full power was conferred, it must have been placed somewhere; and, wherever placed, it must be absolute and cannot be questioned by any tribunal. Where then does it rest? By sec. 92, exclusive power was given to the Provincial Legislatures upon the various subjects therein mentioned, that of education not being alluded to. By sec. 91, certain other specified subjects, not including education, were assigned exclusively to the Dominion Parliament, and also power to make laws in all matters not coming within the "classes of subjects" assigned exclusively to the Provincial Legislatures—as to none of these subjects specified in secs. 91 and 92 was there any restriction or appeal. Then education is dealt with separately in sec. 93, which opens like sec. 92 by saying that in each Province "the Legislature may exclusively make laws" in relation thereto, but adds, "subject and according to the following provisions," which are four in number.

That section, 93, is the only one relating to education, and, if full power was intended, as I think it was, to rest somewhere in Canada, and was not wholly conferred upon the Province, we must look for the unconferred part as being placed in the Dominion somewhere in the Act. Section 91, as already mentioned, does give to the Dominion Parliament authority in relation to all matters not coming within the "classes of subjects" "assigned exclusively" to the Provinces, but education is assigned exclusively to the Legislatures, though subject and according to certain provisions, but not with any exceptions. It would thus appear that not under sec. 91, but within the four provisions of sec. 93, is to be found the only power given to the Dominion Parliament with regard to education. Outside of whatever is given to the Dominion Parliament, the power of the

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Provincial Legislature must be absolute, if absolute power was transferred to this side of the Atlantic.

The first of the four provisions declares that nothing in any such Provincial law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law in the Province at the time of the Union. The second provision extends to dissentient schools in Quebec, the powers, privileges, and duties of the Roman Catholic Separate Schools and School Trustees in Upper Canada—and incidentally these plaintiffs might take notice that duties as well as privileges attached to them. Then the third and fourth provisions shew what may happen if the first provision is not lived up to by the Provinces. The third gives an appeal to the Governor-General in Council from any Act or decision of a Provincial authority affecting any right or privilege of a Protestant or Roman Catholic minority in relation to education in any Province, where there or thereafter a system of separate or dissentient schools exists. And the fourth and last provision is that, if the decision on such appeal is not duly executed by the Provincial authorities, or in case any such Provincial law as from time to time to the Governor-General in Council seems requisite for the due execution of the provisions of sec. 93, is not made, the Parliament of Canada may make—what?—remedial laws for the due execution of the provisions of the section and of any decision of the Governor-General in Council.

This remedial power is the only power given to the Dominion, and it is given only in case the Province itself fails to supply the remedy. But remedial laws, whether of the Province or the Dominion, imply that the law or state of affairs to be remedied is in force or actual existence, not that it is invalid or non-existent. This qualification that the Dominion may make remedial laws, on the refusal of the Province, would seem to be the only qualification of absolute power in the Province, and would seem to imply absolute power if the qualification never takes effect.

Moreover, as the British North America Act gives the appeal against the infringement of the rights which it creates, it would appear from the broad and general nature of the subject, involving matters of high policy and liberal, generous, and wise treatment of minorities, which should not be the subject of technical construction, that the words of Lord Herschell in *Barra-*

clough v. *Brown*, [1897] A.C. 615, might well apply. At p. 620 he said: "I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right." And see also *Pasmore* v. *Oswaldwistle Urban District Council*, [1898] A.C. 387.

It appears to me, therefore, that it may well be open to argument that the only relief ever intended from a Provincial law prejudicially affecting rights or privileges as to denominational schools, was intended to come from the Provincial Legislature itself, or, failing that, then from the High Court of Parliament itself; and that it is not open to have the validity of every change in the law, however trifling or local, in a matter affecting what are, after all, though in a sense state schools, as purely voluntary as joint stock companies or societies, from which members may at any time withdraw, brought before Courts of law in various places to decide, perhaps without adequate evidence, whether a great class throughout the Province is prejudicially affected.

In *City of Winnipeg* v. *Barrett*, [1892] A.C. 445, 5 Cart. 32, the Privy Council considered that under the Manitoba Act such questions could be dealt with by the Courts. But it may be that Manitoba powers, being carved out of the Dominion powers, might be considered more restricted than those which were merely the subject of rearrangement of the powers of independent Provinces at Confederation.

In *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202, a question had been submitted to the Court by the Governor-General in Council. In *Ex p. Renaud* (1873), 1 Pugsley (N.B.) 273, 2 Cart. 445, the New Brunswick School Act of 1871 was held valid, though the Court assumed it was their right and duty to deal with such questions. In *Belleville Separate School Trustees* v. *Grainger* (1878), 25 Gr. 570, 1 Cart. 816, changes in the Ontario Separate School law were held valid by Blake, V.-C., who pointed out that no appeal to the Governor-General in Council had been made.

However, these actions fail, without our having to consider that question. *Appeals dismissed.*

NOTE: This judgment was reversed by the Privy Council, which held that sec. 93 of the B.N.A. Act, 1867, only confers power to pass laws which do not transgress s.s. 1, and that an "unconferred part" (per Magee, J.A.) resides in the British Parliament.—ED.

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BRANT v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee and Hodgins, JJ.A. April 19, 1916.

1. RAILWAY COMMISSION (§ I—2)—GRADE CROSSINGS—ELIMINATION—CLOSING HIGHWAY—POWERS.

The Board of Railway Commissioners is empowered by the Railway Act, R.S.C. 1906, ch. 37, sec. 238, as amended by 8 & 9 Edw. VII. ch. 32, sec. 5, to act upon its own motion to facilitate the elimination or diminishing of grade crossings; and for this purpose authority is conferred upon the Board to order that part of a highway be closed or to require the proper municipal authority to close it.

[*Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602, distinguished.]

2. RAILWAYS (§ II B—19)—ALTERING GRADE OF HIGHWAY—DAMAGES—REMEDY—ARBITRATION.

For damages to property by altering the grade of a street under a valid order of the Board of Railway Commissioners, to alter a grade crossing, the remedy is by arbitration proceedings under the Railway Act, R.S.C. 1906, not by an action against the railway company acting under the order.

Statement. APPEAL by defendant in an action for damages caused by closing part of a highway and by the elevation of railway tracks. Reversed.

Angus MacMurchy, K.C., for appellants.

G. H. Watson, K.C., for respondent.

The judgment of the Court was delivered by

Meredith, C.J.O. MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment, dated the 4th February, 1916, which was directed to be entered by the Chief Justice of the King's Bench, after the trial of the action before him, sitting without a jury, at Toronto, on the previous 31st January.

The respondent is the owner of part of lot number 2 in block B. on the west side of Albany avenue, in the city of Toronto, and sues to recover damages for the alleged wrongful interference by the appellants with the grade of the street, for closing up that part of it which lies to the north of the respondent's land, and for the injury to his house caused, as he alleges, by the additional vibration occasioned by the running of the trains on the tracks which have been elevated; or, in the alternative, for a mandatory order requiring the appellants forthwith to give the necessary notices and to take all necessary and proper proceedings under the Railway Act to provide compensation to the respondent, and for payment to him for the injury and loss which he had sustained, and, if necessary for that purpose, that arbitration proceedings be directed and ensue.

The acts of which the respondent complains were done in the

course of elevating the tracks of the railway between Davenport road and Summerhill avenue, and for the purpose of carrying out a plan which had been adopted for getting rid of certain of the grade crossings in that part of the city.

The appellants justify these acts as having been lawfully done under the authority of the Railway Act (Canada) and of an order made by the Board of Railway Commissioners of Canada; and they contend that, if the respondent's property has been injuriously affected by what has been done, he must seek compensation under the Act.

The adoption of the scheme for the elevation of the tracks which has been carried out was brought about in consequence of a communication dated the 15th July, 1909, addressed by the Board to the appellants the Canadian Pacific Railway Company, as well as to other railway companies, in which attention was called to the provisions of sec. 7 of an Act of the Parliament of Canada (8 & 9 Edw. VII. ch. 32) passed for the purpose of securing in the public interest the gradual elimination of grade crossings, and the railway company were asked to furnish to the Board a list of the crossings upon their lines which in their opinion "should be the ones to make a start at." In compliance with this request, the appellants the Canadian Pacific Railway Company designated (I apprehend in addition to other crossings) the Yonge street crossing. The Board's Chief Engineer (Mr. Mountain), by direction of the Board, examined this crossing, and recommended as "the proper solution of the question" the elimination of two or three grade crossings on each side of Yonge street as well as the one on Yonge street, by elevating the tracks. The report of Mr. Mountain is dated the 19th January, 1910. A meeting of the Board took place on the 27th of the same month for "consideration of the elimination of the grade crossing of the Canadian Pacific Railway Company at Yonge street, North Toronto, Ontario." At this meeting, representatives of that company and of the City of Toronto were present, and the proceedings began by the representative of the railway company saying: "This is another case taken up on the initiative of the Board."

No conclusion was come to by the Board at this meeting, but an adjournment was made until the 1st February following. Mr. E. W. Beatty appeared for the railway company at the adjourned

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meeting. The further consideration of the matter was again adjourned, and the adjourned meeting was held on the 7th June, 1910, at which Mr. Beatty again appeared, and the City of Toronto and the Toronto and York Radial Railway Company were represented.

At or before this meeting, plans of the proposed track elevation prepared by the railway company were filed with the Board, and Mr. Beatty said that they had been filed "as ordered by the Board in March." There does not appear to have been any meeting in March, and the reference is probably to what occurred at the meeting on the 1st February, at which it appears that it was arranged that the railway company should furnish plans shewing what "they propose doing."

On the 13th September, 1910, an order was made by the Board approving "the plan dated May, 1910, shewing the proposed lay-out across . . . Yonge street and Avenue road filed by the railway company, and on file with the Board under file number 9437153."

Nothing further appears to have been done until the 23rd May, 1912, when the matter was further considered by the Board and detail plans of the separation of grades at Yonge street and Avenue road were approved as submitted.

By an order of the Board, dated the 29th June, 1912, made, as it states, "in the matter of the consideration of the question of the elimination of grade crossing by the tracks of the Canadian Pacific Railway Company at Yonge street, North Toronto, in the Province of Ontario," it is ordered that "the plan shewing the track elevation of the said proposed joint section of railway to be used by the Canadian Pacific Railway Company and the applicant company from Summerhill avenue to Dovercourt road, dated May 15th, 1912, filed with the Board under the said file No. 1202170, is hereby approved, except . . ."

The plan referred to in the order is annexed to it, and the plan shews the crossing at Albany avenue and the grade of the track there, and it shews also that part of that street is to be closed.

Acting under the authority of this order, the elevation of the tracks was proceeded with and has been completed, and a by-law has been passed by the Municipal Council of the Corporation of the City of Toronto closing that part of Albany avenue which is bounded on the north by a line distant forty-one feet six inches

northerly from the northerly limit of the right of way of the Canadian Pacific Railway Company and on the south by the southerly limit of that right of way. The by-law was passed on the 21st May, 1915; but it appears that, after the work of elevating the tracks was begun, fences were erected and maintained by the appellants or one of them at each end of the part of Albany avenue which is closed by the by-law.

It was contended by Mr. Watson that the appellants had no right or power to proceed with the elevation of the tracks or otherwise to interfere with Albany avenue unless and until they had complied with the requirements of sec. 167 of the Railway Act (R.S.C. 1906, ch. 37), by submitting to the Board of Railway Commissioners for Canada a plan, profile, and book of reference of the portion of the "railway proposed to be changed, shewing the deviation, change or alteration proposed to be made," obtaining the sanction of the Board to the proposed change being made, and by depositing copies of the plan, profile, and book of reference in the office of the Registrar of Deeds for the locality, and giving public notice of the deposit, and had also made compensation to the respondent before interfering with his rights.

Mr. Watson also contended that the order of the Board was made on the application of the appellants or one of them, and that the Board had no jurisdiction to make the order, because, as he contended, the applicants had no *locus standi* to make the application.

He also contended that the Board had no jurisdiction to close a highway or to order a highway to be closed.

Unless the changes that have been made in the Railway Act since the case of *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602, was decided, have altered the law so as to make what were then held to be conditions precedent to the right of the railway company to lower the grade of a highway and to carry it by a subway under the railway pursuant to an order of the Railway Committee of the Privy Council, sanctioned by the Governor in Council, no longer conditions precedent, that case is conclusive against the appellants.

It was there decided that an order of the Railway Committee of the Privy Council, under sec. 4 of 46 Vict. ch. 24, did not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the purpose of carrying

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out the requirements of the Railway Committee, authorise or empower the railway company upon whom the order is made to take any person's land or to interfere with any person's right; that where a railway company, acting under an order of the Railway Committee does not deposit a plan or book of reference relating to the alterations required by the order, and give the notice of the deposit prescribed by the Act, it is not entitled to commence operations, and that payment of compensation by the railway company was a condition precedent to its right of interfering with the possession of land or the rights of individuals.

The Act under consideration in that case was the Consolidated Railway Act, 1879 (42 Vict. ch. 9), as amended by 46 Vict. ch. 24.

Sections 48 and 49 of the Act of 1879 were repealed by sec. 4 of the amending Act, and there was substituted for sec. 48 the following section: "48. In any case where any portion of a railway is constructed, or authorised or proposed to be constructed, upon or along, or across any turnpike road, street or other public highway, on the level, the railway company, before constructing or using the same, or in the case of railways already constructed within such time as the Railway Committee shall direct, shall submit a plan and profile of such portion of railway, for the approval of the Railway Committee; and the Railway Committee, if it appears to them necessary for the public safety, may, from time to time, with the sanction of the Governor in Council, authorise and require the company to whom such railway belongs, within such time as the said Committee directs, to carry such road, street or highway either over or under the said railway, by means of a bridge or arch, instead of crossing the same on the level, or to execute such other works as under the circumstances of the case appear to the said Committee the best adapted for removing or diminishing the danger arising from the then position of the railway, or to protect such road, street or highway by a watchman, or by a watchman and gates or other protection; and all the provisions of law at any such time applicable to the taking of land by railway companies and its valuation and conveyance to them, and to the compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the Railway Committee. . . ."

The Railway Committee, acting under the authority of this section, on the 21st September, 1883, reported that the Com-

mittee deemed it necessary for public safety that the railway companies interested be authorised and required to carry Queen street under their railways by means of a bridge or subway with the necessary approaches to it, and the report was approved by the Governor in Council.

A subway was accordingly constructed, the effect of which was to lower the roadway in front of the plaintiffs' property and to deprive them of the access to Queen street which they had previously enjoyed, and to injure their property very seriously.

No plan or book of reference of or as to the work had been deposited in the office of the Clerk of the Peace, as required by clause 2 of sec. 8 of the Act of 1879, nor had any notice been given, as required by clause 10 of sec. 9 of the same Act; and, therefore, as provided by clause 8 of sec. 8, the railway companies were not entitled to proceed with "the execution of the railway, or of the part thereof affected by the alterations, as the case may be."

As I have said, it was also held that until compensation had been paid to the persons whose lands were or would be affected injuriously by the work, or a warrant for immediate possession had been obtained after notice to these persons (sec. 9, clauses 27 and 28), the railway companies were not entitled to proceed with the work.

It is unnecessary to go through the various changes that have been made from time to time in the legislation. It will suffice to say that changes were made in 1888 by 51 Vict. ch. 29, and in 1903 by 3 Edw. VII. ch. 58; that the Railway Act was revised in 1906, and appears as ch. 37 in the Revised Statutes of that year; and that the provisions which affect the question for decision were enacted by 8 & 9 Edw. VII. ch. 32.

By secs. 4 and 5 of that Act, secs. 237 and 238 of ch. 37 of the Revised Statutes were repealed, and new sections bearing the same numbers were substituted for them, and (by secs. 6 and 7) new sections, numbered 238A and 239A, were added.

Section 237 deals with applications for leave to construct a railway upon, along, or across a highway, and its provisions need not be referred to further than to say that it deals only with applications by railway companies.

An important change was effected by the new sec. 238, which provides as follows:—

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"238. Where a railway is already constructed upon, along or across any highway, the Board may, upon its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

"2. When the Board of its own motion, or upon complaint or application, makes any order that a railway be carried across or along a highway, or that a railway be diverted, all the provisions of law at such time applicable to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land exclusive of the highway crossing, required for the proper carrying out of any order made by the Board.

"3. Notwithstanding anything in this Act, or in any other Act, the Board may, subject to the provisions of section 238A of this Act, order what portion, if any, of cost is to be borne respectively by the company, municipal or other corporation, or person in respect of any order made by the Board under this or the preceding section, and such order shall be binding on and enforcible against any railway company, municipal or other corporation or person named in such order."

Section 238A made it the duty of railway companies, in the case of railways constructed after the passing of the Act, at their own cost and expense, to "provide, subject to the order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway."

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Section 239A is a new section, and makes an appropriation for the purpose of aiding in the providing, by actual construction work, of protection, safety, and convenience for the public in respect of highway crossings of the railway at rail level, in existence on the 1st day of April, 1909.

Section 238 plainly, I think, deals with proceedings *in invitum* of the railway company, and was passed to facilitate the elimination or diminishing of grade crossings, which was, in the opinion of Parliament, so important a matter as to justify the application of public money in order more easily and speedily to effect the desired object; and it was in furtherance of this object, no doubt, that the Board was empowered to act upon its own motion, as it is provided in sec. 238 it may.

The power vested in the Board to order that a "highway be temporarily or permanently diverted," and the wide power to order such measures to be taken "as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected," in my opinion confer authority upon the Board to order that part of a highway be closed, or at all events authority to require the proper municipal authority to close it.

If I am right in so interpreting sec. 238, it follows, I think, that *Corporation of Parkdale* v. *West* does not apply. It was by reason, and by reason only, of the provisions of the Railway Act which were applied having been made applicable by sec. 4 of 46 Vict. ch. 24, that the conclusion to which the Judicial Committee came was reached.

Section 238, it will have been observed, does not make applicable the provisions of law as to the matters to which it refers, to anything but an order that "a railway be carried across or along a highway" or that "a railway be diverted." The order in question does not require that the railway "be carried across or along a highway," nor does it require the "railway to be diverted." It in effect blots out the highway between the points mentioned in the by-law and vests that part of it in the railway company.

For these reasons, I am of opinion that *Corporation of Parkdale*

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v. *West* does not apply, and that the acts of which the respondent complains were lawfully done in the execution of the order of the Board, unless the contention of the respondent's counsel that the Board had no jurisdiction to make the order, for the reason I have already mentioned, is entitled to prevail.

I am of opinion that that contention is not well-founded. It is manifest from the narrative I have given of the proceedings of and before the Board, that the Board, in making the order in question, was acting under sec. 238, and upon its own motion. The proceedings were initiated by the Board, and everything that was subsequently done was consequent upon the initial action taken by the Board with the view of carrying out the policy of Parliament to eliminate, or to diminish the number of, grade crossings.

In the view I take as to the proper disposition to be made of the appeal, it is unnecessary to determine the question as to the right of the respondent to be compensated for the damage alleged to have been done to his building, which he attributes to the increased vibration caused by the elevation of the railway tracks, as that is a matter which will be dealt with in determining the compensation to which the respondent is entitled.

Upon the argument, counsel for the appellants expressed their willingness to proceed to arbitration to determine the compensation to which the respondent may be entitled for the injurious affection of his property by the closing of the part of the highway which has been closed and for any injury he may have sustained by the elevation of the tracks, so far as that is a matter for which, under the Railway Act, he is entitled to be compensated; and, in my opinion, the proper disposition to be made of the appeal is that, upon the appellants undertaking to proceed without delay to determine the compensation to be paid to the respondent in respect of these matters, the appeal should be allowed and the action be dismissed, and that in the circumstances the parties should be left to bear their own costs of the action and of the appeal. ——— *Appeal allowed.*

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INTERNATIONAL HARVESTER CO. v. HOGAN.

Alberta Supreme Court, Ives, J. September 18, 1916.

EXECUTION (§ I—11)—MORATORIUM—VOLUNTEERS AND RESERVISTS RELIEF ACT—JUDGMENT AS NEW DEBT.

The Volunteers and Reservists Relief Act (Alta. 1916, ch. 6, sec. 3) protects only against proceedings for the enforcement of any "debt,

liability or obligation" incurred *before* the passing of the Act, and has no application to the enforcement of a judgment, which in itself creates a new debt, obtained on the day on which the Act became effective.

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APPEAL in Chambers from a judgment of the Master dismissing an application by plaintiff for leave to sell defendant's goods under an execution under which the sheriff has seized. Reversed.

S. W. Field, for plaintiff.

J. E. Wallbridge, K.C., for defendant.

IVES, J.:—The judgment was obtained on April 19, 1916, the same day on which the Volunteers and Reservists Relief Act (1916, ch. 6) came into force. The defendant, having become a member of the Reserve Militia subsequent to the judgment, claims the protection of the Act. The sheriff's sale would, I think, be a "proceeding" against the defendant. But the Act, sec. 3, protects only against proceedings for the enforcement of any debt, liability or obligation incurred *before* the passing of the Act.

IVES, J.

The question therefore arises, is the judgment a debt, liability or obligation incurred before the passing of the Act? I think not. The judgment creates a new debt; the old debt is gone, merged in the judgment. The new debt is distinct from the original claim and is not merely the evidence of the creditor's claim but is the substance of the claim itself, 23 Cyc., p. 1111. By the judgment the debtor is freed from the original liability and is subjected to a new liability and the creditor has obtained a fresh cause of action. He may sue upon his judgment in the same Court in which he obtained it. Garnishment may issue not on the original claim but in respect of the judgment which only declares the existence of the original claim and fixes its amount. It is true that in some cases the judgment may only declare an old debt in a new form when justice to the parties so requires, as where the original debt is based upon an agreement which provides, *inter alia*, that a judgment shall not merge the debt.

With respect then, I think the judgment of the Master wrong in so far as it extended the provisions of the Act to this defendant. The plaintiff should renew his application to the Master. Plaintiff to have the costs of the appeal.

Appeal allowed.

MAN.

C. A.

WILKS v. LEDUC AND TORONTO GEN'L TRUSTS.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. August 18, 1916.

MECHANICS' LIENS (§ VI—46)—RIGHT OF SUB-CONTRACTOR—CONTRACTOR'S DEFAULT.

A sub-contractor supplying materials is not entitled to claim under the provisions of the Mechanics' Lien Act (R.S.M. 1913, ch. 125, secs. 4, 7, 9), where, owing to the contractor's default, there is no "sum justly due or payable" to the contractor by the owner.

Statement. APPEAL from a judgment under the Mechanics Lien Act, R.S.M. 1913, ch. 125. Varied.

S. Hart Green, for respondent, plaintiff.

A. E. Hoskin, K.C., for Toronto General Trusts.

E. R. Levinson, for executors.

H. J. Symington and *J. R. Crawford*, for lienholder Jack.

The judgment of the Court was delivered by

Cameron, J.A. CAMERON, J.A.:—This is an action to enforce a mechanic's lien brought by the plaintiff against Lucien C. Leduc, a contractor, and the Toronto General Trusts Corp., for supplying 21 yards of gravel of the value of $33, and doing 322½ hours of teaming, at 60 cents per hour, being $193.50, the whole sum claimed being $227.10. The premises are in the city of Winnipeg. The plaintiff registered his lien September 18, 1914. The lien filed claims a lien upon the estate of the Trusts Corporation.

The referee held the plaintiff and another, H. A. Jack, entitled to liens and judgments for their debts and costs; as to the plaintiff against Leduc and the Trusts Corporation "executor of the last will of Abram Milmet, deceased;" and as to Jack against the Trusts Corporation.

With reference to this appeal, in so far as Jack's claim is concerned, I see no reason for varying the judgment.

The contract with the principal contractor, made July 7, 1914, provided that the contractor should provide the materials and perform the work mentioned in the plans and specifications to the satisfaction of the architect; said work is to be done and materials to be used in connection with the erection of basement, foundation and for alterations on the premises named. The work was to be completed August 22, 1914.

Leduc did not complete even the basement and the Trusts Corporation, after his failure to complete, gave notice in accordance with the contract and completed the work through another contractor. There was no work done by Leduc after August 7.

The architect made an estimate, September 8, of the amount due in respect of the actual work done by Leduc, and fixed it at $1,498.20. On this amount the Trusts Corporation paid into Court 20%, or $299.64, when action was brought. The Trusts Corporation claims that the amount fixed by the architect was fully paid.

Wilks commenced his action October 14, 1914. The statement of claim originally did not allege any contract between the Trusts Corporation and Leduc. On the second day of the trial an amendment to that affect was allowed by the referee, and that there was money remaining due to Leduc on that contract sufficient to pay the plaintiff's claim, or that the owners had notice before paying out the money and should be liable. The difficulty in making substantial amendments to the pleadings in lien cases is obvious.

I think it clear that the position of the plaintiff is not that of a wage-earner but that of a sub-contractor to Leduc. His agreement with Leduc was to furnish gravel and the use of three teams. He uses the term wages in his claim, but that is for the purpose of computing the amount claimed by him.

August 7, 1914, the plaintiff procured from Leduc an order on the Trusts Corporation for $135 for wages July 9 to August 6. August 20, he procured an order for $52.50 for wages from August 10 to August 20. Each order was served on the corporation on the day of its date.

The various accounts paid out by the corporation amounted to $1,022.73 up to August 31. One of these amounts was $300 paid to Jack on August 8, on an order filed with the corporation dated July 27 and received August 3 or 4. Jack obtained an order from Leduc for this amount although his contract with the corporation was direct. He says he thought that was the proper way to get his money. In addition, sums amounting to $350 were paid to wage-earners and the sum previously mentioned was paid into Court.

The contention of the corporation is that there was nothing due Leduc to which the plaintiff's claim could attach. By sec. 4 of the Act (R.S.M. 1913, ch. 125) the amount of the lien to be claimed is limited

in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (excepting as herein provided) by the owner;

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Also, in sec. 7—

Save as herein provided, lien shall not attach . . . for a greater sum than the sum payable by the owner to the contractor.

The provisions of sec. 9 were also referred to at length on the argument, particularly those of sub-sec. (4).

It is contended that, with respect to Jack's claim for $300, the owner had a right to hold and pay the amount under section 6 of the contract, and this appears to be the case. A certificate was given by the architect for this $300 and for that payment the corporation held Leduc's order as well as the architect's certificate. The propriety of this payment cannot, it seems to me, be disputed.

Payments were made after notice of the plaintiff's orders to the extent of $350 in addition to the Jack payment of $300. These, however, were to wage-earners whose claims are preferential under sec. 12, sub-sec. (2), and were in accordance therewith.

Par 10 of the contract provides:—

(10). It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for the said work and materials shall be $2,500 (subject to additions and deductions as herein provided) and that such sum shall be payable as follows:

The sum of six hundred (600) dollars as soon as the rear basements under the kitchens are fully completed. The sum of three hundred and fifty (350) dollars as soon as the foundations under front and sides of building are fully completed. The sum of two hundred (200) dollars as soon as the brick work in the building is fully completed. The sum of two hundred (200) dollars as soon as the kitchen floors are raised and the carpenter work put in the cellar. The sum of three hundred (300) dollars as soon as the concrete floor in the catch basin and the catch basin drains are fully completed. The sum of two hundred (200) dollars as soon as the grading in the yard is fully completed and the balance to be paid thirty days after all the work is fully completed and erected. No work is to be paid for until the said architect shall give his certificate that such money should be paid.

Now, it appears, as already stated, that not even the basement was completed by the contractor, and we have before us the express provision as above that no work is to be paid for until the architect has given his certificate that the money should be paid. In these circumstances it cannot be said that there was at the time of the service of the orders any sum justly due the contractor or that there was any sum whatever payable to the contractor by the owner.

It was explained, and it appears by the evidence, that the payments made by the corporation, amounting to $350, after receiving the Wilks' orders were on account of claims by wage-

earners which were recognized by the Trusts Corporation in accordance with the provisions of sec. 12, sub-sec. (2). These payments were, therefore, properly made. And I fail to see how they or the payment to Jack can be considered an acknowledgment of any further liability by the corporation, nor can the payment of 20% of the amount estimated by the architect as the value of the work, into Court be considered such. That payment was made in accordance with the Act, in view of the favoured position of wage-earners and as a measure of precaution.

From both the points of view dealt with, I think the Wilks' appeal by the Trusts Corporation must be allowed. The appeal against that portion of the judgment giving Jack relief must be dismissed.

Has Wilks any charge upon the percentage paid into Court? Under sub-sec. (2) of sec. 9:—

> The liens created by this Act shall be a charge upon the amounts directed to be retained by this section, in favour of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

On the wording of this sub-section, there being no money payable to the contractor, and, therefore, no lien by virtue of, or created by the Act, there can be no charge on the money paid into Court in favour of this plaintiff. In *Rice Lewis* v. *Rathbone*, 9 D.L.R. 114, 27 O.L.R. 630 (where there was no contract to pay except on fulfilment of the contract, p. 632, per Meredith, J.A.), the statement of Middleton, J., in *Farrell* v. *Gallagher*, 23 O.L.R. 130 at 139, that

> When, by reason of the contractor's default, the money never becomes payable, those claiming under him and having this statutory charge upon this fund, if and when payable, have no greater right than he himself had, and their lien fails,

was approved by Magee, J.A., p. 640, who adds, at p. 641:—

> Except in so far as moneys become actually payable, there is no percentage upon which liens other than wage-earners' liens can become a charge.

It is to be noticed that in this case in the præcipe on appeal (par. 8) the Trusts Corporation says that if the plaintiff has any claim it should be included amongst those of the general body of lienholders and that he is restricted to participation in the amount paid into Court by the defendant corporation for the benefit of all lienholders. There is no question that the plaintiff is entitled to a personal order against Leduc and in that sense he has a "claim." But he is not a lienholder under the Act or in

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the terms of the statement in par. 8, and, therefore, not entitled to share in the amount so paid into Court. And in a subsequent paragraph (11) the ground is expressly taken that the plaintiff is not entitled to any lien whatever. As, in my opinion, that contention is correct the logical result is that he is not entitled to participation in the amount paid into Court. The undisputed rights of the other parties to share in this amount cannot be affected by the plaintiff's claim which is not one against the land or the Trusts Corporation on the percentage, but against Leduc only.

In *Deldo* v. *Gough Sellers, Ltd.*, 25 D.L.R. 602, 34 O.L.R. 274, it was held by the Ontario Court of Appeal that the rights of lienholders are measured by the amount "justly owing" by the owner to the contractor, and the owner is not liable for a greater sum than is payable to the contractor.

There was no appeal involving the claims of any other of those entitled to payments out of Court and mentioned in the third schedule of the judgment than that of the plaintiff.

The judgment must go back to the Referee to be modified in accordance with the foregoing.

The Trusts Corporation is entitled to the costs of the Wilks' appeal and of his action so far as his claim is concerned but must pay those of Jack. *Judgment varied.*

ONT.

S. C.

GREENWOOD v. RAE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. March 21, 1916.

LANDLORD AND TENANT (§ III E—116)—LIABILITY TO TENANT FOR WRONGFUL RE-ENTRY—NOMINAL DAMAGES.

Re-entry by a lessor, under the provisions of a covenant in the lease, by reason of the breach of that covenant by the lessee in giving a mortgage upon the chattels on the demised premises, is wrongful if the lessor does not first comply with the requirements as to notice contained in sec. 20 (c) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155; for such wrongful re-entry the lessor is liable in damages to the lessee, but, by reason of his breach of covenant, the lessee is only entitled to nominal damages.

APPEAL by the plaintiff from the judgment of COATSWORTH, Junior Judge of the County Court of the County of York, dismissing an action, brought in that Court and tried by him without a jury, to recover damages for the wrongful entry of the defendant upon a farm demised by the defendant to the plaintiff and the wrongful ejection of the plaintiff therefrom. Reversed.

J. M. Ferguson, for appellant.

ONT.

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GREENWOOD v. RAE.

Meredith, C.J.O.

Frank Arnoldi, K.C., for respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of York, dated the 15th November, 1915, which was directed to be entered by a Junior Judge of that Court (Coatsworth) after the trial of the action before him, sitting without a jury, on the 9th day of that month.

The appellant was tenant of the respondent of a farm in the township of Georgina, held under a lease from him dated the 28th September, 1908. The term of the lease is seven years from the 15th March, 1909, and the rent is $125 for the first year, $150 for the second year, and $175 for each of the remaining five years of the term.

The lease contains a provision that: "If the term hereby granted or any of the goods or chattels of the said lessee shall be at any time during said term seized or taken in execution or attachment by any creditor of the said lessee, or if the said lessee shall make any chattel mortgage or bill of sale of any of his crops or other goods and chattels, or any assignment for the benefit of creditors, or, becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt and insolvent debtors, or shall attempt to abandon said premises or to sell and dispose of his farm stock and implements so that there would not in the event of such sale or disposal be a sufficient distress on said premises for the then accruing rent, of which the said lessor shall be the sole judge, then in every such case the then current and next ensuing year's rent and the taxes for the then current year (to be reckoned upon the rate of the previous year in case the rate shall not have been fixed for the then current year) shall immediately become due and payable, and the term hereby granted shall at the option of the said lessor immediately become forfeited, void and determined, and in every of the above cases such taxes or accrued portion thereof be recoverable by said lessor in the same manner as the rent hereby reserved; and also in case of removal by the lessee of his goods and chattels in whole or a substantial part thereof from off the said premises, the said lessor may follow and distrain the same for thirty days in the same manner as is provided for by law in cases of fraudulent or clandestine removal."

The action is brought to recover damages for the wrongful

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entry by the respondent upon the demised premises and the wrongful ejection by him of the appellant from them.

By his statement of defence the respondent, besides putting in issue the fact of the alleged eviction, justifies his entering into possession of the premises because: (1) the appellant had made a mortgage of his chattels; (2) had removed his chattels from the demised premises in the month of April, 1914; and (3), in the judgment of the respondent, the appellant, in April, 1914, abandoned the demised premises, and did not leave on them a sufficient distress for the rent then accruing; and alleges that, therefore, by virtue of the provisions of the lease which I have quoted, the term granted by it became immediately forfeited and void, and the respondent "became entitled to enter into possession of the demised premises, as he did."

The respondent also claims that, by reason of the acts alleged to have been committed by the appellant, the then current and the next year's rent and the taxes for the current year became immediately due and payable, and by counterclaim he claims judgment for $350 "rent forfeited by the defendant by counterclaim by his acts, and for taxes."

Besides the defence justifying his entry, the respondent at the trial endeavoured to establish that the appellant had voluntarily left the premises and had surrendered his lease and the term granted by it. The learned Judge makes no finding as to these matters; but, in my opinion, the proper conclusion upon the evidence is that neither of these defences was made out.

The learned Judge, however, dismissed the action, holding that, "taking into consideration all the circumstances, the notice by the plaintiff to the defendant, the chattel mortgage, the leaving and apparent abandonment of the premises by the plaintiff, and the removal of his goods therefrom, so that, in the judgment of the lessor, there was not sufficient distress," the respondent "was quite justified in taking possession of the premises, and he was entitled to do so."

The appellant relied upon the provisions of sec. 20 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, but the view of the learned Judge was, that that section applies only where the landlord is suing for the recovery of the premises.

Sub-section 2 of sec. 20 provides that "a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach

of any covenant or condition in the lease other than a proviso in respect of the payment of rent, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach."

I am unable to agree with the conclusion of the learned Judge that sub-sec. 2 applies only where the landlord is suing for the recovery of the premises. It was held otherwise under the corresponding section of the Imperial Act (44 & 45 Vict. ch. 41), by Wright, J., in *In re Riggs, Ex p. Lovell*, [1901] 2 K.B. 16. The view of that learned Judge was that the notice which the Act requires is necessary as a preliminary to re-entry without action; and, referring to the words "or otherwise," he said (p. 20) that "no mode of enforcing such a right otherwise than by action has been suggested except that of peaceable entry." He also thought that the use of the words "if any" in sub-sec. 2 (i.e., of the Imperial Act)—"the lessee may in the lessor's action, if any"—indicates that entry without action was within the purview of sub-sec. 1.

Although in this Province there is a mode, other than an action, by which a right of entry or forfeiture may be enforced, namely, under the overholding provisions of the Landlord and Tenant Act, and to that extent one of the reasons assigned for the conclusion of the learned Judge may be somewhat weakened, we should, I think, adopt his construction of the Act, especially as in the leading text-books on the law of landlord and tenant his view is adopted: Woodfall's Landlord and Tenant, 19th ed., p. 384, note (*a*); Halsbury's Laws of England, vol. 18, p. 539, note (*n*); Foa's Landlord and Tenant, 5th ed., p. 741, note (*a*).

The giving of the chattel mortgage was, no doubt, a breach of the provisions of the lease which I have quoted, which gave to the respondent a right of re-entry and to put an end to the lease; and, but for the provisions of sec. 20 of the Landlord and Tenant Act, that would be sufficient to entitle him to succeed. That

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right is, however, qualified by sec. 20, and the respondent was not entitled to enforce it unless or until he had complied with the requirement of the section as to notice, and that he had not done. In entering he was, therefore, in my opinion, a wrongdoer, but it does not follow that the appellant is entitled to more than nominal damages. He had committed a breach of the condition, and the right of the respondent to re-enter, though the putting of it into force is suspended, still exists, and it is only in the event of the appellant being able to obtain relief from the forfeiture that the right of re-entry will be gone. He has taken no steps to obtain that relief, and it is by no means clear that, if it had been applied for, it would have been obtained. It would therefore be manifestly unfair that he should recover damages based upon his having been deprived of the use of the premises and of the benefit of the ploughing that had been done in the fall before his eviction —in other words, the damages to which he would have been entitled if there had been no breach of the condition and no right in the landlord to evict him.

It is difficult to find any satisfactory basis upon which the damages are to be assessed at more than a nominal sum. If the measure of them is the loss the appellant has sustained by having lost the chance of succeeding in an application to be relieved from the forfeiture, I am unable to see how that loss can be satisfactorily measured, having regard to the fact that the giving of the notice which the statute required the respondent to give before entering was not a condition precedent to the right of the respondent himself to apply for relief, which, under sub-sec. 3 of sec. 20, he may do; and, upon the whole, I am of opinion that only nominal damages should be awarded.

I would, for these reasons, allow the appeal with costs and substitute for the judgment dismissing the action judgment for the appellant for $5, with costs on the appropriate scale.

Appeal allowed.

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