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ANNOTATED

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VOL. 53

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TORONTO:

CANADA LAW BOOK CO. LIMITED

84 BAY STREET

1920

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REX v. TONY SCHMIDEL. ALTA.

S. C.

Alberta Supreme Court, Hyndman, J. June 22, 1920.

INTERNAL REVENUE—(§ I—8)—INLAND REVENUE ACT R.S.C. 1906, CH. 51, SEC. 180—INDICTABLE OFFENCE UNDER—ARREST OF ACCUSED—JUSTIFICATION—SEARCH WARRANT.

An offence under sec. 180 of the Inland Revenue Act, R.S.C. 1906, ch. 51, is a criminal offence and indictable, but in order to justify the arrest of an accused it is necessary to shew that the still, etc., were found in the place which the search warrant authorized the officers to search, where the warrant specifically mentions the "dwelling" of the accused, it does not include an isolated cabin on a piece of land which is not proven to be the property of the accused.

An information which alleges a "still", etc., suitable for the manufacture of "intoxicating liquors" instead of "spirits," as mentioned in the Act is fatal to a conviction.

Statement.

APPLICATION to quash a conviction for an offence laid under sec. 180 of the Inland Revenue Act. Conviction quashed.

J. McKinley Cameron, for applicant; *G. Lafferty*, for the Crown.

Hyndman, J.

HYNDMAN, J.:—The defendant was arrested and brought before the Magistrate as the result of a warrant to "search" his "dwelling."

The facts are that the warrant to search was issued on the ground that there was reason to suspect that a still, worm or other apparatus, etc., were concealed in the dwelling of Tony Schmidel at or near Burmis. The dwelling was searched and nothing of the kind was found there, but later such things were found in a cabin or shack in the woods some 200 yards distant from his house, a fence running between them, but a well defined trail leading from one place to the other. No person was found in the cabin at the time, but certain accounts or memoranda were found therein which pointed very strongly to a connection of the accused with the operations which were evidently being carried on there. Ownership by the accused of the cabin or the land upon which it is was not proven beyond suspicion.

At the trial, an objection was taken at the proper moment to the jurisdiction of the justices on the ground that accused was not properly before them, having been arrested without a warrant, but such objection was over-ruled. It was argued also

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that even had the prohibited goods been found in his dwelling and under his control and operation, sec. 648 of the Code which authorises the arrest without warrant of anyone found committing any criminal offence would not apply to an infraction of the Inland Revenue Act, R.S.C. 1906, ch. 51. I am of opinion, however, that an offence laid under sec. 180 of the Inland Revenue Act does constitute a criminal offence, and in fact is, in terms, expressly made indictable. But in order to justify the arrest of the accused it was necessary first to shew that the still, etc., were found in the place which the warrant authorized the officers to search or that he was found committing a criminal offence. The warrant specifically mentions the "dwelling" of the accused, which is a distinct and definite building or premises from an isolated cabin on a piece of land which was not proven to be the property of the accused, and he was not found therein. Consequently, following the decision of *Rex* v. *Pollard* (1917), 39 D.L.R. 111, 13 Alta. L.R. 157, 29 Can. Cr. Cas. 35, the accused was improperly arrested, and the justices were without jurisdiction to try him.

Another objection taken was that the information does not disclose any offence inasmuch as it alleges a still, etc., suitable for the manufacture of "intoxicating liquors" instead of "spirits" as mentioned in the Act.

It would seem to me that this possibly is also fatal to the validity of the conviction. It may be that there are many kinds of intoxicating liquors which cannot be classed as "spirits," and it would seem to me necessary for the Crown to allege and prove that the offending goods are suitable for the manufacture of spirits. There is no satisfactory evidence that such was the case.

I am of opinion for the reasons above stated that the conviction should be quashed, with the usual protection order, but without costs. *Conviction quashed.*

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. June 14, 1920.

APPEAL (§ VII L—476)—FINDINGS OF JURY—LANGUAGE NOT CLEAR—INTERPRETATION OF.

Where the meaning of the language used by a jury is not clear, that language is to be interpreted in the light of the issues presented by the pleadings, the evidence and the charge of the trial Judge.

[*B.C. Electric R. Co.* v. *Dunphy* (1919), 50 D.L.R. 264, 59 Can. S.C.R. 263, followed.]

Statement.

APPEAL by defendant from the trial judgment in an action by the plaintiff for damages for the death of her husband, a locomotive fireman. Varied.

O. H. Clark, K.C., for appellant.

D. Campbell, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with LAMONT, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—In addressing the jury the trial Judge stated the facts to be as follows:—

Now the facts are that on the day in question, which I think was on July 21, 1917, the deceased Giddings was apparently making the necessary preparations preparatory to starting out on his work as the fireman on an engine which was in charge of Harry Lovitt as engineer; and as part of his duties in getting ready for his work, he went from the engine where it was to the west of the coal track, going easterly to the ice house, to get ice to use on the yard engine, to keep the water fresh, I presume. That at the coalpit track, at the northerly end thereof, and just clear of the lead track, there was standing an engine and tender, the engine facing north, the tender south thereof, and the box car immediately south of the tender, but whether coupled to the tender or not there is no conclusive evidence. That south of this car there was an open space variously estimated at from 4 to 9 feet, and then a string of four cars, the most southerly of which was in the coalpit. Another loaded car was started from the extreme southerly end of the track, started by men with a car-mover, "pinched down," as the expression is, allowed to run down this track to the coaling plant on its own momentum, and it struck the car that was in the coaling plant, driving the same northerly, that the car so driven came in contact with the four cars which were on the track, and unfortunately at the moment when those four cars were so driven northerly so as to come in contact with the car which was immediately to the south of the engine, apparently the deceased was between them and was crushed to death.

Upon these facts, the jury found that defendants were guilty of negligence and that there was no contributory negligence on the part of the deceased.

When asked in what the negligence of the defendants consisted, they answered:—

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Newlands, J.A.

Inasmuch as there were 5 men employed in the coal dock, one or more of whom must have seen a live engine on the coal track, it seems that there was negligence in not assigning one man to warn the engineer or fireman of that engine who might be working underneath the said locomotive that a loaded coal car was about to be run down the incline and to prepare themselves accordingly, and who could also warn employees who might be crossing the track in pursuance of their duties.

This answer consists of two parts; first, that the engineer or fireman who might have been working under the live engine on the track should have been warned, and, second, that employees who might be crossing the track in pursuance of their duties should also have warning that loaded cars were about to be run down the incline.

Eliminating the first from their answer, we have a perfectly intelligent answer to the question asked them: "Inasmuch as there were 5 men employed in the coal dock it seems that there was negligence in not assigning one man to warn employees who might be crossing the track in pursuance of their duties."

That this man should have also warned the engineer of the live engine, was but an additional fact that impressed the jury that on this particular occasion there was greater need than usual of a man being stationed between the cars to give warning, and, there being 5 men working there, they thought one could have been spared from this gang to do this work. I do not think that these additional reasons for taking precautions affect in any way the jury's finding that the defendants should have had a man to warn employees crossing the track in the ordinary course of their duties.

It must happen in a railway yard that employees must pass between cars standing on sidings, and I quite agree with the jury that it is negligence on the part of the railway company not to give employees who must do so some notice when such cars are about to be moved.

The jury having found that there was no negligence on the part of the deceased, the verdict should stand, excepting as to the amount which, in my opinion, exceeds the amount of compensation to which the parties on whose behalf this action was brought are entitled, and I agree with my brother Lamont that, unless plaintiff accepts the amount stated by him, there should be a new trial.

The defendants should have the costs of the appeal.

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Lamont, J.A.

LAMONT, J.A.:—On the morning of July 21, 1917, the plaintiff's husband Albert Charles Giddings, a locomotive fireman in the defendants' employ, was crossing the defendants' tracks in their Saskatoon yard in the course of his duty. In doing so, he attempted to pass between two cars standing on the coal track. These cars were somewhere from 4 to 9 feet apart. As Giddings was in the act of crossing, one of these cars shot against the other, catching him between them and crushing him to death. For the pecuniary loss sustained by herself and infant son through the death of Giddings, the plaintiff, as administratrix, has brought this action. She claims that her husband's death was the result of negligence on the part of the defendants.

That negligence was alleged to consist in:

(a) The dangerous and unsafe system employed by the defendant in operating or moving its cars by which the two said cars were caused or permitted to come together in the manner aforesaid. (b) The failure to give or cause to be given to the said Albert Charles Giddings, notice or warning of the approach of the said moving car or cars.

Negligence in other respects was alleged, but it is not now necessary to consider these. The answers of the jury to the questions submitted to them, so far as material, are as follows:

Q. Was the accident which resulted in the death of the deceased caused by negligence on the part of the defendant company? A. Yes. Q. If so, in what did such negligence consist? A. Inasmuch as there were 5 men employed in the coal dock, one or more of whom must have seen a live engine on the coal track, it seems that there was negligence in not assigning one man to warn the engineer or fireman of that engine who might be working underneath the said locomotive that a loaded coal car was about to be run down the incline and to prepare themselves accordingly, and who could also warn employees who might be crossing the track in pursuance of their duties. Q. Was the deceased guilty of any negligence which contributed to the accident? A. No. Q. At what amount do you assess—(a) Damages for widow? (b) Damages for child? A. (a) $8,000, (b) $12,000.

Judgment was entered in accordance with the verdict of the jury. From that judgment this appeal was brought.

The two main grounds of appeal are: (1) that the answer of the jury to question 2 is not a finding of negligence, but, if it be so held, it is a finding based solely on the ground that one or more of the men employed in the coal dock must have seen the live engine on the coal track, and of this there is absolutely no evidence; and (2) that the damages awarded are excessive.

So far as the jury's answer to question 2 is concerned, the only difficulty is to determine just what is meant by that answer.

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If the jury meant that, under the circumstances of this case, the defendants were guilty of negligence in not assigning a man to warn persons about to cross the coal track before letting loose a loaded car, the judgment should stand, for there is abundant evidence to support the finding. But if the answer means that there was no duty upon the defendants to give this warning to persons about to cross, save only when there was a live engine on the track and that live engine was observed by the men at the coal dock, the judgment in my opinion should be set aside, because there was no evidence that the men at the dock saw the live engine which was on the coal track.

Where the meaning of the language used by the jury is not clear, that language is to be interpreted in the light of the issues presented by the pleadings, the evidence and the charge of the trial Judge. *B.C. Electric R. Co.* v. *Dunphy* (1919), 50 D.L.R. 264, 59 Can. S.C.R. 263.

The evidence disclosed that from the defendants' coal dock south, a track had been constructed on an inclined plane for 175 feet, and from the coal dock north the track was level until it reached the main lead. On the inclined track five cars could be placed, but the most northerly one would then be in the dock in a position ready for unloading. The defendants' system was to place loaded cars on the inclined track with an engine, and then block the wheels so as to hold the cars in place. When the first car was unloaded, it would be pushed forward and the next car let down for unloading. Then as each car was unloaded the next car on the incline was allowed to run down by means of its own weight, and strike the empty car in the dock so that the impact would force the empty car forward out of the way.

On the morning in question four empty cars were standing on the coal track, one in the coal dock and the others in front of the dock to the north, covering something over 100 feet. To the north of the last of these cars stood a box car, tender and engine. Between the most northerly of the empty coal cars and the box car there was a space of from 4 to 9 feet. A few minutes after 7 o'clock in the morning a loaded coal car at the top of the incline was unblocked and started down the incline. It reached a speed of 6 miles per hour, and struck the empty cars with such force that they shot forward, closing the space between them and the

box car. Through this space the plaintiff's husband was passing at the moment of the impact.

The evidence also disclosed, that the practice of allowing the loaded car to run against the unloaded ones with sufficient force to drive them along the track was very dangerous to any employees working under or around an engine on the track if the empty cars were driven against the engine. It was also dangerous to employees passing between cars on that track, unless they had been informed or were aware that the unloaded cars were about to be driven forward. It was shewn to have been a usual practice for employees crossing the tracks to pass through the space between cars standing on a track; and it was further shewn through evidence brought out on cross-examination by counsel for the defendants that, after the accident in question, the defendants adopted the practice of sending a man to warn persons crossing the tracks when loaded coal cars were being allowed to run down the incline.

In his charge, the trial Judge pointed out that counsel for the plaintiff contended that the negligence of the defendants consisted in employing a dangerous system in letting down the loaded cars. On that point he said:—

> Now they say it was negligence for the defendant company to employ such a system, and they suggest that it is dangerous because of what happened. They say that in these yards it is customary and necessary, in the course of their duties, for the servants of the defendant—firemen and engineers, and I suppose other yardmen—to be crossing those tracks, and that it is dangerous to let a car down so as to drive other cars because of the danger that these cars will strike men who necessarily in the course of their employment are crossing the tracks.

And as to whether or not the omission to warn persons crossing the tracks amounted to negligence, he said:—

> I must, however, say this, that the mere fact that after this accident the defendant company have apparently adopted the practice of keeping a man to warn persons passing the tracks when cars are, I presume, being moved as they were on the day in question, is at law no evidence that the defendant company were negligent in not employing such a man before or at the time of the accident. We all learn by experience. If the ordinary, prudent man would not, up to the time of the accident, have considered it necessary to keep a man to warn possible passers over the track; if the ordinary, prudent man would not have considered it necessary to do that before the accident, then the defendant company would not be guilty of negligence in not keeping him there even though in the light of their experience they afterwards came to the conclusion that it would be safer to have one.

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The jury found that the negligence of the defendant was the cause of the accident.

Viewed in the light of the pleadings, the evidence and the charge, I think the jury by their answers intended to express the idea that the method adopted by the defendants of running a loaded car down the incline so as to push the empty cars forward out of the way, was dangerous not only to the engineer and fireman of any engine on that track, which might be struck by the empty cars, but also to any persons crossing the track at an opening between the cars, and, being dangerous, it was negligence not to assign a man to give warning before a loaded car was run down. The danger to employees crossing the track was just the same whether there was a live engine on the track or not. To the engineer and fireman of an engine on the track the danger was the same whether the engine was observed by the men working at the dock or whether it was not. To hold that the jury intended to find that a duty to give warning to people about to cross the coal dock track between cars existed only when there was a live engine on the track and that engine had been seen by the men working at the coal dock would, in my opinion, be inconsistent with an appreciation of the danger, which the jury evidently had, as well as inconsistent with their finding that the defendants' negligence—which was a failure to warn under the circumstances—was responsible for the death of Giddings. The language used by the jury does not, as I read it, compel me to adopt that construction. The jury's answer to my mind does contain a finding, not well expressed it is true, but yet a clear finding, that the defendants were negligent in not assigning a man to warn employees who might be crossing the track in pursuance of their duties. The first ground of appeal therefore fails.

The second ground of appeal is that the damages awarded are excessive.

The action is brought under the Act respecting Compensation to the Families of Persons killed by Accidents, R.S.S. 1909, ch. 135.

Sec. 3 of the Act in part provides as follows:—

> . . . in every such action the Judge or jury may give such damages as he or they think proportioned to the injury resulting from such death

to the parties respectively for whom and for whose benefit such action has been brought.

The jury awarded $8,000 to the widow and $12,000 to the child. The child was unborn at the date of the death, but that appears to be immaterial so long as the action is for the benefit of the child. *Villar* v. *Gilbey*, [1907] A.C. 139; *Orrell Colliery Co.* v. *Schofield*, [1909] A.C. 433.

"The damages recoverable under the Act cannot be founded on sentimental considerations, but are given in respect of some pecuniary loss and that not merely nominally caused by the death." Osler, J.A., in *McKeown* v. *Toronto R. Co.* (1909), 19 O.L.R. 361 at 371.

The wages the deceased was earning prior to his death ran from $80 to $130 per month, that is, an average of $105. The plaintiff stated in her evidence that the pecuniary loss to herself and child as a result of her late husband's death was $70 or $80 a month. She and her child, therefore, are entitled to such sums presently payable as would be the equivalent of the amounts which each respectively might reasonably anticipate to receive from the deceased had the accident not occurred. The damages to the next of kin in a case of this kind are necessarily indefinite, prospective and contingent. They cannot be proved with anything like an approach to accuracy, and yet they are to be estimated and awarded.

In *Rowley* v. *London & N. W. R. Co.* (1873), L.R. 8 Exch. 221, the Court adopted the rule that in awarding damages, etc., for prospective loss of income from property or other earnings, the jury ought not to give the plaintiff such a sum as if invested would produce the full amount of income which he would probably have earned, but ought, in estimating the damages, to take into account the accidents of life and other matters, and to give the plaintiff what they consider under all the circumstances a fair compensation for his loss.

In awarding to the widow the sum of $8,000, I do not think it can be said that the jury allowed her a sum which was more than the equivalent of the pecuniary benefit which she could reasonably expect would have been hers had the accident not happened. The award of $12,000 to the infant child is, however,

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in my opinion, far in excess of any pecuniary loss suffered by the child as a result of the death of his father. Money can be invested so as to yield 5½% net to the investor; 5½% on $12,000 amounts to $660. Can it be said that the child had a reasonable expectation of receiving out of an income of $105 a month and such further increase as the father might have received had he lived, the sum of $660 a year until such time as he was minded to commence earning himself, and then receive a capital sum of $12,000. In my opinion, it is absurd to say that he could have had any such expectation. Although the equivalent of what the child might reasonably expect cannot be gauged with accuracy, there must be some basis in the proof for the estimate. That basis in this case is confined to $105 per month, plus the possibility of promotion, which would increase that amount. On this basis, after deducting the reasonable expectation of the widow, the most sanguine expectation that could reasonably be made for the child could not, in my opinion, be capitalised at anything like the sum awarded. I am, therefore, driven to the conclusion from the amount awarded to the child, that the jury must have taken into consideration matters which they ought not to have considered, or applied a wrong measure of damages. The judgment therefore cannot stand.

Johnston v. *G. W. R. Co.*, [1904] 2 K.B. 250.

The appeal, in my opinion, should be allowed with costs, and a new trial ordered, unless the parties consent to have judgment entered with the damages to the child reduced to $6,000, which, I think, is the equivalent of the utmost pecuniary benefit of which the child had any reasonable expectation.

Judgment accordingly.

N. B.

S. C.

Re CATHERINE DEAN, an Infant.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. April 23, 1920.

INFANTS (§ I C—11)—INTERIM ORDER CONCERNING CUSTODY—APPEAL—RIGHT TO APPLY TO CHANCERY COURT—JUDICATURE ACT, N.B., O. 56, R. 10.

Where an order concerning the custody of an infant child is stated to be of a temporary nature and substantially an interim order, such order will not be interfered with on appeal, it being open to the parties to present a petition to the Chancery Court, which is the proper Court to deal with such matters, under O. 56, r. 10, of the New Brunswick Judicature Act, for the custody of the infant, under which the parties can be heard and a conclusion reached which will be binding so far as the interests of the infant are concerned.

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RE CATHERINE DEAN, AN INFANT.

Grimmer, J.

APPEAL by W. E. Dean from decision of McKeown, C.J., K.B.D., in *habeas corpus* proceedings.

B. L. Gerow, for appellant.

S. B. Bustin, for Adelaide Dean, *contra*.

The judgment of the Court was delivered by

GRIMMER, J.:—In this case McKeown, C.J., K.B.D., under a writ of *habeas corpus* made an order on January 9 last by which it was provided that the infant, who was then about 2 years and 3 months old, having been born on October 5, 1917, should be placed (temporarily) in the custody of Adelaide Dean, its mother, the father William Edgar Dean to have access to his child on Sunday afternoons. From this order, the father now appeals, seeking to have the same rescinded, and the custody of the child given to him.

The proceedings before the Chief Justice were confined entirely to affidavits, a great number of which, absolutely contradictory, were read on the part of both the father and the mother of the infant, and for a better understanding of the matter I consider it advisable here to state verbatim the conclusion reached and the order made by the Chief Justice. It is as follows:—

The Court: You have no evidence of any acts of impropriety against the wife? You are making no claim of that nature?

Mr. Gerow: No, your Honour.

The Court: I will dispose of the matter at once. The permanent custody of a child, its maintenance and bringing up and general education are not matters which can be finally disposed of by a summary application of this kind in the most satisfactory way. It can be better cognizable in the Chancery Division of the Court, which deals more effectively with infants, estates and wardships and custody of children. All I have now to do is to decide under these affidavits in whose custody the child should remain under the circumstances disclosed, and I may say that if either party is disposed to question my conclusion, an action can be brought in the Chancery Division of the Court, which will hear all the evidence that may be offered, and make decree thereunder. I say that, because I do not want either party to think that the decision which I give now must bind for all time. Understanding then that it is open to either party thus to question my view, I say that I see no reason to vary the interim order which I made the last time this matter was before me, and my decision is that the child remain in the custody of the mother and it is accordingly so ordered.

Mr. Gerow: That being your Honour's interim order—

The Court: That is my final order; it may be regarded as an interim order if the Chancery Court after full hearing should decree differently, but until altered this order stands and must be obeyed.

Mr. Gerow: Your Honour having made this order I submit my client has the right to see the child. I have not the slightest doubt that refusal

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will be the order of the day, that he will not be able to see it. I think it is only fair that the Court make some recommendation with regard to that also. I would ask that he have the right to see the child any time he wants to see it.

The Court: I take it there would be no objection on the part of Mrs. Dean that the child should be seen and visited by its father. I would rather make the order by consent, if a day can be agreed on.

Mr. Bustin: (After consultation). They say that Sunday is the best day.

Mr. Gerow: That is satisfactory—Sunday afternoon.

The Court: It will be Sunday afternoon then.

Mr. Bustin: With regard to making our further affidavits?

The Court: I am through with it now, you need not make further affidavits.

The father and mother of the infant were married at the City of St. John on October 27, 1915, and lived in the city until the month of April, 1918, when they removed to the Village of Musquash, in the County of St. John. No difficulties arose between the parties, as appears from the affidavits, from the time of the marriage until September, 1918, when Adelaide, the wife, alleged that her husband took her by the throat and choked her, causing her great pain and suffering, making her afraid to live with him; that shortly after this he threatened to kick her out of the house, but nothing more serious happened until February 22, 1919, when further difficulties arose and the wife left her home and came to St. John to her parents' home, leaving the infant behind her with her husband. On March 1, 1919, Adelaide Dean alleges that she returned to Musquash for the purpose of again living with her husband, but was unable to make satisfactory arrangements, and returned to the City of St. John on the afternoon train. On March 5, 1919, she caused a writ of *habeas corpus* to be issued out of the King's Bench Division of the Supreme Court, commanding the said William Edgar Dean and one Jessie Dean, his mother, to have before the Court on March 10, the body of the said Catherine Elizabeth Alma Dean. This order was obeyed apparently and a hearing took place, but before the termination thereof an agreement was reached between the parents of the infant, and they once more lived together, so far as can be ascertained from the affidavits, in the City of St. John, and continued to live so until December 31 last, when Adelaide Dean alleges her husband again choked her and hurt her. At this time, Adelaide Dean alleges she was making a visit to her sister in the City of St. John, when about 9 o'clock in the evening her husband

came in, went up to her, struck her on the shoulder and said—"'What is the idea—get on your clothes and come along with me.' I said I was afraid to go with him for fear he would beat me. He said he wouldn't." She states further that she went out with him and at the corner of St. James and Carmarthen Streets he said—"I am through now, I am going to take the baby," whereupon he took hold of her roughly by the arm, compelling her to go with him, and shook and hurt her and left her at the house of her brother in Broad St. Later, the same evening, with her sister she went to her home, 308 Carmarthen St., found the door locked but could hear her baby saying "Daddy, let mama in," whereupon the said William Edgar Dean, she states, came out in the hall and pushed her and her sister down stairs. She went out then and returned with a policeman in about 15 minutes, to find that the said Edgar William Dean had left and taken the baby with him. On January 3 last, application was made to the said Chief Justice of the King's Bench Division for another writ of *habeas corpus*, which is the one upon which the order in this case was made. The statements of Adelaide Dean are supported by affidavits of the members of her family, but are vigorously contradicted by her husband, the said William Edgar Dean, who is supported is his statements by the affidavits of members of his family.

There is no charge of impropriety on the part of the father or mother in either of the applications which were made before the Chief Justice, the difficulties being entirely confined, as appears from the affidavits, to family quarrels between the father and mother of the infant, but the Chief Justice was apparently of the opinion, after reading the affidavits, that the needs of the child for the time being made it desirable that she should be placed in the custody of her mother. It will be noticed the Chief Justice in his judgment says that the permanent custody of the child, its maintenance and bringing up and general education are not matters which can be finally disposed of by a summary application of this kind in the most satisfactory manner, but that it can be better cognizable in the Chancery Division of the Court, which deals more effectively with infants, estates and wardships and the custody of children.

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Without attempting to decide where the custody of the child should go at the present time, and while it is undoubtedly better that a Court of Chancery, having full jurisdiction in the matter, should pass upon it, there can, however, as is so very well stated by Barker, C.J., in the case of *Re Annie E. Hatfield* (1895), 1 N.B.Eq. 142, be no doubt that *primâ facie* the father is entitled to the custody of his child, and that the authorities are very plain and positive that the habits and character of the father must be open to the gravest objection to defeat this right. I am by no means convinced that the allegations made by the wife in this case, if true, would be sufficient in law to deprive the father of the custody of his child, but without deciding this, in view of the order made by the Chief Justice, which is, as stated, of a temporary nature, and substantially an interim order, and in consideration of the interests of the infant, that, so far as its custody is concerned, the matter should be fully and finally passed upon by a Court of competent jurisdiction, I am of the opinion that this order should not now be interfered with, it being open to the father to present a petition to the Chancery Court of this Province, under O. 56, r. 10, of the Judicature Act, for the custody of the infant, under which the parties could be heard, their evidence taken and a conclusion reached which would be binding so far as the interests of the infant were concerned.

There will be no costs on this application.

Appeal dismissed.

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McLEAN v. McGHEE.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. May 11, 1920.

SALE (§ I C—17)—SALE OF GOODS ACT R.S.M. 1913, CH. 174—ASSUMPTION OF OWNERSHIP—NO ACTUAL DELIVERY—LIABILITY.

Sec. 6 of the Sale of Goods Act, R.S.M. 1913, ch. 174, is sufficiently complied with to make a purchaser of a machine liable for the purchase price where such purchaser assumes ownership of the machine although there has been no actual delivery, and attempts to sell it to a third person, and authorizes such third person to take the machine and try it out and see if it is suitable for his purpose with a view of purchasing it if satisfactory.

Statement.

APPEAL by plaintiff from the trial judgment in an action to recover the price of a traction engine. Reversed.

A. B. Hudson, K.C., for appellant.

G. A. Eakins, for respondent.

PERDUE, C.J.M.:—In August, 1918, one Meakins, since deceased, agreed with the plaintiff, who is an implement dealer, to purchase a tractor engine from him, the plaintiff to take a portable engine belonging to Meakins in part payment provided that the plaintiff could sell the portable engine. The plaintiff, defendant, Meakins and Reekie, a traveller for the International Harvester Co., met at Meakins' farm. The terms offered by the plaintiff were satisfactory to the defendant. The plaintiff and Reekie state that the defendant then and there agreed to purchase the engine. Defendant was satisfied with the engine and the terms of payment but denies that the sale was closed. He claims that he was to have a few days time to consult with one Murdoch with whom he intended to form a partnership to do threshing, the plaintiff providing the engine in question and Murdoch the separator. The defendant admits that some days after the above meeting he telephoned the plaintiff that he would take the engine. Murdoch failed to procure a separator and the intended partnership was abandoned. The defendant says he then telephoned to the plaintiff that he cancelled the sale. It is clear that the plaintiff did not agree to cancel the sale. The plaintiff had sent by mail promissory notes to be signed by defendant in pursuance of the terms of the sale but these were retained by defendant and never returned.

The main defence is that the requirements of sec. 6 of the Sale of Goods Act, R.S.M. 1913, ch. 174, has not been complied with. But the plaintiff's answer to this is that in the latter part of September, 1918, the defendant assumed ownership of the machine by attempting to sell it to one Jamieson and by authorizing and requesting Jamieson to take the engine from Meakins' farm and try it to see if it was suitable for Jamieson's purposes with a view to the latter purchasing it. This Jamieson took the engine and while using it he allowed water to freeze in it and cause considerable damage to it.

Jamieson states that at the first conversation defendant told him of the terms between him and the plaintiff but that he, defendant, did not need the engine now. Jamieson then had a telephone conversation with the plaintiff. He told the

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plaintiff of the conversation he had had with the defendant. The plaintiff said that he had nothing to do with the engine, that he had sent the notes to defendant for settlement. The evidence of this conversation was admitted by consent. About a week afterwards Jamieson met the defendant and they had a further conversation. Jamieson told defendant that he, Jamieson, and his partner had decided not to take the engine. Defendant, according to Jamieson, expressed his regret and suggested that Jamieson should take it and try it. Jamieson's wife was present when defendant repeated the suggestion that Jamieson should take the engine and try it and she corroborates her husband in this respect. After Jamieson took the engine it remained at his place and was not repaired.

The trial Judge in dealing with the above point assumes that defendant told Jamieson to try the engine to see if it filled his purpose, but considers that this "should not be construed as an acceptance or a constructive taking of possession by McGhee." The trial Judge arrives at this conclusion because defendant says that prior to this he had telephoned to the plaintiff and "cancelled the sale" and that he so informed Jamieson. But the plaintiff denies that the defendant attempted to cancel the sale. In support of his statement the plaintiff produced the letter of December 16, written to him by defendant, in which the latter says: "Well, I am sending a cheque to pay for the grinder (which he had bought at the same time that he bought the engine), *but I can't pay anything on the engine at present.* I have two men in sight just now to buy the engine, both good men too." He goes on in the letter to state that he would like to see the plaintiff and try and make arrangements about selling the engine. "Don't think," he writes, "that I am trying to do you out of the money because I aint, only it is no use to us and I haven't got the money to put into it to lay idle." With respect, I think the trial Judge overlooked the importance of this letter. It shews that the defendant acknowledged the purchase and admitted that he was still liable when the letter was written, more than two months after Jamieson had received the engine. The attempted explanation given by the defendant of his statements in the letter are ineffective and trivial and throw doubt on the value of his testimony as a whole.

The terms of the sale were arranged when the plaintiff and defendant met at Meakins' farm, but the defendant claims that the requirements of sec. 6 of the Sale of Goods Act were not complied with. It is enough if the buyer shall accept the goods sold and actually receive the same. By sub-sec. (3) of sec. 6, R.S.M. 1913, ch. 174:

> There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

In *Chaplin* v. *Rogers* (1800), 1 East 192, 102 E.R. 75, the parties being together in the plaintiff's farmyard agreed to buy a stack of hay standing in the yard at a certain price per hundredweight. Two months afterwards a third party agreed with defendant to buy part of the hay still standing untouched in plaintiff's yard. Defendant sent the third party to look at the hay with the purpose of buying it and the latter took away a part of it. It was held that the defendant had dealt with the commodity as if it were in his actual possession, and there was therefore sufficient evidence of a delivery and acceptance to take the case out of the Statute of Frauds. In giving judgment Lord Kenyon, C.J., said at page 194:

> Where goods are ponderous and incapable, as here, of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property. Now here the defendant dealt with this commodity afterwards as if it were in his actual possession; for he sold part of it to another person.

Chaplin v. *Rogers*, *supra*, was followed in *Marshall* v. *Green* (1875), 1 C.P.D. 35.

Abbott v. *Wolsey*, [1895] 2 Q.B. 97, was a case where goods sold were delivered to the buyer who took a sample from them, and, after examining it, said that the goods were not equal to his sample and that he would not have them. It was held that there was evidence of an act done by him which recognized a pre-existing contract of sale and therefore evidence of an acceptance within the meaning of the Sale of Goods Act, 56-57 Vict. 1893, ch. 71. Lord Esher, M.R., points out that the acceptance that satisfies the statute and the acceptance that binds the purchaser are different things. The acceptance under sec. 4 of the

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English Act (our sec. 6) is such an acceptance as will shew the existence of a contract which the Court may enforce. This is a different acceptance from that described in sec. 35 (our sec. 35) which is to bind the purchaser to pay for the goods. A. L. Smith, L.J., in the same case, said at 102:

> The question what shall be an acceptance in performance of the contract is dealt with by sec. 35, and we have nothing to do with that. The question, therefore, which we have to decide is whether there is any evidence of an act done by the defendant in relation to the goods which recognized a pre-existing contract of sale.

Rigby, L.J., said: "The mere words would as such produce no effect; but an act done in relation to the goods which recognizes a pre-existing contract of sale is sufficient."

In *Taylor* v. *Great Eastern R. Co.*, [1901] 1 K.B. 774, a quantity of barley had been shipped to the buyer and he was notified that it awaited his order at the station. Bigham, J., held that an attempt by the buyer to re-sell was clearly an act in relation to the goods which recognized a pre-existing contract of sale and, therefore, an acceptance.

I think the evidence establishes that the defendant attempted to sell the engine to Jamieson. At all events he exercised such a right of ownership over it that he authorized Jamieson to take the engine and try it, which Jamieson did with the unfortunate results that followed.

But, in addition to this, defendant states in his letter of December 16, that he had then two men in sight to buy the engine. When Jamieson failed to buy, the defendant offered the engine for sale to others.

I think the acts of the defendant recognized a pre-existing contract of sale of the engine to him and that there was an acceptance of it by him sufficient to satisfy the requirements of the statute.

I would allow the appeal and enter judgment for the plaintiff for the amount claimed with costs in both Courts.

Cameron, J.A. Haggart, J.A.

CAMERON and HAGGART, JJ.A., concurred with PERDUE, C.J.M.

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FULLERTON, J.A.:—This action is brought to recover the price of a second-hand gasoline engine. The only defence is that sec. 6, R.S.M. 1913, ch. 174, has not been complied with.

Sec. 6 provides that:

A contract for the sale of any goods of the value of $50 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

Now, it is admitted that nothing was given in earnest to bind the contract or in part payment and that there is no note or memorandum in writing of the contract.

Sec. 6 (3) provides that (see judgment of Perdue, C.J.M., ante p.17):

The appellant contends that acts were done by the defendant in relation to the goods which recognize the pre-existing contract. The trial Judge has found against this contention. I have carefully read the whole of the evidence given on the trial and have arrived at the conclusion that there was an acceptance within the meaning of the statute.

The engine in question originally belonged to one Meakins who in the summer of 1918 lived about 12 miles from Shoal Lake. Early in August the plaintiff had arranged with Meakins to sell him a tractor and take in part payment the engine in question, providing Meakins could effect a sale of his engine. A few days prior to August 26, 1918, Meakins called up the plaintiff by telephone and told him that he had a purchaser for the engine—the defendant—and asked him to be at Meakins' place on a certain day to meet defendant. Accordingly plaintiff went to Meakins' place on the day appointed, accompanied by a man named Reekie, who was a traveller for the International Harvester Co. Plaintiff, defendant, Meakins and Reekie were all present at Meakins' place when the sale of the engine to defendant was discussed. Plaintiff's story of the arrangement that was there effected is as follows:—

4. Q. After dinner what was done then? Any talk between you and McGhee? A. McGhee asked me the price of the engine and the terms and I told him and he bought it. He wanted to know the difference between time and cash and I told him and he bought it. Q. What was the conversation between you and him as to price? A. It was $500 cash, or $550 on terms of two falls: $275 November 1, and $275 the following November. McGhee said, "Will you make it $250 if we pay the first note within 30 days?" And I agreed to do that. Q. You agreed to do that? A. I told him I would draw the notes due November 1, with the first note written on it "Discount of $25, provided it was paid within thirty days." Q. What did McGhee say to that? A. It was agreeable.

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Reekie, who was called by the plaintiff, completely corroborates the story of the plaintiff.

Defendant admits that the price and terms were entirely satisfactory to him, but that he stated to plaintiff he could do nothing definite that day because he had first to consult his partner Murdoch.

In an attempt to corroborate his story defendant called Murdoch, who was permitted to say that he was present and heard defendant ring up plaintiff and say to him: "I guess, Jack, we will take that engine." The plaintiff says there was never any such telephone conversation. The trial Judge makes no finding as to whether the sale was closed at the Meakins' place or subsequently by telephone, although one might gather from his reasons for judgment that he was of the opinion that the sale did take place at the Meakins' place, because he discusses the question of whether or not any possession of the engine was taken by the defendant on that day.

For reasons which I will give later, I would give no weight whatever to the evidence of the defendant where he is contradicted by other witnesses. The evidence of Murdoch, while probably admissible, is not entitled under all the circumstances to much weight when opposed by evidence of both the plaintiff and Reekie, both of whom say that the sale was closed at the Meakins' place and that it was in no way conditional on the approval of any partner of the defendant. I would hold that the sale was closed at the Meakins' place.

The trial Judge finds that there was no delivery of possession at the Meakins' place on the day the sale was closed.

The engine was standing in Meakins' yard when the conversation took place. After the sale was completed, plaintiff said he would draw the notes and send them to the defendant. The defendant and Meakins then started up the engine and began crushing oats for the defendant and immediately afterwards plaintiff and Reekie left the premises. The trial Judge thinks this was not an act in relation to the goods which recognizes a pre-existing contract within the meaning of sub-sec. 3 of sec. 6, R.S.M. 1913, ch. 174, above quoted. He says on this point:—

> It is true that a few minutes later some oats which McGhee was buying from Meakins were crushed with the use of this engine; both men attending

to this operation, but the same thing had been done in exactly the same manner two weeks before, so that this last occurrence had no significance with respect to acceptance.

I think the Judge has overlooked the fact that the engine only became the property of the plaintiff on the day of the sale. The deal which Reekie had previously made with Meakins for the sale to him of a tractor was conditional on Meakins effecting a sale of his engine. When defendant and Meakins were using the engine on the previous occasion it was the property of Meakins, but after the sale was arranged the property in it passed to plaintiff and from him to defendant. One would almost think that when an article, such as an engine, is on the property of a third party and a sale of it is made there and the vendor then leaves the premises and the purchaser remains, that the latter should be regarded as having taken possession of it, particularly when the third person is present and knows about the sale. Certain it is that Meakins, who died before the trial, recognized that he was a bailee of the engine for the defendant because later on, when a man named Jamieson removed it from his premises, he immediately rang up and notified, not the plaintiff but the defendant, of the fact. At the argument, I asked counsel for the defendant to suggest something further that plaintiff should have done to give defendant possession, but received no satisfactory answer. The additional fact that the defendant began to operate the engine to crush oats for himself appears to me to be conclusive on the question of possession.

However, if I am mistaken in my view that the sale was made at the Meakins' farm, and it was in fact completed some days later, when defendant says he telephoned the plaintiff that he would take the engine, I am still of the opinion that there was a subsequent "act" of the defendant which recognized the pre-existing contract.

Defendant says that 5 days after he had telephoned plaintiff that he would take the engine, he telephoned him cancelling the contract. His words are: "I phoned McLean and told him that as the fellow we were going to lease the separator from was going to thresh himself and had told us we could not get it, therefore, we would have to cancel the engine." Plaintiff denies that anything was said about cancell ng the sale but admits that

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defendant phoned him and said he had made different arrangements and wished him to try and sell the engine for him. It makes no matter, in this instance, which story is true as, admittedly, plaintiff declined to accede to the sale being cancelled and consequently a good and valid contract for the sale of the engine is still in existence.

In the latter part of September, 1918, one Jamieson saw the defendant about purchasing the engine. Jamieson was called as a witness by the plaintiff. He stated in effect that defendant explained the terms of his purchase from plaintiff and said, "he didn't need the engine now, that they had dealt in another machine, and he said we could have the engine." Jamieson further said in his evidence, "Of course, in that conversation he explained the deal and he said something about McLean having something to do with it. He gave me to understand that it was hardly a decided thing between the two of them. I was undecided, myself, when I left McGhee as to who was the real owner of the engine." Jamieson says he told McLean he would see his partner Doherty and would let him know later on what he had decided. He then called up McLean who said he had nothing to do with it. Two or three days afterwards Jamieson and his wife went to see the defendant. After some discussion regarding the engine, defendant said to Jamieson: "Take it over and try it out to our satisfaction and if it was not satisfactory, we need not keep it."

Mrs. Jamieson was called and stated that on the occasion last mentioned she heard defendant say to her husband "to take the engine and try it and if it didn't prove satisfactory he didn't have to keep it."

Defendant denies this conversation and says: "I told him to see McLean about getting the engine upon trial; I could not give him the engine on trial. I had never signed any notes and the engine was not mine."

At all events Jamieson took possession of the engine, removed it to his own place, used it for some days and allowed the cylinders to freeze up and crack.

Now, at this stage I had perhaps better give my reasons for thinking that defendant is an utterly unreliable witness.

Defendant says that Jamieson some time later on telephoned to him and said that the engine didn't have power enough to drive the mill, that he wished to get an engine that would drive it, that he had phoned plaintiff but could get no satisfaction, that plaintiff and he were bad friends and that he thought if defendant would phone him a deal could probably be made. Defendant says he phoned plaintiff and said to him, "I asked him how it was he seemed to be assuming this position, that he was trying to hold us for the engine." He says the plaintiff replied, "I am not trying to hold you on the engine but Jamieson came to him wanting all kinds of time to try the engine."

The Judge very properly pointed out that there was nothing in the conversation with Jamieson that day to warrant such a conversation with the plaintiff.

On December 16, 1918, the defendant wrote the following letter to the plaintiff:—

Pope, Man., Dec. 16.

Mr. McLean,—

I suppose you will be thinking that I never intend to pay you. We have been shut up here for 6 weeks with the fever so I have never been able to get up to see you. Well, I am sending a cheque to pay for the grinder, but I can't pay anything on the engine at present. I have two men in sight now to buy the engine, both good men too. One of them is Lou Doherty at Owald and the other is William Lavina, so I would like to come up and see you and make arrangements about selling it as it is of no use to us only I intend to do what is right. Our crop was very poor here this year, it went from 8 to 10 bushels per acre so by the time we pay running expenses out of that there isn't a great lot left so I would like you to think it over but don't think that I am trying to do you out of the money because I aint, only it is no use to us and I haven't got the money to put into it to lay idle. Hoping to hear from you soon, I am,

JOHN McGHEE, Pope.

In the face of this letter there can be no doubt whatever that the alleged telephone conversation sworn to by McGhee never took place. Moreover, the letter clearly recognizes his liability to pay for the engine and is entirely inconsistent with the position he claims to have taken at the time Jamieson was negotiating with him for the engine.

Defendant's attempted explanation on the trial of his own letter shews how little reliance can be placed on his evidence. He was asked by his own counsel:

Q. You say here "I would like you to think it over, but don't think I am trying to do you out of the money;" Think over what? A. Think over to

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let me know if he wanted us to come up and get the thing in shape to sell to somebody else who needed it. The shape the engine was in nobody could do anything with it.

The absurdity of this answer is apparent when it is remembered that there is nothing in the letter about the engine having been damaged and so far as the evidence shews plaintiff knew nothing about it at the time.

The trial Judge has taken the view that what defendant told Jamieson as to taking the engine and trying it should not be construed as an acceptance or a constructive taking of possession by him. I cannot agree with this view. I think the act of the defendant in dealing with the engine as his own was "an act" in relation to the goods which recognized a pre-existing contract of sale to him.

I would allow the appeal with costs and enter judgment for the plaintiff for the amount claimed with costs of the trial.

Dennistoun, J.A.

DENNISTOUN, J.A.:—Taking the findings of fact made by the trial Judge in this case I am of opinion that the appeal of the plaintiff should be allowed and judgment entered for him.

McLean and McGhee entered into a valid contract for the sale and purchase of a portable engine. The contract was, however, not enforceable as there was in the early stages of the matter neither part payment, acceptance, nor a memorandum sufficient to satisfy sec. 6 of the Sale of Goods Act, R.S.M. 1913, ch. 174.

The trial Judge finds that the defendant McGhee cancelled this contract by a telephonic conversation with the plaintiff McLean, and that what he did subsequently had no effect on the contract so determined.

In my opinion, he could not rid himself of the contract by any such summary procedure against the will of the plaintiff, and it is clear that the plaintiff refused to consent to cancellation.

Subsequently, the defendant permitted one Jamieson to take the engine on trial with a view to purchase. So soon as he did this he satisfied the requirements of the section and made the contract enforceable against himself. *Taylor* v. *Great Eastern R. Co.*, [1901] 1 K.B. 774; *Abbott* v. *Wolsey*, [1895] 2 Q.B. 97.

I would allow the appeal and enter judgment for the plaintiff with costs here and below. *Appeal allowed.*

BOONE v. MARTIN.

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Ontario Supreme Court, Appellate Division, Riddell, Kelly, Masten and Logie, JJ. June 4, 1920.

LANDLORD AND TENANT (§ III A—42)—LESSEE TO PAY TAXES—FAILURE—ASSIGNMENT—TAXES PAID BY LANDLORD—RIGHT OF SUBROGATION—PREFERENCE.

Where a lessee covenants to pay all taxes charged on the demised premises or upon the lessor on account thereof, including local improvements and all other rates, and subsequently makes an assignment for the benefit of creditors leaving certain taxes unpaid which the landlord has to pay, the Mercantile Law Amendment Act (R.S.O. 1914, ch. 133,) does not confer upon the landlord the right to distrain for the taxes. Under the Act he is entitled to have the municipality's securities assigned to him and to stand in the place of, and to use all the remedies of, the municipality in order to obtain indemnification of his loss, but the municipality's right of distress ceases upon the payment of the taxes and there is no advantageous position to which he can be subrogated. The landlord is however entitled to a preference for the amount.

Statement.

Appeal by the plaintiff from a judgement of Rose, J., on an action by a landlord against the assignee for the benefit of creditors of his tenant, for a declaration that the plaintiff was entitled to a preferential lien upon the assets of the tenant in the hands of the defendant, for rent and for taxes paid by the plaintiff. Affirmed.

The judgement appealed from is as follows:—

Rose, J.

ROSE, J.:—The plaintiff is a landlord: the defendant is the assignee for the benefit of the creditors of the tenant. The lease is in writing, made according to the Short Forms of Leases Act. The demise is expressed to be in consideration of the rents reserved and of the lessee's covenants and agreements. A yearly rent of $4,705.80 is reserved, and there is a covenant on the part of the lessee to pay all taxes charged upon the demised premises or upon the lessor on account thereof, including local improvement and other rates. At the time of the assignment for the benefit of creditors there was rent in arrear, and certain taxes which the tenant ought to have paid remained unpaid, and the plaintiff has had to pay them. It is admitted that the plaintiff as landlord is entitled to a preferential lien for the rent; the point which has to be determined is whether he is entitled to a similar lien for the taxes which he has paid.

Mr. McCullough supports the plaintiff's claim to a preference by two arguments: the first, that the covenant to pay the taxes is a covenant to pay rent, enforceable by distress, and so entitling the landlord to a preference for payments which he would not

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have had to make but for the tenant's breach of contract: the second, that, since the tenant was primarily liable for the taxes, the landlord, paying the taxes to protect his own property, was entitled to stand in the position of the creditor, the municipality, and to recoup himself by distress upon the goods of the tenant upon the demised premises.

The first argument—the argument that the covenant to pay taxes is really a covenant to pay rent—is based upon the judgment of the Appellate Division in *East* v. *Clarke* (1915),23 D.L.R. 74, 33 O. L. R. 624, which, it is suggested, displaces the judgment of the Court of Appeal in *Finch* v. *Gilray* (1889), 16 A.R. (Ont.) 484. I cannot detect any inconsistency between these two cases. In *Finch* v. *Gilray*, where there were covenants to pay rent and to pay taxes, it was held that the payment of the taxes was not a payment of rent; in *East* v. *Clarke*, where there was a covenant to pay taxes as rent—and where no rent, other than the taxes, was reserved—it was held that the payment of the taxes was a payment of rent; in the latter case, the former was distinguished, but there was no suggestion that *Finch* v. *Gilray* was wrongly decided. *Finch* v. *Gilray* appears to me to decide, adversely to the landlord, the point that is to be decided in this case; and, in my opinion, the plaintiff's claim fails, in so far as it depends upon the first argument.

The question raised by the argument that the landlord, on paying the taxes, became subrogated to the rights of the municipality, is more difficult. The preferential claim of the landlord, in respect of rent in arrear at the time of the assignment for the benefit of creditors, arises, of course, out of the existence of distrainable assets—see Cassels's Ontario Assignments Act, 4th ed., pp. 145 to 150—and if the landlord, upon paying the taxes, became entitled to the benefit of the municipality's right to distrain for taxes, the reasoning which leads to the ruling that there is a priority as regards the rent would lead, equally, to a ruling that there is a priority as regards the taxes. The question, therefore, is whether he did become entitled to the benefit of the municipality's right to distrain.

It is suggested that the landlord was in the position of a surety for the tenant, but I do not think he was; for the reason that his obligation to pay the taxes did not arise out of any undertaking

given by him to the municipality to pay if the tenant did not; and that the municipality's claim against him, like its claim against the tenant and against the land, was derived from the Assessment Act, R.S.O. 1914, ch. 195, secs. 37, 94, and 95.

This, however, does not dispose of the question; for it is not only a surety who, upon paying the debt, becomes entitled to have an assignment of the creditor's securities and to stand in the place of the creditor; the same right is given, by the Mercantile Law Amendment Act (R.S.O. 1914, ch. 133, sec. 3), to every person who, being liable with another for any debt or duty, pays the debt or performs the duty. The landlord here was, under the Assessment Act, liable equally with the tenant for the payment of taxes, and I think he was *liable with* the tenant, within the meaning of the Mercantile Law Amendment Act; therefore, I think the Act entitled him to have the municipality's securities assigned to him, and to *use all the remedies* of the municipality in order to obtain from his co-debtor indemnification of his loss. The right to an assignment of securities is, I take it, unimportant; for, if the municipality had anything which could properly be called a security, such was merely a lien on the land: the right of distress is not a security; it is a particular remedy which arises on non-payment: *In re Russell* (1885), 29 Ch. D. 254, at p. 265. The question, therefore, resolves itself into a question as to the effect of the words that give to the plaintiff the right "to stand in the place of the" municipality, and to use all its remedies.

To stand in the place of the municipality would not benefit the plaintiff unless, so standing, he could use the municipality's remedy of distress; for the municipality was not a preferred creditor, except in so far as the right to distrain entitled it to a preference, similar to the preference which the landlord had for his rent. The case, then, is not like *In re Lord Churchill* (1888), 39 Ch. D. 174, or *In re M'Myn* (1886), 33 Ch. D. 575, in the former of which a person upon whom the Mercantile Law Amendment Act conferred the right to stand in the place of the Crown, was held entitled to the Crown's priority in the administration of assets, and in the latter of which a person upon whom the Act conferred the right to stand in the place of a judgment creditor of the person whose estate was being administered, was held entitled to such judgment creditor's priority; for in those cases the priority depended upon

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grounds peculiar to the creditors, the Crown and the judgment creditor (see *In re Leng*, [1895] 1 Ch. 652, at p. 656), and not upon the right of the creditor to use any particular remedy. (In passing, it may be noted that *In re M'Myn* was decided before the Court of Appeal, in *In re Whitaker*, [1901] 1 Ch. 9, had disapproved of the judgment in *In re Maggi* (1882), 20 Ch. D. 545, in which it was held that the preference formerly enjoyed by a judgment creditor was not destroyed by sec. 10 of the Judicature Act.)

It appears to me, therefore, that, in the final analysis, the case depends upon the answer to the question already stated—the question whether the right of distress is a remedy of the municipality which the Mercantile Law Amendment Act entitled the plaintiff to use. This question seems to be decided by *In re Russell*, 29 Ch. D. 254, in which it was held that the right to distrain for rent does not pass under the Act to a surety who pays the rent: that the right to distrain is not one of the remedies which the Act entitles the plaintiff paying the debt to use: that such remedies are those proceedings at law or in equity in which, but for the Mercantile Law Amendment Act, the payment might have been pleadable. There is a slight difference between the wording of the Imperial Act (19 & 20 Vict. ch. 97, sec. 5) and that of the Ontario Act (R.S.O. 1914, ch. 133, sec. 3), but such difference in wording does not seem to warrant any difference in construction; and, although *In re Russell* deals with a right to distrain for rent, whereas the question here is as to the right to distrain for taxes, I feel that I am bound by that case, just as the Chief Justice of the King's Bench was upon the point which he had to decide in *Re Victor Varnish Co.* (1908), 16 O. L. R. 338. It appears to me, therefore, that the Mercantile Law Amendment Act did not confer upon the plaintiff—the landlord—the right to distrain for the taxes; and that, in so far as the right to subrogation depends upon the Act, the plaintiff's claim fails.

Apart from the Mercantile Law Amendment Act, it is said, that "where two or more persons are equally liable to the creditor, if as between themselves there is a superior obligation resting on one to pay the debt, the other after paying it may use the creditor's security to obtain reimbursement; or where one . . . has paid his own debt, the burden of which has, for a valuable

consideration, been assumed by another," the one so paying will be substituted for or in the place of the creditor: 37 Cyc., pp. 370, 371. This, however, does not help the plaintiff; for the reason that, unless the Act applied so as to keep the right of distress alive for the benefit of the plaintiff, that right ceased upon the payment of the taxes, and there was no advantageous position left to which the plaintiff could be subrogated: *Hodgson* v. *Shaw* (1834), 3 Myl. & K. 183, at p. 190; 40 E.R. 70 at 73: 37 Cyc., pp. 410, 411.

The plaintiff's claim, then, must depend upon the Act, and not upon any general right to subrogation existing apart from the Act; and, the claim under the Act failing, the whole argument based upon the fact that the plaintiff was compelled to pay certain taxes which, as between himself and the tenant, the tenant ought to have paid, fails with it.

The right to priority in respect of the rent is admitted. It is also admitted that the amount of the claim is $702.90.

The judgment will therefore declare that the plaintiff is entitled to a preference for that amount. The success is divided; and the costs which were incurred in connection with the claim as to the rent between the time at which the exact amount of the rent was ascertained and the time of the trial, at which the claim was admitted, must be very small; there will therefore be no order as to costs.

J. W. McCullough, for appellant.

Gordon N. Shaver, for defendant, respondent.

THE COURT, at the conclusion of the argument, dismissed the the appeal with costs, agreeing with the reasons of ROSE, J.

Appeal dismissed.

KIDSTON v. STIRLING & PITCAIRN.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. April 15, 1920.

EVIDENCE (§ VI A—515)—WRITTEN CONTRACT—PAROL EVIDENCE AS TO—ADMISSIBILITY.

Parol evidence of what the parties meant by the words "market price" as used by them in a written contract purporting to embody the entire agreement between them on the subject is not admissible, but when one of the parties asserts that he did not get the "market price" for his goods according to the contract this is a question of fact and parol evidence may be received bearing on this question of fact.

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Macdonald, C.J.A.

APPEAL by defendant from the trial judgment in an action on a contract for the sale of fruit. Reversed.

E. C. Mayers, for appellant.

R. L. Reid, K.C., for respondent.

MACDONALD, C.J.A.:—The contract extending over a period of 7 years for the sale of fruit is in writing. The price to be paid for it "shall be the market price of such fruit in each year." This is the only term of the contract which counsel could suggest to be wanting in conclusiveness. It could not very well be made more specific, since the price of fruit would vary from year to year.

Plaintiff has however interpreted this term in his particulars when he says that the words "market price" was understood between the parties to be the average price realized by the defendants from all sales made in each year by the defendants of each grade and variety of fruit, less the expense properly incurred in handling the same and a reasonable commission on the sale of the fruit.

Parol evidence of what the parties meant by the language used by them in a written contract purporting to embody the entire agreement between them on the subject is not admissible, but as I view it it is not a question of interpretation at all, it is a question of fact to be proven by the plaintiff when he asserts that he did not get the "market price" for his fruit. The plaintiff's statement may therefore be taken as evidence bearing on this question of fact. The defendants' counsel accepted that statement as correct and the question therefore is reduced to one of evidence of the amounts received by the defendants from sales of fruit from year to year and the further question of what is to be deemed a reasonable commission. There is, therefore, in my opinion, no ambiguity in the contract, nor is it void for uncertainty. The prices realized from the sale of the fruit should not be difficult to prove and what is a reasonable commission is just as capable of proof as what is a reasonable wage or current wage in case of a hiring where no wage is mentioned. What is a reasonable commission must be decided as one of the factors in "market price."

There is evidence that a scale was used by the defendants, called the "sliding scale," for fixing the cost of handling the

fruit and the profit which they should receive from the business, but it appears not to have been strictly applied, the defendants claiming that they have deducted for their profits less than the scale would have entitled them to. If the plaintiff gave his assent to the application of this scale, then while that may not be admissible as evidence to add to the written contract, yet, it is evidence of the reasonableness of the commission or profit which the defendants have deducted from their returns to the plaintiff.

Ex. 66 furnishes evidence that one week before the contract was entered into, the defendants sent a copy of the sliding scale to the plaintiff with the intimation that it was effective "amongst our affiliated orchards," that is to say, the defendants' other customers. The plaintiff is, therefore, in error when he says in ex. 18 that he had no definite knowledge of this scale. He says he never agreed to its use, but I do not find that he protested at the time against it being a fair one.

On the same point ex. 13 may be looked at in which, referring to the season of 1914, defendants speaking of deductions for profit say that it is based on the sliding scale and gives them approximately a 10% profit. In his answer to this letter, the plaintiff makes no comment upon the deductions for profit, but asks for information upon two other matters therein mentioned. Exs. 36 and 38 relate to the season of 1915, in which reference is again made to the sliding scale.

In this case it should be observed that the defendants took the risk arising from loss or destruction of fruit delivered to them (see ex. 19) and this, having regard to the nature of the products marketed, may well have been considerable.

No doubt plaintiff was, from year to year, grumbling and asserting that he was not getting all he was entitled to, but it appears to me that in a business such as these parties were engaged in, it was incumbent upon him to take a firm stand if he thought his rights were being infringed and not to allow the alleged wrong to be continued from year to year until the term of the contract had nearly expired.

The relationship between the parties is contractual, not fiduciary. They used the word "commission" as meaning profit. The plaintiff, therefore, is not entitled to an accounting

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in the proper sense of the word, but as counsel for the defendants, speaking of the footing upon which plaintiff should be paid for his fruit, made this statement: "Once that has been settled it is a matter of accounting and it will either go to the registrar or the parties will perform the arithmetical computation themselves." I take it that that course should be adhered to.

A question was also raised concerning some sales of small lots of fruit which were not treated by the defendants on the same basis as the car lots. I think the plaintiff's contention as to these is the correct one, and that they should be treated in the manner of other shipments.

The cost of handling and marketing is a question of fact capable of proof before the registrar or referee. The amount which should be allowed to defendants as profit or commission is one which must be decided by the Court itself. In deciding this question I think it entirely fair to both parties to apply the sliding scale (ex. 14), as evidencing what I think both parties recognized as the fair criterion to be applied in ascertaining defendants' profit or commission, at all events it is the only one which the evidence supplies. I do not say that the plaintiff in terms assented to the application of the sliding scale or that it can be looked upon as in the nature of a contract between the parties, but on all the facts, I think the Court may look to the conduct of the parties in reference to this scale and say that the profit therein provided for would be a reasonable profit.

The plaintiff further claimed that he as a shareholder in defendant company was denied dividends to which he was entitled. He was allotted 50 shares at a premium of $20 per share. He paid $1,500 on account of these shares and the defendants appropriated two-thirds to the shares and one-third to the premium. Apart from any other question affecting the issue and in the absence of appropriation by the plaintiff, assuming that he had the right to appropriate, the appropriation by the defendants in the way above stated was, I think, within their rights.

I think, therefore, the judgment should be set aside and that the action should go back for trial on the basis above indicated. Costs of the appeal should follow the event and the costs in the Court below should be disposed of in that Court.

Consolidated with this action was another action in which the defendants in this action were plaintiffs and the plaintiff in this action was defendant. It was an action brought for specific performance of the contract above-mentioned, and for an injunction restraining its breach by the defendant therein. It was dismissed by the trial Judge, and the judgment is in appeal before us consolidated with the above appeal. An interim injunction was issued in that action and was obeyed by the defendant and as it remained in force as I understand the matter, until last year's fruit was dealt with in accordance with the agreement of the parties, the question so far as the injunction is concerned, has become only one of costs, but in order to decide that question of costs and notwithstanding that Mr. Mayers stated at our Bar that he did not intend to press for an order for specific performance, I think I must, in effect, decide whether the action was well founded or not.

The injunction was one form of an order for specific performance and if the facts of the case did not warrant an action of that kind then the action was rightly dismissed and the judgment below should not be interfered with. At present we do not know whether there has been a breach by the fruit company of the contract or not which could be set up as an answer to an action for specific performance, there was a threatened breach by Mr. Kidston, and that was, I think, sufficient to warrant the injunction. The contract was of a specific nature extending over a term of years and is one which I think falls within a class in which the Courts will grant specific performance.

I think the subject matter falls within sec. 66 of the Sale of Goods Act, R.S.B.C. 1911, ch. 203, and were specific or ascertained goods. The action, therefore, in my opinion, was rightly brought and ought not to have been dismissed.

The costs form part of the costs of appeal.

I do not think I am called upon to say whether the action ought now, in view of the statement of Mr. Mayers, to be dismissed or not, that is a matter with which I think this Court is not concerned, but must be decided by the said Court as a part of the consolidated actions; its decision may be influenced by the result of the first action.

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

GALLIHER, J.A.:—I am agreeing in the judgment of the Chief Justice.

McPhillips, J.A.

McPHILLIPS, J.A.:—I am of the opinion that the appeals be allowed, a new trial to be had to take the accounts upon the basis of the market price, as defined by Mr. Kidston, which upon the appeal was taken to be the true basis, for the taking of the accounts, coupled, however, with the utilization of the sliding scale—which, in my opinion, upon the facts, should be the over-riding scale where necessary. The contract is established and should be specifically performed, but as counsel for the appellants have only asked for a decree of specific performance covering the year 1919, I would limit the decree to 1919 without prejudice to any further proceedings to hereafter proceed to compel specific performance for later breaches (if any). I have not thought it necessary to go over, in detail, the evidence which is somewhat voluminous. I content myself by saying that it is without hesitation I find that there is an enforceable contract and it was right and proper that an injunction issued to restrain the delivery and sale of the fruit to other than the appellants. I am not satisfied that there has been any breach of the contract upon the part of the appellants which would render it proper to refuse specific performance. In truth there is no such evidence. A breach to bring about a refusal of specific performance must be serious and wilful, and this is wholly absent. On the other hand, we have the respondent threatening and attempting to commit what, if accomplished, would have been a most serious and wilful breach of the contract, only restrained by the injunction.

The appeals should be allowed.

Eberts, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

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REX v. BELL.

Alberta Supreme Court, Walsh, J. May 13, 1920.

INTOXICATING LIQUORS (§ III A—55)—LIQUOR EXPORT ACT—ACQUIRING LIQUOR FOR EXPORT—DUTY TO REGISTER—DUTY TO KEEP IN REGISTERED PREMISES—REASONABLE TIME ALLOWED FOR HAULING.

A consignee is not subject to prosecution under the Liquor Export Act (Alta.), sec. 3, for failure to keep liquor in his registered premises until he has had sufficient time to clear the Customs, pay the freight and make arrangements for hauling the liquor from the cars to his warehouse.

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APPLICATION to quash a conviction by a Police Magistrate for neglecting to register as required by the Liquor Export Act, of Alberta, and for failure to keep the liquor as provided in the Act, the applicant having acquired the liquor for shipment or export. Conviction amended.

J. B. Barron, for motion.

Eric Harvey, for Attorney-General.

Walsh, J.

WALSH, J.:—The defendant moves to quash his conviction by the Police Magistrate at Calgary for that he "having acquired liquor for shipment or export to or sale in any other part of Canada did omit or neglect to register with the Attorney-General of the Province of Alberta as required by the provisions of the Liquor Export Act, of Alberta, or to keep the said liquor as provided in the said Act, contrary to sec. 6 of the said Liquor Export Act." The facts disclosed by the depositions are that two car-loads of whisky reached Calgary on the 29th of January last. It was admitted by his counsel that this liquor was owned by the defendant. It was imported by him from the United States but on the date in question the duty was not paid on it, neither were the freight charges. The cars containing it then stood on the bonded track in the railway yards sealed by both the Customs department and the railway company so as to prevent the removal of the contents until payment of the duty and freight charges. At that time the defendant had not complied with the provisions of the Liquor Export Act nor did he do so until four days later. Before the arrival of this liquor he was engaged in negotiations with the Customs authorities for a bonded warehouse in which to store these goods and his failure to register under the Act seems to have been due to the delay in getting the necessary leave for the establishment of this warehouse.

The Act, requires every person who has or keeps in his possession liquor for shipment or export to or sale in any other part of Canada or a foreign country or who in Alberta sells or ships liquor to be delivered at any point outside of Alberta to forthwith upon acquiring or obtaining any liquor for the purposes aforesaid or commencing any such trade or business register with the Attorney-General without further notification, giving at the same time particulars of the location of the premises used by the applicant for the purpose and a detailed statement of

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all kinds and brands of liquor and the amount and quantity of each kind. It further requires him to keep all such liquor on such premises until required for transportation or shipment out of Alberta.

The real question is whether or not upon the above facts the defendant is within the Act. He contends that he is not because he was not in the actual possession of the liquor on the date named but it was then in the possession of either the Customs authorities or the railway company or both of them. I am unable to agree with this view. He was admittedly the owner of the liquor, and so he had acquired it on the date in question. The property in it was then in him subject only to the right of the Customs authorities to withhold it from him until the duty was paid and to the lien of the railway company for the freight charges. I do not think that it was necessary that he should have the liquor in his actual physical possession to bring him within the Act. He bought it and brought it to this Province for the express purpose of exporting it to some other part of Canada and so he had it here and he acquired it and obtained it (to use the words of the Act) for the very purpose for which registration under the Act is made necessary. The reason which he gives for not registering is one which might very properly have appealed to the Attorney-General for refusing to prosecute him for this breach of the Act but does not justify me in holding him not guilty of it.

It is objected that the conviction is double and I agree that this is so. Failure to register is one offence under the Act and failure to keep the liquor in the registered premises is another and quite distinct one. I think that I have the power to amend the conviction by striking from it as I do the words "or to keep the said liquor as provided in the said Act." While I think the evidence quite justifies the conviction for failing to register I do not think it warrants a conviction on the other charge for the liquor only reached Calgary on the 29th of January and the defendant was clearly entitled to sufficient time to clear the Customs, pay the freight and make arrangements for hauling the liquor from the cars to his warehouse before making himself liable to prosecution for failing to keep it in his registered premises. To hold otherwise would mean that a consignee would be subject to such a prosecution the minute the wheels of the car containing the liquor stopped

turning in the yards to which it was consigned. Though but one fine was imposed for these two offences it was the minimum fine under the Act and so no difficulty arises in respect of it.

The conviction will be amended as above and the motion to quash will be dismissed but without costs.

Judgment accordingly.

NANTEL v. HEMPHILL.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. April 15, 1920.

NEW TRIAL (§ II—6)—DISMISSAL OF ACTION BEFORE PLAINTIFF'S CASE IS CLOSED.

When the trial Judge dismisses an action before the plaintiff's case is closed, whereby plain error of law and miscarriage of justice occurs, a new trial will be granted.

APPEAL by plaintiff from the judgment of Clement, J. New trial ordered. Statement.

S. S. Taylor, K.C., for appellant.

J. W. de B. Farris, K.C., for respondent.

MACDONALD, C.J.A.:—I would allow the appeal. There should be a new trial. Macdonald, C.J.A.

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

MCPHILLIPS, J.A.:—In my opinion, the proper disposition of the appeal is to direct a new trial. The trial Judge saw fit to dismiss the action before the plaintiff's case was closed and in doing this, with all due respect, I think, there was plain error of law and plain miscarriage occurred. Evidence was adduced at the trial of a *primâ facie* case of negligence, requiring the Hemphill's Trade Schools Limited to discharge the burden of shewing that the negligence was not its negligence and that burden was not discharged. In truth, there was no opportunity to do so in consequence of the course adopted by the trial Judge. Had the plaintiff's case been closed and the evidence as to quantum of damages been introduced, medical and other testimony, the case would have warranted the entry of judgment for the plaintiff, but as damages would have to be assessed, the interests of justice would seem to require, looking at the whole case, the direction that a new trial be had between the parties. Here the defendant owed a duty to the plaintiff even greater than that owing by a master to his servant, and even were the present case one of that character, the evidence, as adduced at the trial, McPhillips, J.A.

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shews that the driver of the truck was not selected with due care, but was wholly incompetent, and should not have been entrusted with the driving of the truck, nor should the plaintiff have been sent out with such an incompetent person in charge of the truck. The onus must rest on the defendant to shew that the driver of the truck was, in fact, fitted to discharge the duties which he was put to discharge. The defendant's duty to the plaintiff, a pupil for instruction, was to safeguard the pupil from injury in every reasonable manner (see *Cormack* v. *School Board of Wick & Pulteneytown* (1889), Sess. Cas. (Scotch), 16 Rettie 812, 813, 814; *Crisp* v. *Thomas* (1890), 63 L.T. 756; *Williams* v. *Eady* (1893), 10 T.L.R. 41), and when the pupil was under the direction of officials of the company, it was the duty of the company to see to it, as in the present case, that the driver of the truck was of proved and known efficiency. On the other hand, the evidence, as adduced at the trial, on the part of the plaintiff, was that the driver of the truck, with whom the plaintiff was instructed to go, was, to the knowledge of the company, absolutely inefficient and it is reasonable to believe, upon all the facts—of course the defence was not gone into—that the proximate cause of the accident arose from the incapacity of the driver of the truck, and to escape liability, the onus is upon the company to shew that the driver of the truck was of proved and known efficiency, or that the accident was not occasioned by the inefficiency of the driver of the truck, but was because of the negligence of the driver of the other car which collided with the car in which the plaintiff was, there being no incompetency or contributory negligence on the part of the driver of the company's truck. *Jones* v. *C.P.R. Co.* (1913), 13 D.L.R. 900, 16 Can. Ry. Cas. 305, 30 O.L.R. 331, is an authority which may be usefully looked at, although that case involved the breach of a statutory duty. In considering the question of legal liability in the present case, it is well to note that Lord Atkinson deals with the question at large and apart from the statutory duty. The question of common employment would not be open, in my opinion, or available to the company. In any case, were it open, any such defence would be defeated by evidence which was adduced in the present case, that the driver of the truck with whom the plaintiff was sent out was not selected with due care (see Lord Watson

in *Johnson* v. *Lindsay & Co.*, [1891] A.C. 371). The appeal should be allowed and a new trial be had between the parties —the costs of the first trial to abide the event of the second trial, the appellant to have the costs of the appeal.

New trial ordered.

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DONER v. LOOSE.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. May 11, 1920.

BROKERS (§ II B—10)—REAL ESTATE—SALE OF LAND—COMMISSION—SUFFICIENCY OF SERVICES.

When a real estate broker produces a purchaser ready, willing and able to purchase property listed with him for sale, and a formal agreement is drawn up and signed by the owner of the property and the purchaser, the broker is entitled to his commission although the purchaser subsequently backs out and no effort is made to enforce the agreement.

Statement.

APPEAL by plaintiff from the trial judgment in an action by a real estate agent for commission on the sale of land. Reversed.

W. S. Morrissey, for appellant; *D. A. Stacpoole*, for respondent.

Perdue, C.J.M.
Cameron, J.A.

PERDUE, C.J.M., and CAMERON, J.A., concurred with FULLERTON, J.A.

Haggart, J.A.

HAGGART, J.A.:—This is an action brought by the plaintiff for a commission earned in effecting a sale of the plaintiff's land, lots 17, 18 and 19 in the Parish of St. Norbert and certain live stock and chattels, and during the negotiations it was agreed that in consideration of the procuring of a purchaser at a price and on terms satisfactory to the defendant, the defendant should pay $1,000 as a commission which was a sum less than the regular or usual amount for such service.

The terms of the alleged sale were reduced to writing and consist of two documents, one written by the defendant dated September 5, 1917, addressed to the Dominion Farm Exchange and Doughie, Jack & Lyons, the sub-agents of the plaintiff, which is in these words:—

> This is to say that in the event of a sale being completed by me to C. Bleasdale, of my farm and chattels, at St. Adolphe, lots 17, 18 and 19, St. Norbert, I agree to pay you a cash commission of $1,000, this is to be accepted by you in full. Yours truly, Elmer P. Loose.

and upon the same date there is drawn up a formal agreement between the defendant of the one part, as vendor, and the said Bleasdale, as purchaser, providing for the sale of the said property,

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containing all the details of the purchase, which is signed and sealed by the defendant and one Calvert Bleasdale, the purchaser. On the delivery of that document the plaintiff had earned the commission of $1,000, and there was nothing done by which the defendant was released from his obligation to pay that sum.

There was a good deal of evidence given on the trial as to what was meant by a completed sale and as to what took place subsequently in the negotiations with one Barker. This evidence was improperly admitted. The writings are there to speak for themselves and there is nothing to shew that the defendant was released from his obligation to pay the moneys earned by the men who acted as agents for the vendor. The foregoing facts dispose of the whole matter. I think the trial Judge should have refused to receive the evidence properly objected to and should have entered a verdict for the plaintiff for $1,000, the sum claimed.

Fullerton, J.A.

FULLERTON, J.A.:—The plaintiff alleges that a considerable time prior to September 5, 1917, the defendant listed with her and with Doughie, Jack & Lyons, real estate agents, his farm in order that the plaintiff and the said Doughie, Jack & Lyons should obtain for him a purchaser for the said property and agreed to pay a commission in case they or any of them should obtain a purchaser, that plaintiff and said Doughie, Jack & Lyons obtained a purchaser for the said property in the person of one C. Bleasdale, who was acceptable to the defendant, and who was ready, willing and able to purchase said property, at a price and on terms satisfactory to the defendant and in consideration for procuring said purchaser the defendant agreed to pay to the plaintiffs the sum of $1,000 and that subsequently Bleasdale entered into a binding agreement under his hand and seal to purchase the said farm from the defendant. There is also the allegation that Doughie, Jack & Lyons had duly assigned to the plaintiff all their claim for commission against the defendant.

The defence denies every material allegation in the statement of claim and in par. 6 sets up the defence relied upon at the trial. Par. 6 reads as follows:—

In the alternative the defendant repeats paragraphs 2, 3, 4 and 5 hereof, and says that if any agreement as to commission was signed by the defendant (which by the way is not alleged), it was signed after an agreement or arrangement was made with the said Bleasdale, and after the defendant had informed the said Doughie of the terms and conditions under which he would make a

sale to the said Bleasdale and after the defendant had explained to the said Doughie what he, the defendant, meant by "a completed sale," and the defendant says that a sale was never completed to the said Bleasdale of the said farm . . . , the said Bleasdale not having made the cash payment, nor conveyed certain properties which were to be conveyed to the defendant, nor executed securities on certain chattels, all of which the said Bleasdale was to perform before a sale to him was completed in the terms of the said agreement, referred to in par. 4 of the plaintiff's statement of claim.

The facts briefly are that the plaintiff received a letter from the defendant, dated August 20, 1917, containing a full description of his farm. About September 1, 1917, Bleasdale came to plaintiff's office looking for a farm. Plaintiff's manager, George F. Doner, at that time could not think of a property that would suit him; he, however, saw Doughie, of Doughie, Jack & Lyons, who suggested the property of the defendant. Doughie, Bleasdale and Doner drove out to the property, saw defendant, looked over the property, discussed the terms of a sale and settled them. The question of commission was also discussed. The defendant urged that as the cash payment was small, he could not afford to pay full commission, which would have been over $2,000. It was finally agreed that the commission payable to the agent should be $1,000. This arrangement of terms and commission was effected on Tuesday, September 4. All four men then returned to Winnipeg. About 5 o'clock the same evening, Bleasdale paid the defendant a deposit on the land of $100. On September 5 a formal agreement for sale of the property to Bleasdale was executed. By this agreement "in consideration of the sum of $500 now paid by the purchaser to the vendor, the said parties hereto covenant and agree as follows:—

1. The vendor agrees to exchange with and sell to the purchaser "the following land" describing it. The price fixed is $41,000, "payable to the vendor as follows: $1,000 in cash on production by the vendor of formal writings conveying the above described property to the purchaser or his nominees; $9,000, by the purchaser assuming and agreeing to pay a certain mortgage for that amount now registered against the above described property in favour of the Federal Life Assurance Co. of Canada and bearing interest at the rate of 7½%. The purchaser agrees to pay the vendor 6% per annum on all deferred payments. The purchaser hereby agrees to pay and vendor hereby agrees to accept $3,500 of the above

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purchase price by transfer or assignment of the equity of redemption in those certain properties hereinafter described in par. 4 hereof, and to pay the balance of the purchase-price at Winnipeg as follows:" by deferred payments extending from 1918 to 1922.

Bleasdale gave the defendant a cheque for $4,000 the balance of the cash payment, drawn on the Chagrin Falls Banking Co., of Chagrin Falls, Ohio.

Early the following morning Bleasdale saw the defendant and asked to be released from the agreement on the ground that his wife positively refused to leave her home in Ohio and live here on a farm. Defendant said the matter was out of his hands, that if he were to release him he would become liable for the commission.

The cheque was put through for collection, but in the meantime Bleasdale stopped payment of it. So far as the evidence shews, no attempt whatever has ever been made to enforce the agreement, nor is there anything to shew that Bleasdale was not able to carry out his part of the agreement.

If there were no other facts in the case the plaintiff would clearly, under the authorities, be entitled to recover.

On the trial the defendant sought to establish that subsequent to the execution of the agreement for sale, an agreement in writing was entered into between the plaintiffs and the defendant that plaintiffs were only to be paid the commission on the "completion of the sale" and he urges that the words "completion of the sale" mean the carrying out of the conditions of the agreement of sale as to Bleasdale paying the $400, transferring to the defendant the property at Chagrin Falls and giving the mortgage on the farm to secure the balance of the purchase money.

No such defence is raised by the pleadings. Par. 6 of the defence quoted above raises no such defence. Apparently, however, the trial was conducted on the assumption that such a defence was raised by par. 6 and we should deal with the case on that basis.

Mr. Sharpe, who acted for the defendant in closing out the sale, was called by the defendant. He said that on September 5, 1917, and before the agreement for sale was signed, Mr. Doughie handed him a letter and desired him to have it signed by the defendant. The letter is marked ex. 7 on the trial and is in the following words:—

Winnipeg, Sept. 5th, 1917.

Messrs. Dominion Farm Exchange &
Doughie, Jack & Lyons,
Somerset Building,
Winnipeg, Man.

Dear Sirs:

This is to say that in consideration of your having this day affected a sale of my farm in the Municipality of Richot to Mr. C. Bleasdale, of the Town of Chagrin Falls, in the State of Iowa, I hereby agree to pay you a cash commission of one thousand dollars.

Yours truly,

Mr. Sharpe says he took exception to the words: "In consideration of your having this day affected (meaning effected) a sale" and said that they had not effected a sale, and would not have effected a sale until they had paid the full cash payment, had the American property transferred to Mr. Loose, giving the security that he had bargained for, consisting of a chattel mortgage and other securities. Mr. Sharpe says: "I altered their form myself, dictated it in their presence, and they acquiesced in the change that I made in it—'upon the completion of the sale' and I explained why I changed it to after giving the security, the cash payment, as part of the cash consideration and—I altered the agreement accordingly to ex. 3."

Exhibit 3 reads as follows:—

Winnipeg, Manitoba, Sept. 5th, 1917.

Messrs. Dominion Farm Exchange &
Doughie, Jack & Lyons,
Somerset Building,
Winnipeg, Manitoba.

Dear Sirs:

This is to say that in the event of a sale being completed by me to C. Bleasdale, of my farm and chattels, at St. Adolphe, lots 17, 18 and 19, St. Norbert, I agree to pay you a cash commission of one thousand dollars, this is to be accepted by you in full.

Yours truly,

ELMER P. LOOSE.

The defendant contends that this letter, which he says was acquiesced in by the plaintiffs, constituted the contract between himself and the plaintiffs with regard to the payment of commission. Mr. Sharpe himself says that whatever was arranged that day with regard to commission was reduced to writing in ex. 3.

Assuming that this document constitutes an agreement, then all oral evidence of the negotiations leading up to the making of

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this agreement, including the draft letter, ex. 7, were improperly admitted in evidence: *Inglis* v. *Buttery* (1878), 3 App. Cas. 522. The learned trial Judge allowed the evidence to be given and stated that he would rule on its admissibility later on. He evidently decided that it was admissible since he makes it very largely the basis of his judgment.

The evidence does not establish that the terms of the letter, ex. 3, were ever assented to by the plaintiffs. Mr. Sharpe says: "They acquiesced in it" but on cross-examination he was asked: "What did they say? A. I don't remember what they said." Such evidence standing alone would not support a finding of acquiescence.

Doughie says he never saw that letter and Doner says there was no discussion in regard to it.

In any event, even if such assent were proved, the agreement would be ineffective since it is supported by no consideration. If ex. 3 be regarded, as I think it should be regarded, not as an agreement at all but merely a letter written by defendant to plaintiff after the execution of the agreement for sale, and viewing it in that light it of course follows that the conversations sworn to by Mr. Sharpe in reference to the commission would be admissible, I fail to see how it can affect the plaintiffs' right to commission which they had earned when they produced a purchaser, ready, willing and able to purchase the property.

Counsel for the defendant argued that by reason of events which subsequently occurred, the defendant was released, but as there is no defence of release on the record I do not consider this contention.

I would allow the appeal and direct that judgment be entered in favour of the plaintiff for $1,000 with costs here and below.

Dennistoun, J.A.

DENNISTOUN, J.A., concurs with Fullerton, J.A.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Clute, Sutherland and Masten, JJ. March 26, 1920.

1. SET-OFF AND COUNTERCLAIM (§ I D—21)—PERSONAL DEBT AGAINST TRUSTEE—SET OFF OF DEBT DUE TO HIM AS TRUSTEE.

A debt claimed against a trustee personally cannot be set off against a debt due to him as trustee.

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2. PARTIES (§ II—95)—ACTIONS BY PERSONS CLAIMING UNDER A TRUST—PERSON IN WHOM LEGAL ESTATE VESTED NECESSARY PARTY.

In all actions by persons claiming under a trust, the trustee or other person in whom the legal estate is vested is required to be a party to the proceeding, whether the trust is expressed or implied.

3. ASSIGNMENT (§ I—1)—OF PART OF CLAIM—VALIDITY OF—ACTION FOR RECOVERY OF PART ASSIGNED FROM DEBTOR.

It is more than doubtful whether there can be an assignment of a part of a claim so as to entitle the assignee to maintain an action for the recovery of such part from the debtor, under sec. 58 (5) of the Judicature Act, R.S.O. 1897, ch. 51. There is no binding authority to that effect, and the better opinion seems opposed to such a conclusion.

Statement.

APPEAL from the judgment of Hodgins, J.A., on actions by the respective plaintiffs as assignees of one Ash to recover from the defendant the amounts of debts alleged to be due by the defendant to Ash. Reversed.

The judgment appealed from is as follows:—

HODGINS, J. A.:—Since delivering judgment at the close of the trial, which I did under the impression that both Mr. Gray and Ash had agreed that the latter should be added as a party plaintiff, I am informed that Mr. Gray declines to add Ash as a party plaintiff, and no application was made to add him as a defendant. I have therefore to dispose of the question argued before me by Mr. McCallum, namely, that, without Ash as a party, the plaintiffs cannot succeed, because the assignment is of only a part of the debt in question.

I have already expressed the view that, whatever the plaintiffs' rights may be under the terms of the agreement itself, or under the assignments from Ash, they could not recover except subject to whatever rights arose out of the agreement which contains the covenant on which they sued. The case is distinguishable from those where the party to whom the money is payable is merely a trustee for others. Here no trust is disclosed, nor was there any proof that the plaintiffs were entitled to the money within the terms of the agreement. I do not think that, suing alone, they can recover either upon the terms of the covenant in the agreement itself or by virtue of the assignments by Ash to them. The sum of $5,900 is part of the consideration for the entire agreement between Ash and the defendant, and the defendant is entitled to require Ash to carry out his agreement strictly before he is called upon to hand over the consideration or to pay the sum of $5,900, either to Ash or to "the various persons entitled thereto." Until

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the contract is carried out, neither Ash nor those persons are entitled to the $5,900 or to any part of it. Whatever may be the law as to partial assignments of a simple chose in action, I do not think the statute extends to an assignment of part only of the consideration for an agreement, so as to vest in the assignee the right to sue without joining his assignor. His assignor is the person to carry out the agreement, and he is only entitled to the consideration-money or part of it on so doing.

Where, as in this case, questions arise which, although not going to the root of the contract, and therefore not entitling the parties to rescind, yet affect the rights of the parties under the agreement, either to have an account taken or to make deductions or in some other way to modify or alter the carrying out of the strict terms of the agreement, I think the parties to the contract must always be parties to an action to enforce it, notwithstanding any intermediate rights which they may have endeavoured to give to others, and notwithstanding any rights which may arise under the contract in favour of third parties, whose claims are subordinate to the carrying out of the contract.

I have read and considered the cases cited to me as well as others bearing upon the point in question. I think the reasoning of Gibson, J., in *Conlan* v. *Carlow County Council*, [1912] 2 I.R. 535, 542, is applicable here: "A contracts with B to build a house for him for £1,000; he assigns absolutely £500 thereof to C, and gives D another assignment for £500. If B disputed due performance of the contract, is he to be sued twice over, with perhaps different results according to the view taken in each case by the jury? What is to happen if it is decided that only £500 is payable? Is D, by suing first, though his assignment is later, entitled to capture all? Is the assignor not to be a party to the action in which the debtor's liability is to be determined?"

The same idea, i.e., that the parties to the contract must be present and be bound by any determination where they retain any interest in the debt part of which is assigned, or, on the other hand, where the debtor has claims against the assignor which must be settled before the balance is ascertained, is to be found underlying the following decisions:—

In *Durham Brothers* v. *Robertson*, [1898] 1 Q.B. 765, referring to the English Judicature Act, 1873, sec. 25, sub-sec. 6, it is said

by the Court of Appeal: "It does not involve him" (the debtor) "in any question as to the state of accounts between the mortgagor and the mortgagee . . . The question is not one of mere technicality or of form: it is one of substance, relating to the protection of the original debtor and placing him in an assured position" (p. 773).

In *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454, and in *Graham* v. *Crouchman* (1917), 39 D.L.R. 284, 41 O.L.R. 22, an equitable assignee of the whole fund was held entitled to sue alone, but it appeared in each case that the assignor had no beneficial interest in the fund.

In *Seaman* v. *Canadian Stewart Co.* (1911), 2 O.W.N. 576, the Court of Appeal said, at p. 579, after reviewing the English cases: "It is more than doubtful whether there can be an assignment of a part of a claim so as to entitle the assignee to maintain an action for the recovery of such part from the debtor, under sec. 58 (5) of the Judicature Act, R.S.O. 1897, ch. 51. There is no binding authority to that effect, and the better opinion seems opposed to such a conclusion."

I think that here Ash is a necessary party, either as plaintiff or defendant; and, as the plaintiffs decline to add him as a party plaintiff, and no application is made to add him as a defendant, and as the point is one that is particularly set out in the defence, and was urged before me, I must give effect to it. I am reluctant to dismiss the actions for want of the proper parties; but, having given an opportunity to the plaintiffs to remedy this defect, I do not see that any course is advisable or open to me other than a dismissal of the present actions.

The judgment as outlined by me at the conclusion of the case will therefore go for nothing, and judgment will be entered dismissing both these actions with costs.

J. J. Gray, for appellants.

W. J. McCallum, for defendant, respondent.

Masten, J.

MASTEN, J.:—This is an appeal from the judgment of Hodgins, J.A., delivered by him on the 30th December last, dismissing the plaintiffs' actions on the ground that one Ash was a necessary party thereto.

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Counsel for the appellants in opening his appeal stated that he had failed to make his position clear to the trial Judge, and that he had never intended to withdraw from his offer to add Ash as a co-plaintiff, and he applied to this Court for an order making Ash a co-plaintiff and undertaking to file his consent and to represent him on the hearing of the appeal. On these undertakings an order was made adding Ash as a co-plaintiff, and directing that all necessary amendments in the pleadings should be made, also that the two actions should be consolidated. The order was made without prejudice to the plaintiffs' right to contend, on the question of costs, that separate actions had been properly launched in their original form, and that the original plaintiffs, Best and Calvert, were entitled to maintain their actions as launched. Counsel for the defendant consented to the adding of Ash.

I pause here to say that I fully agree with the judgment of the trial Judge dismissing for want of parties the action as it stood before him. I shall revert to the question when dealing with the costs.

After the addition of Ash as co-plaintiff, the argument of the case proceeded on what was admitted to have been throughout the real issue in controversy between the parties, namely, as to whether the defendant is entitled to deduct from the sum of $5,900 claimed by the plaintiffs, $857.06, being the amount of liabilities which he claimed to have paid in excess of certain liabilities undertaken by him.

In order to understand this contention, a brief statement of the facts is necessary:—

The plaintiff Ash, having entered into agreements for the acquisition of certain manufacturing plants, caused to be incorporated and was promoting the flotation of a company known as the Canadian Drill and Electric Box Company Limited for the purpose of carrying on the manufacturing undertaking. The promotion did not succeed, and ultimately it was deemed to be the best course for Ash and the Canadian Drill and Electric Box Company to sell out all their assets to Beatty, the defendant. The agreement for that sale is exhibit 1 at the trial.

By one of its recitals, the agreement purports to be founded on the "representation, condition, and understanding that at the date hereof the assets of the company (the Canadian Drill and

Electric Box Company Limited) are as set out in schedule A. attached hereto, and that the total liabilities or obligations of the company are as set out in schedule B. hereto." (Schedule B. shews liabilities of $36,894.38.) The operative part of the agreement is as follows:—

"And in consideration of the foregoing the purchaser hereby covenants and agrees to assume the obligations and liabilities of the company as set forth in schedule B. attached hereto, amounting to the sum of $36,894.38 or thereabouts, and to pay to the vendor or the various persons entitled thereto the sum of $5,900, upon receiving releases of their respective rights arising from the payment of money to the vendor, or transfers of the shares in the said company upon which the said amount has been paid by the persons making said payments or subscribing for shares."

The assets were handed over to Beatty, and subsequently it was found that the outstanding liabilities exceeded the sum of $36,894.38, and Beatty paid on this account an additional sum of $857.06.

In the course of promoting the Canadian Drill and Electric Box Company Limited, Ash went about seeking subscribers for shares, and obtained $5,900 of money which, it now transpires, he received as trustee for the subscribers in order that he might procure for them shares in the company. No shares were ever issued to these subscribers, and Ash remained a trustee of the moneys which he had received, amounting to $5,900. These moneys are traced to the defendant, and are, in my opinion, repayable by him to Ash, and by Ash to the parties who contributed them: *Royal Bank of Canada* v. *The King*, [1913] A.C. 283; *National Bolivian Navigation Co.* v. *Wilson* (1880) 5 App. Cas. 176.

This situation does not appear to have been brought to the attention of the trial Judge by counsel for the plaintiffs, and only transpired in the course of the argument in this Court from the admissions of counsel for the defendant in answer to questions from the Court. This circumstance appears to me to be decisive of the controversy. The issue is as to the right to set off against the $5,900 due by the defendant to Ash as trustee the overpayment made by the defendant on account of general liabilities, for repayment of which Ash is alleged to be personally responsible.

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In other words, what is claimed is to set off against a debt due to Ash as trustee a claim against him personally. But these are not mutual debts, and could not be set off either in law or equity: *Ambrose* v. *Fraser* (1887), 14 O.R. 551.

The plaintiffs are therefore entitled to recover the full amounts claimed without any set-off or deduction in respect of the claim of $857.06.

It remains to deal with the question of costs.

If, as contended by their counsel, each of the plaintiffs is entitled to maintain his own action in his own name without adding Ash as a party, then the plaintiffs are entitled to their costs of the actions throughout; but, as I have stated above, I cannot take that view.

The latest statement of the law which I have observed is that of Lord Haldane in *Dunlop Pneumatic Tyre Co.* v. *Selfridge and Co. Limited*, [1915] A.C. 847. At p. 853 he says:—

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quæsitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*."

In Ontario the cases were fully reviewed in 1893 by the Queen's Bench Divisional Court in the case of *Faulkner* v. *Faulkner* (1893), 23 O.R. 252. I quote the remarks of Street, J., at p. 258, as follows:—

"In all the cases since *Tweddle* v. *Atkinson* (1861), 1 B.& S. 393, 121 E.R. 762, in which a person not a party to a contract has brought an action to recover some benefit stipulated for him in it, he has been driven, in order to avoid being shipwrecked upon the common law rule which confines such an action to parties and privies, to seek refuge under the shelter of an alleged trust in his favour: *Mulholland* v. *Merriam* (1872), 19 Gr. 288; *In re Empress Engineering Co.* (1880), 16 Ch. D. 125; *In re Rotherham Alum Co.* (1883), 25 Ch. D. 103, 111; *Gandy* v. *Gandy* (1885), 30 Ch. D. 57; *Henderson* v. *Killey* (1889), 17 A.R. (Ont.) 456; *Osborne* v. *Henderson* (1889), 18 Can. S.C.R. 698; *Robertson* v. *Lonsdale* (1891), 21 O.R. 600."

This expresses the law as I understand it to exist in Ontario at the present time.

Counsel for the plaintiffs relied upon the case of *Moot* v. *Gibson*, (1891), 21 O.R. 248, which was decided by Mr. Justice Robertson in Single Court, on an application to have a judgment creditor appointed receiver of a certain annuity payable to the judgment debtor, and in which the learned Judge made the order asked and granted the receivership. The order so made by him appears to be beyond criticism, because the judgment debtor was without question entitled to the annuity, as she had given up her dower in certain lands in consideration of receiving this annuity from her sons. The learned Judge, although acting on this ground, also discusses the effect of the formal written agreement in which the judgment debtor was named as a party, and considers and rejects the argument which had been presented before him, that, as she had not executed the agreement, she could not recover on it. His remarks in that regard are *obiter*, and in any case are not binding on this Court. In so far as they are at variance with the law as stated in the cases which I have quoted I disagree with them. If there was no trust, there was no right to sue. If there was a trust, the proper course was for the *cestui que trust* to apply to his trustee to become a co-plaintiff with him, and, upon his refusal, to sue alone and join the trustee as a co-defendant.

This practice as to parties is laid down in Daniell's Chancery Practice, 8th ed., pp. 151, 152, as follows:—

"In general, where a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it should be a party to the action: for, if he were not, his legal right would not be bound by the judgment, and he might, notwithstanding the success of the plaintiff, have it in his power to annoy the defendant by further proceedings. . . . Upon this ground it is that in all actions by persons claiming under a trust, the trustee or other person in whom the legal estate is vested is required to be a party to the proceeding; and the rule is the same whether the trust be expressed or only implied."

The rule so stated is fully supported by the authorities there cited—see also *Pigott* v. *Stewart*, [1875] W.N. 69.

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I have not overlooked Rule 85*, nor the claim that the documents adduced in evidence shew an assignment of a chose in action by Ash to the plaintiffs, and notice to the debtor, entitling them to sue in their own names. For reasons already stated, I think that this is not the true view, but that Ash was a trustee for the plaintiffs, and that they never bargained with Ash to accept from him an unascertained share of a contested balance due from the defendant in lieu of their full claim as *cestuis que trust* against both Ash and the defendant.

But, even if this were an assignment of a chose in action, the plaintiffs' position is not improved. I agree with what was said by the trial Judge in this regard, and refer to the remarks of Moss, C.J.O., in the case of *Seaman* v. *Canadian Stewart Co.*, 2 O.W.N. 576, at p. 579, where he says:—

"It is more than doubtful whether there can be an assignment of part of a claim so as to entitle the assignee to maintain an action for the recovery of such part from the debtor, under sec. 58 (5) of the Judicature Act, R.S.O. 1897, ch. 51. There is no binding authority to that effect, and the better opinion seems opposed to such a conclusion;" and he prefers the conclusion in *Forster* v. *Baker*, [1910] 2 K.B. 636, to *Skipper & Tucker* v. *Holloway and Howard*, [1910] 2 K.B. 630.

The result is that the action was not properly constituted until the order was made by this Court joining Ash as a co-plaintiff. Up to that point the plaintiffs were wrong. I would, therefore, while giving judgment to each of the plaintiffs for the full amount claimed by them respectively, grant no costs of the action or appeal to either party.

There will be judgment in favour of the plaintiffs for the amounts of the respective claims of the two original plaintiffs, without costs to either party, and without prejudice to the defendant's claim to recover from Ash the $857.06 alleged overpayment, and without prejudice to any defence which Ash may set up to such claim.

Mulock, C.J.Ex.
Clute, J.
Sutherland, J.

MULOCK, C.J. EX., and CLUTE, J., agreed with MASTEN, J.

SUTHERLAND, J.:—I agree that, with the action as now constituted, the appeal should be allowed.

*85. An assignee of a chose in action may sue in respect thereof without making the assignor a party.

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With reference to what Masten, J., terms in his judgment "the operative part of the agreement in question" and quoted by him therein as follows, "And in consideration of the foregoing the purchaser hereby covenants and agrees to assume the obligations and liabilities of the company as set forth in schedule B. attached hereto, amounting to the sum of $36,894.38 or thereabouts, and to pay to the vendor or the various persons entitled thereto the sum of $5,900, upon receiving releases of their respective rights arising from the payment of money to the vendor, or transfers of the shares in the said company upon which the said amount has been paid by the persons making said payments or subscribing for shares," I should like to add that, in my opinion, the expression "or thereabouts" is flexible enough to include the $857.06 of obligations and liabilities of the company beyond the sum of $36,894.38 mentioned therein; and that, apart from this, upon the proper construction of the whole clause, the sum of $5,900 must be paid in full by the purchaser, whether paid to the vendor himself or to the various parties entitled thereto, without being susceptible to any deduction, and with the only reservation that releases of their respective rights shall be given.

Appeal allowed.

HOLMES v. KIRK AND CO.

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C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips and Eberts, JJ.A. March 19, 1920.

1. AUTOMOBILES (§ III B—205)—MOTOR TRAFFIC REGULATION ACT, R.S.B.C. 1911, CH. 169—PROVISIONS OF—INTERPRETATION.

Section 16 of the Motor Traffic Regulation Act, R.S.B.C. 1911, ch. 169, which provides that: "Every driver of a motor going in the same direction as and overtaking a street car which is stopped or is about to stop for the purpose of discharging or taking on passengers, shall, when such car stops, also stop such motor . . . ", does not apply where a street car having been backed from a cross street to a point preparatory to proceeding forward on its journey is standing still.

2. EVIDENCE (§ II H—224)—STATUTORY PROVISION AS TO MOTOR DRIVER SOUNDING HORN—DUTY OF PLAINTIFF TO PROVE THAT HORN IN FACT NOT SOUNDED—BURDEN OF PROOF.

Where a statute provides that "every motor shall be equipped with an alarm bell, gong or horn, and the same shall be sounded whenever it shall be reasonably necessary to notify pedestrians and others of the approach of such motor," the plaintiff cannot stop upon proving that it was reasonably necessary under the circumstances that the horn should have been sounded but must produce evidence to justify a jury in finding that the horn was not sounded. The onus is not on the defendant to prove that it was sounded.

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Macdonald, C.J.A.

APPEAL by defendant from the trial judgment in an action for damages for injuries caused the plaintiff by being struck by defendant's motor car as he was about to board a street car. New trial ordered.

L. G. McPhillips, K.C., and *E. J. Grant*, for appellant.

Sir Chas. H. Tupper, K.C., and *I. Rubinowitz*, for respondent.

MACDONALD, C.J.A.:—Unless it can be said that the Judge misdirected the jury the verdict cannot, in my opinion, be disturbed. Several grounds of appeal are stated, but I find it necessary to refer only to those which deal with misdirection, and only two of these need, I think, be considered.

The two grounds I refer to are stated in paragraphs 14 and 19 of the amended notice of appeal, the latter of which deals with the following situation:

The plaintiff was injured by being struck when about to board a street car, by a motor truck driven by the defendant's servant. The Motor Traffic Regulation Act, R.S.B.C. 1911, ch. 169, sec. 31 as amended by 3 Geo. V. 1913 (B.C.), ch. 46, sec. 16, reads:—

> Every driver of a motor going in the same direction as and overtaking a street car, which is stopped or is about to stop for the purpose of discharging or taking on passengers, shall, when such car stops, also stop such motor at a distance of at least 10 feet from said car, and shall keep such motor at a standstill until the said car has been again set in motion, and all passengers who have alighted shall have reached the side of the highway or otherwise gotten safely clear of said motor.

At the time of plaintiff's injury, the street car having been backed from a cross street to the point in question preparatory to proceeding forward on its journey, was standing still; the plaintiff stepped back for the purpose of allowing a lady to precede him, when he was struck. The question raised in argument is that, assuming there was evidence on which the jury could find that the street car was standing at the place aforesaid, after having been backed to that point for the purpose of taking on passengers, and not having yet moved forward, could the provisions of the said section be made applicable?

It was argued by the appellants that the truck was not overtaking a street car "'going' in the same direction." Primarily it is a question of fact as to whether the street car was going in the same direction as the truck, but the facts upon which the question now under consideration has to be decided are not in dispute. The question has become one of construction. If the Act applies

the Judge was called upon to instruct the jury that if they found that the car had been backed up to that point with the intention of its being driven forward though it had not yet started on its forward journey, the defendant's driver was "overtaking a street car going in the same direction" and that it was his duty under the statute to stop. The Judge, I think, did instruct the jury on this point correctly from his point of view as to the meaning of the said words. Reading his charge to the jury, it seems to me quite manifest that this was the view which the Judge took of the statute. But unless I can construe the words, "going in the same direction" as capable of being read, "about to go in the same direction" then the section does not, in my opinion, apply to the facts of this case. The word "going" has a great variety of meanings and shadows of meanings, but it is essentially a word denoting motion and while it would be be quite usual and proper to say of a car standing at a terminus and about to go on a journey, that that car is *going* south, or is *going* into town, yet I think that that was not the sense in which the Legislature meant to use the word "going" in the section aforesaid.

It will be observed that the driver of the motor is assumed to be *going;* that he is assumed to be *overtaking* a street car; that the street car is *going* in the same direction as the following vehicle; it is contemplated that it may stop or that it may be about to stop, that the motor should be kept at a standstill until the car has been *again set in motion.* The whole section contemplates a situation in which a car shall be moving or proceeding and shall be caught up with by a motor vehicle following it. "Again set in motion" is significant. The idea suggested to my mind is that the car has been in motion going in that direction and has stopped and is *again* to be put in motion. The fact, if it be a fact, that the driver must have known that the car was about to go in the direction he was going and should have observed the spirit of the Act, cannot I think, be relevant. The construction of the statute cannot be made to depend on the knowledge or conduct of this particular driver. I am, therefore, forced to the conclusion that there was misdirection on this point in the case.

The other ground above-mentioned set out in par. 14 of the notice of appeal also turns on misdirection. The said statute also provides that "every motor shall be equipped with an alarm bell,

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gong or horn, and the same shall be sounded whenever it shall be reasonably necessary to notify pedestrians and others of the approach of such motor." The Judge told the jury that "if the plaintiff has proven it was reasonably necessary for the horn to be sounded then the defendant must adduce evidence that would lead you to believe it was sounded, and in another place he repeats his instruction by saying that in the circumstances above, "the onus is upon the defendant to shew that it was sounded because that is a duty cast upon him by law."

With great respect, I think the Judge was clearly wrong in so directing the jury with regard to the onus of proof being upon the defendant to shew that the horn had been sounded. While it is impossible to say that it had influenced the jury's verdict, there being evidence pro and con, yet it is equally impossible to say that it had not. I think, therefore, the judgment and verdict must be set aside and a new trial ordered.

The costs of the previous trial should abide the result of the new trial. As to the costs of the appeal, I see no reason for ordering that these shall be disposed of otherwise than in accordance with the event.

Martin, J.A.

MARTIN, J.A., would order a new trial.

Galliher, J.A.

GALLIHER, J.A.:—In this case the jury brought in a general verdict for $5,000, and we must assume that they found all facts in favour of the plaintiff necessary to entitle him to a verdict.

As to whether the car was standing ready to take on passengers or not, there is a direct conflict of evidence, and if the jury believed the evidence of the conductor, the plaintiff and Mrs. Patton, then there was evidence upon which they could find that the car was standing at the place where passengers were taken on. But the words of the statute, 3 Geo. V. 1913, ch. 46, sec. 16, are: "Every driver of a motor going in the same direction as and overtaking a street car, which is stopped" etc., and Mr. McPhillips contends that this street car was backing up in an opposite direction and had not reached the point where passengers were taken on, therefore, it was not going in the same but in an opposite direction, and the motor did not overtake the street car.

If the jury had believed the defence evidence that would have been an end of the plaintiff's case on this branch.

The car when the passengers would be taken on would proceed in the same direction as the motor and if the jury found that it was standing still at the point where passengers were taken on I think it would be in no different position to what it would have been had the car been proceeding in the same direction as the motor and had stopped to take on passengers, if it were not for the particular wording of the section. The Act says: "going in the same direction as and overtaking a street car which is stopped," and further on states that "such motor shall be kept at a standstill until the car has *again* been set in motion." This language seems to point to the fact that the car must be previously in motion in the same direction as the motor and therefore the Motor Act does not apply on this branch. There was, therefore, misdirection by the Judge.

The driver of the motor admits that he knew the locality, had often driven over it and must have known that the car which had backed up on the east track would, when it had taken on its passengers be moving in the same direction as himself, and this was urged in argument, but this can be of no assistance to us in interpreting the statute.

The jury may not have found negligence on this ground, but as there was another ground on which they may have found defendants negligent, viz., for not blowing the horn, and as the trial Judge directed the jury on that ground as to onus, which direction is objected to by Mr. McPhillips, it will be necessary to consider this under the head of misdirection.

As to the blowing of the horn, the plaintiff's witnesses all say they did not hear it blown, while on the other hand, Ferguson, the driver of the motor, and Boyd, who was sitting beside him, both swear the horn was sounded while still some 20 feet from the plaintiff.

Apart from the direction as to onus of proof of the sounding of the horn, we have again contradictory evidence upon which the jury might find in favour of the plaintiff.

The next point is as to contributory negligence of the plaintiff.

Again, assuming that the jury found, as they must have, that the car was stationary at the point for taking on passengers and if they believed the evidence of the plaintiff and considering that

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the distance from the street curb to the nearest rail was 25 feet, and that there was 17 feet clear in which to drive after the plaintiff had stepped back, I am not prepared to say the jury would be wrong in not finding contributory negligence in the plaintiff stepping back without looking. I do not think that any question of ultimate negligence arises upon the evidence, apparently all was done that could be done.

As to the question of damages, I express no opinion, as I think there should be a new trial on the ground of misdirection.

I will not go over the different grounds of appeal, but will state generally that, in my opinion, it was not a case that should have been taken from the jury, nor is it a case where I could say that the verdict of the jury is perverse.

The Judge charged the jury as to the negligence of the defendant on two grounds. The jury may have found on one or the other, or on both, and not having answered the questions submitted, we cannot determine this. They may have found negligence on the second ground, viz., failure to sound the horn, and if the Judge had properly charged as to where the onus of proof lay as to sounding the horn, then I should not interfere. Mr. McPhillips' complaint is founded on ground 14 of the notice of appeal as follows:—

> The Judge erred in telling the jury that "when the plaintiff had convinced the jury that the conditions were such that it was reasonably necessary that the horn should be sounded, then the onus was upon the defendant to shew that it was sounded, because it was a duty cast upon him by law under the circumstances.

If that is a correct statement of the law, that the onus was on the defendant, even if plaintiff put in no evidence, the jury could say "we disbelieve the defendant's witnesses" and find "the onus has not been satisfied," while on the other hand, if the onus is on the plaintiff to satisfy the jury that the horn was not sounded, the plaintiff must produce evidence to justify a jury in so finding.

I do not think it is a correct statement to say that when a statute imposes a duty a breach of which would constitute negligence, that when the circumstances are such that (as in this case), it was reasonably necessary that the horn should be sounded, the plaintiff can stop there and it is incumbent on the defendant to shew that the horn was sounded. I think the plaintiff must go further and adduce evidence.

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McPHILLIPS, J.A.:—In my opinion the proper order to make in view of all the circumstances of this case, is that a new trial be had between the parties. McPhillips, J.A.

EBERTS, J.A., would order a new trial. Eberts, J.A.

New trial ordered.

TAYLOR v. RABBITS.

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C. A.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. March 30, 1920.

BROKERS (§ II B—12)—REAL ESTATE AGENT—SALE OF LAND—SERVICES ENTITLING TO COMMISSION.

To entitle a real estate agent to a commission on the sale of land, the agent must bring his client into relation with his principal as an intending purchaser. He need not effect the actual sale, nor even introduce the purchaser and owner one to the other but there must be some act of the agent that directs the purchaser as an intending purchaser to the land which he subsequently buys.

[*Herbert* v. *Bell* (1912), 8 D.L.R. 763, 6 S.L.R. 10; *Barnett* v. *Isaacson* (1888), 4 T.L.R. 645, referred to. See annotation 4 D.L.R. 531.]

APPEAL by plaintiff from the trial judgment in an action by a real estate agent for commission on the sale of land. Affirmed. Statement.

C. M. Johnston, for appellant; *J. W. Estey*, for respondent.

LAMONT, J.A.:—On June 26, 1916, the defendant listed his farm for sale with the plaintiff. He signed a listing card on which the plaintiff had written the particulars of the listing. On the card there were certain headings printed, and amongst others, the words "exclusive agency," after which the plaintiff says he wrote in the words "F. J. Taylor," his own name. Under the heading of "Remarks" were written the words: "This list to hold good until June 26, 1917." A short time after getting the listing, the plaintiff was out at the farm of one Jacob Hagel, endeavouring to sell him life insurance. Failing that, he tried to sell him some land, and he says he told Hagel about the defendant's land. Hagel says he did not give him any description of the land or the name of the defendant, but told him he had land in a certain section of the country, which Hagel said was too far from his father's farm. Later on, at Allen, the plaintiff spoke to Hagel about the defendant's land, but Hagel told him distinctly he would not buy. This is admitted by the plaintiff. The reason given by Hagel on this occasion also was that the land was too far from his father's place. The plaintiff did not see Hagel again about buying this land. Lamont, J.A.

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In March, 1917, Hagel was looking for a farm to rent, and one Petrofski told him the defendant's farm could be rented. Hagel, as the trial Judge found, went to the defendant's place for the purpose of renting it. There is nothing in the evidence to justify a suspicion that when Hagel went to the defendant's place he had the slightest intention of endeavouring to buy it. The terms of the lease were discussed that day, but the lease was not entered into. Some days later the defendant suggested to Hagel that he should buy the place. Hagel pointed out that this was impossible, as he had no money and that a portion of his outfit belonged to his father. The defendant told him that if he would buy the place he would sell it on crop payments, and would supply him with the seed necessary to put in a crop. Hagel, as a result of these inducements, bought the place. The plaintiff brought this action for his commission, claiming that Hagel was a purchaser found by him.

The District Court Judge dismissed the plaintiff's action, holding that the plaintiff had not found Hagel as a purchaser for the land. The plaintiff now appeals.

The first question is: Did the plaintiff find Hagel as a purchaser?

I agree with the trial Judge that he did not. It is not enough that the plaintiff spoke to Hagel about buying the land. To be entitled to his commission the agent must bring his client into relation with the principal as an intending purchaser. He need not effect the actual sale, nor even introduce the purchaser and owner one to the other, but it must be some act of the agent that directs the purchaser, as an intending purchaser, to the land which subsequently he buys.

In *Herbert* v. *Bell* (1912), 8 D.L.R. 763, 6 S.L.R. 10, my brother Newlands, at page 764, said:—

> The agreement, in my opinion, means that the defendant is to pay a commission if the plaintiffs bring the property, directly or indirectly, to the attention of any person who becomes a purchaser from the fact of their having so brought it to his attention. In this case the man to whose attention they brought the business gave up all idea of buying same and the matter was closed. He took it up again and bought through the efforts of another agent and the plaintiffs had nothing to do with his having become a purchaser.

See also *Barnett* v. *Isaacson* (1888), 4 T.L.R. 645.

At no time did the plaintiff ever have Hagel as an intending purchaser. He had distinctly said that he would not buy, and

when he went to see the land he went there as a prospective lessee without any intention whatever of being a purchaser. His becoming a purchaser was, therefore, not the result of any act on part of the plaintiff.

It was, however, argued that, even if the plaintiff did not find Hagel as a purchaser, yet he was entitled to his commission by reason of the fact that he had an exclusive agency for the sale of this land. Did he have the exclusive agency? The learned trial Judge found that he did not, because this term, although appearing on the card, was never agreed to. There was in my opinion evidence to justify this finding. The parties met and the plaintiff asked the defendant to list his land with him. The defendant said he would, but did not care to do so that night as he was in a hurry to get home. The plaintiff replied that it would not take a minute. He produced a card, on the front side of which there were printed underneath one another, on successive lines, the words: "Owner," "Address," "Exclusive agency," "Date." At the bottom of this side the defendant signed his name. On the reverse side were headings respecting the various descriptions of the place and the information required by the agent. The plaintiff admits that he called out the headings and the defendant gave the information appropriate to each, which the plaintiff wrote down. He admits also that he did not call out the heading "exclusive agency," and that nothing was said about the character of his agency, but he says his name was written in after the words "exclusive agency" when the defendant signed. This the defendant denies. The defendant says that nothing at all had been written on that side of the card when he signed it, and that had the plaintiff asked for an exclusive agency he would have refused it.

On this evidence it was, in my opinion, open to the trial Judge to find that the defendant had never agreed to give the plaintiff the exclusive agency for the sale of the farm.

Having reached this conclusion, it is unnecessary to consider the argument of counsel for the respondent, founded upon a number of American cases, that a contract for an exclusive agency is not violated by a sale by the owner to one not a customer of the agent.

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

NEWLANDS and ELWOOD, JJ.A., concurred in the result.

Newlands, J. Elwood, J.A.

Appeal dismissed.

ALTA.

S. C.

REX v. LOUIE HONG.

Alberta Supreme Court, Hyndman, J. June 22, 1920.

SUMMARY CONVICTIONS (§ II—20)—INDIAN ACT, R.S.C. 1906, CH. 81, SEC. 135a—INFORMATION—MORE THAN ONE OFFENCE CHARGED—VALIDITY—JURISDICTION OF MAGISTRATE.

An information under the Indian Act, R.S.C. 1906, ch. 81, sec. 135a, is invalid if more than one offence is charged in such information, and the trial of two offences together by the magistrate will also invalidate the convictions.

Statement. APPLICATIONS to quash convictions under the Indian Act, R.S.C. 1906, ch. 81, sec. 135 (a). Convictions quashed.

J. McK. Cameron, for appellant; *H. W. Lunney*, for the Crown.

Hyndman, J. HYNDMAN, J.:—These are two applications to quash convictions by W. S. Davidson, police magistrate, the first made on May 25, 1920, against Louie Hong for that the said Louie Hong on May 21, 1920, at Cluny, in the said Province, did unlawfully supply Bernard Standing at the Door, a Blackfoot Treaty Indian, intoxicating liquor contrary to sec. 135 (a) of the Indian Act, the accused being sentenced to imprisonment with hard labour for the term of 2 months, and the second on the same date for that the said Louie Hong on May 21, 1920, at Cluny, in the said Province did unlawfully supply Maxine Three Sons, a Blackfoot Indian, intoxicating liquor to wit, Florida water, contrary to sec. 135 (a) of the Indian Act, upon which the accused was adjudged to pay a fine of $200 and costs and in default of payment, imprisonment for 3 months.

The principal grounds raised against the validity of the convictions were (1) that the information in each case is bad for duplicity and for charging two offences; (2) that the magistrate heard all the evidence on both charges against the accused set out in said informations before he convicted and thus destroyed his jurisdiction and (3) before receiving the evidence of the Indians said magistrate failed to caution them that they would be liable to incur punishment if they did not tell the truth as required by sec. 153 of the Indian Act.

It was disclosed that the charges were entirely separate and distinct from one another, the sale not being one sale to both Indians but that each purchase of the prohibited goods was at different times, therefore the information and conviction would be invalid on the ground that more than one charge was laid, and

it seems to me that on that ground the conviction is bad. I think, also, on the ground that both charges were tried together, the convictions must also be held to be invalid.

In *Rex* v. *McManus* (1918), 30 Can. Cr. Cas. 122, it was held by my brother McCarthy that the proceedings were illegal and void because the magistrate had pending before him at the time of the hearing of the information therein, another information against the defendant for a similar offence and did not dispose of the same before he entered upon the hearing of the second charge. It seems to me that this case is even stronger in favour of the accused than the one cited as the two informations here were tried together and intermingled. (*The Queen* v. *McBerny* (1897), 3 Can. Cr. Cas. 339; *Rex* v. *Burke* (1904), 8 Can. Cr. Cas. 14; *Rex* v. *Bullock* (1903), 8 Can. Cr. Cas. 8; *Rex* v. *La Pointe* (1912), 4 D.L.R. 210, 20 Can. Cr. Cas. 98; *Rex* v. *Iman Din* (1910), 18 Can. Cr. Cas. 82.)

As to the effect of sec. 153 of the Indian Act (ch. 81, R.S.C.). Although it is not necessary to decide the force of this objection, it seems to me, that it is not applicable to the case because it is not shewn that the Indian giving the evidence was of the class or character referred to in sec. 151 of the Indian Act. In this case the Indian was sworn in the regular way, and there is nothing to indicate that he was destitute of the knowledge of God or of any fixed and clear belief in religion or in a future state of rewards and punishments, which is the class of Indian dealt with by the two sections. Sec. 153 enacts that the Court, Judge, magistrate, etc., shall before taking any such evidence, information or examination caution every *such* Indian or non-treaty Indian as aforesaid that he will be liable to incur punishment if he does not tell the truth, the whole truth, and nothing but the truth. It is clear that sec. 153 refers only to one described in sec. 151 above referred to. However, on the other grounds mentioned, I think the convictions are bad and should be quashed, without costs and with the usual protection.

Convictions quashed.

GREEN v. TOWN OF MELFORT.

Saskatchewan Court of King's Bench, Bigelow, J. May 28, 1920.

HIGHWAYS (§ IV A—127)—MUNICIPALITY—LIABILITY UNDER TOWN ACT, SASK., TO KEEP SIDEWALK IN REPAIR—LIABILITY FOR DAMAGES—NOTICE.

The Saskatchewan Town Act, 6 Geo. V. 1916, ch. 19, sec. 493, imposes an absolute duty to keep sidewalks in repair, and where damage arises

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from a breach of this statutory duty, the town is responsible for such damage regardless of whether or not it had notice or knowledge of the defective sidewalk.

[Judgment of Cameron, J.A., in *Lottine* v. *Langford* (1917), 37 D.L.R. 566, 28 Man. L.R. 282, followed.]

ACTION for damages for injuries caused by stepping into a hole caused by a broken plank in a sidewalk.

A. M. Mathieson, for plaintiff; *A. McN. Stewart*, for defendant.

Bigelow, J.

BIGELOW, J.:—The defendant is a town municipality subject to the provisions of the Town Act, 6 Geo. V. 1916 (Sask.), ch. 19. On August 19, 1919, about 8 o'clock p.m., the plaintiff was in Melfort in connection with his business, and was walking on a wooden sidewalk on the north side of Saskatchewan Ave. when his foot went into a hole caused by a broken plank, and, in consquence, the plaintiff suffered serious personal injuries. There is no evidence as to what caused the break in the sidewalk, or how long it had been there. The sidewalk was built in 1917, partly of tamarac and partly of spruce. Tamarac should ordinarily last 10 years and spruce 5 years, but these wooden sidewalks require repairs every year. The defendant had a road foreman who, with his men, went over the sidewalks and made repairs in the spring, the work continuing until June 15, and then, apparently, there was no supervision over the sidewalks until September, when the road foreman and his men went over the sidewalks and made necessary repairs again. Between June 15 and the end of September there was no inspection, the policy of the town officials apparently being during that period only to make repairs when they were notified of defects. The official who acted as road foreman had several other duties, viz., chief of police, chief of the fire brigade, waterworks superintendent, license inspector. After the sidewalks were inspected in the spring, the road foreman was busy as superintendent of waterworks, deepening the town well two miles west of the town. There is no evidence that the defendant had notice or knowledge of this defective sidewalk. Is the defendant liable under these circumstances?

Sec. 493 of the Town Act, 6 Geo. V. 1916, ch. 19, provides that:—

> Sidewalks . . . shall be kept in repair by the town, and on default of the town so to keep the same in repair the town, besides being subject to any punishment provided by law, shall be civilly responsible for all damage sustained by any person by reason of such default.

There are conflicting decisions on similar statutes in other Provinces, but apparently this point has never come before the Saskatchewan Courts.

In *Bell* v. *City of Winnipeg* (1919), 29 Man. L.R. 401, it was held by the Manitoba Court of Appeal that, in order for a municipality to be liable for an accident by reason of non-repair, it must be shewn that it had notice of the existence of the defect or that the defect has existed for such a length of time as makes it probable that it knew of it or ought to have known of it. Dennistoun, J.A., at page 410, states:—

> There is another and stronger ground upon which this case should have been withdrawn from the jury. As the law stands in Manitoba and Ontario, the existence of a state of non-repair at the time of the happening of an accident is not of itself sufficient to establish negligence on the part of the corporation. Something further is required. There must be reasonable notice of the state of non-repair, either to some ministerial officer of the corporation charged with the duty alleged to have been neglected, or by actual notice to the council of the existence of the defect, or by shewing that it has existed for such a length of time as, having regard to its nature and to all the other circumstances of the case, makes it probable that the council must have known of it or ought to have known of it through their officers upon whom the duty of taking action in respect of it has been cast. *Rice* v. *Town of Whitby* (1897), 25 A.R. (Ont.) 191, at 200; *Lottine* v. *Langford* (1917), 37 D.L.R. 566, 28 Man. L.R. 282.

On this point *Bell* v. *City of Winnipeg* apparently followed *Lottine* v. *Langford*, 37 D.L.R. 566, 28 Man. L.R. 282, a decision of the Court of Appeal in Manitoba, in which the decision of the trial Judge, MacDonald, J., for the defendant was upheld, on an equal division of the Court of Appeal, Perdue and Haggart, JJ.A., deciding for the defendant, and Howell, C.J.M., and Cameron, J.A., for the plaintiff. At page 576 (37 D.L.R.), Cameron, J.A., reviews the history of similar legislation in the New England States, and his views and conclusions appeal to me as more reasonable than the opposite views. He states at page 577:—

> In Dillon, sec. 1691, note, the substance of the various New England statutes is given. In Massachusetts the liability is modified by the requirement that the town must have reasonable notice of the defect or that it might have had notice by the exercise of proper care and diligence, and that the defect could have been prevented by reasonable care. Rhode Island has substantially the same provision. In Vermont, Connecticut and New Hampshire the obligation is absolute without any such or any similar modification. In Maine the town must have twenty-four hours' notice of the defect. The essentials of a recovery under the Maine statutes are clearly and concisely stated by Clifford, J., as quoted in Dillon, note to sec. 1691.

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Bigelow, J.

It is clear that under the New England statutes the right of action arises on a breach of the statute causing damage. It is the breach of the duty imposed by statute that gives rise to the action, and the question of negligence does not enter into consideration of the liability. This view finds support in the statement of Rigby, L.J., in *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, at 412, "where an absolute duty is imposed upon a person by statute, it is not necessary, in order to make him liable for breach of that duty, to shew negligence. Whether there be negligence or not, he is responsible *quâcunque via* for non-performance of the duty." The right of action under our Act, therefore, is based on a breach of the statutory duty, and when damage arises from that breach, it follows that, when a plaintiff has proved damage occasioned by reason of a road not being kept in repair, that is an end of the case so far as fixing the civil responsibility of the municipality is concerned, unless, it may be, the injured person has been himself the author of his or her own wrong.

And at page 578 he states:—

It may be that the Ontario decisions were influenced by the view which was expressed by Harrison, C.J., in *Castor* v. *Tp. of Uxbridge* (1876), 39 U.C.Q.B. 113, at 126, that "the action is based on negligence. There cannot in such a case be negligence unless there be knowledge or means of knowledge."

And at page 579:—

But that case was decided some time before *Groves* v. *Wimborne*, *supra*. The terms of our statute are positive and distinct, contain no justification for any modifications of liability, such as are set out in some of the New England provisions alluded to, and do not warrant the Courts in altering their plain meaning. I confess I can see no reason why we should not take the sections of the Act as they are and as they read, and leave any amendments of them to the Legislature in its discretion, though if the convenience and safety of the public are to be the main consideration, I can see no object in making any alteration.

In the *City of Vancouver* v. *Cummings* (1912), 2 D.L.R. 253, 46 Can. S.C.R. 457, the head-note is as follows:—

Where a municipal corporation is liable for damages sustained by reason of negligent nonfeasance of the statutory duty imposed upon it to maintain its highways in good repair, the questions of notice or knowledge of the defects do not arise. There is a presumption, in such cases, against the municipal corporation, and upon it lies the onus of adducing positive evidence in rebuttal; it is not sufficient to shew that the existence of the defects were not known by the corporation officials.

Although it may be contended that this case is not directly in point, as the Court said that the defendant had means of knowledge and was negligently ignorant of it, and that they must be held equally responsible, if it was only through their culpable negligence that its existence was not known to them, still there is much of the judgment that is directly in point. Idington, J., at page 256, says:—

Notice to, or knowledge on the part of, the authorities of a want of repair never formed part of the statute.

And at page 258, Idington, J., says:—

I am, despite dicta to the contrary, prepared to hold that, unless in some such case as I have suggested, the question of notice or knowledge does not arise, and that in all cases where the accident has arisen from the mere wearing out, or apparent wearing out, or imperfect repair of the road, there arises upon evidence of accident caused thereby, a presumption without evidence of notice that the duty relative to repair has been neglected.

The municipality is bound to take every reasonable means through its overseeing officers and otherwise, to become acquainted with such possible occurrences, and if it has done so can possibly answer the presumption.

See also *Jamieson* v. *City of Edmonton* (1916), 36 D.L.R. 465, 54 Can. S.C.R. 443.

My conclusion is that under our statute notice or knowledge is not necessary, and that when damage arises from a breach of the statutory duty to keep a sidewalk in repair, that is enough to fix responsibility. The obligation and liability are absolute, whether there was notice or knowledge or not. The foundation of the doctrine of notice or knowledge seems to me to be that the municipality would not be negligent unless they had notice or knowledge and a reasonable chance to repair, and that they would not be liable except in case of negligence. There is nothing about notice or knowledge or negligence in sec. 493, 6 Geo. V. 1916, ch. 119, and my opinion that the Legislature intended this absolute liability under sec. 493 is strengthened by sec. 494, which reads: "Except in case of negligence, a corporation shall not be liable for personal injury caused by snow or ice upon a sidewalk."

If it were necessary to put my decision on another ground, which I do not think it is, I would hold that the duty to keep in repair was neglected where there was no inspection from June 15th until September, and further that the defendant was negligently ignorant of the want of repair for the same reason, and that that would make the defendant liable. *Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93.

As to damages: the plaintiff suffered a severe shock to the nervous system, and developed symptoms of brain injury. He was in bed two weeks and in the house one month. He is not able to take such an active part in his business as he did before. From the medical evidence, and that of the plaintiff, I believe the plaintiff is likely to suffer permanently from headaches. I allow the plaintiff $50 medical fees paid, and $2,000 general damages; in all $2,050.

SASK.

K. B.

GREEN v. TOWN OF MELFORT.

Bigelow, J.

The plaintiff claims loss of profits for a month of the Prince Albert Mineral Water Limited, of which he was president and manager and in which he held $5,800 stock out of $6,000. The plaintiff was paid a salary as manager, and his salary continued while he was laid up. I do not think the plaintiff can recover profits which the company lost.

The defendant contended that the present claim is not in accordance with the notice required by sec. 496 of the Town Act., Sec. 496 is as follows:—

> No action shall be brought for the recovery of such damages unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the mayor or town clerk within thirty days after the happening of the injury.

Notice giving full particulars of the claim and injury was sent on September 17, 1919, within the 30 days, but the amount demanded was $1,550. The plaintiff's action is brought for $5,550. I do not think it is necessary to mention the amount of the claim in the notice, or that the plaintiff is precluded from recovering more than the amount he may have mentioned. The claim must be put in within 30 days, but at that time the plaintiff may not know his full damage. I am convinced in this case he did not then know the probability of permanent injury.

The plaintiff will have judgment for $2,050 and costs.

Judgment accordingly.

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Le BLANC v. MONCTON TRAMWAY ELECTRICITY & GAS Co. Ltd.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White, and Grimmer, JJ. April 23, 1920.

NEW TRIAL (§ III A—10)—CONFLICTING ANSWERS BY JURY TO QUESTIONS—IMPOSSIBILITY OF RECONCILING.

Answers by a jury to questions should be given the fullest possible effect, and if it is possible to support the same by any reasonable construction they should be so supported, but when the answers are so conflicting that it is impossible intelligently to reconcile them a new trial will be granted.

Statement.

MOTION by defendant to set aside verdict entered for plaintiff and for new trial. New trial granted.

M. G. Teed, K.C., for defendant; *A. J. Leger*, contra.

The judgment of the Court was delivered by

Hazen, C.J.

HAZEN, C.J.:—This action, which was for negligence, was tried before Chandler, J., and a jury, and on the answers of the jury a verdict was entered for the plaintiff for $800.

The plaintiff claimed damages for injuries sustained while travelling on the defendant's street car in the City of Moncton, and claimed that, when endeavouring to alight in the proper and usual manner, he was thrown down by a sudden jerk or jolt of the car, from his position on the step of the car, on his way out, and fell to the ground and was cut about the face, nose and forehead, and otherwise severely injured.

In opening the case to the jury, the plaintiff's counsel stated that the car was moving slowly, and while Mr. LeBlanc was in the act of alighting the car gave a jerk and he was precipitated to the ground head first and received severe injuries, and in his statement of claim it is stated that the plaintiff was precipitated and thrown violently down from the said car to the roadway or side of Main St., in the said City of Moncton, and that while he was preparing to alight from the car and was in the act of doing so, and before he had time to alight therefrom and to reach the ground in safety, the said car, through the careless, negligent and improper conduct of the motorman (there being no conductor on said car) the agent and servant of the defendant, who was at the time operating the said car, the latter was suddenly, negligently and improperly started, and in consequence of the wrongful, negligent and improper conduct of the said motorman, the plaintiff was thrown violently down from the said car, etc.

On this branch of the case, several questions were left to the jury. In addition to this it was alleged in the statement of claim that the defendant employed a dangerous and negligent system of carrying on its business, and employed defective machinery and appliances in connection with the running of the said electric car, and that the defendant did not provide a proper, safe, secure and efficient system to control the operation of the car, it being grossly negligent on its part to leave the control thereof to one man only, whose many duties made it impracticable to him to attend to passengers and to control the movement of the said car at the same time. (This refers to the fact that the car was what is known as a one man car, and will be referred to hereafter.)

The statement of claim further alleges that a conductor should have been provided in connection with the running of the car, to look after the safety of the passengers therein, and that the damage and injury was caused by the negligence of the defendant

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and by the improper and defective system adopted by the defendant in operating the said street railway, it being essential for the operation thereof and the safety of passengers that certain specified places for stopping the car should have been provided, and had that system been adopted the injury to the plaintiff would not and could not have happened.

The defects in the system and equipment as I understand them which are alleged in the statement of claim and which plaintiff sought to prove in evidence were: 1, That there was no conductor on the car. 2, That the brakes were not in good order and condition. 3, That the push bells were not connected with the batteries and were not in working order. 4, That there were no white posts to mark the places where the car should stop. 5, That the doors at the front of the car were left open instead of being closed at the time the plaintiff left the car and went out on the steps, and that the mechanism for closing the door was not up to date.

The evidence goes to shew that the car on which the accident occurred was what is known as a one man car, or pay-as-you-enter car, similar in every way to other cars used in the street railway service in the City of Moncton. It has been claimed that it was not a car of the most approved type, such as said defendant was required by statute to have on its railway, but I do not think that in the present case anything turns upon that point.

It appeared from the evidence that these one man cars are used in many places, Sydney, Bangor, Halifax and New York among the number, and that their use is constantly increasing, as they are more economical in point of operation. The passenger enters by the front door or vestibule and pays as he does so, dropping his money or ticket into a box. He goes out by the same door through which he entered, when he desires to leave the car. The car had been equipped with push buttons, but the batteries had been disconnected some time previous to the accident happening, as boys travelling on the cars were in the habit of annoying the motorman by ringing the bell at unnecessary times. When anyone wanted to get off the car he (the passenger) held up his hand or stood up, and his reflection appeared in a mirror in front of the motorman, who on seeing this took steps to stop the car so that the passenger might alight. As I understand the plaintiff's contention, it is said that if the car had been equipped with push

buttons the passenger would push the button, thus attracting the attention of the conductor or motorman, who would stop the car, and that the passenger would remain in his seat until the car was stopped, then arise, walk to the end of the car through the door and step onto the street. As a matter of fact I think it is common knowledge that in street cars, street cars that are equipped with push buttons, the passenger usually after pushing the button leaves his seat and gets to the place of exit as quickly as he can, so as to leave the car the moment it is safe to do so.

On the day of the accident, when he came close to the point at which he wished to leave the car the plaintiff arose from his seat and walked towards the motorman, who saw his reflection in the mirror. He (plaintiff) states that he started to get off, that he was on the steps and caught hold of the rail, that the car gave a jerk and he thought it was going to stop and it was going very slowly, and suddenly it gave a jerk and he fell. He states the motorman did not say anything to him and did not tell him to remain on the car. In cross-examination, when asked if he would swear the motorman did not say anything to him he replied that he did not remember his saying anything.

The evidence of Walter Scott, the motorman, however, is somewhat different. He says that the plaintiff was sitting near the door at his end of the car; that by means of the mirror he saw the plaintiff arise from his seat and come towards him; that he then started to stop the car by the brakes in the usual way; that the plaintiff kept on coming forward, and came up to where the motorman was, and that he (Scott) then told him to wait until he stopped the car. He (plaintiff) did not stop but went right along and out the door; that at this time the motorman had his brakes on and the car was slowing up.' This statement of the motorman is to a certain extent confirmed by the evidence of two witnesses. Mrs. Ina Clark testified that she was on the street car on the occasion of the accident, accompanied by her daughter. She was sitting at the front end of the car, near the motorman and right next to the door when the plaintiff got up to leave the car. She says that he walked down the car to the motorman and she heard the motorman say to him—"Wait a minute," but that he kept on going. Asked if when the plaintiff approached the motorman the latter did anything regarding the brakes, she says—"I can't re-

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member what he did, but as he was going out he said 'wait a minute' and the car began to stop." She further says that she did not observe any jolt as though the car was started up quickly, and that nothing of that sort impressed itself on her mind as having taken place. Her daughter, Miss Lilian Cole, gave evidence to the same effect. She heard the motorman tell the plaintiff to wait a minute, and she has no recollection of any jerk or jolt of the car taking place. If the jolt was so pronounced as to throw the plaintiff off the steps of the car with violence, it is certainly strange that it was not noticed by either of these ladies.

A number of questions were left to the jury, the first of which was as follows: Q. What was the approximate or immediate cause of the accident which occurred on November 10, 1917, and which resulted in injury to the plaintiff? A. Plaintiff walked off the car while in motion.

This certainly seemed to negative the plaintiff's contention that he was thrown off the car by a sudden jerk or jolt caused through defective brakes or by the unskilful handling of the car by the motorman.

A question was also left by the plaintiff as follows: 4. Was the fall of the plaintiff caused by the jerk of the car while plaintiff was getting off such car? and this question was not answered.

If these questions and answers stood alone they would certainly, it seems to me, as I said before, negative the plaintiff's contention to which I have just referred, and if the plaintiff walked off the car while in motion after being told by the motorman to wait a minute, the fault would seem to be entirely his own, and the defendant not liable for the accident which occurred. The jury, however, was asked in question 2: Q. Was the accident caused by negligence on the part of the defendant company or its employee or employees? A. Yes, and in answer to the third question they stated that such negligence consisted in want of proper equipment. Then in answer to the fourth question submitted by the Court: Q. Was the plaintiff guilty of contributory negligence in connection with the accident? The answer is, "No."

It is impossible for me to reconcile the answers to the first and fourth questions. If the immediate cause of the accident was the action of the plaintiff in walking off the car while in motion, I cannot understand how it can be said in any view of the case that

he was not guilty of contributory negligence or that the accident was caused through the sudden jerk or jolt of the car. To my mind the answers are inconsistent and conflicting, though if I had been compelled to direct a finding on those answers alone I am disposed to think that I would have found in favour of the defendant. The jury, however, by their answers to questions 2 and 3, found that the accident was caused by negligence on the part of the defendant company or its employee or employees, and that such negligence consisted in the want of proper equipment. They do not say what the equipment was that was deficient or defective, although questions on that subject were submitted to them at the request of the plaintiff. In answer to the plaintiff's question they found that the car was not equipped with push button bells; that there was no conductor on it; and that when the plaintiff left his seat to alight the doors of the car were open. They failed to answer a question as to whether the fall of the plaintiff was caused by the jerk of the car while plaintiff was getting off it, and also failed to answer the following question: "Did the motorman make all reasonable efforts to prevent the plaintiff from alighting?"

They also failed to answer three other questions, viz: As to whether the car stopped at regular and specified places and if there was a system of white posts; whether the car of the defendant company on which the plaintiff was riding was of the most approved kind or not; and if the cars of the defendant company were maintained and kept in good order.

It will be observed that while the jury state that the accident was caused by negligence on the part of the defendant company or its employee, and that the negligence consisted in want of proper equipment, they do not state what the equipment was that was lacking.

In an earlier part of this judgment, I have referred to the different contentions regarding lack of equipment. So far as the cars being one man cars is concerned, and there not being any conductor, I fail entirely to see how that could have caused the accident, for even if there had been a conductor on the car he would have been at the rear end, and could have done no more than the motorman did to avert the accident that took place. It is altogether immaterial whether the defendant was negligent or not if its negligence in no way contributed to the accident.

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There is not a particle of evidence to shew that the brakes on the car were not in good working order on the day when the accident occurred, nor is there anything to shew that the absence of white posts marking the stopping places could have anything to do with the accident or that their existence could have averted it, but it is contended that when the jury found that the accident was due to want of proper equipment they referred to the push bells and the mechanism of the doors, which doors were open at the time that the plaintiff passed out from the car into the vestibule. As the motorman saw the plaintiff approach, and stopped the car so that he could alight, it is difficult to see how the presence of a push bell in the car could have helped the situation, as his attention was called to the fact that a passenger wanted to alight, and could not have been more directly called to it by the ringing of a bell. So far as the doors are concerned, there is no evidence that I should think would lead anyone to conclude that if they had been closed the accident would not have occurred, and I doubt very much if the leaving open of a door can be said to be want of equipment, although if the door had been closed and had been opened by the motorman before the car was stopped, such act might be held to be an intimation to a passenger that it was safe for him to alight.

It seems to me that the finding that the negligence consisted in want of proper equipment is vague and uncertain, and in any event is in conflict with the answer to the first question, that the immediate cause of the accident was the action of the plaintiff himself in walking off the car while it was in motion.

Answers by a jury to questions should be given the fullest possible effect, and if it is possible to support the same by any reasonable construction they should be so supported, but when the questions, answered and unanswered, leave the original question in controversy in doubt and ambiguity, the cause of justice is best promoted by a new trial. In my opinion that is the condition in this case. The answers are so conflicting that it is impossible intelligently to reconcile them, and I do not think the Judge below was justified in entering a verdict against the defendant. I am disposed to think that I would have directed the verdict to be entered the other way, but in view of the jury's finding that there was negligence on the part of the defendant, consisting of want of proper equipment, the trial Judge took the other view, and because

of the ambiguous, conflicting and irreconcilable character of the answers given to the different questions, and of the jury's failure to answer certain questions of importance, I think there should be a new trial, the costs of this appeal to be paid by the respondent.

Judgment accordingly.

HORNING v. WINCHELL.

Saskatchewan Court of King's Bench, Taylor, J. March 18, 1920.

CONTRACTS (§ V C—402)—SALE OF LAND—FALSE REPRESENTATION AS TO SUITABILITY—RESCISSION—DAMAGES.

A false representation that a farm is well drained and one of the best farms in the district, on which the purchaser relies in purchasing the farm, which is in fact practically unfit for cultivation owing to the construction of drainage works, which cause waters, which would be ordinarily carried away, to be emptied onto it every year, entitles the purchaser to rescind the contract and receive back the purchase money, but if such representation was not made with knowledge of its falsity he is not entitled to recover damages.

Statement.

ACTION to recover the amount due on several promissory notes and counterclaim to have an agreement for sale of land rescinded and set aside.

P. J. Dixson, for plaintiff; *C. R. Morse*, for defendant.

Taylor, J.

TAYLOR, J.:—In this action, the plaintiff, who, according to the pleadings, resides in the State of New York, sued the defendant, who, according to the pleadings, resides at Kindersley, in Saskatchewan, on a number of promissory notes, alleged to have been made by the defendant to the plaintiff, payable at New York, in the United States, or in the City of New York, claiming an amount of some $2,355. In answer to the claim, the defendant, as well as pleading a general denial, has pleaded what he calls a guarantee, but which would be more properly designated as an agreement for an extension of the notes, and counterclaims to have the agreement, which has been filed as Fx. "Q" made between the plaintiff Frank E. Horning, and one Joseph R. Wetmore, as vendors, with the defendant Winchell, whereby Horning and Wetmore agreed to sell, and Winchell to purchase, certain lands in the State of New York, for the price of $8,000 on the terms therein mentioned, rescinded and set aside, on the ground that Winchell was induced to enter into the agreement by fraudulent representations by Horning, and he also claims damages for the representations.

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Before the case came up for trial, counsel on behalf of the plaintiff Horning intimated to me that they were unable to proceed, and were unable, owing to delay in the trains, to make application for an adjournment, and counsel for Winchell intimated that he was ready to go on, and there was nothing to do but to direct the action to go on for trial. The claim was, thereupon, dismissed, and the defendant Winchell proceeded with his counterclaim against Frank E. Horning and Joseph R. Wetmore. It would appear from the reply and rejoinder of Frank E. Horning and the defence to the counterclaim filed by Frank E. Horning and Joseph R. Wetmore, that they have submitted to the jurisdiction of the Court and have asked an order of the Court that the contract be declared to be enforced.

On the evidence adduced, it would appear that Horning did make representations in reference to the farm. He represented that he, Horning, had inspected this farm under normal conditions in the summer, and that he would give his word that it was well drained, and that there was enough timber on it to pay for it. The fact is, according to Winchell's evidence, owing to the construction of some drainage works, which he said was constructed about a year before, but apparently, he does not know when it was actually constructed, the waters which would ordinarily be carried away, were emptied on to his farm in the spring, and the farm was practically unfit for cultivation. There is no evidence that these waters were so carried down before the year or spring in which Winchell took possession of the place. There is no evidence at all to shew that the representation as to timber was not true. The defendant Winchell also says that Horning produced a contract under which he purchased the land, shewing that he paid $6,000 for the farm, and that in addition to that he claimed to have paid $1,200 for improvements put on it, and told him it was good valuable land, none better in the country. The representation as to its being well drained is apparently a false representation, a representation which, when the defendant Winchell found that it was false, entitled him to rescind and to elect, as he apparently did elect, to leave the farm in question, and to recover the money which he had paid on account of the purchase price, $1,000, on March 2, 1917, but I cannot, on the evidence, it seems to me find that Horning knew the representations were false, nor can I find

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that the representation as to the quality of the land, and as to the drainage, was made with a knowledge of its falsity. Undoubtedly it was made for the purpose of inducing Winchell to buy, and he relied upon it, and there is nothing from which I can infer that Horning knew that this water was going to come down the next spring and ruin the farm and farming operations. It is suggested that they must have been made recklessly, but the document which is put in as Ex. "B," March 2, 1917, shews that Horning gave an undertaking to go on any note for stock that may be purchased on the farm by Winchell, and in certain cases he would advance money to him, and if Winchell should have bad luck and not be successful in operating the farm, he would resell for him on favourable terms. Further, that when Winchell took the matter up with him he claimed that it was an extraordinarily wet year, and that had to do with the condition. Under the circumstances, and in face of this, I cannot conclude that he knew that the representation as to drainage was false when he made it. Winchell was, therefore, entitled to elect to rescind the contract for the representation which was made. The representation has proved to be false, and he is entitled to recover his money back. He has failed to establish that the representation was made with a knowledge of the falsity and must fail with his claim for damages. There will be judgment accordingly for the defendant Winchell against the defendants Horning and Wetmore, on the counterclaim, for the sum of $1,000 with interest from March 2, 1917, and a declaration that Winchell was entitled to elect, and did elect, to cancel the said contract on the ground that it had been induced by a fraudulent representation, and the same is hereby rescinded. Winchell is entitled to costs. *Judgment accordingly.*

MULCAHY v. **E. D. and B. C. R. Co.**

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. June 12, 1920.

MASTER AND SERVANT (§ II B—156)—DANGEROUS TRACK AND ROAD BED—NEGLIGENCE IN REPAIRING—INJURY TO EMPLOYEE—"VOLENTI NON FIT INJURIA"—APPLICATION OF PRINCIPLE.

The principle "*volenti non fit injuria*" cannot be by implication extended to cover a consent to encounter unnatural dangers caused by neglect to supply necessary material for their removal.

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MULCAHY v. E. D. AND B.C.R. CO.

Harvey, C.J.

Stuart, J.

APPEAL from the judgment of Hyndman, J., in an action for damages for personal injuries received in the course of plaintiff's employment as roadmaster on defendant's line of railway.

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

H. H. Parlee, K.C., for defendant.

HARVEY, C.J., concurred with Ives, J.

STUART, J.:—With considerable hesitation I concur in the judgment agreed upon by the other members of the Court. We are confronted with a peculiar case in which to discuss the applicability of the doctrine *volenti non fit injuria*, because the actual work and duty of the plaintiff was to put into repair the very thing whose dangerous condition is alleged to have caused the accident. While, therefore, I do not dissent from the judgment proposed I cannot but feel that the facts involve a re-statement or modification of the rule as heretofore laid down in decided cases.

Beck, J.

BECK, J., concurred with Ives, J.

Ives, J.

IVES, J.:—The accident occurred within a mile east of Spirit River on September 28, 1917. The plaintiff had been employed continually by defendant company during 3 or 4 years. In July, 1917, he was employed as section foreman at Bon Accord and on the 26th of that month received from the defendant's general manager, Mr. W. R. Smith, a letter as follows:—

> For your confidential information, I beg to advise that I will probably require your services at another point on different work about Aug. 1, but I imagine the superintendent will instruct you to call on me before that date.

Considering the fact of the plaintiff's then employment I think the language of this communication wholly inconsistent with an offer of promotion to be taken into consideration by the servant before deciding upon acceptance or refusal. It was simply a notice to him that he was to expect orders to work somewhere else on different work.

In the following month (August) he was made acting roadmaster and shortly after roadmaster, over some 350 miles of defendant's railway with which he was not acquainted before his appointment. If this track, over which he had jurisdiction and over which the nature of his employment necessitated his constant travel, *was dangerous*, then he was *put* in a position of danger by the employer rather than that he accepted an employment under conditions known to him to be dangerous. On September 28 it became

necessary for the plaintiff, in the course of his employment, to proceed from Spirit River to McLennan. As a means of transportation, a hand car was used upon which had been erected a seat with a high back constructed of wood and iron, and with a gasoline six horsepower engine installed for motive power. This machine throughout the case is called a "speeder" but I apprehend it is misnamed and is but a converted hand car. Whether it differs materially in construction and safety from a speeder, the evidence does not disclose. Accompanying the plaintiff was one Carboni, sitting with the plaintiff on the seat in front, and Frank Donis, sitting behind the plaintiff and driving the car. The track east of Spirit River was in bad condition, being a skeleton track, in many places sunken in mud, the rails surface bent and kinked, or, perhaps I might make the condition clearer by saying the rails were bent both vertically and horizontally. From the evidence it would appear that, apart from ballast in some sections, this was the condition of the track more or less throughout the entire 95 miles from Spirit River to McLennan, but it is to be noted that, if the necessity of new rails is an indication of the state of the track, the requisition for rails made by the plaintiff in his letter of August 25, 1917, to Supt. Murray, allots 117 new rails to the section between Spirit River and Belloy, a distance of 22 miles, as against 153 new rails to the section between Belloy and McLennan, a distance of 73 miles. Within a mile after leavng Spirit River, and while travelling at from eight to 12 or 15 miles per hour, the hand-car left the rails, and went over the dump turning at least partially over. The plaintiff was struck in the back by the seat he says, and has been permanently injured. He gives the cause of the derailment as a bent rail. The only evidence against this reason is by some of the witnesses to the effect that speeders will leave the track at times without explainable cause. No attempt is made here by the defendant to shew that anything other than the bad condition of the track caused the derailment. The trial Judge makes no finding as to the cause of it, but I think the conclusion on the evidence irresistible that the derailment was due to the bad condition of the track and to nothing else.

The trial Judge dismissed the action on the one ground that the principle *volenti non fit injuria* applies, and from a perusal of his judgment it would seem that he has been chiefly influenced by

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the circumstance that the plaintiff entered into, or, at least, continued in his employment with knowledge of the risk attendant. This circumstance is important, but not conclusive against the plaintiff.

In the language of Lord Watson in *Smith* v. *Baker & Sons*, [1891] A.C. 325 at 355:—

> When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, *with such knowledge and appreciation*, will in every case necessarily imply his acceptance. Whether it will have that affect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case.

In the present case, there is nothing surrounding plaintiff's entry upon his employment from which it can be inferred that he accepted any risk other than ordinarily attaches to the position he was appointed to on an operating railway.

In 1917, the defendant's line of railway had been in operation some 2 years doing the usual public business of freight and passenger traffic. The plaintiff was not acquainted with it or with the unusual dangers attendant upon its disrepair, nor is there any evidence that the unusual risk was called to his attention at or before the time of his appointment. He cannot be held to have accepted a risk of which he was ignorant. But, it is clear that those aggravated conditions which gave rise to the unusual danger in a roadmaster's employment were within the knowledge of the defendant's general manager and should have been appreciated by him. This ignorance on the part of the plaintiff and knowledge on the part of the defendant at the commencement of the employment as roadmaster is clearly a personal negligence of the defendant in that the plaintiff was put in a position of unusual hazard. Nor will the plaintiff be deemed to have accepted and assumed the risk after having acquired knowledge of it by continuing in his employment. He had every reason to expect that the conditions would improve. He knew that he was appointed for that purpose. His duty was to report the necessities; the defendant's duty was to supply material as he required. He asks on August 24 by letter to the superintendent, for rails, and points out what sections of

the line he requires them for. Fifty-eight of these rails asked for are for the very part of the line where he was injured by derailment. In this letter he points out that these rails are for the worst places and tells the superintendent that the condition of the bent rails in the track is very bad and liable to cause derailment. No rails were sent him, so on September 6 he writes the superintendent again and says he has requisitioned the new rails, pointing out that the bent rails must be removed from the track. No rails are sent to him. Again on September 11 he writes the superintendent for these rails but they were not sent. And in the evidence of General Manager Smith we find that the defendant had rails. No reason is advanced by Mr. Smith as to why they were not supplied. Surely this is a case to which the words of Lord Bramwell in *Smith* v. *Baker & Sons*, [1891] A.C. at 345, exactly apply, viz: "A man may be *volens* to encounter the natural dangers of a business but not those superadded by negligence." And so here, if it is to be implied that the plaintiff consented to encounter the dangers that became known to him after his appointment, surely we are not warranted in extending the implication to cover a consent to encounter dangers aggravated by defendant's neglect to supply the necessary material asked for to remove the unnatural dangers.

Certainly the plaintiff reasonably expected the defendant company to do their part. See *Holmes* v. *Clarke* (1862), 31 L.J. (Ex.) 356.

As to the effect of continuance in employment after knowledge of the risk, see *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338.

From the whole evidence, I cannot infer that the circumstances are such as necessarily to lead to the conclusion that this plaintiff voluntarily incurred the risk, superadded to by defendant's neglect. Upon the facts to be inferred from the evidence here, I think it peculiarly a case for the application of the language used by their Lordships in *Smith* v. *Baker*, which I have already cited. In that case the field of law anent the maxim *volenti non fit injuria* has been well covered but it may also be interesting to refer to the following cases: *Holmes* v. *Clarke*, cited; *Holmes* v. *Worthington* (1861), 2 F. & F. 533; *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685 at

ALTA.

S. C.

MULCAHY v. E. D. AND B.C.R. Co.

Ives, J.

690, *per* Lord Esher, M.R.; *Williams* v. *Birmingham Battery and Metal Co.*, supra; 20 Hals. par. 236, page 121; Labatt's Master & Servant, 2nd ed., vol. 4, ch. 55, and 22 L.R.A., page 472 *et seq.*, and the recent case of *Monaghan* v. *Rhodes & Son*, [1920] 1 K.B. 487. I would allow the appeal with costs and give judgment for the plaintiff for the sum of $8,500 and costs, subject to defendant's right within 30 days to appeal from the amount assessed.

Appeal allowed.

MAN.

C. A.

Re FENTON ESTATE.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. May 11, 1920.

WILLS (§ III D—100)—STATUTE OF MORTMAIN—NOT IN FORCE IN MANITOBA. What is generally known as the Statute of Mortmain, 9 Geo. II., ch. 36 (Imp.), is not in force in the Province of Manitoba. [Review of authorities.]

Statement.

APPEAL by the Attorney-General of Manitoba from judgment of Galt, J. (1920), 51 D.L.R. 694. Reversed.

John Allen, Dep. Attorney-General, for the Province.

James Auld, for trustee.

H. A. Bergman, for next of kin, etc.

Perdue, C.J.M.

PERDUE, C.J.M.:—The point involved in this case is simply whether the so-called Mortmain Act, 9 Geo. II., ch. 36 (Imp.), is or is not in force in Manitoba. This Act has long been held to be in force in the Province of Ontario: *Doe d. Anderson* v. *Todd* (1845), 2 U.C.Q.B. 82; *Whitby Corporation* v. *Liscombe* (1876), 23 Gr. 1; *Macdonell* v. *Purcell* (1893), 23 Can. S.C.R. 101. In the first mentioned case Robinson, C.J., at page 84, in giving judgment, clearly indicated that he would have followed the reasoning of Sir William Grant in *Attorney-General* v. *Stewart* (1817), 2 Mer. 143, 35 E.R. 895, and have held that the statute had not been introduced into Upper Canada by the Act of the Legislature of that Province, 32 Geo. III., 1791, ch. 1, had it not been that the Legislature had assumed in certain Acts that 9 Geo. II., 1736 (Imp.), ch. 36, was in force in the Province. This case was decided in 1845. In 1875 the same point came up for consideration for the first time in a Court of appeal in the case of *Whitby Corp.* v. *Liscombe*, 23 Gr. 1. In the meantime several decisions had been rendered in the superior Courts following *Doe d. Anderson* v. *Todd*, 2 U.C.Q.B. 82.

In *Whitby Corp.* v. *Liscombe, supra*, it was held that 9 Geo. II., ch. 36, was in force in Ontario. The grounds upon which it was so held were (1) that the decision in *Doe d. Anderson* v. *Todd* had been acquiesced in too long, and had for too long a period governed titles to land in Ontario, to be interfered with by any authority short of legislative enactment; (2) that there had been ample recognition through Acts of the Legislature that the statute in question had been introduced into and was in force in the Province. Expressions occur in some of the judgments which indicate that had the question come before the Court as *res integra* the decision would not, at all events, have been unanimous. I would refer to the remarks of Patterson, J., 23 Gr. 1, at pages 27-28, and of Moss, J., at page 36. The latter said:—

> If the only question was, whether *Doe d. Anderson* v. *Todd* was well decided, I should hesitate long before holding in the affirmative . . . Robinson, C.J., was of opinion that but for subsequent legislative exposition the true interpretation of the statute of Geo. III. excluded the Mortmain Act, while the other members of the Court seem to have entertained a different view. The reasoning of the Chief Justice appears to me to be unanswerable—at least if the decision of Sir William Grant in *Attorney-General* v. *Stewart, supra*, is correct, and apart from its intrinsic force it would be hopeless to impugn this after its approval by the House of Lords in *Whicker* v. *Hume* (1858), 7 H.L. Cas. 124 at 150, 11 E.R. 50.

In *Macdonell* v. *Purcell*, 23 Can. S.C.R. 101, two of the Judges refer to *Doe d. Anderson* v. *Todd* and *Whitby Corp.* v. *Liscombe* as declaring the state of the law in Ontario in regard to the statute 9 Geo. II., ch. 36, being in force in that Province. It was not a decision of the Supreme Court upon that point.

In *Law* v. *Acton* (1902), 14 Man. L.R. 246, Richards, J., following the above Ontario cases, held that 9 Geo. II., ch. 36, was in force in Manitoba, except as it may be affected by provincial statutes.

According to the decision of *Sinclair* v. *Mulligan* (1886), 3 Man. L.R. 481; aff'd (1888), 5 Man. L.R. 17, the laws in force in Manitoba at the time that Province entered Confederation were the laws of England of the date of the Hudson's Bay Company's charter, namely, May 2, 1670. In 1874, 38 Vict. ch. 12 (Man.), sec. 1, the Legislature of the Province declared that the Court of Queen's Bench, then formed,

> shall decide and determine all matters of controversy relative to property and civil rights (both legal and equitable), according to the laws existing, or

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established and being in England, as such were, existed and stood on July 15, 1870, *so far as the same can be made applicable* to matters relating to property and civil rights in this Province.

This section has been repeated in the several consolidations and revisions of the statutes down to the present time.

It is plain that all the laws of England were not introduced, but only those that "can be made applicable" to the subjects mentioned in the enactment. In *Jex* v. *McKinney* (1889), 14 App. Cas. 77, at page 80, a decision of the Privy Council holding that 9 Geo. II., 1736, ch. 36, had not been introduced into British Honduras, the expressions used in the Act of the Assembly of the Colony, 1856, introducing the law of England, were (sec. 5) "so much of the common law of England as has been used in or is applicable to this settlement and to the inhabitants thereof"; also introducing the statutes there described (sec. 7) "in so far as they are applicable or can be applied to this settlement and the inhabitants thereof." Lord Hobhouse in delivering the judgment of the Judicial Committee pointed out that the condition of applicability to the Colony runs through the whole of the enactments introducing the laws of England. He then went on to say at page 81:—

> It has been argued at the bar that the laws described are to prevail if they are applicable or can be applied, and that the latter words give a wider sense to the word "applicable." Their Lordships read the words "can be" as meaning "can reasonably be" agreeing herein with Knight Bruce, L.J., who in *Whicker* v. *Hume* (1852), 1 DeG. M. & G. 506, 42 E.R. 649, 14 Beav. 509, 51 E.R. 381, placed that construction upon similar words in a New South Wales Act. The change of expression would rather seem to point to such cases as are provided for by the Ordinance of 1879, where some amount of moulding in formal or insignificant details is required before an English statute, suitable in its nature to the needs of the Colony, can be actually applied to them.

Lord Hobhouse then considers the question whether the statute of Geo. II. is suitable to a young English colony in a new country—the very condition of Manitoba in 1874. He refers (at page 82) to the principle on which such questions should turn as laid down by Blackstone in the Commentaries, vol. 1, page 108. He points out that in the two decisions above referred to, *Att'y-Gen'l* v. *Stewart*, and *Whicker* v. *Hume*, all of the eminent Judges who took part in one or other of these cases decided that the statute was framed for reasons affecting the land and society of England, and not for reasons applying to a new colony.

The statute has been held not to apply to British Columbia, *In re Pearse Estate* (1903), 10 B.C.R. 280; or to Saskatchewan, *Re Miller Estate* (1918), 11 S.L.R. 76; or New Brunswick, *Ray* v. *Annual Conference* (1881), 6 Can. S.C.R. 308.

In the period between the entry of Manitoba into Confederation and the year 1884 a number of Acts of the Legislature were passed incorporating religious, educational and charitable bodies and enabling some of them to hold land for charitable and other purposes, and others to hold land bequeathed to them. There has been no legislation of the Province which has directly introduced the statute 9 Geo. II. Down to 1884 there were many Acts passed which were inconsistent with the existence of that statute as part of the law of the Province. It is stated that the first mention of a statute or statutes of Mortmain in a Manitoba statute is found in the Methodist Church Act 1884, 47 Vict. ch. 65. After that year, there occur expressions in certain Acts of incorporation such as: "without license in Mortmain," 1886, 49 Vict. ch. 56, sec. 3; "without being subject to any law of Mortmain," 1895, 58-59 Vict. ch. 50, sec. 2, and similar words. The above expressions were, I think, in each case introduced by the draftsman into the Act *ex abundanti cautelâ*, or perhaps the expression was copied from an Ontario statute. The Legislature, when passing these Acts, with the exceptions as framed, had no intention of declaring that the statutes of Mortmain were in force in this Province. To put such a construction upon these Acts would be to introduce "by a side wind" legislation which was not in the contemplation of the Legislature to enact. See *Forbes* v. *Ecclesiastical Commissioners* (1872), L.R. 15 Eq. 51, 53; also, *Western Counties R. Co.* v. *Windsor etc. R. Co.* (1882), 7 App. Cas. 178, 189.

Applying to the Act of 1874, 38 Vict. ch. 12, the proper rule of construction as laid down in *Jex* v. *McKinney*, it did not introduce the statute 9 Geo. II., ch. 36, into Manitoba. The proper construction was placed on the statute for a number of years, and no exception was made, in Acts creating charitable corporations, of enactments respecting Mortmain, because no protection against mortmain was necessary. It would be strange indeed if the taking of needless precautions against the operation of a law which was not in force should have the effect of bringing that very law into

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force. This would be most unfair to corporations created prior to 1884, whose incorporators, taking a proper view of the law, asked for no protection against the operation of statutes of mortmain.

Galt, J., 51 D.L.R. 694, followed *Law* v. *Acton*, 14 Man. L.R. 246, as being a decision of a Judge of co-ordinate jurisdiction, not, as I read his judgment, because he approved of the *ratio decidendi* in that case.

I think the appeal should be allowed, and the matter referred back to the Court of King's Bench to settle a scheme for the execution of the trust. See *In re Pyne; Lilley* v. *Att'y-Gen'l*, [1903] 1 Ch. 83. The costs of all parties should come out of the estate.

Cameron, J.A.

CAMERON, J.A.:—The so-called Statute of Mortmain, 9 Geo. II., ch. 36, entitled "An Act to restrain the disposition of lands, whereby the same become inalienable" was the first Act passed in England by which gifts of land to charitable purposes made by will were avoided. By it, however, gifts to such purposes were permitted if carried out in a certain way, that is by a gift or conveyance by deed executed in the presence of two or more witnesses 12 months before the date of the death of the donor and enrolled in the Court of Chancery within 6 months after its execution. The objects influencing Parliament in passing the Act are set forth in the preamble to the Act, but were not necessarily fully disclosed.

The question before us is whether this Act is in force in this Province by virtue of sec. 1, 38 Vict., ch. 12, now sec. 11 of our King's Bench Act, R.S.M. 1913, ch. 46, under which the Courts in Manitoba are to decide all matters of controversy relative to property and civil rights according to the laws of England as they were on July 15, 1870, "so far as the same can be made applicable to matters relating to property and civil rights in this Province."

The statute, 9 Geo. II., ch. 36, did not extend to the British Colonies; in its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for the purposes of local policy, complicated with local establishments, and incapable without great incongruity in the effect, of being transferred as it stands, into the Code of any other country.

Jarman on Wills, 6th ed., vol. 1, pages 271-2, citing Sir William Grant in *Att'y-Gen'l* v. *Stewart*, 2 Mer. 143, 35 E.R. 895; *Att'y-Gen'l* v. *Giles* (1835), 5 L.J. (Ch.) 44; *Whicker* v. *Hume*, 7 H.L. Cas. 124, 11 E.R. 50; *Mayor of Lyons* v. *East India Co.* (1836), 1 Moo. P.C.C. 175, 12 E.R. 782; *Jex* v. *McKinney*, 14 App. Cas. 77.

There is nothing in the Act of 1736 (or 1888) to prevent a person domiciled in Victoria from leaving money for the purchase of land in England for a charitable object. *Mayor of Canterbury* v. *Wyburn*, [1895] A.C. 89 at 96, where Lord Hobhouse approves and applies Sir W. Grant's reasons in *Att'y-Gen'l* v. *Stewart*, *supra*, holding that:

It cannot have been intended that methods of a local character prescribed for making a lawful gift should be adopted in a distant colony, or, if not, that the gift should be invalid.

In the *Mayor of Lyons* v. *East India Co.*, *supra*, Lord Brougham, referring to the distinction between foreign settlements acquired by conquest and those made by colonizing, says that in a case of the former the law of the country subsists until changed, and in the latter the subjects of the Crown carry with them the laws of England, subject to the limitation expressed by Blackstone, J., (1 Moo. P.C.C. 273):—

that only so much of the English law is carried into them by the settlers as is applicable to their situation and to the condition of an infant colony . . . And Sir William Grant, in *Att'y-Gen'l* v. *Stewart* (2 Mer. at 161), applies the same exception even to the case of conquered or ceded countries, into which the English law of property has been generally introduced. Upon this ground, he held that the Statute of Mortmain did not extend to the Colonies governed by the English law, unless it has been expressly introduced there, because it had its origin in a policy peculiarly adapted to the circumstances of the mother country.

In *Jex* v. *McKinney*, 14 App. Cas. at 82, Lord Hobhouse says that the principle laid down in Blackstone has been applied in two cases and that every Judge who has addressed his mind to the question has come to the same conclusion, namely, "that the statute was framed for reasons affecting the land and society of England and not for reasons applying to a new colony."

In addition to these cases I refer to *Doe d. Hazen* v. *Rector of St. James* (1879), 18 N.B.R. 479; *In re Pearse Estate*, 10 B.C.R. 280, and *Re August Brabant* (1903), 10 B.C.R. 282; Clement's Canadian Constitution, 3rd ed., 1916, page 274, *et seq.*

Where the law of England has been introduced in colonies by legislation, there is a difference in the wording of the various enactments, but there is little or no difference in substance. There can be no real difference in meaning between the enactment under discussion in *Jex* v. *McKinney*, *supra*, and the words in our King's Bench Act, R.S.M. 1913, ch. 46. The evident intention of the legislating bodies was the same in both cases.

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The difficulties in the case are occasioned by the decisions of the Courts of Upper Canada and Ontario commencing with the well-known decision in *Doe d. Anderson* v. *Todd*, 2 U.C.Q.B. 82, the effect of which was that the statute, 9 Geo. II., ch. 36, was in force in Upper Canada by virtue of its implied recognition by the Legislature: the view of the majority of the Court being that it was not introduced by the sole force of 32 Geo. III., ch. 1. See Clement's Canadian Constitution, 3rd ed., 1916, pages 287 *et seq.* That doubts were entertained as to the correctness of this decision appears from the judgments in *Whitby Corp.* v. *Liscombe*, 23 Gr. 1, where it was followed mainly on the ground that it had established a rule of law, recognized for so long a period, that it was inadvisable in the public interest to interfere with it. But we are not bound by the Ontario decisions which are at variance with those cited, some of which are of the highest authority and binding upon us.

The judgment of Richards, J., in *Law* v. *Acton*, 14 Man. L.R. 246, was dwelt on as a binding authority or as having, at any rate, created an established rule of law from which we must not now depart. That case was decided in 1902, but there is no reference whatever in the judgment or in the argument to *Jex* v. *McKinney*, *supra*, decided in 1889, or to *Att'y Gen'l* v. *Stewart*, *supra*, or *Whicker* v. *Hume*, *supra*. In *Macdonell* v. *Purcell*, 23 Can. S.C.R. 101, referred to by Richards, J., two of the Supreme Court Judges considered that an opinion given by counsel, which was a factor in the litigation, on the subject of the law of mortmain in Ontario, was sound under the law of that Province as it then stood. But the subject itself was not in issue in the case before the Supreme Court. In my opinion, in view of the overwhelming weight of reason and authority, we cannot avoid overruling the decision in *Law* v. *Acton*. As pointed out by Galt, J., the present Lord Chancellor in the recent case of *Bourne* v. *Keane*, [1919] A.C. 815, declared that it is not the function of the Courts to make error perpetual (51 D.L.R. at 697).

I confess I can attach no particular significance to the provisions found in various private Acts of the Legislative Assembly of this Province, purporting to modify the application of the Statute of Mortmain in the case of corporations incorporated by it of a charitable, educational, or ecclesiastical character. In the first instances such clauses were no doubt inserted *ex abundanti*

cautelâ, for as remarked by Lord Cranworth in *Whicker* v. *Hume*, 7 H.L. Cas. 124 at 161, 11 E.R. 50: "Nothing is more difficult than to know which of our laws is to be regarded as imported into our colonies," and the earlier enactments were subsequently followed largely as a matter of course by successive draftsmen. It is, to my mind, impossible to agree that they have the effect of introducing the statute, for, as pointed out by Sir William Grant in *Att'y-Gen'l* v. *Stewart*, *supra*, and by Lord Chelmsford, L.C., in *Whicker* v. *Hume*, 7 H.L. Cas. at 151, that could only be done by clear and positive enactment. Nor can I accede to the contention that the re-enactment of sec. 11 in the King's Bench Act, R.S.M., 1913, ch. 46, had the effect of crystallizing into law an erroneous decision of a single Judge.

HAGGART, J.A.:—I have carefully perused the reasons of my brothers Cameron and Fullerton and I have come to the same conclusion, namely, that the Imperial Statute, 9 Geo. II., ch. 36, is not in force in Manitoba. Haggart, J.A.

On the argument a great deal of stress was laid upon the fact that several private Acts of the Legislature in the incorporation of churches and other educational and charitable organizations, provision was made for accepting devises or bequests. This, it was contended, had the effect of introducing the Statute of Mortmain.

I agree with the disposition my brother Judges have made of that question.

My brother Judges have very fully covered the ground and to repeat the reasons given by them would serve no good purpose.

I would here refer to the decisions in *Doe d. Anderson* v. *Todd*, 2 U.C.Q.B. 82; *Whitby Corp.* v. *Liscombe*, 23 Gr. 1; *Law* v. *Acton*, 14 Man. L.R. 246; *Att'y-Gen'l* v. *Stewart*, 2 Mer. 143, 35 E.R. 895; *Whicker* v. *Hume*, 7 H.L. Cas. 124, 11 E.R. 50, and the other cases that have been specifically referred to by Cameron and Fullerton, JJ.

What is generally known as the Statute of Mortmain, 9 Geo. II., ch. 36, is not in force in the Province of Manitoba.

FULLERTON, J.A.:—The important question raised in this appeal is whether or not the Imperial Statute, 9 Geo. II., ch. 36, commonly called the Mortmain Act, is in force in Manitoba. Fullerton, J.A.

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Fullerton, J.A.

No specific legislation has ever been enacted introducing the Mortmain Act into Manitoba.

Sec. 1 of 38 Vict. 1874 (Man.), ch. 12, provides that:—

The Court of Queen's Bench in Manitoba shall decide and determine all matters of controversy relative to property and civil rights according to the laws existing, or established and being in England, as such were, existed and stood, on July 15, 1870, *so far as the same can be made applicable to matters relating to property and civil rights in the Province* . . .

In *Att'y-Gen'l* v. *Stewart* (1817), 2 Mer. 143, 35 E.R. 895, the question was whether the Mortmain Act was in force in the Island of Grenada. By the Treaty of Paris made in 1763, Grenada was ceded to Great Britain.

The King's Proclamation, dated October 9, 1763, establishes a separate Legislature and provides that:—

in the meantime, and until such assemblies could be called, all persons inhabiting it, or resorting to, the said colonies, were to confide in the royal protection for the enjoyment of the benefit of the laws of England, for which purpose, power was given under the great seal, to the Governor of the said colonies, with the advice of the council, to erect Courts of Judicature within the colonies for hearing and determining all causes, as well criminal as civil, according to law and equity, and as near as might be agreeable to the law of England, with liberty of appeal to the King in Council.

Legislative assemblies were from time to time convened and several Acts passed but no Act was passed in any way relating to the Mortmain Act.

Sir Wm. Grant, M.R. (2 Mer. 143, 35 E.R. 895), held that the Mortmain Act was not in force. After pointing out that the mischief to be prevented by the statute was a mischief existing in England, that the causes which necessitated such an Act never existed in the colonies, that if a Legislature of a colony were disposed to adopt a similar law it would not adopt this Act as it stands with the two English universities and the three great English schools or colleges exempted from its operation, that the provisions of the statute, requiring alienations authorized by the Act to be enrolled in His Majesty's High Court of Chancery, could not be complied with, Sir Wm. Grant goes on to say, 2 Mer. 143, at page 163:—

If the Legislature of the island think any measure of the same kind necessary, they may so shape and modify it, as to adapt it to their own circumstances and situation. But, framed as the Mortmain Act is, I think it quite inapplicable to Grenada, *or to any other colony*. In its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly *English*, calculated for purposes of local policy, complicated with local establishments, and incapable without great incongruity in the effect, of being transferred as it stands into the code of any other country.

In 1851 the same question was raised in regard to the laws of New South Wales in the case of *Whicker* v. *Hume*, 1 DeG. M. & G. 506, 42 E.R. 649, 14 Beav. 509, 51 E.R. 381.

By sec. 24 of 9 Geo. IV. 1828, ch. 83 (Imp.), it is enacted:—

> that all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith, or with any Charter or Letters Patent or Order-in-Council, which may be issued in pursuance hereof), shall be applied in the administration of justice in the Courts of New South Wales . . . so far as the same can be applied within the said colonies . . . .

It will be noted that the words of the Manitoba Act (38 Vict. 1874, ch. 12, sec. 1) above quoted are " . . . so far as the same can be made applicable to matters relating to property and civil rights in the Province . . . ."

The matter first came before Sir John Romilly, M.R., who held that the question was settled by the decision in *Att'y-Gen'l* v. *Stewart*, *supra*, and that the Mortmain Act was not in force in New South Wales.

An appeal was heard by Lord Justices Sir James L. Knight Bruce and Lord Cranworth and dismissed. In his judgment in 1 DeG. M. & G., at page 511, 42 E.R. 649, Knight Bruce, L.J., said, referring to the Imperial Statute above quoted:—

> Taking the whole of the section together, I am of opinion, that the words "can be applied" mean "can be reasonably applied," a construction which, of necessity, introduces all those considerations that presented themselves to Sir William Grant's mind in the case of *Att'y-Gen'l* v. *Stewart*, 2 Mer. 143, 35 E.R. 895, a case specifically differing from the present but which it is impossible to read without seeing that the opinion expressed by Sir William Grant applies to a case like this.

An appeal was then taken to the House of Lords where the decree was upheld. See 7 H.L. Cas. 124, 11 E.R. 50.

It is quite clear, from the speeches of the Law Lords in this case that they regarded the case of *Att'y-Gen'l* v. *Stewart*, *supra*, as conclusive on the point.

In 1889, in the case of *Jex* v. *McKinney*, 14 App. Cas. 77, the Privy Council held that on the true construction of the local Acts and ordinances of British Honduras the Mortmain Act had not been introduced into British Honduras and approved the decisions in *Att'y-Gen'l* v. *Stewart*, *supra*, and *Whicker* v. *Hume*, *supra*.

The local statute mainly relied on in this case was passed on March 8, 1856. Sec. 5 provided:—

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That so much of the common law of England as has been used in or is applicable to this Settlement, and the inhabitants thereof . . . and all statutes of the Imperial Parliament in abrogation or derogation, or in any way declaratory, of the common law, shall be and continue, and are hereby declared to be, part of the laws of this Settlement.

Sec. 7 enacts:—

That all laws of universal application relating to . . . descents, inheritances, and successions; to wills and administrations . . . or generally in relation to property . . . in so far as they are applicable to this Settlement and the inhabitants thereof . . . shall be and the same are hereby declared, to be laws of this Settlement; but this is not extended to any law of any local or limited operation, or to any law relating to bankruptcy or insolvency, or to any Act relating to Customs or excise, or to any law relating to or regulating any trade, business or profession.

Lord Hobhouse, who delivered the judgment of the House, after pointing out that the Mortmain Act falls within several of the expressions used in these enactments, that it is in derogation of the common law and that it relates to successions and to wills, and to property, continues at pages 81-82:—

It has been argued at the bar that the laws described are to prevail if they are applicable or can be applied, and that the latter words give a wider sense to the word "applicable." Their Lordships read the words "can be" as meaning "can reasonably be," agreeing herein with Knight Bruce, L.J., who in *Whicker* v. *Hume*, 1 DeG. M. & G. 506 at 511, 42 E.R. 649, placed that construction upon similar words in the New South Wales Act, . . . If the Colonial enactments are to be construed in this way we are brought back to the question whether the statute of Geo. II. is suitable to a young English Colony in a new country. The principle on which such questions should turn has been laid down by Blackstone in his Commentaries, vol. 1, page 108. It has been applied to the statute of Geo. II. in two English decisions, and every Judge who has addressed his mind to the question has come to the same conclusion. In *Att'y-Gen'l* v. *Stewart*, 2 Mer. 143, 35 E.R. 895, with reference to Grenada, Sir William Grant; in *Whicker* v. *Hume*, *supra*, with reference to New South Wales, Lord Romilly at the Rolls, Knight Bruce, L.J., and Cranworth, L.J., in the Court of Appeal; Lord Chelmsford, Lord Cranworth and Lord Wensleydale in the House of Lords; all decided that the statute was framed for reasons affecting the land and society of England, and not for reasons applying to a new colony. Their Lordships think the reasoning on which those decisions are founded is sound reasoning, and is applicable to British Honduras as the Court below has applied it.

Counsel maintaining the position that the Mortmain Act is in force here rely on the Ontario decisions which hold that the Act is in force in Ontario.

The earliest decision on the point in Ontario is *Doe d. Anderson* v. *Todd*, 2 U.C.Q.B. 82. The Court there held that the Mortmain Act was in force in Ontario.

In 1876 the Court of Appeal in Ontario in *Whitby Corp.* v. *Liscombe*, 23 Gr. 1, followed *Doe d. Anderson* v. *Todd*.

Robinson, C.J., one of the Judges who decided *Doe d. Anderson* v. *Todd*, 2 U.C.Q.B. 82, was of the opinion that the Ontario statute 32 Geo. III., 1791, ch. 1, standing alone, had not the effect of introducing the Mortmain Act but that the Legislature of Ontario by its recognition of the Mortmain Act in subsequent legislation had clearly evidenced their intention of introducing it by 32 Geo. III., ch. 1.

At page 89 (2 U.C.Q.B.), Robinson, C.J., says:—

If the Legislature had left the subject of "Mortmain" untouched, making no reference to it in any of their Acts, then I think for the reasons given by Sir William Grant, in *Att'y-Gen'l* v. *Stewart, supra*, we should have held that the Statutes of Mortmain were not introduced by the Provincial statute, 32 Geo. III., ch. 1; but to treat them as inapplicable to this Province, and on that ground to keep them wholly out of view, after what the Legislature has done in contemplation of their being in force, would lead to greater inconveniences and inconsistencies than those which Sir William Grant has pointed out as arguments against their being held generally applicable to the colonies.

As an illustration of legislative recognition, he refers to the Church Temporalities Act, 3-4 Vict. 1840, ch. 78, which, he says, at page 88, provides:—

that lands may be conveyed to such uses, for the benefit of the United Church of England and Ireland in this Province, as would clearly have been prohibited by the British statute, 9 Geo. II., ch. 36, and they have shewn it to be their understanding that without such express legislative authority the English statutes of Mortmain would have restrained parties from making such a disposition, for they have added the words "the Acts of Parliament commonly called the Statutes of Mortmain, or other Acts, laws, or usages to the contrary notwithstanding."

In the Court of Appeal, in *Whitby Corp.* v. *Liscombe, supra*, the judgments are based very largely on the view that as the decision in *Doe d. Anderson* v. *Todd, supra*, had stood so long and so many titles were dependent on it, it should not be interfered with by any authority short of legislative enactment.

Referring to *Doe d. Anderson* v. *Todd*, I must confess I have difficulty in understanding how recognition by legislation, short of actual enactment, can have the effect of bringing into force legislation so recognized.

Whether or not the Ontario Act introduced the Mortmain Act must surely depend upon the terms of that statute and the conditions existing in Ontario when it was passed. When the statute

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was passed the Mortmain Act was or was not brought into force. I cannot believe that a casual reference in subsequent legislation, or even a reference which recognizes the Mortmain Act as being in force, can have the effect of bringing it into force.

In *North West Electric Co.* v. *Walsh* (1898), 29 Can. S.C.R. 33, Sedgewick, J., at pages 48-49, said: "But in addition to this it may be observed that any enactments of the Legislature as to what the law is, is not of itself equivalent to the making of the law." He then quotes, at page 49, from the judgment of the Privy Council in *Mollwo, Marsh & Co.* v. *The Court of Wards* (1872), L.R. 4 P.C. 419, at page 437:—

> The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shewn to be different from that which the Legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence.
>
> A misapprehension of the law by the Legislature would not have the effect of making that the law which the Legislature had erroneously assumed it to be. *The Earl of Shrewsbury* v. *Scott* (1859), 29 L.J. (C.P.) 34.

In view of the decisions in England which I have already referred to in reference to the introduction of the Mortmain Act into Grenada, New South Wales and British, Honduras, it is impossible to hold that the Mortmain Act was introduced into Manitoba by 38 Vict. 1874, ch. 12, sec. 1.

If the Mortmain Act is in force here it can only be by reason of its recognition in subsequent Acts of the Legislature which in my view, as indicated above, is not sufficient.

Numerous statutes have been passed by the Legislature in this Province authorizing corporations to hold lands, but the first reference to the Mortmain Act is to be found in ch. 65, 47 Vict., 1884 (Man.), entitled "An Act respecting the Union of certain Methodist Churches therein named." Sec. 6 provides:—

> The power conferred upon the said corporation by the Parliament of Canada to take, hold and receive any real or personal estate by virtue of any devise contained in any Last Will and Testament of any person whatsoever, shall not be limited by any statute or statutes of Mortmain or by the provisions of any statutes in this Province.

The next reference to the Mortmain Act is contained in a statute entitled "An Act to incorporate the Masonic Temple Association of Winnipeg," ch. 50, Acts 1895. Sec. 2 provides that the corporation "shall have power . . . to . . . receive by gift, or devise (without being subject to any law of Mortmain) . . . any real and personal estate, ..."

The last reference is to be found in ch. 140, 4 Geo. V. 1913-14 (Man.), entitled "An Act to incorporate the Confederation of Polish Catholic Societies in Canada." Sec. 4 enacts as follows: "Notwithstanding the statutes of Mortmain or any statutes of this Province, the said corporation may . . . receive . . . property . . . devised or bequeathed to it . . . ."

I cannot hold that these casual references to the Mortmain Act have the effect of introducing it into the laws of the Province. My view is that the references in the several statutes above quoted were inserted merely *ex abundanti cautelâ*.

Finally it is said that we should follow the decision of Richards, J., in *Law* v. *Acton*, 14 Man. L.R. 246, holding that the Mortmain Act is in force in Manitoba. It is urged that even if the decision of Richards, J., is wrong,

> still the inconvenience caused by the unsettling the law, and disturbing what was quiet, is so great that . . . even a Court of Error should be slow to reverse decisions, which, though originally wrong, have long been uniform. Blackburn, J., in *Jones* v. *The Mersey Docks and Harbor Board* (1865), 11 Jur. (N.S.) 746 at 750 (col. 2).

If in *Law* v. *Acton*, *supra*, Richards, J., had held that the Mortmain Act was not in force in Manitoba and we proposed to reverse him, the case would be entirely different and many titles might be interfered with. I fail to see how any titles can be dependent on a decision which holds that the Act is not in force.

In *Bourne* v. *Keane*, [1919] A.C. 815, the question was whether a bequest of personal property for masses for the dead was void as a gift to superstitious uses. The authorities in England, beginning with *West* v. *Shuttleworth* (1835), 2 Myl. & K. 684, 39 E.R. 1106, and continuing down to 1919 had consistently held such dispositions of property to be void. The House of Lords overruled these decisions. The language of Lord Birkenhead, L.C., is directly applicable to this case. In, [1919] A.C. at page 860, he said:—

> In my view it is undoubtedly true that ancient decisions are not to be lightly disturbed when men have accepted them and regulated their dispositions in reliance upon them. And this doctrine is especially deserving of respect in cases where title has passed from man to man in reliance upon a sustained trend of judicial opinion.
>
> But this, my Lords, is not the present case. If my view is well founded, citizens of this country have for generations mistakenly held themselves precluded from making these dispositions. I cannot conceive that it is my function as a Judge of the Supreme Appellate Court of this country to make error perpetual in a matter of this kind.

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For the reasons above set forth, I hold that the Imperial Statute, 9 Geo. II., ch. 36, is not in force in Manitoba.

DENNISTOUN, J.A.:—The main question for decision upon this appeal is whether or not the statute 9 Geo. II., ch. 36, commonly called the Mortmain Act, is in force in Manitoba.

The matter has been ably argued by counsel who agree that the statute if it be a part of the law of this Province became such by reason of sec. 1 of the Queen's Bench Act passed by the Provincial Legislature in 1874, 38 Vict., ch. 12, which enacted that (see judgment of Perdue, C.J.M., *ante* page 83.

It is, therefore, necessary to inquire whether the statute is one which is or ever was or can be made applicable to conditions existing in Manitoba.

The judgment of Sir William Grant, M.R., pronounced in the case of *Att'y-Gen'l* v. *Stewart*, 2 Mer. 143, 35 E.R. 895, decides that the Mortmain Act, 9 Geo. II., ch. 36, was not introduced into the Island of Grenada with the general body of English law. By the King's Proclamation of 1763 it was declared that until a general assembly should be summoned to make and ordain laws, statutes and ordinances, all persons were to confide in the royal protection for the enjoyment of the benefit of the laws of England, for which purpose power was given to the Governor of the Colony of Grenada with the advice of the council to erect Courts of judicature for hearing and determining all causes as well criminal as civil according to law or equity and as near as might be agreeable to the law of England.

Sir William Grant, 2 Mer. 143, 35 E.R. 895, bases his judgment on the ground that the statute was not applicable to an English colony for a number of reasons. He says, at page 160:—

> Whether the Statute of Mortmain be in force in the Island of Grenada, will, as it seems to me, depend on this consideration—whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of *English* law that property is governed. I conceive that the object of the Statute of Mortmain was wholly political—that it grew out of local circumstances, and was meant to have merely a local operation. It was passed to prevent what was deemed to be a public mischief, and not to regulate, as between ancestor and heir, the power of devising, or to prescribe, as between grantor and grantee, the forms of alienation. . . . The thing to be prevented was a mischief existing in *England*, and it was by the quality and extent of the mischief, as it there existed, that the propriety of legislative

interference upon the subject was to be determined. The statute begins by referring to the ancient laws made against alienations in mortmain. None of the causes in which those laws originated had ever had an existence in the colonies. It then recites that this public mischief had of late greatly increased. There is locality in that assertion.

He then goes on to shew that the exception of English universities and schools from the operation of the Act clearly shews that it was intended to be local in its operation, and to paraphrase his language, if this statute were in force in Manitoba the consequence would be that a testator could not, by will, give an acre of land for the support of a school in the Province, while he might give his whole estate to augment the endowments of an English college.

The Master of the Rolls (Sir Wm. Grant) then deals with alienations in mortmain *inter vivos* which are not prohibited but regulated and shews that the provisions for enrolment are of so local a character as to be quite inapplicable to Grenada or any other colony.

He concludes, at page 163:—

> If the Legislature of the Island think any measure of the same kind necessary, they may so shape and modify it as to adapt it to their own circumstances and situation. . . . In its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly *English*, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity in the effect, of being transferred as it stands into the Code of any other country.

The exclusion of Scotland from the operation of the statute in express terms is a clear indication that it was not considered to be generally applicable throughout the British Isles by the Legislature which passed it. Sir William Grant's reasoning that it was local in its character and design is to my mind convincing.

Robinson, C.J., discussing the like question in *Doe d. Anderson* v. *Todd*, 2 U.C.Q.B. 82, and referring to the judgment of Sir William Grant in *Att'y-Gen'l* v. *Stewart*, says, at page 88:—

> I think the reasoning of the Master of the Rolls as applied to the particular provisions and exceptions in that statute is obvious and irresistible, and that it should lead us to say, that the Legislature if they had given no other evidence of their intention than is to be found in the statute, 32 Geo. III., ch. 1, did not intend by that Act to introduce the statutes of Mortmain among which the 9th Geo. II. is usually though not very accurately classed.

Robinson's, C.J. opinions on all subjects connected with the introduction and development of colonial jurisprudence have

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always been recognized as of the greatest weight and authority and are read by the present generation of lawyers with the highest respect.

If he had felt free to exercise his own judgment he would undoubtedly have held that the Mortmain Acts had not been introduced into Upper Canada with the general body of English law, but he came to the conclusion that the Legislature of the Province by certain references to the statutes of Mortmain had so to speak by estoppel precluded the Courts from so holding.

In *Whitby Corp.* v. *Liscombe*, 23 Gr. 1, a strong Court composed of Draper, C.J., Burton, Patterson and Moss, JJ., followed the decision in *Doe d. Anderson* v. *Todd*, *supra*, as had been done in other cases in Ontario such as *Davidson* v. *Boomer* (1868), 15 Gr. 1; *Hambly* v. *Fuller* (1872), 22 U.C.C.P. 141; *Doe d. Bowman* v. *Cameron* (1847), 4 U.C.R. 155; *Hallock* v. *Wilson* (1857), 7 U.C.C.P. 28; and *Mercer* v. *Hewston* (1860), 9 U.C.C.P. 349; but throughout the judgments there are to be found strong expressions of approval of the reasoning of Sir William Grant in *Att'y-Gen'l* v. *Stewart*, *supra*, and several intimations that had the matter been *res integra* the Ontario Judges would have come to an opposite conclusion. They felt that the Legislature had so unequivocally intimated that the Mortmain Act was in force in Upper Canada and so long a time had elapsed since that position has been first taken by the Courts that the doctrine *stare decisis* should prevail, and the introduction of an element of uncertainty avoided by standing fast to the legal policy laid down by Robinson, C.J., in *Doe d. Anderson* v. *Todd*.

If the statutes of Mortmain were not applicable they were not introduced into Manitoba by the statute of 1874 with the general body of English law, and could not thereafter be introduced except by express enactment.

When the Legislature in 1884, 47 Vict., ch. 65, dealing with the Methodist Church, made reference to "any statute or statutes of Mortmain," and in 1895, 58-59 Vict., ch. 50, enabled the Masonic Temple Association to receive land by devise "without being subject to any law of Mortmain," and in 1914 gave powers to the Polish Catholic Societies of Canada "notwithstanding the statutes of Mortmain" such references were, in my opinion, made in deference to the apprehensive and excessive caution of the draughts-

man of what were in reality private bills and in no way indicated that in the opinion of the Legislature the English Mortmain Acts were in force in Manitoba.

Even if the contrary were the fact and the legislators believed that the Mortmain Acts were in force, how could such a mistake operate to bring into existence a law which was not introduced with the general body of English law for the reasons so ably set forth by Sir W. Grant and Robinson, C.J.? Nothing short of direct legislation could, in my opinion, bring about such a result.

Repeated references in recent Manitoba incorporating statutes to the Mortmain and Charitable Uses Act, which it is declared shall not stand in the way of devises and bequests to religious corporations, shew how absurd it is to take such references by the Legislature as having any legislative effect whatsoever. The statute referred to was not passed in England until 1908 and could under no possible circumstances have any force in Manitoba, and previous references to the Statutes of Mortmain or License in Mortmain have no greater effect.

The Mortmain Acts have been held not to be in force in New South Wales, *Whicker* v. *Hume* (1858), 7 H.L. Cas. 124, 11 E.R. 50; British Honduras, *Jex* v. *McKinney*, 14 App. Cas. 77; British Columbia, *In re Pearse Estate*, 10 B.C.R. 280; Saskatchewan, *In re Miller Estate* (1918), 11 S.L.R. 76, following the decision in *Att'y-Gen'l* v. *Stewart*, *supra*, and against these decisions we find *Doe d. Anderson* v. *Todd*, *supra*, in Ontario; and *Law* v. *Acton*, 14 Man. L.R. 246, by which the late Richards, J., decided that the Mortmain Acts were in force in Manitoba and that he should be guided by the decision in *Doe d. Anderson* v. *Todd*.

Galt, J., who tried this case, 51 D.L.R. 694, considered that he was bound to follow the judgment in *Law* v. *Acton*, but his reasoning, with which I agree, leads to the conclusion that he would approve a reversal of his judgment. This is the first occasion upon which this question has come before a Court of Appeal in this Province and for the reasons given by the Lord Chancellor in *Bourne* v. *Keane*, [1919] A.C. 815, I am of opinion that it is better to overrule *Law* v. *Acton* and to allow this appeal rather than perpetuate an error which has had the effect of depriving charitably disposed persons from carrying their intentions into effect.

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If, at any time, it is felt by the Legislature that the absence of such laws has occasioned "a public mischief" as 9 Geo. II., ch. 36, puts it, a statute can be passed to cure the evil.

I would allow the appeal of the Attorney-General and set aside the judgment of the Court of King's Bench (51 D.L.R. 694) and remit the cause to that Court for the settlement of a scheme for the administration of the trust for charitable uses created by the will of the testatrix.

Costs of all parties should be paid out of the estate as between solicitor and client. *Appeal allowed.*

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S. C.

Re ESTATE OF MARTHA C. McDONALD.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. April 23, 1920.

1. APPEAL (§ I B—21)—FROM DECISION OF PROBATE COURT—WHEN APPEAL WILL LIE.

Where an application is made to the Probate Court in a contested matter, and arguments of counsel are heard, and the Court, after taking time to consider, finally makes an order or decision which at once effects the status of the parties by establishing a course of proceeding which must be followed, differing from the ordinary course of proceeding followed in such cases—the order is such as was contemplated by sec. 113 of the Probate Act (N.B. 1915, 5 Geo. V., ch. 23), and the proceedings being properly returned an appeal will lie.

2. WILLS (§ I E—48)—PROOF IN SOLEMN FORM—PETITION—CROSS EXAMINATION OF PETITIONERS—JURISDICTION OF PROBATE JUDGE.

Upon a petition being presented by executors to the Judge of Probate for the proving of a will in solemn form, the petition having been sworn to as required by the Probate Act, the Judge of Probate has no power or jurisdiction to order the cross-examination of the petitioners on matters stated in the petition until such petitioners have been allowed to prove the will in solemn form and has no power to adjourn the Court *sine die* upon the petitioners refusing to be so examined.

Statement.

APPEAL from decision of the Judge of Probate for the County of Queens. Reversed.

M. G. Teed, K.C., for appellant.

J. R. Dunn and *R. B. Hanson*, K.C., for respondent.

The judgment of the Court was delivered by

Grimmer, J.

GRIMMER, J:—This is an appeal from the Probate Court of the County of Queens. The facts leading up to the appeal are briefly as follows:—

One Martha C. McDonald, the wife of Frederick E. McDonald, died on June 3, 1919, having first duly made and executed her last will and testament in due form of law, of date September 9, 1916, and thereby appointed Marianna H. Davis and Theodore

H. Belyea, executrix and executor thereof respectively. After his wife's death and before application was made for probate of her will, Frederick E. McDonald, her surviving husband, filed a caveat against the will and the granting of letters testamentary thereof, alleging that the will had not been duly or properly executed. Afterwards, the executors presented a petition to the Judge of Probate of Queens County for the proving of the will in solemn form. A citation was issued returnable on December 9 last. Upon the return thereof, the executrix with her proctor and two witnesses attended the Court, the caveator also attending with his proctor, and affidavits were read proving the publication, posting and service of the citation. Application was then made on behalf of the caveator for permission to cross-examine the petitioners upon the statements made by them in the petition. This was objected to on the part of the petitioners on three grounds, viz.: 1. Their evidence is not in Court. They are not witnesses. They have presented the petition through their solicitor. 2. The statute points out the way that the caveator shall produce his testimony, and it is not by such means. 3. The petition is not an affidavit nor does it fall under the rules of affidavits.

The Court was also informed that only one petitioner, Mrs. Davis, was then present, and that she declined to be cross-examined, and application was made for leave to call a witness to prove the will in solemn form. The Judge, thereupon, ruled that the petitioner would not be allowed to proceed to prove the will until an opportunity was first given for her cross-examination, and upon the petitioner, Mrs. Davis, acting under advice, declining to be examined, the Court was adjourned until January 5, 1920. Pursuant to adjournment, the Court met on the day appointed, the same parties being present as upon the first occasion. The proctor for the caveator renewed his application to have Mrs. Davis sworn and examined, which was resisted on her behalf upon the ground that the caveator had no right to call any witnesses until after a *primâ facie* case had been made out in support of the will, and the petitioner again asked that she be allowed to prove the will in solemn form and to call witnesses to establish the validity thereof. The Court ruled that the petitioner should be cross-examined and declined to allow her to proceed to prove the will in solemn form until she was so cross-examined, and upon her refusal to be examined the Court adjourned *sine die*.

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Against this order or ruling the appeal is taken to the Court upon the following grounds: 1. There is no provision in the Probate Act or practice or otherwise authorizing the petitioners, executors as aforesaid, to be cross-examined on matters stated in the petition, and the Judge of Probate had no power or jurisdiction to order said examination or cross-examination at that stage. 2. The provisions of the Probate Courts Act, 5 Geo. V. 1915 (N.B.), ch. 23, sec. 48, direct that upon the return of the citation the Judge shall first hear sufficient evidence to establish *primâ facie* the validity of the will, and the said Judge refused to do so. 3. The matters stated in the petition can have no bearing upon the question of the proper execution of the will or the *primâ facie* testamentary capacity of the testator. 4. The caveator may be entitled to call the petitioners as his witnesses for examination or cross-examination under said sec. 48, but only after such *primâ facie* validity has first been established.

Counsel for the respondent, the caveator, as a preliminary objection, states that "no appeal lies in this case as there is no order or decree of the Probate Court to be appealed from." It therefore becomes necessary to examine the proceedings before the Probate Court under the return made and filed, as well as the statute for the purpose of a decision upon this objection before considering other and further objections urged against the appeal, for it is clear and patent that if the preliminary objection prevails then it is an end of the appeal. Sec. 113 of the Probate Courts Act, 5 Geo. V. 1915, ch. 23, provides that: "Any person aggrieved by any order or decree of the Judge may appeal therefrom to the Supreme Court," and the mode of conducting the appeal is duly provided for, the terms of which so far as this appeal is concerned having been duly carried out. This clearly provides for an appeal, other requisites being complied with.

Was there, then, any order of the Court in this case from which an appeal would lie? It was contended on the part of the respondent that there was no order of the Probate Court before this Court from which an appeal would lie. There is, however, a stenographic copy of the proceedings of the Probate Court, signed by the Judge and attested by the registrar, which must be considered as correct, and which contains the decisions upon which the appeal was based. There were two sessions of the

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Court as stated, the first on December 9, on which occasion, after the formality of proving the publication, service, etc., of the citation had been concluded and application had been made to cross-examine the petitioner, and arguments heard thereon, the return proceeds as follows: "The Judge declines to allow Mr. Belyea to proceed to prove the will in solemn form until Mr. Dunn has an opportunity to cross-examine the petitioner Mrs. Davis," and the Court, thereupon, adjourned until January 5, 1920. The return then shews that the Court convened again on January 5 last, at 8 o'clock p.m., and the full proceedings of this session signed by the Judge and attested by the registrar under the seal of the Court are as follows:

Gagetown, N.B., January 5, 1920. Court opened at 8 o'clock P.M.

Mr. Dunn asks that Mrs. Davis shall be sworn—he states she has already been sworn, but asks that she be examined, and in order to cover the whole matter asks that she shall be sworn.

Mr. Belyea objects that he has no right to call any witness until after a *primâ facie* case has been made in support of the validity of the will. Mr. Dunn again asks that Mrs. Davis be examined.

Mr. Belyea advises Mrs. Davis that she shall have nothing to say.

Mr. Dunn asks that Mrs. Davis shall be called and sworn as the petitioner.

Mr. Belyea asks to be allowed to prove the will of Martha C. McDonald in solemn form and to call the two witnesses to make out a *primâ facie* case in support of the validity of the will.

Mr. Belyea moves to read the will of Martha C. McDonald.

Mr. Dunn states the will had already been read, and asks that he shall be allowed to cross-examine the petitioners with regard to the facts that they have sworn to in the petition—he asks to cross-examine Mrs. Davis.

Mr. Belyea gives one reason why this request of Mr. Dunn is beside the mark altogether, as sec. 48 points out the purpose of the petition is to prove the validity of the will.

Judge Peters decides that Mr. Dunn has a right to cross-examine the petitioner.

Mr. Dunn asks to cross-examine the petitioners asking for probate of the will in this case.

Judge Peters decides it is a reasonable request that Mr. Dunn shall be allowed to examine Mrs. Davis, who is present.

Judge Peters decides to allow the cross-examination of the petitioners with regard to the will.

Mr. Belyea offers to call the witness, Mr. Robertson, to prove the will in solemn form, and asks if Judge Peters decides if he can or cannot go on.

Mr. Dunn again calls Mrs. Davis.

Mr. Belyea answers for Mrs. Davis and states she will not willingly consent to take the stand for cross-examination.

Mr. Dunn asks the Judge to send for the Sheriff of the County to commit Mrs. Davis to gaol for contempt of Court.

Mr. Belyea leaves the Court.

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Mr. Dunn states Mrs. Davis has refused to be sworn and is, therefore, guilty of contempt of Court.

Mr. Dunn asks Mrs. Davis if she refuses to be sworn.

Mrs. Davis does not answer.

Court adjourns *sine die*.

(Signed) F. M. O'Neill, Registrar of Probate. (Signed) Samuel L. Peters, Judge of Probate.

(Seal of the Probate Court of Queens County, N.B.).

It will be seen from this, the Judge made three distinct decisions or rulings on the application before him, viz.: 1. Judge Peters decides that Mr. Dunn has a right to cross-examine the petitioner. 2. Judge Peters decides it is a reasonable request that Mr. Dunn shall be allowed to examine Mrs. Davis who is present. 3. Judge Peters decides to allow the cross-examination of the petitioners with regard to the will.

In addition to the return mentioned, there is also on file a short return from the registrar of the proceedings before the Court, which is as follows:

Probate Court, County of Queens, 5th January, 1920.

8 o'clock P.M.

Present: Samuel L. Peters, Esq., Judge of Probate.

F. M. O'Neill, registrar.

George H. Belyea, K.C.

John R. Dunn.

Mr. Dunn asks for order of the Court for the examination of Mrs. Marianna Hendry Davis. Judge so orders. Mr. Belyea again proposes to prove the will in solemn form.

Mr. Dunn objects. The Judge rules that Mr. Dunn has a right to examine Mrs. Davis.

Mr. Dunn asks to cross-examine the petitioner present now, Mrs. Marianna H. Davis.

Mr. Belyea leaves the Court.

Mrs. Davis, on the advice of counsel, refuses to be sworn.

Court adjourned *sine die*.

(Signed) F. M. O'Neill, Registrar.

This record shews the Judge made two orders or rulings, viz.: 1. Mr. Dunn asks for the order of the Court for the examination of Mrs. Marianna H. Davis. Court so orders. 2. Mr. Belyea again proposes to prove the will in solemn form. Mr. Dunn objects. The Judge rules that Mr. Dunn has a right to examine Mrs. Davis.

The term "order" as I understand it is applied to a decision or direction of the Court given and obtained in the matter before it, and as contrasted with a judgment is a judical or ministerial

direction or conclusion. In this case a contested matter was before the Court, an application was made therein, arguments of counsel were heard, the Court took time to consider and finally an order or decision was made which at once affected the status of the parties before it by establishing a course of proceeding which must be followed differing from the ordinary course of proceeding in cases of this nature. In my opinion, it was such an order as was contemplated in sec. 113 of the Probate Act, 5 Geo. V., 1915, ch. 23, and as the proceedings are duly and properly returned and are before the Court, the appeal will lie.

On the argument the case of *Re Estate of Paul Daly* (1906), 37 N.B.R. 483, was referred to. In the report, it is described as an appeal from a decree of the Probate Court of the City and County of Saint John, founded upon the judgment of the Probate Judge. During the argument, the question arose whether the return before the Court was a decree, and whether the Court would hear an appeal from a Probate Court when the decree of the Judge below was not before it. This, however, was not made a factor in the appeal, the question was not decided, the appeal being heard by consent, and the judgment of the Probate Court was confirmed.

The appeal was taken under the provisions of sec. 115, Con. Stats. N.B., 1903, ch. 118, which provide that "any person aggrieved by any final order or decree of the Judge may appeal therefrom to the Supreme Court." The judgment appealed from, while not in the technical form of a decree, was nevertheless a final order of the Court, from which under the statute an appeal would properly lie, but the attention of the Court was not called to the statute and its provisions, nor was it pointed out that an appeal would lie thereunder from a "final order," as well as a decree.

The present appeal is under sec. 113 of the Probate Courts Act, consolidated and amended, which provides that "any person aggrieved by any order or decree of a Judge may appeal therefrom to the Supreme Court," and the intention of the Legislature in making this change must have been to enlarge and extend, as it undoubtedly did enlarge and extend, the right and privilege to appeal, immeasurably beyond the scope of the former Act, under which the *Daly* appeal was taken, thereby authorizing appeals which formerly could not have been taken.

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I am also of the opinion that neither sec. 53 of the Probate Act, nor O. 38, r. 1, of the Judicature Act referred to, authorize the course which was proposed and moved by counsel for the caveator, and followed by the Probate Judge in this case, as was so strongly argued and contended by counsel for the respondent upon the appeal. Sec. 53 (1915, ch. 23) provides that "the rules of evidence observed in the Supreme Court shall be applicable to and observed on the trial of all questions of fact in the Probate Court," and O. 38, r. 1, provides that "upon any motion, petition or summons, evidence may be given by affidavit, but the Court or Judge may, on application of either party, order the attendance for cross-examination of the person making any such affidavit."

Neither of these have any bearing upon the question in the present case. Sec. 53 cannot have any bearing, because no question of fact was before the Court for trial at the time when the application was made for the cross-examination of the petitioner, who was proceeding according to the statute to estalish the validity of the will.

O. 38, r. 1, cannot have any bearing, because no evidence had been given by affidavit, either in support of or against the petition which was before the Court. The petition had been sworn to as was required by the Probate Act in order to give the Judge jurisdiction, and bring the petition properly before the Court, but this does not carry it further than to create or become a substantiation of the facts alleged in the petition, as occurs in certain cases where complaints are laid under the Criminal Code in order that warrants may issue, and does not amount to, nor can it be considered as evidence given by affidavit, in the sense contemplated by the rule. Unless the petition had been sworn to, the Court would not have had jurisdiction to hear it, the citation could not have issued, and from any view which has been presented or suggested, I cannot find any reason to justify the conclusion that the mere fact of the petition having been sworn necessarily brought the question involved in this portion of the appeal within the scope, purview and intention of O. 38, r. 1.

If, however, in any light, the petition could possibly be considered as a statement of the petitioner's case, to be established before the Court, then as I have hereafter pointed out, the statute

intervenes and provides that the first evidence shall be directed to establishing the validity of the will.

In addition to what has already been pointed out and considered, the Probate Court made a further order, viz., "to adjourn *sine die*," the effect and result of which was to deprive the petitioner of the opportunity of establishing the validity of the will, and it could not have been the intention of the Legislature to leave the petitioner without remedy in such a case as this.

Nor could the appellant secure adequate redress by means of a mandamus, for the Court could not, by such a writ, do more than direct the Judge of the Probate Court to hear the matter of the petition, thus leaving it quite open to him in the exercise of his discretion, to adopt the same course he had previously followed, thereby negativing the purpose of the mandamus.

As to the second ground of appeal, the proceedings upon proof of a will in solemn form are governed by sec. 48 of the Probate Act, 1915, which is as follows:—

> Upon proceedings for the proof of a will in solemn form, no citation preliminary or additional to the citation mentioned in the next preceding section of this Act shall be required, and the Judge, upon return of such citation, shall first hear sufficient evidence to establish *primâ facie* the validity of the will. If such validity is so established, the Judge shall so pronounce, whereupon, if any party cited by such citation to appear before the Court at which such *primâ facie* case may be proved, shall make request to the Court to have a witness examined, it shall be the duty of the Judge to hear any witnesses that may be in attendance upon the Court, or be produced before the Court by parties opposed to the will, not exceeding two, to be selected by the Judge from those proposed by the parties touching the validity of the will, and thereupon, before further evidence adduced, shall require all parties interested and appearing, to state whether they support or oppose probate of the will; any person opposing probate may file forthwith, or in such further time as may then be allowed by the Judge, allegations of the ground on which he proposes to contest Probate of the Will, and, upon such allegations being filed, the Judge shall hear the evidence adduced by any and all parties, and decide the matter, and if no allegations be filed, the Judge shall decide in favour of the validity of the will; provided a *primâ facie* case shall have been made in favour of the will.

To me this section is clear, distinct and imperative, and I can find no provision in the Probate Act or practice, or otherwise, which authorizes or requires the petitioners in the case of the proof of a will in solemn form to be cross-examined on matters stated in the petition, the Judge's duty upon the return of the citation being to first hear sufficient evidence to establish *primâ facie*

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the validity of the will. In my opinion, the words "first hear" superseded the provision of the Judicature Act referred to, making applicable the rules of the Supreme Court to matters before the Probate Court when the matter under consideration is the proof of a will in solemn form. The imperative nature of these words render the rules irrelevant and inapplicable, and the Probate Court Judge was in error in making the order he did. This, I think, is also clear for the further reason that an examination of the petitioners as to the facts or matters stated or set out in the petition could have no possible bearing upon the question of the due and proper execution or validity of the will or *primâ facie* the testamentary capacity of the testatrix, and the caveator, under sec. 48 of the Act, could have called the petitioners as his witnesses after the *primâ facie* validity of the will had been established, or could have cross-examined them when giving evidence on their own behalf as the case may be. If the motion for the examination of the petitioners had been refused, the respondent could not possibly have been prejudiced, for should the Judge have decided there was sufficient evidence to establish *primâ facie* the validity of the will he would have been entitled to have the petitioners before the Court and examined as witnesses, and so have accomplished his purpose, or had the Judge decided the will was invalid then the matter would have been disposed of in his favour and there would have been no occasion for the examination of the petitioners.

The appeal must, therefore, be allowed.

In view of the proceedings that have been taken before the Probate Court, and for the purpose of avoiding expense to the estate, in my opinion, this case should be remitted back to the Probate Court of the County of Queens, with instructions to the Judge thereof to proceed to the hearing of the petition which is before him, the case to be reopened before the said Probate Court for that purpose, and the costs of this appeal must be allowed to the appellant and paid by the respondent.

Appeal allowed with costs to be paid by the respondent.

Appeal allowed.

THE KING v. SOMERS; EX PARTE GORAYEB.

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New Brunswick Supreme Court, Crocket, J. June 25, 1920.

INTOXICATING LIQUORS (§ I—91)—INTOXICATING LIQUOR ACT, N.B.—INFORMATION—WARRANT—NECESSITY OF FOLLOWING PROCEDURE LAID DOWN IN SEC. 8 OF THE SUMMARY CONVICTIONS ACT.

Sec. 120 of the Intoxicating Liquor Act, 1916 (6 Geo. V., ch. 20), providing that an information or complaint under the Act need not be on oath, does not apply to an information to obtain a warrant in the first instance, and a magistrate issuing a warrant in the first instance must follow the procedure laid down in sec. 8 of the Summary Convictions Act, C.S.N.B., ch. 123.

Statement.

RULE absolute for a *certiorari* and rule *nisi* to quash a conviction made against one Elie Gorayeb under the Intoxicating Liquor Act, 1916, was granted by Crocket, J., upon the ground that the information was bad, in that neither the information nor the matter of the information was sworn to, as required by sec. 8 of the Summary Convictions Act.

P. J. Hughes, shewed cause.

E. A. MacKay, supported the rule.

Crocket, J.

CROCKET, J.:—This is an application by way of *certiorari* to quash a conviction made against the defendant for selling liquor contrary to the provisions of the Intoxicating Liquor Act, 1916. The order for *certiorari* and order *nisi* to quash were granted upon the grounds: First, that the justice had no jurisdiction over the person or the subject matter, inasmuch as the defendant was brought before the convicting magistrate on a warrant improperly issued on an information not under oath and pledging the information and belief of the informant; and, second, no proper conviction.

As to the second ground: the conviction returned by the magistrate is perfectly good upon its face, properly setting forth an offence committed against the Act, and within the territorial jurisdiction of the magistrate. The case therefore turns entirely upon ground No. 1.

The information upon which the magistrate proceeded was not sworn, and set forth that the informant was informed and believed that the defendant did, on or about February 10, 1920, unlawfully sell liquor, without the license therefor by law required, contrary to the provisions of the Provincial Prohibition Act, 1916.

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Sec. 111 of the Intoxicating Liquor Act provides that all punishments for any violation of the provisions of the Act, and all proceedings for the imposition of the punishment by fine, penalty or imprisonment for infraction of any of the provisions of the Act, may be brought for hearing and determination before a magistrate, etc., etc., under the provisions and procedure of the Summary Convictions Act.

Sec. 6 of the Summary Convictions Act provides that when information (1) shall be laid before a justice that any person has committed or is suspected to have committed or made any act or default punishable by summary conviction, etc., etc., the justice may issue his summons (2) requiring such person to appear, etc. The information set forth in the appendix of the Act as Form 1, is a sworn information.

Sec. 8 provides that, unless the defendant is a corporation, instead of issuing a summons, the justice may, upon oath being made to substantiate the matter of the information to his satisfaction, issue in the first instance his warrant (4) for apprehending such person and bringing him before the justice, etc.

The Summary Convictions Act, therefore, requires a sworn information for the issue of a summons, and an oath substantiating the matter of the information to the satisfaction of the magistrate, for the issue in the first instance of a warrant.

Sec. 120, however, of the Intoxicating Liquor Act makes special provision with regard to informations or complaints under that Act. This section provides that all informations or complaints for the prosecution of any offence against any of the provisions of the Intoxicating Liquor Act may be made without any oath or affirmation to the truth thereof, and that the same may be according to Form No. 38 in the appendix to the Act. The information in this case was according to this form.

It was contended by Mr. Hughes, in shewing cause against the order *nisi*, that the information being good under sec. 120 of the Intoxicating Liquor Act, the magistrate had jurisdiction of the offence, and that *certiorari* would, therefore, not lie.

There is no doubt, I think, that the information gave the magistrate jurisdiction of the offence; but under the cases of *Ex parte Boyce* (1885), 24 N.B.R. 347; *The King* v. *Mills* (1905), 37 N.B.R. 122; and *The King* v. *Carleton*; *Ex parte Grundy* (1906),

37 N.B.R. 389, cited by Mr. MacKay on the argument, he had no jurisdiction over the defendant's person.

Ex parte Boyce, supra, was the case of a conviction for violation of the Canada Temperance Act. The information there was sworn to, and stated that the complainant had just cause to suspect and believe and did suspect and believe that the defendant did unlawfully sell intoxicating liquors contrary to the provisions of the Act. On this information the magistrate issued a warrant in the first instance in the form prescribed by the Dominion Summary Convictions Act, upon which the defendant was arrested and brought before the magistrate. Sec. 25 of the last mentioned Act as it then stood provided that in all cases of informations where the justice receiving the same issued his warrant in the first instance to apprehend the defendant, and in every case where the justice issued his warrant in the first instance, the matter of the information should be substantiated by the oath or affirmation of the informant, or by some witness or witnesses on his behalf, before the warrant should be issued. Although the information in that case was sworn to, the Court held it was the duty of the magistrate, before issuing a warrant, to examine upon oath the complainant or his witnesses, as to the facts upon which his sworn information and belief were founded, and quashed the conviction upon the ground that the defendant, having been brought before the magistrate on a warrant improperly issued, the magistrate had no jurisdiction over the defendant's person. Palmer, J., in concluding his judgment, said at page 356:—

> Upon this I think that, although there was a proper complaint, and, therefore, the magistrate had jurisdiction of the offence, the matter thereof was not substantiated on oath, and, therefore, he had no authority to have the defendant arrested and brought before him by warrant to answer; and he had no jurisdiction over the defendant's person, and consequently the conviction was not authorized, and a *certiorari* ought to issue.

Ex parte Boyce, supra, was followed, in 1905, in *The King* v. *Mills, supra*, where another conviction for an offence against the Canada Temperance Act was quashed upon the ground that the facts upon which the suspicion and belief of the complainant were based were not substantiated on oath before the magistrate issued the warrant on which the defendant was brought before him; and in 1906, in *The King* v. *Carleton; Ex parte Grundy*, where

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a conviction for wilfully leaving a gate open, in a railway fence, was also quashed on *certiorari* upon the same ground.

These cases, I think, clearly establish that an information and complaint laid before a magistrate, without any oath or affirmation to the truth thereof, although perfectly good under the provisions of sec. 120 of the Intoxicating Liquor Act for the purpose of the issue of a summons, does not authorize the magistrate to issue a warrant in the first instance and bring the defendant's person before him. The provision of the section is that all informations or complaints may be made without any oath or affirmation to the truth thereof; but that surely cannot be held to do away with the requirement of sec. 8 of the Summary Convictions Act, that there must be an oath "substantiating the matter of the information to his (the magistrate's) satisfaction," before he can issue a warrant in the first instance.

The warrant, therefore, having been improperly issued, and the defendant having been illegally brought before the magistrate, I am bound by the decision in the three cases referred to to hold that this conviction cannot be supported. It will therefore be quashed. *Conviction quashed.*

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WINKLER v. HUTTON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. June 28, 1920.

CONTRACTS (§ IV C—340)—TO DIG WELL—PROPORTION OF PRICE TO BE PAID FOR DRY HOLE—IMPLIED PROMISE—INCOMPLETE PERFORMANCE —RIGHT TO RECOVER FOR WORK DONE.

When a party contracts to bore a well with a proviso that he is to be paid a proportion of the price if it is a "dry hole," there is an implied promise to go the distance his machinery will bore, and if he does not go that distance it is not a "dry hole" and there is no liability on the part of the other party to pay.

Statement.

APPEAL by defendant from the trial judgment in an action to recover the price agreed upon for boring a dry well. Reversed.

W. G. Ross, for appellant.

Walter Mills, K.C., for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S. concurred with LAMONT, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—In this case the plaintiffs contracted with the defendant to bore him a well.

The plaintiffs, in their evidence, say that the agreement was, that defendant was to pay $1 per ft. for the first 30 ft. and

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an additional 20c. for every 20 ft. below that; that if they did not get water or crib the well they were to get 75% of the amount due, and they say they told defendant they could drill 138 ft. After drilling 72 ft. plaintiffs struck a rock, and as they could not get through it, they gave up digging. They went to another place, and after drilling 126 ft. struck water. Defendant refused to pay for the first hole, and plaintiffs bring this action for 75% of the agreed cost, claiming that it is a dry hole under the contract.

I am of the opinion that when a party contracts to bore a well with a proviso that he is to be paid a proportion of the price if it is a dry hole, that there is an implied promise to go the distance that his machinery will bore, and, if he does not go that distance, that it is not a dry hole and there is no liability on the part of the other party to pay.

In this case plaintiffs told defendant that they could bore 138 feet. In the first hole they only went down 72 feet. It is not therefore in my opinion a dry hole under the contract. The fact that they state that it was impossible for them to go further is no excuse. They should have provided for striking a rock or for a cave in in their contract. The promise on their part was an absolute one, and they are not excused from performing it because they found conditions that they could not overcome.

In 7 Hals., page 427, par. 877, he says:—"A party who has made an absolute promise is not discharged from liability if it afterwards appears that it is impossible for him to perform the contract, even though that is not due to any default on his part. It is his own fault if he runs the risk of undertaking to perform an impossibility."

The appeal should, therefore, be allowed with costs.

Lamont, J.A.

LAMONT, J.A.:—The plaintiffs are well diggers. They entered into a contract with the defendant to sink a well for him at $1 per foot for the first 30 ft. and an additional 25c. per ft. for every 20 ft. below that. If the plaintiffs sank what was known as a "dry hole" they were to be allowed 75% of the above prices. The plaintiffs dug down 70 ft. and struck a large rock. They drilled into the rock and put in a charge of dynamite and set

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it off. They then went to town for a couple of days to let the gas get out of the well. When they returned they found there was too much gas still in the well to enable them to go down in safety, so they lowered another charge on the top of the stone and set it off. This charge did not remove the stone, but it seems to have caused the earth to cave in and the plaintiffs gave up digging. They then started another hole, and got water at a depth of 126 ft. The defendant tendered the plaintiffs the amount to which they were entitled for this second hole, but refused to pay for the first hole. This tender the plaintiffs refused, and brought this action for the price of both holes.

In his evidence the plaintiff Winkler said:—

We left the first hole and started to dig the second because we did not want to wait for the gas to come from the first hole. I told defendant that we had to quit the first hole. I told defendant we could not get the stone out on account of the gas.

The plaintiff Martin said:—

From my experience in digging wells it is not safe to go down on account of the gas. When I said I would not do more with this hole, the defendant said well I guess I will have to pay for it. So defendant said to come over to a spot and start digging another hole and we did.

The trial Judge in his judgment very correctly said:—"The only dispute is as to whether or not the first hole bored by the plaintiffs is or is not what under the contract is called a 'dry hole.'"

The essential part of his judgment is as follows:—

There is such contradictory evidence between the plaintiffs on the one hand and the defendant on the other as to the cause which induced the plaintiffs to abandon the first hole and sink another. I am of the opinion that the plaintiffs were justified in abandoning the first hole, and that while the plaintiffs might not have adopted perhaps the very best method of overcoming the difficulty which they met with, namely, a large rock or boulder 70 feet below the surface of the ground, yet they did everything in reason to overcome the difficulty and enable them to drill, but the rock still remained and they could not drill further down on account of it.

And he gave judgment for the plaintiffs for the full amount claimed.

With deference, I am of opinion that the question is not whether the plaintiffs were justified in abandoning the first hole or not, but, did that hole, when they did abandon it, answer the description of a "dry hole" as understood by the parties when they entered into the contract? The plaintiff Winkler said: "A dry hole is a hole you don't crib. A dry hole can be any depth."

The other plaintiff did not define it, so far as the evidence in the appeal book discloses.

The defendant says: "When you strike a stone it is not 'a dry hole' unless you are at the capacity of the machine."

The only other witness who deals with the point is Edward Leect, who testified as follows:—

A dry hole is a hole dug to the length of your rods or when you strike soap stone. It is possible to take out large rock. Took out one four feet thick on Lawson's place. Blast drill 22 inches in the rock. We never got stuck on a well. If we got down and found a rock we lost the hole and the farmer does not pay for it.

The plaintiff's definition can scarcely be accepted as sufficient, for under it a well-digger could go down a certain distance and, without finding any obstacle whatever, he could cease digging if he found it more convenient or more profitable to be elsewhere, and if he did not crib the hole it would, under his definition, be a dry hole for which the farmer would be obliged to pay. Such a state of affairs cannot be considered as being within the contemplation of a contract for well digging. On the evidence before us, the first well sunk cannot, in my opinion, be considered a dry hole, the plaintiffs not having reached the capacity of their machine.

The appeal, therefore, should be allowed with costs and the judgment reduced to the sum of $186.20. As the defendant tendered this amount before action and paid the same into Court with his defence, he is entitled to the costs of action.

Appeal allowed.

Rex ex rel LYNCH v. CANMORE COAL Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. July 5, 1920.

STATED CASE (§ I—1)—BY JUSTICE—SEC. 761 CRIM. CODE—APPLICATION—INFORMATION TO BE GIVEN IN—TIME OF ENTERING INTO RECOGNIZANCE—TIME OF TRANSMITTING CASE.

In an application for a stated case under sec. 761 of the Criminal Code, the justice must be informed whether the case is to be stated for a single Judge or for the Appellate Division in order that he may know where to file the recognizance. Where the application states with sufficient definiteness that the justice is required to state a case for the Appellate Division it will be upheld, although it refers to a particular sittings of the Court which is unnecessary and of no interest to the justice.

The recognizance need not be entered into before the last day allowed for making the application for a stated case; it is sufficient if it is entered into at any time before the case is stated.

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The three days of sec. 761 sub-sec 3 (e) of the Criminal Code in which the case must be transmitted to the Court has been extended by Rule 819 (Alta.) to twenty days.

Where a justice is asked to state a case under sec. 761 he is by reference requested to state the facts.

CASE STATED for the opinion of the Court by a Justice of the Peace under the provisions of sec. 761 of the Criminal Code.

A. Macleod Sinclair, K.C., and *H. Ostlund*, for appellant.

J. E. A. Macleod, for respondent.

James Muir, K.C., for Minister of Justice.

Harvey, C.J. HARVEY, C.J., concurred with STUART, J.

Stuart, J. STUART, J.:—Counsel for the respondent the Canmore Coal Co. raised a number of preliminary objections.

First, he contended that the case had not been properly applied for in that the application made some reference to the sittings of the Appellate Division at Edmonton, and *Rex* v. *Dean* (1917), 37 D.L.R. 511, 28 Can. Cr. Cas. 212, was cited. The application, however, did state with sufficient definiteness to inform the justice how to act that he was required to state the case for the Appellate Division. In the first and main clause it is true that no reference is made to the matter but the application concludes with a notice "that the complainant intends to appeal by stated case to the Appellate Division of the Supreme Court of Alberta at the sittings to be held in the City of Edmonton in the month of May, A.D. 1920." The reference to the particular sitting was of no interest to the Justice of the Peace. Under the rules he needs to be informed whether the case is to be stated for a single Judge or for the Appellate Division so that he may know where to file the recognizance whether with the clerk or the registrar. The rule was undoubtedly substantially complied with and this objection should be overruled.

Leaving the second objection for the moment, the third one was, that the required recognizance should have been entered into not later than the last day allowed for making the application for a stated case, which had not been done. This objection is based on sec. 762 of the Cr. Code which reads:—"The appellant at the time of making such application and before a case is stated and delivered to him by the justice shall . . . enter into a recognizance, etc." Short and Mellor, page 420, was referred to but the passage does nothing more, apparently, than repeat the

words of the corresponding English statute. And in *Stanhope* v. *Thorsby* (1866), L.R. 1 C.P. 423, at 429, the Court of Common Pleas, under a provision whose words seem to have been directly copied in sec. 762, held that it is sufficient if the recognizance is entered into at any time before the case is stated. I think this is a sound decision and that, therefore, we should also so decide. The reasoning of Bovill, Q.C., seems there to have been adopted by the Court and I would add that it would appear to me that when once the application is before the justice the expression "time of making such application" covers the whole period while he has it before him up to the time limited for stating and delivering the case. This objection should be overruled.

Fourthly, it was objected that sec. 761, 3 (*c*), of the Code (as amended by 8-9 Edw. VII., ch. 9, sec. 2), had not been complied with. It states that "the applicant shall within 3 days after receiving the case, transmit it to the Court, first giving notice in writing of such appeal with a copy of the case as signed and stated to the other party to the proceeding which is questioned."

But this is only effective if there is no rule otherwise providing and our rule 819 clearly makes one inconsistent provision, *i.e.*, with regard to time. In *Re Wood and Hudson's Bay Co.* (1918), 40 D L.R. 160, it was admitted that neither what was required by sec. 761, 3 (*c*), nor apparently by our rules 819 and 821 had been done. At least, it does not appear that rules 819 and 821 had there been complied with. Possibly, they may have been, and if they were I am not sure that it was so understood at the time. In any case, however, the "three days" of 761, sub-sec. 3 (*c*), has certainly been extended by rule 819 to "20 days" and it appears that within that time the other provisions even of 761, sub-sec. 3 (*c*), had been complied with. This objection, therefore, also fails.

The fifth objection was that one of the services which had to be made on the respondent had been made merely upon Mr. Macleod who had appeared for the respondent company at the hearing before the magistrate. Mr. Macleod acted also for the respondent company in making the preliminary objections before us and I think, therefore, that it is proper to infer that he was continuously between the two occasions the properly instructed

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solicitor of the respondents. This being so, I think, when the rule or section does not exact *personal* service, that service on such a solicitor is proper service. This objection is overruled.

The sixth objection was that the application for the stated case had not been signed by the applicant or his solicitors. The facts, which I need not describe in detail, are such as to remove all validity from this objection.

The seventh objection is rested upon the circumstance that, whereas sec. 761 gives the aggrieved party a right to "apply to such justice to state and sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned," nevertheless the application here delivered to the justice merely informed him that he was "required to state and sign a case under sec. 761 of the Criminal Code and sec. 1 *et seq.* of the Alberta Rules of Court with reference to cases stated under sec. 761 of the Criminal Code . . . and that your judgment is questioned upon the following amongst other grounds (setting forth four distinct grounds)." Sec. 1 of the rules referred to, *i.e.*, rule 816, merely requires the grounds of objection to be stated in the application. Obviously, the tenuous substance of this objection is that the applicant did not tell the justice that he was required to state the facts of the case. *Rex* v. *Earley* (No. 1) (1906), 10 Can. Cr. Cas. 280, was cited, but it will be observed that the application there not merely did not contain a request to state the facts but it requested a statement of the grounds on which the conviction was (not "questioned" as in the Code)—but "supported." In other words, it asked the justice to give his reasons for his judgment, not the objections which the applicant took to it, which latter is what the Code requires. And, in any case, the precedents cited by Wetmore, J., all contained facts which created much more serious objection than anything existing here. In one, the case had not been transmitted within the prescribed time. In the second, the application had been made orally. In the third, the only application actually made to the justices was oral, though a written one had been left with their clerk.

In the present case, I scarcely think it is necessary to disagree entirely with the decision in *Rex* v. *Earley*, *supra*, because of the more serious mistake which was there made in the application. The justice could not be expected to know fully what objections

were taken to his decision unless he were told in the application. But as to the facts he is the only one who can state those because he finds them. And when he has his Code before him and is asked to state a case under sec. 761 (the very section referring to what must be requested), it seems to me that by reference he is requested to state the facts. Indeed, I very much doubt if the passage in sec. 761, so far as facts are concerned, is intended so much as a direction to the applicant as it is to the justice although in grammatical form it applies to the applicant's request.

I think the request was sufficient in form and that this objection should be overruled.

Returning now to the second objection, this rests upon the assertion that the required recognizance had not been filed in this Court. An enquiry of the registrar, led to the result that no recognizance could be discovered. The respondent was in no position to say that one had never been entered into before a justice as required by sec. 762 but it was certainly entitled to be assured that one was available for its protection in regard to costs before the case should go on. Counsel for the applicant stated that the proper recognizance had been received by Mr. Davidson and that Mr. Davidson had stated that he had filed it with the registrar. The Code says nothing about what the justice should do with the recognizance, but rule 822 states that the justice must, before or immediately after delivering a case stated to the appellant, "transmit the recognizance to . . . the registrar." Mr. Davidson was out of the city on his holidays and the matter could not be traced. It was his duty to send in the recogniance and not the applicant's. In these circumstances I think the proper course is to give the applicant appellant time to have the matter traced. The case should, therefore, stand adjourned to the next sittings at Calgary, when the applicant should be at liberty to shew that a proper recognizance is on file.

Beck, J.

BECK, J.:—In this case I think the only one of the preliminary objections taken by the respondent to the right of the Court to hear the stated case is the absence of proof of the giving and delivery to the magistrate of the recognizance required by sec. 762 of the Criminal Code.

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Beck, J.

As the recognizance, which it was asserted had actually been given, could not be found in the short time available after the objections were raised we adjourned the argument.

We are agreed that the appellant should have an opportunity of proving the recognizance. If it is proved, the arguments on the merits may be proceeded with.

Ives, J.

IVES, J., concurred with STUART, J.

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MURRAY v. COLLINS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. June 28, 1920.

NEGLIGENCE (§ II D—104)—PERSON HIRING HORSE—DEATH OF HORSE FROM ACUTE INDIGESTION—ONUS OF PROOF.

Where a person hires an animal and takes it into his possession and it dies from acute indigestion while in his custody, the onus is upon him to shew circumstances negativing negligence on his part. Overfeeding is negligence for which he is liable.

Statement.

APPEAL by plaintiff from the trial judgment in an action for damages for the death of a horse while in defendant's possession as a bailee for hire. Reversed.

G. H. Barr, K.C., for appellant.

F. W. Turnbull, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—In this case the respondent was the bailee for hire of a horse belonging to the appellant. The evidence shews that the horse died while in his possession, and the onus is, therefore, upon him of shewing that the death occurred through no neglect or default on his part. The evidence of the veterinary surgeon, upon which the case practically turns, is to the effect that the horse died of rupture of the stomach which was caused by acute indigestion. It further shews that acute indigestion could be brought on by overfeeding with sheaf oats. There is evidence to shew that, immediately preceding the death of the horse, it was fed with sheaf oats in rather large quantities. Several witnesses were of opinion that the sheaf oats were fed in excessive quantities. The veterinary surgeon, while stating that he would not himself have given such large quantities of sheaf oats, said he would rather attribute the cause of death to other reasons. The conclusion I would draw from his evidence is, that while he has discovered an obvious reason for the death of the animal, he has only theorised as to another

possible cause of death. There is no evidence to shew what food was given to the horse before the sheaf oats were fed to him, and there is nothing to support the theory that indigestion was the result of the earlier feeding. As the animal died on his hands, and there is some evidence of negligent or improper feeding, I do not think that the defendant has satisfactorily relieved himself of the onus cast upon him.

The appeal should, therefore, be allowed, the judgment below set aside, and judgment entered for the plaintiff for $165 and costs.

Newlands, J.A.

NEWLANDS, J.A. (dissenting):—In this case the defendant has proved that the horse died of acute indigestion. He also proved by the veterinary surgeon that the horse had been properly fed while in his possession, and that the indigestion which caused its death did not come from the feed he gave it. Under these circumstances I think he has proved that it was not from any negligence on his part that the horse died, but from causes over which he had no control.

He is, therefore, not liable, and the appeal should be dismissed with costs.

Lamont, J.A.

LAMONT, J.A.:—The defendant is a well-digging contractor, and he hired the plaintiff's mare at $1.50 per day to be used for the purpose of his business. He used the mare for 8 days, when she died from rupture of the stomach caused by indigestion. The evidence discloses that for 6 days after the defendant got the mare, she was kept in a livery barn in Regina, and fed well-cured hay and old oats. On the 7th day, September 3, 1919, the mare and her mate were driven from Regina a distance of 14 miles, with a three-tongue well-digging apparatus. They left Regina about 8 o'clock in the morning, and arrived at the scene of their operations about 1 o'clock. The team was then watered, and fed oat sheaves a short time after. They were worked that afternoon from 3 to 6 o'clock, when they were again fed oat sheaves. During the night, the mare in question took sick, pounded up the earthen floor of the barn in which she was kept, broke her halter strap, and the barn door having been left open, went out. The following day, in the evening, the defendant was notified that she had been found dead about a mile away. The plaintiff now brings this action for damages for the non-return of the mare to him.

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Lamont, J.A.

The authorities to which I make reference in my judgment in *McCauley* v. *Huber*—an appeal heard at this sittings of the Court—establish that, apart from a special contract altering the common law rights and liabilities of parties, the rule is, that where a person hires an animal and takes it into his possession and it dies or is lost while in his custody, the onus is upon him of establishing that he took due care of the animal while in his custody. That care is the care which a prudent man would take of his own animals under the circumstances. In this case, the onus is upon the defendant to shew circumstances negativing negligence on his part. The question is, has he discharged that onus?

The mare died from rupture of the stomach caused by undigested food fermenting and forming gas. This indigestion often results from overfeeding, and sometimes from the stomach getting out of order. The main contention of the plaintiff was, that the mare had been overfed. It was also contended that the defendant had been guilty of negligence in other respects, but I agree with the conclusions of the trial Judge that there was no ground for believing that any of the other acts of negligence charged had anything to do with the death of the mare. Then, was she overfed?

Dr. Boucher, the veterinary surgeon who examined the mare after she was dead, found a large quantity of undigested food in the stomach. At the bottom of the stomach there was undigested food about half an inch thick, caked, which looked as if it were in a decaying condition instead of in process of digestion, indicating, as the doctor said, that all the food in the stomach was not from the last meal the mare had. This decaying food had been in the stomach, in the doctor's opinion, at least 24 hours—from 24 to 48 hours. As to the composition of the food found in the stomach, the doctor says, "there did not appear to be anything else in the stomach but the oats and oat sheaves and mixed up stuff and oats." It does not clearly appear just what the doctor meant by the "oats" in addition to the oat sheaves. If he meant that the stomach contained oats apart from those coming from the oat sheaves, they must have been those fed on the morning of the 3rd, before making the 14 mile trip. If he did not mean that, they must have been the oats

out of the oat sheaves fed at 1 o'clock on the 3rd. In either case the decaying food indicated a derangement of the stomach, and the onus was upon the defendant to shew that such derangement was not caused by overfeeding. There was no evidence at all of the quantity of oats the mare received before starting on the 14-mile trip. Neither was there any evidence of the quantity of oat sheaves she received at 1 o'clock, after making the trip. On the evening of the 3rd, she was fed by John McDonald, who testified that he fed the mare two ordinary sized oat sheaves. Two sheaves, he also said, is "the usual sized meal for a horse when working." McDonald also says he saw the team fed at noon by McIsaac and Joe McDonald after the long trip, but he does not say how many sheaves they received. The defendant did not have anything to do with the feeding of the horses, but he gave the following evidence:—"Q. What were they feeding it that day? A. Sheaf oats. Q. Did you notice what quantity of oats they put in for it to eat? A. They put in 4 or 5 sheaves for the two."

The evidence does not disclose whether the defendant in these answers was referring to the noon or the evening meal. Dr. Boucher, however, testified that he did not think two oat sheaves in the evening was a dangerous feed for a mare the size of the one in question, unless they were extra large, and that, in his opinion, the mare had not been overfed; but on cross-examination he said that, if his advice had been asked, knowing it was a change of feed, he would have advised that a smaller feed be given at first. He said he thought the cause of death was acute indigestion caused by the stomach getting out of condition, which it might do either from overfeeding or from natural causes without overfeeding. The stomach in his opinion had been out of condition 24 or it might be 48 hours. This time corresponds with the time the decaying food had been in the stomach. Was that food the cause of the stomach getting out of order? If it was, the onus was on the defendant to shew that such food had been given to the mare in proper quantities.

Where death results from indigestion which may have resulted from overfeeding or from natural causes with proper feeding, the onus, in my opinion, is upon the defendant to negative overfeeding for the time that the undigested food was in the stomach.

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Lamont, J.A.

In this case from 24 to 48 hours. This would cover the last feed the mare had in Regina, as well as the noon and evening meals of sheaf oats. The defendant failed to shew the quantity of feed the mare had at any meal excepting the last. If the time he saw "4 or 5 sheaves between the two" being fed was the noon meal on September 3, such feed, if five sheaves were given, was more than the usual feed, for McDonald says two sheaves to a working horse is the usual feed. Furthermore, all the witnesses, including Dr. Boucher, say, that in changing from hay and old oats to new sheaf oats, less than an ordinary feed should be given at first.

I am, therefore, of opinion that the defendant has failed to shew circumstances which negative overfeeding on his part, for the time the undigested food was in the stomach, and is, therefore, liable for the loss. The appeal, in my opinion, should be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for the sum of $165, with interest from September 3, 1919, and costs. *Appeal allowed.*

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STRAPAZON v. OLIPHANT MUNSON COLLIERIES Ltd.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Ives, JJ. July 6, 1920.

MASTER AND SERVANT (§ II C—75)—DANGEROUS PREMISES—HIGH EXPLOSIVES NECESSARY TO BUSINESS—EXPLOSION—LIABILITY FOR DAMAGES.

Where the possession and use of a high explosive is a commonly known part of the operation of a man's business, and where such explosive suddenly and without explicable cause explodes, no liability attaches in favour of those who knew of its presence and whose work to their knowledge brought them into proximity with it unless there has been an absence of the degree of care which is proper to be exacted in the circumstances.

[*Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, distinguished.]

Statement.

APPEAL from a judgment of Hyndman, J., in an action for damages for injury caused by an explosion in a mine. Affirmed.

Frank Ford, K.C., for plaintiff.

J. M. Macdonald, for defendant.

Harvey, C.J.

HARVEY, C.J.:—After long and anxious consideration I have come to the conclusion that the plaintiff cannot succeed and that the appeal should be dismissed with costs.

I cannot agree that the principle of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, applies so as to make the defendants liable at

all events. The explosives are not like water as in that case, nor gas or electric currents as in other cases, all of which require to be kept confined in order to prevent injury. The explosives without the operation of some other agency will not cause injury, and we have been referred to no authority which will extend the principle to such a case.

They are, however, extremely dangerous unless handled with the utmost care, and no doubt a special duty is imposed on the defendants in respect of them. The only respect in which it is contended that they failed in this regard is in keeping the explosives in the lamp house an unnecessary length of time and the evidence as to this is of the most casual nature. At the close of the plaintiff's case, there was not a word shewing any negligence in this regard, and the facts disclosing it, insofar as it is established, are brought out in a few sentences of cross-examination of one of the defendants' witnesses.

So far as one can gather from the reasons for judgment and the general evidence the plaintiff rested his case upon the claim that he was ordered by the defendants' superior officers to go where he was in danger and in consequence of which he suffered the injury. The trial Judge finds against him on this and I doubt whether it is of any legal consequence in any event since, at the time, the plaintiff was not subject to the orders of the defendants.

Under the circumstances I would hesitate to decide in the plaintiff's favour on the evidence given, but even if negligence has been established in this respect, I cannot satisfy myself that it was what has, in some of the cases, been called the *causa causans* of the injury.

The plaintiff knew of the risk and was warned and took precautions to avoid it. Afterwards when he thought, and in my opinion had reasonable ground for thinking, that the risk was over, and, therefore, was not negligent in his conduct, he deliberately and voluntarily put himself in the place of danger. It is true that, but for the defendants' acts in putting the explosives in the place where they were, the injury would not have resulted, but that is the situation always in cases of negligence, but under our law the defendant is not liable if notwithstanding his negligence the plaintiff's own negligence is the immediate cause of

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the injury. The reason for that is that it is the plaintiff's act and not the defendants' which is the real cause of the injury.

I see no reason for distinguishing between acts of the plaintiff in this respect as regards negligence. If it was the plaintiff's act, whether it was an act of negligence or not, which was the cause of the injury, the defendant is relieved. I think on this ground, therefore, the plaintiff must fail, though I cannot avoid expressing the view that since what he was doing was purely and simply the expression of his better nature when he was assisting in trying to save his employer's property, a reciprocal expression on the part of the defendants would be becoming.

Stuart, J.

STUART, J.:—In *Parry* v. *Smith* (1879), 4 C.P.D. 325, at page 327, Lopes, J., stated what seems to me to be the correct principle of law with which we must begin in this case. He said:—

> I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to by-standers. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract.

By adopting this opinion as a starting point, I, of course, obviously take the view that negligence must here be shewn to support the appellant's case, but that with such a substance as an explosive used in blasting in a mine, a failure to exercise the highest possible degree of care would amount to negligence.

Such an explosive is, I think it may be taken as admitted, a substance in common use in blasting and mining operations. My view, therefore, is, that if, without negligence in the stringent sense in which that failure of duty is to be interpreted in such a case, the explosive suddenly and without explicable cause, does explode no liability would attach to the person possessing it in favour, at least, of those who knew of its presence and whose work to their knowledge necessarily brought them into proximity with it.

Possibly, the principle of *Rylands* v. *Fletcher*, *supra*, would apply in favour of persons passing along a highway or occupying an adjoining property but having no connection at all with the business of the person having the dangerous substance in his possession. In favour of such people, the possessor would probably keep the substance at his own risk if he kept it so near the boundary of his own property that an explosion would injure them, and, perhaps, in the absence of statutory authority, the greatest degree of care would not excuse him.

But where the possession and use of the explosive is a commonly known part of the operation of a man's business, the persons who, with knowledge of this, come into proximity to the explosive can surely only complain where there has been an absence of the degree of care which is proper to be exacted in the circumstances.

I am inclined to agree with the view which I understand is expressed by Beck, J., that the keeping of the explosive an unnecessarily long time in proximity to the persons engaged in work around the mine might be treated as a failure to exercise the utmost care because no doubt the chances of an explosion from any cause are increased in proportion to the time the article is allowed to lie there unused.

But, even assuming that there was for this reason an absence of the utmost degree of care, we are still confronted with the problem whether this failure of duty was the real cause of the accident. The plaintiff saw the fire, he knew, as all did, that there were dangerous explosives there. He undoubtedly heard the preliminary and minor explosions. His work even then did not take him into proximity to the danger. True he must have thought that the danger was over, for otherwise he surely would not have gone where he did. But, unless he was falsely informed by someone, upon whose knowledge he was entitled to rely, that the danger was over, and that everything dangerous had already been burnt up or had exploded, I am unable to discover any ground of liability. I doubt if false information even would establish liability unless it passed beyond what would obviously be a mere expression of opinion and was known to be false by the person giving it. Possibly, an assurance by a person in authority given to one who was bound to go upon command

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Stuart, J.

would also establish liability but in the present case we have a finding that there was no command and along with that no real obligation to obey the command even if given. I would even go so far as to admit the possibility of liability in the absence of such a legal obligation to obey if there had been shewn a clear and unmistakable assurance in words by the managers that the danger was over, coupled, as no doubt it would have been, with a strong natural impulse, without legal obligation, to go and assist in protection of property. But I think the possibility of a liability upon such a ground is rather vague in point of law and in any case the trial Judge has found that there was no such verbal assurance. The possibility of liability seems to me to vanish entirely when the only assurance of safety that is suggested is based upon mere example in action and not upon spoken words.

I think, therefore, the appeal must be dismissed with costs.

Beck, J.

BECK, J. (dissenting):—This is an appeal from a judgment of Hyndman, J., dismissing the plaintiff's action—one for negligence.

The defendant company have coal mines which they carry on on a large scale and the numerous employees form a kind of hamlet in the close vicinity of the mines. The plaintiff was one of these employees. There was a "main magazine" kept for the storing of explosives needed and used in the getting out of coal, which was, apparently, situated at a safe distance from the work and the places frequented by the employees. There was also a small lamp house close to the mines; but it was also used as a place in which to put daily the explosives required for the next day's work. At the time of the accident the mine was running in three shifts in 24 hours beginning a short time before 8 a.m., 4 p.m., and 12 midnight. At that time there were about 60 men on the morning shift; about 30 on the afternoon shift and about 4 on the night shift; all mining.

The custom was to bring each day at about 4.30 or 5 p.m., from 3 to 6 cases of explosives from the main magazine to the lamp house, a quantity calculated as being sufficient for the three shifts on the following day. "It would not take perhaps ten minutes" to bring the supplies from the main magazine to the lamp house.

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Beck, J.

The general facts of the case are sufficiently set forth in the trial Judge's reasons for judgment.

The way the case presents itself to my mind is that the defendant company created, without sufficient reason or necessity, a situation which was hazardous to their employees generally during the hours from 4.30 or 5 p.m. till shortly before 8 in the morning while the supply of explosives needed at only 8 o'clock in the morning were lying in the small lamp house next to the blacksmith shop. That this was dangerous ought to have been appreciated from the bare fact that the explosives were commonly kept, according to custom, if not regulations, in a magazine in a safe, out-of-the-way place. The putting into the small lamp house and the keeping of them under the circumstances did, in fact, prove to be hazardous to the employees.

I think the creation of that situation constituted negligence for which the company is liable.

The same principle lies, I think, as the foundation of our recent decision in *Mulcahy* v. *E.D. & B.C.R.Co.* (1920), 53 D.L.R. 77. The trial Judge thought the plaintiff was not entitled to recover because he found that there had been no order or request by anyone on behalf of the company to the plaintiff to go and assist in extinguishing the fire or to save the contents of the blacksmith shop. To my mind, whether this is so or not, is of no consequence, the circumstances were such, if not to lay a moral obligation upon the workmen in the neighbourhood of the fire, at least to lead the well-disposed and good-hearted among them voluntarily to lend assistance. That is to attract them into immediate danger.

On the principle above indicated I think the plaintiff is entitled to recover. I would, therefore, allow the appeal with costs and refer the case back to the trial Judge to assess the damages upon the evidence.

Ives, J.

IVES, J.:—This is an appeal from the judgment of Hyndman, J.

The action is brought to recover damages for personal injuries. The facts shortly are:—the plaintiff is a miner and at the time of the accident was in the employ of the defendants who were operating a coal mine. The defendants kept a stock of explo-

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Ives, J.

sives on the premises for use in its mining operations and these explosives were stored in an isolated building used for the purpose. At some sufficient distance from this magazine was situate a building known as the blacksmith shop and it appears that the miners deposited their tools there when they brought them from the mine at the end of their shift of work, but this plaintiff did not have his tools there on the day of the fire. Almost abutting this blacksmith shop was a shed-like building called the lamp house in which was kept a supply of explosives sufficient to meet the mine's need for 24 hours. This 24 hour supply was taken daily from the magazine and put in this shed about 6 p.m. and on the day of the accident the supply for the following day had been brought to the shed before the fire. About 7 p.m. of May 14, 1918, fire started in this shed containing the daily supply of powder. Warning of it was given by the blowing of a whistle at the engine house, and employees off shift to the number of perhaps a hundred sought safety in distance, the superintendent Mr. Brownrigg, warning them to keep back, and himself setting an example by going away from the scene of the fire in a westerly direction to a safe distance. A number of detonations were heard from time to time as the fire progressed, until finally the roof fell in but no heavy explosion had occurred. After the building had collapsed, men were seen to be returning to the scene of the fire and were concentrating on the blacksmith shop to get out the tools. Brownrigg, Oliphant and Thom followed and directed an organized effort to try and save the blacksmith shop. An explosion took place in the ruins of the shed, killing Mr. Brownrigg and injuring this plaintiff, who at the time was aiding in the effort to save the blacksmith shop.

The plaintiff swears that Brownrigg, when he started on his return to the fire, in the presence of Oliphant, Thom, and Williams ordered him to "come on and help put out the fire" or words to that effect. This is denied by Oliphant and Williams and the trial Judge says:—"I come to the conclusion that he was acting as a mere volunteer and not under orders." Add to this finding on the evidence by the trial Judge, the evidence of the plaintiff himself who says that he was a miner of 16 years' experience, accustomed to the handling and use of powder and,

when Brownrigg and Oliphant told him to "go and help save the blacksmith shop" he "was afraid to go." He was certainly under no obligation to go. He was not subject at the time to his master's orders as it was between his shifts of work.

The only fact distinguishing the position of this plaintiff from that of a stranger is the fact of the employment of this plaintiff by the defendant and I have come to the conclusion that this fact is not relevant.

Granting for the sake of argument that it is the duty of the defendant to make and keep safe not only that part of its premises where the employee actually worked, but all its premises where, in off hours, the employees might be, and I am not prepared to admit so much, the trial Judge finds that the defendant first warned the employees to seek a place of safety, that this plaintiff was in a place of safety and that he received no order from anyone to depart from his safe place and no assurance from anyone in words that the danger was past. Couple with this finding the plaintiff's own testimony that he knew of the daily practice of placing a day's supply of explosives in this building, that he had almost daily gone there for what explosives he required in his own work, and he knew of the presence of explosives in the burning building, that he had handled explosives as a miner for 16 years, that he knew the result of the contact of fire with powder and that at the time he was *afraid* to go to the scene of the fire, and the result is I think that in strict law the plaintiff was a stranger volunteer.

I cannot think that the mere return of Brownrigg with and after other employees to the scene of the fire and the return of other employees, should revive any liability which existed in the defendant before the warning to seek safety given after the danger arose. In view of the findings of the learned trial Judge and the testimony of the plaintiff, to which I have referred, I would say that, in my opinion, he deliberately walked to his own injury.

I would dismiss the appeal with costs.

Appeal dismissed.

MAN.

C. A.

MOGGEY v. BLIGHT.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. June 25, 1920.

NEW TRIAL (§ IV—30)—NEW EVIDENCE—DISCOVERY OF—SUFFICIENCY OF IN ORDER TO OBTAIN.

A new trial will not be granted as a matter of course where the applicant can shew that new evidence of a material character has been discovered. He must also shew: (1) That the evidence could not, with reasonable diligence have been discovered and have been given before, (2) that the evidence is not merely verbal corroboration of evidence given at the trial; (3) that the evidence is such that there is a reasonable probability that if a new trial is proceeded with a different verdict to that in the former trial will be given.

[*Trumble* v. *Hortin* (1895), 22 A.R. (Ont.) 51; *Anderson* v. *Titmas* (1877), 36 L.T. 711; *Murtagh* v. *Barry* (1890), 24 Q.B.D. 632; *Brown* v. *Dean*, [1909] 2 K.B. 573; [1910] A.C. 373, followed; *Sklar* v. *Borys* (1917), 10 S.L.R., referred to.]

Statement. APPEAL from an order of a County Court Judge, granting a new trial on the ground of newly discovered evidence.

J. P. Foley, K.C., for appellant; *P. C. Locke*, for respondent.

Perdue, C.J.M. PERDUE, C.J.M.:—This is an appeal from an order made by His Honour Judge Barrett granting a new trial. The action is one of replevin brought in the County Court of Portage la Prairie to recover possession of a cow and her calf, valued at $130, which the plaintiff claims as his property. The defendant states that he purchased the cow from one Brown and disputes the plaintiff's claim. The trial lasted 5 days, over 20 witnesses being examined. As the Judge states in his judgment on the motion for a new trial, the issue upon the trial narrowed itself down to the question of whether there was or was not a brand upon the cow that had been replevied. At the close of the case, the Judge desired to call further evidence upon that point and two witnesses were called by him. These witnesses, Dempsey and Fowler, after making an examination of the cow in question gave evidence to the effect that there was no brand upon her. The Judge states that the evidence of these two witnesses exercised some weight in causing him to decide, as he thereupon did, in favour of the defendant.

A week after judgment had been given in the case, the witness Fowler made a further examination of the cow for the purpose of again searching for the mark of a brand upon her. On this second examination, which lasted about 2 hours, he claims to have found marks of a brand on the upper left hip of the animal in the very spot he had examined a week before when he had found none. The plaintiff applied to the Judge for a new trial on the ground that this new evidence had been discovered. The Judge granted

MAN.

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the application and ordered a new trial. From that order this appeal is brought.

Under sec. 328 of the County Courts Act, R.S.M. 1913, ch. 44, a new trial or a re-hearing may be granted by the Judge "upon sufficient cause being shewn for that purpose." No doubt, the Judge has a wide measure of discretion in granting or refusing applications of this nature, but it is a judicial discretion which must be exercised in accordance with the established principles governing the granting or refusing of new trials: *Murtagh* v. *Barry* (1890), 24 Q.B.D. 632; *Brown* v. *Dean*, [1909] 2 K.B. 573; affirmed, [1910] A.C. 373; *Sklar* v. *Borys* (1917), 10 S.L.R. 359. This is not a case of the discovery of new evidence which could not, with reasonable diligence, have been adduced at the trial. It is a case where a witness who had given testimony at the trial declares that he has since discovered that that testimony was erroneous and that he is now prepared to state something quite contrary to it. To grant a new trial in order to receive such evidence would be, in my opinion, without precedent and contrary to the interests of justice. In *Hanson* v. *Ross* (1914), 42 N.B.R. 650, McLeod, C.J., said, at page 656: "It would be manifestly improper to grant a new trial because a witness who was examined on behalf of the defendant claims that he could on a new trial give some different evidence."

There is the further objection that the proposed new evidence would be merely corroborative or cumulative in respect of other evidence given by plaintiff's witnesses and contradicted by witnesses called by the defendant. See *Trumble* v. *Hortin* (1895), 22 A.R. (Ont.) 51; *Anderson* v. *Titmas* (1877), 36 L.T. 711; *Howarth* v. *McGugan* (1893), 23 O.R. 396; *Riverside Lumber Co.* v. *Calgary Water Power Co.* (1916), 28 D.L.R. 565.

With great respect, I think the appeal should be allowed, and the order granting a new trial set aside. The plaintiff must pay the costs of this appeal and of the application to the County Court Judge for a new trial.

Fullerton, J.A.

FULLERTON, J.A.:—Sec. 328 of the County Courts Act, R.S.M. 1913, ch. 44, provides that "a new trial may be granted, or a judgment reversed or varied, in any action, suit, matter or proceeding, *upon sufficient cause being shewn for that purpose.*"

New trials are not granted as a matter of course where the applicant can shew that new evidence of a material character

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has been discovered. He must also shew: (1) That the evidence could not, with reasonable diligence, have been discovered, and have been given before; (2) that the evidence is not merely verbal corroboration of evidence given at the trial; (3) that the evidence is such that there is a reasonable probability that if the new trial is proceeded with a different verdict to that in the former trial will be given. *Trumble* v. *Hortin*, 22 A.R. (Ont.) 51; *Anderson* v. *Titmas*, 36 L.T. 711.

The point involved in this case is the identity of a cow which the plaintiff attempted to prove was branded with his brand. Ten witnesses were called by the plaintiff and nine by the defendant, all of whom gave evidence as to the brand. The trial Judge then appointed two men—Fowler and Dempsey—to examine the cow, both of whom swore that the cow was not branded and judgment was then given for the defendant.

Plaintiff applied under sec. 328 of the County Courts Act for a new trial, on the ground of newly discovered evidence and also on the ground that Fowler had made another examination and discovered that the cow was branded with the plaintiff's brand.

The plaintiff deposes that since the conclusion of the trial he has been informed by a large number of reliable and creditable men that they have made an examination of the cow in question and have discovered and been able to discern plainly the marks and brands on the left hip of the cow as described by the plaintiff in his evidence at the trial.

Such evidence cannot, in any sense, be said to be newly discovered evidence, and in any event would be merely corroborative of the evidence given by the ten witnesses called on behalf of the plaintiff.

The sole point then which is left to the plaintiff is the alleged mistake of the witness Fowler. Fowler, before the trial, examined the cow for fifteen minutes and could find no brand. After the trial he says he made an examination lasting two hours and discovered the brand. It appears to me that under these circumstances his evidence on the new trial would be of little weight.

The costs already incurred are out of all proportion to the amount involved, and I think it is in the interest of both plaintiff and defendant that the litigation should be ended. I would allow the appeal.

Cameron, J.A.
Haggart, J.A.
Dennistoun, J.A.

CAMERON, HAGGART and DENNISTOUN, JJ.A., concurred in the result. *Appeal allowed.*

ANNOTATION

Annotation.

BANKRUPTCY ACT OF CANADA, 1920.

9-10 George V., Chapter 36, 1920

THE ACT CONSIDERED BY SECTIONS WITH NOTES ON EACH SECTION AS SUBDIVIDED UNDER THE VARIOUS HEADINGS

by

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1. INTRODUCTION.

A bankruptcy law means a system created by statute by which an insolvent debtor may on petition to the Court be adjudicated bankrupt. Possession is taken of the debtor's property, under order of the Court, the same is distributed proportionately amongst his creditors and the bankrupt and his after acquired property is, in the discretion of the Court, discharged from debts provable in bankruptcy existing at the institution of the bankruptcy proceedings.

The Bankruptcy Act which came into force on the first day of July, 1920, is the third Bankruptcy Act which the Parliament of Canada has passed. The first Act was passed in 1869. This Act was repealed by the Insolvency

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Act of 1875 which after being in operation for about five years was repealed, chiefly on the grounds that the administration of the Act was too expensive and cumbersome. Since the repeal of the Act of 1875 several other Bankruptcy Acts were introduced in the House of Commons, but they never reached the final reading, one, at least, was promptly killed by the financial interests because it provided for the abolishment of preferences to creditors.

Bankruptcy law has two objectives: one the expeditious and economical distribution of the debtor's assets, and, secondly, a release of the debtor from his creditors when the debtor has not been guilty of any misconduct or fraud, and has surrendered all his assets.

This Act is largely based on the English Bankruptcy Act, 1914, 4-5 Geo. V. ch. 59. The English Act is a consolidation of the Acts of 1883, 1890, and 1913.

The rules are also based on the English Bankruptcy rules and are to have the same effect as if enacted by the Act, are to be judicially noticed, but must not extend the jurisdiction of the Court.

2. *CONSTITUTIONALITY OF THE ACT.*

The Act is a direct interference with the property, estate and civil rights within a Province of a debtor residing in the same or another Province, and the question arises has the Dominion Parliament jurisdiction to enact the present legislation. It is submitted that it has.

Under the British North America Act the Dominion Parliament has exclusive jurisdiction in respect of "The Regulation of Trade and Commerce" (sec. 91, clause 2), and in respect of "Bankruptcy and Insolvency" (sec. 91, clause 21). These are expressly enumerated in the classes of subjects assigned to the Parliament of Canada.

Each Provincial Legislature has exclusive jurisdiction in respect of "Property and Civil Rights in the Province" (sec. 91, clause 13), and in respect of "Generally all matters of a merely local or private nature in the Province" (clause 16).

At the time when the British North America Act was passed bankruptcy and insolvency legislation existed and was based on very similar provisions both in Great Britain and the Provinces of Canada. In 1869 the Dominion Parliament passed an Insolvency Act. This Act was repealed by a new Insolvency Act of 1875, which, after being twice amended, was, together with the amending Acts, repealed in 1880.

The Insolvency Act of 1875 was held by the Judicial Committee of the Privy Council to be *intra vires* the Dominion Parliament. *Cushing* v. *Dupuy*, 5 App. Cas. 409; 49 L.J. (P.C.), 63. That Act, in addition to provisions usual in such enactments for the compulsory transfer of the insolvent's assets to the assignee in insolvency and for the realization and distribution among creditors, contained provisions for proceedings in the Courts, and, amongst others, one which made the decisions of certain Courts in insolvency litigation final, so far as any appeal as of right was concerned. These provisions were attacked as being laws in relation to (1) "property and civil rights in the Province" and (2) "procedure in civil matters"—sec. 91, clause 14. They were, however, upheld as relating to "bankruptcy and insolvency."

Sir Montague Smith in giving judgment in the above case said:—

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"It was contended for the appellant that the provisions of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the legislature of the province. The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some special mode of procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them."

After the repeal of the Insolvent Act of 1875, the Ontario Legislature passed the Assignments and Preferences Act. Section 9 of the latter Act (now sec. 14, R.S.O., 1914, ch. 134) which postpones judgments and executions not completely executed by payment to the assignment for the general benefit of creditors was attacked as "bankruptcy and insolvency" legislation.

The Judicial Committee of the Privy Council in *Re Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A.C. 189, decided that such legislation was within the competence of the Provincial Legislature so long as it did not conflict with any existing bankruptcy legislation of the Dominion Parliament. Lord Herschell in pronouncing judgment stated at page 200:—

"It is not necessary in their Lordships' opinion nor would it be expedient to attempt to define what is covered by the words 'bankruptcy' and 'insolvency' in section 91. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships the learned counsel for the respondents were unable to point to any scheme of bankruptcy or insolvency legislation which did not invlove some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate. In their Lordships' opinion these considerations must be borne in mind when interpreting the words 'bankruptcy' and 'insolvency' in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question relating as they do to assignments purely voluntary do not infringe on the exclusive legislation power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme

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of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislatures. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislatures would doubtless be then precluded from interfering with this Legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects as might properly be treated as ancillary to such a law, and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the Provincial Legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence."

The decisions of the Judicial Committee of the Privy Council on the constitutionality of certain legislation passed by the Dominion Parliament under other clauses of sec. 91 which purported to give exclusive juridsiction to the Dominion Parliament throw light on the subject. It had been uniformly held that Dominion legislation in such matters which affects "property and civil rights" and "procedure within the Province" is *intra vires* the Dominion Parliament provided that for the proper enforcement and to give full effect to the Dominion legislation it is necessary to encroach upon the matters assigned to the provincial legislatures and to such extent only.

It was held in *Valin* v. *Langlois*, 5 App. Cas. 115, that the Dominion Act imposing upon certain existing provincial Courts the duty of determining election petitions relating to Federal elections was *intra vires* the Dominion Parliament, as not a law in relation to administration of justice in the provinces including the constitution, maintenance and organization of provincial Courts. Section 92, clause 14.

In *Citizens Insurance Co.* v *Parsons*, 7 App. Cas. 96, 51 L.J. (P.C.) 11, it was held that an Act of the Province of Ontario providing for uniform conditions in fire insurance policies which was attacked as being legislation in relation to "the regulation of trade and commerce" was *intra vires* the Ontario Legislature relating to "property and civil rights in the Province" Sir Montague Smith stated that the two sections 91 and 92 of the British North America Act must be read together and the language of one interpreted and where necessary modified by that of the other It becomes necessary, as soon as an attempt is made to construe the general terms in which the classes of subjects in clauses 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited.

In *Russell* v. *Regina*, 7 App. Cas. 829, it was held that the Canada Temperance Act, which was attacked as invading provincial rights in three respects: (1) "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes;" (2) "property and civil rights in the province;" (3) "generally, all matters of a merely local or private nature in the province" was *intra vires* the Dominion Parliament.

In *Bank of Toronto* v. *Lambe*, 12 App. Cas. 175, an Act of the Province of Quebec imposing taxation upon banks carrying on business in the Province, the amount of the tax depending in part upon the amount of the bank's

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paid-up capital and in part upon the number of its branches in the Province, was attacked on the ground that it was not direct taxation with the Province, and that banks as the offspring of federal legislation were not proper subjects of provincial legislation. It was held *intra vires* the Quebec Legislature as legislation in relation to "direct taxation within the Province in order to the raising of a revenue for provincial purposes" (sec. 92, clause 2).

In *Tennant* v. *Union Bank*, [1894] A.C. page 31, a provision in the Dominion Bank Act which empowered banks to take warehouse receipts as collateral security for the re-payment of moneys advanced to the holders of such receipts was contested as legislation in relation to "property and civil rights in the Province" and therefore *ultra vires* the Dominion Parliament. The Judicial Committee of the Privy Council however were of the opinion that though it did affect such rights, it interfered with them no further than the fair requirements of a banking Act would warrant and they upheld the law as one relating to banking under section 1, clause 15. The principle is well laid down by Lord Watson, who gave judgment in this case, in the following language:—

"Section 91 gives the Parliament of Canada power to make laws in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the legislatures of the provinces and also exclusive legislative authority in relation to certain enumerated subjects. . . . Section 92 assigns to each provincial legislature the exclusive right to make laws in relation to the classes of subjects therein enumerated. . . . The objection taken by the appellants to the provisions of the Bank Act would be unanswerable if it could be shewn that by the Act of 1867 the Parliament of Canada is absolutely debarred from trenching to any extent upon matters assigned to the provincial legislatures by section 92. But section 91 expressly declares that 'notwithstanding anything in this Act' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament so long as it strictly relates to those matters is to be of paramount authority. To refuse effect to this declaration would render nugatory some of the legislative powers specially assigned to the Canadian parliament. For example, among the enumerated classes of subjects in section 91 are 'patents of invention and discovery' and 'copyright'. It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces. . . . The power to legislate conferred by that clause (91) may be fully exercised, although with the effect of modifying civil rights in the province."

The result of the decision in *Tennant* v. *Union Bank* is that legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in section 91, is of paramount authority even though it trenches upon the matters assigned to the Provincial Legislature by section 92.

Attention is drawn to the following cases:—*Attorney-General* (*Ontario*) v. *Attorney-General* (*Canada*), [1896] A.C. 348; *Attorney-General* (*Canada*) v. *Attorney-Generals Ontario, Quebec, Nova Scotia* (*Fisheries Case*), [1898] A.C. 700; *G.T.R.* v *Attorney-General* (*Canada*), [1907] A.C. 65; *Toronto* v. *C.P.R.*, [1908] A.C. 54; *Montreal* v. *Montreal Street Railway*, 1 D.L.R. 681, [1912] A.C. 333, 13 Can. Ry. Cas. 541; *Attorney-General* (*Ontario*) v. *Attorney*

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General for Canada (*References Case*), [1912] A.C. 571; *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330; *Bonanza Creek* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566; *Attorney-General* (*Canada*) v. *Attorney-General* (*Alberta*), 26 D.L.R. 288, [1916] 1 A.C. 588; *Attorney-General* (*Ontario*), v. *Attorney-General* (*Canada*), 26 D.L.R. 293, [1916] 1 A.C. 598.

The present Bankruptcy Act, which is based largely on the Imperial Act, appears to be bankruptcy or insolvency legislation of the character referred to in *Cushing* v. *Dupuy*, 5 App. Cas. 409, and in *Re Attorney-General* (*Ontario*) v. *Attorney-General* (*Canada*), [1894] A.C. 189, and in view of the Privy Council's decisions above referred to *intra vires* the Dominion Parliament.

3. EFFECT OF THE ACT UPON CONFLICTING PROVINCIAL STATUTES.

The Privy Council in *Re Att'y-Gen'l* (*Ontario*) v. *Att'y-Gen'l* (*Canada*), [1894] A.C. 189, held that the Provincial Legislature had authority to pass certain legislation which was ancillary to bankruptcy and insolvency legislation in the absence of bankruptcy or insolvency legislation by the Dominion Parliament. As the Dominion Parliament introduced no bankruptcy or insolvency legislation, the different Provinces passed assignments and preferences Acts which had the effect, on an assignment for the benefit of creditors being made, of postponing thereto judgments and executions not completely executed by payment and providing for a rateable distribution of all the assets of the debtor amongst his creditors. In the absence of bankruptcy and insolvency legislation by the Dominion Parliament these provincial Acts were clearly *intra vires*.

The present Bankruptcy Act provides that on the making of a receiving order the trustee shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by the Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt or shall commence any action or other legal proceedings unless with the leave of the Court. (Section 6.)

Section 9 of the Act provides that an insolvent debtor whose liabilities exceed $500.00 may make an authorized assignment; that is, an assignment to a trustee authorized by the Act. The section further provides that every assignment made by an insolvent debtor other than an authorized assignment for the general benefit of his creditors shall be null and void. Section 3 provides that a debtor who makes an assignment for the benefit of his creditors commits an act of insolvency. These sections are in direct conflict with the Assignments and Preferences Acts. Any assignment made under these Acts by a debtor is null and void in so far as the effect of the provision of the Bankruptcy Act.

Section 11 of the Act provides that every receiver order in every authorized assignment shall take precedence over (a) all attachments of debts unless the debt involved has been actually paid over, and (b) all other attachments, executions or other process against the property except such thereof as have been completely executed by payment.

Sections 6 and 11 above referred to directly relate to civil procedure incident to bankruptcy legislation and would repeal by implication any conflicting provincial statutes.

Annotation.

Sections 29, 30, 31, 32 and 33 of the Act deal with fraudulent conveyances. The provisions of these sections are broader than the sections in the Assignments and Preferences Acts touching upon the same subjects.

Having regard to the decisions of the Privy Council above referred to, and particularly what was stated by Lord Herschell in *Re Att'y-Gen'l (Ontario)* v. *Att'y-Gen'l (Canada)*, [1894] A.C. 200, that "Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament"—it would appear that all provincial legislation which has any bearing upon or deals with any of the matters mentioned in the Act, should be carefully considered, and if in conflict with the provisions of the Act, or if the effect of such provincial Acts is an interference with the bankruptcy legislation, then such legislation would be *ultra vires* the Provinces.

4. *GENERAL EFFECT OF THE ACT.*

The Act provides for three methods of distribution of the debtor's assets and the administration of his estate: (1) Adjudicating the debtor a bankrupt by making an order called a receiving order for the protection of the debtor's estate (sec. 4, sub-sec. 5); (2) the execution by an insolvent debtor of an authorized assignment; that is an assignment made by him for the general benefit of his creditors to a trustee authorized by the Act to act as trustee, (sec. 9), and (3) a composition, extension or scheme of arrangement submitted by the debtor in writing and approved of by the creditors and the Court (sec. 13).

1. The procedure to adjudicate a debtor a bankrupt is by obtaining a receiving order. The order is obtained upon petition duly verified by affidavit by a creditor having a debt amounting to not less than $500.00. The application is made to a Bankruptcy Court, which, under section 65 of the Act, is the Supreme Court or the High Court of the Province. To support a petition there must have been an act of bankruptcy committed by the debtor within six months before the date of the presentation of the petition. Section 3 of the Act sets forth very clearly what constitutes an act of bankruptcy. The making of an assignment by a debtor, whether an authorized assignment or not, a fraudulent conveyance, a fraudulent preference, absconding, an unsatisfied execution, his goods sold by a sheriff, or having no goods to be found, constitute acts of bankruptcy. A debtor may also commit an act of bankruptcy by exhibiting at any meeting of his creditors a statement of his assets and liabilities which shews that he is insolvent. If the debtor assigns or disposes of any of his goods with intent to defraud or delay his creditors, or if he makes any bulk sale of his goods contrary to the provisions of the Bulk Sales Act, he also commits an act of bankruptcy. A petitioning creditor to obtain an order must have proof to support his debt. If the Court is not satisfied with the proof it may, however, adjourn the proceedings in order to enable a creditor to prove his debt. In case of an authorized assignment being made the Court may instead of adjudicating the debtor a bankrupt and making a receiving order, continue the proceedings under the authorized assignment provided, of course, that it appears that the estate can be best administered under the assignment. The Court is empowered to make an order for an interim receiver if it is shewn to be necessary for the protection of the estate.

Annotation.

2. An insolvent debtor whose liabilities to creditors exceed $500.00 may at any time prior to the making of a receiving order against him make to an authorized trustee in his locality an assignment of all his property for the general benefit of his creditors. This assignment is made in pursuance of the Act and vests the trustee with all the powers for the distribution of his property as provided in the Act. Section 9 expressly provides that every assignment other than an assignment of this character made by an insolvent debtor for the general benefit of his creditors shall be null and void.

The Act contains provisions making effectual the receiving order and an authorized assignment for the benefit of creditors. Upon the making of the receiving order or an authorized assignment all attachments, debts, executions and other process not completely executed by payment cease to have priority (sec. 11) and no creditor shall have any remedy against the property or person of the debtor in respect of his debt, or shall commence any action or other legal proceedings except with the leave of the Court (sec. 6). It is provided that inspectors shall be appointed, the claims of the creditors shall be proved, the assets distributed and all proceedings taken by the trustee for the economical and expeditious winding-up of the estate. The preferential lien of the landlord and other preferred claims are duly protected. Adequate provision is made for the setting aside of all fraudulent conveyances or preferences and the legislation in this particular is much broader than that now in force in the Provinces. Sections 58, 59 and 60 provide for the discharge of the bankrupt upon application being made to the Court. The procedure for obtaining a discharge and the grounds that must be shewn in that connection are set forth in detail in those sections. If the bankrupt or authorized assignor has not received his discharge and he obtains credit to the extent of five hundred dollars or upwards from any person without informing that person that he is an undischarged bankrupt or an undischarged assignor, or if he engages in any trade or business under a name other than that under which he was adjudicated bankrupt or made such authorized assignment without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt or made such authorized assignment by virtue of section 90 shall be guilty of an indictable offence and liable to a fine not exceeding five hundred dollars and to a term not exceeding one year's imprisonment, or to both.

3. Section 13 provides that an insolvent debtor may either before or after the making of a receiving order or the making of an authorized assignment submit to an authorized trustee in writing a proposal for a composition in satisfaction of his debts or an extension of time for payment thereof, or a scheme of arrangement of his affairs. The trustee may thereupon convene a meeting of the creditors for the consideration of such proposal. If the creditors and the Court approve of the proposal the same is binding on all the creditors. The Court may require security to be given for the carrying out of the proposal agreed upon. Ample provisions have been made to safeguard the creditors' interests

5. *THE ACT CONSIDERED BY SECTIONS WITH NOTES THEREON.*

SHORT TITLE.

1. This Act may be cited as The Bankruptcy Act.

2. The original section 2 of the Act has been amended by the Bankruptcy Act Amendment Act, 1920, and as amended is as follows:

Annotation.

(*a*) "affidavit" includes statutory declaration and affirmation;

(*b*) "alimentary debt" means a debt incurred for necessaries or maintenance.

Attention is drawn to section 61 (c) which provides that an order of discharge of a bankrupt shall not release the bankrupt or authorized assignor from any liability for alimony.

(*c*) "appeal court" means the court having jurisdiction in bankruptcy, under this Act, on appeal.

Under section 63 (3) the courts named in that sub-section are constituted appeal courts of bankruptcy.

(*d*) "assignment" includes conveyance.

This definition is very extensive. See section 9 with reference to the effect of an assignment.

(*e*) "assignor" means the maker of an assignment, whether under this Act such maker may lawfully make such assignment or such assignment may lawfully be made, or not;

(*f*) "authorized assignment" means an assignment made as provided in this Act to an authorized trustee by an authorized assignor of all his property for the general benefit of his creditors.

Section 9 provides for an authorized assignment. Section 3 constitutes such an assignment as an act of bankruptcy.

(*g*) "authorized assignor" means an insolvent assignor whose debts provable under this Act exceed five hundred dollars.

If an insolvent debtor makes an assignment other than to an authorized trustee the assignment is void. See section 9.

(*h*) "available act" "act of bankruptcy" means an act of bankruptcy available for a bankruptcy petition at the date of the presentation of a petition on which a receiving order is made.

See section 3 for definition of an act of bankruptcy.

(*i*) "banker" includes any person owning, conducting or in charge of any bank or place where money or securities for money are received upon deposit or held subject to withdrawal by depositors.

See section 88, which provides that nothing in the provisions of this Act shall interfere with or restrict the rights and privileges conferred upon banks and banking corporations by the Bank Act.

(*j*) "bank" or "chartered bank" means an incorporated bank carrying on the business of banking under the Bank Act;

(*k*) "corporation" includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the Provinces of Canada, and any incorporated company, wheresoever incorporated, which has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies.

This definition would cover every corporation doing business in Canada with the exceptions referred to. Sub-section "O" of this section should be read in conjunction with this sub-section.

(*l*) "court" or "the Court" means the Court which is invested with original jurisdiction in bankruptcy under this Act.

Section 63 specifies what courts are constituted courts of bankruptcy in the different Provinces.

(*m*) "creditor" with relation to any meeting held under authority of this Act, shall, in the case of a corporation, include bond-holder, debenture holder, shareholder and member of the corporation, and each class thereof shall in meeting express its views or wishes in manner prescribed by General Rules.

(*n*) "debt provable in bankruptcy" or "provable debt" or "debt provable" includes any debt or liability by this Act made provable in bankruptcy or in proceedings under an authorized assignment. **Annotation.**

Section 44 provides what debts are provable in bankruptcy and section 45 provides what proof shall be given in support of such debts.

(*o*) "Debtor" includes any person whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him, or any authorized assignment was made by him, (*a*) was personally present in Canada, or (*b*) ordinarily resided or had a place of residence in Canada, or (*c*) was carrying on business in Canada personally or by means of an agent or manager, or (*d*) was a corporation or a member of a firm or partnership which carried on business in Canada; and where the debtor is a corporation, as defined by this section, the Winding-up Act, 1906, ch. 144, shall not, except by leave of the Court, extend to or apply to it notwithstanding anything in that Act contained, but all proceedings instituted under that Act before this Act comes into force or afterwards, by leave of the Court, may and shall be as lawfully and effectually continued under that Act as if the provisions of this paragraph had not been made.

Sub-section "o" in the original Act was repealed and the above substituted thereof by the Bankruptcy Act Amendment Act, 1920.

FOREIGNER. Some nice questions have arisen as to whether a foreigner can be made bankrupt. The provision of our Act is broader than the English Act and it is submitted that a foreigner can be declared bankrupt, provided that the petitioning creditor complies in other respects with the provisions of the Act. It will be particularly noticed that in the definition of "debtor" it includes any person whether a British subject or not. Section 4 (D) of the English Act has not been incorporated in our Act. See *Re Pearson*, [1892] 2 Q.B. 263; *Cook* v. *Voleger Co.*, [1901] A.C. 102.

INFANTS. An infant being incapable of contracting except for necessaries cannot be adjudged a bankrupt even though he carries on business and for it obtains goods and credits. *Ex parte Jones, Re J.*, 18 Ch.D. 169. Contracts by infants for the repayment of money loaned, or for goods supplied or to be supplied (other than contracts for necessaries), and accounts stated with infants are, under the Infants Relief Act, absolutely void, and no action shall be brought on a promise after full age made by an infant to pay a debt contracted during infancy or a ratification of a promise or contract made during infancy. Therefore, a debt rendered void by that Act though ratified after the infant obtains majority will not be a good debt to support bankruptcy proceedings. *Ex parte Kibble*, L.R. 10 Ch. 373. It will be noted that the debt in this case was not incurred for necessaries.

MARRIED WOMEN. Married women can be made bankrupt. Married women under our laws have a completely independent status. Section 75 of the Act provides that every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the provisions of this Act as if she were a *feme sole*, and for all the purposes of this Act any judgment or order obtained against her, whether or not expressed to be payable out of her separate property shall have effect as though she were personally bound to pay the judgment, debt or sum ordered to be paid. Attention is also drawn to section 48 of the Act which provides for postponement of the husband's claim when he files a claim against her estate as a creditor, until all claims of the other creditors of his wife for valuable consideration have been satisfied. A claim filed by a married woman against her husband's estate is treated in the same manner.

Annotation.

LUNATICS. A lunatic, if he contracted the debt and committed the act of bankruptcy whilst sane, can be made a bankrupt. *Ex parte Stamp*, De Gex 345; *Ex parte Layton*, 6 Ves. 440. Section 85 provides that a lunatic may act by his committee or by the guardian or curator of his property.

CONVICTS. They can be made bankrupt. *Ex parte Graves*, 19 Ch. D. 1.

MEMBERS OF PARLIAMENT. The English Act provides for their disqualification upon being declared bankrupt. No corresponding provision appears in our Act.

PARTNERSHIPS. Section 76 provides that subject to such modifications as may be made by general rules, the provisions of this Act shall apply to limited partnerships in like manner as if limited partnerships were ordinary partnerships and, on all the general partners of a limited partnership being adjudged bankrupt or making an authorized assignment, the assets of the limited partnership shall rest in the trustee. It will be therefore seen that all partnerships and members of partnerships may be declared bankrupt. Section 85 provides that a firm may act by any of its members.

COMPANIES. The English Act excludes companies from its operation. Under our law any company incorporated or authorized to carry on business by or under any Act of the Parliament of Canada or any of the Provinces of Canada and any incorporated company wheresoever incorporated which has an office in or carries on business within Canada with the exception of building societies having a capital stock, incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies may, notwithstanding the Winding-up Act, be made bankrupt. Section 2 (K) and (O). It is especially provided that the Winding-up Act shall not, except by leave of the Court in such cases, extend or apply to such company. It is pointed out that all proceedings instituted under the Winding-up Act before the Bankruptcy Act comes into force or afterwards, by leave of the Court, may and shall be as lawfully and effectually continued under the Winding-up Act as if the Bankruptcy Act had not been passed. Section 85 provides that a corporation may act by any of its officers authorized in that behalf under the seal of the corporation.

WAGE-EARNERS. Section 8 provides that the provisions of Part One of the Act (which relate to receiving order) shall not apply to wage-earners. It would appear, however, that wage-earners can make an authorized assignment. Section 2 (kk) defines a wage-earner to mean one who works for wages, salary, commission, or hire at a rate of compensation not exceeding fifteen hundred dollars per year and who does not on his own account carry on business.

FARMERS. Section 8 provides that the provisions of Part One of the Act (which relate to receiving order) shall not apply to persons engaged solely in farming or the tillage of the soil. Farmers can, however, make an assignment under Part Two of the Act.

(*p*) "discharge" means the release of a bankrupt or authorized assignor from all his debts provable in bankruptcy or under an authorized assignment save such as are excepted by this Act. See sections 58, 59, 60, 61 and 62.

(*q*) "gazetted" means published in the Ontario Gazette.

See section 11, subsections 4, 5, 6 and 7.

(*r*) "general rules" includes forms.

Annotation.

The rules are based on the English rules and provide the procedure to be adopted on application to the Court. It is provided that the general practice of the Court in civil actions or matters before it, including the course of proceedings and practice in judges' chambers, shall in cases not provided for by the Act and amendments thereto, or these rules, and so far as the same are applicable and not inconsistent with the said Act or these rules, apply to all proceedings under the said Act.

(*s*) "goods" includes all chattels personal and moveable property.

The definition of "property" (sec. 2, subsection (dd)), should be read along with this subsection.

(*t*) "insolvent person" and "insolvent" include a person, whether or not he has done or suffered an act of bankruptcy, (i) who is for any reason unable to meet his obligations as they respectively become due, or (ii) who has ceased paying his current obligations in the ordinary course of business, or (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process would not be sufficient, to enable payment of all his obligations, due and accruing due, thereout.

See section 9 which provides that an assignment, other than an authorized assignment by an insolvent debtor, is void. See section 3 which provides that any statement submitted by a debtor of his assets and liabilities which shews that he is insolvent constitutes an act of bankruptcy.

(*u*) "judge" means a judge of the court which is by this Act invested with original jurisdiction in bankruptcy.

Section 63 of the Act together with the rules 2 and 63 should be read along with this definition.

(*v*) "judgment" or "execution" or "attachment" shall have operation as if by law the liability of married women thereon and thereunder were personal as well as proprietary.

See section 11 which provides that all receiving orders and authorized assignments shall take precedence of all judgments, executions, or attachments not completely executed.

(*w*) "local newspaper" means a newspaper published in and having a circulation throughout the bankruptcy district or division wherein the debtor has resided or carried on business for the longest period during the six months immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment.

See section 11 (4) which provides for publication of the receiving order and authorized assignment in the local newspaper.

(*x*) "locality" of a debtor (whether a bankrupt, assignor or person who has proposed a composition, extension or arrangement to or with his creditors) means either the place within a bankruptcy division or district whereat the debtor has carried on business at any time during the six months immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment, or where the greater portion of the property of such debtor is situate, or where the debtor resides.

The definition in the original Act was repealed and the above substituted therefor by the Bankruptcy Act Amendment Act, 1920. See section 4 (4) which provides that the bankruptcy petition shall be presented to the Court having jurisdiction in the locality of the debtor, and Section 9 which provides that an authorized assignment must be made to an authorized trustee for the debtor's locality.

(*y*) "oath" includes affirmation and statutory declaration.

(*z*) "ordinary resolution" means a resolution carried in manner provided by sub-section fourteen of section forty-two of this Act.

Section 42 provides for the meetings of creditors and under section 43 inspectors are appointed by ordinary resolution.

Annotation.

(*aa*) "person" includes corporation and partnership.

See previous annotations on corporations and partnerships *supra*.

(*bb*) "petition" means petition in bankruptcy.

Section 4 contains provisions with reference to the petition. See rules 74 to 91 inclusive.

(*cc*) "prescribed" means prescribed by General Rules within the meaning of this Act.

(*dd*) "property" includes money, goods, things in action, land, and every description of property, whether real or personal, movable or immovable, legal or equitable, and whether situate in Canada or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of, or incident to property as above defined.

See definition of goods in section 2 (s).

(*ee*) "registrar" includes any other officer who performs duties like to those of a registrar.

For the powers of the registrar, see section 65, and rules 4, 5, 6, and 20.

(*ff*) "resolution" means ordinary resolution.

For calling meetings of creditors and procedure at meetings of creditors, see section 42.

(*gg*) "secured creditor" means a person holding a mortgage hypothec, pledge, charge, lien or privilege on or against the property of the debtor, or any part thereof, as security for a debt due or accruing due to him from the debtor.

See sec. 6 (1) which provides that a receiving order shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as if he would have been entitled to realize or deal with it if sec. 6 (1) had not been passed. Section 51 deals with priority of claims and section 52 provides for the landlord preferential lien.

(*hh*) "Sheriff" includes bailiff or any officer charged with the execution of a writ or other process;

(*ii*) "special resolution" means a resolution decided by a majority in number of the creditors present, personally or by proxy, at a meeting of creditors and voting three-fourths in value of the proved debts on the resolution.

See sec. 42 as to meetings of creditors.

(*jj*) "trustee" or "authorized trustee" means, dependent upon the context, (*a*) one of the persons appointed by the Governor in Council, under authority of this Act as proper persons to be trustees in bankruptcy or otherwise hereunder, or (*b*) one of such persons named in a receiving order or in an authorized assignment to act, or who is otherwise hereunder authorized to act, as a trustee in bankruptcy, or under an authorized assignment or in connection with a proposal by a debtor for a composition, extension or arrangement to or with his creditors.

See sec. 6, and notes thereunder.

(*kk*) "wage-earners" means one who works for wages, salary, commission or hire at a rate of compensation not exceeding fifteen hundred dollars per year and who does not on his own account carry on business.

Sec. 8 provides that Part 1 of the Act relating to receiving orders shall not apply to wage-earners.

PART I.

BANKRUPTCY AND RECEIVING ORDERS.

Acts of Bankruptcy.

3. A debtor commits an act of bankruptcy in each of the following cases:—

(*a*) If in Canada or elsewhere he makes an assignment of his property to a trustee or trustees for the benefit of his creditors generally, whether it is an assignment authorized by this Act or not;

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(*b*) If in Canada, or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof;

(*c*) If in Canada or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this Act be void as a fraudulent preference if he were adjudged bankrupt;

(*d*) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of Canada, or, being out of Canada, remains out of Canada, or departs from his dwelling house, or otherwise absents himself, or begins to keep house;

(*e*) If he permits any execution or other process issued against him under which any of his goods are seized, levied upon or taken in execution to remain unsatisfied until within four days from the time fixed by the sheriff for the sale thereof, or for fourteen days after such seizure, levy or taking in execution, or if the goods have been sold by the sheriff or the execution or other process has been held by him after written demand for payment without seizure, levy or taking in execution or satisfaction by payment for fourteen days, or if it is returned endorsed to the effect that the sheriff can find no goods whereon to levy or to seize or take; provided that where interpleader proceedings have been instituted in regard to the goods seized, the time elapsing between the date at which such proceedings were instituted and the date at which such proceedings are finally disposed of, settled or abandoned, shall not be taken into account in calculating any such period of fourteen days;

(*f*) If he exhibits to any meeting of his creditors any statement of his assets and liabilities which shews that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;

(*g*) If he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his goods with intent to defraud, defeat or delay his creditors or any of them;

(*h*) If he makes any bulk sale of his goods without complying with the provisions of any Bulk Sales Act applicable to such goods in force in the Province within which he carries on business or within which such goods are at the time of such bulk sale.

This section is one of the most important sections of the Act, as it is necessary, on an application for a receiving order, to shew some definite act of bankruptcy. Immediately on the debtor committing one of these acts, he becomes liable to be made a bankrupt. The corresponding section in the English Bankruptcy Act is sec. 1, but there are a number of differences, and while consulting authorities under that section particular attention should be paid to our section to see if the differences are material. For definition of debtor see sec. 2 (o). It will be noted that in sub-section (a) of this section, an act of bankruptcy is committed immediately the debtor makes an assignment for the benefit of his creditors whether it is an authorized assignment or not But under sec. 4 (6) the Court can, in case of an authorized assignment, dismiss the application for a receiving order if it appears that the estate can be best administered under the assignment. With reference to sub-sections (b), (c) and (d) relating to fraudulent conveyances, fraudulent preferences, and absconding, the provincial Acts should be consulted on these matters.

A fraudulent disposition of property may be fraudulent under the Statutes of Elizabeth or fraudulent within the meaning of the bankruptcy laws. It has been held under the English bankruptcy laws that a conveyance is fraudulent thereunder as necessarily delaying and defeating creditors if the whole of the debtor's property is included substantially and if the consideration be a past debt and there is no fair present equivalent. An assignment of the whole of the debtor's property to one or several creditors to the exclusion of others for past debts is a fraudulent assignment. See *Ex parte Lukes*,

Annotation. L.R. 7 Ch. 302; *Young* v. *Fletcher*, 34 L.J. (Exch.) 154; *Ex parte Teevor*, L.R. 1 Ch. 297. A *bonâ fide* sale, however, either of the whole or a part of the debtor's property does not in itself constitute an act of bankruptcy. There is a great difference between the assignment of the whole and of a part of the debtor's property for a past consideration. If the debtor when he makes the assignment is insolvent and intends to defeat his creditors generally it is clearly invalid and an act of bankruptcy will be committed. *Ex parte Pearson*, L.R. 8 Ch. 667. Intent to defeat or delay creditors must be shewn to support these acts of bankruptcy. Such intent is frequently a matter of inference. See *Ex parte Kilmer*, 2 Dea. 324; *Re Woolstenholme*, 4 Mor. 258; *Re Alderson*, [1895] 1 Q.B. 183. It has been held under the English Act that if a man quits England or remains out of England and provides no funds to meet bills becoming due, it may generally be assumed that his intention is to delay his creditors. But if the debtor's permanent home is abroad, this may not, however, be so. *Ex parte Brandon, Re Trench*, 25 Ch. D. 500. A married woman who leaves her place of business without paying her creditors, or notifying her change of address, commits an act of bankruptcy, though she goes to live with her husband elsewhere at his request. *Re Worsley*, [1901] 1 K.B. 309.

Sub-section (e) sets out plainly that an act of bankruptcy is committed when the debtor has an unsatisfied execution or permits his goods to be sold by the sheriff or if the sheriff can find no goods for seizure. The English Act provides that if an execution against the debtor has been levied by seizure of his goods under process and the goods have been either sold or held by the sheriff for twenty-one days, the debtor thereby commits an act of bankruptcy. Under that section it has been held that the 21 days are exclusive of the day of seizure.

Re North, [1895] 2 Q.B. 264. A petition for bankruptcy must be presented within 3 months (time specified by the English rules) of the completion of the 21 days, though the sheriff remains longer in possession. *Re Beeston*, [1899] 1 Q.B. 626. See Execution Act for rights and duties of the sheriff with regard to seizure, levy and sale.

Sub-section (f) provides that the debtor must exhibit to a meeting of his creditors a statement of his assets and liabilities which shews that he is insolvent or presents to such meetings a written admission of his inability to pay his debts to constitute an act of bankruptcy. See sec. 2, (t) for definition of insolvent person.

Petition and Receiving Order.

4. (1) Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy a creditor may present to the court a bankruptcy petition.

(2) The petition shall be verified by affidavit and served on the debtor in the prescribed manner.

(3) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless,—

(*a*) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors amounts to five hundred dollars; and,

(*b*) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition.

(4) The petition shall be presented to the court having jurisdiction in the locality of the debtor.

(5) At the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may adjudge the debtor a bankrupt and in pursuance of the petition, make an order, in this Act called a receiving order, for the protection of the estate. Annotation.

(6) If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or, in case an authorized assignment has been made, that the estate can be best administered under the assignment, or that for other sufficient cause no order ought to be made, it may dismiss the petition.

(7) Where the debtor appears on the petition, and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security (if any) being given as the court may require for payment to the petitioner of any debt which may be established against him in due course of law and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

(8) Where proceedings are stayed, the court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid.

(9) A creditor's petition shall not, after presentment, be withdrawn without the leave of the court.

(10) The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the service of the petition on which a receiving order is made against him.

(11) Provided, however, that nothing herein contained shall invalidate any proceedings by reason of the same having been commenced, taken or carried on in the wrong court, but the court may at any time transfer to the proper court the petition, application or proceedings, as the case may be.

The original sub-section 2 of section 4 was repealed and the above substituted therefor by the Bankruptcy Act Amendment Act, 1920, and a new sub-section, numbered 11, was added. Section 3 of the Imperial Act provides that if a debtor commits an act of bankruptcy, the Court may, on a bankruptcy petition being presented by either a creditor or the debtor, make a receiving order. It will be noted that under the above section only the creditor may present to the Court a bankruptcy petition. For what constitutes an act of bankruptcy, see sec. 3. The petition has to be verified by affidavit, and the petition and affidavit served on any party to be affected thereby not less than eight days before the day named for hearing in the petition. The Court may, however, abridge the time. See Rules 74 and 77. The application must be made to the Court of the debtor's locality. See sec. 8 which provides that "debtor" shall not include wage-earners or persons engaged solely in farming or tillage of the soil.

Sub-section 3 requires that the act of bankruptcy on which the petition is grounded must occur within six months before the presentation of the petition.

Section 8, subsection (2), provides that notwithstanding anything in the Act, no no act or omission of a debtor in respect of any debt which, (a) was contracted or existed before the coming into operation of this Act; or (b) is or is evidenced by any judgment or negotiable or renewable instrument the cause or consideration whereof (whether or not such judgment or instru-

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ment is a renewal or one of several renewals, had or made, before or after the coming into force of this Act, proceeding from the same cause or consideration) existed before the coming into operation of this Act; shall be deemed an available act of bankruptcy, nor shall any such debt be deemed sufficient to found the presentation of a bankruptcy petition.

Attention is drawn to section 5 which provides for the appointment of an interim receiver to protect the estate where it is shewn to be necessary. For practice, see Rules 4, 5, 6, 14 to 20, 26, 28 to 33, 50, 74 to 95.

5. The Court may, if it is shewn to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint an authorized trustee as interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or of any part thereof.

See Rules 85 and 86 which provide the procedure for the appointment of an interim receiver.

Trustee Under Receiving Order.

6. (1) On the making of a receiving order the trustee shall be thereby constituted receiver of the property of the debtor and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court and on such terms as the court may impose. But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

(2) The court may constitute as such receiver the trustee named in the petition or some other authorized trustee acting for or within the same bankruptcy district as such named trustee, having regard as far as the court deems just to the wishes of the creditors as proved by any sufficient evidence.

(3) On a receiving order being made against a debtor the property of the debtor shall forthwith pass to and vest in the trustee named therein and in any case of change of trustee, shall pass from trustee to trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever.

(4) The court, upon the application of the trustee or of a creditor proceeding under authority of an ordinary resolution carried by the votes of a majority in number of the known creditors, and upon satisfactory proof that the affairs of the debtor can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may at any time by order, transfer any proceedings under this Act, which are pending before it to another bankruptcy district or division wherein thereafter they may be carried on as effectually as if therein commenced, or the court in which any such proceedings were commenced may of itself, for like cause upon satisfactory proof that such proceedings were commenced in good faith and not for the purpose of attempting to vest authority over the estate involved in any particular authorized trustee or in the authorized trustee acting for or within any bankruptcy district, and provided that such proceedings were commenced within the province of the debtor's locality, order that such proceedings be retained in the bankruptcy district or division in which they were commenced, although the court so ordering may not be the court in which the proceedings ought to have been commenced.

The effect of a receiving order is to make the debtor a bankrupt. Section 4, subsection (5). The creditors may accept a composition, or if the debtor has been adjudicated a bankrupt, a composition may be accepted and the bankruptcy annulled by the Court. After a receiving order, the debtor must submit a statement of his affairs to the trustee. The debtor is subject to an examination and must attend the meeting of creditors and give such

information as the meeting may require. As to the scope of the debtor's examination, see *Re Atherton*, [1912] 2 K.B. 251; *Re Solicitor*, 25 Q.B.D. 17. It will be noted that this section vests all the debtor's property of every kind in the trustee free from any action except action by a secured creditor to realize his security. Annotation.

7. (1) The court may, at any time after the presentation of a bankruptcy petition against a debtor, order that any action, execution or other proceeding against the person or property of the debtor pending in any court other than the court having jurisdiction in bankruptcy shall stand stayed until the last mentioned court shall otherwise order, whereupon such action, execution or other proceeding shall stand stayed accordingly; and the court in which any such proceedings are pending may likewise, on proof that a bankruptcy petition has been presented against the debtor, stay such proceedings until the first mentioned court shall otherwise order.

(2) On the making of a receiving order every such action, execution or other proceeding for the recovery of a debt provable in bankruptcy shall, subject to the provisions of the next preceding section as to the rights of secured creditors, stand stayed unless and until the court shall, on such terms as it may think just, otherwise order.

The purpose of this section is to stay any action against the debtor pending investigation. Attention is called to Rule 13 which provides that where any proceedings in bankruptcy have been commenced against a corporation or where a corporation has made an authorized assignment, the Court may, on the application of the trustee or any creditor or shareholder, grant leave that all further proceedings in the winding-up of the corporation or liquidation of his assets be continued under the Winding-up Act and amendments thereto, and may make such order for the transfer of proceedings or to effectuate such leave as to the Court shall seem best.

8. (1) The provisions of this Part of this Act shall not apply to wage-earners or to persons engaged solely in farming or the tillage of the soil.

(2) Notwithstanding anything in this Part appearing, no act or omission of a debtor in respect of any debt which,—

(*a*) was contracted or existed before the coming into operation of this Act; or

(*b*) is or is evidenced by any judgment or negotiable or renewable instrument the cause or consideration whereof (whether or not such judgment or instrument is a renewal or one of several renewals, had or made, before or after the coming into force of this Act, proceeding from the same cause or consideration) existed before the coming into operation of this Act;

(*c*) shall be deemed an available act of bankruptcy, nor shall any such debt be deemed sufficient to found the presentation of a bankruptcy petition, but it shall be provable in any proceedings otherwise founded under this Part, and otherwise.

By section 2, sub-section (kk), "wage-earner" means one who works for wages, salary, commission or hire, at a rate of compensation not exceeding fifteen hundred dollars per year, and who does not on his own account carry on business. While a receiving order cannot be obtained against a farmer, yet he may, under sec. 9, make an authorized assignment.

The effect of the above sub-section 2 is that the act or omission of a debtor in respect of the debt relied on as constituting the act of bankruptcy must take place subsequently to the 1st July, 1920.

PART II.

ASSIGNMENTS AND COMPOSITIONS.

Assignments.

9. Any insolvent debtor whose liabilities to creditors, provable as debts under this Act, exceed five hundred dollars, may, at any time prior to the mak-

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ing of a receiving order against him, make to an authorized trustee appointed pursuant to section fourteen with authority in the locality of the debtor, an assignment of all his property for the general benefit of his creditors. An assignment so made is in this Act referred to as an "authorized assignment," and every assignment of his property other than an authorized assignment made by an insolvent debtor for the general benefit of his creditors shall be null and void.

The debtor must be an insolvent one. By section 2, sub-section (t), "insolvent person" includes a person, whether or not he has done or committed an act of bankruptcy, (i) who is for any reason unable to meet his obligations as they respectively become due, or (ii) who has ceased paying his current obligations in the ordinary course of business, or (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process would not be sufficient, to enable payment of all his obligations, due and accruing due, thereunder.

Section 3 provides that the making of an assignment by an insolvent debtor constitutes an act of bankruptcy; but sec. 4, sub-sec. 6, provides that in case of an authorized assignment, the Court may dismiss an application for a receiving order if it appears that the estate can be best administered under the assignment.

Particular attention is drawn to the last paragraph of this section which provides that every assignment made under any Provincial Act by an insolvent debtor is null and void.

By section 14, the Governor in Council may, upon application made to the Secretary of State of Canada, appoint sufficient fit and qualified persons to be trustees in bankruptcy and under authorized assignments and in proceedings by insolvent debtors to secure compositions, extensions, and arrangements under this Act.

10. Every authorized assignment shall be valid and sufficient if it is in the form provided by General Rules or in words to the like effect; and an assignment so expressed shall, subject to the rights of secured creditors vest in the trustee all the property of the assignor at the time of the assignment excepting such thereof as is held by the assignor in trust for any other person and such thereof as is, against the assignor, exempt from execution or seizure under legal process in accordance with the laws of the province within which the property is situate and within which the debtor resides.

See form 18 of prescribed forms for an authorized assignment for the general benefit of creditors.

General Provisions Relating to Receiving Orders and Assignments.

11. (1) Every receiving order and every authorized assignment made in pursuance of this Act shall take precedence over,—

(*a*) all attachments of debts by way of garnishment, unless the debt involved has been actually paid over to the garnishing creditor or his agent; and

(*b*) all other attachments, executions or other process against property, except such thereof as have been completely executed by payment to the execution or other creditor;

but shall be subject to a lien for one only bill of costs, including sheriff's fees, which shall be payable to the garnishing, attaching or execution creditor who has first attached by way or garnishment or lodged with the sheriff an attachment, execution or other process against property.

(2) An execution levied by seizure and sale on and of the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases, acquire a good title to them against the authorized trustee.

Annotation.

(3) If an authorized assignment or a receiving order has been made, the sheriff or other officer of any court having seized property of the debtor under execution or attachment or any other process, shall, upon receiving a copy of the assignment certified by the trustee named therein or of the receiving order certified by the registrar or other clerical officer of the court which made it, forthwith deliver to the trustee all the property of the execution debtor in his hands, upon payment by the trustee of his fees and charges and the costs of the execution creditor who has a lien as in this section provided. If the sheriff has sold the debtor's estate or any part thereof, he shall deliver to the trustee the moneys so realized by him less his fees and the said costs.

(4) No receiving order or authorized assignment or other document made or executed under authority of this Act shall be within the operation of any legislative enactment now or at any time in force in any province of Canada relating to deeds, mortgages, judgments, bills of sale, chattel mortgages, property or registration of documents affecting title to or liens or charges upon property real or personal, immovable or movable; but a notice in the prescribed form of such receiving order or assignment and of the first meeting of creditors required to be called pursuant to this Act shall, as soon as possible after the making or executing of such receiving order or assignment, be gazetted, and not less than six days prior to said meeting be published in a local newspaper.

(5) The registrars of the courts of bankruptcy, the registrars of all land title and land registration offices and the recorders or clerks of all courts and offices wherein any documents of title relating to property are, according to the provisions of this Act or of the law of a province, registered, recorded or filed, shall keep on file for public reference a copy of each issue of the *Canada Gazette* which contains any notice or notices, of, incident to or resulting from receiving orders or authorized assignments referring to bankrupts or assignors who resided or carried on business in the province wherein the said courts or offices are situated; and they shall also keep an index book wherein they shall enter alphabetically the name of each bankrupt and authorized assignor who resided or carried on business in such province prior to the date of the receiving order or assignment and in respect of whose estate a notice may at any time hereafter appear in the said *Canada Gazette*.

(6) A fee not exceeding twenty-five cents for each search and fifty cents for each certificate may be charged by such registrar, recorder or clerk.

(7) The King's Printer, upon request of any person who is by this Act required to keep on file for public reference a copy of the *Canada Gazette*, shall regularly supply to such person, *gratis*, two copies of every issue of such Gazette.

(8) Every receiving order and every authorized assignment (or a true copy certified as to such order by the registrar or other clerical officer of the court which has made it, and as to such assignment certified by the trustee therein named) shall be registered or filed by or on behalf of the trustee in the proper office in every district, county or territory in which the whole or any part of any real or immovable property which the bankrupt or assignor owns or in which he has any interest or estate is situate.

(9) The proper office in this section referred to shall be the land titles office, land registration office, registry office or other office wherein, according to the law of the province, deeds or other documents of title to real or immovable property may or ought to be deposited, registered or filed.

(10) From and after such registration or filing or tender thereof within the proper office to the registrar or other proper officer, such order or assignment shall have precedence of all certificates of judgment, judgments operating as hypothecs, executions and attachments against land (except such thereof as have been completely executed by payment) within such office or within the district, county or territory which is served by such office, but subject to a lien for the costs of registration and sheriff's fees, of such judgment, execution or attaching creditors as have registered or filed within such proper office their judgments, executions or attachments.

(11) Every registrar or other officer for the time being in charge of such proper office to whom any trustee shall tender or cause to be tendered for registration or filing any such receiving order or authorized assignment shall register or file the same according to the ordinary procedure for registering

Annotation. or filing within such office documents which evidence liens or charges against real or immovable property (and subject to payment of the like fees) if at the time of the tender of such document for such purpose there be tendered annexed thereto as part thereof an affidavit substantially in the following form:—

"In the matter of *The Bankruptcy Act.*"

"Canada

"Province of

"I of in the province of , make oath and say—

"That the hereunto annexed document is tendered for registration (or filing) under the authority and direction of of in the Province of a duly appointed trustee under *The Bankruptcy Act.*

"Sworn before me at.....

in the province of.....

this day of.....19..."

(12) Such affidavit may be sworn before such registrar or other officer, or before a notary public or a commissioner authorized to administer oaths for use in any of the courts of the province.

(13) Any such registrar or other officer, who upon tender of any such receiving order or assignment or a copy thereof, certified as aforesaid, with the proper fees, and with the request that such document be registered or filed as aforesaid, shall refuse or omit to forthwith register or file the same in manner hereinbefore indicated or who shall omit or refuse to comply with the provisions of subsection five of this section in so far as they are applicable to him, shall be guilty of an indictable offence punishable upon indictment or summary conviction by a fine not exceeding one thousand dollars or by imprisonment for a term not exceeding one year or to both such fine and such imprisonment.

(14) If the receiving order or authorized assignment is not registered, or filed, or if notice of said receiving order or assignment is not published within the time and in the manner prescribed by this section, an application may be made by any creditor or by the debtor to compel the registration or filing of the receiving order or assignment, or publication of such notice, and the judge shall make his order in that behalf and with or without costs, or upon the payment of costs by such person as he may, in his discretion, direct to pay the same; and such judge may, in his discretion, impose a penalty on the trustee for any omission, neglect or refusal to so register, file, or publish as aforesaid, in an amount not exceeding the sum of five hundred dollars, and such penalty when imposed shall forthwith be paid by the trustee personally into and for the benefit of the estate of the debtor.

(15) Saving and preserving the rights of innocent purchasers for value, neither the omission to publish or register as aforesaid, nor any irregularity in the publication or registration, shall invalidate the assignment or affect or prejudice the receiving order.

(16) The provisions of paragraphs one and ten of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in either of the provinces of Nova Scotia and New Brunswick prior to the coming into force of this Act, which became, under the laws of the province wherein it was registered, a charge, lien or hypothec upon such real or immovable property.

Subsection 1 of the original Act was repealed and the above subsection 1 substituted therefor by the Bankruptcy Act Amendment Act, 1920.

The above subsection 16 was not in the original Act. It was added by the Bankruptcy Act Amendment Act, 1920.

12. No advantage shall be taken of or gained by any creditor through any mistake, defect or imperfection in any authorized assignment or in any receiving order or proceedings connected therewith, if the same can be amended or corrected; and any mistake, defect or imperfection may be amended by the court. Such amendment may be made on application of the trustee

or of any creditor on such notice being given to other parties concerned as the judge shall think reasonable; and the amendment when made shall have relation back to the date of the assignment or petition in bankruptcy, but not so as to prejudice the rights of innocent purchasers for value.

Annotation.

Section 84 provides, (1) No proceeding in bankruptcy or under any authorized assignment shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court. (2) No defect or irregularity in the appointment of an authorized trustee or an inspector shall vitiate any act done by him in good faith.

Composition, Extension or Scheme of Arrangement.

13. (1) Where an insolvent debtor intends to make a proposal for,—

(*a*) a composition in satisfaction of his debts; or,

(*b*) an extension of time for payment thereof; or,

(*c*) a scheme of arrangement of his affairs;

he may, either before or after the making of a receiving order against him or the making of an authorized assignment by him, require in writing an authorized trustee to convene at the office of such trustee a meeting of such debtor's creditors, for the consideration of such proposal. In case the convening of such meeting is required after a receiving order or assignment has been made only the trustee named in such order or assignment, or his successor, shall be authorized to convene it.

(2) The debtor shall at the time when he requires the convening of such meeting, or within such time as the trustee may then fix, lodge with the trustee,

(*a*) a true statement of the debtor's affairs, including a list of his creditors, which list shall show the post office address of and the amount payable to each creditor, the whole statement being verified by the debtor by way of statutory declaration; and,

(*b*) a proposal in writing signed by the debtor, embodying the terms of the proposed composition, extension or scheme and setting out the particulars of any sureties or securities proposed.

(3) The trustee shall, when so required, convene a meeting of creditors, and shall, at least ten days before the meeting, send to each creditor a notice of the time and place of such meeting and a copy of the debtor's statement of affairs and of his proposal; if at such meeting a majority in number of creditors who hold two-thirds in amount of the proved debts resolve to accept the proposal, either as made or as altered or modified at the request of the meeting, it shall be deemed to be duly accepted by the creditors, and if approved by the court shall be binding on all the creditors.

(4) Any creditor who has proved his debt may assent to or dissent from the proposal by a letter to that effect addressed postage prepaid and registered to the trustee, prior to the meeting, and any such assent or dissent if received by the trustee at or prior to the meeting shall have effect as if the creditor had been present and had voted at the meeting.

(5) The trustee shall forthwith, if the proposal is accepted by the creditors, apply to the court to approve it.

(6) If creditors who hold ten per cent. or more in amount of proved debts request the examination of the debtor, the trustee shall cause him to be examined under oath before the registrar or other officer appointed for that purpose by General Rules and his testimony to be taken down in writing. The testimony, so taken, may be read upon the hearing of the application for the approval of the composition or scheme of arrangement. The court if not satisfied with such testimony as so taken, may direct that the debtor attend before the court for the purpose of further examination.

(7) The court shall, before approving the proposal, hear a report of the trustee as to the terms thereof, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.

(8) If the court is of opinion that the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, or

Annotation.

in any case in which the court is required, where the debtor is adjudged bankrupt, to refuse his discharge, the court shall refuse to approve the proposal.

(9) If any facts are proved on proof of which the court would be required either to refuse, suspend or attach conditions to the debtor's discharge were he adjudged bankrupt, the court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than fifty cents on the dollar on all the unsecured debts provable against the debtor's estate.

(10) In any other case the court (subject to the provisions of subsection sixteen of this section) may either approve or refuse to approve the proposal.

(11) If the court approves the proposal, the approval may be testified by the seal of the court being attached to the instrument containing the terms of the proposed composition, extension or scheme, or by the terms being embodied in an order of the court.

(12) A composition, extension or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable under this Act, but shall not release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order or for alimony, or under a judgment against him as co-respondent in a matrimonial case or for necessaries of life or alimentary debts, except to such an extent and under such conditions as the court expressly orders in respect of such liability.

(13) The provisions of a composition, extension or scheme under this Act may be enforced by the court on application by any person interested, and any disobedience of an order of the court made on the application shall be deemed a contempt of court.

(14) If default is made in payment of any instalment due in pursuance of the composition, extension or scheme, or if it appears to the court, on satisfactory evidence, that the composition, extension or scheme cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the court was obtained by fraud, the court may, if it thinks fit, on application by the trustee or by any creditor, adjudge the debtor bankrupt, make a receiving order against him and annul the composition, extension or scheme, but without prejudice to the validity of any sale, disposition or payment duly made, or thing duly done, under or in pursuance of the composition, extension or scheme. Where a debtor is adjudged bankrupt under this subsection, any debt provable in other respects, which has been contracted before the adjudication, shall be provable in the bankruptcy.

(15) All parts of this Act shall, so far as the nature of the case and the terms of the composition, extension or scheme admit, apply thereto as if the terms "trustee," "bankruptcy," "bankrupt," "assignment," "authorized assignment," "assignor," "authorized assignor," "order" and "order of adjudication" included respectively a composition, extension or scheme of arrangement, a compounding, extending or arranging debtor and an order approving the composition, extension or scheme.

(16) No composition, extension or scheme shall be approved by the court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt or authorized assignor.

(17) The acceptance by a creditor of a composition, extension or scheme shall not release any person who under this Act would not be released by an order of discharge if the debtor had been adjudged bankrupt.

(18) Where a debtor has been adjudged bankrupt or has made an authorized assignment, and the court subsequently approves the composition, extension or scheme, it may make an order annulling the bankruptcy or authorized assignment and vesting the property of the debtor in him or in such other person as the court may appoint on such terms and subject to such conditions, if any, as the court may declare.

(19) Notwithstanding the acceptance and approval of a composition, extension or scheme, it shall not be binding on any creditor so far as regards a debt or liability from which, under the provisions of this Act, the debtor would not be discharged by an order of discharge in bankruptcy, unless the creditor assents (as, for the purposes solely of proceedings relating to a compo-

sition, extension or scheme he may, notwithstanding anything in this Act, so assent) to such composition, extension or scheme. **Annotation.**

Rule 98 provides that where a debtor intends to submit a proposal for a composition, extension, or scheme of arrangement the prescribed forms in the appendix, of proposal, notice and report shall be used by the trustee for the purpose of meetings of creditors for consideration of the proposal.

Rule 99 provides that whenever an application is made to the Court to approve of a composition, extension or scheme, the trustee shall, not less than seven days before the hearing of the application, send notice by registered mail of the application to the debtor and to every creditor, who has proved his debt; and the trustee shall file his report not less than two days before the time fixed for hearing the application.

Rules 100 to 106 inclusive should also be read in connection with this section.

For examination of the debtor, see secs. 56 and 57, and Rules 131 to 134 inclusive, for procedure on such examination.

The effect of sub-sec. 15 is to make all the sections of the Bankruptcy Act, so far as the nature of the case and the terms of the composition, extension or scheme of arrangement admit, applicable to the composition, or extension or scheme of arrangement. Section 86 provides that save as provided in the Act, the provision of the Act relating to the effect of a composition or scheme of arrangement and the effect of a discharge, shall bind the Crown.

The scheme or composition can be approved of by the Court. The Court's approval or refusal is largely based on the report of the trustee. The report of the trustee is *primâ facie* evidence of the facts contained in it. *Ex parte Campbell*, 15 Q.B.D. 213; *Re Bottomley*, 10 Mor. 262, as to annulment of composition or scheme see *Ex parte Moon*, 19 Q.B.D. 669; *Walton* v. *Cook*, 40 Ch. D. 325. The approval of the Court to a composition is discretionary. See *Re Flew*, [1905] 1 K.B. 278; *Re Burr*, [1892] 2 Q.B. 467, and *Re McTear*, 59 L.T. 150.

PART III.

TRUSTEES AND ADMINISTRATION OF PROPERTY.

Appointment of Trustees.

14. (1) The Governor in Council may, upon application made to the Secretary of State of Canada, appoint sufficient fit and qualified persons to be trustees in bankruptcy and under authorized assignments and in proceedings by insolvent debtors to secure compositions, extensions and arrangements under this Act.

(2) Every such trustee shall be appointed with authority limited territorially to the whole or part of some one or more bankruptcy districts or divisions but he shall, for the purpose of obtaining possession of, and realizing upon, the assets of a bankrupt or authorized assignor of whom he is trustee, have power to act as such anywhere. Trustees appointed pursuant to this section are in this Act referred to as "authorized trustees."

(3) Every person who applies to be appointed an authorized trustee shall state in his application full particulars of his qualifications, ability and previous business experience.

(4) No authorized trustee shall accept any assignment or trust or execute any duties under this Act unless and until he has given security to the satisfaction of the Governor in Council, by bond or otherwise, executed to His Majesty as represented by such departmental officer as may be designated by the Governor in Council, for due accounting and for payment over and transfer of all moneys and property received by him as such trustee. If the security required is provided in cash the trustee shall be entitled to be paid thereon such interest as may be prescribed by General Rules.

Annotation.

(5) Such departmental officer shall be a special trustee for the creditors and for the estate.

(6) The amount of such security shall not, at any time, be less than ten thousand dollars.

(7) The said bond shall be kept in force by the trustee until such time as the appointment of the trustee is revoked or until he resign such appointment, and until the Governor in Council is satisfied that all moneys and properties received by the trustee have been duly accounted for and paid over to the parties entitled thereto, whereupon such bond shall be released and discharged.

(8) Unless the creditors, either at the first meeting, or at a meeting convened by notice to all the known creditors, resolve to dispense with further security, the trustee shall give security by bond or otherwise to the registrar of the court in the bankruptcy district or division of the debtor's locality, in an amount satisfactory to the registrar, for the due accounting and payment over and transfer of all moneys and properties received or to be received by him as such trustee in respect of the estate of such debtor, and such security shall be given within thirty days of the date of the receiving order or the making of the assignment. The expense incident to the furnishing of such security may be charged by the trustee to the estate of the debtor.

(9) Should the trustee be unable or fail to give the security required, in the manner and within the time hereinbefore provided, he shall within ten days from the expiration of the said thirty days, by notice in writing, convene a meeting of creditors for the purpose of appointing a new authorized trustee, and should he neglect or refuse to call such meeting, he shall be guilty of an offence and subject to the penalties provided by this Act.

(10) In case the trustee fails to give the security provided by this section and a new trustee is not appointed by the creditors, the court may, on the application of any creditor, appoint from among the available authorized trustees a new trustee.

See section 9 which declares null and void any assignment made by an insolvent debtor other than to an authorized trustee.

Section 96 provides that any person who,—

(*a*) not being an authorized trustee, advertises or represents himself to be such; or

(*b*) being an authorized trustee, either before providing the bond required by section fourteen, subsection four, of this Act, or after providing the same but at any time while the said bond is not in force, acts as or exercises any of the powers of an authorized trustee; or

(*c*) having been appointed an authorized trustee, with intent to defraud fails to observe or to perform any of the provisions of this Act, or fails duly to do, observe or perform any act or duty which he may be ordered to do, observe or perform by the court, pursuant to any of the provisions of this Act;

shall be guilty of an indictable offence and liable to a fine not exceeding one thousand dollars or to a term not exceeding two years' imprisonment or to both such fine and such imprisonment.

Section 84 (2) provides that no defect or irregularity in the appointment of an authorized trustee or an inspector shall vitiate any act done by him in good faith.

A trustee must have no interests which will conflict with his office and must be wholly impartial. See *Re Martin*, 21 Q.B.D. 29; *Re Lamb*, [1894] 2 Q.B. 805; *Re Mardon*, [1896] 1 Q.B. 140.

All the property of the debtor is vested in the trustee as soon as the trustee is appointed, but the trustee's title to the property is not limited by the date of his appointment or by the date of the receiving order or by the date of the adjudication, but it has been held under the English Act that it relates back to the time of the first act of bankruptcy committed by the debtor within the prescribed time. *Re Bumpus*, [1908] 2 K.B. 330; *Re Simmond*, [1894] 1 Q.B. 433; *Re Mander*, 80 L.T. 234.

The doctrine of relating back is very important. As to decisions on the point under the English Bankruptcy Act, see *Davies* v. *Petrie*, [1906] 2 K.B. 786; *Ponsford* v. *Union of London and Smith's Bank*, [1906] 2 Ch. 444; *Re Teale*, [1912] 2 K.B. 367; *Re Ashwell*, [1912] 1 K.B. 390. **Annotation.**

A trustee under the Act has the same power in respect of acquiring and retaining possession of the debtor's property as if he was appointed receiver by the Court. A trustee can apply to the Court for directions in relation to any matter arising under the bankruptcy. In the management of the estate, the trustee must use his own discretion. The trustee is an officer of the Court and any person dissatisfied by any decision of the trustee can apply to the Court for relief. *Ex parte Kearsley*, 17 Q.B.D. 1; *Ex parte James*, L.R. 9 Ch. 609.

15. (1) A majority in number of the creditors who hold half or more in amount of the proved debts of twenty-five dollars or upwards may, at their discretion, at any meeting of creditors, substitute any other authorized trustee acting for or within the same bankruptcy district for the trustee named in the receiving order or to whom an authorized assignment has been made.

(2) An authorized trustee may be removed and another substituted or an additional authorized trustee may be appointed for cause, by the court.

(3) When a new trustee is appointed or substituted, all the property and estate of the debtor shall forthwith vest in the new trustee without any conveyance or transfer, and he shall gazette a notice of the appointment or substitution and register an affidavit of his appointment in the office of the registrar of the court from which the receiving order was issued, or in the case of an authorized assignment, in every office in which the original assignment or copy or counterpart thereof was lodged, registered or filed. Registration of such affidavit in any land registration district, land titles office, registry office or other land registration office, or lodging or filing such affidavit as aforesaid, shall have the same effect as the registration, lodging or filing of a conveyance or of a transfer to the new trustee.

(4) The new trustee shall pay to the removed trustee, out of the funds of the estate, his proper remuneration and disbursements, which shall be ascertained as provided by section forty of this Act.

(5) No authorized trustee shall be bound to accept an authorized assignment or to act as trustee in matters relating to assignments or receiving orders or to compositions, extensions, or arrangements by debtors, if, in his opinion, the realizable value of the property of the debtor is not sufficient to provide the necessary disbursements and a reasonable remuneration for the trustee, unless and until the trustee has been paid or tendered a sum sufficient to defray such disbursements and remuneration.

For debts provable and proofs of debts, reference should be made to secs. 44 and 45. The practice in regard to calling meetings of creditors and proceedings thereat is set forth in sec. 42. Section 40 provides that the remunerations of the trustee shall be limited to 5% and his disbursements to be taxed.

Official Name.

16. (1) The official name of an authorized trustee acting in bankruptcy or authorized assignment proceedings shall be "The Trustee of the Property of .....a Bankrupt (or Authorized Assignor)" (inserting the name of the bankrupt or assignor), and by that name the trustee may in any part of Canada or elsewhere hold property of every description, make contracts, sue or be sued, enter into any engagement binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office.

(2) The official name of an authorized trustee acting with respect to proceedings by a debtor for a composition of, or extension of time for the payment of, his debts, or an arrangement of his affairs shall be "The Trustee acting in *re* the proposal of .....(insert the name of the debtor) for a composition of his debts" or "arrangement of his affairs."

Annotation. Under sections 6 and 9, on the making of a receiving order, and on the making of an assignment, all the property vests in the trustee.

Duties and Powers of Trustees.

17. (1) The trustee shall, as soon as may be, take possession of the deeds, books and documents of the debtor and all other parts of his property capable of manual delivery.

(2) The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the debtor, be in the same position as if he were a receiver of the property, appointed by the court, and the court may, on his application, enforce such acquisition or retention accordingly.

(3) Unless otherwise directed in writing by the inspectors, the trustee shall forthwith, on the making of a receiving order or execution of an authorized assignment, insure and keep insured in his official name until sold or disposed of by him all the insurable property of the debtor, to the full insurable value thereof, in insurance companies duly authorized to carry on business in the province wherein the insured property is situate.

(4) All insurance covering property of the debtor in force at the date of the making of such receiving order or execution of such assignment shall, immediately upon such making or executing, and without any notice to the insurer or other action on the part of the trustee, and notwithstanding any statute or rule of law or contract or provision to a contrary effect, become and be, in the event of loss suffered, payable to the trustee, as fully and effectually as if the name of the trustee were written in the policy or contract of insurance as that of the insured, or as if no change of title or ownership had come about and the trustee were the insured.

For notes on this section, see section 14.

18. Subject to the provisions of this Act, an authorized trustee may do all or any of the following things:—

(*a*) Give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof;

(*b*) Prove, rank, claim and draw a dividend in respect of any debt due to the debtor;

(*c*) Exercise any powers the capacity to exercise which is vested in the trustee under this Act, and execute any powers of attorney, deeds and other instruments for the purpose of carrying into effect the provisions of this Act.

See notes to section 14.

19. (1) Where any property of the debtor vesting in an authorized trustee consists of patented articles or goods which were sold to the debtor subject to any restrictions or limitations, the trustee shall not be bound by any such restrictions or limitations but may sell and dispose of any such patented articles, or goods as hereinbefore provided, free and clear of any such restrictions or limitations.

(2) If the manufacturer or vendor of any such patented articles or goods objects to the disposition of them by the trustee as aforesaid and gives to the trustee notice in writing of such objection within five days after the date of the receiving order or authorized assignment, such manufacturer or vendor shall have the right to purchase such patented articles or goods at the invoice prices thereof, subject to any reasonable deduction for depreciation or deterioration.

(3) Where the property of a bankrupt or authorized assignor comprises the copyright in any work or any interest in such copyright, and he is liable to pay to the author of the work royalties or a share of the profits in respect thereof, the trustee shall not be entitled to sell, or authorize the sale of, any copies of the work, or to perform or authorize the performance of the work, except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt or authorized assignor, nor shall he, without the consent of the author or of the court, be entitled to assign the right or transfer the interest or to grant any interest in the right by license, except upon terms which will secure to the author payments by way of royalty or share of the profits at a rate not less than that which the bankrupt or authorized assignor was liable to pay.

The corresponding English section was passed superseding the decision in *Re Richards*, [1907] 2 K.B. 93. Annotation.

20. (1) The trustee may, with the permission in writing of the inspectors, do all or any of the following things:—

(*a*) Sell all or any part of the property of the debtor (including the good-will of the business, if any, and the book debts due or growing due to the debtor), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

(*b*) Carry on the business of the debtor, so far as may be necessary for the beneficial winding-up of the same;

(*c*) Bring, institute, or defend any action or other legal proceeding relating to the property of the debtor;

(*d*) Employ a solicitor or other agent to take any proceedings or do any business, which may be sanctioned by the inspectors;

(*e*) Accept as the consideration for the sale of any property of the debtor a sum of money payable at a future time subject to such stipulations as to security and otherwise as the inspectors think fit;

(*f*) Mortgage or pledge any part of the property of the debtor for the purpose of raising money for the payment of his debts;

(*g*) Refer any dispute to arbitration, compromise any debts, claims and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the debtor and any person who may have incurred any liability to the debtor, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on;

(*h*) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable against the estate;

(*i*) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the debtor, made or capable of being made on the trustee by any person or by the trustee on any person;

(*j*) Divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold.

(2) The permission given for the purposes of this section shall not be a general permission to do all or any of the above mentioned things but shall only be a permission to do any particular thing or things for which permission is sought in the specified case or cases.

(3) (*a*) All sales of property made by the trustee shall vest in the purchaser all the legal and equitable estate of the debtor therein;

(*b*) in the province of Quebec, if the sale has been made at public auction at the place prescribed and after advertisement as required for the sale of immovable property by sheriff, in the district or place where such immovable property is situate, the sale made by the trustee shall have the same effect as to mortgages, hypothecs, privileges or other real rights then existing thereon as if the same had been made by the sheriff in the said province under a writ of execution issued in the ordinary course, and the title conveyed by such sale in the said province shall have equal validity with a title created by sheriff's sale, and the conveyance of the trustee shall have the same effect as a sheriff's deed in the said province. Such sale shall be subject to the contribution to the building and jury fund provided for in the case of sheriff's sales. In case of false bidding the same recourse as in case of sheriff's sale may be exercised against the false bidder in the manner prescribed by General Rules.

Section 43 provides that at the first or subsequent meeting the creditors shall appoint one or more, but not exceeding five, inspectors of the administration by the trustee of the debtor's estate. Section 22 protects the trustee from personal liability.

21. The trustee, with the permission in writing of the inspectors, may appoint the debtor himself to superintend the management of the property of the debtor or any part thereof, or carry on the trade (if any) of the debtor

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for the benefit of his creditors, and in any other respect to aid in administering the property in such manner and on such terms as the trustee may direct, and may, with like permission, make from time to time such allowance as he may think just to the debtor out of his property for the support of the debtor and his family, or in consideration of his services, if he is engaged in winding-up his estate, but any such allowance may be reduced by the court.

As to the profits of a business carried on by a bankrupt, see *Re Rogers*, [1894] 1 Q.B. 425; *Affleck* v. *Hammond*, [1912] 3 K.B. 162.

22. (1) Where the trustee has seized or disposed of any property in the possession or on the premises of a debtor against whom a receiving order has been made or by whom an authorized assignment has been made, without notice of any claim by any person in respect of such property and it is thereafter made to appear that the property was not at the date of the making of said receiving order or assignment the property of the debtor, the trustee shall not be personally liable for any loss or damage arising from such seizure or disposal sustained by any person claiming such property, nor for the costs of any proceedings taken to establish a claim thereto, unless the court is of opinion that the trustee has been guilty of negligence in respect of the same.

(2) Where any goods of a debtor against whom a receiving order has been made or by whom an authorized assignment has been made, are held by any person by way of pledge, pawn, or other security, it shall be lawful for the trustee, after giving notice in writing of his intention to do so, to inspect the goods, and, where such notice has been given, such person as aforesaid shall not be entitled to realize his security until he has given the trustee a reasonable opportunity of inspecting the goods and of exercising his right of redemption if he thinks fit to do so.

23. The authorized trustee of a bankrupt or assignor shall keep, in manner prescribed, proper books, in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor of the bankrupt or authorized assignor may, subject to the control of the court, personally or by his agent inspect any such books.

No person shall, as against the trustee, be entitled to withhold possession of the books of account belonging to the debtor or to set up any lien thereon. Rule 145. Section 91 provides penalties for the bankrupt failing to keep proper books of account. Rule 110 provides that the trustee shall keep for a period of at least 6 years from the date of declaring a final dividend all current books of record and important documents of the estate of the bankrupt or authorized assignor.

24. (1) The authorized trustee of a bankrupt or assignor shall from time to time report,—

(*a*) when required by the inspectors, to every creditor; and,

(*b*) when required by any specific creditor, to such creditor,

shewing the condition of the debtor's estate, the moneys on hand, if any, and particulars of any property remaining unsold. The trustee shall be entitled to charge against the estate of the debtor, for the preparation and delivery of any such report, only his actual disbursements.

(2) The authorized trustee of a bankrupt or assignor (but not the trustee under a composition, extension or arrangement of a debtor's debts or affairs) shall promptly after their receipt or preparation mail to the Dominion Statistician, Department of Trade and Commerce, Ottawa, a true copy of,—

(*a*) the notice referred to in subsection four of section eleven of this Act;

(*b*) the statement referred to in subsection one of section fifty-four of this Act;

(*c*) the abstract of receipts and disbursements and the dividend sheet referred to in subsection two of section thirty-seven of this Act;

(*d*) every order made by the court upon the application for discharge of any bankrupt or authorized assignor; and,

(*e*) the statement prepared by the trustee upon which a final dividend is declared.

(3) Any person shall be entitled to examine and make copies of all or any of the documents mentioned in subsection two hereof, which are in the possession of the trustee. **Annotation.**

Administration of Estate.

25. The property of the debtor divisible amongst his creditors (in this Act referred to as the property of the debtor) shall not comprise the following particulars:—

(i) Property held by the debtor in trust for any other person;

(ii) Any property which as against the debtor is exempt from execution or seizure under legal process in accordance with the laws of the province within which the property is situate and within which the debtor resides.

But it shall comprise the following particulars:—

(*a*) All such property as may belong to or be vested in the debtor at the date of the presentation of any bankruptcy petition or at the date of the execution of an authorized assignment, and, in the case of a bankrupt, all property which may be acquired by or devolve on him before his discharge; and,

(*b*) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of the property as might have been exercised by the debtor for his own benefit at the date of said petition or assignment, or, in the case of such bankrupt, before his discharge.

Generally speaking all the debtor's property vested in the bankrupt at the commencement of the bankruptcy or acquired during the bankruptcy is divisible amongst his creditors. Wages earned after bankruptcy do not pass to the trustee. See *Wadling* v. *Oliphant*, 1 Q.B.D. 145; *Re Roberts*, [1900] 1 Q.B. 442.

As to goods sold on credit, see *Brandon* v. *Robinson*, 18 Ves. 429.

Damages for bodily injury do not pass to the trustee. *Beckham* v. *Drake*, 2 H. L. Cas. 579.

Where any part of the property consists of things in action, such things will be deemed to have been duly assigned to the trustee but he takes them merely as statutory assignee and subject to equities. So that he cannot, by giving notice to an insurance company, obtain priority over a mortgagee of a policy of insurance who is given no notice. *Re Wallis; Ex parte Jenks*, [1902] 1 K.B. 719.

As to what property is exempt from execution or seizure, see the Execution Acts in force in the different Provinces.

Under the English Act after-acquired property may be dealt with by the bankrupt. In *Cohen* v. *Mitchell*, 25 Q.B.D. 262, the Court of Appeal laid down the following rule: Until the trustee intervenes, all transactions entered into by a bankrupt after his bankruptcy with any person dealing *bonâ fide* with him, and for value, with respect to his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. See *Hunt* v. *Fripp*, [1898] 1 Ch. 675. This rule does not apply to real estate. See *Official Receiver* v. *Cook*, [1906] 2 Ch. 661.

26. (1) No property of an estate of a bankrupt or of an authorized assignor shall be removed out of the province where such property was at the date when any receiving order or authorized assignment was made, without the consent in writing of the inspectors or the order of the court in which proceedings under this Act are being carried on or within the jurisdiction of which such property is situate.

(2) The trustee shall deposit in a chartered bank the proceeds of the sale of any property of the estate of the bankrupt or the authorized assignor and all other moneys realized on account of any trust estate which he is administering under this Act and he shall not withdraw or remove therefrom, without the consent in writing of the inspectors or the order of the court, any such

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moneys, except for payment of dividends and other charges incidental to the administration of the estate.

(3) No trustee in a bankruptcy or under any authorized assignment or composition or scheme of arrangement shall pay any sums received by him as trustee into his private banking account.

It is the duty of the trustee by sec. 23 to keep proper books of account.

27. If the trustee is directed to continue the business of a debtor he may incur obligations and make necessary or advisable advances, which obligations and advances so incurred or made shall be discharged or repaid to the trustee out of the assets of the debtor in priority to the claims of the creditors. Provided that,—

(*a*) the creditors or inspectors may by resolution limit the amount of the obligations or advances which may be made or paid by the trustee in the continuance of the business or the period of time for the continuance of the business; and,

(*b*) the trustee shall not be under obligation to continue the business if in his opinion the realizable value of the assets of the debtor is insufficient to fully protect him against possible loss from so doing, and if the creditors, upon demand made by the trustee, neglect or refuse to secure him against such possible loss.

Section 21 provides for the trustee appointing the debtor to superintend the management of his property and to carry on the business.

28. (1) The law of set-off shall apply to all claims made against the estate, and also to all actions instituted by the trustee for the recovery of debts due to the debtor in the same manner and to the same extent as if the debtor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences.

(2) If any debtor who has made an authorized assignment or against whom a receiving order has been made, owes or owed debts both individually and as a member of one or more different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other or others after all the creditors of such other estate or estates have been paid in full.

If a creditor who proves is himself indebted to the bankrupt, it would be unfair to make him pay his debt in full and allow him to receive only a dividend on the debt due to him.

Debts must not accrue in different rights. Thus, where a voluntary settlement by the bankrupt is set aside, the donee cannot set off, against the sum settled, a debt due to him by the bankrupt, for the sum settled was never a debt due by him to the bankrupt. *Lister* v. *Hooson*, [1908] 1 K.B. 174.

The line of set-off is, as a rule, to be drawn at the date of the receiving order, but it may be drawn at an earlier date where the party who has dealt with the bankrupt had notice of an available act of bankruptcy. *Re Daintrey, Ex parte Mant*, [1900] 1 Q.B. 546; *Elliott* v. *Turquand*, 7 App. Cas. 39; *Re Gillespie*, 14 Q.B.D. 963.

Where a limited company is being wound-up, a solvent contributory can not set off against calls made by the liquidator on him money due to him from the company. *Re Overend, Gurney & Company, Grissell's Case*, L.R. 1 Ch. 528; *Gill's Case*, 12 Ch.D. 755; *Re Washington & Co.*, [1893] 3 Ch. 95. The same rule applies where a contributory is another company in liquidation. See *Re Auriferous Properties, Ltd.*, (1), [1898] 1 Ch. 691. The reason of the rule appears to be that calls are made for the benefit of creditors *pari passu*, but to allow a set-off would give one an advantage. Nor can the liquidator of the contributory company receive a dividend in the winding-up of the other company until he has paid all calls made in such winding-up.

Annotation.

It has been held in England, if the contributory is a bankrupt, the bankruptcy rules prevail, and his trustee may set off against calls a debt due from the winding-up company to the contributory. *Re Universal Banking Corp.*, L.R. 5 Ch. 492; *Re G.E.B.*, [1903] 2 K.B. 340.

Settlement and Preferences.

29. (1) Any settlement of property hereafter made, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt or insolvent or makes an authorized assignment within one year after the date of the settlement, be void against the trustee in the bankruptcy or of the assignment and shall, if the settlor becomes bankrupt or insolvent or makes an assignment as aforesaid at any subsequent time within five years after the date of the settlement, be void against such trustee, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof.

(2) Any covenant or contract hereafter made by any person (hereinafter called "the settlor") in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband or children, or for the future settlement on or for the settlor's wife or husband or children, of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt or makes an authorized assignment as aforesaid, and the covenant or contract has not been executed at the date of the petition in bankruptcy or said assignment, be void against such trustee except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy or assignment proceedings under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied.

(3) Any payment of money hereafter made (not being payment of premiums on a policy of life insurance in favour of the husband, wife, child or children of the settlor) or any transfer of property hereafter made by the settlor in pursuance of such a covenant or contract as aforesaid, shall be void against the trustee unless the person to whom the payment or transfer was made prove either,—

(*a*) that the payment or transfer was made more than six months before the date of the petition in bankruptcy or the date of the authorized assignment; or,

(*b*) that at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred; or,

(*c*) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant or contract and was made within three months after the money or property came into the possession or under the control of the settlor;

but, in the event of any such payment or transfer being declared void, the persons to whom it was made shall be entitled to claim for dividend under or in respect of the covenant or contract in like manner as if it had not been executed at the date of the said petition or assignment.

(4) "Settlement" shall, for the purpose of this section, include any conveyance or transfer of property.

Annotation.

Under the corresponding section of the Imperial Act it has been held that it is sufficient if the interests of the settlor in such property had passed to the beneficiaries. *Re Lowndes*, 18 Q.B.D. 677. Also, where by a settlement the settlor declared that he would hold the property in trust for the beneficiary. *Shrager* v. *March*, [1909] A.C. 402. There is no "settlement" within sub-section 1, unless the settlor wishes the property to be preserved. *Re Player*, No. (2), 15 Q.B.D. 682; *Re Tankard*, [1899] 2 Q.B. 57; *Re Plummer*, [1900] 2 Q.B. 790; *Re Farnham*, [1895] 2 Ch. 799. In *Re Brandon, Ex parte Moore*, 83 L.J. (K.B.) 1073, it was held that there was no "settlement" where the transfer was to a third party for value, though the debtor was to get some benefit from it.

"Void" does not mean void *ab initio*, but "voidable," and the sub-section is aimed at donees under settlements, and not at *bonâ fide* purchasers or mortgagees from them. Thus, where the wife in the case just referred to pledged, before the husband's bankruptcy, the diamonds with jewellers, the jewellers' title was not defeated by the voluntary settlement. *Re Vansittart*, No. (2), [1893] 2 Q.B. 377.

The fact that a settlement has been declared "void against the trustee in bankruptcy" does not entitle such trustee to stand in the place of the beneficiaries, so as to give him priority over the mortgagees and incumbrancers subsequent to the settlement. *Sanguinetti* v. *Stuckey's Banking Co.*, [1895] 1 Ch. 176.

It was held in *Ex parte Russell; Re Butterworth*, 19 Ch.D. 588, that in determining a settlor's ability to pay his debts without the aid of the settled property, the value of the implements of his trade, fixtures, and goodwill should not be taken into account if he intends to continue business; at any rate, such value, if taken into account, should only be what would be realized at a forced sale.

"Purchaser" in the above section is not limited to a purchaser in the mercantile sense of the term, but includes a person who has given some valuable consideration, not necessarily money or physical property, *e.g.*, it may be the release of a right or the compromise of a claim. But there must be a real consideration or *quid pro quo*. *Hance* v. *Harding*, 20 Q.B.D. 732; *Re Pope*, [1908] 2 K.B. 169. The "good faith" required is to be on the part of the purchaser, not necessarily on both sides. *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; *Re Tetley*, 3 Mans. 321.

Rules 120 and 121 provide the procedure for applying to a Judge in Chambers to initiate proceedings to set aside the fraudulent settlement and as to the registration of a *lis pendens*. Section 3, sub-section (b), provides that a fraudulent conveyance, gift, delivery, or transfer by the debtor of his property or any part thereof shall constitute an act of bankruptcy.

30. (1) Where a person engaged in any trade or business makes an assignment to any other person of his existing or future book debts, or any class or part thereof, and is subsequently adjudicated bankrupt or makes an authorized assignment, the assignment of book debts shall be void against the trustee in the bankruptcy, or under the authorized assignment, as regards any book debts which have not been paid at the date of the petition in bankruptcy or of the authorized assignment, unless there has been compliance with the provisions of any statute which now is or at any time hereafter may be in force in the province wherein such person resides or is engaged in said trade or business as to registration, notice and publication of such assignments. Provided that nothing in this section shall have effect so as to render void any assignment of book debts, due at the date of the assignment from specified

debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made *bonâ fide* and for value, or in any authorized assignment. **Annotation.**

(2) For the purposes of this section "assignment" includes assignment by way of security and other charges on book debts.

Where an assignment of book debts complies with the provisions of a statute in force in any of the Provinces in reference to registration notice and publication of the assignment the section becomes inoperative.

This section contemplates a general assignment of book debts, not specific individual assignments.

It has been held in the corresponding section in the English Bankruptcy Act that an assignee of book debts due to the bankrupt in the course of his trade should, to avoid the section, give immediate notice to the debtors, and if he does so, before the receiving order, and before notice of an available act of bankruptcy, he will be protected, but the appointment of a receiver, without such notice, will not suffice. *Rutter* v. *Everett*, [1895] 2 Ch. 872; *Re Neal*, [1914] 2 K.B. 191.

31. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, incurring, taking, paying or suffering the same, or if he makes an authorized assignment, within three months after the date of the making, incurring, taking, paying or suffering the same, be deemed fraudulent, and void as against the trustee in the bankruptcy or under the authorized assignment.

(2) If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *primâ facie* to have been made, incurred, taken, paid or suffered with such view as aforesaid whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.

(3) For the purpose of this section, the expression "creditor" shall include a surety or guarantor for the debt due to such creditor.

The corresponding section in the original Act was repealed and the above substituted therefor by the Bankruptcy Act Amendment Act, 1920.

This section aims at a fraudulent preference and should be carefully compared with existing legislation on fraudulent preferences in the various provinces and the decisions thereunder.

The corresponding section in the Imperial Act does not take away the defence of pressure. Our section specifically provides that if any conveyance or transfer has the effect of giving a creditor a preference over other creditors it shall be presumed *primâ facie* to have been made with a view to giving such creditor a preference, whether it was made voluntarily or under pressure. Generally, if the dominant view of the debtor is to prefer a creditor, the Court will find (the other conditions of the section being fulfilled) a fraudulent preference, although the debtor may have been actuated by other motives as well. *Ex parte Griffith*, 23 Ch. D. 69; *Ex parte Hall*, 19 Ch. D. 580. Under the English Act the onus of proof lies on the trustee. *Re Laurie*, 5 Mans.

Annotation.

48. But under our section, under certain circumstances, there is a presumption which it would be necessary for the defendant to rebut. Section 3, sub-section (c), provides that a fraudulent preference is an act of bankruptcy.

32. (1) Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy or of an authorized assignment on an execution, attachment or other process against property, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy or an authorized assignment,—

(*a*) any payment by the bankrupt or assignor to any of his creditors;

(*b*) any payment or delivery to the bankrupt or assignor;

(*c*) any conveyance or transfer by the bankrupt or assignor for adequate valuable consideration;

(*d*) any contract, dealing, or transaction by or with the bankrupt or assignor for adequate valuable consideration;

provided that both the following conditions are complied with, namely:—

(i) that the payment, delivery, conveyance, assignment, transfer, contract, dealing, or transaction, as the case may be, is in good faith and takes place before the date of the receiving order or authorized assignment; and,

(ii) that the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, transfer, contract, dealing or transaction was made, executed or entered into, has not at the time of the payment, delivery, conveyance, assignment, transfer, contract, dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt or assignor before that time.

(2) The expression "adequate valuable consideration" in paragraph (*c*) of this section means a consideration of fair and reasonable money value with relation to that of the property conveyed, assigned or transferred, and in paragraph (*d*) hereof means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

It has been held under the corresponding section of the English Act that a case within this section is outside section 29. *Re Reis; Ex parte Clough*, [1904] 1 K.B. 451; not reversed on this point by Court of Appeal, [1904] 2 K.B. 769.

A charging order on stock or shares or money in Court belonging to a judgment debtor is not a "transaction" protected by this section: *Re O'Shea's Settlement*, [1895] 1 Ch. 325; nor is an order charging a judgment debtor's interest in a partnership: *Wild* v. *Southwood*, [1897] 1 Q.B. 317; nor the payment of money in respect of lost bets: *Ward* v. *Fry*, 50 W.R. 72.

Want of notice. The onus of proving the want of notice lies on the person seeking the protection of the section. *Ex parte Schulte*, L.R. 9 Ch. 409; *Ex parte Revell*, 13 Q.B.D. 727. A person will be deemed to have notice of an act of bankruptcy if he has knowledge of it or if he wilfully abstains from acquiring such knowledge, or if he knows facts from which any impartial person would naturally infer that an act of bankruptcy has been committed; and in such a case the Court will not inquire whether he did in fact draw that inference or not. *Ex parte Snowball*, L.R. 7 Ch. 549. Notice of a bankruptcy petition is notice of an act of bankruptcy, because such a petition must be founded upon an act of bankruptcy. *Lucas* v. *Dicker*, 6 Q.B.D. 84. But notice that a petition has been dismissed would appear not to be notice of an act of bankruptcy. *Re O'Shea's Settlement*, [1895] 1 Ch. 325.

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33. If a person in whose favour any settlement of property, conveyance or transfer which is void under this Act has been made, shall have sold, disposed of, realized on or collected the property so conveyed or transferred, or any part thereof, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee as such, who may recover such property or the value thereof from the person in whose favour such settlement of property, conveyance or transfer was made or from any other person to whom the person in whose favour such settlement of property, conveyance or transfer was made may have resold, redisposed of or paid over the proceeds of such property as fully and effectually as the trustee could have recovered the same if it had not been so sold, disposed of, realized on or collected. Provided that where any person to whom such property has been sold or disposed of shall have paid or given therefor in good faith fair and reasonable consideration he shall not be subject to the operation of this section but the trustee's recourse shall be solely against the person in whose favour such settlement was made for recovery of the consideration so paid or given or the value thereof; and further provided that in case the consideration payable for or upon any sale or resale of such property or any part thereof shall remain unsatisfied the trustee shall be subrogated to the rights of the vendor to compel payment or satisfaction.

In case the donee under a fraudulent settlement or the grantee under a fraudulent conveyance or transfer sells or disposes of the property, then the trustee has under this section power to take action to recover the proceeds of such sale.

34. (1) All transactions by a bankrupt with any person dealing with him *bonâ fide* and for value, in respect of property whether or real personal, acquired by the bankrupt after the making of a receiving order shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction. For the purposes of this subsection, the receipt of any money, security, or negotiable instrument, from or by the order or direction of a bankrupt by his banker, and any payment and any delivery of any security or negotiable instrument made to, or by the order or direction of a bankrupt by his banker, shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value.

(2) Where a banker has ascertained that a person having an account with him is an undischarged bankrupt, then, unless the banker is satisfied that the account is on behalf of some other person, it shall be his duty forthwith to inform the trustee in the bankruptcy of the existence of the account, and thereafter he shall not make any payments out of the account, except under an order of the court or in accordance with instructions from the trustee in the bankruptcy, unless by the expiration of one month from the date of giving the information no instructions have been received from the trustee.

This section applies to real as well as to personal property, and only applies to property acquired after the adjudication and not to property acquired between the act of bankruptcy and the adjudication. *Cohen* v. *Mitchell*, 25 Q.B.D. 262.

35. If at any time a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the bankrupt's or authorized assignor's estate, and the trustee, under the direction of the creditors or inspectors, refuses or neglects to take such proceeding after being duly required to do so, the creditor may, as of right, obtain from the court an order authorizing him to take proceedings in the name of the trustee, but at his own expense and risk, upon such terms and conditions as to indemnity to the trustee as the court may prescribe, and thereupon any benefit derived from the proceedings shall, to the extent of his claim and full costs, belong exclusively to the creditor instituting the same; but if, before such order is granted, the trustee shall, with the approval of the inspectors, signify to the court his readiness to institute the proceedings for the benefit of the creditors, the order shall prescribe the

Annotation. time within which he shall do so, and in that case the advantage derived from the proceedings, if instituted within such time, shall belong to the estate.

The Act gives exclusive right to the trustee to take proceedings, but this section, however, enables a creditor to apply to a Court to compel the trustee to bring action, if he does not wish to do so, upon the trustee being indemnified as to costs. A trustee is an officer of the Court and any person dissatisfied by any decision of the trustee can apply to the Court for relief. *Ex parte James*, L.R. 9 Ch. 609.

Contributories to Insolvent Corporations.

36. (1) This section shall apply only to corporations which have become bankrupt or authorized assignors under this Act.

(2) Every shareholder or member of a corporation or his representative shall be liable to contribute the amount unpaid on his shares of the capital or on his liability to the corporation or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company or otherwise; such shareholder or member will hereinafter be referred to as the "contributory."

(3) The amount which the contributory is liable to contribute shall be deemed an asset of the corporation and a debt payable to the trustee forthwith upon the making of a receiving order against the corporation or on the execution by the corporation of an assignment for the general benefit of creditors.

(4) If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the corporation or to its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the corporation for the purposes of this Act and shall be liable to contribute as aforesaid to the extent of his liabilities to the corporation or its members or creditors independently of this Act.

(5) The amount which he is so liable to contribute shall be deemed an asset and a debt as aforesaid.

(6) The trustee may from time to time make demand on any contributory requiring him to pay to the trustee within thirty days from and after the date of the service of such demand, the amount for which such person is so liable to contribute or such portion thereof as the trustee deems necessary or expedient. Any such demand shall be deemed to have been properly served if delivered personally to the contributory or if a copy of the same is mailed in a registered prepaid letter addressed to the contributory at his last known address or at the address shown in or by the stock register or other books of the corporation.

(7) If the contributory disputes liability, either in whole or in part, he shall within fifteen days from the service of such demand give notice in writing to the trustee stating therein what portion of the demand is disputed and setting out his grounds of defence and he shall not thereafter, unless by leave of the court, be permitted to plead in any action or proceeding brought against him by the trustee any grounds of defence of which he has not notified the trustee within said fifteen days.

(8) If at the expiration of thirty days from the date of the service of such demand the contributory has not paid to the trustee the required amount, the trustee may take proceedings against the contributory for the recovery thereof in the manner provided by General Rules.

(9) If the contributory considers the demand excessive or unjust he may apply to the court to reduce or disallow it.

(10 If the court considers the demand to be grossly excessive or unjust it may order the trustee to pay personally the costs of any such application.

(11) The court shall, on the application of any contributory, adjust the rights of the contributories among themselves without the intervention of the trustee and without expense to the estate.

The original section 8 of this section was repealed and the above was substituted therefor by the Bankruptcy Act Amendment Act, 1920.

Annotation.

Section 2, subsection (k) provides that "corporation" shall include any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the Provinces of Canada, and any incorporated company, wheresoever incorporated, which has an office in or carried on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies.

Section 2, subsection (o), states that where the debtor is a corporation as defined by that section, the Dominion Winding-up Act shall not, except by leave of the Court, extend or apply to this Act notwithstanding anything in that Act contained, but all proceedings instituted under the Winding-up Act before this Act comes into force or afterwards, by leave of the Court, may and shall be as lawfully and effectually continued under the Winding-up Act as if the provisions of sec. 2, subsec. (o), had not been made.

The procedure under this section may be found in Rules 122 to 130 inclusive.

Attention is drawn to section 28 as to the application of the law of set-off, and the annotation thereunder.

Dividends.

37. (1) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the trustee in bankruptcy or in authorized assignment proceedings shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts. Such dividend as can be paid shall be so paid within six months from the date of the receiving order or assignment, and earlier, if required by the inspectors. Thereafter a further dividend shall be paid whenever the trustee has sufficient moneys on hand to pay to the creditors ten per cent, and more frequently if required by the inspectors, until the estate is wound up and disposed of.

(2) So soon as a final dividend sheet is prepared the trustee shall send by mail to every creditor (1) a notice of the fact, (2) an abstract of his receipts and expenditures as trustee which abstract shall indicate what amount of interest has been received by the trustee for moneys in his hands, and (3) a copy of the dividend sheet with notice thereon (*a*) of the claims objected to and (*b*) whether any reservation has been made therefor. After the expiry of fifteen days from the date of the mailing of the last of said notices, abstracts and dividend sheets, dividends on all debts not objected to up to the time of payment shall be paid.

(3) Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the trustee and dividend or dividends he may have failed to receive, before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

(4) Where one partner of a firm is adjudged bankrupt, or makes an authorized assignment, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt or authorized assignor until all the separate creditors have received the full amount of their respective debts.

(5) Where joint and separate properties are being administered, dividends of the joint and separate properties shall, on the application of any person interested, be declared together, and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to work done for and the benefit received by each property.

Annotation.

(6) When the trustee has realized all the property of the bankrupt, or authorized assignor, or so much thereof as can, in the joint opinion of himself and of the inspectors, be realized without needlessly protracting the trusteeship, he shall declare a final dividend, but before so doing he shall give notice by registered prepaid letter posted to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the court within a time limited by the notice (which shall be within thirty days after the mailing or service of the notice), he will proceed to make a final dividend without regard to their claims.

(7) After the expiration of the time so limited, or, if the court on application by any such claimant grants him further time for establishing his claim, then on the expiration of such further time, the property of the bankrupt, or authorized assignor shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons.

(8) Where a trustee has published the notice in the form and in the manner provided by section eleven, subsection four, of this Act and has mailed prepaid and registered a circular to each creditor of the bankrupt or assignor of whom he has notice or knowledge as provided by section forty-two, subsection two, of this Act, such trustee shall at the expiration of thirty days from the date of the mailing of the last of the said circulars or from the date of last publication (whichever date should last occur) be at liberty to distribute the proceeds of the estate of the bankrupt or assignor among the parties entitled thereto, having regard only to the claims of which the trustee has then notice, and shall not be liable for the proceeds of the estate or assets or any part thereof so distributed to any person of whose claim the trustee has not notice at the time of the distribution thereof. The trustee shall, not later than six months after he is at liberty pursuant to the provisions of this section to distribute the proceeds of the estate of the bankrupt or assignor, pay to the Receiver General of Canada all declared but unpaid dividends remaining in his hands, and shall at the same time provide a list of the names and post office addresses, so far as known, of the creditors entitled, showing the respective amounts payable to the respective creditors. The Receiver General shall, thereafter, upon application made, pay to any unpaid creditor his proper dividends as shown on this list, and such payment shall have effect as if made by the trustee.

(9) No action for a dividend shall lie against the trustee but if the trustee refuses to pay any dividend, the court may, if it thinks fit, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld and the costs of the application.

The original subsection 8 was repealed and the above substituted therefor by the Bankruptcy Act Amendment Act, 1920.

For costs of administration, attention is drawn to section 40. For debts provable in bankruptcy, see sec. 44 and annotations thereunder, and for proof of debts, see sec. 45.

Under the corresponding section in the Imperial Bankruptcy Act, no action for a dividend will lie against the trustee, but if the trustee refuses to pay one, the Court may, if it thinks fit, order him to pay it, and also to pay out of his own money interest thereon from the time it was withheld and the costs of the application.

See section 96 which provides penalties for an authorized trustee failing to observe or perform any provisions of the Act.

38. The debtor shall be entitled to any surplus remaining after payment in full of his creditors with interest as by this Act provided and of the costs, charges and expenses of the authorized assignment.

Appeals from Decisions of Trustee.

39. If the debtor or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court

may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just. **Annotation.**

Attention is drawn to sections 63 and 64 which provide for Courts and procedure. Rules 63 to 73 should also be read in conjunction therewith.

Remuneration of Trustee.

40. (1) The trustee in bankruptcy or in any other proceedings under this Act shall receive such remuneration as shall be voted to him by the creditors at any general meeting.

(2) Where the remuneration of the trustee has not been fixed under the next preceding subsection before the final dividend, the trustee may insert in the final dividend sheet and retain as his remuneration a sum not exceeding five per cent. of the cash receipts, subject to reduction by the court upon application of any creditor or of the debtor.

(3) The remuneration of the trustee for all services shall not under any circumstances exceed five per cent. of the cash receipts.

(4) The disbursements of a trustee shall in all cases be taxed by the prescribed authority unless such taxation is waived either by creditors at a general meeting called prior to the declaration of the final dividend, or by the inspectors.

Remuneration under the corresponding English section is arrived at on a different basis. Under the Dominion Winding-up Act, the usual commission is 5% on the corpus of the estate exclusive of an annual allowance for care and management. *Re Farmer's Loan and Savings Co.*, 3 O.W.R. 837. The remuneration is based chiefly on the time occupied, the responsibility imposed and the work done. *Re Central Bank*, 15 O.R. 309.

Discharge of Trustee.

41. (1) When the affairs of an estate have been fully administered, or, for sufficient cause, before full administration, an authorized trustee may, upon his own request, be discharged from further performance of all or any of his duties and obligations with respect to such estate.

(2) Such discharge may be granted by order of the court.

(3) The grant of such discharge (whether full or partial) shall operate as a release of the special security provided pursuant to subsection eight of section fourteen.

(4) The trustee shall finally dispose of all books and papers of the estate of the bankrupt or authorized assignor in manner prescribed by General Rules.

For application and the procedure with reference to obtaining discharge, see Rules 107 to 111 inclusive.

PART IV.

CREDITORS.

Meeting of Creditors.

42. (1) As soon as may be after the making of a receiving order against a debtor or after the making of an authorized assignment by a debtor, a general meeting of creditors (in this Act referred to as the first meeting of creditors) shall be held for the purpose of considering the affairs of the debtor and to appoint inspectors and give directions to the trustee with reference to the disposal of the estate.

(2) It shall be the duty of the trustee to inform himself, by reference to the debtor and his records and otherwise, of the names and addresses of the creditors, and within five days from the date of the receiving order or assignment, to mail prepaid and registered to every creditor known to him a circular calling the first meeting of creditors at his office or some other convenient place to be named in the notice, for a date not later than fifteen days after the mailing of such notice.

(3) The trustee may at any time call a meeting of creditors, and he shall do so whenever requested in writing by twenty-five per cent. in number of

Annotation.

the known creditors holding twenty-five per cent. in value of the known claims. But, after the first meeting he shall not be under obligation to give notice of any meeting to any creditors other than those who have proved their debts.

(4) Meetings other than the first thereof shall be called by mailing or otherwise giving notice of the time and place thereof to each creditor at the address given in his proof of claim.

(5) At all meetings the chairman shall be such person as the meeting by resolution appoints, and he may with the consent of the meeting adjourn the meeting from time to time and from place to place.

(6) A meeting shall not be competent to act for any purpose except the election of a chairman of and the adjournment of the meeting, unless there are present or represented at least three creditors, or all the creditors if their number does not exceed three.

(7) If within half an hour from the time appointed for the meeting a quorum of creditors is not present or represented, the meeting shall be adjourned to the same day in the following week at the same time and place, or to such other day as the chairman may appoint, not being less than seven nor more than twenty-one days.

(8) The chairman shall cause minutes of the proceedings at the meeting to be drawn up and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting.

(9) A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt provable in bankruptcy or under an authorized assignment to be due to him from the debtor, and the proof has been duly lodged with the trustee before the time appointed for the meeting.

(10) For the purpose of voting, a secured creditor shall unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security.

(11) A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and against whom a receiving order has not been made, or by whom an authorized assignment has not been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof.

(12) The chairman of a meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the court. If he is in doubt whether the proof of a creditor should be admitted or rejected, he shall mark the proof as objected to, and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

(13) A creditor may vote either in person or by proxy deposited with the trustee at or before the meeting at which it is to be used. The trustee shall send to each creditor with the notice summoning the first meeting of creditors, a proxy in the form prescribed by General Rules; but neither the name of the trustee nor of any other person shall be printed or inserted in the proxy before it is so sent. A proxy shall not be invalid merely because it is in the form of a letter, telegram or cable.

(14) Subject to the provisions of this Act, all questions at meeting of creditors shall be decided by resolution carried by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows:—

For every claim of or over twenty-five dollars and not exceeding two hundred dollars—one vote;

For every claim of over two hundred dollars and not exceeding five hundred dollars—two votes;

For every claim of over five hundred dollars and not exceeding one thousand dollars—three votes;

For every additional one thousand dollars or fraction thereof—one vote.

(15) No person shall be entitled to vote on a claim acquired after the assignment unless the entire claim is acquired, but this shall not apply to persons acquiring notes, bills or other securities upon which they are liable.

(16) A secured creditor shall not be entitled to vote at any meeting of creditors until he has proved his claim and valued his security as hereinafter provided. **Annotation.**

(17) The trustee, if a creditor or a proxy for a creditor, may vote as a creditor at any meeting of creditors, and, in addition, in case of a tie, shall have a casting vote, personally, as if he were a creditor holding a proved claim of twenty-five dollars.

(18) A corporation may vote at meetings of creditors as if a natural person, by an authorized agent.

(19) The vote of the trustee, or of his partner, clerk solicitor, or solicitor's clerk, either as creditor or as proxy for a creditor, shall not be reckoned in the majority required for passing any resolution affecting the remuneration or conduct of the trustee.

Section 2, sub-section (z), provides that an "ordinary resolution" means a resolution carried in manner provided by sub-sec. 14 of sec. 42 of this Act. Sub-section (ii) of section 2 provides that a "special resolution" means a resolution decided by a majority in number of the creditors present, personally or by proxy, at a meeting of creditors and voting three-fourths in value of the proved debts on the resolution. The Rules relating to meetings of creditors are numbers 112, 113 and 114. As to proof of debts, see sec. 45.

Inspectors.

43. (1) At the first or a subsequent meeting the creditors shall appoint one or more, but not exceeding five, inspectors of the administration by the trustee of the estate of the debtor.

(2) The powers of inspectors may be exercised by a majority of them.

(3) The creditors may, at any meeting, revoke the appointment of any inspector and in such event or in case of the death, resignation, or absence from the province of an inspector, may appoint another in his stead.

(4) Each inspector may be repaid his actual and necessary travelling expenses incurred in and about the performance of his duties, and may also be paid the following fees:—

Estates with assets below				$5,000	a fee of	$2.00	per meeting.
"	"	"	from	$5,000 to $15,000	"	3.00	"
"	"	"	"	$15,000 " $30,000	"	4.00	"
"	"	"	"	$30,000 " $50,000	"	5.00	"
"	"	"	"	$50,000 " $100,000	"	7.50	"
"	"	"	"	$100,000 and over	"	10.00	"

The original sub-section 4 was repealed and the above substituted therefor by the Bankruptcy Act Amendment Act, 1920.

The English Bankruptcy Act provides for a committee of inspection.

Debts Provable.

44. (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract promise or breach of trust shall not be provable in bankruptcy or in proceedings under an authorized assignment.

(2) Save as aforesaid all debts and liabilities present or future to which the debtor is subject at the date of the receiving order or the making of the authorized assignment or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order or of the making of the authorized assignment shall be deemed to be debts provable in bankruptcy or in proceedings under an authorized assignment.

(3) The court shall value at the time and in the summary manner prescribed by General Rules, all contingent claims and all such claims for unliquidated damages as are authorized by this sectionf and after, but not before, such valuation, every such claim shall for all purposes of this Act, be deemed a proved debt to the amount of its valuation.

Contingent debts are capable of being estimated for proof. See *Hardy* v. *Fothergill*, 13 App. Cas. 351. Any liability which can be fairly estimated

Annotation. can be proved. For example, an annuity. See *Ex parte Naden*, L.R. 9 Ch. 670. Again, a surety would be entitled to prove in respect to his liability. *Re Parrett*, 39 W.R. 400. Any person affected by an estimate of the value of a contingent debt can apply to the Court to have the value assessed by the Court itself.

Damages for bodily injury do not pass to the trustee. *Beckham* v. *Drake*, 2 H. L. Cas. 579.

Debts payable at a future time may be proved. Section 50.

Proof of Debts.

45. (1) Every creditor shall prove his debt as soon as may be after the of a receiving order or after the date of an authorized assignment or as soon as possible after such creditor has received notice of meeting for the consideration of a composition, extension or scheme of arrangement.

(2) A debt may be proved by delivering or sending through the post in a prepaid and registered letter to the trustee, a statutory declaration verifying the debt.

(3) The statutory declaration may be made by the creditor himself or by some person authorized by or on behalf of the creditor. If made by a person so authorized, it shall state his authority and means of knowledge.

(4) The statutory declaration shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The trustee may at any time call for the production of the vouchers.

(5) The statutory declaration shall state whether the creditor is or is not a secured creditor.

(6) Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors before the first meeting, and at all reasonable times.

The original subsection 1 was repealed and the above substituted therefor by the Bankruptcy Act Amendment Act, 1920.

See Rule 115 which provides that in any case in which it shall appear from the debtor's statement of affairs that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made, either by the debtor, or his foreman, or the bookkeeper of the debtor, or some other person on behalf of all such creditors.

See also Rule 116 which provides that where a creditor's proof has been admitted the notice of dividend shall be sufficient notification to such creditor of such admission.

Only creditors who have proved their debts are entitled to vote at the first or any other meeting of creditors. Sec. 42, sub-sec. 9.

Proof by Secured Creditors.

46. (1) If a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized. (Eng. Sch. 2 No. 10.)

(2) If a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove for his whole debt. (Eng. Sch. 2 No. 11.)

(3) If a secured creditor does not either realize or surrender his security, he shall within thirty days of the date of the receiving order, or of the making of the authorized assignment, or within such further time as may be allowed by the inspectors, or in case they shall refuse, then within such further time as may be allowed by the court, file with the trustee a statutory declaration stating therein full particulars of his security or securities, the date when each security was given, and the value at which he assesses each thereof. He shall

be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed. **Annotation.**

(4) Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value.

(5) If the trustee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the trustee, or as, in default of such agreement, the court may direct. If the sale be by public auction the creditor, or the trustee on behalf of the estate, may bid or purchase.

(6) Notwithstanding subsections four and five of this section the creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the trustee does not, within one month after receiving the notice or such further time or times as the court may allow, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued.

(7) Where a security has been realized as provided by this section, the net amount realized shall be paid to the secured creditor and shall be substituted for the amount at which he valued such security in his claim and shall be treated in all respects as an amended valuation by the secured creditor. The costs and expenses of any such sale shall be in the discretion of the court.

(8) If the trustee has not elected to acquire the security as hereinbefore provided, a creditor may at any time within two months after filing his claim amend the valuation and proof on showing to the satisfaction of the trustee, or the court, that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the court shall order, unless the trustee shall allow the amendment without application to the court.

(9) Where a valuation has been amended in accordance with the foregoing subsection, the creditor shall forthwith repay any surplus dividend which he may have received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be, shall be entitled to be paid out of any money, for the time being available for dividend, any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment.

(10) If a secured creditor does not comply with the foregoing subsections he shall be excluded from all share in any dividend.

(11) Subject to the provisions of subsections five and six of this section, a creditor shall in no case receive more than one hundred cents in the dollar and interest as provided by this Act.

Section 2, subsection (gg), provides that a "secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor, or any part thereof, as security for a debt due or accruing due to him from the debtor.

Under the corresponding section of the English Act, a creditor having a security on a separate estate need not value it when proving against the joint estate. *Ex parte W. Riding Bank*, 19 Ch. D. 105.

Proof in respect of Distinct Contracts.

47. If a debtor was, at the date of the receiving order or authorized assignment, liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals,

Annotation.

or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts.

Restricted Creditors.

48. (1) Where a married woman has been adjudged bankrupt or has made an authorized assignment, her husband shall not be entitled to claim any dividend as a creditor in respect of any money or other estate hereafter lent or entrusted by him to his wife for the purposes of her trade or business, or claim any wages, salary or compensation for work thereafter done or services hereafter rendered in connection with her trade or business, until all claims of the other creditors of his wife for valuable consideration in money or money's worth have been satisfied.

(2) Where the husband of a married woman has been adjudged bankrupt or has made an authorized assignment, his wife shall not be entitled to claim any dividend as a creditor in respect of any money or other estate hereafter lent or entrusted by her to her husband for the purposes of his trade or business, or claim any wages, salary or compensation for work hereafter done or services hereafter rendered in connection with his trade or business, until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied.

(3) Where any person or firm has been adjudged bankrupt or has made an authorized assignment, any father, son, daughter, mother, brother, sister, uncle or aunt of any such person or of any member of said firm shall not be entitled to claim by way of dividend or otherwise from the trustee any wages, salary or compensation for work hereafter done or services hereafter rendered to said person or firm exceeding an amount equal to three months' wages, salary or compensation, until all claims of the other creditors of said person or firm for valuable consideration in money or money's worth have been satisfied.

(4) Where any corporation has been adjudged bankrupt or has made an authorized assignment no officer, director or shareholder thereof shall be entitled to claim by way of dividend or otherwise from the trustee any wages, salary or compensation for work hereafter done or services hereafter rendered to such corporation exceeding an amount equal to three months' wages, salary or compensation, until all claims of the other creditors of said corporation for valuable consideration in money or money's worth have been satisfied.

It has been held under the corresponding section of the English Act that, as a rule, the onus will not be on a married woman to show that she did not advance the money for the purpose of any trade or business of her husband. *Re Cronmire*, [1901] 1 K.B. 480; *Re Genese*, 16 Q.B.D., 700.

If a married woman has ceased to trade, she remains liable to bankruptcy for trade debts, and possibly for others, contracted by her during the trading period. *Re Dagnall*, [1896] 2 Q.B. 704.

Interest.

49. On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the receiving order or authorized assignment and provable under this Act, the creditor may prove for interest at a rate not exceeding six per cent. per annum to the date of the order or authorized assignment from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment.

As a general rule, there can be no proof for interest after receiving order. *Ex parte Lubbock*, 4 DeG. J. & Sm. 516; *Quartermaine's Case*, [1892] 1 Ch. 639.

Debts Payable at a Future Time.

50. A creditor may prove for a debt not payable at the date of the receiving order or of the authorized assignment as if it were payable presently and

may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of six per cent. per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted. **Annotation.**

As to interest on a contract payable at a future time, see *Re Browne and Wingrove; Ex parte Ador*, [1891] 2 Q.B. 574.

Priority of Claims.

51. (1) Subject to the provisions of the next succeeding section as to rent, in the distribution of the property of the bankrupt or authorized assignor there shall be paid, in the following order of priority,—

Firstly, The fees and expenses of the trustee;

Secondly, The costs of the execution creditor (including sheriff's fees and disbursements) coming within the provisions of section eleven, subsections one and ten;

Thirdly, All wages, salaries, commission or compensation of any clerk, servant, travelling salesman, labourer or workman in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment.

(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor is sufficient to meet them.

(3) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.

(4) Subject to the provisions of this Act, all debts proved in the bankruptcy or under an assignment shall be paid *pari passu*.

(5) If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order or assignment at the rate of six per cent. per annum on all debts proved in the bankruptcy or under the assignment.

(6) Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

Subsection 3 of this section was repealed and the above substituted therefor by the Bankruptcy Act Amendment Act, 1920.

Services must be rendered personally, not by a paid agent of the clerk. See *Cairney* v. *Back*, [1906] 2 K.B. 746. The rules provide that one proof may be made for a number of workmen. It has been held that an assignment by an outgrowing partner of his interest in the partnership assets to the continuing partners is not necessarily fraudulent as against creditors. If the assignment was made *bonâ fide*, it will not constitute an act of bankruptcy. See *Ex parte Williams*, 11 Ves. 3; *Ex parte Walker*, 31 L.J. (Bank.) 69; and *Ex parte Fell*, 10 Ves. 347. Where a partner assigned the whole of his separate estate to secure an existing separate debt, and the partnership was at that time insolvent, the execution of the deed was held to be an act of bankruptcy. *Ex parte Trevor, Re Burghardt*, 1 Ch. D. 297.

Rights of Landlord.

52. (1) Where the bankrupt or authorized assignor is a tenant having goods or chattels on which the landlord has distrained, or would be entitled to distrain, for rent, the right of the landlord to distrain or realize his rent by

Annotation. distress shall cease from and after the date of the receiving order or authorized assignment and the trustee shall be entitled to immediate possession of all the property of the debtor, but in the distribution of the property of the bankrupt or assignor the trustee shall pay to the landlord in priority to all other debts, an amount not exceeding the value of the distrainable assets, and not exceeding three months' rent accrued due prior to the date of the receiving order or assignment, and the costs of distress, if any.

(2) The landlord may prove as a general creditor for (i) all surplus rent accrued due at the date of said receiving order or assignment; and (ii) any accelerated rent to which he may be entitled under his lease, not exceeding an amount equal to three months' rent.

(3) Except as aforesaid the landlord shall not be entitled to prove as a creditor for rent for any portion of the unexpired term of his lease, but the trustee shall pay to the landlord for the period during which he actually occupies the leased premises from and after the date of the receiving order or assignment, a rental calculated on the basis of said lease.

(4) In case of continued occupation by the trustee of the leased premises for the purposes of the trust estate any payment of accelerated rent made to the landlord shall be credited to the occupation of the trustee.

(5) Notwithstanding any provision or stipulation in any lease or agreement, where a receiving order or an authorized assignment has been made, the trustee may within one month from the date of any such receiving order or assignment, by notice in writing signed by him given to the landlord, elect to retain the premises occupied by the bankrupt or assignor at the time of the receiving order or assignment for the unexpired term of any lease under which such premises were held or for such portion of the term as he shall see fit, upon the terms of the lease and subject to payment of the rent therefor provided by such lease or agreement, or he may disclaim the lease or agreement. Should the trustee not give such notice within the time hereinbefore provided, he shall be deemed to have disclaimed the lease or agreement.

(6) If the trustee so elects to retain such premises for such unexpired term or portion thereof and the provisions of the lease do not preclude the lessee from assigning the term or subletting the premises the trustee shall have power to assign or sublet for the unexpired term.

(7) The entry into possession of the premises by the trustee during the said period of one month shall not be deemed to be evidence of an intention on the part of the trustee to elect to retain the premises nor affect his right to disclaim the lease or agreement.

Under the corresponding English section a landlord can at any time either before or after the commencement of the bankruptcy distrain for rent due to him from the bankrupt subject to the limitation that the distress shall not be for more than six months' rent accrued due before the adjudication if it be levied after the commencement of the bankruptcy.

Under this section the right of the landlord to distrain shall cease from and after the date of the receiving order or authorized assignment, and the trustee shall be entitled to immediate possession of the property.

A landlord cannot distrain and prove for the same rent. See *Ex parte Grove*, 1 Atk. 104.

Disallowance of Claims.

53. (1) The trustee shall examine every proof and the grounds of the debt, and may require further evidence in support of it. If he considers the claimant is not entitled to rank on the estate, or not entitled to rank for the full amount of his claim, or if directed by a resolution passed at any meeting of creditors or inspectors, he may disallow the claim in whole or in part, and in such case shall give to the claimant a notice of disallowance. The said notice may be given either by serving the claimant with a copy thereof personally or by mailing such copy in a registered prepaid letter, addressed to the claimant at his last-known address, or at the address shown in or by the claimant's proof. Such disallowance shall be final and conclusive unless within thirty days after the service or mailing of the said notice or such further

time as the court may on application made within the same thirty days allow, the claimant appeals to the court in accordance with General Rules from the trustee's decision. **Annotation.**

(2) The court may also expunge or reduce a proof upon the application of a creditor or of the debtor, if the trustee declines to interfere in the matter.

As to proof of claims, see Rules 115 and 116.

PART V.

DEBTORS.

Duties of Debtors.

54. (1) Where a receiving order or an authorized assignment is made, the bankrupt or assignor shall make out and submit to the trustee a statement of and in relation to his affairs in the prescribed form verified by affidavit and showing the particulars of the debtor's assets, debts, and liabilities, the names, residences and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be prescribed or as the trustee may require. Such statement shall be submitted within seven days from the date of the receiving order or assignment, but the court may, for special reasons, extend the time.

(2) Any person stating himself in writing to be a creditor of the bankrupt or assignor, may personally or by agent inspect the statement at all reasonable times and take any copy thereof or extract therefrom, but any person untruthfully so stating himself to be a creditor shall be guilty of a contempt of court, and shall be punishable accordingly on the application of the trustee.

(3) Every debtor against whom a receiving order is made and every assignor who makes an authorized assignment shall, unless prevented by sickness or other sufficient cause, attend the first meeting of his creditors, and shall submit to such examination and give such information as the meeting may require.

(4) He shall give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such times on the trustee, execute such powers of attorney, conveyances, deeds, and instruments, and, generally, do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the trustee, or may be prescribed by General Rules, or may be directed by the court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the trustee, or any creditor or person interested.

(5) He shall aid, to the utmost of his power, in the realization of his property and the distribution of the proceeds among his creditors.

(6) If a debtor wilfully fails to perform the duties imposed on him by this section, or to deliver up possession of any part of his property which is divisible amongst his creditors under this Act and which is for the time being in his possession or under his control, to the trustee, or to any person authorized by the court to take possession of it, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of court, and may be punished accordingly.

Rule 97 provides for the statement of affairs. The statement is to be made out on Form 52.

Under the Imperial Act it was held that the debtor must be actually present in the room during the meeting. *Ex parte Best*, 18 Ch.D 488; *Ex parte Hollander; Re Cox*, W.N. 186.

The discharge only releases a bankrupt from debts provable in bankruptcy, and not from the obligation to perform the duties prescribed by the statute during the bankruptcy, and therefore, even after his discharge, he may be

Annotation. committed for contempt of Court if he wilfully fail to perform the duties imposed upon him by this section, or if he fails to deliver up possession to the trustee of any part of his property which is divisible amongst his creditors. *Ex parte Waters*, L.R. 18 Eq. 701.

It has been held under the English Act that an appeal will lie from a refusal of a Judge to commit, though the Court of Appeal will be slow to overrule the discretion of the Judge below (*Jarmain* v. *Chatterton*, 20 Ch.D. 493); and the rule at all events at common law, was that even though a majority of the Court to whom the application was made thought there should be a committal, if one Judge thought otherwise, no order could be made. (*Swinfen* v. *Swinfen*, 26 L.J. (C.P.) 97.)

As to the general jurisdiction in cases of contempt, see *Re Hooley* (*Rucker's Case*,) 5 Mans. 331, and *Re Pickard; Ex parte Official Receiver*, [1912] 1 K.B. 397.

Where it is sought to commit a person for contempt in disregarding an injunction, the person applying to commit must show, beyond reasonable doubt, that proper notice of the injunction was given. *Ex parte Langley; Re Bishop*, 13 Ch.D. 110.

Section 89 expressly providing for bankruptcy offences makes it a criminal offence if a debtor does not to the best of his knowledge and belief fully and truly discover to the trustee all his property, real and personal, and how and to whom and for what consideration and when he disposed of any part thereof.

Section 94 provides that where a debtor has been guilty of any criminal offence, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition, extension, or scheme of arrangement has been accepted or approved.

Arrest of Debtors.

55. (1) The court may, by warrant addressed to any constable or prescribed officer of the court, cause a debtor to be arrested, and any books, papers, money and goods in his possession to be seized, and him and them to be safely kept as prescribed until such time as the court may order under the following circumstances:—

(*a*) If, after the presentation of a bankruptcy petition against him, it appears to the court that there is probable reason for believing that he has absconded, or is about to abscond from Canada, with a view of avoiding payment of the debt in respect of which the bankruptcy petition was filed, or of avoiding appearance to any such petition, or of avoiding examination in respect of his affairs or of otherwise avoiding, delaying or embarrassing proceedings in bankruptcy against him;

(*b*) If after presentation of a bankruptcy petition against him, or after an authorized assignment has been made by him, it appears to the court that there is probable cause for believing that he is about to remove his goods with a view of preventing or delaying possession being taken of them by the trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods or any books, documents or writings which might be of use to the trustee or to his creditors in the course of the bankruptcy or authorized assignment proceedings;

(*c*) If after service of a bankruptcy petition on him or after he makes an authorized assignment, he removes any goods in his possession above the value of twenty-five dollars without the leave of the trustee.

(2) No payment or composition made or security given after arrest made under this section shall be exempt from the provisions of this Act relating to fraudulent preferences.

Annotation.

Section 72 provides for warrants of bankruptcy Courts and sec. 73 for commitment to prison.

The power to issue a warrant extends to the case of a debtor who has absconded before the issue of a notice or the presentation of a petition. *R.* v. *Northallerton County Court Judge*, [1898] 2 Q.B. 680; on appeal *sub nom. Skinner* v. *Northallerton County Court Judge*, [1899] A.C. 439.

A door may be broken open in order to affect the arrest. *Re Von Weissenfeld, Ex parte Hendry*, 9 Mor. 30.

Attention is drawn to rules 44 to 53 inclusive which provide the procedure for warrants, arrests and commitments.

Examination of Debtors and Others.

56. (1) Where a receiving order or an authorized assignment has been made, the trustee, upon ordinary resolution passed by the creditors present or represented at a meeting regularly called, or upon the written request or resolution of a majority of the inspectors of the estate, may, without an order, examine under oath before the registrar of the court or other prescribed person, the debtor or any person who is or has been an agent, clerk, servant, officer, director or employee of the debtor, respecting the debtor, his dealings or property, and, in the case of a bankrupt, as to any property, acquired or disposed of by him subsequently to the date of the receiving order.

(2) If the debtor, or any person liable to be examined as provided by the preceding subsection, is served with an appointment or summons to attend for examination and is paid or tendered the proper conduct money and witness fees, but refuses or neglects to attend as required by such appointment or summons, or, if attending, refuses to make satisfactory answers to any questions asked him or refuses to produce any book, document or other paper, having no lawful impediment made known to the examiner at the time of his sitting for such examination and allowed by him, the court may, by warrant, cause him to be apprehended and brought up for examination, and may order him to be committed to the common gaol of the judicial district in which he resides for any term not exceeding twelve months.

(3) The amount of conduct money and witness fee shall be fixed by General Rules.

(4) If any person has, or is believed or suspected to have, in his possession or power any of the property of the debtor, or any book, document or paper of any kind relating in whole or in part to the debtor, his dealings or property, or shewing that such person is indebted to the debtor, such person may, upon ordinary resolution passed by the creditors present or represented at a regularly called meeting (exclusive of such person, if he is a creditor), or upon the written request or resolution of the majority of the inspectors of the estate, be required by the trustee to produce such book, document or paper for the information of such trustee, or to deliver over to him any such property of the debtor.

(5) If such person fails to produce such book, document or other paper, or to deliver over such property, within four days of his being served with a copy of the said resolution and a request of the trustee in that behalf, or if the trustee or the majority of the inspectors is or are not satisfied that full production or delivery has been made, the trustee may, without an order, examine the said person before the registrar of the court or other prescribed person touching any such property, book or document or other paper which he is supposed to have received.

(6) Any such person may be compelled to attend and testify, and to produce upon his examination any book, document or other paper which under this section he is liable to produce, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as is provided by subsections two and three of this section.

(7) If any person on such examination admits that he is indebted to the debtor, the court may, on the application of the trustee, order him to pay to

Annotation. the trustee, at such time and in such manner as to the court seems expedient, the amount admitted, or any part thereof, either in full discharge of the whole amount in question or not, as the court thinks fit, with or without costs of the examination.

(8) If any person on such examination admits that he has in his possession any property belonging to the debtor, the court may, on the application of the trustee, order him to deliver to the trustee such property, or any part thereof, at such time, and in such manner, and on such terms, as to the court may seem just.

Subsection 2 of the original Act was repealed and the above substituted therefor by the Bankruptcy Act Amendment Act, 1920.

Rules 131 to 134 inclusive provide the procedure for examination of debtors and others. Rules 34 to 43 inclusive should also be consulted. Section 2, subsection (z), defines "ordinary resolution" as a resolution carried in the manner provided by subsection 14 of sec. 42 of the Act. As to what constitutes a meeting regularly called, see annotations to sec. 42 and Rules 112, 113 and 114.

Under the corresponding section of the English Act the bankrupt being under a personal obligation to make a full disclosure of his property, will not be entitled to any protection in reference to incriminating answers in relation to a question touching his estate. *Ex parte Schofield; Re Firth*, 6 Ch.D. 230.

In *Reg.* v. *Scott*, 25 L.J. (M.C.) 128, Lord Campbell, in his judgment, says that the result seems to be that a question cannot be put to a bankrupt which does not touch his trade dealings, or estate, or the direct object of which is to show that he has committed a criminal act; yet he cannot refuse to answer a question which does touch his trade dealings or estate, although the answer may tend to show that he has concealed his effects, or been guilty of any other offence connected with his bankruptcy. This case was followed in *Reg.* v. *Robinson*, L.R. 1 C.C.R. 80.

57. Where a receiving order is made against a debtor or where a debtor makes an authorized assignment, the court, on the application of the trustee, may from time to time order that for such time, not exceeding three months, as the court thinks fit, post letters, post packets and telegrams addressed to the debtor at any place or places mentioned in the order for re-direction, shall be re-directed, sent or delivered by the Postmaster General or the officers acting under him, or by the various telegraph and cable systems, government and other, operating in Canada, or by the operators thereof, to the trustee, and the same shall be done accordingly.

Discharge of Bankrupt or Assignor.

58. (1) Any debtor may, at any time after being adjudged bankrupt or making an authorized assignment, apply to the court for an order of discharge, to become effective not sooner than three months next after the date of his being adjudged bankrupt or of his making such assignment, and the court shall appoint a day for hearing the application.

(2) A bankrupt or authorized assignor intending to apply for his discharge shall produce to the registrar of the court a certificate from the trustee specifying the names and addresses of his creditors of whom the trustee has notice (whether they have proved or not) and it shall be the duty of the trustee to furnish such certificate upon request therefor by the bankrupt or authorized assignor. The registrar shall, not less than twenty-eight days before the day appointed for hearing the application, give to the trustee notice of the application and of the time and place of the hearing of it, and the trustee shall not less than fourteen days before the day appointed for hearing the application give to each creditor who has proved his debt like notice.

Annotation.

(3) The trustee shall file with the registrar of the court, at least three days before the day appointed for hearing the application, his report as to the conduct and affairs of the bankrupt or assignor (including a report as to the conduct of the bankrupt or assignor during the proceedings under his bankruptcy or assignment). If the bankrupt or assignor has been examined, the trustee shall also file such examination, and shall report to the court any fact, matter or circumstance which would, under this Act, justify the court in refusing an unconditional order of discharge.

(4) On the hearing of the application the court shall take into consideration the report of the trustee, and may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt or authorized assignor or with respect to his after-acquired property.

(5) The court shall refuse the discharge in all cases where the bankrupt or authorized assignor has committed any offence under this Act or any offence connected with his bankruptcy or assignment or the proceedings thereunder, unless for special reasons the court otherwise determines, and shall on proof of any of the facts mentioned in the next succeeding section, either,—

(*a*) refuse the discharge; or,

(*b*) suspend the discharge for a period of not less than two years: provided that the period may be less than two years if the only fact proved of those hereinafter mentioned is that his assets are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities; or,

(*c*) suspend the discharge until a dividend of not less than fifty cents in the dollar has been paid to the creditors; or,

(*d*) require the bankrupt or assignor, as a condition of his discharge, to consent to judgment being entered against him by the trustee for any balance or part of any balance of the debts provable under the bankruptcy or assignment which is not satisfied at the date of the discharge, such balance or part of any balance of the debts to be paid out of the future earnings or after-acquired property of the bankrupt or assignor in such manner and subject to such conditions as the court may direct; but execution shall not be issued on the judgment without leave of the court, which leave may be given on proof that the bankrupt or assignor has, since his discharge, acquired property or income available towards payment of his debts.

Provided that, if at any time after the expiration of one year from the date of any order made under this section the bankrupt or assignor satisfies the court that there is no reasonable probability of his being in a position to comply with the terms of such order the court may modify the terms of the order, or of any substituted order, in such manner and upon such conditions as it may think fit.

The procedure for application for discharge is found in Rule 135. Rule 136 provides that an appeal to the Appeal Court shall lie at the instance of the trustee, the debtor and or at the instance of any creditor or creditors, who oppose the discharge, from any order of the Court made upon the application for discharge.

Where a debtor intends to dispute any statement with regard to his conduct and affairs contained in the trustee's report he must comply with the provisions contained in Rule 137.

Under Rule 138, a debtor shall not be entitled to have any of the costs of or incidental to his application for discharge allowed to him out of his estate. If the debtor does not make his application for discharge until after the trustee has paid the final dividend, he shall, before the order of discharge is signed or delivered out, pay to the trustee such remuneration and solicitor's costs as the Court may allow.

Rule 139 provides for orders conditional on a consent judgment.

The order of the Court made on an application for discharge shall be dated on the day on which it is made, and shall take effect from the day on which the order is drawn up and signed. See Rule 140.

Annotation.

Provision is made in Rule 141 for application for leave to issue execution.

Rule 142 and Form 77 deal with accounts of after-acquired property.

See also Rules 143 and 144.

As to the suspension of the discharge until a stated dividend is paid, see *Re Walmsley*, 98 L.T. 55.

In dealing with an application for a discharge from bankruptcy, the Court will take into consideration not only the interests of the bankrupt and his creditors, but also the effect of a discharge on public morality. See *Ex parte Campbell*, 15 Q.B.D. 213.

As to the effect of a promise to pay a provable debt in bankruptcy after obtaining a discharge, see *Heather* v. *Webb*, 2 C.P.D. 1; *Elmslie* v. *Corrie*, 4 Q.B.D. 295; *Ex parte Barrow*, 18 Ch. D. 464.

An order discharging a bankrupt bars all debts wherever contracted insofar as an action in our Courts is concerned. See *R.* v. *Peters*, 16 Q.B.D. 636. As to actions in foreign Courts, see *Reg.* v. *Dyson*, 59 L.T. 932.

59. The facts referred to in the next preceding section are,—

(*a*) that the assets of the bankrupt or assignor are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible;

(*b*) that the bankrupt or assignor has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy or the making of the assignment;

(*c*) that the bankrupt or assignor has continued to trade after knowing himself to be insolvent;

(*d*) that the bankrupt or assignor has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;

(*e*) that the bankrupt or assignor has brought on, or contributed to, his bankruptcy or assignment by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs;

(*f*) that the bankrupt or assignor has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him;

(*g*) that the bankrupt or assignor has, within three months preceding the date of the receiving order or assignment, incurred unjustifiable expense by bringing a frivolous or vexatious action;

(*h*) that the bankrupt or assignor has, within three months preceding the date of the receiving order or of the making of the assignment, when unable to pay his debts as they became due, given an undue preference to any of his creditors;

(*i*) that the bankrupt or assignor has, within three months preceding the date of the receiving order or of the making of the assignment, incurred liabilities with a view of making his assets equal to fifty cents in the dollar on the amount of his unsecured liabilities;

(*j*) that the bankrupt or assignor has, on any previous occasion, been adjudged bankrupt or has made an authorized assignment or made a composition, extension or arrangement with his creditors;

(*k*) that the bankrupt or assignor has been guilty of any fraud or fraudulent breach of trust.

Under the corresponding section in the English Act it has been held that the Court may properly refuse the discharge where the bankrupt has been guilty of gross misconduct as a trader, although not guilty of any of the specific offences mentioned in the section. *Re Badcock*, 3 Mor. 138. On the other hand, if there are special circumstances, a conditional discharge

Annotation.

may be granted even when the bankrupt has committed a misdemeanour. *Re Solomons*, [1904] 1 K.B. 106.

Rule 139 provides for an order of discharge conditionally upon the debtor consenting to judgment being entered against him by the trustee for the balance or any part of the balance of the debts provable under the bankruptcy or authorized assignment which is not satisfied at the date of his discharge.

It has been held that a trader was not bound to leave off trading merely because he was in difficulties, the question being whether he had continued trading after there ceased to be any reasonable prospect of his retrieving himself. *Ex parte Johnson*, 4 DeG. & S. 25. See judgment of Cave, J., in *Re Stainton, Ex parte Board of Trade*, 4 Mor. 242, 251.

It has been held under the English Act that though a speculation turned out very badly, the bankrupt did not come within the section if, when he entered upon it, he possessed property beyond the amount of his liability. *Ex parte Evans*, 31 L.J. (Bank), 63.

As to rash and hazardous speculations see *Ex parte Rogers*, 13 Q.B.D. 438.

As to extravagance in living, see *Re Stevens*, 7 L.T. 649.

As to vexatiously defending an action, see *Re Pownall*, Fonb. 221; *Re Smith*, 29 L.T. (o.s.) 147.

60. (1) For the purposes of the preceding section the assets of a bankrupt or authorized assignor shall be deemed of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities when the court is satisfied that the property of the bankrupt or assignor has realized, or is likely to realize, or with due care in realization, might have realized an amount equal to fifty cents in the dollar on his unsecured liabilities, and a report by the trustee shall be *primâ facie* evidence of the amount of such liabilities.

(2) For the purposes of this and the next preceding sections the report of the trustee shall be *primâ facie* evidence of the statements therein contained.

(3) Any statutory disqualification on account of bankruptcy shall cease if and when the bankrupt obtains from the court his discharge with a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his part. The court may, if it thinks fit, grant such a certificate, and a refusal to grant such a certificate shall be subject to appeal.

(4) At the hearing of the application, the court may read the examination of the bankrupt or assignor, and may put such further questions to him and receive such evidence as it may think fit.

(5) The trustee, the debtor and any creditor may attend and be heard in person or by counsel.

(6) The powers of suspending and of attaching conditions to the discharge of a bankrupt or authorized assignor may be exercised concurrently.

(7) In either of the following cases, that is to say:—

(*a*) In the case of a settlement made before and in consideration of marriage where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement; or,

(*b*) In the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife);

if the settlor is adjudged bankrupt or makes an authorized assignment or compounds or arranges with his creditors, and it appears to the court that such settlement, covenant or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the court may refuse or suspend an order of discharge or grant an order subject to conditions, or refuse to approve a composition or arrangement, as the case may be, in like manner as in cases where the debtor has been guilty of fraud.

Annotation.

The burden of proving insufficiency of assets is on the opposing creditors. *Re Van Laun; Ex parte International Assets Co. Ltd.*, 14 Mans. 281.

The powers of suspending and of attaching conditions to a bankrupt's discharge may be exercised concurrently. *Re Walmsley*, 98 L.T. 55.

61. (1) An order of discharge shall not release the bankrupt or authorized assignor,—

(*a*) from any debt on a recognizance nor from any debt with which the bankrupt or assignor may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence, and he shall not be discharged from such excepted debts unless an order in council proceeding from the Crown in the proper right is filed in court consenting to his being discharged therefrom; or,

(*b*) from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party; or,

(*c*) from any liability under a judgment against him in an action for seduction, or under an affiliation order, or for alimony or under a judgment against him as a co-respondent in a matrimonial case, except to such an extent and under such conditions as the court expressly orders in respect of such liability; or,

(*d*) from any debt or liability for necessaries of life, and the court may make such order for payment thereof as it deems just or expedient.

(2) An order of discharge shall release the bankrupt or assignor from all other debts provable in bankruptcy or under an authorized assignment.

(3) An order of discharge shall not release any person who at the date of the receiving order or assignment was a partner or co-trustee with the bankrupt or authorized assignor or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him.

(4) An order of discharge shall be conclusive evidence of the bankruptcy, and of the validity of the proceedings therein, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge.

(5) Notice of the order of discharge of a bankrupt, or authorized assignor shall be forthwith gazetted.

See section 86 which provides that save as provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown.

Section 2, subsection (b), defines "alimentary debt" as a debt incurred for necessaries or maintenance. Sec. 2, sub-sec. (p), defines "discharge" as meaning the release of a bankrupt or authorized assignor from all his debts provable in bankruptcy or under an authorized assignment save such as are excepted by this Act.

See section 13, subsection (12), as to what extent a composition, extension or scheme of arrangement discharges the debtor. Sec. 84 provides that no proceeding in bankruptcy or under an authorized assignment shall be invalidated by any formal defect or by any irregularity.

See sec. 44 as to what debts are provable in bankruptcy.

62. (1) Where, in the opinion of the court, a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order annul the adjudication.

(2) Where an adjudication is annulled under this section, all sales and dispositions of property and payments duly made, and all acts theretofore done by the trustee, or other person acting under his authority, or by the

court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court may appoint, or, in default of any such appointment, revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court may declare by order. Annotation.

(3) Notice of the order annulling an adjudication shall be forthwith gazetted and published in a local paper.

(4) For the purposes of this section any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court.

Rule 96 provides that an application to the Court to annul an adjudication, shall not be heard except upon proof that notice of the intended application and a copy of the affidavits in support thereof have been duly served upon the trustee. Unless the Court gives leave to the contrary, notice of any such application together with copies of such affidavits shall be served on the trustee not less than four days before the day named in the notice for hearing the application. Pending the hearing of the application, the Court may make an interim order staying such of the proceedings as it thinks fit.

Section 2, subsection (w), provides that "local newspaper" means a newspaper published in and having a circulation throughout the bankruptcy district or division wherein the debtor has resided or carried on business for the longest period during the six months immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment.

PART VI.

COURTS AND PROCEDURE.

Jurisdiction.

63. (1) The following named courts are constituted Courts of Bankrutpcy and invested within their territorial limits as now established, or as these may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms as they are now, or may be hereafter, held, and in vacation and in chambers:—

(*a*) In the provinces of Alberta, British Columbia, Nova Scotia, Ontario and Prince Edward Island, the Supreme Court of the province;

(*b*) In the provinces of Manitoba and Saskatchewan, the Court of King's Bench of the province;

(*c*) In the province of New Brunswick, the King's Bench Division of the Supreme Court of the province;

(*d*) In the province of Quebec, the Superior Court of the province; and,

(*e*) In the Yukon Territory, the Territorial Court of the Yukon Territory.

(2) Subject to the provisions of this Act and to General Rules, the judge of the court exercising jurisdiction in bankruptcy or in authorized assignment proceedings may exercise in chambers the whole or any part of his jurisdiction.

(3) The courts in this subsection named are constituted Appeal Courts of Bankruptcy, and, subject to the provisions of this Act with respect to appeals, are invested with power and jurisdiction to make or render on appeal asserted, heard and decided according to their ordinary procedure, except as varied by General Rules, the order or decision which ought to have been made or rendered by the court appealed from. All appeals asserted under authority of this Act shall be made —

(*a*) In the provinces of Alberta, Nova Scotia and Prince Edward Island, to the Supreme Court *in banc* of the province;

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(*b*) In the provinces of British Columbia, Manitoba and Saskatchewan to the Court of Appeal of the province;

(*c*) In the province of Ontario, to the Appellate Division of the Supreme Court of the province;

(*d*) In the province of New Brunswick, to the Appeal Division of the Supreme Court of the province;

(*e*) In the province of Quebec, to the Appeal side of the Court of King's Bench;

(*f*) In the Yukon Territory, to the Court of Appeal of the province of British Columbia.

Rule 63 provides that the Judge or Judges of the Court appointed by the Minister of Justice to have jurisdiction in bankruptcy shall with the approval of the Chief Justice of the Court regulate the bankruptcy sittings and vacations of the Court.

See also Rules 64, 65 and 66 and Rules 4 to 42 inclusive.

Sittings and Distribution of Business of Courts.

64. (1) The courts having jurisdiction in bankruptcy under this Act shall not be subject to be restrained in the execution of their powers hereunder by the order of any other court.

(2) Periodical sittings for the transaction of the business of such courts shall be held at such times and places and at such intervals as each of such courts shall for itself prescribe.

(3) Except as otherwise provided by this Act, all the powers and jurisdiction in bankruptcy and otherwise conferred by this Act may and shall be exercised by or under the direction of one of the judges of the court upon which such powers and jurisdiction are so conferred, and the Minister of Justice shall from time to time assign a judge or judges of such court for that purpose. The judgment, decision or order of such judge shall be deemed the judgment, decision or order of the court, and references in this Act to the court shall, where necessary, apply to such judge exercising the powers and jurisdiction of such court. Provided that during vacation or during the illness of the judge so assigned or during his absence, or for any other reasonable cause, such powers and jurisdiction or any part thereof may be exercised by or under the direction of any judge of the court named for that purpose by the Chief Justice thereof.

(4) The Chief Justice of each court upon which such powers and jurisdiction are so conferred shall from time to time appoint and assign such registrars, clerks, and other officers in bankruptcy as he deems necessary or expedient for the transaction or disposal of matters in respect of which power or jurisdiction is given by this Act.

(5) Each province of Canada shall constitute for the purposes of this Act, one bankruptcy district, but the Governor in Council may divide any such bankruptcy district into two or more bankruptcy divisions and name or number them. A judge shall be assigned to each of such divisions to exercise therein the powers and jurisdiction conferred by this Act on the court of which he is a member.

(6) In case the Chief Justice of the court having jurisdiction in bankruptcy in any province shall report to the Minister of Justice that it is impossible or highly inconvenient for any judge of his court to undertake to exercise within any bankruptcy division in such province the powers and jurisdiction conferred on such court, the Minister of Justice may, from time to time, assign to exercise within said division said powers and jurisdiction any district, county or other judge, who shall for all the purposes of this Act be deemed a judge of the court having jurisdiction in bankruptcy, and references in this Act to the court or to the judge of the court shall, where necessary, apply to such district, county or other judge, so assigned.

Section 7 provides that the Court may, at any time after the presentation of a bankruptcy petition against the debtor, order that any action, execution or other proceeding against the person or property of the debtor pending in any Court other than the Court having jurisdiction in bankruptcy shall

stand stayed until the last mentioned court shall otherwise order, whereupon such action, execution or other proceeding shall stand stayed accordingly. Annotation.

Rule 63 provides that the Judge or Judges of the Court appointed by the Minister of Justice to have jurisdiction in bankruptcy shall with the approval of the Chief Justice of the Court regulate the bankruptcy sittings and vacations of the Court.

Powers of Registrar.

65. (1) The registrars of the several courts exercising bankruptcy jurisdiction under this Act shall have the powers and jurisdiction in this section mentioned, and any order made or act done by such registrars in the exercise of the said powers and jurisdiction shall be deemed the order or act of the court.

(2) Subject to General Rules limiting the powers conferred by this section, a registrar shall have power,—

(*a*) to hear bankruptcy petitions where they are not opposed, and to make receiving orders and adjudications thereon, where they are not opposed;

(*b*) to hold examinations of debtors;

(*c*) to grant orders of discharge where the application is not opposed;

(*d*) to approve compositions, extensions or schemes of arrangement where they are not opposed;

(*e*) to make interim orders in cases of urgency;

(*f*) to make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers;

(*g*) to hear and determine any unopposed or *ex parte* application;

(*h*) to summon and examine any person known or suspected to have in his possession effects of the debtor or to be indebted to him, or capable of giving information respecting the debtor, his dealings or property;

(*i*) to hear and determine appeals from the decision of a trustee allowing or disallowing a creditor's claim where such claim does not exceed five hundred dollars.

(3) A registrar shall not have power to commit for contempt of court.

(4) Any person dissatisfied with an order or decision of the registrar may appeal therefrom to a judge, in manner prescribed by General Rules.

Subsection 4 did not appear in the original Act. It was added by the Bankruptcy Act Amendment Act, 1920.

Section 64 (4) provides that the Chief Justice of each Court upon which such powers and jurisdictions are so conferred by that section, shall from time to time appoint and assign such registrars, clerks, and other officers in bankruptcy as he deems necessary or expedient for the transaction or disposal of matters in respect of which power or jurisdiction is given by this Act.

Rule 64 provides that any registrar in bankruptcy may act for any other registrar.

Section 2 (ee) provides that "registrar" shall include any other officer who performs duties like those of a registrar.

A registrar may without any general or special directions of the Judge hear and determine any matter or application referred to in sec. 55 (2) of the Act. See Rule 5.

Any matter or application pending before a registrar which under the Act, or the Bankruptcy Rules for the time being in force, a registrar has jurisdiction to determine, shall be adjourned to be heard before the Judge, if the Judge shall, either specially or by any general direction applicable to the particular case, so direct. See Rule 6.

Rule 67 provides that an appeal from the registrar shall be by ordinary notice of motion to the Judge of the bankruptcy district or division in which

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the proceedings are pending. No appeal shall be brought unless the notice thereof is filed with the registrar and served within ten days after the pronouncing of the order or decision complained of, or within such further time as may be allowed by the Judge. The notice shall set forth fully the grounds of appeal. No security for the costs of the appeal need be given by the appellant.

General Rules.

66. (1) The Governor in Council may make, alter or revoke, and may delegate to the judges of the several courts exercising bankruptcy jurisdiction under this Act the power to make, alter or revoke, General Rules not inconsistent with the terms of this Act for carrying into effect the objects thereof.

(2) Such rules shall not extend the jurisdiction of the court, save and except that, for the purpose of enabling the provision of rules having application to corporations, but for such purpose only, the Winding-up Act, chapter 144 of the Revised Statutes of Canada, shall be deemed part of this Act.

(3) All General Rules, as from time to time made, shall be laid before Parliament within three weeks after made, or, if Parliament is not then sitting, within three weeks after the beginning of the next session. Such Rules shall be judicially noticed, and shall have effect as if enacted by this Act.

Rule 152 provides the general practice of the Court in civil actions or matters before it, including the course of proceedings and practice in Judges' Chambers, shall in cases not provided for by the Act and amendments thereto or these Rules, and so far as the same are applicable and not inconsistent with the said Act or these Rules, apply to all proceedings under the said Act.

Fees and Returns.

67. All attorneys, solicitors and counsel acting for the trustee or for the estate of a debtor in respect of proceedings under this Act, shall be paid out of the assets of such estate their reasonable costs and fees as fixed in a tariff provided by General Rules; but, except as hereinafter provided, the aggregate amount of such costs and fees so payable out of the assets of estates whereof the gross proceeds exceed five thousand dollars shall not exceed five per centum of such gross proceeds. This provision shall not disentitle such attorneys, solicitors and counsel to any costs or fees which may be awarded against or be payable by persons other than the trustee or the estate of the debtor, and notwithstanding anything in this Act contained, in estates whereof the gross proceeds do not exceed five thousand dollars, the costs or fees payable may, by unanimous vote of the inspectors, be increased to any amount not to exceed ten per centum of the gross proceeds of such estate. Such tariff shall direct by whom and in what manner such costs and fees are to be collected and accounted for and to what account they shall be paid.

Section 87 provides that all persons who are barristers, solicitors or advocates of any Court in any Province may practice as barristers, solicitors and advocates in the Courts exercising bankruptcy jurisdiction under this Act in any or in all of the Provinces.

The fees to be charged for or in respect of proceedings under the Act shall be as fixed by the tariff in part three of the Appendix and shall be collected and may by retained by the registrars or other proper officers who perform the duties under the Act or these Rules in respect of which such fees are payable. In case of any proceedings not covered by the tariff, a fee may be charged of an amount equal to the tariff fee for the proceeding most nearly resembling the one in question. In the case of any dispute as to the amount of fees charged, the Judge shall fix and settle the amount. Rule 62.

The procedure with reference to costs and taxation is provided in Rules 54 to 61 inclusive. Part 2 and part 3 of the forms provide the tariff of costs and scale of fees.

Procedure. Annotation.

68. (1) All proceedings in bankruptcy or under authorized assignments subsequent to the presentation of a bankruptcy petition or the making of an authorized assignment shall be entitled "In the matter of the Bankruptcy" of the debtor, or "In the matter of the Authorized Assignment" of the debtor, as the case may be.

(2) Subject to the provisions of this Act and to General Rules, the costs of and incidental to any proceeding in court under this Act shall be in the discretion of the court.

(3) The court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose.

(4) The court may at any time amend any written process or proceedings under this Act upon such terms, if any, as it may think fit to impose.

(5) Where by this Act, or by General Rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose.

(6) Subject to General Rules, the court may in any matter take the whole or any part of the evidence either *viva voce*, or by interrogatories, or upon affidavit, or, out of the Dominion of Canada, by commission.

(7) Where two or more bankruptcy petitions are presented against the same debtor or against joint debtors, the court may consolidate the proceedings, or any of them on such terms as the court thinks fit.

(8) Where the petitioner does not proceed with due diligence on his bankruptcy petition, the court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor, or may dismiss the petition.

(9) If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive.

(10) The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to such conditions as the court may think just.

See Rules 7 to 13 as to proceedings, 14 to 19 as to motions and practice, 20 settlement of order, 21 to 25 security in Court, 26 to 33 as to affidavits, 34 to 42 as to witnesses and depositions, 43 discovery and examination, 44 to 49 warrants or arrests and commitments, 50 to 53 as to service and execution of process, and 54 to 61 costs and taxation.

69. (1) Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm, without including the others.

(2) Where there are more respondents than one to a bankruptcy petition the court may dismiss the petition as to one or more of them, without prejudice to the effect of the petition as against the other or others of them.

(3) Where a receiving order has been made on a bankruptcy petition by or against one member of a partnership, any other bankruptcy petition by or against a member of the same partnership shall be filed in or transferred to the court in which the first-mentioned petition is in course of prosecution, and unless the court otherwise directs, the same trustee shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the court may give such directions for consolidating the proceedings under the petitions as it thinks just.

See Rules 80 and 81 as to service on firm.

70. (1) Where a member of a partnership is adjudged bankrupt, the court may authorize the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action relates shall be void; but notice of the application for authority to commence the action shall be given to him, and he may show cause against it, and on his application, the court may, if it thinks fit, direct that he shall receive his proper share of the

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proceeds of the action, and, if he does not claim any benefit therefrom, he shall be indemnified against costs in respect thereof as the court directs.

(2) Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case the court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath or otherwise, as the court may direct.

(3) Where a bankrupt or authorized assignor is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt or authorized assignor.

Section 85 provides that for all or any of the purposes of this Act, a corporation may act by any of its officers, authorized in that behalf under the seal of the corporation, a firm may act by any of its members, and a lunatic may act by his committee or by the guardian or curator of his property.

71. (1) Any order made by a court exercising jurisdiction in bankruptcy under this Act in any province of Canada shall be enforced in the courts having jurisdiction in bankruptcy in all other provinces of Canada in the same manner in all respects as if the order had been made by the Court hereby required to enforce it.

(2) All courts having jurisdiction in bankruptcy in all provinces of Canada and the officers of such courts respectively shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy and in proceedings under authorized assignments, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regards to the matter directed by the order, such jurisdiction as either the court which made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

(3) The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of such judge or officer shall be subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior court when the appeal shall be under section seventy-four of this Act.

Subsection 3 did not appear in the original Act. It was added by the Bankruptcy Act Amendment Act, 1920.

72. (1) Any warrant of a court having jurisdiction in bankruptcy may be enforced in any part of the Dominion of Canada in the same manner and subject to the same privileges in, and subject to which, a warrant issued by any justice of the peace under or in pursuance of the Criminal Code may be executed against a person for an indictable offence.

(2) A search warrant issued by a court having jurisdiction in bankruptcy for the discovery of any property of a debtor may be executed in manner prescribed or in the same manner and subject to the same privileges in and subject to which a search warrant for property supposed to be stolen may be executed according to law.

See Rules 44 to 49 inclusive as to procedure with reference to warrants, arrests and commitments.

73. Where the court commits any person to prison, the commitment may be to such convenient prison as the court thinks expedient, and if the gaoler of any prison refuses to receive any prisoner so committed, he shall be liable for every such refusal to a fine not exceeding five hundred dollars.

See Rules 45, 46 and 47.

Review and Appeal.

74. (1) Every court having jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

(2) Any person dissatisfied with an order or decision of the court or a judge in any proceedings under this Act may,—

(*a*) if the question to be raised on the appeal involves future rights; or, **Annotation.**

(*b*) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy or authorized assignment proceedings; or,

(*c*) if the amount involved in the appeal exceeds five hundred dollars; or,

(*d*) if the appeal is from the grant or refusal to grant a discharge and the aggregate of the unpaid claims of creditors exceeds five hundred dollars; appeal to the Appeal Court.

(3) The decision of the Appeal Court upon any such appeal shall be final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of that Court.

(4) The Supreme Court of Canada shall have jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

(5) No such appeal to the Supreme Court of Canada shall operate as a stay of proceedings unless the judge who permits such appeal shall so order, and to the extent to which he shall order, and the appellant shall not be required to provide any security for costs, but unless he provides security for costs, in an amount to be fixed by the judge permitting the appeal, he shall not be awarded costs in the event of his success upon such appeal.

(6) The decision of the Supreme Court of Canada on any such appeal shall be final and conclusive.

See section 63 and the annotations thereunder.

Appeals from registrars are governed by Rule 67.

Rule 68 provides the procedure for appeals and securities to be given on appeals to Appeal Courts.

Appeals from the Appeal Courts to the Supreme Court of Canada are governed by Rule 72.

Appeals to the Supreme Court of Canada shall, as nearly as possible, be regulated by the Rules of such Court for the time being in force in relation to appeals in civil matters or actions. Rule 73.

PART VII.

SUPPLEMENTAL PROVISIONS.

75. Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the provisions of this Act as if she were a *feme sole*, and for all the purposes of this Act any judgment or order obtained against her, whether or not expressed to be payable out of her separate property shall have effect as though she were personally bound to pay the judgment debt or sum ordered to be paid.

A married woman can be made a bankrupt. See section 3 and the annotations thereunder.

76. Subject to such modifications as may be made by General Rules, the provisions of this Act shall apply to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general partners of a limited partnership being adjudged bankrupt or making an authorized assignment, the assets of the limited partnership shall vest in the trustee.

Ordinary and limited partnerships may be declared bankrupt. See sec. 3 and the annotations thereunder.

77. (1) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting by a person describing himself as or appearing to be chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

(2) Until the contrary is proved, every meeting of creditors in respect to the proceedings whereof a minute has been so signed, shall be deemed to have been duly convened and held and all resolutions passed or proceedings thereat to have been duly passed or had.

(3) A copy of the *Canada Gazette* containing any notice inserted therein in pursuance of this Act, shall be evidence of the facts stated in the notice.

Annotation.

(4) The production of a copy of the *Canada Gazette* containing any notice of a receiving order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date.

As to meetings of creditors, see sec. 42 and Rules 112, 113 and 114.

78. Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate, made by any court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit or document made or used in the course of any bankruptcy proceedings or other proceedings had under this Act shall if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.

Section 80 provides that every Court having jurisdiction in bankruptcy under this Act shall have a seal describing the Court, and judicial notice shall be taken of the seal and of the signature of the Judge or registrar of any such Court in all legal proceedings.

79. Subject to General Rules, any affidavit to be used in a court exercising jurisdiction in bankruptcy under this Act may be sworn before any person authorized to administer oaths in the court having jurisdiction or before any registrar of the court or before any officer of a court having jurisdiction in bankruptcy authorized in writing in that behalf by the court, or before a justice of the peace for the province, county or place where it is sworn, or, in the case of a person who is out of Canada, before a notary public, a magistrate or justice of the peace or other person qualified to administer oaths in the country where he resides, he being certified to be a magistrate or justice of the peace or qualified as aforesaid by a British consul or vice-consul or by a notary public.

Rules 26 to 33 inclusive state requisites of affidavits to be used in the Courts.

80. Every court having jurisdiction in bankruptcy under this Act shall have a seal describing the court, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of any such court in all legal proceedings.

See section 78 which provides for the sealing of proceedings in bankruptcy.

81. In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceedings under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.

82. (1) Where by this Act any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, then in the computation of that limited time the same shall be taken as exclusive of the day of that date or of the happening of that event, and as commencing at the beginning of the next following day; and the act or proceeding shall be done or taken at latest on the last day of that limited time as so computed, unless the last day is a Sunday or a statutory holiday throughout the province where the act or proceeding is to be done or taken or a day on which the court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards which is not one of the days in this section specified.

(2) Where by this Act any act or proceeding is directed to be done or taken on a certain day, then, if that day happens to be one of the days in this section specified, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards which shall not be one of the days in this section specified.

In all cases in which any number of days not directed to be clear days is prescribed by the Act or by these Rules, or by any notice or order in reference to any proceeding under the Act, the same shall be reckoned exclusively of the date from which the computation is made but inclusively of the day on which the actual proceeding referred to is to be done or taken. See Rule 148.

Annotation.

Where notice is to be given or service is required to be made a certain number of days before the day on which something is to be done, if the words "clear days" or "at least" or "not less than" are used, both the day of service or of giving notice and the day on which such thing is to be done shall be excluded from the computation. Rule 149.

Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, days on which the offices of the Court are closed shall not be reckoned in the computation of such limited time. Rule 150.

Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices of the Court are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking same, be held to be duly done or taken on the next day on which the said offices are open. Rule 151.

83. All notices and other documents for the service of which no special mode is directed may be sent by registered and prepaid post to the last known address of the person to be served therewith.

See Rules 50 to 52 inclusive as to services and execution of process.

84. (1) No proceeding in bankruptcy or under an authorized assignment shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

(2) No defect or irregularity in the appointment of an authorized trustee or an inspector shall vitiate any act done by him in good faith.

Non-compliance with any of these Rules, or with any Rule of Practice for the time being in force, shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit. Rule 146.

85. For all or any of the purposes of this Act, a corporation may act by any of its officers authorized in that behalf under the seal of the corporation, a firm may act by any of its members, and a lunatic may act by his committee or by the guardian or curator of his property.

Section 2, subsection (k), provides that "corporation" includes any company incorporated or authorized to carry on business by or under an Act of Parliament of Canada or of any of the provinces of Canada, and any incorporated company, wheresoever incorporated, which has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies.

A corporation, firm and lunatic may be made bankrupt. See sec. 3 and annotations thereunder.

86. Save as provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown.

Subsection 1 (a) of section 61 provides that an order for discharge shall not release the bankrupt or authorized assignor from any debt on a recognizance nor from any debt with which the bankrupt or assignor may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff

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or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence, and he shall not be discharged from such excepted debts unless an order in council proceeding from the Crown in the proper right is filed in Court consenting to his being discharged therefrom; or from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party; or from any liability under a judgment against him in an action for seduction, or under an affiliation order, or for alimony or under a judgment against him as a co-respondent in a matrimonial case, except to such an extent and under such conditions as the court expressly orders in respect of such liability; or from any debt or liability for necessaries of life, and the Court may make such order for payment thereof as it deems just or expedient.

Subsection 2 of section 61 provides that an order of discharge shall release the bankrupt or assignor from all other debts provable in bankruptcy or under an authorized assignment.

87. (1) All persons who are barristers, solicitors or advocates of any court in any province may practise as barristers, solicitors and advocates in the courts exercising bankruptcy jurisdiction under this Act in any or in all of the provinces.

(2) All persons who may practise as barristers, solicitors or advocates in the courts exercising bankruptcy jurisdiction under this Act shall be officers of such courts.

For tariff of costs and fees, see section 67 and notes thereunder.

88. Nothing in the provisions of this Act shall interfere with, or restrict the rights and privileges conferred on banks and banking corporations by The Bank Act.

Section 2, subsection (k), expressly excludes building societies having a capital stock, incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies from the operation of the Act.

PART VIII.

Bankruptcy Offences.

89. Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made, or who has made an authorized assignment under this Act, shall in each of the cases following be guilty of an indictable offence and liable to a fine not exceeding one thousand dollars or to a term not exceeding two years' imprisonment or to both such fine and such imprisonment:—

(*a*) If he does not to the best of his knowledge and belief fully and truly discover to the trustee all his property, real and personal, and how and to whom and for what consideration and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any) or laid out in the ordinary expense of his family, unless he proves that he had no intent to defraud;

(*b*) If he does not deliver up to the trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless he proves that he had no intent to defraud;

(*c*) If he does not deliver up to the trustee, or as he directs, all books, documents, papers and writing in his custody or under his control relating to his property or affairs, unless he proves that he had no intent to defraud;

(*d*) If after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he conceals any part of his property to the value of fifty dollars or upwards or conceals any debt due to or from him, unless he proves that he had no intent to defraud;

Annotation.

(*e*) If after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he fraudulently removes any part of his property to the value of fifty dollars or upwards;

(*f*) If he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud;

(*g*) If, knowing or believing that a false debt has been proved by any person under the bankruptcy or authorized assignment, he fails for the period of a month to inform the trustee thereof;

(*h*) If, after the presentation of a bankruptcy petition against him or after he makes an authorized assignment, he prevents the production of any book, document, paper or writing, affecting or relating to his property or affairs, unless he proves that l e had no intent to conceal the state of his affairs or to defeat the law;

(*i*) If, after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation or falsification of any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law;

(*j*) If, after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after making an authorized assignment or within six months next before the date of making thereof, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law;

(*k*) If, after the presentation of a bankruptcy petition against him or within six months next before such presentation or if after the making of an authorized assignment by him or within six months next before the date of making thereof, he fraudulently parts with, alters or makes any omission in, or is privy to the fraudulently parting with, altering or making any omission in, any document affecting or relating to his property or affairs;

(*l*) If, after the presentation of a bankruptcy petition against him or after the making of an authorized assignment by him or at any meeting of his creditors within six months next before such presentation or assignment, he attempts to account for any part of his property by fictitious losses or expenses;

(*m*) If, within six months next before the presentation of a bankruptcy petition against him or next before the date of the making of an authorized assignment by him, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same;

(*n*) If, within six months next before the presentation of a bankruptcy petition against him or next before the date of the making of an authorized assignment by him he obtains, under the false pretense of carrying on business and, if a trader, of dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless he proves that he had no intent to defraud;

(*o*) If within six months next before the presentation of a bankruptcy petition against him, or next before the date of the making of an authorized assignment by him or after the presentation of a bankruptcy petition against him or the making of an authorized assignment by him he pawns, pledges or disposes of any property which he has obtained on credit and has not paid for, unless in the case of a trader such pawning, pledging or disposing is in the ordinary way of his trade and unless in any case he proves that he had no intent to defraud;

(*p*) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to an agreement with reference to his affairs or to his bankruptcy;

(*q*) If he knowingly makes or causes to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing, with intent that it shall be relied upon respecting the financial condition or means or ability to pay of himself or any other person, firm or corporation in whom or

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in which he is interested, or for whom or for which he is acting, for the purpose of procuring in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan, or credit, the extension of a credit, the discount of any account receivable, or the making, acceptance, discount or endorsement of a bill of exchange, cheque, draft or promissory note, either for the benefit of himself or such person, firm or corporation;

(r) If he, knowing that a false statement in writing has been made respecting the financial condition or means or ability to pay of himself or any other person, firm or corporation in whom or in which he is interested or for whom or for which he is acting, procures upon the faith thereof, either for the benefit of himself or such person, firm or corporation, any of the benefits mentioned in the preceding paragraph.

The onus of proving no intent is on the accused and this is declaratory of the law as laid down in *R.* v. *Thomas*, 22 L.T. 138; and *R.* v. *Bolus*, 23 L.T. 339. As to evidence negativing intent, see *R.* v. *Wiseman*, 9 Mans. 12. In *R.* v. *Mitchell*, 50 L.J. (M.C.) 76, it was held that such disclosure was not restricted to property in the possession of the bankrupt at the commencement of his bankruptcy. See *R.* v. *Creese*, L R. 2 C.C.R. 105, distinguished in *R.* v. *Humphris*, [1904] 2 K.B. 89.

It is not enough that there should have been a false representation; it must be by means of the false representation that the goods were obtained. *Ex parte Stallard, Re Howard*, L.R. 3 Ch. 408. Where goods were obtained on credit in the county of Durham by means of false representation made in Glasgow, it was held that the offence was properly triable in the county of Durham. *R.* v. *Ellis*, [1899] 1 Q.B. 230.

90. Where an undischarged bankrupt or an undischarged authorized assignor,—

(a) either alone or jointly with any other person obtain credit to the extent of five hundred dollars or upwards from any person without informing that person that he is an undischarged bankrupt or an undischarged authorized assignor; or,

(b) engages in any trade or business under a name other than that under which he was adjudicated bankrupt or made such authorized assignment without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt or made such authorized assignment;

he shall be guilty of an indictable offence and liable to a fine not exceeding $500 and, to a term not exceeding one year's imprisonment, or to both such fine and such imprisonment.

Section 90 of the original Act was repealed and the above substituted therefor by the Bankruptcy Act Amendment Act, 1920.

If credit is in fact obtained, there need be no agreement to give it (*R.* v. *Peters*, 16 Q.B.D. 636); and credit "within the section" may in fact be obtained even though security for the debt is given. *R.* v. *Fryer*, 7 Cr. App. Rep. 183. The offence is committed where the bankrupt keeps goods to the statutory extent though the order was for a less amount. *R.* v. *Juby*, 55 L.T. 788. Nor is it necessary to shew an intent to defraud. *R.* v. *Duson*, [1894] 2 Q.B. 176.

Under the original section, $50.00 was stated as the amount of credit. In the amendment, $500.00 was substituted.

91. (1) If any person who has on any previous occasion been adjudged bankrupt or made an authorized assignment or extension or arrangement with his creditors, is adjudged bankrupt, makes an authorized assignment or secures or asks for a composition, extension or arrangement with his creditors, he shall be guilty of an indictable offence and liable to a fine of one thousand dollars and to one year's imprisonment if, having, during the whole or any part of the two years immediately preceding the date of the presentation of

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the bankruptcy petition or of the making of the authorized assignment or of the securing or asking for the composition, extension or arrangement, been engaged in any trade or business, he has not kept proper books of account throughout those two years or such part thereof, as aforesaid, and if so engaged at the date of presentation of the petition or the making of the assignment or the securing or asking for the composition, extension or arrangement, thereafter, whilst so engaged, up to the date of the receiving order, or the making of the assignment or the securing or asking for the composition, extension or arrangement, or has not preserved all books of account so kept: Provided that a person who has not kept or has not preserved such books of account shall not be convicted of an offence under this section if his unsecured liabilities at the date of the making of the receiving order, or the assignment or of the securing or asking for the composition, extension or arrangement did not exceed five hundred dollars or if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable.

(2) For the purposes of this section, a person shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, also accounts of all goods sold and purchased, and statements of annual and other stock-takings.

(3) Paragraphs (*i*), (*j*) and (*k*) of section eighty-nine of this Act (which relate to the destruction, mutilation, and falsification and other fraudulent dealings with books and documents), shall, in their application to such books as aforesaid, have effect as if "two years next before the presentation of the bankruptcy petition" and "two years next before the date of the making of an authorized assignment" were substituted for the time mentioned in those paragraphs as the time prior to such presentation or making within which the acts or omissions specified in those paragraphs constitute an offence.

For computation of time, see section 82 and annotations thereunder.

Rule 145 provides that no person shall, as against the trustee, be entitled to withhold possession of the books of account belonging to the debtor or to set up any lien thereon.

92. If any creditor, or any person claiming to be a creditor, in any bankruptcy proceedings, or in any proceedings pursuant to section thirteen of this Act, for obtaining a composition, extension or arrangement of a debtor's debts or of his affairs, or in any proceedings under an authorized assignment, wilfully and with intent to defraud makes any false claim, or any proof, declaration or statement of account, which is untrue in any material particular, he shall be guilty of an indictable offence, and shall on conviction on indictment be liable to imprisonment with or without hard labour for a term not exceeding one year.

An intention to defraud is essential to this offence. *R.* v. *Brownlow*, 26 T.L.R. 345.

93. Where an authorized trustee reports to any court exercising jurisdiction under this Act that, in his opinion, a debtor in respect of whose estate a receiving order has been made or who has made an authorized assignment has been guilty of any offence under this Act, or where the court is satisfied, upon the representation of any creditor or inspector that there is ground to believe that the debtor has been guilty of any such offence, the court shall, if it appears to the court that there is a reasonable probability that the debtor will be convicted, order that the debtor be prosecuted for such offence. Provided that it shall not be obligatory on the court, in the absence of any application by the trustee for such an order, to make an order under this section for the prosecution of an offence unless it appears to the court that the circumstances are such as to render a prosecution desirable.

A trustee prosecuting without leave may not get costs out of the estate. *Re Howes, Ex parte White*, [1902] 2 K.B. 290.

Annotation. It was held in *Mittens* v. *Foreman*, 58 L.J. (Q.B.) 40, that an order would not protect the trustee from an action for malicious prosecution.

In the corresponding section of the English Act, the application by the trustee is made *ex parte* and the debtor cannot appeal from the order. *Ex parte Marsden*, 2 Ch. D. 786.

Where there is reasonable evidence to go to a jury of a bankrupt having committed offences within this Act a prosecution will be directed, and the Court will not try the question whether the evidence is sufficient to induce a jury to find him guilty, though a prosecution will not be directed on mere suspicion. *Ex parte Stallard; Re Howard*, L.R. 3 Ch. 408; *Ex parte Strickland*, 32 L.J. (Bank), 12.

94. Where a debtor has been guilty of any criminal offence, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition, extension or scheme of arrangement has been accepted or approved.

As to the effect of a composition, extension, or scheme of arrangement, see sec. 13, and as to the effect of a discharge see sec. 61 and notes thereunder.

95. (1) Where there is, in the opinion of the court, ground to believe that the bankrupt or any other person has been guilty of any offence under this Act, the court may commit the bankrupt or such other person for trial.

(2) For the purpose of committing the bankrupt or such other person for trial, the court shall have power to take depositions, bind over witnesses to appear, admit the accused to bail, or otherwise.

(3) In an indictment for an offence under this Act, it shall be sufficient to set forth the substance of the offence charged in the words of this Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant or document of, any court acting under this Act.

(4) Where any person is prosecuted for an offence under this Act no other prosecution shall be instituted against him for the same offence under any other Act.

See secs. 89, 90 and 91 as to bankruptcy offences by a bankrupt and notes thereunder.

96. Any person, who,—

(*a*) not being an authorized trustee, advertises or represents himself to be such; or

(*b*) being an authorized trustee, either before providing the bond required by section fourteen, subsection four, of this Act, or after providing the same but at any time while the said bond is not in force, acts as or exercises any of the powers of an authorized trustee; or

(*c*) having been appointed an authorized trustee, with intent to defraud fails to observe or to perform any of the provisions of this Act, or fails duly to do, observe or perform any act or duty which he may be ordered to do, observe or perform by the court, pursuant to any of the provisions of this Act;

shall be guilty of an indictable offence and liable to a fine not exceeding one thousand dollars or to a term not exceeding two years' imprisonment or to both such fine and such imprisonment.

The original section was repealed and the above section substituted therefor by the Bankruptcy Act Amendment Act, 1920.

See secs. 6 and 9 which require an authorized trustee to act in bankruptcy and assignment proceedings.

Section 9 declares any assignment by an insolvent debtor to an authorized trustee to be null and void. See annotations on trustees and sec. 14 on appointment of trustees and sec. 17 on duties and power of trustees with the annotations thereunder.

97. Any person who maliciously institutes or carries on against any person who has not done or suffered any act of bankruptcy any proceeding in bankruptcy under this Act shall be guilty of an indictable offence and liable to a fine not exceeding one thousand dollars or to a term not exceeding two years imprisonment, or to both such fine and such imprisonment. **Annotation.**

This section was repealed by the Bankruptcy Act Amendment Act, 1920.

The proclamation of the Governor in Council declared that the Bankruptcy Act shall come into force on the 1st of July, 1920.

The General Rules and Forms under the Bankruptcy Act became effective on the same date.

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6. GENERAL RULES UNDER THE BANKRUPTCY ACT.

1. These Rules may be cited as "the Bankruptcy Rules," and shall come into operation on the First day of July, A.D. 1920. (E.R. 1 in part.)

2. (1) In these Rules, unless the context or subject matter otherwise requires,—

"The Act" means "The Bankruptcy Act" and amendments thereto for the time being in force.

"The Court" means the Court as defined by The Bankruptcy Act and includes a Registrar when exercising the powers of the Court pursuant to the Act or these rules.

"Creditor" includes a corporation and a firm of creditors in partnership.

"Contributory" means a contributory as defined by Section 36 (2) of the Act.

"Judge" means the Judge to whom bankruptcy business is for the time being assigned in any Court having jurisdiction under the Act, or any other Judge having authority under the Act or these rules to act.

"Proper Officer" means the officer appointed by the Chief Justice of the Court for the transaction or disposal of the particular matter in question.

"Province" includes Territory.

"Registrar" means a registrar, deputy registrar or local registrar having jurisdiction in bankruptcy.

"Seal" shall mean the seal ordinarily used in civil actions and matters before it by the Court having jurisdiction, and the words "Sealed" or "and Sealed" where used shall refer to such seal.

"Taxing Officer" means and includes the officer of the Court whose duty it is to tax costs in bankruptcy proceedings or in pursuance of an authorized assignment or composition, extension or scheme of arrangement.

"Trustee" or "authorized trustee" means a Trustee or authorized trustee as defined by The Bankruptcy Act.

"Written" "writing" and any like expression shall include typewriting, printing and mimeographing or partly one and partly another.

(2) The definitions contained in section two of the Act shall, where applicable and unless the context or subject matter otherwise requires, apply to and be part of these rules.

3. (1) The forms in the Appendix, where applicable, or forms to the like effect with such variations as circumstances may require, shall be used.

Annotation. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same, unless the Court shall otherwise direct. (E.R. 5.)

(2) The provisions contained in the forms prescribed shall be deemed to be authorized by these rules.

4. All matters and applications shall be heard and determined in Chambers unless the Court or a Judge shall in the particular matter or application otherwise direct.

5. A Registrar may without any general or special directions of the Judge hear and determine any matter or application referred to in Section 65 (2) of the Act.

6. Any matter or application pending before a Registrar which under the Act, or the Bankruptcy Rules for the time being in force, a Registrar has jurisdiction to determine, shall be adjourned to be heard before the Judge, if the Judge shall, either specially or by any general direction applicable to the particular case, so direct. (E.R. 8.)

PROCEEDINGS.

7. Every proceeding in Court under the Act shall be dated, and shall be intituled in the name of the Court in which it is taken "In Bankruptcy," and then in the matter to which it relates. Numbers and dates may be denoted by figures. (E.R. 10.)

(2) Unless otherwise provided, all proceedings and documents required, under the Act or these Rules, to be filed in Court or with the proper officer shall be filed with the registrar.

8. All proceedings in Court shall be written on sheets of paper of the size ordinarily used in civil actions or matters before it by the Court; but no objection shall be allowed to any proof, affidavit, or other proceedings on account of its being written or printed on paper of other size. (E.R. 11.)

9. All proceedings of the Court shall remain of record in the Court, but they may at all reasonable times be inspected by any person. (E.R. 12 in part.)

10. All petitions, and warrants and subpœnas issued by the Court shall be sealed. (E.R. 14.)

11. (1) The Judge may at any time, for good cause shown, order the proceedings in any matter under the Act, to be transferred to the Court in another bankruptcy district or division. (E.R. 18.)

(2) Where the proceedings in any matter are transferred to the Court in another bankruptcy district or division the proper officer of the first Court shall send by post the records of proceedings transferred, to the Registrar of the Court in the bankruptcy district or division to which the transfer is made and shall include with such records a copy of the order of transfer. (E.R. 22 modified.)

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12. When a bankruptcy proceeding has been commenced in a bankruptcy district or division in which it should not have been commenced, the Judge of the Court of such bankruptcy district or division may order that the proceeding shall be transferred to the Court in the bankruptcy district or division in which the same should have been commenced, or that it be continued in the Court in which it was commenced; but, unless and until a transfer is made under these Rules, the proceeding shall continue in the Court in which it was commenced. (E.R. 24 in part.)

13. Where proceedings in bankruptcy have been commenced against a corporation or where a corporation has made an authorized assignment, the Court may, on the application of the trustee or any creditor or shareholder, grant leave that all further proceedings in the winding up of the corporation or liquidation of its assets be continued under *The Winding Up Act* and amendments thereto, and may make such order for the transfer of proceedings or to effectuate such leave as to the Court shall seem best.

MOTIONS AND PRACTICE.

14. Every application (unless otherwise provided by these Rules, or the Court shall in any particular case otherwise direct) shall be made by motion. (E.R. 26.)

15. Where any party, other than the applicant, is affected by the motion, no order shall be made, unless upon the consent of such party duly shown to the Court, or upon proof to the satisfaction of the Court that notice of the intended motion had been duly served upon such party; provided that the Court, if satisfied that the delay caused by serving notice would or might entail serious mischief, may make any order *ex parte* upon such terms as to costs and otherwise, and subject to such undertaking, if any, as the Court may think just; and any party affected by such order may move to set it aside. (E.R. 27.)

16. Unless the Court gives leave to the contrary, notice of motion shall be served on any party to be affected thereby not less than four days before the day named in the notice for hearing the motion. An application for leave to serve short notice of motion may be made *ex parte*. (E.R. 28.)

17. In cases in which personal service of any notice of motion, order, or other proceeding, is required the same may be effected by delivering to each party to be served a copy of the notice of motion, order, or other proceeding, as the case may be. (E.R. 32 in part.)

18. Every affidavit to be used in supporting or opposing any motion or application shall be filed with the proper officer not later than the day before the day of the hearing. (E.R. 33.)

19. A party intending to move shall, not later than the day before the day of the hearing, file with the proper officer a copy of his notice of motion. (E.R. 35 in part.)

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SETTLEMENT OF ORDER.

20. All orders made by a Judge in Chambers shall be settled and signed by him or by the Registrar or proper officer. All orders made by the Registrar shall be settled and signed by the Registrar. The person who has the carriage of any order which in the opinion of the Judge or Registrar requires to be settled shall obtain from the Judge or Registrar, as the case may be, an appointment to settle the order and give reasonable notice of the appointment to all persons who may be affected by the order, or to their solicitors. (E.R. 37 in part.)

SECURITY IN COURT.

21. (1) Except where otherwise provided any security required to be given shall be by bond of a guarantee company or corporation approved by the Court. (E.R. 38 modified.)

(2) Provided, however, that the Court may in its discretion permit the security to be given by bond with one or more surety or sureties to the Registrar of the Court or to the person proposed to be secured and in such case the Court may require the surety or sureties to make an affidavit of justification and may also require such notice to be given to the person proposed to be secured as the Court deems advisable or expedient.

22. The bond shall be taken in a penal sum, which shall be not less than the sum for which security is to be given, and probable costs to be estimated by the Court, unless the opposite party consents to it being taken for a less sum. (E.R. 39.)

23. Where a person is required to give security he may, in lieu thereof, lodge in Court a sum equal to the sum in question in respect of which security is to be given and the probable costs to be estimated as aforesaid of the trial of the question, together with a memorandum to be approved of by the Registrar and to be signed by such person, his solicitor, or agent, setting forth the conditions on which the money is deposited. (E.R. 40.)

24. Where a person makes a deposit of money in lieu of giving a bond, he shall forthwith give notice in writing to the person to whom the security is to be given of such deposit having been made. (E.R. 46.)

25. Except as in the Act or these Rules otherwise provided the Rules for the time being in force in civil actions or matters before it of the Court relating to payment into or out of Court of moneys shall apply to moneys lodged in Court or to be paid out of Court under these Rules. (E.R. 41 modified.)

AFFIDAVITS.

26. Every affidavit shall be drawn up in the first person, and shall state the description and true place of abode of its deponent, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any part of an affidavit containing unnecessary matters or which in the opinion of the taxing officer is unduly prolix. (E.R. 50 and 51.)

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27. The Court may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client. (E.R. 53.)

28. No affidavit having in the jurat or body thereof, any interlineation, alteration, or erasure shall, without leave of the Court, be read or made use of in any matter depending in Court unless the interlineation, alteration or erasure is authenticated by the initials of the officer or person taking the affidavit. (E.R. 54 in part.)

29. Where an affidavit is sworn by any person who appears to the person taking the affidavit to be illiterate or blind, the person taking the affidavit shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature or declared his inability to sign in the presence of such person. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent. (E.R. 55.)

30. The Court may receive any affidavit sworn for the purpose of being used in any matter notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received. (E.R. 56.)

31. No affidavit (other than a proof of debt) shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent, clerk or partner of such solicitor, or before the party himself. (E.R. 58 in part.)

32. Where by this Act or in these Rules it is provided that an affidavit or declaration be made by a debtor, authorized trustee or any other person and such debtor, authorized trustee or other person is a corporation such affidavit or declaration may be made by the Manager or by any officer or employee of the corporation who has knowledge of the facts deposed to providing that he states therein that he has such knowledge.

33. The Court shall take judicial notice of the seal and/or signature of any person authorized by or under the Act or these rules to take affidavits or to certify to such authority. (E.R. 60.)

WITNESSES AND DEPOSITIONS.

34. Any party to any proceeding in Court may by a writ of subpœna in the prescribed form, with or without a clause requiring the production of books, deeds, papers, documents and writings, require the attendance of a witness for the purpose of using his evidence upon any motion, petition or other proceeding before the Court or any Judge or Registrar. The name of one or more witnesses may be inserted in the subpœna. (E.R. 61 and K.B. Man., 489.)

35. A copy of the subpœna shall be served personally, on the witness, within a reasonable time before the time of the return thereof and service of

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the subpœna may where required, be proved by affidavit. (E.R. 62 and 63 modified.)

36. The costs of witnesses, whether they have been examined or not, may, in the discretion of the Court or taxing officer, be allowed; provided, however, that the Court may at any time limit the number of witnesses to be allowed on taxation of costs. (E.R. 64 and 65.)

37. The Court may, in any matter where it shall appear necessary for the purpose of justice, make an order for the examination upon oath before the Court or any officer, or other person, and at any place, of any witness or person, and may empower any party to any such matter to give such depositions in evidence therein on such terms (if any) as the Court may direct. (E.R. 66.)

38. (1) Where the evidence of any person is taken on or for use on the hearing of any motion, application or issue or in pursuance of an order for examination, commission or letters of request or where the debtor or any other person is examined under section 56 of the Act, or otherwise under the Act or these Rules, such evidence or examination may be taken in shorthand by a shorthand writer approved and duly sworn by the judge, registrar, or person before whom the examination is taken. A shorthand writer who has been duly appointed to report trials at sittings of the Court need not be sworn.

(2) When taken in shorthand the evidence or examination may be taken down by question and answer; and unless otherwise ordered it shall not be necessary for the depositions to be read over to or signed by the person examined, unless the judge or registrar so directs, when the examination is taken before a judge or registrar, or in other cases unless any of the parties so desire.

(3) A copy of the depositions so taken, certified by the judge, registrar or person before whom the same were taken as correct, shall for all purposes have the same effect as the original depositions in ordinary cases.

39. An order for examination, commission or letters of request to examine witnesses, and the writ, order, commission or request, shall follow the forms for the time being in use in the Court in civil actions or matters before it with such variations as circumstances may require. (E.R. 69 modified.)

40. The Court may, in any matter, at any stage of the proceedings, order the attendance of any person for the purpose of producing any writings or other documents named in the order, which the Court may think fit to be produced. (E.R. 70.)

41. Any person wilfully disobeying any subpœna or order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of Court, and may be dealt with accordingly. (E.R. 71.)

42. Any witness required to attend for the purpose of being examined, or to produce any document, or to give evidence, shall be entitled to the witness fees and conduct money provided by the tariff of costs in the appendix hereto. (E.R. 72 in part.)

DISCOVERY AND EXAMINATION. Annotation.

43. Any party to any proceeding in Court may with leave of the Court, administer interrogatories to, or obtain discovery of documents or examination for discovery from any other party to such proceeding, or any other person as authorized by the Court and may also cross-examine any person upon an affidavit made by him in such a proceeding. Proceedings under this Rule shall be regulated as nearly as may be by the Rules of the Court for the time being in force in relation to like matters in civil actions or matters in such Court. An application for leave under this Rule may be made *ex parte*. (E.R. 73 modified.)

WARRANTS, ARRESTS AND COMMITMENTS.

44. A warrant of seizure, or a search warrant, or any other warrant issued under the provisions of the Act, or these rules, shall be addressed to the Sheriff or such other officer or person as the Court may in each case direct. (E.R. 80.)

45. When a debtor is arrested under a warrant issued under section fifty-five of the Act, he shall be given into custody of the Governor or Keeper of the prison or gaol mentioned in the warrant, who shall produce such debtor before the Court as it may from time to time direct, and shall safely keep him until such time as the Court shall otherwise order; and any books, papers, moneys, goods, and chattels in the possession of the debtor, which may be seized, shall forthwith be lodged with the trustee. (E.R. 81.)

46. Where a person is apprehended under a warrant issued under section fifty-six (2) of the Act the officer apprehending him shall forthwith bring him before the Court issuing the warrant to the end that he may be examined, and if he cannot immediately be brought up for examination or examined, the officer shall deliver him into custody of the Governor or Keeper of the prison or gaol mentioned in the warrant, and the said Governor or Keeper shall receive him into custody and shall produce him before the Court as it may from time to time direct or order and subject to such direction or order shall safely keep him. (E.R. 82.)

47. The officer executing a warrant issued under section fifty-six (2) of the Act shall forthwith, after apprehending the person named in the warrant and bringing him before the Court as in the last preceding rule mentioned, or after delivering him to the Governor or Keeper of the prison or gaol in the last preceding rule mentioned, as the case may be, report such apprehension or delivery to the Court issuing the warrant, and apply to the Court to appoint a day and time for the examination of the person so apprehended, and the Court shall thereupon appoint the earliest practicable day for the examination and shall issue its direction or order to the said Governor or Keeper to produce him for examination at a place and time to be mentioned in such direction or order. Notice of any such appointment shall forthwith be given by the Registrar to the Trustee and to such other person who shall have applied for the examination or warrant. (E.R. 82.)

48. Where an order of committal is made against any person, for disobeying any order of the Court, to do some particular act or thing, the Court

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may direct that the order of committal shall not be issued, provided that such person complies with the previous order within a specified time. (E.R. 85.)

49. Where a debtor or witness refuses or neglects to attend at the time and place appointed for his examination or, if attending, refuses to be sworn, or to answer any lawful question, the rules of practice for the time being in force in similar or analogous proceedings in civil actions or matters before the Court shall in so far as the same are applicable, and not inconsistent with the Act or these Rules, apply.

SERVICE AND EXECUTION OF PROCESS.

50. Every solicitor suing out, filing or serving any petition, notice, summons, order, or other document, shall indorse thereon his name or firm and place of business, which shall be called his address for service. All notices, orders, documents, and other written communications which do not require personal service shall be deemed to be sufficiently served on such solicitor if left for him at his address for service. (E.R. 87.)

51. Service of notices, orders, or other proceedings shall be effected before the hour of five in the afternoon, except on Saturdays, when it shall be effected before the hour of one in the afternoon. Service affected after five in the afternoon on any week day, except Saturday, shall for the purpose of computing any period of time subsequent to such service be deemed to have been effected on the next following day which is not a legal holiday. Service effected after one in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the next following day which is not a legal holiday. (E.R. 88.)

52. It shall be the duty of the sheriff or bailiff of the Court having jurisdiction or such officer, or officers as the Court may direct, to serve such orders, summonses, petitions and notices as the Court may require him to serve; to execute warrants and other process; and to do and perform all such things as may be required of him by the Court. Where any notice or other proceeding may be served by post it shall be sent by registered letter. (E.R. 89 in part.)

53. Every order of the Court may be enforced as if it were a judgment of the Court. (E.R. 91.)

COSTS AND TAXATION.

54. (1) The Court in awarding costs may direct that the same shall be taxed and paid as between party and party or as between solicitor and client, or the Court may fix a sum to be paid in lieu of taxed costs.

(2) In the absence of any express direction costs of an opposed motion shall follow the event, and shall be taxed as between party and party.

(3) Where an action is brought by or against an authorized trustee as representing the estate of the debtor, or where an authorized trustee is made a party to a cause or matter, on his application or on the application of any other party thereto, he shall not be personally liable for costs unless the Judge before whom the action, cause or matter is tried for some special reason otherwise directs. (E.R. 96 modified.)

Annotation.

55. (1) When a receiving order is made on a creditor's petition the costs of the petitioning creditor shall be taxed and be payable out of the estate.

(2) When the proceeds of the estate are not sufficient for the payment of the petitioning creditor's costs and of any costs necessarily incurred by the trustee down to the conclusion of the first meeting of creditors the Court may order such costs to be paid by the petitioning creditor. (E.R. 187 in part.)

56. The costs directed by any order to be paid shall be taxed on production of a copy of such order, and the allocatur or certificate of taxation shall be signed and dated by the taxing master or officer and delivered to the person who presented such bill for taxation. (E.R. 98.)

57. (1) The tariff of costs set forth in the Appendix and the regulations contained in such tariff, shall, subject to these Rules, apply to the taxation and allowance of costs and charges in all proceedings.

(2) Where the estimated assets of the debtor, in accordance with the certificate of the authorized trustee, do not exceed the sum of fifteen hundred dollars a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely—two-thirds of the charges ordinarily allowed, disbursements being added, unless the Court by order directs that increased costs be allowed. (E.R. 103 modified.)

58. Every person whose bill or charges is or are to be taxed shall in all cases give not less than two days' notice of the appointment to tax the same to the Trustee. (E.R. 112.)

59. Every person whose bill or charges is or are to be taxed shall on application of the trustee furnish to the trustee a copy of his bill or charges so to be taxed on payment at the rate of fifteen cents per folio, which payment may be charged to the estate. (E.R. 114 in part.)

60. Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred the trustee may pay such costs and charges as cannot be paid out of the joint estate out of the separate estates of such co-debtors or one or more of them in such proportion as he may determine, with the consent of the inspectors of the estates out of which the payment is intended to be made, or, if such inspectors withhold or refuse their consent, then with the approval of the Court. (E.R. 121 modified.)

61. Subject to the provisions of the Act, no costs shall be paid out of the estate or assets of the debtor, excepting the costs of the solicitor or solicitors employed by the trustee and such costs as have been awarded against the trustee or the estate of the debtor by order of the Court in any action or proceeding under the Act or these Rules.

FEES.

62. The fees to be charged for or in respect of proceedings under the Act shall be as fixed by the tariff in part three of the Appendix and shall be collected and may be retained by the registrars or other proper officers who perform the duties under the Act or these Rules in respect of which such fees are payable. In case of any proceedings not covered by the tariff a fee may be charged of an amount equal to the tariff fee for the proceeding most nearly resembling the one in question. In the case of any dispute as to the amount of fees charged the Judge shall fix and settle the amount.

Annotation.

RULES RELATING TO THE BUSINESS OF THE COURT.

63. The Judge or Judges of the Court appointed by the Minister of Justice to have jurisdiction in bankruptcy shall with the approval of the Chief Justice of the Court regulate the bankruptcy sittings and vacations of the Court. (E.R. 122.)

64. Any Registrar in bankruptcy may act for any other Registrar. (E.R. 124 in part.)

65. Writs of execution shall issue from the proper office of the Court and all proceedings thereon and in relation thereto shall be regulated as nearly as may be by the Rules of the Court for the time being in force in relation to executions in civil actions or matters before such Court. (E.R. 126.)

66. Where any registrar, clerk or other officer in bankruptcy refuses or neglects to act as such registrar, clerk or other officer or to perform or carry out any act, matter or thing connected with the office to which he has been appointed or assigned for the transaction or disposal of any matter in respect of which power or jurisdiction is given by "The Bankruptcy Act" or by these Rules, then, and in every such case, the registrar, clerk or other officer so neglecting or refusing, shall be guilty of contempt of Court and be liable to be punished accordingly.

APPEALS FROM REGISTRAR.

67. An appeal from the registrar shall be by ordinary notice of motion to the Judge of the bankruptcy district or division in which the proceedings are pending. No appeal shall be brought unless the notice thereof is filed with the registrar and served within ten days after the pronouncing of the order or decision complained of, or within such further time as may be allowed by the Judge. The notice shall set forth fully the grounds of appeal. No security for the costs of the appeal need be given by the appellant.

APPEALS TO APPEAL COURT.

68. No appeal from a Judge to the Appeal Court shall be brought unless notice thereof is filed with the registrar and served within ten days after the pronouncing of the order or decision complained of or within such further time as may be allowed by a Judge.

(2) At or before the time of entering an appeal the party intending to appeal shall lodge in the Court the sum of one hundred dollars to satisfy, in so far as the same may extend, any costs that the appellant may be ordered to pay. Provided that the Appeal Court may in any special case increase or diminish the amount of such security or dispense therewith. (E.R. 131.)

69. The proper officer of the Court appealed from shall upon receiving a copy of the notice of appeal promptly transmit to the Registrar of the Appeal Court the notice of appeal and the file of proceedings in the matter under appeal. (E.R. 133.)

70. Where an issue or question is, under the provisions of section seventy-one of the Act, tried by a Court other than the Court in which the bankruptcy proceedings are pending, any appeal from the decision of such

Court shall be made to and be heard by the Appeal Court of the province in which the bankruptcy proceedings are pending. Annotation.

71. Subject to the foregoing Rules, appeals to the Appeal Court in any bankruptcy district or division shall be regulated by the Rules of such Court, for the time being, in force in relation to appeals in civil actions or matters. (E.R. 134 modified.)

APPEALS TO SUPREME COURT.

72. An application for special leave to appeal from a decision of the Appeal Court and to fix the security for costs, if any, shall be made to a Judge of the Supreme Court of Canada within thirty days after the pronouncing of the decision complained of and notice of such application shall be served on the other party at least fourteen days before the hearing thereof.

(2) Where any security for the costs of such appeal is fixed the same shall be given to the Registrar in the manner and form prescribed by the rules and practice of the Supreme Court of Canada, or in manner and form to like effect.

73. Subject to the foregoing Rules appeals to the Supreme Court of Canada shall, as nearly as possible, be regulated by the Rules of such Court for the time being in force in relation to appeals in civil matters or actions.

74. Every petition shall be fairly written and no alteration, interlineations, or erasures shall be made therein, after the same has been filed, without the leave of the Registrar. (E.R. 145 in part.)

75. A petitioning creditor who is resident abroad, or whose estate is vested in a trustee under any law relating to bankruptcy, or against whom a petition is pending under any such law, or who has made default in payment of any judgment, order for payment of money or of any costs ordered by any Court to be paid by him to the debtor, may be ordered to give security for costs to the debtor. (E.R. 150 modified.)

76. With every creditor's petition when filed there shall be lodged a copy to be sealed and issued to the petitioner. The petition shall be deemed to have been presented to the Court on the day of the filing thereof.

77. A true copy of the creditor's petition together with a notice of the time and place of the presentation and hearing thereof shall be personally served upon the debtor at least eight days before the presentation and hearing; provided that where it is proved to the satisfaction of the Court that the debtor has absconded, or in any other case for good cause shown, the Court may, on such terms, if any, as the Court may think fit to impose, hear the petition at such earlier date and without such service as the Court may deem expedient. (E.R. 155 and 156 modified.)

78. If the Court is satisfied by affidavit or other evidence that the debtor is keeping out of the way to avoid service of the petition or any other document, or service of any other legal process, or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition or such other document to some adult

Annotation.

inmate at his usual or last known residence or place of business, or by registered letter, or in such other manner as the Court may direct, and such petition or other document shall then be deemed to have been duly served on the debtor. (E.R. 156 modified.)

79. Service of the petition may be proved by affidavit, with a sealed copy of the petition attached, and the same shall be filed in Court as soon as practicable after the service. (E.R. 157.)

80. Any notice, petition or other document for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place or one of the principal places of business of the firm in the province wherein the proceedings are taken or if there is no such place then at the principal place of business of the firm in Canada, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there. (E.R. 279 modified.)

81. The provisions of the last preceding rule shall so far as the nature of the case will admit apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own. (E.R. 280.)

82. Any notice, petition or other document for which personal service is necessary shall be deemed to be duly served on a corporation if it is served at the head office or principal place, or one of the principal places of business of a corporation in the province wherein the proceedings are taken or if there is no such place at the head office or principal place of business of the corporation in Canada, on the president, vice-president, secretary, treasurer, manager or upon any officer of the corporation or upon any person having at the time of service the control or management of the business of the corporation at the place of such service.

83. Where a debtor is not in Canada, the Court may order service of the petition, or any other document to be made within such time and in such manner and form as it shall think fit. (E.R. 158 and 183 modified.)

84. If a debtor against whom a bankruptcy petition has been filed dies before service thereof, the Court may order service to be effected on the personal representatives of the debtor, or on such other person as the Court may think fit. (E.R. 159.)

INTERIM RECEIVER.

85. After the presentation of a petition, upon the application of a creditor, or of an authorized trustee, or of the debtor himself, and upon proof by affidavit of sufficient grounds for the appointment of an authorized trustee as interim receiver of the property of the debtor or any part thereof, the Court may, if it thinks fit, and upon such terms as may be just, make such appointment; such order may be made *ex parte*. (E.R. 160 modified.)

86. Where, after an order has been made appointing an authorized trustee interim receiver, the petition is dismissed, the Court shall, upon application to be made within 21 days from the date of the dismissal thereof, adjudicate, with respect to any damages or claim thereto arising out of the appointment, including the proper remuneration of the trustee, and shall make such order as the Court thinks fit. (E.R. 165 modified.)

HEARING OF PETITION. Annotation.

87. Where a debtor intends to show cause against a petition he shall file a notice with the proper officer, specifying the statements in the petition which he intends to deny or dispute, and shall transmit by post to the solicitor of the petitioning creditor, a copy of the notice three days before the day on which the petition is to be heard. (E.R. 169.)

88. If the debtor does not appear at the hearing, the Court may make a receiving order and adjudge the debtor bankrupt on such proof of the statements in the petition as the Court shall think sufficient. (E.R. 170.)

89. On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved to the satisfaction of the Court by affidavit or by any evidence which would be admissible to prove the facts in a civil action in the Court. (E.R. 171 modified.)

90. Where proceedings on a petition have been stayed for the determination of the question of the validity of the petitioning creditor's debt, which question may be determined in such manner as the Court may direct, and such question has been decided in favour of the validity of the debt, the registrar shall on production of the judgment of the Court, or a copy thereof, and on the application of the petitioning creditor fix a day on which further proceedings on the petition may be had. The petitioning creditor shall within forty-eight hours of the date of said appointment mail or deliver to the debtor, at the address given in his notice of dispute, a notice in writing of such appointment, and a like notice to his solicitor, if known. (E.R. 174 modified.)

91. Where proceedings on a petition have been stayed for the determination of the question of the validity of the petitioning creditor's debt, and such question has been decided against the validity of the debt the registrar shall on the production of the judgment of the Court or a copy thereof, and on application of the debtor fix a day on which he may apply to the Court for the dismissal of the petition with costs. The debtor shall within forty-eight hours of the date of the appointment mail or deliver to the petitioner (and to his solicitor, if known) notice in writing of the time and place fixed for the hearing of the application. (E.R. 175 modified.)

RECEIVING ORDER.

92. When a receiving order is made on a creditor's petition there shall be stated in the receiving order the nature and date, or dates of the act, or acts, of bankruptcy upon which the order has been made. (E.R. 179 in part.)

93. The Trustee shall cause a copy of the receiving order or of the order appointing the trustee an interim receiver, as the case may be, to be served on the debtor. (E.R. 182.)

94. A receiving order against a firm shall operate as a receiving order not only against the firm, but also against each person who at the date of the order is a partner in that firm. (E.R. 285 modified.)

Annotation.

95. The rights or liabilities of any past or present limited partner of a limited partnership, against which a receiving order has been made or which has made an authorized assignment, as such rights or liabilities are fixed or defined by the statutory provision (if any) of the province wherein the partnership business is or has been carried on, shall not in any way be prejudiced or affected by these Rules. (E.R. 290 modified.)

96. An application to the Court to rescind a receiving order or to stay proceedings thereunder, or to annul an adjudication, shall not be heard except upon proof that notice of the intended application and a copy of the affidavits in support thereof have been duly served upon the trustee. Unless the Court gives leave to the contrary, notice of any such application together with copies of such affidavits shall be served on the trustee not less than four days before the day named in the notice for hearing the application. Pending the hearing of the application, the Court may make an interim order staying such of the proceedings as it thinks fit. (E.R. 188.)

STATEMENT OF AFFAIRS.

97. (1) Every debtor shall be furnished by the trustee with instructions for the preparation of his statement of affairs. Such statement of affairs shall be made out in duplicate and shall be verified by the debtor. The trustee shall file with the Registrar one of such verified statements. (E.R. 189 modified.)

(2) Where the debtor is a partnership it shall submit a statement, in duplicate, of its partnership affairs verified by one of the partners or by the manager in charge of the business and each partner shall submit a statement, in duplicate, of his separate affairs verified personally.

(3) Where the debtor is a corporation the statement of affairs, in duplicate, shall be verified by the president, vice-president, secretary, treasurer, general manager, manager or by any officer or director of the corporation having knowledge of the facts contained in such statement.

COMPOSITION, EXTENSION OR SCHEME OF ARRANGEMENT.

98. Where a debtor intends to submit a proposal for a composition, extension or scheme of arrangement the prescribed forms in the appendix, of proposal, notice and report shall be used by the trustee for the purpose of meetings of creditors for consideration of the proposal. (E.R. 200.)

99. Whenever an application is made to the Court to approve of a composition, extension or scheme, the trustee shall, not less than seven days before the hearing of the application, send notice by registered mail of the application to the debtor and to every creditor, who has proved his debt; and the trustee shall file his report not less than two days before the time fixed for hearing the application. (E.R. 203 and 205.)

100. In any case in which an application is made to the Court to approve a composition, extension or scheme and the trustee reports to the Court any fact, matter, or circumstance which would justify the Court in refusing to approve of the composition, extension or scheme, such application shall be deemed to be an opposed application within the meaning of section 65 (2) (*d*) of the Act. (E.R. 204.)

Annotation.

101. On the hearing of any application to the Court to approve of a composition, extension or scheme the Court shall in addition to considering the report of the trustee hear the trustee, the debtor and/or any opposing, objecting or assenting creditor thereon, and an appeal to the Court of Appeal shall lie at the instance of the trustee, the debtor or any such creditor from any order of the Court made upon such application. (E.R. 206 modified.)

102. No costs incurred by a debtor, of or incidental to an application to approve a composition, extension or scheme, other than the costs incurred by the trustee, shall be allowed out of the estate if the Court refuses to approve the composition, extension or scheme. (E.R. 207.)

103. The Court before making an order approving a composition, extension or scheme shall, in addition to investigating the other matters as required by the Act, require proof that the provisions of section 13 (1) and (2) of the Act have been complied with. (E.R. 208 in part.)

104. At the time a composition, extension or scheme is approved, the Court may correct or supply any accidental or formal slip, error, or omission therein, but no alteration in the substance of the composition, extension or scheme shall be made. (E.R. 211.)

105. Where a composition, extension or scheme is annulled, the property of the debtor shall, unless the Court otherwise directs, forthwith re-vest in the trustee, if any, in whom the estate was originally vested without any special order being made or necessary. (E.R. 216 modified.)

106. Every person claiming to be a creditor under any composition, extension or scheme, who has not proved his debt before the approval of such composition, extension or scheme, shall lodge his proof with the trustee thereunder, who shall admit or disallow the same. And no creditor shall be entitled to enforce payment of any part of the sums payable under a composition, extension or scheme unless and until he has proved his debt and his proof has been admitted or allowed. (E.R. 219.)

DISCHARGE OF TRUSTEE.

107. The application of an authorized trustee for a grant of discharge (whether full or partial) shall be made in the prescribed form to the Registrar and shall be verified by the affidavit of such authorized trustee. Such application shall contain or have attached thereto a complete and itemized statement showing all moneys realized by such authorized trustee from and out of the property of the bankrupt or assignor and of all moneys disbursed and expenses incurred and the remuneration claimed by such authorized trustee; and full particulars, description and value of all property belonging to the estate which has not been sold or realized upon, setting out the reasons why such property has not been sold or realized upon; and full particulars and information with regard to any unsettled disputes, actions or proceedings between such authorized trustee and either the debtor or any creditor or creditors or any other person connected with the estate.

108. The trustee shall, unless otherwise ordered by the Court on an *ex parte* application, at least ten days prior to the hearing of the application send notice in writing by registered mail to the debtor and to each of the creditors.

Annotation.

109. (1) If the debtor or any creditor desires to oppose the application for discharge he shall file with the Registrar, at least two days prior to the hearing or within such further time as the Court may allow, a notice in writing of his intention to oppose the application setting out his reasons therefor and shall serve a copy of the said notice on the authorized trustee, within the time aforesaid.

(2) If the application for discharge is not opposed the Registrar may either grant or refuse the same. If the application is opposed the same shall be adjourned for hearing before a Judge.

110. The authorized trustee shall keep for a period of at least six years from the date of declaring a final dividend all current books of record and important documents of the estate of the bankrupt or authorized assignor. After the expiration of such period the trustee may destroy unimportant books and documents but shall continue to keep for a further period of fourteen years from the date thereof all title papers relating to real or immovable estate, important documents under seal and such other books and papers which in the judgment of the trustee should be kept. During the said periods the trustee shall at all times produce and dispose of all books and papers in his possession as ordered by the Court.

111. In the case of the sale of immovable property in the Province of Quebec by the trustee, if the purchaser has not paid the whole of the purchase price or given security when he may lawfully do so under the provisions of the Code of Civil Procedure for the Province of Quebec, the trustee may obtain from the Court an order for the resale of the property; the purchaser may however prevent the resale for false bidding by paying to the trustee, before such resale, the amount of his bid with the interest accrued by reason of his default and all costs incurred thereby; if a resale takes place the false bidder is liable to the trustee for the difference between the amount of his bid and the price brought on the resale with all costs incurred by reason of his default for the payment of which on application of the trustee, the Court may make an order against the false bidder; if the price obtained on the resale is greater, it goes to the benefit of the estate.

MEETING OF CREDITORS.

112. (1) Where a meeting of creditors is called by notice, the proceedings had and resolutions passed at such meeting shall, unless the Court otherwise orders, be valid, notwithstanding that some creditors shall not have received the notice sent to them and notwithstanding the inadvertent omission to send such notice to one or more creditors. (E.R. 243.)

(2) Where a meeting of creditors is adjourned, the adjourned meeting shall be held at the same place as the original place of meeting, unless in the resolution for adjournment another place is specified. (E.R. 248.)

113. A debtor who is required by a trustee to attend any meeting of creditors (other than the first meeting) and who resides at a distance of more than ten miles from the place of such meeting, shall be entitled to be paid for such attendance the like conduct money and expenses as if he were a witness required to attend in Court or for the purpose of being examined.

114. Every class of creditors shall express its views and wishes separately from every other class and the effect to be given to such views and wishes shall, in case of any dispute and subject to the provisions of the Act, be in the discretion of the Court having regard to the financial condition of the debtor. **Annotation**

PROOF OF CLAIMS.

115. In any case in which it shall appear from the debtor's statement of affairs that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or his foreman, or the bookkeeper of the debtor, or some other person on behalf of all such creditors. Such proof shall have annexed thereto, as forming part thereof, a schedule setting forth the names of the workmen and others, and the amounts severally due to them. Any proof made in compliance with this Rule shall have the same effect as if separate proofs had been made by each of the said workmen and others. (E.R. 251.)

116. Where a creditor's proof has been admitted the notice of dividend shall be sufficient notification to such creditor of such admission. (E.R. 261.)

DISALLOWANCE OF CLAIMS.

117. The appeal of a claimant from the trustee's decision under section 53 of the Act shall be by notice of motion to a Judge and the trustee shall be served with a copy thereof in the ordinary manner provided by these Rules. The Judge shall hear and dispose of the appeal summarily on affidavits or viva voce evidence or both as to the Judge shall seem best.

118. The trustee shall in no case be personally liable for costs in relation to an appeal from his decision rejecting or disallowing any proof wholly or in part. (E.R. 263.)

CONTINGENT OR UNLIQUIDATED CLAIMS.

119. Where a contingent claim has been filed with a trustee, or one in the nature of unliquidated damages arising by reason of a contract, promise or breach of trust, and the trustee under the provisions of section 20 of the Act has been unable to make a compromise or other arrangement satisfactory to the inspectors in respect thereto, the trustee shall apply to a Judge, by way of notice of motion, to value the claim, serving the claimant with a copy of the notice of motion in the ordinary manner provided by these rules. The trustee shall prior to the hearing of the motion file with the registrar a copy of the claim in question, and an affidavit or affidavits by the trustee, the debtor or of some other person having knowledge of the claim setting out as full particulars and information as to the claim as have been ascertained, also setting out what steps (if any) were taken to make a compromise or other arrangement in respect of the claim, and particulars of any offer of compromise or arrangement made by the trustee with the permission of the inspectors, and such other facts as the trustee deems advisable. The Judge shall hear and dispose of the matter summarily and either on affidavits or viva voce evidence or both as to the Judge shall seem best.

Annotation.

SETTLEMENTS AND PREFERENCES.

120. Applications by a trustee, or any person, to set aside or avoid under the Act, or any other Act or law, any settlement, conveyance, transfer, security or payment, or to declare for or against the title of the trustee to any property adversely claimed, and any proceedings under "The Winding-up Act" against any past or present director, manager, liquidator, receiver, employee, or officer of any company, against whom a receiving order has been made, or which has made an authorized assignment, shall be to a Judge in chambers by notice of motion served in the ordinary manner as provided by these rules. The Judge may proceed in a summary manner to try the question or issue in the case or may adjourn the hearing, or may direct or settle any question or issue to be tried, or may give such directions for the preparation and filing of pleadings and for the trial of such question or issue, or may make such other order in the premises as to the Judge shall seem best.

121. Any application or notice of motion under the preceding rule, may contain a description of the land (if any) in question and upon filing the same or a copy thereof, signed by the solicitor of the applicant, with the proper officer, a certificate of lis pendens may be issued for registration, and in case the said application or motion is refused in whole or in part, a certificate of such order may be issued for registration.

CONTRIBUTORIES TO INSOLVENT CORPORATIONS.

122. The demand of an authorized trustee on any contributory shall be in the prescribed form and there shall be no duty imposed on the authorized trustee to make demands on a *pro rata* basis so far as the contributories of a debtor are concerned or to adjust rights as between contributories.

123. If a contributory does not pay the authorized trustee the amount demanded and does not give notice in writing, to the trustee, disputing the demand within the time and in the manner provided by the Act, the authorized trustee may from and after the expiration of thirty days from the date of service of the demand, make an *ex parte* application to the Court in the prescribed form for judgment against the contributory and the Court may on such application, without notice to the contributory, give judgment in favour of the trustee for the amount demanded or such amount as the Court finds justly owing and for the costs of the application.

124. In the case where a contributory has given notice in writing to the trustee disputing the demand, within the time and in the manner provided by the Act, the trustee may, from and after the expiration of thirty days from the date of service of the demand, make application to the Court in the prescribed form for judgment against the contributory, giving the contributory at least four days' notice of such application, and the Court on the hearing of the application may proceed in a summary way to try the question or issue in the case or may adjourn the hearing or may direct and settle any question or issue to be tried between the authorized trustee and the contributory or may give such directions for the preparation and filing of pleadings or for the trial of such question or issue or may make such other order in the premises as to the Court shall seem best.

Annotation.

125. The authorized trustee may include in any application more than one contributory.

126. At least two days before the hearing of any such application the authorized trustee shall file with the proper officer the verified statement of the affairs of the debtor; an estimate of the authorized trustee as to the realizable value of all property of the debtor, and a list of all proved or provable claims against the estate of the debtor in so far as the authorized trustee is able to ascertain.

127. If it should appear to the Court that the issue of immediate execution under any judgment recovered or entered by an authorized trustee against a contributory would be an undoubted hardship on the contributory, or would be unjust or inequitable, the Court may, on the application or request of the contributory and on such terms as to security or otherwise as the Court deems advisable, order that execution be stayed pending the adjustment of rights between contributories or for such period as to the Court shall seem best.

128. In case a contributory desires to have the Court adjust rights and liabilities as between contributories he may make application to the Court in the prescribed form setting out his grounds in an affidavit in the prescribed form. He shall give at least four days' notice of such application to all other contributories from whom he claims contributions. The Court may on an *ex parte* application direct the method of service of said notice, whether by personal service, mail or otherwise, as to the Court may seem best.

129. The Court may on any such application order any one or more of the contributories of the debtor to pay into Court such amounts as may be found by the Judge to be just and equitable and in default of payment of the amount so found the Court may give judgment against any defaulting contributory directing payment of such amount to the applicant or to the trustee or otherwise and may dispose of the costs of such application.

130. All moneys paid into Court shall be adjusted, divided and paid out according to the directions of the Judge and where the Judge deems advisable such moneys or any portion thereof may be paid out to the authorized trustee.

EXAMINATION OF DEBTOR AND OTHERS.

131. Examinations under section fifty-six of the Act or any other examination may be held before a Registrar or before any person or officer who is qualified or authorized to hold examinations for discovery or of judgment debtors in accordance with the Rules, for the time being in force in civil actions or matters of the Court in the bankruptcy district or division in which the examination is held or to be held or before such other person as the Court on an *ex parte* application therefor may order.

132. Such examination may be held in the bankruptcy district or division in which the debtor, or other person to be examined resides or in which he is served with the appointment for examination, or in which the debtor, or such other person, resided or carried on business at the date of the receiving order or authorized assignment, notwithstanding that such bankruptcy district or division may not be the same district or division in which

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the bankruptcy of the debtor occurred or in which the debtor made an authorized assignment or in which the proceedings are being carried on; or the examination may be held at such time and place and in such bankruptcy district or division in Canada as the Court on application may order. Such application, unless the Court otherwise directs, may be made *ex parte*.

133. Any such registrar, person or officer empowered to hold examinations may grant, in duplicate, an appointment for examination in the form provided by the Appendix or in form to like effect.

134. A duplicate of such appointment shall be served upon the debtor or person to be examined at least forty-eight hours before the time of examination.

DISCHARGE.

135. (1) In any case in which an application is made to the Court by a debtor for his discharge and the trustee reports to the Court any fact, matter or circumstance which would, under the Act, justify the Court in refusing an unconditional order of discharge, such application shall be deemed to be an opposed application within the meaning of section sixty-five (2) (*c*) of the Act. (E.R. 228.)

(2) The Court may, on the application by a debtor for his discharge, cause the debtor to be brought before the Court for examination or further examination.

136. An appeal to the Appeal Court shall lie at the instance of the trustee, the debtor and/or at the instance of any creditor or creditors, who oppose the discharge, from any order of the Court made upon the application for discharge. (E.R. 229 modified.)

137. When a debtor intends to dispute any statement with regard to his conduct and affairs contained in the trustee's report he shall at or before the time appointed for hearing the application for discharge give notice in writing to the trustee specifying the statements in the report, if any, which he proposes at the hearing to dispute. Any creditor who intends to oppose the discharge of a debtor on grounds other than those mentioned in the trustee's report shall give notice of the intended opposition, stating the grounds thereof, to the trustee and to the debtor at or before the time appointed for the hearing of the application. In either of such cases the Judge or registrar may enlarge the hearing of the application as deemed advisable. (E.R. 231 modified.)

138. (1) A debtor shall not be entitled to have any of the costs of or incidental to his application for discharge allowed to him out of his estate. (E.R. 232.)

(2) If the debtor does not make his application for discharge until after the trustee has paid the final dividend, he shall, before the order of discharge is signed or delivered out, pay to the trustee such remuneration and solicitor's costs as the Court may allow.

139. (1) Where the Court grants an order of discharge conditionally upon the debtor consenting to judgment being entered against him by the trustee for the balance or any part of the balance of the debts provable under the bankruptcy or authorized assignment which is not satisfied at the date

Annotation.

of his discharge, the order of discharge shall not be signed completed or delivered out until the debtor has given the required consent. The judgment shall be entered in the Court having jurisdiction in bankruptcy in the district or division in which the order of discharge is granted.

(2) If the debtor does not give the required consent, within ten days of the making of the conditional order the Court may, on the application of the trustee, revoke the order or make such other order as the Court may think fit. (E.R. 233 in part.)

140. The order of the Court made on an application for discharge shall be dated on the day on which it is made, and shall take effect from the day on which the order is drawn up and signed; but such order shall not be delivered out or gazetted until after the expiration of the time allowed for appeal, or, if an appeal be entered, until after the decision of the Appeal Court thereon. (E.R. 234.)

141. (1) An application by the trustee for leave to issue execution on a judgment entered pursuant to a conditional order of discharge shall be made to the Court in writing, and shall state shortly the grounds on which the application is made.

(2) The trustee shall give not less than four days' notice of the application to the debtor, and shall at the same time furnish him with a copy of the application. (E.R. 236 modified.)

142. Where a debtor is discharged subject to the condition that judgment shall be entered against him, or subject to any other condition as to his future earnings or after-acquired property, it shall be his duty until such judgment or condition is satisfied, from time to time, to give the trustee such information as he may require with respect to his earnings and after-acquired property and income, and not less than once a year to file in the Court and with the trustee a statement shewing the particulars of any property or income he may have acquired subsequent to his discharge. (E.R. 237.)

143. Any statement of after-acquired property or income filed by a debtor whose discharge has been granted subject to conditions, shall be verified by affidavit, and the trustee may require the debtor to attend before an examiner to be examined on oath with reference to the statements contained in such affidavit, or as to his earnings, income, after-acquired property, or dealings. Where a debtor neglects to file such affidavit or to attend for examination when required so to do, or properly to answer all such questions as the Court may decide to be proper, the Court may, on the application of the trustee, rescind the order of discharge. (E.R. 238.)

144. Where after the expiration of one year from the date of any order made upon a debtor's application for a discharge, the debtor applies to the Court to modify the terms of the order on the ground that there is no reasonable probability of his being in a position to comply with the terms of such order, he shall give 14 days' notice by mail of the hearing of the application to the trustee and to all his creditors. (E.R. 239.)

Annotation.

MISCELLANEOUS.

145. No person shall, as against the trustee, be entitled to withhold possession of the books of account belonging to the debtor or to set up any lien thereon. (E.R. 383.)

146. Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit. (E.R. 385.)

147. Where an authorized trustee provides the security required by section 14 (4) of the Act in cash, the amount thereof shall be paid by the authorized trustee to the Receiver General, and the authorized trustee shall receive interest thereon, payable . . . yearly at the rate of . . . per cent. per annum.

148. In all cases in which any number of days not directed to be clear days is prescribed by the Act or by these rules, or by any notice or order in reference to any proceeding under the Act, the same shall be reckoned exclusively of the date from which the computation is made, but inclusively of the day on which the act or proceeding referred to is to be done or taken.

149. Where notice is to be given or service is required to be made a certain number of days before the day on which something is to be done, if the words "clear days" or "at least" or "not less than" are used, both the day of service or of giving notice and the day on which such thing is to be done shall be excluded from the computation.

150. Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, days on which the offices of the Court are closed shall not be reckoned in the computation of such limited time.

151. Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices of the Court are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking same, be held to be duly done or taken on the next day on which the said offices are open.

152. The general practice of the Court in civil actions or matters before it, including the course of proceedings and practice in Judges' chambers, shall in cases not provided for by the Act and amendments thereto, or these rules, and so far as the same are applicable and not inconsistent with the said Act or these rules, apply to all proceedings under the said Act.

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Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. June 28, 1920.

REFERENCE (§ I—3)—EFFECT OF COURT ORDERING REFERENCE—WHAT INCLUDED IN ORDER.

Where the effect of a judgment of an appellate Court is to direct a reference to take an account of the moneys due from the defendant to the plaintiff and where that judgment in effect directs an amendment to the pleadings to claim an account, the action is subject to the power of the Court to extend the time for amending the statement of claim and fix a time for the reference.

Statement.

APPEAL from an order of a Judge in Chambers striking out an amended statement of claim on an order fixing the time for a reference.

E. B. Jonah, for appellant; *P. H. Gordon*, for respondent.

The judgment of the Court was delivered by:—

Elwood, J.A.

ELWOOD, J.A.:—The plaintiff brought this action upon a contract in writing for the sale by him to the defendant of a quantity of hay. Judgment was given in the plaintiff's favour. On appeal to this Court, it was held—(1919), 49 D.L.R. 57, 12 S.L.R. 409—that the plaintiff could not recover on the contract, but must account for the proceeds of the hay. The concluding portion of the judgment of my brother Lamont in that appeal is as follows, 49 D.L.R. at page 59:—

> The plaintiff's hay having got into the defendant's possession by virtue of an invalid contract, and the defendant having sold the same, the plaintiff is entitled to have him account for the proceeds thereof, and the matter will be referred back to the Judge of the District Court to take the account.
>
> As the plaintiff in his statement of claim did not ask for an accounting by the defendant, he is not entitled to his costs, and as the defendant's defence was a barefaced attempt to retain moneys to which he knew he was not entitled, I would not allow him any costs either. On amending his pleading to claim an accounting, the plaintiff will be entitled to judgment for whatever sum the District Court Judge may find to be due on the reference. No costs of appeal to either party.

This judgment constituted the judgment of the Court. Subsequently to this judgment, some correspondence took place between the solicitors for the plaintiff and the defendant with regard to a settlement. On December 17, 1919, the order of the Court on the appeal was filed in the office of the clerk of the District Court in which the original action was commenced. In February, 1920, the plaintiff amended his pleadings to conform to the judgment of the Court of Appeal, and applied to the Judge of the District Court to fix a time for the reference ordered in the judgment of the Court of Appeal. From the order

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fixing the time for the reference the defendant appealed to a Judge in Chambers, and in May, 1920, MacDonald, J., gave judgment striking out the amended statement of claim and the order fixing the time for the reference. From this latter judgment this appeal is taken.

It was contended before us that the judgment of the Court of Appeal not having fixed any time for amendment, the amendment should have been made within 14 days in accordance with our r. 259.

On behalf of the appellant, it was contended that, under r. 704, power was given to the Court to extend the time for making the amendment, even although the 14 days had elapsed.

I am of the opinion that the effect of the judgment of this Court, referred to above, was to direct a reference to take an account of the moneys due from the defendant to the plaintiff, and that that judgment, in effect, directed an amendment to the pleadings to claim an account. It is quite true that the judgment of my brother Lamont does not direct an amendment, but that judgment does direct a reference, and a reference having been directed—to paraphrase the words of Moss, C.J.O., in *Strati* v. *Toronto Construction Co.* (1910), 22 O.L.R. 211, at page 216—the action was not so entirely out of Court that it was not subject to the power of the Court if necessary to extend the time for amending the statement of claim.

In my opinion, therefore, the appeal should be allowed, the time for amending the statement of claim extended to and including the date upon which the plaintiff did amend his statement of claim; the amended statement of claim should be restored, and the District Court Judge directed to fix a time for the reference.

Under the circumstances, I would not allow any costs of the appeal or of the application before MacDonald, J., to either party.

Appeal allowed.

MAN.

C. A.

McDILL v. HILSON.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. June 25, 1920.

SALE (§ I B—11)—OF GOODS—NOT IN A DELIVERABLE CONDITION—TIME OF PASSING OF PROPERTY IN THE GOODS—DESTRUCTION OF GOODS—REFUND OF PURCHASE MONEY.

Where a purchaser agrees to purchase goods from a vendor, but the goods are not in a deliverable condition at the time the agreement is

made, and the vendor agrees to put them in a deliverable condition before delivering them, payment of the purchase price does not convert the transaction into a sale, and destruction of the goods before they have been put into such deliverable condition entitles the purchaser to recover back the purchase price.

[The Sales of Goods Act, R.S.M. 1913, ch. 174, discussed.]

APPEAL by plaintiff from the trial judgment in an action to recover back the price of goods sold, but destroyed while in the vendor's warehouse. Reversed.

E. D. Honeyman, for appellant.

E. C. Monteith, for respondent

FULLERTON, J. A.:—The plaintiff arranged with the defendant to purchase from him certain furniture. The furniture was chipped and scratched and it was agreed that the defendant should polish it and deliver it at a subsequent date to an address which the plaintiff would give him. Before the furniture was polished and while still in the defendant's possession a fire occurred and it was destroyed. Plaintiff paid $5 deposit on the price and subsequently paid the balance $370. Fullerton, J.A.

The question is whether the plaintiff or the defendant must bear the loss. This depends on whether or not the property in the furniture had passed to the plaintiff at the time of the fire.

Sec. 19 of the Sale of Goods Act, R.S.M. 1913, ch. 179, provides as follows:—

Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Sec. 20:—

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

. . . . . .

(b) Rule 2. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

"Deliverable state" is defined by sec. 2(4) of the Act as follows:—"Goods are in a 'deliverable state' within the meaning of this Act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them."

There is nothing in "the terms of the contract, the conduct of the parties, or the circumstances of the case" to indicate that

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it was the intention of the parties that the property in the furniture should pass before it was polished. The buyer clearly could not be compelled to take it until it had been polished in accordance with the agreement. The goods were consequently not in a deliverable state when the contract was made and the case comes squarely within rule 2 above quoted.

It was urged, however, that the payment by the plaintiff of the consideration had the effect of converting the transaction into a sale and that the agreement to polish the furniture was a mere collateral agreement. I am unable to understand this contention. In *Logan* v. *Le Mesurier*, (1847), 6 Moo. P.C.C. 116, 13 E.R. 628, the sale was of a quantity of timber measuring 50,000 ft. more or less to be delivered, by the defendants. If the quantity turned out more than 50,000 ft., the purchasers were to pay for the surplus on delivery, and if it fell short, the difference was to be refunded by the sellers. The raft of timber was broken up by a storm and lost before it was measured and delivered.

It was held that the former part of the contract, whereby an ascertained chattel was sold for an ascertainable sum, was controlled by the latter part providing for admeasurement and adjustment of the price on delivery and accordingly that the property was not transferred until measured. *The plaintiff had paid for the timber* and the action was brought to recover back the price. It was held that the plaintiff was entitled to succeed.

In *Acraman* v. *Morrice* (1849), 8 C. B. 449, 137 E.R. 584, the defendant had contracted for the purchase of the trunks of certain oak trees from one Swift. The course of trade between the parties was that, after the trees were felled, the purchaser measured and marked the portions he wanted. Swift was then to cut off the rejected parts and deliver the trunks at his own expense.

The timber in controversy had been bought, measured, *and paid for*, but the rejected portions had not yet been severed by Swift when he became bankrupt, and the felled trees then lay on his premises. The defendant afterwards had the rejected portions severed by his own men, and carried away the trunks for which he had paid. Action in trover by the assignee of the bankrupt. Held that the property had not passed to the buyer.

In neither of these cases was the point suggested that the payment of the price had any bearing on the question of the passing of the property.

In my view the payment of the purchase price does not, of itself, afford any indication of the intention of the parties as to the passing of the property. I think the plaintiff is entitled to recover from the defendant the sum paid him as the price of the furniture.

I would allow the appeal with costs and direct that judgment be entered in favour of the plaintiff for the amount claimed with costs.

DENNISTOUN, J. A.:—On June 21, 1919, the plaintiff and his wife were examining some parlour furniture at the defendant's auction rooms with a view to purchasing it. The furniture was second-hand and was scratched and chipped. Dennistoun, J.A.

The defendant's salesman in order to induce the plaintiff to purchase said that the furniture would be French-polished, but that the polisher was on strike and it could not be done until his return.

The plaintiff said he was in no hurry, that he would take the eleven-piece parlor suite and the bed, to be put right and delivered not later than a month." The price was fixed at $200.

Plaintiff then paid a deposit of $5. On June 24, his wife paid a further sum of $170, and on June 30, the balance of $25 was paid in full.

A memorandum was given to the plaintiff on June 21, on one of the defendant's bill forms. It sets forth the furniture and the price and contains the following:—"Lot to be polished. No hurry. Hold one month. Paid in full." Then follow the initials of the salesman, with the date of the last payment, 30-6-19.

On June 28, the plaintiff saw a piano at the defendant's rooms which was badly scratched and chipped, and it was agreed that it would be French-polished also and delivered for $175, which was paid.

On July 5, the plaintiff told the defendant's salesman that he had moved into a house of his own and could take delivery of the lot but "was waiting for it to be polished up." He was informed that the work had not been done as the polisher was still on strike. The evidence is that it would take about two days to French-polish the piano and that the polisher charged $1 per hour while at work. The time required to polish the eleven pieces of parlour furniture is not stated.

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McDILL v. HILSON.

Dennistoun, J.A.

The plaintiff paid the defendant in all the sum of $375.

Before any work was done to the furniture or piano and before delivery, a fire in the defendant's premises destroyed the furniture and the piano, and the plaintiff asks in this action for the return of his money. The trial Judge granted a non-suit on the ground that the title to the property had passed to the plaintiff who should bear the loss. Plaintiff appeals.

In my humble opinion, the appeal should be allowed.

By sec. 20 of the Sale of Goods Act, R.S.M. 1913 ch. 174, unless a contrary intention appears, where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof.

By sec. 2 (4), goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

It was a condition upon which the agreement to purchase was made that the goods should be French-polished and delivered. They never were in a deliverable state within the meaning of the definition quoted, and the title did not pass from the defendant to the plaintiff, nor is there any evidence of a contrary intention. *Young* v. *Matthews* (1866), L.R. 2 C. P. 127; *Laidler* v. *Burlinson* (1837), 2 M. & W. 602, 150 E.R. 898.

Payment of the purchase price was not a waiver of the condition which the defendant failed to perform. The Act is silent on this point unless the Court can infer that when the money was paid over it was the intention of the parties, evidenced thereby, that the title should pass. I am unable to draw that inference from the evidence. The plaintiff and his wife were unwilling to buy the furniture in the condition in which they saw it. The defendant agreed to renovate it by an expert at some expense and to deliver it at the plaintiff's address. The plaintiff, relying on the defendant's undertaking to have the work done, paid over his money; but the contract remained executory on the defendant's part and on his breach of the stipulated condition was subject to cancellation. Performance having become impossible by reason of the destruction of the specific articles sold the plaintiff was justified in declaring it at an end and in demanding his money back.

A case in point is *Rugg* v. *Minett* (1809), 11 East 211, 103 E.R. 985. Turpentine in casks was sold by auction at a price per cwt. A deposit was to be paid at the time of the sale and the balance within 30 days on delivery. It was the duty of the seller to fill up the casks to a certain marked quantity. This was to be done from the two last casks which were sold at uncertain quantities. Some of the casks were so filled, but before the rest were filled a fire consumed the whole lot. Lord Ellenborough, at p. 217, says:

> When the casks were filled up, everything was done which remained to be done by the sellers . . . which lay upon them to perform in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter. But, with respect to the other ten casks, as the filling them up according to the contract remained to be done by the sellers, the property did not pass to the buyers, and, therefore, they are not bound to pay for them.

The fact that a part of the purchase-price had been paid by the defendant did not preclude the defendant from the defence raised.

In *Logan* v. *Le Mesurier*, 6 Moo. P.C.C. 116, 13 E.R. 628, the judgment of the Judicial Committee of the Privy Council was delivered by Lord Brougham.

The vendors sold timber to the purchasers, consisting of 1,391 pieces measuring 50,000 ft., more or less, to be deliverable at a certain boom at Quebec, on or before June 15, next, and to be paid for by the purchasers, promissory notes at the rate of 9½d. per foot measured off: if the quantity turned out more than above stated, the surplus was to be paid for, and if it fell short the difference was to be refunded by the sellers. The price of the 50,000 ft. at the agreed rate was paid according to the terms of the contract. The timber was not delivered on the day prescribed, and when it arrived at Quebec, and before it was measured and delivered, the raft was broken up by a storm whereby the greater part of the timber was dispersed and lost.

The purchasers sued to recover the amount paid on their promissory notes and for breach of contract. The Privy Council held that the action was maintainable; that by the terms of the contract, until the measurement and delivery of the timber were made, the sale was not complete, nor did the title pass, and the purchaser was entitled to recover the amount which he had paid to the vendor.

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Dennistoun, J.A.

In *Acraman* v. *Morrice*, 8 C.B. 449, 137 E.R. 584, the purchaser agreed to purchase the trunks of certain oak trees then felled and lying at Hadnock. The purchaser was to select and mark those portions which he intended to purchase and the vendor was to sever the tops and sidings, and float the trunks down the river to Chepstow, and there deliver them. After a portion of the timber had been delivered, and the whole paid for, the vendor became bankrupt; whereupon the purchaser sent his men to Hadnock and severed and carried away the marked portions of certain trees: Held, that no property in the trees, or any portion of the trees which had not been delivered passed by the contract. The fact that the purchase price had been paid made no difference.

Relying on these and other similar authorities, I think with respect that the appeal should be allowed and judgment entered for the plaintiff for $370 with costs here and below.

PERDUE, C. J. M., CAMERON and HAGGART, JJ.A., concurred in the result. *Appeal allowed.*

N. S.

S. C.

McKENZIE v. WALSH

Nova Scotia Supreme Court, Harris, C.J., Longley, J., and Ritchie, E.J. May 5, 1920.

CONTRACTS (§ II D—170)—REAL PROPERTY—PAROL AGREEMENT TO PURCHASE —WRITTEN MEMORANDUM—REQUISITES OF STATUTE OF FRAUDS.

When there is a complete oral contract for the sale of land, the note or memorandum must contain the terms of the contract as completed, in order to comply with the provisions of the Statute of Frauds.

Statement.

APPEAL by defendant from the judgment of Drysdale, J., in favour of plaintiff in an action claiming the specific performance of an agreement entered into whereby defendant agreed to sell to plaintiff a house and premises in the city of Halifax, for the sum of $10,500, the sum of $200 being paid at the date of the agreement and the balance to be paid on delivery of the deed.

J. J. Power, K.C., and *J. L. Ralston*, K.C., for appellant.

S. Jenks, K.C., for respondent.

HARRIS, C.J.:—The plaintiff claims specific performance and damages for breach of an alleged contract for the sale to him by the defendant of a house and lot in the city of Halifax. The statement of claim sets up that on February 5, 1919, by an agreement in writing the defendant contracted to sell and did sell to the plaintiff the lands in question; said agreement being in the words and figures following:

Halifax, N. ., February 5th, 1919.

Received from A. C. MacKenzie the sum of two hundred dollars on the purchase of house No. 33 Spring Garden Road. Purchase price ten thousand five hundred dollars. Balance on delivery of deed.

(Signed) Hattie Walsh.

The statement of claim also alleges payment of $200 on account, and sets up a subsequent verbal agreement to the effect that the payment of the remainder of the purchase price and the delivery of the deed should be made by April 15, and that defendant should occupy the house until May 1 free of rent.

The defence, apart from denials of the allegations in the statement of claim sets up that the contract of sale between the parties was conditional upon the defendant being able to get possession by April 1 of another property belonging to her, and then under lease to certain tenants and that she was unable to get possession.

It is also alleged that the writing signed was represented to her as simply a receipt for the $200 (paid as a deposit) and that the defendant was induced to sign it by fraud and misrepresentation of plaintiff.

There is also an allegation that the writing does not contain all the terms of the said conditional agreement and does not purport and was not intended to be a written memorandum of the agreement and the plaintiff's action is barred by sec. 7 of the Statute of Frauds.

The case was tried before Drysdale, J., with a jury, and the trial Judge put certain questions to the jury.

These questions and the findings of the jury are as follows:

1. Was it a condition of the arrangement between the plaintiff and the defendant that the plaintiff was not to have the house unless the defendant could get her tenants out of the South Park Street house by April 1st? A. No. 2. Did plaintiff fraudulently represent to defendant that the memorandum sued on was only a receipt for $200? A. No. 3. Does defendant agree that she was to sell the house regardless of whether the tenants were out? A. Yes.

In a memorandum subsequently filed by the trial Judge, after discussing the pleadings, he says:

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Harris, C.J.

These questions of fact were settled against the defendant by the jury and defendant now relies on the Statute of Frauds and alleges insufficiency in the memorandum of agreement.

The first point taken is that the time for completion of the contract is not mentioned or contained in the memorandum. After the most careful consideration I am able to give to this point I am of the opinion that the written memorandum discloses a contract in writing and satisfies the statute. It seems the parties met after the date of the memo and arranged for a time of completion, viz., April 15, and possession May 1, but I think such arrangements were in the nature merely of appointments to carry out the contract and not an effort to vary the terms, which could not I think be verbally done.

Another point was raised as to the sufficiency of the memo, a point that has given me a good deal of trouble and as to which I am not free from doubt. It seems the property was mortgaged for $5,000, and the agreement was that plaintiff should take it subject to the mortgage, that is, pay the defendant in cash $5,500, and assume the mortgage of $5,000. There was never any question or dispute between the parties over the question of the property being mortgaged. The contract price was $10,500, no doubt for a good title and the parties dealt on this assumption and no doubt on the assumption that on adjusting the payments the mortgage would be assumed by plaintiff or come out of the purchase price. Nothing was said about this apparently at the time and it was only after the questions of fact were disposed of adversely to defendant that the question was raised as to the outstanding mortgage. It is now said that what plaintiff was buying was defendant's equity of redemption and that there is no sufficient memorandum of such a contract in writing. I cannot agree with this. What plaintiff was buying was the whole property; it is true that it was mortgaged and both parties knew this, but the sale was for the whole at $10,500, and nothing was said or published in the memo about the mortgage, the parties no doubt assuming that the amount thereof was to be reckoned for in closing the sale. The mortgage covers only as I understand it the property sold and there being nothing in dispute respecting the mortgage, it seems to me that the question reduces itself to this. We have a plain contract of sale of property worth $10,500, an agreement to pay that sum therefor, and it appearing that a mortgage exists on such property the plaintiff can, I think, either assume the mortgage or have the payment provided for out of the purchase money. Such a course would I think be consistent with the bargain as reduced to writing in the memorandum. If it is said something must have taken place respecting the mortgage in the bargain for sale and we find nothing referring thereto in the memorandum the memo cannot be a sufficient memo under the statute, I think the answer is that a deficiency such as this is not material and the contract will be worked out as if it provided for the mortgage. The subject received consideration in the Supreme Court of Canada in *Williston* v. *Lawson*, 19 Can. S.C.R., at 679, where a mortgage covering not only the land sold but other lands was not provided for in the memo. Then I find Strong, J., using the following language: "If the mortgage had embraced no other lands but those which were the subject of the sale no difficulty would have arisen. The well settled principles of law as administered by Courts of Equity between vendor and purchaser would have supplied the deficiencies of the written agreements of the parties." This statement applied here seems very apt. I think I ought

to hold the memorandum good and the plaintiff entitled to specific performance. There will be a reference as to the question of damages.

There is an appeal from this decision.

So far as the Statute of Frauds is concerned the contentions of counsel for the defendant are:

1. That the memorandum on its face is a sale of the lands for $10,500, whereas the evidence shews that the real contract was a sale of the equity of redemption only for $5,500.

2. That the time for payment of the balance of the purchase money and for delivery of possession of the property, were proved to have been part of the original agreement and must therefore have been set out in the writing.

Before dealing with these questions it is perhaps best to mention one point raised in the reply of counsel. It is said that the questions now raised are not set up by the pleadings. This is obviously so, but the parties took the evidence and argued out the questions before the trial Judge on the assumption that the points were raised by the pleadings and no doubt the trial Judge would have granted an amendment if the sufficiency of the pleadings had been questioned and it is the duty of this Court to allow the amendment to be made now. (See decision of Anglin, J. in *Green* v. *Stevenson*, 9 O.L.R. at p. 673) and I therefore propose to deal with the matter on that basis.

In considering the questions raised as to the Statute of Frauds it is important to bear in mind that there is a broad distinction between the case of a memorandum which omits essential terms of the real contract or agreement between the parties, and the case of a subsequent parol variation of the written contract. In the former case the memorandum would be insufficient to warrant a decree for specific performance, while in the latter the rule is that the defendant may elect to take advantage of the parol variations, but if he does not so elect specific performance will be decreed of the original agreement.

In *Robinson* v. *Page*, 3 Russ. 114, the Master of the Rolls thus states the rule, page 121:

> Where parties have entered into a binding agreement in writing and variations are afterwards introduced by parol or by an instrument not signed accor ling to the Statute of Frauds these variations are not sufficient to prevent the execution of the agreement and are no answer to a bill for specific performance.

And at page 123 he says:

> Ashe (plaintiff) has offered that the performance should be with the variations introduced by the memorandum of the 13th March. The decree

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must be in that form if the defendant thinks proper to accept the offer. If the defendant does not accept it the decree must be for a specific performance of the agreement of March 5.

In Leake on Contracts (6th ed.) page 583, the rule is stated in the same way. See also 7 Hals. 422 and 528; *Moloughney* v. *Crowe*, 26 O.L.R. 579.

Of course, there may be such a thing as a subsequent waiver by parol of the written contract where there is "an entire abandonment and dissolution of the contract restoring the parties to their former situation." (See *per* Sir Wm. Grant, in *Price* v. *Dyer*, 17 Ves. 364). But no such question arises here.

The trial Judge has found that the parol agreement fixing April 15 for the completion of the purchase and May 1, as the time for delivery of possession, was made subsequent to the date of the written contract. I have examined the evidence on this point and I cannot find anything definite to shew that these dates were fixed before the contract was signed and I think the finding of the trial Judge on this point should be upheld. It is not an essential term of a contract of sale that a time for the completion of the purchase or for possession should be fixed in the contract. The contract is a good contract within the Statute of Frauds ordinarily, if nothing is said about time. See 25 Hals. page 291; *Gray* v. *Smith*, 43 Ch. D. 208, *per* Kekewich, J., at pages 214 and 215.

I say that ordinarily a contract is good in which no time is mentioned for completion because there are cases of a special nature, such as *May* v. *Thompson*, 20 Ch. D. 705, which was the case of a sale of a medical practice where it was held that time was an essential part of the particular contract, but all these cases turn on the particular circumstances and do not apply here. I am therefore of the opinion that the second contention of the defendant fails.

There remains the question as to whether the real contract between the parties was a sale simply of the equity of redemption in the land for $5,500, or a sale of the land itself for $10,500.

There is no doubt that the mortgage was talked about at the first conversation between plaintiff and defendant. Plaintiff admits it at page 36 of the printed case, and there is no other evidence about the matter. His evidence is thus reported: "Q. When was

the mortgage talked about? A. At that same time. Q. The very first conversation? A. Yes, she told me there was $5,000 mortgage on the place and that could remain on."

It is rather curious that defendant does not in her evidence say a single word about the mortgage. Her statement is that she told plaintiff her price was $10,500 ,and that is the plaintiff's statement also. He says:

> I just asked her if the house was for sale; she told me it was; then I asked her the price; she told me what the price was, $10,500, and after a little talking back and forth I told her I would give her her price. Q. That is, $10,500? A. Yes. Q. You agreed to give her $10,500? A. Yes. Then I went out and told her I would be back in half an hour. I went out and came back with the receipt and money.

From this evidence only one conclusion is possible. It is, I think, clear that the sale was of the fee for $10,500. No doubt the mortgage was mentioned and plaintiff was told that it could remain on the property, but there was no agreement that it should remain. It is only by distorting the language that any other meaning can be given to it. Then the writing was drawn up and signed and that is evidence of the real bargain, and it says nothing about the mortgage. I have no hesitation in finding that the sale agreed on was a sale of the whole property for $10,500, and not of the equity of redemption for $5,500. Both parties evidently regarded the reference to the mortgage as merely a statement of what the defendant thought might be done by the mortgagee when the plaintiff came to pay for the property.

Much stress was laid upon the fact that defendant would still be liable on the implied contract to indemnify the original mortgagor if the mortgage was allowed to stand against the property, but it is apparent that both parties regarded the property as worth $10,500 and it was a matter of indifference to the vendor whether the mortgage remained or was paid off. She probably knew nothing about the decision in *Waring* v. *Ward*, 7 Ves. 332, or *Jones* v. *Kearney*, 1 Dr. & War. 134, and neither party had in mind the question of the defendant being still liable on the mortgage. The statement that it could remain on the property was no part of the agreement of sale, but only a suggested means by which the sale could be carried into effect, which the plaintiff apparently did not accept or reject. He bound himself to pay the whole purchase price and the defendant accepted that view of the contract.

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I think the first contention of the defendant therefore fails also, and that the decision of the trial Judge on this point was correct.

It was also argued that the findings of the jury were against evidence, but after hearing counsel the Court intimated that the verdict could not be successfully assailed on this ground.

Another ground raised was that there was misdirection by the trial Judge. It was said that the case for the defendant had not been fairly put to the jury and that they may have understood from the charge of the Judge that they were to consider only the evidence of the plaintiff and defendant, and ignore that of all the other witnesses. I have had much difficulty with this question, but have reached the conclusion that the verdict ought not to be disturbed on this ground.

As Lord Watson, in the case of *Bray* v. *Ford*, [1896] A.C. 44, said at page 49: "Every party to a trial by jury has a legal and constitutional right to have the case which he has made either in pursuit or in defence fairly submitted to the consideration of that tribunal."

But while this is so we must take all the circumstances into consideration in arriving at a conclusion as to whether the facts were so "imperfectly and inadequately stated by the Judge and so stated as tending to mislead the jury."

The argument here is that the trial Judge ignored the evidence of the two daughters of the defendant and put the case as one in which the jury was to decide the issues simply and solely upon the evidence of the plaintiff and defendant. Counsel fairly admitted on the argument that in addressing the jury they had discussed the evidence of the defendants two daughters and no doubt they at that time urged very forcibly that the evidence of the daughters corroborated that of the defendant. The charge of the trial Judge came immediately after the address of counsel and it is impossible for me to think that the jury could have been misled into supposing from anything the Judge said or did not say that they were to ignore the evidence of these two girls in reaching their conclusions.

Counsel for the defendant had an opportunity if he thought the charge defective, to call the attention of the trial Judge to the matter, but he refrained from doing so. On the whole, I find myself unable to say that any "substantial wrong or mis-

carriage" has been occasioned by the charge and I would therefore dismiss the appeal with costs.

LONGLEY, J.:—I am satisfied upon reading the Judge's charge that for some reason or other he did not state the case fairly. In this case the whole thing depended upon the examination of the witnesses in respect to the added condition of the bargain between the plaintiff and the defendant; that it was dependent entirely upon the fact of being able to get the people out of the defendant's house on May 15. Upon this point the evidence of the plaintiff was taken on the one side, and on the other side that of the defendant and her two daughters; and as the whole crucial matter was involved in their evidence, it seems to me that the matter would have been placed fairly before the jury. The Judge refers to the evidence in an entirely peculiar and unsatisfactory manner; he says there was the evidence of the girl who said something—and this was the only reference he made in any way to the confirmation. I am therefore under the impression that there should be a new trial on this point.

I have read over the judgment of my brother Ritchie in which he has decided that the plaintiff fails on the Statute of Frauds and that the document is not of that character which fulfils the conditions of the Statute of Frauds. While I have some difficulty in reaching such a conclusion myself, I am disposed to agree with him on this point. And therefore I think the plaintiff's action should be dismissed on the Statute of Frauds quite irrespective of the failure of the Judge to give a fair comprehensive statement of the matter as between plaintiff on the one side and the defendant and her daughters on the other.

RITCHIE, E.J.:—This is an action brought by the purchaser for specific performance of an alleged contract for the sale of real estate. The question as to whether or not the Statute of Frauds has been complied with goes to the root of the plaintiff's action. The case was tried by my brother Drysdale with a jury. The findings of the jury were as follows:

1. Was it a condition of the arrangement between the plaintiff and the defendant that the plaintiff was not to have the house unless the defendant could get her tenants out of the South Park street house by April 1st? A. No.

2. Did plaintiff fraudulently represent to defendant that the memorandum sued on was only a receipt for $200? A. No.

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3. Did defendant agree that she was to sell the house regardless of whether the tenants were out? A. Yes.

These findings of course in no way affect the question of the Statute of Frauds, but the trial Judge has decided this question in favour of the plaintiff and given him judgment.

An attack was made on the findings and on the charge of the Judge, but in the view which I take of the question of law, it would be quite purposeless to consider the grounds of this attack. The memorandum which the plaintiff relies on as satisfying the Statute of Frauds is as follows:

Halifax, February 5th, 1919.

Received from A. C. MacKenzie the sum of two hundred dollars on the purchase of house No. 33 Spring Garden Road. Purchase price ten thousand five hundred dollars. Balance on delivery of deed.

This receipt was signed by the defendant. The two hundred dollars was paid. Subsequently the defendant offered to return the money but the plaintiff would not accept it and the defendant brings it into Court.

There was a mortgage on the property.

I look at the evidence to see if there was a completed oral contract, and to ascertain what that contract was.

The plaintiff himself says:

When was the mortgage talked about? A. At that same time. Q. The very first conversation? A. Yes, she told me there was $5,000 mortgage on the place and that could remain on. Q. And there was an arrangement that the deed was to be given on the 15th of April? A. Yes, that was the time I had to pay her the balance of the money. Q. And that arrangement was made when? A. It was made the next time I was in. Q. The time the receipt was signed? A. No; I do not know; I am not sure about that; it might have been that time; if not it was later. Q. It was part of the arrangement between you to pay her on the 15th of April and the deed was to pass that day? A. Yes. Q. And you think it was made the time the receipt was signed? A. It was either that or in the next conversation; I am not sure which. Q. This receipt did not represent all your agreement, if it was in the next conversation, did it? A. That only represented the purchase of the house. Q. A pretty important part was the payment of the money? A. We arranged that part of it; I am not certain; it might have been that time or the next time I was in. Q. Anyway this receipt did not contain the time when the money was to be paid? A. No, that was verbal. Q. And the mortgage was verbal too? A. Yes, she told me; the mortgage was verbal. Q. And you do not know whether that arrangement about the payment of the money was made at the time the receipt was given or later? A. Either that time or the next conversation I had with Mrs. Walsh.

When the plaintiff says that these terms were "part of the arrangement" I have no difficulty in coming to the conclusion

that they were part of the completed contract. When there is a completed oral contract, it is I think clear as a matter of law that the note or memorandum must contain the terms of the contract as completed, except the ordinary incidents of the contract as, for instance, that the deed will contain the usual covenants. The fact that there was a mortgage on the property was not stated; neither was it stated that the balance of the purchase price was to be paid on April 15 and that the deed was then to be delivered. As to these points there were express stipulations in the completed oral agreement, thereby making them material. Chancellor Kent, at page 511 of 2 Kent's Commentaries, says:

> Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective it cannot be supplied by parol proof, for that would be at once to introduce all the mischiefs which the Statute of Frauds and perjuries was intended to prevent.

It is to my mind quite clear that on the plaintiff's own evidence the receipt does not contain the whole oral contract and I think it does not purport to do so. To constitute a good note or memorandum it is, as a matter of law, essential that it should contain the whole oral contract as completed.

This, I venture to think, is an elementary proposition of law; it would be an easy task to cite authorities in support of it, but it does not seem necessary. I ask myself the question, does the receipt contain the whole oral agreement as completed? In the evidence I answer this question in the negative. If I am right then the provisions of the Statute of Frauds have not been complied with. The remarks of Anglin, J., in *Green* v. *Stevenson*, 9 O.L.R. at page 677, where he speaks of the receipt in that case, are in my opinion singularly applicable to the receipt in this case. I quote:

> The document before us is merely a receipt which cannot be said, except *primâ facie* perhaps, to purport to contain all the terms of the contract to which it refers. Some of those terms it no doubt does set forth. But it is quite consistent with the receipt serving all the purposes for which, as a receipt, it was designed, that there should be terms of the contract to which it relates not embodied in it. Evidence of such additional terms in no wise conflicts with the receipt and their omission from the receipt cannot be urged as a ground for rejecting parol testimony adduced to prove them. Reformation of a written instrument is not in question. Neither can it be said that the omission of the terms as to taxes and interest is shewn to be a mistake. Their inclusion in a mere receipt may well have been deemed quite unnecessary.

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The case of *Martin* v. *Pycroft*, 2 De.M. & G. 785, I think has no application to this case. It was fully dealt with by Martin J., in *Green* v. *Stevenson* at page 678. That which he there says is in my opinion so clearly applicable to this case that I again quote:

> Perhaps the strongest argument for the plaintiff is furnished by the decision of the Lords Justices in *Martin* v. *Pycroft*, 2 D. M. & G. 785. In that case an agreement in writing for a lease, otherwise complete, omitted a term requiring the plaintiff to pay a premium of £200. The plaintiff, seeking specific performance, by his bill stated this omission and offered to pay the premium. The defendant set up the Statute of Frauds unsuccessfully, the Lords Justices, in reversing Parker, V.-C. declaring that in such a case the defendant could only ask the Court to refuse its aid unless the plaintiff would consent to performance of the omitted term. The fact that the plaintiff Green does not in his statement of claim set out the omitted terms and offer to perform them does not in my opinion distinguish this case from *Martin* v. *Pycroft*. On cross-examination by defendant's counsel, the plaintiff admits these terms, and his position is that he is ready to perform them as a condition of obtaining specific performance.
>
> In *Martin* v. *Pycroft* had the plaintiff chosen to insist upon his written agreement without variation the defendant could have successfully resisted its enforcement only by the aid of a Court of Equity permitting him to adduce parol evidence, inadmissible at law, to vary or add to its terms. That aid the Court might well refuse to the defendant unless upon the condition that he do equity by submitting to a decree for specific performance with the variation or addition which such parol evidence disclosed. It is not surprising that in such a case the plaintiff should be in no worse plight because of his frankness in stating the omitted term in his bill and of his docility in offering to perform it, thus rendering the introduction of parol testimony to prove it unnecessary.
>
> Having regard to the grounds upon which the decision proceeds I cannot reconcile *Martin* v. *Pycroft* with the strong and uniform current of authority that neither at law nor in equity can a plaintiff, against a defendant resisting and pleading the Statute of Frauds, enforce a contract whose terms are not evidenced by a memorandum in writing sufficient to satisfy that statute, unless upon the ground that equity, when allowing advantage to be taken of its own rule permitting parol proof of an omitted term, does so upon such conditions as are in the particular case deemed equitable.
>
> Here, however, we are dealing with a mere receipt. The defendant is not obliged to seek any special favour from a Court of Equity in defending himself against the plaintiff's claim. The receipt not purporting to contain the whole terms of the bargain offers no legal impediment to the introduction of parol evidence to prove terms which it omits. The contract was, for aught that appears to the contrary, designedly left partly in parol. Its special equitable jurisdiction not being invoked by the defendant, or requisite to his defence, the Court is not in a position to impose terms upon him. He defeats the plaintiff's claim without any indulgence which it is peculiarly the province of a Court of Equity to afford. By evidence admissible in any Court he shews a parol contract of which only some of the terms are evidenced as required by the Statute of Frauds. His defence is thus complete. By no known

process can those terms not so evidenced be put in a writing signed by the defendant. Nothing less can constitute an enforceable agreement so long as the Statute of Frauds prevails. There is no fraud, no mistake, even if that would suffice, to enable the Court to avoid the effect of the statute; no part performance to satisfy it in the absence of a sufficient memorandum.

As to the other cases in equity cited by the counsel for the plaintiff, I think the short answer is, the defendant is not seeking the aid of a Court of Equity and therefore equitable terms cannot be imposed on her.

I would allow the appeal with costs and dismiss the action with costs. *Appeal allowed.*

SKAGEN v. SMITH & BALKWELL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. June 28, 1920.

1. INTERPLEADER (§ III—30)—BY EXECUTION CREDITORS—ONUS OF PROOF. On an interpleader issue where the substantial onus of proof rests upon the execution creditors they should be made the plaintiffs in the issue and must prove that the goods are the property of the execution debtor. Where they fail to discharge this onus the execution debtor or person claiming through him is entitled to judgment, although the Judge discredits his testimony.
2. APPEAL (§ IV B—116)—FROM DISTRICT COURT JUDGE—REASONS FOR JUDGMENT—FINDINGS OF FACT—RULE 662 (b) (SASK.). The reasons for his decision by a District Court Judge called for by rule 662 (b) (Sask.) are those given by him at the time he rendered his decision upon which judgment is entered. The Judge in giving his decision in all appealable cases should either orally or in writing state his findings of fact and the reasons for coming to the conclusion at which he arrived, so that in case an appeal is taken the Appellate Court may be informed of his decision and his reasons therefor including his findings of fact.

Statement.

APPEAL from a District Court judgment in favour of defendants in an interpleader issue. Reserved.

T. D. Brown, K.C., for appellant.

A. Allan Fisher, for respondents.

The judgment of the Court was delivered by

Lamont, J.A.

LAMONT, J. A.:—This is an appeal from a judgment in favour of the defendants on an interpleader issue. The defendants are execution creditors of one Albert Rossler. Prior to April 3, 1919, Albert Rossler owned and farmed the N. W. ¼ 30-19-4-West 2nd. He did not reside upon the land, because there were no buildings thereon. He resided on the N. E. ¼ of the same section, which, along with several other sections, was owned and farmed by the plaintiff. On April 3, 1919, the plaintiff purchased from Albert Rossler all his interest in the said N. W. quarter. A crop was put

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in on the land, which crop was seized in the fall of that year by the sheriff under the execution of the defendants against Albert Rossler. The plaintiff claimed the grain seized, and the sheriff applied for an interpleader order and an issue was directed. The claimant Skagen was made the plaintiff in the issue, and the execution creditors were made defendants. At the trial of the issue, apart from the sheriff who proved the defendants' execution and the seizure thereunder, the only witness called was the plaintiff Skagen. He testified that Albert Rossler was related to him; that he had purchased the said N. W. quarter from Rossler on April 3, and he produced the documents of title to the land. He further testified that he had purchased the seed grain sown on the land in 1919 and put it in; that he hired Albert Rossler to work for him at $85 per month; that Rossler worked for him during the months of April, May, June, August, September, October and part of November, and was paid therefor; that he (the plaintiff) furnished the horses and implements with which the farming operations were carried on, and that he bought the twine and paid for the threshing. When the sheriff seized the crop, the plaintiff immediately claimed it as owner thereof. There was absolutely no contradiction of the plaintiff's evidence. The trial Judge determined the issue in favour of the defendants, finding that the grain seized was their property as against the plaintiff. The plaintiff now appeals.

Although, under the form of the issue, the claimant is made the plaintiff, the onus, in my opinion, is upon the execution creditors, and they should have been made plaintiffs.

In *Massey-Harris* v. *Dell* (1919), 45 D.L.R. 734 at p. 736, 12 S.L.R. 136, this Court held (Lamont, J. A.) :—

> That the party upon whom the substantial onus of proof rests should be made plaintiff in the issue; that, where the goods seized are, at the time of the seizure, in the actual or apparent possession of the judgment debtor, the presumption is that the goods are his, and the onus is upon the claimant to establish title thereto. Where, however, the goods at the time of the seizure are not in the actual or apparent possession of the execution debtor, the onus is upon the execution creditor to establish his right to seize them.

When the sheriff seized the grain on the N. W. ¼-30, there was no one living on the quarter. The grain seized was, therefore, at the time of the seizure no more in the possession—actual or apparent—of Rossler than it was of Skagen. The grain not

being in the possession of the execution debtor at the time of the seizure, the onus was upon the execution creditors to establish that it belonged to the debtor Rossler, otherwise they had no right to seize it. That onus, in my opinion, they have not discharged. For, assuming that the trial Judge entirely disbelieved Skagen's testimony, as was argued before us, the facts of the case would then bring it within what was laid down in *Pudwill* v. *Folkins & Campbell* (1919), 50 D.L.R. 734, 12 S.L.R. 503, where, in giving the judgment of this Court, my brother Newlands said:—

> The only evidence given at the trial of the issue as to the ownership of the goods in question is given by the defendant and her husband, and is to the effect that the goods are the property of the defendant. The trial Judge says that he does not believe this evidence, and therefore finds for the plaintiffs that the goods are the goods of the execution debtor.
>
> In this issue, the burden of proof is upon the plaintiffs. The effect, therefore, of the Judge disbelieving the evidence on the part of the defendants, leaves the issue without any evidence as to the ownership of these goods. That being the case, the plaintiffs, the parties asserting the affirmative, upon whom the burden of proof is, must fail. The trial Judge was, therefore, wrong in giving judgment for the plaintiffs, and his judgment must be set aside.

In all cases where the onus is upon the execution creditors, they must prove that the goods are the property of the execution debtor. *Wright* v. *Jones* (1919), 49 D.L.R. 512.

As I have already said, the onus was upon the execution creditors to establish that the grain seized was the property of the execution debtor Rossler, and this onus they have failed to discharge.

The appeal should, therefore, be allowed with costs, the judgment appealed from set aside, and judgment entered for the plaintiff in the issue with costs.

It appears to me not inadvisable to here draw attention to what appears to be a misapprehension on the part of some District Court Judges as to the meaning of rule 662 (*b*).

That rule in part is as follows:—

> (*b*) It shall be the duty of the party appealing to apply to the Judge of the District Court for a signed copy of the note made by him of any question of law raised before him, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision on the question or matter submitted to him, together with in either case his reasons therefor including his findings of fact in the case. . . .

In this case the District Court Judge after trial gave the following written fiat:—

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Skagen v. *Smith & Balkwell.* I determine the issue herein in favour of the defendants, the execution creditors. I find that the property in question is the property of the execution creditors as against Fred Skagen the claimant.

The defendants will pay the sheriff's costs, the claimant will pay the defendants' costs, including the costs so ordered to be paid to the sheriff and the defendants will be paid their claim and costs out of the monies in Court. Stay for 30 days.

No other reasons appear to have been given. On this fiat, judgment was entered.

On a request being made to the Judge for a copy of his notes of evidence, findings, and reasons for judgment, he seems to have thought that the rule rendered it obligatory for him to set out reasons for his decision which he had not given before judgment was entered. In my opinion, such is not the meaning of the rule. The reasons for his decision called for by the rule are those given by him at the time he rendered his decision upon which judgment is entered. The rule, in my opinion, contemplates that, in all appealable cases, the Judge in giving his decision will either orally or in writing state his findings of fact and the reasons for coming to the conclusion at which he arrived. If these are in writing, they should be filed with the clerk of the Court; if given orally, the Judge should make a memorandum thereof in his book, so that, in case an appeal is taken, a copy thereof would inform the appellate Court of his decision and his reasons therefor, including his findings of fact.

The language of the rule, it is true, lends itself somewhat to the view taken by the trial Judge; but I am satisfied that it was not so intended. Indeed, the English authorities indicate that an appellate Court should not look at any additions by a Judge to his reasons for judgment made after judgment is entered, except where he is simply correcting an ambiguity. See *Lowery* v. *Walker*, [1907] 1 K.B. 173.*

In *Duck* v. *Floht* (1914), 20 D.L.R. 497, 7 S.L.R. 389, this Court pointed out that there had been a clear breach of R. 662 (b) where the notes entered in his book by the trial Judge did not shew the findings of fact made by him and his reasons for judgment. *Appeal allowed.*

*See *Lowery* v. *Walker*, [1911] A.C. 10.

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Ontario Supreme Court, Appellant Division, Mulock, C.J. Ex., Clute, Riddell, Sutherland and Masten, JJ. March, 26, 1920.

PRINCIPAL AND AGENT (§ II A—7)—POWER OF ATTORNEY—PROVISION NOT TO BE REVOKED BY DEATH—EFFECT TO BE GIVEN—POWERS OF ATTORNEY ACT, R.S.O. 1914, CH. 106—DEVOLUTIONS OF ESTATES ACT.

If a power of attorney contains plain words providing that it "shall not be revoked by the death of the person executing" it, such words must be given effect to and held to be valid and effectual. If there is any conflict between the Powers of Attorney Act, R.S.O. 1914, ch. 106, and the Devolutions of Estates, Act the Powers of Attorney Act must be given effect to, it being the later Act.

Statement.

APPEAL by Thomas McCarty from the judgment of Middleton, J., upon a case stated by the Master of Titles.

The judgment appealed from is as follows:

Mary McCarty in her lifetime was the owner in fee simple of the lands in question.

By a general power of attorney, dated July 25, 1916, she appointed her husband, Thomas McCarty, her attorney, giving him general powers to deal with all her real and personal property; "and also as and when my said attorney or attorneys shall think fit to sell and absolutely dispose of my said real estate lands and hereditaments . . . and to convey assign transfer and make over the same respectively to the purchaser or purchasers thereof . . . and further for me and in my name and as my act and deed to execute and do all such assurances deeds covenants and things as shall be required and my said attorney or attorneys shall see fit and for all or any of the purposes aforesaid."

The power of attorney also contains this clause: "And I hereby grant full power to my said attorney to substitute and appoint one or more attorney or attorneys under him with the same or more limited powers and such substitute or substitutes at pleasure to remove and others to appoint I the said Mary McCarty hereby agreeing and covenanting for myself my heirs executors and administrators to allow ratify and confirm whatsoever my said attorney or his substitute or substitutes shall do or cause to be done in the premises by virtue of these presents and hereby expressly providing (*sic*) that these presents shall not be revoked by my death."

Mary McCarty died on August 3, 1919, intestate, and the fact of her death, of course, was known to her husband, and also

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well-known to the purchasers at the time they made an agreement for the purchase of the lands in question. The husband, after the death of his wife, having agreed to sell the lands, has tendered for registration at the Lands Titles office a deed to the purchasers, bearing a date subsequent to the death of his wife, by which she purports to convey the lands to the purchasers. The Master of Titles had refused to receive or act upon this conveyance, owing to the doubt he feels as to the statute enabling a good conveyance to be made in the name of a dead person, under the power of attorney in question.

The question turns upon the construction of the Powers of Attorney Act, now found as R.S.O. 1914, ch. 106, sec. 2, which reads as follows:—

2. Where a power of attorney for the sale or management of real or personal estate, or for any other purpose, provides that the same may be exercised in the name of and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual, subject to such conditions and restrictions, if any, as may be therein contained.

The situation, apart from this statute, is admirably stated in Watters' Property Statutes, page 303:—

A power of attorney, in its strict acceptation, being an authority to the attorney to do certain specific acts in the name of, and as personally representing, the party granting the power, it seems necessarily to follow from a consideration of the nature of such a power, that it must determine with the death of the donor. When, therefore, an attorney is authorised to sign, seal, and deliver, in the name of and as the act of the party conferring the authority, a deed of feoffment or other assurance of real or personal property, and the attorney omits to execute the deed until after the death of the party granting the power, the deed is void; and no stipulation in the power that the act of the attorney should be binding, notwithstanding the death of the donor of the power, could render the deed valid in law, as immediately upon the death of the donor of the power the estate would pass to his heir or devisee, and the attorney be necessarily *functus officio*: Co. Litt. 52 (*b*); for "how can a valid act be done in the name of a dead man?" *per* Lord Ellenborough, 4 Camp. 272.*

This statute (the Powers of Attorney Act, Ontario) had its origin in the statute of the Province of Canada, 29 Vict. ch. 28, "An Act to Amend the Law of Property and Trusts in Upper Canada," secs. 23 and 24, and has no corresponding English

*See *Watson* v. *King* (1815), 4 Camp. 272, at page 274.

counterpart. The provisions of sec. 3* are based upon English enactments and protect those who act upon a power of attorney in ignorance of the fact of the death of the donor.

It is not without significance that there is no reported case shewing that under the English statute an estate which has in fact vested in the heir or executor upon the death of the donor would pass under a conveyance executed by the attorney after the death.

Under the English Conveyancing Act of 1882 (46 Vict. ch. 39, sec. 9), a power of attorney may be made expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, in which case, in favour of a purchaser, the power shall not be revoked by the death of the donor, and the thing done in pursuance of the power shall be as valid as if the death had not then happened.

Bearing in mind the fundamental principle established in the case of *Bryant* v. *La Banque du Peuple*, [1893] A.C. 170, that powers of attorney are to be construed strictly, and where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of that instrument, either in express terms or by necessary implication, it is necessary here critically to examine the power of attorney and the statute which it is contended validates the conveyance here made.

Upon the death of the donor, her estate in the lands came to an end. It passed to her heirs subject to the provisions of the Devolution of Estates Act, vesting it temporarily in her personal representatives. The statute indicates that two distinct things

*3.—(1) Independently of such special provision in a power of attorney, every payment made and every act done under and in pursuance of a power of attorney, or a power, whether in writing or verbal, and whether expressly or impliedly given, or an agency expressly or impliedly created, after the death of the person who gave such power or created such agency, or after he has done some act to avoid the power or agency, shall, notwithstanding such death or act, be valid as respects every person who is a party to such payment or act, to whom the fact of the death, or of the doing of such act, was not known at the time of such payment or act *bonâ fide* made or done, and as respects all claiming under such last mentioned person.

(2) Nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the person making the payment.

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are contemplated by it: an authority conferred upon the donee of the power to sell or deal with the property which had vested in the heir, devisee, or personal representative, in the name and on behalf of those heirs, devisees, or personal representatives; and, on the other hand, a power to act in the name of the donor of the power, and to deal with the property, which was not to be revoked by the death of the donor. These two things are quite distinct. There is much that might be done after the death of the donor in the way of getting in and managing his estate, quite distinct from selling it. For some reason, the draftsman of the power, evidently having the provisions of the statue present to his mind, has chosen to provide only that the power of attorney shall not be revoked by the death of the donor, and has not chosen to confer the right to sell or dispose of the property in the name and on behalf of the heirs, devisees, executors, or administrators.

This is alone sufficient to indicate to me that the Master rightly refused to register the conveyance.

The effect of our statute, if it is capable of the wide meaning attributed to it by counsel for the husband, in this instance is extraordinary. The document, being itself operative after the death of the donor, is testamentary in its character. The statute does not require that the signature should be witnessed, much less that it should be executed with the formalities attending a last will. The attorney can under it execute all the functions of an executor. Under the statute he would have authority to deal with the property in the name of the heirs, devisee, executor, or administrator. There is no power given or reserved to those beneficially interested, even to the executor of the deceased, to revoke or cancel the power of attorney, and there is no obligation on the part of the attorney expressed in the statute to account to those beneficially interested. Lands might be sold, and estates be realised and divided, without the payment of succession duties, and without any of the precautions deemed essential where infants are interested in the estates of intestates. Fortunately I have not to consider these aspects of the situation, as, in my view, the provision found here does not enable a conveyance to be made of the property which is vested in the representatives of the deceased donor.

If the sale of the lands which has been arranged is deemed to be desirable, the Official Guardian is ready to investigate its propriety,

and to allow the sale to be carried out under the provisions of the Infants Act. The adult children also concur in the sale, and it is entirely likely that the proposed sale is in the interests of the infants. If this course is adopted, the costs of the father and the Official Guardian may be borne by the proceeds of the sale, otherwise it is not a case for costs.

William Proudfoot, K.C., for appellant; *E. C. Cattanach*, for Official Guardian; *F. P. Brennan*, for the Attorney-General, protector of the assurance fund under the Land Titles Act; *A. M. Denovan*, for purchasers.

Sutherland, J.

SUTHERLAND, J.:—An appeal from the order or judgment of Middleton, J., dated December 5, 1919, upon a case stated by the Master of Titles under sec. 88 of the Land Titles Act.

The owner of the land in question, one Mary McCarty, executed a general power of attorney in favour of her husband, Thomas McCarty, bearing date July 25, 1916. She therein did "name constitute and appoint her said husband her true and lawful attorney irrevocable for her and in her name for her sole and exclusive use and benefit" to do certain things therein mentioned and amongst others the following:—

"To take possession of and to let set manage and improve" her "real estate" . . . "to sell and absolutely dispose of" her "real estate lands and hereditaments" and "to convey assign transfer and make over the same respectively to the purchaser," "to execute and do all such assurances deeds covenants and things as shall be required," and "generally to act in relation to her estate and effects real and personal as fully and as effectually in all respects as if" she were "personally present."

The concluding clause of the power of attorney is as follows:—

And I hereby grant full power to my said attorney to substitute and appoint one or more attorney or attorneys under him with the same or more limited powers and such substitute or substitutes at pleasure to remove and others to appoint I the said Mary McCarty hereby agree and covenanting for myself, my heirs, executors and administrators to allow ratify and confirm whatsoever my said attorney or his substitute or substitutes shall do or cause to be done in the premises by virtue of these presents and hereby expressly providing that these presents shall not be revoked by my death.

Mary McCarty died on August 3, 1919, intestate. Her husband and attorney thereafter entered into an agreement to sell the land in question to purchasers, he and they being aware of her death. In October, 1919, the husband in his own name signed a written transfer under the said power of attorney, wherein Mary McCarty (deceased), by her attorney Thomas

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McCarty, purported, as registered owner of the freehold, to transfer to the purchasers the said lands. An affidavit attached is in part as follows:—

I, Thomas McCarty, the transferor named in the above document, make oath and say:—That the above named Mary McCarty, deceased, was my wife and was of the age of 21 years or over. That the power of attorney under which I convey has not been revoked and is of full force and effect.

On the face of the said transfer there is written the following: "Consent to registration, under sec. 13 of the Devolution of Estates Act, R.S.O. 1914, ch. 119, as amended.* R. E. M. Meighen, solicitor under Succession Duty Act to the Treasurer of Ontario."

*The amendment is found in the Statute Law Amendment Act, 1918, 8 Geo. V. ch. 20, sec. 22.

On this transfer being offered to the Master of Titles for registration, he declined to receive it, and, under sec. 88 of the Land Titles Act, referred the matter in the form of a stated case for the opinion of the Court, stating therein: "Notwithstanding the wide language of sec. 2 of the Powers of Attorney Act, R.S.O. 1914, ch. 106, I feel doubtful as to whether the statute extends to make good a conveyance in the name of a dead person by an attorney, when both the attorney and the transferee are aware of such person's death, and the beneficial interests in the property have devolved upon other persons."

The case came on to be heard before Middleton, J., in Chambers. He held that the Master rightly refused to register the conveyance, and dealt with the matter in his judgment in this way (quoting from the reasons for judgment of Middleton, J., 46 O.L.R. at pages 408 and 409).

From that decision the husband of the deceased Mary McCarty now appeals on the following grounds:

(1) That Middleton, J., erred in holding that the power of attorney was inoperative after the death of Mary McCarty.

(2) That he should have held that, according to the true construction of sec. 2 of ch. 106, R.S.O. 1914, the power of attorney was effective after her death, and the transfer should have been received and entered by the proper official in the Land Titles office.

Sections 2 and 3 of the Powers of Attorney Act, R.S.O. 1914, ch. 106, are as follows:—

2. Where a power of attorney for the sale or management of real or personal estate, or for any other purpose, provides that the same may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of

words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual, subject to such conditions and restrictions, if any, as may be therein contained.

3.—(1) Independently of such special provision in a power of attorney, every payment made and every act done under and in pursuance of a power of attorney, or a power, whether in writing or verbal, and whether expressly or impliedly given, or an agency expressly or impliedly created, after the death of the person who gave such power or created such agency, or after he has done some act to avoid the power or agency, shall, notwithstanding such death or act, be valid as respects every person who is a party to such payment or act, to whom the fact of the death, or of the doing of such act, was not known at the time of such payment or act *bonâ fide* made or done and as respects all claiming under such last mentioned person.

(2) Nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the person making the payment.

In Armour on Titles, 3rd ed. (1903), page 119, there is the following reference to the Act then in force:—

If a power of attorney provides that the same may be exercised in the name and on behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words that it shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual to all intents and purposes. If there is no such provision in a power of attorney every payment made and act done under the power after the death of the constituent or after some act done by him to avoid the power is valid as respects every person party to such payment or act to whom the fact of the death or of the doing of such act was not known at the time thereof, and as respects all claiming under them: the act or payment must have been done or made in good faith.

At page 120 Mr. Armour refers to Watters' Property Statutes, page 303, from which Middleton, J., in his judgment quotes as follows:—

A power of attorney, in its strict acceptation, being an authority . . . to do certain specific acts in the name of, and as personally representing, the party granting the power, it seems necessarily to follow from a consideration of the nature of such power, that it must determine with the death of the donor.

It is to be noted that sec. 3 of the Act in question provides that, although the donor has died, certain acts thereafter done pursuant to the power are valid.

It was stated on the argument before us that the adult heirs have approved of the sale, and that the Official Guardian would probably do so if necessary. Counsel for the Attorney-General appeared as protector of the Assurance Fund, and contended, as I understood him upon the argument, that, as the power of

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attorney did not state that it might be exercised in the name of and on behalf of the heirs, etc., there was no authority for the attorney assuming to execute the transfer as he had done. I understood him to admit that, if there had been such a provision, the attorney might have exercised it on behalf of the heirs, etc., and validly executed the transfer. Middleton, J., does not in his judgment expressly say that that is also his view, although at one point in his judgment he seems to indicate that it is.

In my opinion, if the power of attorney had expressly provided, as indicated in the first part of sec. 2, that it might be exercised in the name of and on behalf of the heirs, etc., and also, as it does, "that these presents shall not be revoked by my death," it would be clear that it could thus be validly exercised after the death of the donor. In that case it would also be open to the suggestion or criticism that it was testamentary in its character, even though not executed with the "formalities attending a last will." But it is suggested that the second clause in sec. 2, stating that, where the power of attorney provides by any form of words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual, may possibly validate acts done by the attorney after the death of the donor in the way of getting in and managing the estate quite distinct from selling it. Would not these acts, however, be acts which, if done by a person not named as an executor in a will, be improper intermeddling with the estate which would cause him to be regarded as an executor *de son tort?* If, however, he could do this validly under the second clause of sec. 2, would he not thereby be given authority to do acts ordinarily to be done only by an executor after the death of the testator and in consequence of the power derived from the will?

While sec. 2 deals with two distinct cases—(1) that of the power providing that it may be exercised in the name of and on the behalf of the heirs, etc., and (2) providing by any form of words that the same shall not be revoked by death—the clause following applies to each, and enacts that each provision shall be valid and effectual. It is a principle of the construction of statutes that where the language is clear and explicit effect must be given to it: *Garland* v. *Carlisle* (1837), 4 Cl. & F. 693, at page 705, 7 E.R. 263; *Warburton* v. *Loveland* (1832), 2 Dow. & Cl.

(H.L.) 480, 489, 6 E.R. 806; Craies'-Statute Law, 4th ed. (1906), page 66.

If then the power of attorney contains plain words providing that it "shall not be revoked by the death of the person executing" it, as this does, such words must be given effect to and held to be valid and effectual: if there is any conflict between this statute and the Devolution of Estates Act, as this is the later statute, effect should be given to it. There would appear to be a like conflict between it and that Act, had the words in the first part of the section been included in the power of attorney. I do not see how otherwise any reasonable or adequate effect can be given to the second clause in the section. The intention seems plain that in the one case the attorney can exercise the power in the name of the heirs, etc., though the donor is dead, and in the other case, in the name of the donor, though she be then dead. It can be exercised in her name and on her behalf in the same manner as though she were still living, and no one can legally object, in view of the provision of the statute empowering the attorney so to do: *In re Whitely Partners Ltd.* (1886), 32 Ch. D. 337; MacKenzie's Powers of Attorney and Proxies, page 20.

I am therefore of opinion that under the power of attorney in question the attorney could convey and can execute the transfer in question.

But that does not dispose of the matter so far as the manner in which he has assumed to execute it in the transfer in question. It should be executed by the attorney for and in the name of the donor. He has not so executed it, but in his own name. I am of opinion, therefore, that he has not validly executed the transfer, notwithstanding the initial clause in the transfer already quoted. It should have been executed as follows: "Mary McCarty by her attorney Thomas McCarty." In his affidavit he describes himself as the transferor, and speaks of the power under which he conveys.

I think, therefore, I must come to the same conclusion as Middleton, J., though for a different reason—that the Master could not properly receive and register the transfer in its present form. If amended and re-executed as suggested, it can and should be received and registered.

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I am of opinion also that, if and when the amended or new transfer is executed by Thomas McCarty and the money paid to him, he will receive it for the estate of the donor and be responsible to it therefor. It was suggested by the Court upon the argument that the purchase-money might be paid into Court. Counsel for the appellant, though contending that this was not necessary, agreed that it should be done.

The order will contain a provision as to this. I think the costs of all parties should, under the circumstances, be out of the purchase-money or estate.

Mulock, C.J.Ex. MULOCK, C.J. EX., agreed with SUTHERLAND, J.

Clute, J. CLUTE, J. (after stating the facts):—Mary McCarty died intestate, and it is intended that letters of administration of her estate shall not be taken out. (Counsel for the estate said on the argument, as I understood him, that he had no objection to administration being granted if necessary. In that case the husband, who executed the power of attorney, would be entitled to the letters of administration.) The solicitor, under the Succession Duty Act, for the Treasurer of Ontario, has, under sec. 13 (7) of the Devolution of Estates Act, as amended by 8 Geo. V. ch. 20, sec. 22, consented to the registration of the said transfer.

The Master of Titles, notwithstanding the wide language of sec. 2 of the Powers of Attorney Act, R.S.O. 1914, ch. 106, feels doubtful as to whether the statute extends to make good a conveyance in the name of a dead person by an attorney, when both the attorney and the transferee are aware of such person's death, and beneficial interests in the property have devolved upon other persons.

The parties interested, so far as the Master of Titles has been informed, are the said attorney, Thomas McCarty, W. A. Dempsey, G. A. Dempsey, the persons named as transferees in the said transfer, Lawrence McCarty, Mabel McCarty, and Arthur McCarty, the children and heirs of the said Mary McCarty, the last two being under the age of 21 years, and the Attorney-General for Ontario as protector of the assurance fund.

Upon the application of Thomas McCarty for a direction in the matter of the stated case, Middleton, J., held that the Master of Titles had rightly and properly refused to register

the conveyance of the said lands to the said W. A. Dempsey and G. A. Dempsey, by the said Thomas McCarty under said power of attorney. He further declared that the said power of attorney was inoperative to enable Thomas McCarty to convey the real estate of the said Mary McCarty, deceased, subsequent to the death of the said Mary McCarty, and further ordered that the sale of the said lands be carried out under the provisions of the Infants Act, and that in this event the costs of the said Thomas McCarty and of the Official Guardian may be borne by the proceeds of the said sale; save as aforesaid each party shall bear his own costs of this application.

In his reasons for judgment, the learned trial Judge points out that, upon the death of the donor, her estate in the lands came to an end; it passed to her heirs subject to the provisions of the Devolution of Estates Act, vesting it temporarily in her personal representatives; and that the draftsman has not chosen to confer the right to sell or dispose of the property in the name and on behalf of the heirs, devisees, executors, administrators. This alone, in his opinion, was sufficient to indicate that the Master rightly refused to register the conveyance; he adds that lands might be sold, and estates be realised and divided, without the payment of succession duties, and without any of the precautions deemed essential where infants are interested in the estates of intestates. He then adds: "Fortunately I have not to consider these aspects of the situation, as, in my view, the provision found here does not enable a conveyance to be made of the property which is vested in the representatives of the deceased donor."

I am unable to agree with the learned Judge in his view of the statute and of its effect. The question turns upon the construction of the statute R.S.O. 1914, ch. 106, sec. 2, which reads as follows:—

> 2. Where a power of attorney for the sale or management of real or personal estate, or for any other purpose, provides that the same may be exercised in the name of and on behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual, subject to such conditions and restrictions, if any, as may be therein contained.

It will be observed that the statute provides for two distinct cases: (1) where authority is conferred upon the donor of the

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power of attorney to sell or deal with the property which had vested in the heir, devisee or personal representative in the name and on behalf of those heirs, devisees, or personal representatives; (2) or a power to act in the name of the donor of the power and to deal with the property, which is not to be revoked by the death of the donor. Such provision shall be valid and effectual, subject to such conditions and restrictions, if any, as may be therein contained.

The effect of this is, in my opinion, whether the words used are those contained in clause 1 or clause 2, that "such provision shall be valid and effectual, subject to such conditions and restrictions, if any, as may be therein contained."

The power of attorney expressly authorises the attorney to convey, assign, transfer, and make over respectively to the purchaser or purchasers thereof, with power to give credit for the whole or any part of the purchase-money thereof, and to permit the same to remain unpaid for whatever time and upon whatever security, real or personal, either comprehending the purchased property or not, as the said attorney or attorneys shall think safe and proper, and to execute such assurances, deeds, covenants, and things as shall be required, "and my said attorney or attorneys shall see fit, and for all or any of the purposes aforesaid; and to sign and give receipts and discharges for all or any of the sum or sums of money which shall come to his or their hands by virtue of the powers herein contained, and which receipts, whether given in my name or that of my said attorney or attorneys, shall exempt the person or persons paying such sum or sums of money from all responsibility of seeing to the application thereof."

The language of the statute (sec. 2, quoted above) is clear and explicit. I do not see how any language could be more clear than that used in the statute; and, in my opinion, it expressly covers a case like the present. Had he executed the power in her lifetime, there can be no doubt that the proceeds of the sale of the land would form part of her estate, that is, that it was done, as he declares, expressly for her and on her behalf; and it equally follows, I think, that where a power of attorney such as this is acted upon after her death, the proceeds of the sale form also a part of her estate and are subject to the Succession Duty

Act, and may be treated in all respects as a part of her estate. It does not, in my opinion, preclude the necessity for administration.

Taking this view, I think the appeal should be allowed, and the order of Mr. Justice Middleton set aside, and that it should be declared that the power of attorney executed by the said late Mary McCarty in favour of the said Thomas McCarty was operative after the death of the said Mary McCarty, and that, according to the true construction of sec. 2 of ch. 106, R.S.O. 1914, the said power of attorney was effective after the death of the said Mary McCarty, and the said transfer of the said lands should have been received and entered by the proper official in the Land Titles Office.

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For the first time this Act has been under review, and the Master of Titles acted properly in asking for the opinion of the Court.

There being infants interested in the purchase-money, by consent the same is to be paid into Court, and thereupon the conveyance in question may be registered, all parties to be entitled to payment of their costs out of the moneys, and the balance is to be apportioned by order in Chambers between the parties entitled thereto.

Since writing the above, my attention has been called, by my brother Sutherland, to a point that was not raised in the Court below or during the argument on appeal, namely, that the deed presented for registration to the Master of Titles was imperfectly executed under the power of attorney, which of itself justifies the Master of Titles in not receiving it. My judgment was confined to the only question argued before us, namely, the effectiveness of a conveyance executed under the power of attorney in question after the death of the constituent of the power.

MASTEN, J.:—This is an appeal from an order of Mr. Justice Middleton made on the 15th December, 1919. The order was made under the provisions of the Land Titles Act, upon a case stated by the Master of Titles, and the effect of it is to declare that a deed tendered for registration under the Land Titles Act is not validly executed. Mary McCarty was the owner of the lands in question during her lifetime, and she died on or about August 3, 1919, intestate, having, on July 25, 1916, executed a

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general power of attorney in favour of her husband, Thomas McCarty.

Acting under this power of attorney, Thomas McCarty executed and tendered for registration a deed of the lands in question. The deed purports to be from "Mary McCarty, late of the City of Toronto, in the County of York, married woman (deceased), by her attorney Thomas McCarty of the said City of Toronto," conveying the lands to W. A. Dempsey and C. A. Dempsey, and is signed "Thomas McCarty."

The Master has felt doubt and difficulty in regard to the acceptance of this deed, and has referred the matter to the Court. The validity of the deed is supported by the appellant under the provisions of R.S.O. 1914, ch. 106, sec. 2, which reads as follows:—

> Where a power of attorney for the sale or management of real or personal estate, or for any other purpose, provides that the same may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual, subject to such conditions and restrictions, if any, as may therein be contained.

I am of opinion that the order of Mr. Justice Middleton holding the deed invalid should be maintained and the appeal dismissed.

It is a principle of construction that some meaning must, if possible, be given to every part of a statute: another principle is equally well settled—that a power of attorney is construed strictly by the Courts: *Howard* v. *Baillie* (1796), 2 H. Bl. 618, 126 E.R. 737; *Withington* v. *Herring* (1829), 5 Bing. 442, 130 E.R. 1132; *Bryant* v. *La Banque du Peuple*, [1893] A.C. 170.

The first provision of the statute is that the power of attorney may provide that it "may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same."

That provision appears to me aptly to cover the whole field here in question and to exhaust the subject-matter, so far, at least, as it relates to the conveyance of an estate in lands.

The second provision, viz., where the power "provides by any form of words that the same shall not be revoked by the death of the person executing the same" must therefore relate

to a subject-matter other than a conveyance of land, or else it is mere surplusage. It is, however, apt to enable the donee of the power to act where there is no heir, devisee, executor, or administrator.

Such a case arises where action is taken in regard to personal estate, and there is neither a will nor letters of administration of the estate of the donor of the power.

In such a case the first provision does not apply because there is no heir, devisee, executor or administrator, in whose name or on whose behalf the power can be exercised, but by force of the second provision the power of attorney remains valid and effective, and the donee of the power can deal with such personal estate.

The power of attorney purports to authorise Thomas McCarty to sell the lands of the donor of the power and to convey the same, and in her name and as her act and deed to execute all deeds required for such purpose, and provides that the power shall not be revoked by her death. The statute provides that the power may be drawn so as to provide that it may be exercised in the name of and on behalf of the heirs or devisees, executors or administrators, of the deceased; but in the present case that was not done.

It must be taken that the power as granted is in force and valid, for the statute expressly says so. Hence the attorney may, in the name of Mary McCarty, exercise the power for whatever it is worth. The difficulty is that the donee of the power is an agent of Mary McCarty, who is dead. He can, as agent, convey in her name what his principal holds and no more. But she does not hold these lands. On her death, by the force of law not touched by this statute, they passed from her, and a deed from her can convey nothing because she possesses nothing.

I can understand that an effective deed might be executed by the donee of the power if he was authorised to sell and convey in the name and on behalf of the heirs, devisees, or personal representatives of Mary McCarty, in whom the lands actually vest on her death, but a deed from Mary McCarty can convey nothing, for she has nothing.

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There is further consideration to be borne in mind. What we are here asked to do is in effect to declare that the purchasers are entitled to a certificate giving them an absolute title in fee simple in these lands.

Where the right is so doubtful, and where there is no difficulty in making a good title in other ways, we ought, it seems to me, to be very cautious indeed about declaring such a right or establishing such a precedent.

The appeal should be dismissed.

RIDDELL, J., agreed with MASTEN, J.

Appeal dismissed, with a declaration that the attorney can by a deed in the proper form, make a valid transfer under the Land Titles Act (RIDDELL, *and* MASTEN, JJ., *dissenting*).

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CITY OF MEDICINE HAT v. HOWSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. June 29, 1920.

TAXES (§ III—100)—MEDICINE HAT CHARTER—DEBT RECOVERABLE IN PERSONAL ACTION.

The effect of secs. 6 and 7, Title XXXII. of the Medicine Hat Charter, 6 Edw. VII. 1906 (Alta.), ch. 63, is to make taxes which are due to the city, a debt recoverable in a personal action by it. The omission to include the lots in a tax sale which was held does not release the debtor from his liability.

[*Castor* v. *Fenton* (1917), 33 D.L.R. 719, 11 Alta. L.R. 320, applied.]

Statement.

APPEAL by plaintiff from a judgment on a special case in an action wherein the plaintiff sought personal judgment for certain taxes alleged to be due to the city in respect of certain real property situate therein.

S. G. Bannon, for appellant.

G. M. Blackstock, for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The city had not resorted to any of the other remedies provided by the statute viz: (1) distress of personal property; (2) sale, nor to an action to enforce the lien given by the statute; assuming that this latter remedy this intended to be given or exists.

It was contended by the defendant that the Act in question did not give any right to the corporation to recover the taxes as a debt. The material sections of the Act contained in Title 32 (Alta. Stats. 1906, ch. 63), are as follows:—

6. The taxes due upon any land may be recovered from any owner or tenant originally assessed therefor and from any subsequent owner of the whole or any part thereof saving his recourse against any other person, and such taxes shall be a special lien upon the land and shall be collectable by action or distraint in priority to every claim, privilege, lien or encumbrance of every person except the King; and lien in its priority shall not be lost or impaired by any neglect, omission or error of any officer of the city.

7. The production of a copy of so much of the roll as relates to the taxes payable by any person in the city certified as a true copy by the secretary-treasurer shall be conclusive evidence of the debt.

It is apparently well settled law that a tax is not a debt unless expressly declared to be so by the statute imposing it.

The simple question is whether by the words used in the above sections, the Court should hold that the statute has declared the taxes to be a debt. The words are practically the same as those of sec. 305 of the Town Act and in the case of *Castor* v. *Fenton*, (1917), 33 D.L.R. 719, 11 Alta.L.R. 320, the Chief Justice held that under the latter section taxes could be recovered in a personal action as a debt. The majority of the Court, while inferentially holding that the taxes were a debt, were of opinion that the debt had been extinguished by forfeiture proceedings. My memory is that the point was not there directly argued but that both parties assumed that in the beginning the taxes had been a debt. But so far as the case goes I think, with much respect, that its value is not diminished by the circumstance alluded to in the judgment of the trial Judge in this case, that in sec. 305 of the Town Act there is a semicolon after the word "person" while in the Medicine Hat statute there is, at that place, only a comma. The rule adopted in the Courts is, I think, to pay little, if any, attention to punctuation. See Beal Cardinal Rules, 2nd ed., 264; Craies' Hardcastle, 4th ed., pp. 182-3. This rule apparently rests upon the fact that the rolls of the British Parliament are never punctuated. What the practice is in the original rolls of the Alberta Legislature, I am not sure, but I should, in any case, hesitate to rest much upon a difference in punctuation without an examination of the original roll.

There is another rule of interpretation which is applicable here and that is the rule against the existence of superfluous words. See Beale p. 321, Craies' Hardcastle, 2nd ed., 102, 103. The following are some of the judicial opinions there cited. Lord Brougham said: "A Statute is never supposed to use words without

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a meaning." It is a "settled canon of construction that a statute ought to so be so construed, that if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." And there are several other equally strong opinions quoted.

So in the present case, if the contention of the defendants be correct as to the meaning of sec. 6 of Title 32, viz: that it merely creates a lien and give a right to collect the taxes in an action to enforce the lien or by distress, then all the words of the section down to "thereof" in the third line are superfluous. They would, in that case, add absolutely nothing whatever to the meaning of the statute because everything that the defendants admit is done by the section is done fully and completely by the succeeding words.

Just why there should be any necessity of an action to enforce the lien when a summary sale is provided for is not clear, such an action has never been brought in this Court so far as I know.

Furthermore, it is quite impossible for one to discern what sensible meaning can be given to the words "may be recovered from any owner or tenant originally assessed therefor" if there is only to be a lien and a distress. How could either a lien or a distress be enforced against one who is only an owner originally assessed therefor but not the owner at the time of the proceedings? Possibly a distress might be so enforced but the clauses dealing with distress clearly indicate that the distress, where the taxes are a lien, is to be made on the goods of the "owner of the land" (sec. 10 sub-sec. (1) of the Title). Distress generally upon goods wherever found in the city is confined to the case where taxes are not a lien on the land, that is personal property and income tax etc. (sec. 13 sub-sec. 1).

The use of the word "recover" is also, I think, significant. That is the word almost invariably used in entering a personal judgment viz: "that the plaintiff do recover from the defendant etc." True, the word is often given a wider meaning, so wide even as to include distress (see Willes, J., in *Haines* v. *Welch* (1868), L. R. 4 C.P. 91). But it is surely also significant that further on in the section, when reference is again made to an action, the words used are "collectable by action." Reference may also be made to *C. & E. Ry. Co.* v. *Sask. Land & Homestead Co.* (1919), 50 D.L.R. 16.

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Taking all these circumstances together, I cannot but conclude that the real meaning and effect of the statute is to make the taxes a debt recoverable by personal judgment and I, therefore, think the appeal should be allowed with costs and that question (a), submitted in the special case, should be answered in the affirmative. I see nothing in the statute which shews that the omission to include the lots in a tax sale which was held would release the defendants from their liability.

To question (b) I think it should be answered that the female defendant is liable only for the taxes for 1917, 1918 and 1919, but that the male defendant is for the taxes for the whole five years. He was the registered owner throughout the whole period and the assessment of the wife was not based upon any real transfer of ownership, but seems to have been made merely at their joint request and that request being acceded to the wife cannot, it was admitted, object to the consequences.

Judgement accordingly.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. June 28, 1920.

INNKEEPERS (§ I—2)—PROPRIETOR OF HOTEL RENTING OUT DINING ROOM—DINING ROOM OPEN FOR GUESTS OF HOTEL—LIABILITY AS INNKEEPER FOR LOSS OF GOODS DELIVERED TO CLERK FOR SAFE KEEPING.

The keeper of a hotel is none the less an innkeeper because he has made arrangements under which the hotel dining room is operated by someone other than himself where it is still open to the guests of the hotel, who can obtain there the food they require. A person who with the acquiescence of the proprietor is behind the counter of a hotel, registering people who come there as guests, is the clerk or agent of the proprietor and such proprietor is liable for goods handed to such agent for safe keeping.

Statement.

APPEAL by plaintiff from the trial judgment in an action for the recovery of Victory Bonds left with the defendant in his hotel for safe keeping.

W.F.A. Turgeon, K.C., for appellant.

W.M. Rose, for respondent.

Haultain, C.J.S.

HAULTAIN, C. J. S.:—The two questions to be decided in this appeal are:—1, whether or not the defendant is an innkeeper, and 2, whether or not Biron was the servant or agent of the defendant.

As to the first question; the only ground upon which the defendant seeks to escape the ordinary liability of an innkeeper

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is that he was only a lodging-house keeper, inasmuch as he did not supply meals to his lodgers. This does not seem to me to create any distinction. If a hotelkeeper or an innkeeper sublets his dining room that does not change the character of his business. An ordinary traveller stopping at a hotel conducted on what is known as the "European plan," should not be put on enquiry when he goes into the hotel dining room as to whether he is paying the hotelkeeper or his lessee for the meals which he gets. In this case, the defendant sublet his dining room to some Greeks, who supplied meals to the travelling public who stopped at the hotel. I would hold, therefore, that the defendant is an innkeeper.

As to the second question: the evidence shews that Biron at the request and with the knowledge of the defendant, on the occasion in question and on other occasions, acted as a clerk or assistant in the hotel. The defendant thereby held him out as his servant or agent, and must be held liable for goods delivered to him for safe keeping.

It should not be necessary to cite authority as to the liability of an innkeeper for goods, or money, or valuables delivered to him for safe keeping, and, as in this case the documents in question were lost, the defendant must make good the loss.

The appeal should, therefore, be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for the amount of the bonds, interest and costs.

Newlands, J.A.

NEWLANDS, J. A.:—In the statement of claim, it is alleged that defendant kept an hotel or inn for the accommodation of travellers called the Royal Hotel, at Gravelbourg; that plaintiff being a traveller was received at this hotel as a guest on February 7, 1919; that he had with him three Victory Bonds valued at $300.08; that he deposited these Victory Bonds with defendant for safe keeping, and that through the negligence of the defendant or his servants these bonds were lost.

The defendant denies that he is an innkeeper, or that the bonds were left with him for safe keeping. The trial Judge has found that defendant was not an innkeeper, and that Biron, to whom the bonds were handed by plaintiff, was not a servant of defendant.

As to the first finding, I am of opinion that this case comes within the decision of *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283, 106 E.R. 667.

In that case the facts were stated as follows, at p. 283 :—It appeared the defendant kept a house of public entertainment, called the Globe Tavern and Coffee House, in Fore St. Moorgate, where he provided lodging and entertainment for travellers and others. No stage coaches or waggons stopped there, nor were there any stables belonging to the house. The plaintiff, in December, 1818, having lived before that time in furnished lodgings in London, went to the defendant's house and engaged a bed; he continued to reside there for several months, and then left the place. The defendant, in his bill, charged for eighty-three nights' lodging; and claimed to detain the goods mentioned in the declaration, on account of money due to him for lodging and entertainment provided for the plaintiff. Upon these facts the Lord Chief Justice was of opinion, that the defendant had a lien upon the goods, . . .

Upon these facts, Bayley, J., at p. 286, said:—

I am of opinion that this is substantially an inn. In order to learn its character, we must look to the use to which it is applied, and not merely to the name by which it is designated. Now this house was used for the purpose of giving accommodation to travellers, who, in London, reside either in lodgings or inns. The defendant did not merely furnish tea and coffee as the keeper of a coffee-house does, nor a table as the keeper of a tavern does; but he provided lodgings, and that in the way they are provided at inns: for the charge was so much per night.

And Best, J., at p. 287, said:—

I am of opinion that the defendant's house, under the circumstances of this case, is to be considered as an inn. The consequence of which is, that he has a lien on the goods of his guests; and, on the other hand, that he is responsible to them for property left in his care. An inn is a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received. In this case, the defendant does not charge as a mere lodging-house keeper, by the week or month, but for the number of nights. A lodging-house keeper, on the other hand, makes a contract with every man that comes; whereas an innkeeper is bound, without making any special contract, to provide lodging and entertainment for all, at a reasonable price.

In that case, it appears that the guest was furnished with lodging only, as it is contended was the case here. Although defendant did not actually serve meals to his guests, he provided for these wants of travellers by renting his restaurant to the Greeks, who provided the meals. There, as here, the proprietor only provided the guest with lodgings, for which he charged

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so much each night. I think he is, therefore, an innkeeper and liable as such.

The plaintiff handed the Victory Bonds to one Biron, who was behind the counter, and apparently in the employ of the innkeeper. As a matter of fact, he was not actually so employed, but was only helping out the proprietor. There was, however, a sufficient holding out of Biron as an employee to make the defendant liable.

In 22 Cyc., page 1078, par. 2, it is stated:—"When goods are delivered to a servant if he is at a proper place and clothed with the appearance of authority to receive the goods the innkeeper is liable from the time of delivery to the servant." I agree with that proposition.

The evidence is to the effect that the bonds were handed to Biron when he was ostensibly acting as a clerk in the hotel for safe keeping, and that they were afterwards lost. The defendant is, therefore, liable, and the appeal should be allowed with costs.

Lamont, J.A.

LAMONT, J. A.:—The material facts in this case are as follows:—The plaintiff was a traveller and the defendant was the keeper of the Royal Hotel at Gravelbourg. On the evening of February 7, 1919, the plaintiff went to the defendant's hotel and registered as a guest. Behind the registration counter at the time were Quesnelle, the clerk, and one Biron. The plaintiff had in his pocket three $100 Victory Bonds. He asked Quesnelle if he could take them for safe keeping. Quesnelle referred him to Biron. Biron took them. Both the plaintiff and Biron swear that when Biron took the bonds he asked the defendant, who was also at the counter: where he should put them, and that the defendant said: "In the safe;" that Biron went to the safe, and finding it locked asked the defendant if they would be all right in the cash register, and that defendant replied in the affirmative. Biron put the bonds in the drawer of the cash register. The defendant took the cash himself that night, but says no bonds were in the drawer. He denies the conversation testified to by the plaintiff and Biron. The plaintiff sued for the value of the bonds. The trial Judge found for the defendant on two grounds: (1) that the defendant was not an innkeeper, and (2), that Biron was not his servant or agent.

With deference, I am of opinion that the Judge erred on both points.

What constitutes an innkeeper is laid down by Kennedy, J., in *Orchard* v. *Bush & Co.*, [1898] 2 Q.B. 284, at 288, as follows:—

> The defendant was an innkeeper, keeping the hotel as an inn. I am content to take Best, J.'s, definition of what is an inn in *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283, 106 E.R. 667: "An inn is a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided." The house in question there was a London tavern where no coaches stopped, and there were no stables. It was contended that it was not an inn; but the Court held that that view was too narrow and was unreasonable. Bayley, J., said:—"I take the true definition of an inn to be, a house where the traveller is furnished with everything he has occasion for whilst on his way." The Royal Court Hotel, in the present case, unquestionably was an inn: it was a place in which the owner held himself out as ready to receive all travellers and sojourners, and to supply food and accommodation for them whether they stayed the night, or used it temporarily on their way. If so, the legal liability of an innkeeper attached to the defendants. It was said that the dining-room accommodated not only people who stayed at the hotel, but people who came there only for the purpose of getting a meal. There is scarcely an inn in the country where that is not done; and can it be said that the rights and liabilities of the innkeeper are thereby altered? I cannot think they are. The cases of a restaurant keeper, as in *Ultzen* v. *Nicholls*, [1894] 1 Q.B. 92, or of a place kept separately from the hotel, as in *Reg* v. *Rymer* (1877), 2 Q.B.D. 136, are perfectly different. In those cases a perfectly separate business was carried on in premises which did not form part of the inn.

The only respect in which it was contended that the defendant was not an innkeeper was, that some time previously he had ceased serving meals in the hotel dining room himself and had rented it to certain Greeks, who supplied meals to whoever went into the dining room therefor and collected the price thereof.

In my opinion, the keeper of a hotel is none the less an innkeeper because he has made arrangements under which the hotel dining room is operated by someone other than himself. Where the hotel dining room is still open to the guests of the hotel and these guests can obtain there the food they require, the hotelkeeper, in my opinion, holds out to his guests that they can obtain their meals at the hotel. The defendant was, therefore, an innkeeper.

The other point is, I think, equally clear. It was established beyond question that Biron was registering in the guests on the night in question. It was also established that on other occasions he had been behind the counter, and also that he had sold on be-

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half of the defendant cigars, cigarettes, etc. Biron himself says the defendant asked him to help, and, although he was not getting wages, he says, on one occasion at least, the defendant reduced the rent of his room on account of his services. The defendant denied that he had employed Biron, but admitted that on the night in question he was "registering the people in." The defendant himself was in the room in which the guests were being registered. Under these circumstances, the defendant, in my opinion, held out Biron as his clerk or agent.

The appeal, in my opinion, should be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for the amount of the bonds, interest and costs.

Appeal allowed.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. June 10, 1920.

1. TRIAL (§ II C—105)—LIBEL AND SLANDER—PRIVILEGE—SUFFICIENCY OF EVIDENCE TO SUPPORT—WITHDRAWAL OF CASE FROM JURY.

In an action for damages for libel if privilege has been pleaded, the facts on which the claim of privilege is based must be proved before the Judge can rule whether the occasion is privileged or not. If at the conclusion of the plaintiff's case, facts sufficient to support the plea of privilege have been clearly established, and no evidence of malice has been given, the Judge should enter judgment for the defendant and not let the case go to a jury.

2. MASTER AND SERVANT (§ I E—22)—DISCHARGE OF SERVANT FOR GOOD CAUSE—NECESSITY OF STATING GROUNDS FOR—JUSTIFICATION SHEWN BY FACTS KNOWN SUBSEQUENTLY.

It is not necessary that a master dismissing a servant for good cause should state the ground for such dismissal and provided good ground existed in fact it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shewn by proof of facts known subsequently to the dismissal.

Statement.

APPEAL by plaintiff from the judgment of the trial Judge withdrawing his claim for damages for libel from the jury and cross appeal by defendant against the verdict of the jury—assessing damages for wrongful dismissal. Appeal dismissed, cross-appeal allowed.

D. Campbell and *O. H. Campbell*, for appellant.

A. J. Andrews, K.C., and *C. H. Green*, for respondent.

Fullerton, J.A.

FULLERTON, J. A.:—This action was brought to recover damages for libel and also damages for wrongful dismissal.

The plaintiff was, for some time prior to August 7, 1917, in the employ of the defendant as a telegraph operator at the Yard Office in Regina. On July 27, 1917, he was arrested and charged with stealing a crate of canteloupes. On August 6, at the conclusion of his preliminary examination, he was committed for trial, and on August 7 was discharged by the defendant from its employ. The procedure in the case of a telegrapher in the employ of the defendant, claiming to have any grievance in connection with his treatment by the company, is to apply personally to the company for an adjustment and, failing this, to have the matter referred to the Local Chairman of the Telegraphers Union who takes the matter up with the proper officer of the company. If he fails to get the matter adjusted, he refers it to the general chairman of the union who, if necessary, refers it to the general manager. On September 24, 1917, the plaintiff, claiming that he had taken his trial and had been acquitted of the charge made against him, applied to the defendant for reinstatement. This having been refused, he applied to Mr. Barry, the local chairman of the telegraphers' committee at Regina. Barry took the matter up with the division superintendent at Regina, Mr. Chown, who refused reinstatement. Upon being advised of this by Barry, the plaintiff requested him to turn the case over to the general chairman of the telegraphers' committee, Mr. Mien. This was done and Mien requested the plaintiff to meet him in Moose Jaw on December 9, 1917, and bring with him his certificate of service. Plaintiff applied for this at the office of Chown at Regina, but was unable to secure it as all certificates of service were issued from the Staff Record Office at Winnipeg. He, however, went to Moose Jaw on December 9 as requested by Mien. There he learned that Mien had the plaintiff's notice of dismissal and on his return to Regina was informed by Barry that he had received the certificate of service which plaintiff had applied for before leaving Regina.

These are the documents referred to in par. 8 of the statement of claim, and it is in respect to the statement contained in these documents: "Dismissed for being implicated in a case of theft of fruit from car" that the plaintiff charges libel against the defendant.

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At the argument counsel for the plaintiff stated that he rested his case, so far as his claim for libel was concerned, solely on the certificate of service. This document is one that is always, when requested by employees who have been dismissed, issued to him by the company and in it are shewn particulars of the employee's service with the company and the cause of his dismissal.

Prendergast, J., who presided at the trial, withdrew from the jury the question of libel, but allowed the claim for wrongful dismissal to go to the jury. The jury found that the plaintiff was unjustly dismissed, assessing the damages at $425.

The plaintiff now appeals from the judgment of the trial Judge withdrawing the plaintiff's claim for damages for libel from the jury and the defendant cross-appeals against the verdict of the jury and the judgment entered in accordance therewith.

A great deal of evidence was given by the plaintiff with regard to the charge of stealing canteloupes and as this charge was the cause of his dismissal and has also an important bearing on the question of the alleged libel, I propose first to give a summary of this evidence. The plaintiff's story is that on or about July 27, 1917, his house in Regina was searched and the officers there found a crate of canteloupes which he admits were proved by very clear evidence at his trial to have been stolen from a car standing in the defendant's yards at Regina which had been broken into. The plaintiff also admitted that he had heard of some cases of pilfering from cars standing in the yards at Regina. His explanation of his possession of the cantaloupes is that he bought them from a man while he was on duty at the Yard Office at Regina. The time was dusk on a Sunday evening and the man was standing outside the Yard Office. Asked what the man was doing there he answered that he inferred he was waiting for a freight train to go past so that he could cross the track. He also inferred that the man was coming from a wholesale fruit house, did not think it a curious thing for a man to be coming from a wholesale fruit house at that hour on Sunday night and gave as a reason that he understood they had a watchman there at all hours of the night and day. He could not remember the details of the conversation with the man but he offered to sell them to him, making the remark that they were very heavy to carry home. He offered them to him

at what he considered a very reasonable price, $5. He admits they were worth $12.50.

Now, dealing first with the appeal of the plaintiff from the refusal of the trial Judge to submit the question of libel to the jury, as above pointed out the plaintiff complains only of the certificate of service and contends that it is libelous and was published to Barry, the Local Chairman of the Telegraphers' Committee.

The certificate in question is dated Winnipeg, Dec. 8, 1917. Under the heading "Details of service" it gives the occupation of the plaintiff, the different places at which he had worked while in the company's service and the length of service at each place. Under the heading "Reason for leaving" is dismissed. Under the heading "Remarks" are the words complained of "For being implicated in case of theft of fruit from car."

The certificate bears the office stamp of the Staff Records Office, Can. Pac. Ry. Co., Winnipeg, and is signed "D. Gray, Chief of Staff Records."

It appears from the evidence that when a man is discharged from the service of the company, a regular form is filled up by the superintendent in charge of the particular division, giving the reasons for his discharge. This form is forwarded to the Staff Records Office at Winnipeg and filed there.

The plaintiff was discharged on the day after he was committed for trial and at that time the form was prepared shewing the reason for his discharge: "For being implicated in case of theft of fruit from car." This form was in due course sent to the Staff Record Office at Winnipeg. Now, clearly no objection can possibly be taken to the correctness of the above stated reason for discharge.

Now, let us see the circumstances under which the certificate of service which is complained of came into the possession of Barry.

Following the regular course of procedure, when the company declined to reinstate the plaintiff, he appealed to the telegraphers union and, as plaintiff himself admits, the union owed a duty to every one of its members to deal with any complaint he might have against the company. The plaintiff further admits that one of their duties was to get all the information possible from the company as to the cause of dismissal. Barry, as local chairman of

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the telegraphers' committee at Regina, had first taken up the matter on behalf of the plaintiff. The plaintiff had given him full particulars of his case including all the circumstances in connection with the criminal charge. Barry then saw Chown, the division superintendent at Regina, who had discharged the plaintiff, but had failed to induce him to reinstate the plaintiff. As previously stated, the matter was then taken up by Mien, the general chairman.

Under date December 4, Mr. Mien addressed a letter to Barry, plaintiff and one Cheney in which he says:

I would like to meet Brothers Barry and Bancroft at Regina on arrival of No. 1, if possible, to discuss Bro. Bancroft's grievance, before going to Moose Jaw. If Bro. Bancroft cannot arrange to do this, perhaps he could come to Moose Jaw on Sunday and attend meeting there when I could talk the matter over with Bro. Barry and him. I would be glad to meet one of you on arrival of No. 1 and advise what arrangements you can follow out, I desire to meet you both together.

On December 5, 1917, Mien wrote the following letter:—

Order of Railroad Telegraphers.

Winnipeg, December 5th, 1917.

W. J. Barry, Esq.,
C. O. Bancroft, Esq.,
G. J. Cheney, Esq.,

Dear Sir and Brother:—

My letter of yesterday to you evidently has crossed with letters received from Bros. Barry and Bancroft regarding Bro. Bancroft's case.

As the matter has now been taken up by the local chairman with his superintendent in the regular way, it will be in order for me to appeal to the general superintendent, and I have written to Mr. Stevens requesting an interview with him on Saturday, December 8, on my arrival in Moose Jaw.

It will not now be necessary for me to stop over at Regina. I would like to be in Moose Jaw before the train that leaves Regina about 14.30 gets to Moose Jaw, as it would leave time rather short to arrange meeting with Genl. Supt. Bro. Bancroft has not given me much of the particulars of his case, so that I am somewhat handicapped, however, I will go ahead and do the best I can, *but I want to have his form 104 which gives reason for dismissal* as without it I am not in a position to discuss the case intelligently. I would therefore request that *either Bro. Barry or Bancroft meet me on No. 1 Saturday at Regina and hand me this form* along with other particulars . . .

Yours fraternally,

J. M. Mein,
General chairman.

As a result of this request the plaintiff says:—

I communicated with Mr. McGuire (Chown's chief clerk) requesting my service letter; I requested it in time to take it out to Moose Jaw on Sunday (the 9th) and this was on Friday. He said it would be impossible on account of the paper being issued in Winnipeg; and I said if I could not

get it in time for Sunday I would call for it the following week on my return from Moose Jaw.

It is quite evident that Chown immediately applied to the Staff Record Office in Winnipeg for the certificate as it is dated December 8th, and we find a letter in evidence from Chown, dated December 10, addressed to Barry reading : "I enclose herewith form 104, certificate of service, in favour of C. O. Bancroft. Please acknowledge receipt."

The following discovery evidence of Chown referring to the certificate was put in by the plaintiff:—

"Q. Why didn't you send it to Bancroft? A. We hadn't Bancroft's address. Q. Now you did not endeavour to send ex. B by mail? A. Bancroft came into the office and asked for that twice, and if he had said 'Will you mail it to me?' it would have been mailed to anywhere in the world as far as that goes. Q. No instructions to send it any place? A. No. And we gave it to Mr. Barry; he knew where he was and he was acting for him right along."

I think it extremely doubtful, under the circumstances if it can even be said that the delivery of the certificate to Barry was a publication. Without deciding this, however, it is perfectly clear that the communication was privileged.

Counsel for the plaintiff contends that, even if privilege existed, there is evidence of malice which should have been submitted to the jury. As evidence of malice he points to the fact that when plaintiff was charged with the offence, Chown called him into his office and asked him for information as to how the cantaloupes got into his possession, and upon plaintiff refusing to answer, Chown dismissed him for refusing to answer questions. Upon the form being submitted to the general superintendent, it was changed to "dismissed for being implicated in case of theft of fruit from car." How can it possibly be suggested that this is evidence of malice? Both reasons were quite correct. The general superintendent had the idea that, while the reason suggested by Chown was a good one, that suggested by himself was a better.

Counsel for the plaintiff also claimed that the defendant knew, when the certificate was issued, that the plaintiff had been acquitted and with this knowledge the issue of the certificate with the words complained of was evidence of malice.

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The information on which the certificate was issued was a matter of record in the Staff Record Office based on the form of dismissal filed months before. The reason for dismissal was given at the time of the dismissal and to give any other reason in the certificate would be to give not the true but some other reason.

To my mind there is not a shadow of evidence of malice in the whole case.

The trial Judge evidently took the view that the occasion was privileged and that there was no evidence of malice. Under these circumstances it was clearly his duty to withdraw the case from the jury.

The rule as laid down in Odgers on Libel and Slander, 5th ed., at p. 691, is as follows:—

> If privilege has been pleaded, the facts on which the claim of privilege is based must be proved before the Judge can rule whether the occasion is privileged or not. If at the conclusion of the plaintiff's case, facts sufficient to support the plea of privilege have been clearly established, and no evidence of malice has been given, the Judge should enter judgment for the defendant and not let the case go to the jury.

Now as to the claim for wrongful dismissal, the contract of hiring is alleged in par. 5 of the statement of claim in the following terms:

> At the time of the said dismissal of the plaintiff and for some time prior thereto the plaintiff was earning an average of $130 per month, and the continuity of his employment was subject only to the efficient and faithful discharge of his duties and to the determination thereof according to law and according to the terms of his contract of employment, and he was also entitled to advancement in his employment whereby he would receive increased remuneration and more profitable employment.

Apart from the allegation in par. 3 that the plaintiff was employed by the defendant the above is the only allegation in the statement of claim concerning his contract of hiring.

The evidence wholly fails to support any such contract.

What the plaintiff relied on at the trial as supporting such a contract was 'an agreement between the telegraphers union and the defendant covering wages and the working conditions of the men. The fact is that no such agreement was ever established. A book containing what purported to be a copy of the agreement was tendered in evidence at the trial. Not a line of evidence was given to shew that it was in fact a copy of such an agreement and there is absolutely nothing to justify its admission. Even

if such an agreement had been proved it could not possibly help the plaintiff. It would be hopeless to urge that an argeement between the union and the defendant would enable every individual workman to attach the conditions of such an agreement to his own contract of service.

The object of the agreement is of course to secure uniform working conditions among the men and to provide means for the adjustment of disputes between them and the company and thereby prevent strikes. It is doubtful if such an agreement could be enforced at law even by the union itself, which has its own method of enforcement by going out on strike.

The evidence of the plaintiff as to the terms of his employment is as follows:—Q. Were you hired for any definite period by the Canadian Pacific Company? A. Did I have a contract for any definite period? Q. Yes? A. They were at liberty to dismiss me at any time they saw fit, or I could have resigned at any time. Q. Your pay was every fortnight? A. Every thirty days.

The plaintiff has, therefore, wholly failed to establish the contract of hiring set up in his pleadings and cannot, therefore recover for wrongful dismissal.

I would dismiss the appeal with costs and allow the cross-appeal with costs including the costs of the trial.

DENNISTOUN, J. A.:—The plaintiff brought action against the defendant company asking damages for libel and for wrongful dismissal. The Judge at the trial entered a nonsuit on the claim for libel and gave judgment on the claim for wrongful dismissal for $425.00 on the verdict of the jury. The plaintiff appeals against the nonsuit and the defendant cross-appeals against the verdict. Dennistoun, J.A.

To deal first with the claim for wrongful dismissal, the plaintiff puts his case as follows:—He was in July, 1917, employed as a telegraph operator by the C.P.R. Co., at Regina. His wages were estimated on a monthly basis and paid fortnightly and the trial Judge considered this to be evidence of a monthly hiring although the plaintiff said :"They were at liberty to discharge me at any time they saw fit, or I could have resigned at any time." I accept the view of the trial Judge that there was some evidence of a monthly

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hiring but do not propose to consider the matter further as the case does not appear to turn on that point.

About August the plaintiff's rooms were examined under a search warrant when a portion of a shipment of canteloupes which had been stolen from a car in the Regina yard was found in his possession. He was arrested and admitted to bail. A few days later he received a preliminary hearing before a magistrate and was committed for trial at the next assizes, being again released on bail.

The district superintendent of the railway, Mr. Chown, then sent for him and asked him how the canteloupes got into his possession. He refused to answer on the advice of counsel. Mr. Chown then dismissed him.

He came up for trial in September and giving evidence on his own behalf said that he bought the canteloupes from an unknown man on a Sunday evening about dusk in the railway yard. The man was carrying a crate of forty-eight canteloupes which he offered to sell for $5. The plaintiff paid the sum demanded and took the crate into his office for the night. In the morning he sent it to his house by transfer wagon. There was no corroboration of these statements, nevertheless the plaintiff was acquitted of the charge of theft.

In my opinion, the superintendent was by law entitled to dismiss the plaintiff summarily on his refusal to give any information concerning the stolen goods which were found in his possession. Bancroft did not make any protest against the suspicion under which he rested. He made no claim to innocence. He was possibly well advised by his counsel to make no answer of any kind and to reserve his defence until the moment of the trial, but in electing to do so he knew that he thereby forfeited the confidence of his employers and permitted them to think the worst.

If he had given Mr. Chown the explanation which he afterwards gave at the trial it would probably have availed him little, even if believed.

That a trusted railway employee in a responsible position should be trafficking at dark on a Sunday night in the railway yard with unknown persons, and purchasing goods which very slight inquiry would have shewn to have been stolen from the company was in itself a ground for instant dismissal. How much

more when the accused, whose duty called upon him to disclose all he knew to his employers, stands mute when questioned and refuses to say anything, or even to claim that he is innocent.

Lord Esher, M.R., in *Pearce* v. *Foster* (1886), 17 Q.B.D. 536, at 539, says:

> The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him.

What constitutes good and sufficient cause for the discharge of a servant is a question of law, and where the facts are undisputed, it is for the Court to say whether the discharge was justified. But where the facts are disputed it is for the jury to say upon all the evidence whether there were sufficient grounds to warrant the discharge. 26 Cyc. 1016. Maclennan, J. A., in *McIntyre* v. *Hockin* (1889), 16 A.R. (Ont.) 498, at 500, says:

> Notwithstanding some earlier cases to the contrary, I think it is now settled that it is for the Judge to say whether the facts are sufficient in law to warrant a dismissal, and for the jury to say whether the alleged facts are proved to their satisfaction.

In the case at bar, the conduct of the plaintiff was not in accordance with his duty. There was valid ground in law for his dismissal. There was no dispute as to the facts. The plaintiff's own story put him out of Court. The defendants called no witnesses and it was the duty of the trial Judge to have so determined and to have dismissed the action on this branch of the case.

It was urged that the district superintendent and the general superintendent had given different reasons for the dismissal of the plaintiff, the one stating that it was for "refusing to answer questions" and the other "for being implicated in a case of theft of fruit from car" and that this was, in itself, evidence of wrongful dismissal.

It is not necessary that the master dismissing a servant for good cause should state the ground for such dismissal; and provided good ground existed in fact it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts known subsequently to the dismissal, or on grounds differing from those alleged at the time: 20 Hals., page 101, and cases there referred to.

I think the motion for nonsuit on this branch of the case should have been allowed.

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It now remains to be considered if the trial Judge was right in withdrawing the claim for libel from the jury.

The alleged libel was contained in what is called the "certificate of service" of the plaintiff. It was compiled from the staff records kept in Winnipeg and shewed the positions which the plaintiff had held and the reason for terminating the employment. It contained the entry—"Dismissed for being implicated in a case of theft of fruit from car."

A libel for which civil damages may be recovered must be a "false defamatory statement," for unless the statement be untrue the plaintiff has suffered no injury to his right or reputation and has no cause of action: 18 Hals. page 608.

Taken as it stands the statement is not necessarily false. The plaintiff was very seriously implicated in a case of theft from a car. He had been found with the stolen goods in his possession, had refused to give any explanation, and had been committed for trial. But the plaintiff seeks to go further and says that the innuendo to be drawn from these words is "that he did participate in stealing fruit from one of the defendant's railway cars in the City of Regina."

The defendant having denied the innuendo laid, it was the duty of the trial Judge to determine whether the words were capable of the meaning alleged in the innuendo; it was for the jury to determine whether that meaning was properly attached to them. *Australian Newspaper Co* v. *Bennett*, [1894] A.C. 284. The trial Judge gave no reasons for withdrawing the case from the jury and assuming he did not do so on the ground that the innuendo laid could not be inferred from the words used, it is necessary to look for other grounds to support his ruling.

The defendants by their pleading set up the further defence that the occasion was privileged and that there was no malice on their part.

I think the occasion was privileged and that the plaintiff upon whom the onus lay failed to shew malice. An occasion is privileged where the person who makes a communication has an interest or a duty to make it to the person to whom he does make it, and the person to whom he does make it has a corresponding interest or duty to receive it.

The plaintiff relies upon a letter written to Barry, local secretary of his union, enclosing the certificate of service as publication of the libel. This letter was written by the divisional superintendent to Barry about December 10, 1917, some time after the plaintiff's acquittal at the assizes.

Barry as an official of the brotherhood or union had been placed in charge of the plaintiff's appeal to the railway officials against his dismissal. Mien, the general secretary, had also been called upon for assistance. The plaintiff laid all the facts of the case before them and was told there would be a meeting of the committee to consider his appeal at Moose Jaw in December and that he must have his certificate of service available for the meeting.

He called twice for it at the superintendent's office and gave him to understand why he wanted it at once. The document had been delayed in Winnipeg and the plaintiff said he would call once more for it. Before he did so, the certificate arrived, and knowing the purpose for which it as required and the persons before whom it was to be laid, the superintendent not having the plaintiff's address in his office, sent it under cover to Barry.

It is now charged that this was not only publication but evidence of malice as well.

That the occasion was privileged was a question for the Judge and I have no doubt he so considered it. Barry and Mien were the plaintiff's advocates. They were concerned at the time in preparing his case for appeal, all of which the superintendent knew. All parties had a mutual concern and interest in the subject of the dismissal and the reasons for it. Barry and Mien knew all the facts and required this very document to complete their case. The occasion has all the requisites of privilege and the action of the superintendent in sending the document to Barry so that it might be in time for the meeting was apparently to expedite the plaintiff's appeal and to assist him in putting his case in order.

The occasion being privileged the plaintiff has the onus cast upon him of proving malice sufficient to destroy the protection which the privilege afforded.

I can find no evidence of malice whatsoever. The plaintiff's counsel in his able argument alleges two facts upon which he

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relies. The first is that the ground of dismissal given was not the ground at first alleged by the superintendent which was "dismissed for refusing to answer questions." The ground finally entered in the staff record was given by the general superintendent, who varied the words used by the district superintendent. I can find no evidence of malice in this. The first form of words gave no sufficient indication of the real reason for the dismissal for entry in the record; the general superintendent, noting this, made an entry which gave the requisite information. Then it is said there was evidence of malice in sending the certificate to Barry instead of keeping it in the Regina office until the plaintiff called for it. I take that evidence as shewing the very opposite. It was done for the accommodation of the plaintiff and sent to his friends direct to prevent further delay.

After careful consideration and examination of the numerous authorities cited, I am of opinion that the occasion was privileged, and was so held by the trial Judge, and that there was no evidence of malice to go to the jury. The trial Judge was right on this branch of the case. *Harris* v. *Thompson* (1853), 13 C.B. 334, 138 E.R. 1228.

As a result, the appeal of the plaintiff should be dismissed with costs, and the cross-appeal of the defendants allowed with costs, and the action dismissed with costs.

PERDUE, C. J. M., CAMERON AND HAGGART, JJ. A., concurred in the result.

Appeal dismissed; cross-appeal allowed.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J. K.B.D., and White, J. June 2, 1920.

LAND TITLES (§ VI—62)—SURVEY BY CROWN LAND DEPARTMENT—ERROR IN—CORRECT RETURN MADE—RIGHT TO CORRECT ERROR.

When it is brought to the attention of the Crown Land Department that a line run by one of its deputy surveyors does not follow the course prescribed or set out in such surveyor's return, it is open to the Department to correct such error by causing the line to be run in its true and proper course where such action does not interfere with the lines of any grant already issued, and this right should not be curtailed by the fact that a subsequent grantee has without color of right assumed such erroneous line as one of the boundaries of his granted land in contradiction to the plain wording of his grant and at variance with the plan attached thereto.

MOTION by defendant to set aside verdict entered for plaintiff and to enter verdict for defendant or for a new trial. Affirmed.

J. E. Michaud and *P. I. Hughes*, for appellant.

A. Lawson, for respondent.

The judgment of the Court was delivered by

McKEOWN, C.J. K.B.D.:—This case was tried at the last sitting of the Circuit Court in the County of Madawaska before Chandler, J., without a jury, and resulted in a verdict for the plaintiff. The dispute has to do with the boundary line between tiers number two and number three on the northern side of the St. John river in the parish of St. Francis, Madawaska county. The plaintiff is the owner and in possession of lot number 12 in tier 3, which abuts defendant's lot number 49 in the second tier. Defendant is also the owner, and is in possession of part of the adjoining lot number 48, and, in discussing the issues involved, it will be well, I think, to give attention to both of the two last mentioned lots from the standpoint of the grants and measurements thereof. The grants of lots 48 and 49 aforesaid are of a date earlier than the grant of lot number 12 in tier three. Lot 48 was granted in February, 1874, lot 49 was granted in April of that year, while plaintiff's lot, number 12 in tier 3, was not granted until March, 1893. Neither of the parties to the suit is the original grantee of any of the lots in question, and there is no dispute as to the title of either party to whatever land passes by the respective deeds of conveyance put in evidence; the only question is as to the proper boundary between the holdings, which, as before remarked, abut upon each other.

Defendant put in evidence copies of the original grants (with plans attached) of lots 48 and 49, as well as of lots 50, 41, 11, 6, 2 and 1, all in tier number two. The plans attached to these respective grants, as well as more complete plans shewing the full quota of all lots comprising said second tier, indicate a common base line for all of said lots, which base line, according to the evidence, is a travelled road between the first and second tiers of St. John river lots at that place, by the survey of 1843 made by the Commissioners of the British Government at the time of the Washington Treaty. Of the three lots involved in this controversy, number 48 was the first granted. The patent was issued on February 2, 1874, to Theophile Souci his heirs and assigns, and

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the land therein granted is now vested in the defendant. The description of such land in the grant reads as follows:—

Beginning at the southeasterly angle of lot number forty-nine purchased by Isaie Cote in the second tier north of the River St. John, thence north eighty chains, thence north sixty nine degrees, east eleven chains, thence south eighty chains, and thence south sixty-nine degrees west eleven chains to the place of beginning. Containing ninety acres more or less and distinguished as lot number forty-eight in the second tier north of the River St. John; and also particularly described and marked on the plot or plan of survey hereto annexed.

There is no ambiguity in the above description. No question at all was raised as to where the point of beginning is to be found. The line between lots 48 and 49 is undisputed, and the "south-easterly angle of lot 49" is unquestionably the point where the dividing line between said lots intersects the base line of the second tier, and from such point of intersection the land so granted runs "north 80 chains."

The next grant in point of time was of lot 49 in the second tier. It was granted April 15, 1874. The grantee was one Isaie Cote and defendant is the present owner. The description of the land so therein granted reads as follows:—

Beginning at the southwesterly angle of lot number forty eight purchased by Theophile Souci in the second tier, thence north eighty chains, thence south sixty nine degrees west twelve chains, thence south eighty chains, and thence north sixty-nine degrees, east twelve chains to the place of beginning. Containing ninety acres more or less and distinguished as lot number forty-nine in the second tier east of Little River; and also particularly described and marked on the plot or plan of survey hereto annexed.

It will be observed that the point of beginning mentioned in the above description of lot number 49 is identical with the point of beginning in the description of lot 48. Only the dividing line of the lots separates the south-east angle of lot 49 from the south-west angle of lot number 48. Both descriptions, therefore, start from the same point, both run on the same line "north 80 chains." At that point they part company—the northern line of lot 48 running "north 69 degrees east eleven chains," while the northern line of lot 49 runs "south 69 degrees west twelve chains"; consequently the northern boundary of lots 48 and 49 form a straight line, which, for the short distance it runs, is a part of the northern line of the second tier. The plans attached to the grants of lots 48 and 49, above mentioned, as well as the other plans submitted, shew the northern line of this second tier of lots to be a line parallel

to the base line of said tier, and at a distance of 80 chains therefrom. As before remarked, the last named line is said to have been run in connection with a survey of the first tier of lots in 1843 by Commissioners of the British Government. The other line bounding the second tier of lots was run by one Testu, a New Brunswick deputy land surveyor, and his return to the Crown Land Department in 1869 shews the northern line of the lots comprising the second tier to be 80 chains from the base line and parallel thereto. But there is a serious discrepancy between his base line so shewn on the plan, and the base line actually traced on the ground by him. Before discussing this discrepancy, I think it is well to clearly recognize the sequence of events concerning the grants made to plaintiff and defendant and to recognize clearly how much land was conveyed to each. Those which are vested in defendant are first in point of time, and consequently must have precedence if they, and the subsequent grant to plaintiff, cover the same ground.

The next matter for consideration is that in the year 1891 the Crown Land Department, having been advised that a mistake had been made by deputy surveyor Testu in running the rear line of the second tier, sent surveyor Hanson to look over the situation and run the line in its proper place. We have Hanson's return of survey in evidence, and he gave testimony at the trial fully explaining the error which surveyor Testu had fallen into. I do not think it is necessary to set out in detail the nature of the mistake made by Testu. It is admitted on all sides, that the line he laid down upon the ground is not in conformity with his return to the Department, and, touching these lots in question, the result of such error was that he laid down a line 17 chains to the north of the proper northern boundary of lots 48 and 49 as such lots are described in the grants thereof, and as shewn on the plans attached to such grants. Mr. Hanson was directed by the Department to run the line correctly, and in accordance with Testu's return. There seems to be no doubt that he did so, and that the line so run by him follows the true course called for in the grants of lots 48 and 49; there being, as above indicated, a distance of some 17 chains between his and that run by surveyor Testu in 1869, at the place involved in this suit.

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Two years afterwards the Department granted lot 12 in tier 3 to one Aubin, and plaintiff is now the owner thereof. As before remarked, this lot abuts lot 49 and a part of lot 48 in tier 2. The description of the Aubin grant is as follows:—

> Beginning at a post standing on the northern side of a reserved road at the south-east angle of lot number eleven purchased by Remi Peltier in the third tier, north of River St. John in Deputy Hanson's survey of 1891, thence running by the magnet north one degree east, fifty chains to the southern side of another reserved road, thence along the same north seventy-one degrees and thirty minutes, east twenty-two chains, thence south one degree, west fifty chains to another post standing on the northern side of the first aforesaid reserved road and thence along the same south seventy-one degrees and thirty minutes, west twenty-two chains to the place of beginning, containing one hundred acres more or less and distinguished as lot number twelve in the third tier north of River Saint John in Deputy Hanson's survey of 1891.

It is clear from the above description, and from the evidence given by surveyor Hanson, that the Crown Land Department was fully advised of the discrepancy between the respective lines laid down by deputies Testu and Hanson. The Department repudiated the line laid down on the ground by Testu, and, in the grant of lot number 12 in tier 3, it clearly adopted the line made by Hanson. As far as the Department is concerned, its intention was manifest, it has included the land between the Testu and Hanson lines in the grant of lot 12 in tier 3 to Aubin. But the defendant disputes the right of the Department to doth is, and contends that the land in dispute up to the Testu line had already passed from the Crown in the grant of lot 49 of the second tier—and if this be true, it is beyond the power of the Crown to grant it to Aubin or to anyone else. And so the question, therefore, is, did the Crown include this disputed land in the grant of lot number 49 to Cote, or has it become dispossessed of it in any way, or is the Crown estopped from granting it to Aubin? I have hereinbefore set out in full the description of the lands comprised in grants 48 and 49 through which defendant claims. There can be no question that each one of them gives a distance northward of 80 chains, but we also know that, as a fact, Testu laid down on the ground a line some 17 chains farther north, at the point material to this discussion; and I think it must be admitted that the grantee of lot 49, and his successors in title, regarded this Testu line as the northern limit of their holdings; and if the difference between the size of their holdings and the quantity of land mentioned in the

grants occurred to them, they probably attributed their increased acreage to the generosity of the Crown.

But it is of more importance to regard the matter from the standpoint of the Crown Land Department. The Crown only conveyed what is contained in its patents. Has it in any way been divested of the balance claimed against it, or has anything in the nature of an estoppel transpired, the effect of which would be to render it unjust to make the grant of lot 12 in tier 3 with the boundaries actually set out therein? No question of adverse possession as against the Crown has been urged, nor could it be, under the evidence. The grants of lots 48 and 49 were not issued until more than three years had elapsed from the actual survey and return by Testu. It was not an instance of the grantee and a Crown land surveyor meeting upon the land, and the latter actually running lines in the grantee's presence and putting him in possession under the survey—as far as he might have power to do so. At the time of Testu's survey and return, as far as the evidence goes, neither of the subsequent grantees of these lots was known to the Department, and neither of them, as far as is disclosed, had any knowledge of the survey or of the return. But three years afterwards each of them got a grant specific in its terms, and in no way, directly or indirectly, referring to Testu's survey. Taking it as far as we can in the grantee's favour, they went on the land, they observed this line (the only line), and took possession up to it. This they did, although the wording of their grants as well as the plans attached, limited their ownership to an eighty chain depth. It is also clear, I think, that when the Department issued the grant of land now owned by defendant, no official thereof had any knowledge that the base line had been so erroneously located.

Now, under these circumstances, I cannot see how a grantee would have any claim to more land than his grant actually calls for, and further, I see nothing in this case that would prevent the Crown, after learning of the mistake its official had made, from having the base line run correctly, as it did some years afterwards. By running this line as Hanson ran it, the line of the ground was not only brought into conformity with Testu's return of survey to the Department, but it conformed also to the grants issued to defendant's predecessors in title. It did not in any way cut down

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the quantum of land conveyed to Cote in the grant of lot 49. Had such been the result, other questions would, or might, have arisen.

I think when it is brought to the attention of the Crown Land Department that a line run by one of its deputy surveyors does not follow the course prescribed or set out in such surveyor's return, it is open to the Department to correct such error by causing the line to be run in its true and proper course, in a case like the present, where such action does not interfere with the lines of any grant already issued. I do not think this right could or should be abridged, or curtailed, by the fact that a subsequent grantee has, without colour of right, assumed such erroneous line as one of the boundaries of his granted land, in contradiction to the plain wording of his grant, and at variance with the plan attached thereto. In the grants before us, there is no alternative description of any of the boundaries, and there is consequently nothing to reconcile in either case. They are both clear and unambiguous, and I think must be construed according to their obvious meaning and intention.

Cases were cited at the hearing shewing the importance to be attached to plans and surveys in coming to a conclusion concerning the quantum of land passing to a grantee. Such authorities are of much assistance, and many of them binding, where any ambiguity exists or doubt arises as to the amount of land granted or conveyed, and I think there is little doubt about the law governing such instances. In *Grasett* v. *Carter* (1883), 10 S.C.R. 105, referred to by counsel for the appellant, the law is thus laid down by Strong, J., at page 114 of the report:—

> When lands are described, as in the present instance, by a reference, either expressly or by implication, to a plan, the plan is considered as incorporated with the deed, and the contents and boundaries of the land conveyed, as defined by the plan, are to be taken as part of the description, just as though an extended description to that effect was in words contained in the body of the deed itself. Then, the interpretation of the description in the deed is a matter of legal construction and to be determined accordingly as a question of law by the Judge, and not as a question of fact by the jury. In construing the description contained in the deed, in cases where land is conveyed by a private owner, and where no statutory regulations apply, but the deed has to be interpreted according to common law rules of construction, extrinsic evidence of monuments and actual boundary marks found upon the ground, but not referred to in the deed, is inadmissible to control the deed, but, if reference is made by the deed to such monuments and boundaries, they govern, although they may call for courses, distances, or computed contents which do not agree with those stated in the deed.

In the case of *Eastwood* v. *Ashton*, [1915] A.C. 900, it was held that a certain strip of land shewn on a plan attached to a conveyance was included in such conveyance, although not specifically described in the deed, and to which the grantor had lost his title by operation of the Statute of Limitations. Lord Parker of Waddington refers to the matter thus at page 912 of the report:—

> It appears to me that of the three descriptions in question the only certain and unambiguous description is that by reference to the map. . . . Where there are several descriptions, which, when evidence of surrounding facts is admitted, are not consistent one with the other, I do not think that there is any general rule by which the Court can decide which description ought to prevail. . . . It seems to me that under these circumstances the Court must in every case do the best it can to arrive at the true meaning of the parties upon a fair consideration of the language used and the facts properly admissible in evidence.

Attention has already been drawn to the fact that in the grants involved in this suit, no ambiguity of any kind exists as far as the description of the land is concerned, and the plans attached to such grants are in complete accord with the written descriptions therein, one grant agreeing with the other in every way material to this dispute. This being true, I think that the only rule of construction necessary, is to follow the wording of the grants and the delineations of the plans attached, in deciding how much land passed from the Crown to the defendant's predecessors in title. The head-note to the case of *Smith* v. *Millions* (1889), 16 O.A.R. 140, says:—

> When a conveyance describes the property by reference to a plan, the plan becomes incorporated with the conveyance, and just as much part of the description as if it had been drawn upon the face of the conveyance, and to determine what passes by the conveyance, the description and plan alone are to be looked at, their construction being a question of law.

We have no evidence shewing under what circumstances lot 49 was granted. It was argued that it was made under the Labour Act, and that the survey made by Testu was in pursuance of such Act and that the grants must follow the line of such survey. There is nothing, either in the grant itself or in the evidence to support such view, and I think the construction must be according to the ordinary rules which prevail.

The Supreme Court of Nova Scotia in the case of *Boehner* v. *Hirtle* (1912), 46 N.S.R. 231, had before it an action of trespass, wherein plaintiff relied upon allotment proceedings preliminary to a township grant, and the decision of the Court in that case was

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urged as authority for the position taken by appellants. In a lengthy and, to me, instructive judgment, Graham, E.J., says, at page 267:—

> As I have just said the plaintiff is not dependent on the plan solely for his description. It is useful to shew the divisions and which way the numbers run. . . . And it shews monuments which can be measured from and the true distances ascertained. But if there is a description found to be false, which may be rejected leaving a sufficient description of the lot to identify it, then the false description is to be rejected. The fact that a plan shews too much or too little quantity, or wrong location by scaling, and therefore can no longer be depended on in that respect, will not be allowed to prevent the correct quantity and dimensions and locality and monuments also called for and evidenced in other ways from controlling.

And the learned Judge also quotes an extract from 4 A. & E. Ency. 777, as follows:—

> When the plan and monuments made by an original survey do not coincide the monuments govern, and this is also the case when the monuments are made by one survey and the plan afterwards by another and the plan only is referred to in the deed.

When plans, and monuments as well, are mentioned in a grant, or the latter are marked on a plan attached to such grant, it is the duty of the Court, in construing the same, to give full effect if possible to all that is so written or delineated. Having regard both to the description set out in a grant, as well as to an attached plan in all its particulars, the case last referred to is authority for the proposition that precedence is to be given to monuments laid down on the ground, if the plans and monuments, mentioned or shewn as aforesaid, do not coincide in meaning. At page 784 of the same volume many authorities are cited shewing that: "when there are no monuments called for"—as well as in many other cases cited—"then and in such cases the boundary of the land must be ascertained by the courses and distances given in the patent or deed." The latter citation, not the former, is applicable to the facts of the case now before us.

I therefore conclude that the learned trial Judge has placed a correct construction upon the grants and conveyances in evidence, in deciding that the plaintiff is entitled to the land described in the grant to Aubin, with the exception of that portion to which he considered the defendant had acquired a title by possession. I also think the damages allowed are fair and reasonable, and that this appeal should be dismissed with costs.

MOOSE JAW BREAD Co. v. CITY OF MOOSE JAW.

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Saskatchewan Supreme Court, Haultain, C.J.S., Newlands and Lamont, JJ.A. June 28, 1920.

HIGHWAYS (§ IV A—127)—EXCAVATION IN—NEGLIGENCE IN FILLING IN BY MUNICIPALITY — INJURY — NUISANCE — PRESUMPTION THAT MISFEASANCE CONTINUING.

A municipality which after making an excavation in a street fills in the ditch so negligently that a subsidence of two feet takes place during the winter, where the evidence shews that the work can be safely done in the winter time and that there need be no sinking of the soil until spring, is liable for a misfeasance in creating a nuisance, and having created the nuisance should know that it has not abated, and is therefore liable for any resulting damage.

[*Douglas* v. *City of Regina* (1918), 42 D.L.R. 464, 11 S.L.R. 255, distinguished.]

Statement.

APPEAL by plaintiff from the trial judgment in an action for damages caused by the plaintiff's horse falling into a hole in the highway that had been negligently filled. Reversed.

J. W. Corman, for appellant; *N. R. Craig*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with LAMONT, J.A.

Newlands J.A.

NEWLANDS, J.A.:—The plaintiffs in this action allege that they suffered damage through the negligence of the defendants by their not keeping in proper repair a public street in the city known as Lilloet Street West in the City of Moose Jaw, thereby causing injury to a horse belonging to the plaintiff which was lawfully passing along the said street on January 28, 1919; by reason of the said injury the plaintiff has suffered loss in that the said horse was seriously injured.

The plaintiff gives particulars of the negligence relied on as follows:

The defendant had excavated the said public road or street for some purpose better known to the defendant than to the plaintiff and after the completion of the said purpose the defendant filled in the said excavation but so negligently did so that the said horse belonging to the plaintiff upon stepping on the place where the excavation had been made sank in the loose earth and was seriously injured.

The facts as found by the trial Judge are as follows:—

On January 28, 1919, a servant of the plaintiff company, while driving a bread wagon along Lilloet St. West, in the City of Moose Jaw, stopped opposite a certain house in the course of the business of the plaintiff; that upon re-entering the bread wagon, which is a covered vehicle, he started up the horse and almost immediately the horse sank through the slight mound which had been left by the defendant's workmen when water connections were put into the house at which the plaintiff's servants had stopped, and the horse was injured.

He further found,

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that the damages suffered by the plaintiff company by reason of the said injury to the horse are not exaggerated, and that they did suffer the sum of $277.00 damages by reason of the injury received by the horse.

He further found,

that the plaintiff's servants had driven over the street the day before, and that there was nothing to indicate that the surface of the street was at all dangerous, and up to the moment of the accident there was nothing, which by an inspection of the street could be seen, which would indicate that the place of the accident was at all dangerous.

He also found,

that the city had inspected the locus of the accident, and that there was nothing to indicate there was anything which would shew that the street at that particular place was in need of repair, and that plaintiffs were, therefore, not entitled to recover.

No finding was made as to whether the ditch had been properly filled in in the first place. Upon this point the evidence shews that the work can be safely done in the winter time and that there is no danger from sinking of the soil until about April. That the city has put in hundreds of such connections in the winter time and that this was the only one that sank down and became dangerous in the winter time to the knowledge of the city officials, and one of their witnesses swore that the work could not have been properly done or the accident would not have happened. No witness was called who could say how this ditch had been filled in.

From this evidence I draw the conclusion that the ditch was not properly filled in with earth in the first place.

This case differs therefore from *Douglas* v. *City of Regina* (1918), 42 D.L.R. 464, 11 S.L.R. 255, as there the Court came to the conclusion, as stated by Lamont, J.A., at page 466:—"We start, therefore, with a sewer properly constructed under the surface of the highway."

It is not a case, therefore, of the repair of a properly constructed work, where notice is necessary before there is any liability on the part of the city, but a case of misfeasance in negligently constructing the work.

The defendants are liable if in the exercise of their statutory powers they have been negligent.

In *Jeddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cass. 430, Lord Blackburn, at pages 455-456, 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. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law.

The appeal should, therefore, be allowed with costs, and judgment entered for plaintiffs for the amount of damages which the trial Judge found they had suffered, with costs.

Newlands, J.A.

LAMONT, J.A.:—Between the 13th and 16th days of December, 1918, the defendants made an excavation on Lilloet St. in the City of Moose Jaw, for the purpose of affording water and sewer connection to a house on that street. After making the necessary connection, the defendants filled in the excavation. On January 28, 1919, a servant of the plaintiff company, while driving on said street in the course of his business, had occasion to drive over the filled in excavation. In doing so, the hind feet of his horse sank into the excavation to a depth of about 2 ft., by reason of which the plaintiffs suffered damage to the extent of $227, as found by the trial Judge. To recover for such loss, the plaintiffs have brought this action. They claim that the loss occurred through the negligence of the defendants in not properly filling in the excavation which they had made in the street. The trial Judge gave judgment in favour of the defendants on the ground that "the duty of a municipality to keep its streets in repair was dependent upon notice to this extent, that where they have by a system of inspection or otherwise taken reasonable precautions to prevent the streets from getting into non-repair, no action will lie against the municipality," and that the evidence in this case shewed that the defendants had inspected the locus of the accident only two days previous thereto. He held himself bound by the decision of this Court in *Douglas* v. *City of Regina*, 42 D.L.R. 464, 11 S.L.R. 255, which he thought on all fours with the present case.

Lamont, J.A.

In my opinion, there is one essential difference between *Douglas* v. *City of Regina*, *supra*, and the other cases referred to in the judgment of the Judge and the case before us. In the present case the basis of the plaintiff's claim is: that the defend-

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ants made an excavation and did not properly fill it in; that is, that they dug a hole in the street and by filling it over on top but leaving a cavity below they created a nuisance, or trap, which caused damage to the plaintiffs. This is a charge of misfeasance. In *Douglas* v. *City of Regina*, *supra*, reference was pointedly made to the fact that no negligence on the part of the city in constructing the sewer was alleged.

In *Lambert* v. *Lowestoft Corp.*, [1901] 1 K.B. 590, the sewer had been constructed with care and of proper materials.

In *Jamieson* v. *City of Edmonton* (1916), 36 D.L.R. 465, 54 Can. S.C.R. 443, no question as to the original construction of the sidewalk was involved.

In these cases the question was, the liability of the municipality to keep in repair something which had been originally properly constructed. The municipalities in these cases were charged with nonfeasance, not misfeasance. The distinction between these two is set out in 21 Hals., page 375, as follows:—

> 646. The term "misfeasance" is used to describe the improper performance of some lawful act: "nonfeasance" indicates the failure or omission to perform some act which there is no obligation to perform. Thus it is a misfeasance for a highway authority which has a duty to repair roads to remake a road and open it to the public with a hole in it, and a nonfeasance to permit a road to become worn into a hole.

The distinction is of no importance once the act of negligence alleged had been established, but it is of importance in this respect: that where the negligence charged in simply failure to keep in repair a roadway originally properly constructed, it is a good answer to that charge to shew that the municipality took every reasonable means to keep the roadway in a safe condition for traffic and could not reasonably be expected to know or to provide against the defect. *Douglas* v. *City of Regina*, 42 D.L.R. 464, 11 S.L.R. 255; Duff, J., in *Jamieson* v. *City of Edmonton*, 36 D.L.R. 465, 54 Can. S.C.R. 443. While such answer would obviously have no application to a charge of misfeasance; for in misfeasance, the municipality having created the nuisance, it knows or should be held to know that such nuisance had not been abated. Applied to the facts of this case, the defendants, having made the excavation in the street, knew, or should have known, that it was not properly filled in, if such was the case. The whole question, therefore, here is, does the evidence estab-

lish that the excavation was not properly filled in? In my opinion it does.

The fact that the hole which caused the damage had been made by the defendants would probably, without further evidence, be sufficient to cast upon them the onus of shewing how this particular hole had been filled in. This they did not do. But apart from that, we have in this case the positive testimony of the defendants' witnesses that these street connections can be made in the winter time without any danger to traffic; that they can be filled in so that, until the spring at least, the subsidence will not amount to more than a few inches. The evidence shews that they have made hundreds of these connections in the winter time and that this is the first occasion in which a cavity has been found below the surface after the filling in has been completed.

In his evidence, the foreman of the defendants waterworks department was frank enough to admit what, to my mind, is apparent from the evidence of the other witnesses for the defence, that, where the subsidence during the winter amounted to 2ft., as in the present case, the filling in could not have been done properly. In my opinion, that is the only reasonable conclusion to be reached on the evidence.

In *James Smith & Co.* v. *West Derby Local Board* (1878), 3 C.P.D. 423, the facts are practically identical with the case at bar. The head-note of that case reads:—

> The defendants, who were both the highway and the sewer authorities of West Derby, employed a contractor to construct a pipe-sewer under a highway within their district. The contractor in the laying the pipes dug a trench, which he afterwards filled in with earth, and the roadway was apparently made good. The work was done under the directions and to the satisfaction of the defendants' surveyor. Some months after it was finished, a subsidence of the soil in the trench took place without any assignable cause, leaving the road apparently sound. The plaintiffs' horse, in consequence of the surface giving way, fell into the trench and was injured:—
>
> *Held*, that there was evidence that the work of filling in the trench had been negligently and improperly done, and that the defendants—either as the sewer or the highway authority, or as both—were responsible.

In giving judgment in appeal, Grove, J., at page 428, said:—

> I think there were facts from which negligence might and ought to have been inferred. The trench was so improperly filled in that a subsidence of from 12 to 15 inches took place—a thing not likely to occur by fair wear and tear, if the earth had been properly consolidated.

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The appeal in my opinion should, therefore, be allowed with costs, the judgment below set aside, and judgment entered for the plaintiffs for the amount the trial Judge found they had suffered, and costs. *Appeal allowed.*

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. June 10, 1920.

MURDER (§—I—1)—DEATH CAUSED IN FURTHERANCE OF ROBBERY.

Where death is caused by a person in furtherance of a robbery, which is a crime of violence, the killing is murder.

[Review of legislation and authorities.]

Statement.

QUESTIONS submitted by the Chief Justice of the King's Bench for the opinion of the Manitoba Court of Appeal as to the law of murder, the accused having been convicted by him of manslaughter.

John Allen, for the Crown; *A. C. Campbell*, for the accused.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—William J. De Forge, a man of 32 or 33 years of age, was in October last, and for some time before that had been, in business as a storekeeper. The defendant, Elnick, was a young man born in Rumania, who came to this country at the age of 15 and became 21 on January 1, last. He had been with the Canadian Expeditionary Force in France for 4 months and was wounded twice. On his return to the city after the armistice, he, along with Clements and Burdie, the other defendants, entered upon a systematic career of crime. He admitted that he and Clements had broken into a shop on Portage Ave. and stolen two revolvers. Two nights before the commission of the crime in question, Elnick and the two others were returning from St. James and crossing Portage Ave. went along Maryland St. and from the street saw a man counting money. Remarks were passed about the amount of money and it was then and there planned "to hold the man up." The man was De Forge and the next night they went to the place and followed him, but he stopped to talk to some one and they lost track of him. They were also there the next night (this time without Burdie) when nothing happened. On the Thursday afternoon they arranged to meet Friday night for the purpose of holding up the man on Maryland St. Elnick and Clements left his (Elnick's) room together about 8 o'clock, Elnick carrying a five-shooter automatic pistol, which was concealed in a hiding place

back of the Venice Cafe. They then were joined by Burdie at the Triangle Hut, left it about 11 o'clock, went to where the automatic was concealed and got it. Clements suggested that they should have the other two guns and these were obtained by Elnick, who put one (a Luger automatic) in his pocket after assuring himself that the safety catch was up. The three of them then started for Maryland St. which they reached about half-past eleven. Elnick says he told Clements and Burdie that "no matter what happens, under no circumstances, no shooting is to be done," to which the others assented. After a while De Forge came along the street to where the three were standing. When he got about 8 feet past, Elnick called out "Hands up." De Forge turned to the left, raised his hands and faced Elnick at an angle and, as Elnick says, he said some words and as he was saying them Elnick was holding the Luger automatic in his hand and looking De Forge in the face and he says a shot went off, and that as soon as it went off another followed. Clements and Burdie, who were standing near by, then broke into a run and Elnick followed. Elnick and Clements, who had been wearing handkerchiefs on their faces, threw them aside and, subsequently, concealed the revolver in the attic of the quarters where they lived.

The automatic pistol used was of the type that discharges on the pressure of the trigger almost without interval, but there was a perceptible interval in this case. De Forge fell, struck with a bullet through the chest, and was carried into a neighbouring house where he expired.

The three perpetrators of this crime were subsequently apprehended and brought to trial at the last Winnipeg Assizes. The Grand Jury preferred an indictment for murder against Elnick, Clements and Burdie, who were accordingly tried before the Chief Justice of the King's Bench and a jury. The case against Elnick was the first one disposed of. He gave evidence on his own behalf, was found guilty of manslaughter and sentenced to 25 years in the penitentiary. The other two were subsequently tried, found guilty of manslaughter and sentenced to 15 years each in the penitentiary.

The following extracts are made from the charge of the Chief Justice to the jury in the *Elnick* case:—

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He (Elnick) has admitted all the outstanding facts; he has admitted that with Burdie and Clements, they deliberately formed the design of robbing De Forge and that they went to Maryland St. and took up positions where they could observe the movements of their intended victim and he has also admitted that De Forge met his death from a revolver bullet fired from the firearm in his hand, but he says he did not intend to shoot. That makes the issue that you are called upon to decide a very narrow one, but at the same time, an issue that will require from you the greatest care and deliberation before arriving at a decision.

The act of killing, while in the prosecution of an unlawful design, having been admitted, it only remains to enquire whether there was present the intent which would make the killing murder, or whether there was no such intent—in which case the killing would be manslaughter.

Culpable homicide on the other hand is criminal and the perpetrator is guilty of either murder or manslaughter. It is murder if the offender means to cause the death of the person killed or if he means to cause the person killed any bodily injury, which he knows is likely to cause death and is reckless whether death ensues or not. It is also murder if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death and thereby kills any person, though he may have desired that his object should be effected without hurting anyone or if he inflicts grievous bodily injury for the purpose of facilitating robbery or his flight upon the commission or attempted commission of robbery and death ensues from the effect of such injury, whether or not he meant death to ensue, or knew that death was likely to ensue.

These are the instances of culpable homicide which amount to murder. Any other culpable homicide which does not fall within these classes amounts to manslaughter. . . .

In order to reduce the crime to manslaughter it was therefore incumbent to shew that he did not intend to fire the shot by which De Forge was killed.

The accused has told you his own story. He admits that with Clements and Burdie he went to the place where the shooting took place on the night in question with the intention of robbing De Forge as he passed along Maryland St. on his way home from his store. He admits that with others he burglarised a dwelling house in search of automatic pistols supposed to be there, that not finding any he and Clements afterwards burglarised a store on Portage Ave. for the express purpose of possessing themselves of the Luger automatic revolver with which the crime was committed. He admits that on the night in question he was armed with this revolver and that Clements and Burdie were also armed. He admits that when De Forge reached a point about 5 feet past the opening of the lane at the south of the Elsinore Block he pointed his pistol at De Forge and said "Hands up." He admits that De Forge acquiesced and raised his hands; he admits that two shots were fired out of the pistol that was in the hands of one of them hit and almost instantly killed De Forge. He admits that he set the safety catch so that the gun would shoot when the trigger was pressed. But he says he did not intend to fire the pistol at all. That, gentlemen of the jury, is the defence. Now, as a matter of law, an intent to do one or other of the things that I have enumerated is an essential element in the crime of murder; that is, the accused must have meant either to kill De Forge or to cause him bodily injury which he knew

to be likely to cause death or to inflict grievous bodily injury for the purpose of facilitating the robbery or their flight afterwards. And I must tell you that although his hand physically discharged the weapon, if his mind did not go with the act, the shooting did not amount to murder but to manslaughter only. If he did not intend to fire the gun at all, his offence would be manslaughter because, if a man, while doing an unlawful act, kills another, although he did not intend to do him any hurt, it is manslaughter. That he was unlawfully attempting to commit robbery is admitted, so the only real issue you are called upon to decide is the intent with which he fired the gun. If you find that it was intentionally fired, there appears to be no alternative but a verdict of guilty of the offence charged. But on the other hand if you find that although his hand physically discharged the weapon his mind did not accompany the act, in short, that, at the moment, he had no intention of discharging it, your verdict must be manslaughter only. . . .

Now, let me again state that if you find that he intended to fire the shot that killed De Forge, you should find him guilty of the crime charged, but if you think he had no intention of shooting at all and that in some unexplained way the gun went off, your verdict should be one of manslaughter.

It is quite plain that the Chief Justice told the jury that the provisions of the law as set out in the Criminal Code, sub-secs. (*a*), (*b*) and (*d*) of sec. 259, and sub-sec. (*a*) of sec. 260, were, as applicable to the facts of this case, exhaustive of the classes of culpable homicide that constitute murder. "Any other culpable homicide which does not fall within these classes amounts to manslaughter."

The following are the sections:—

259. Culpable homicide is murder,—

(*a*) if the offender means to cause the death of the person killed;

(*b*) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

(*d*) if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

260. In case of . . . robbery . . . culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue,—

(*a*) if he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury.

The gist of the charge is to be found in the sentence: "And I must tell you that although his hand physically discharged the weapon, if his mind did not go with the act, the shooting did not amount to murder but to manslaughter."

The jury, upon this statement of the law, elected to give credence to Elnick's denial of his intention to kill, and brought in a verdict of manslaughter accordingly.

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No objection was made by counsel for the Crown to the charge at the trial. Subsequently, however, the Chief Justice was asked by the Crown to state a question for the opinion of this Court as to the accuracy in law of his charge, which he declined to do on grounds which were set out in a statement that was read to the Court only after the argument on this appeal had been proceeding for some time.

As to the ground that the case was merely academic (inasmuch as the Crown had announced its determination not to ask for a new trial), it is sufficient to point out that it involves matter of the gravest importance in the administration of criminal justice and that the House of Lords, in the case of *Rex* v. *Beard* (1919), 14 Cr. App. R. 110, 14 Cr. App. R. 159, to which I make reference at length later on, dealt with an appeal by the Crown under somewhat similar circumstances. The Chief Justice further objected to the form of the questions proposed to be stated, and indicated a willingness to sign the cases stated if amended. This was done during the argument by confining the questions as to the correctness of the charges to those portions relating to the law of murder. In the *Elnick* case the questions submitted by the Crown are therefore as follows: 1. Was my charge to the jury correct as to the law of murder? 2. If it was not correct how should I have charged the jury?

Counsel for the prisoner consented to the amendments and to the hearing and there is no question whatever as to the rights, authority and duty of this Court under sec. 1015 of the Code to entertain this application. See *Rex* v. *Blythe* (1909), 19 O.L.R. 386, 15 Can. Cr. Cas. 224.

Two subjects of the first importance are presented for consideration: (1) Whether the provisions of the Code above referred to are exhaustive on the subject of murder so far as therein purporting to be dealt with, and (2) whether the rule, that one who, in furtherance of a crime of violence such as is disclosed on the evidence in this case, takes the life of another, is guilty of murder, prevails in this province.

Section 129 of the B.N.A. Act 1867, provides for the continuation of the laws in force in Canada, Nova Scotia and New Brunswick, including criminal laws, both statutory and common law, subject to repeal, abolition and alteration by the proper legislative

authority. In the original Provinces the English common criminal law was in force as of the dates set out in Burbidge's Digest of Canadian Criminal Law, pages 9-13.

As to Manitoba, prior to July 15, 1870, the common criminal law of England was that as of the date of the Hudson's Bay Co.'s charter, except as varied by subsequent legislation by the Imperial Parliament and the Council of Assiniboia, as was laid down by the late Wood, C.J., in the *Lepine* case.

These laws were continued by the provisions of the B.N.A. Act 1867, the Rupert's Land Act, 31-32 Vict. 1868 (Imp.), ch. 105; 32-33 Vict. 1869 (Can.), ch. 3; the Manitoba Act, ch. 3, 33 Vict. (Can.); and the B.N.A. Act of 1871, 34-35 Vict. (Imp.), ch. 28; and in 1871, 34 Vict. (Can.), ch. 14, extended to Manitoba certain criminal laws in force in the other Provinces of the Dominion, including the Act, ch. 20 of 1869, 32-33 Vict. (Can.), respecting offences against the person, including the offences of murder and manslaughter but making, no definition of either. Finally, in 1888, by 51 Vict. (Can.), ch. 33 it was enacted that the laws of England relating to matters within the jurisdiction of the Parliament of Canada as the same existed on July 15, 1870, were and are in force in Manitoba in so far as they are applicable and have not been or may not hereafter be repealed, altered, varied, modified or affected by any Act of the Imperial or Dominion Parliaments.

Next comes the enactment of the Criminal Code of 1892. In the revision of 1906, secs. 10, 11 and 12 specifically refer to Ontario, British Columbia and Manitoba. Sec. 12, referring to Manitoba, repeats the provision of the Act of 1888 previously quoted. It is thus expressly declared in the Code itself that the criminal law of England as it existed on July 15, 1870, in so far as it is applicable to Manitoba, and has not been repealed by any Act of the Parliament of the United Kingdom, or by the Code, or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such Act, shall be the criminal law of this Province. As this sec. 12 now stands, embodied in the Code, it appears to me to have greater significance than formerly, though that greater significance is apparent rather than real. Quite apart from other considerations, this section appears to me as conclusive of the question under discussion.

By sec. 15 of the Cr. Code it is provided:—

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15. Where an act or omission constitutes an offence, punishable on summary conviction or on indictment, under two or more Acts or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of such Acts, or at common law, but shall not be liable to be punished twice for the same offence.

This is an extension of the terms of sec. 933 of the original Act of 1892, in making express mention of the retention of common law offences.

And by sec. 16 it is further provided:—

16. All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith.

Thus it appears from repeated provisions of the Code itself, the common criminal law of England of July 15, 1870, is the law of this Province save as altered, varied, modified or affected by the Code or otherwise by competent legislative authority.

This is made clear by the fact that the English Draft Code, upon which our Code is largely based, contained a clause expressly abrogating the common law with respect to criminal offences. Strong exception was taken by the English Judges to such a provision and the Dominion Parliament in enacting the Code left out this clause.

By the provisions of the above sec. 16 and by the omission of any prohibitory clause such as that inserted in the English Draft Code against proceeding at common law, our own Code preserves the common law not only so far as it affords a *defence* in cases not expressly provided for, but also so far as it may afford a *ground of prosecution* in cases not expressly provided for. Crankshaw's Criminal Code (4th ed., 1915), page 24, par. 16.

Mr. Crankshaw, in the introduction to the first edition of his work (1893), traces the history of the Code and says:—

It is a codification of both the common and the statutory law, relating to criminal matters and criminal procedure; but while it aims at superseding the statutory law, it does not abrogate the rules of common law. These are retained, and will be available, whenever necessary, to aid and explain the express provisions of the Code or to supply any possible omissions, or meet any new combination of circumstances that may arise.

This statement has been reproduced in the subsequent editions of this work.

This view is clearly borne out by judicial decisions. In *Union Colliery Co.* v. *Reg.* (1900), 31 Can. S.C.R. 81, 4 Can. Cr. Cas. 400, the judgment of the majority of the Supreme Court was delivered by Sedgewick, J., who says at page 87:—

Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. So that if the facts stated in the indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then unquestionably an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by statement of what is law, then both are in force.

In *Rex* v. *Cole* (1902), 5 Can. Cr. Cas. 330, it was held that the common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the latter law. See the note appended to the report of this case (page 336). *Brousseau* v. *The King* (1917), 39 D.L.R. 114, 29 Can. Cr. Cas. 207, 56 Can. S.C.R. 22, Fitzpatrick, C.J., reiterated the opinion of the Court in the *Union Colliery* case, 31 Can. S.C.R. 81, 4 Can. Cr. Case 400, that the criminal common law of England is still in force in Canada except in so far as repealed either expressly or by implication.

Reference is also made to *Graves* v. *The King* (1913), 9 D.L.R. 589, 47 Can. S.C.R. 568, 21 Can. Cr. Cas. 44. That case was decided upon certain sections of the Code and "without determining that the definition contained in secs. 259 and 260 is exhaustive" as pointed out by Anglin, J., at page 597 (9 D.L.R.)

We can take it, therefore, as settled beyond controversy that in this Province the common law jurisdiction as to criminal offences is still operative and even in cases provided for by the Code, unless there is such repugnancy as to cause the Code to prevail.

By the Code, sec. 14, the distinction between felony and misdemeanour has been abolished and proceedings in respect of all indictable offences are to be conducted in the same manner. The section deals with procedure, but for certain purposes the distinction remains.

In England the act by which death is caused must be attended by the state of mind known as "malice aforethought" in order to constitute the crime of murder. In *Reg.* v. *Mawgridge* ( ), Kel. 119, 84 G.R. 1107, Holt, L.C.J., defines "malice aforethought" thus:—

> He that doth a cruel act voluntarily doth it of malice prepensed (*i.e.*, aforethought).

These words, it has been said repeatedly, are technical and are not used in their ordinary meaning.

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Cameron, J.A.

Murder is "the unlawful killing, by any person of sound memory and discretion, of any person under the King's peace, with malice aforethought, either *express* or implied by law. This malice aforethought which distinguishes murder from other species of homicide is not limited to particular ill-will against the person slain, but means that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit; a heart regardless of social duty and deliberately bent upon mischief. Russell on the Law of Crimes, 7th Eng. ed., page 655.

The term "malice aforethought" has been omitted from the Code.

Coke, in his Third Institute, says plainly, that if unintentional homicide takes place in the doing of an unlawful act it is murder. Stephen Criminal Law, vol. 3, page 57.

A later definition of murder is to be found in Blackstone's Commentaries, Lewis' ed., 1769, vol. 4, page 201:—

And if one intends to do another felony, and undesignedly kills a man, this is also murder. Thus, if one shoots at A., and misses *him*, but kills B., this is murder, because of the previous felonious intent, which the law transfers from one to the other.

It is laid down in East, Pleas of the Crown, vol. 1, page 255, par. 31, ch. 5:—

And first it is principally to be observed that if the act on which death ensue be *malum in se*, it will be murder or manslaughter according to the circumstances; if done in prosecution of a felonious intent, however, the death ensued against or beside the intent of the party, it will be murder.

Chitty on Criminal Law, edition of 1826, page 729, says:—

When death ensues in the pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter, as the intended offence is felony or only a misdemeanour, Fost. 258. Thus, if a man shoot at the poultry of another with intent merely to kill them, which is only a trespass, and slay a man by accident, it will be manslaughter; but if he intended to steal them when dead, which is felony, he will be guilty of murder, Kil. 117, Fost. 258. So where the party shoots at one man and kills another, malice will be implied as to the latter; and the felonious intent is transferred, on the same ground, where poison is laid to destroy one person and is taken by another, 1 Hale 466.

I would refer also to the views of Sir Michael Foster (1762), as summarized by Stephen's Criminal Law of England, vol. 3, page 76:—

Death caused by the unintentional infliction of personal injury is *per infortunium* if the act done was lawful and was done with due caution, or was accompanied only by slight negligence. If it was accompanied by culpable negligence, the act is manslaughter. If it was accompanied by circumstances shewing a heart regardless of social duty and fatally bent upon mischief, or if the intent is felonious, it is murder.

In *Reg.* v. *Franz* (1861), 2 F. & F. 580, Blackburn, J., told the jury:—

As matter of law, if you are satisfied that when the deceased met her death from violence by any person or persons to enable them to commit a burglary (or any other felony) although those who inflicted that degree of violence might not have intended to kill her (probably you think so here, and merely to stop her outcry in calling for assistance), all who are parties to that violence are guilty of murder.

In *Reg.* v. *Horsey* (1862), 3 F. & F. 287, the prisoner was indicted for murder for having set fire to a stack of straw close to a barn and the deceased had been burnt to death as a consequence. Lord Bramwell told the jury, at page 288:—

that the law laid down was that where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder even though he did not intend it. And though (he said) that may appear unreasonable, yet, as it is laid down as law, it is our duty to act upon it.

There is a long foot-note to the report of this case, in which the writer criticizes Lord Bramwell's direction, which has, in its turn, been the subject of criticism. See the remarks on the argument in *Rex* v. *Beard*, 2nd day, page 63.

In *Reg.* v. *Desmond, Barrett et al.* (1868), referred to in Burbidge's Digest of the Canadian Criminal Law, Cockburn, L.C.J., said, page 218:—

If a man did an act, more especially if that were an illegal act, although its immediate purpose might not be to take life, yet if it were such that life was necessarily endangered by it—if a man did such an act, not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it, that was murder.

And further, in citing the oft-quoted illustration used by Foster (Burbidge, page 219), "A. shoots at a domestic fowl, intending to steal it, and accidentally kills B. A. commits murder"; the author says this doctrine (which is supported by many other authorities) was followed by Cockburn, L.C.J., in *Barrett's* case (1868). He said:—

If a person seeking to commit a felony should, in the prosecution of that purpose cause, although it might be unintentionally, the death of another, that, by the law of England, was murder. There were persons who thought and maintained that where death thus occurred, not being the immediate purpose of the person causing the death, it was a harsh law which made the act murder. But the Court and jury were sitting there to administer law, not to make or mould it, and the law was what he told them.

This is a re-statement of what was said by Lord Bramwell in the *Horsey* case, 3 F. & F. 287, and is, beyond question, an authoritative declaration of the law of England on this subject as it stood on July 15, 1870.

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We are now brought down to a modification or narrowing of the law introduced in *Reg.* v. *Serné* (1887), 16 Cox. C.C. 311, where Stephen, J., charged the jury in a case in which the prisoners were indicted for the murder of a boy, it being alleged that they wilfully set fire to a shop by which act the death of the boy had been caused. The boy was an imbecile son of one of the prisonrs whose life had insured; the stock and furniture in the shop had been heavily been insured. In his charge Stephen, J., refers to the old illustration of a man shooting at a fowl with intent to steal it, and accidentally kills a man, expresses a doubt whether that is really the law. He goes on to say, at page 313:—

> I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder. I think that everyone would say in a case like that, that when a person began doing wicked acts for his own base purposes, he risked his own life as well as that of others. That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol, or a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began. That, I take to be the true meaning of the law on the subject. In the present case, gentlemen, you have a man sleeping in a house with his wife, his two daughters, his two sons, and a servant, and you are asked to believe that this man, with all these people under his protection, deliberately set fire to the house in three or four different places, and thereby burnt two of them to death. It is alleged that he arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was placing all those people in deadly risk. It appears to me that if that were really done, it matters very little indeed whether the prisoners hoped the people would escape or whether they did not. If a person chose, for some wicked purpose of his own to sink a boat at sea, and thereby caused the deaths of the occupants, it matters nothing whether at the time of committing the act he hoped that the people would be picked up by a passing vessel. He is as much guilty of murder, if the people are drowned, as if he had flung every person into the water with his own hand. Therefore, gentlemen, if Serné and Goldfinch set fire to this house when the family were in it, and if the boys were by that act stifled or burnt to death, then the prisoners are as much guilty of murder as if they had stabbed the children. I will also add, for my own part, that I think in so saying the law of England lays down a rule of broad, plain, common sense.

This modification of the former rule seems to have been generally, though not universally, adopted in England. See the note in

9 Hals., page 579; also Roscoe's Criminal Evidence, 13th ed., 618. But Stephen, J.'s statement of the law would be decisive against the prisoner Elnick in this case: "The prisoner must take the consequences if he goes further than he intended when he began," and that is a rule of broad, plain common sense. But on the argument in *R.* v. *Beard, supra*, referred to hereafter, Lord Sumner states that in reading Stephen, J., it is very difficult to tell when he is laying down the law that previous authorities have laid down and when he is frankly laying down what he thinks should be the law.

A recent statement of the law is to be found in Archbold's Criminal Pleading, 25th ed. (1918), page 852: "If a person, whilst doing or attempting to do another act, undesignedly kills a man—if the act intended or attempted were a felony, the killing is murder; if unlawful, but not amounting to felony, the killing is manslaughter."

I wish to point out a significant statement made by Lord Atkinson on the argument in the *Beard* case, *supra* (1st day, page 102): "All the prosecutor has to do in murder is to prove that the accused killed the man. Then the law presumes that he did it of malice aforethought." Lord Atkinson, earlier on the same day, at page 77, remarked: "If in the commission of a felony you do an act not intended to kill and which does kill it is murder."

It is worthy of notice that the definition in the Code, sec. 262, "Culpable homicide not amounting to murder is manslaughter" is not restricted to "murder as defined by this Act"; thus it makes culpable homicide manslaughter only when it is not murder either by common law or under the Code.

It was pointed out that Elnick was guilty of an offence against sec. 122 of the Code in pointing a firearm.

There is a class of cases dealing with death resulting from attempted abortion, such as *Reg.* v. *Whitmarsh* (1898), 62 J.P. 711, and *R.* v. *Lumley* (1912), 76 J.P. 208, 22 Cox C.C. 635, where it has been laid down that a jury may find a verdict of manslaughter if the death is so remote a contingency that no reasonable man would have taken it into his consideration. But this "extraordinary view," as it has been called, is confined to cases of abortion. The reason assigned for it is that in such cases the woman, whose death is caused, has voluntarily submitted to a felonious

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act for the purpose of procuring abortion. See remarks of the Attorney-General in *Rex* v. *Beard*, notes of argument, 1st day, page 92. It may be doubted whether the reasoning of the Attorney-General is convincing on the point. In *Reg.* v. *Radalyski*, 24 V.R.L. 687, also a case of death during an attempted abortion, Madden, C.J., held it the rule "that if a person while endeavouring to commit a felony by some means or other kills another person he is responsible for the murder." It may well be questioned whether the direction to the juries in the *Whitmarsh* and *Lumley* cases, *supra*, would now be followed, in view of the decision of the Court of Criminal Appeal and the House of Lords in *R.* v. *Beard*, 14 Cr. App. R. 110; 14 Cr. App. R. 159. However that may be, it is absolutely clear that the ruling in abortion cases has no application whatever to cases such as that now before us.

In the recent case of *R.* v. *Beard*, decided by the House of Lords, on appeal from the Court of Criminal Appeal, on March 5, last, we have an authoritative and illuminating exposition of the law. The judgment was given by the Lord Chancellor. The case is reported in the Court of Criminal Appeal, though not yet in the House of Lords, but we have been furnished with copies of the judgment and argument. The prisoner was convicted at the Chester Assizes of murder and sentenced to death. The Court of Criminal Appeal quashed the conviction and substituted a verdict of manslaughter and a sentence of 20 years of penal servitude. On July 25, 1919, about 6 p.m., a girl of 13 years was sent to make a small purchase. She was seen to enter the mill where Beard was night watchman. He proceeded to ravish her and when she struggled, he placed his hand over her mouth, and his thumb on her throat, causing her death by suffocation. There was some, but not much evidence that the prisoner was under the influence of intoxicating liquor at the time. The prisoner was not called at the trial but statements made by him were introduced into evidence. He stated he had a struggle with the girl, and seemed to "lose his senses" and that he would not have injured her had he not been "sodden and mad with drink." The only defence presented was that there was no intention on the part of the prisoner to cause the girl's death, and therefore, the verdict should be manslaughter and not murder, and that the case came within *Rex* v. *Meade*, [1909] 1 K.B. 895. The Lord Chancellor sets out the

direction of Mr. Justice Bailache to the jury to which objection was taken. In the Court of Criminal Appeal two separate points of misdirection were raised: (1) That the Judge should have told the jury that if they were of opinion that the violent act which was the immediate cause of death was not intentional but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter, and (2) that the Judge wrongly directed the jury as to the defence of drunkenness and gave a direction which was not in accordance with the decision in *Meade's* case and was applicable only to the defence of insanity.

As to the second ground that, though of vital importance, is of no application here. But as to the first ground the Lord Chancellor says that the Court of Criminal Appeal held,

> that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The Court held that by the law of England such an act was murder. No attempt has been made in your Lordships House to displace that view of the law and there can be no doubt as to its soundness.

In the Court of Criminal Appeal Reading, L.C.J., describes the struggle made by the child to escape the prisoner who eventually did the act which resulted in her death and says: "By the law of England this is murder; it is an act of violence done in the course or pursuance of a felony involving violence, and beyond all question and beyond the range of any controversy that is murder." *Rex* v. *Beard*, 14 Crim. App. R. at 116.

After discussing at length the law relating to the defence of drunkenness, the Lord Chancellor examines the decision in the *Meade* case and proceeds to say of it that there (at page 196),

> the crime charged was that death arose from violence done with intent to cause grievous bodily harm. In this (*Beard's*) case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's* case, therefore, it was essential to prove the specific intent: in *Beard's* case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape.

And further he says at p. 197:—

> For in the present case the death resulted from two acts or from a succession of acts, the rape and the act of violence causing suffocation. These acts cannot be regarded separately and independently of each other. The capacity of the mind of the prisoner to form the felonious intent which murder involves is, in other words, to be explored in relation to the ravishment; and not in relation merely to the violent acts which gave effect to the ravishment.

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And finally, after expressing a doubt whether there was any sufficient evidence to go to the jury that the prisoner was drunk, he says: "There was certainly no evidence that he was too drunk to form the intent of committing rape. Under these circumstances it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing is by the law of England murder."

Lord Buckmaster, L.C.J., Viscount Haldane, Lord Dunedin, Lord Sumner, Lord Atkinson and Lord Phillimore concurred in the judgment of the Lord Chancellor. It is to be noted that, before the judgment was delivered, it was officially stated that the sentence of the prisoner had been respited. Nevertheless, the judgment of the House of Lords was that the appeal should be allowed and the conviction of murder be restored.

This view of the law, sanctioned by the most eminent authority and founded on precedent and common sense, is directly applicable to the case of *Elnick* before us. On the undisputed facts, the death of De Forge was caused by an act of violence done by Elnick in furtherance of a robbery which it itself a crime of violence. Such a killing is murder according to our law. The Chief Justice, therefore, misdirected the jury in telling them that "although his (Elnick's) hand physically discharged the weapon, if his mind did not go with the act, the shooting did not amount to murder but to manslaughter only. If he did not intend to fire the gun at all his offence would be manslaughter because if a man while doing an unlawful act kills another, although he did not intend to do him any hurt, it is manslaughter only" and in the other passages in his charge to the same effect. This is a clearly an erroneous statement of the law. Elnick was engaged in the commission of a crime of violence and his intention to discharge the revolver cannot be regarded separately from his avowed intention to commit robbery. To ascertain his mind as to the former, it must be explored as to his intention to commit the robbery of which there is no doubt whatever. The jury should have been told that, on the undisputed and admitted facts, the killing of De Forge was caused by an act of violence done by Elnick in furtherance of a crime of violence, that the killing was, therefore, murder and that it was their duty to return a verdict of guilty.

The questions submitted should be answered accordingly.

In the cases of *Clements* and *Burdie* precisely the same considerations apply as in that of *Elnick*. Under sec. 69 of the Code these men were as responsible for the killing of De Forge as if they themselves had done that which Elnick did which resulted in his death. The answers to the questions in these cases, identical with those in the *Elnick* case, should be in accordance with the foregoing.

THE KING v. LACHANCE.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Dennistoun, JJ.A. June 10, 1920.

INTOXICATING LIQUORS (§ III D—73)—TRIAL OF OFFENDERS—SEVERAL CHARGES—INSUFFICIENCY OF EVIDENCE AS TO SOME—AMENDMENT OF CONVICTION.

Where several offences are charged under the Manitoba Temperance Act, 6 Geo. V. 1916, ch. 112, and it is apparent that the magistrate found the accused guilty of all of them and imposed the minimum penalty in respect to each, there being no difficulty in examining the sufficiency of the evidence as applicable to each offence, the Court will amend the conviction, and reduce the penalty in respect to any charges as to which there is not sufficient evidence to warrant a conviction.

[*Rex* v. *Ritchie* (1920), 51 D.L.R. 652, distinguished.]

Statement.

APPLICATION for *certiorari* and to quash a conviction under the Manitoba Temperance Act, 6 Geo. V. (1916), ch. 112. Conviction amended.

M. G. Macneil, for applicant; *John Allen*, for Crown.

Haggart, J.A.

HAGGART, J.A.:—I agree with the observations made by the magistrate, Mr. Noble, when he says, after the conclusion of the case:

> This has been one of the most flagrant cases of dealing with prescriptions that has come before me and if the evidence before me is any indication of the whole business of the Doctor in reference to prescriptions for liquor, it could not possibly be more flagrant. Whatever we think of the Act, 6 Geo. V. 1916 (Man.), ch. 112, 95 per cent. of the profession try to live up to the law. It is a noble profession. I have friends in the medical profession who are very incensed at the way things are going on. I find the accused guilty and order him to pay a fine of $300 and costs or 4 months in jail.

There is a serious question as to whether there is sufficient evidence to convict on all the charges included in the information and I agree with the suggestion of my brother Dennistoun that the conviction be amended so as to exclude the case where the evidence is not sufficient: in which case the fine or penalty would be reduced to the extent of $50. In the information there are 6 offences charged so that instead of making it a fine or penalty of $300, justice would be done by amending the conviction and

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making the penalty $250. In fact, counsel for the Crown practically admits there is not sufficient evidence to support the conviction for the offence charged as having taken place on December 21, 1919.

There is a question as to whether the expression "Scotch" is a sufficient charge that intoxicating liquor was prescribed on the dates mentioned. I think the language is sufficient to cover the charge. I would hold that "Scotch" is intoxicating liquor.

The application for the *certiorari* should be granted and the conviction should be amended so as to make the penalty $250.

Dennistoun, J.A.

DENNISTOUN, J.A.:—This is an application for *certiorari* and to quash a conviction under the Manitoba Temperance Act, 6 Geo. V. 1916, ch. 112.

The information charges that the accused:—

on or about the 21st day of December, 1919, and on the 9th, 13th, 17th, and 19th days of February, 1920, at Winnipeg and St. Boniface, in the Province of Manitoba, unlawfully did, being a physician, lawfully and regularly engaged in the practice of his profession, give prescriptions for intoxicating liquor in cases where there was no actual need, in violation of and contrary to the provisions of the Manitoba Temperance Act.

Evidence was given in respect to two offences on February 19.

The conviction follows the wording of the information and imposes a fine of $300 with $9.50 costs with 4 months' imprisonment in default of payment.

Counsel for the accused stated that he relied on the judgment of this Court in *Rex* v. *Ritchie* (1920), 51 D.L.R. 652, and asked that the conviction be quashed, but that case is clearly distinguishable from the case at bar.

In the *Ritchie* case, 51 D.L.R. 652, this Court found it impossible to amend the conviction which was clearly defective, for the reason that the minimum penalty of $50 only having been awarded in respect to three offences charged, it was impossible to determine upon the conflicting evidence adduced which offence the magistrate had in mind when he made his adjudication.

In the present case, there are six offences and it is apparent the magistrate found the accused guilty of all of them and imposed the minimum penalty of $50 in respect to each, amounting to $300 in all. The Court has no difficulty in examining the sufficiency of the evidence as applicable to each offence nor in amending the conviction in respect to any or all of such offences if deemed advisable to do so.

Counsel for the Crown admits there is no evidence to support the conviction for December 21, 1919. The conviction should be amended accordingly, the finding in respect to that date struck out and the penalty reduced to $250.

The offences of the 9th and 13th of February are very clear cases of giving prescriptions "for which there was no actual need" and are quite different from the cases referred to by Fullerton, J.A., in the *Ritchie* case, 51 D.L.R. 652 at 656. In the present case the applicants never saw the physician at all, but obtained prescriptions from the physician's clerk who had a supply on hand which he issued at $1 each to the applicants.

The accused admitted on cross-examination that as many as a dozen had been furnished to an applicant at one time upon his statement that they were wanted for friends who were ill.

When a physician gives trustworthy evidence that he prescribed liquor for a person who, in his opinion, had need of it, after a personal examination of the patient, I agree that it is difficult for a Court to convict him, but there is no difficulty in respect to the cases of the 9th and 13th of February, for the doctor never saw the patients at all, and moreover there was, in respect to all these charges, such an open disregard of both the spirit and the letter of the law as to justify the magistrate in disregarding the evidence of the accused in respect of the charges laid for the 17th and 19th of February, to the effect that one man said he was "a little nervous" and the other said he "did not feel very well."

The doctor was called as a witness in his own behalf, but he does not say that, in his opinion, there was any need for a prescription for intoxicating liquor in any of the cases referred to, and the witnesses for the prosecution make it clear that they disclosed no case of need to the physician.

It only remains to deal briefly with the second case on February 19, in which the accused gave a man a signed prescription with a blank to be filled in with "gin, rye or Scotch" whichever might happen to be in stock when presented at the drug store. It is argued this was not a prescription for intoxicating liquor as no liquor was mentioned in it. To so hold would open a wide door to violations of the Act and I agree with the finding of the magistrate that this was a contravention of the statute, sec. 57, and was

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a prescription for intoxicating liquor issued when there was no actual need and without any exercise of judgment in the part of the physician as to its use being necessary.

The remaining prescriptions called for "40 oz. of Scotch" and objection was taken that in the absence of evidence the Court should not assume that intoxicating liquor within the definition given in the Act was prescribed.

A perusal of the evidence makes it clear that intoxicating liquor was what the applicants required and what the accused and his clerk had in mind when the prescriptions were issued, and a Court which is familiar with cases of this character and the language in common use by persons who are dealing in intoxicating liquors, may take judicial notice that the word "Scotch" when used in such connection means "Scotch whiskey," a liquor which is intoxicating within the meaning of the statute. Murray's Dictionary gives as one of the meanings of "Scotch"—"eliptically used for Scotch whiskey," and Webster defines "whiskey" as "an intoxicating liquor distilled from grain."

In *Rex* v. *Scaynetti*, 25 Can. Cr. Cas. 40, 34 O.L.R. 373, Middleton, J., held that a magistrate might take judicial notice that beer is both a spirituous and a malt liquor and consequently included in the definition of "liquor" given by the Ontario Liquor License Act, R.S.O. 1914, ch. 215; and it was unnecessary to take evidence as to whether or not it contained more than two and a half per cent. of proof spirits.

I adopt his reasoning as applicable to this case.

In the result, an order for *certiorari* will issue, the conviction will be amended by striking out the words "on or about December 21, 1919 and" in the 5th and 6th lines thereof and by striking out the penalty of $300 therein awarded and substituting $250 therefor and that otherwise the said conviction be sustained and confirmed. *vide* sec. 101, Manitoba Temperance Act, 6 Geo. V. 1916, ch. 112.

There will be no order as to costs.

Perdue, C.J.M.; Cameron, J.A.

PERDUE, C.J.M., and CAMERON, J.A., concurred in the result.

Conviction amended.

WESTWOOD v. McMILLAN.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J.S., Newlands and Elwood, JJ.A. June 28, 1920.

EVIDENCE (§ II B—105)—BREACH OF WARRANTY OF HORSE—ACTION FOR DAMAGES—SUFFICIENCY OF EVIDENCE OF UNSOUNDNESS.

In an action for breach of warranty of a horse it is not sufficient to give such evidence as to induce a suspicion that the horse was unsound. The plaintiff must positively prove that the horse was unsound at the time of sale. The evidence of a veterinary surgeon who pledges his professional opinion that the horse was diseased at the time of sale is sufficient evidence of unsoundness.

[*Frye* v. *Milligan* (1885), 10 O.R. 509, distinguished.]

Statement.

APPEAL by defendant from the trial judgment in an action for damages for breach of warranty of a horse. Affirmed.

P. H. Gordon, for appellants.

L. McK. Robinson, for respondents.

Haultain, C.J.S.

HAULTAIN, C. J. S.:—I agree that the appeal should be dismissed.

Newlands, J.A.

NEWLANDS, J. A.:—Defendants sold two horses to plaintiffs for $300 each. Plaintiffs paid $300 and gave lien note for the balance. Defendants warranted the two horses to be sound. One of them died 4 months after the sale, from thrombosis, and the note not having been paid, the other was seized by defendants under the lien note. Plaintiffs then tendered defendants $40, claiming that one of the horses was unsound at the time of the sale, and that they were entitled to set-off their damages under the breach of warranty. These damages they claimed were $260, the horse being worth only $40 at the time of sale. As defendants would not accept $40 or return the horse seized, plaintiffs bring this action for a return of the horse or damages.

At the trial, a veterinary surgeon, who examined the body of the horse after its death, said that the disease of which the horse died was thrombosis, and that in his opinion the horse had the disease more than four months before its death, which would be before the sale of the horse to plaintiffs. It was contended by Mr. Gordon that there must be positive evidence of a breach of warranty, and that in this case the veterinary surgeon was not certain of the length of time the horse had thrombosis; but after a careful reading of the evidence I have come to the conclusion that the witness was of the opinion that the horse had this disease at the time of sale.

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In *Eaves v. Dixon* (1810), 2 Taunt. 343, 127 E.R. 1110, it was held that on the warranty of a horse it is not sufficient to give such evidence as to induce a suspicion that the horse was unsound; if he only throws the soundness in doubt he is not entitled to recover; the plaintiff must positively prove that the horse was unsound at the time of sale. I think the evidence of the surgeon in this case does more than throw a doubt on the soundness of the horse at the time of sale. If his evidence is to be believed the horse was unsound at that time.

In *Joliff* v. *Bendell* (1824), Ry. & M. 136, where witnesses gave their opinion that certain sheep died from a disease that was hereditary, Abbott, C. J., left it to the jury to say (at p. 137), whether, at the time of the sale, the sheep had existing in their blood or constitution the disease of which they afterwards died, or whether it had arisen from any subsequent cause?

There being evidence on which the trial Judge could find a breach of warranty and he having so found, I would not disturb his judgment, but would dismiss the appeal with costs.

Elwood, J.A.

ELWOOD, J. A.:—On June 11, 1918, the plaintiffs bought a grey gelding and a bay mare from the defendant McMillan, for $300 each, and paid on account of the purchase-price $300 in cash, and gave the defendant McMillan a lien note for $300 with interest, payable on December, 1918.

On October 10, 1918, the bay mare dropped dead. On April 24, 1919, the defendant Molloy, acting for the defendant McMillan, took possession of the grey gelding under the lien note above referred to, for the balance of the purchase-price, and advertised the gelding for sale. The plaintiffs had the gelding replevied, and tendered the defendants before replevin the sum of $74, made up as follows: Value of mare at date of sale $40; expenses in connection with seizure and possession of gelding $34. This tender was refused and the plaintiffs brought this action for the return of said gelding, and in the alternative $300 by way of damages, and paid into Court the said sum of $74, alleging that at the time of the sale the defendant McMillan warranted both mare and gelding to be sound, and that the mare was not sound at the time of sale but was suffering from a growth on or near the heart called thrombosis, from which the mare died. Judgment

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was given at the trial for the plaintiffs, and from that judgment this appeal is taken.

The only question to consider in this appeal—apart from the question of whether or not the plaintiffs had any cause of action, the sale having been made under a lien note—is, whether there was any evidence, or sufficient evidence, that at the time of the sale the mare in question was unsound. The only evidence on this question was the evidence of A. R. Coleman, a veterinary surgeon. He swore that the mare died from thrombosis; that she had a very large thrombosis, and that from his examination of the mare he could not say how long the disease had been developing, he would imagine it had been several months forming to be that size; that he would imagine that the disease did not commence within 4 months before the mare died; that he did not think it would be possible for the mare to have this disease for less then 4 months, but he could not say positively; that there are indications that one judges by, and that is principally from the size of the thrombosis, and that it was from the size of the thrombosis in this mare that he concluded that the thrombosis originated more than 4 months before she died.

It was contended on behalf of the appellants that this evidence was not sufficient to justify the conclusion that the mare had thrombosis at the time of the sale, and in support of that contention the case of *Eaves* v. *Dixon*, 2 Taunt. 343, 127 E.R. 1110, was cited. The report of that case is very short, and is as follows:

This was an action upon the warranty of a horse. The horse died a few days after the sale; and on dissection it was found that the lungs were greatly inflamed and adhered to the ribs, and the *pericardium* was a hundredfold thicker than in a state of health. Evidence was given that the horse had been apparently in health and high condition down to the time of the sale and delivery; and several veterinary practitioners stated that the disorder was of so rapid a nature, that inflammation of the lungs was sometimes known to begin, and proceed to mortification within the short space of three days; and that it was impossible that this complaint could have existed at the time of the sale, for if it had, it would certainly have been manifested by a thickness of breathing. The plaintiff called a farrier, who imputed the sleekness and facility with which the skin of the horse at the time of the sale moved over the muscles, to the water of a dropsy on the chest having gotten between the external skin and the flesh, and on his testimony the jury, at the Guildhall sittings after last Michaelmas term, before Mansfield, C.J., found a verdict for the plaintiff.

Vaughan, Serjt., in Easter term obtained a rule *nisi* to set aside the verdict, and Best, Serjt., with him, now endeavoured to support it; he said

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the evidence was doubtful, and the jury, who were the proper judges of that doubt, had decided it.

But the Court were clear that the plaintiff ought to have been nonsuited at the trial. On the warranty of a horse, it is not sufficient for the plaintiff to give such evidence as to induce a suspicion that the horse was unsound: if he only throws the soundness into doubt, he is not entitled to recover: the plaintiff must positively prove that the horse was unsound at the time of the sale.

It will be observed from a perusal of the facts set out in that case, that the conclusion that the horse was unsound at the time of the sale was pure conjecture. In the case at bar, however, there is the evidence of an expert who pledges his professional opinion that the mare had thrombosis for more than 4 months, which would bring it to a period prior to the sale. It is quite true that at one place in his evidence he says he could not say positively, but it seems to me that he was merely stating what every conscientions expert should state when expressing an opinion. The statement in *Eaves* v. *Dixon*, *supra*, as follows:—

In an action on a warranty of an horse, "the plaintiff must positively prove that the horse was unsound." I apprehend, in the light of the evidence that that case, goes no farther than to state that the evidence of unsoundness must be something more than suspicion or conjecture. I do not understand it to mean that the plaintiff must prove his case beyond all doubt, as he would have to do in a criminal case. In a civil case the evidence must shew a preponderance of probability in favour of the plaintiff's contention. There must not be mere conjecture or suspicion in his favour, and in the case at bar, in my opinion, the evidence of the unsoundness of the mare at the time of sale is something more than mere conjecture or suspicion. The evidence of the veterinary shows that there is at least a strong probability that the mare at the time of the sale was suffering from the disease from which she subsequently died. That evidence is uncontradicted, and I think is sufficient.

It was further objected that, the sale having been made under a lien note, the property in the animals had not passed to the plaintiffs, and the plaintiffs could not recover damages for breach of warranty. In support of that contention, *Trye* v. *Milligan* (1885), 10 O.R. 509, was cited. The head-note to that case is as follows:—

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The defendant delivered a piano to the plaintiff on a "hire contract," the price being stated to be $500, payable by crediting $100 on an old piano taken in exchange, and the balance of $400 by monthly instalments, the plaintiff giving a note for the $400, payable by like instalments. The contract stated that the defendant did "neither part with said piano," nor did the plaintiff "acquire any title" to it until the note was fully paid. Certain instalments fell due and payment was enforced, *and there were instalments in arrear when action was brought.* The plaintiff sued for fraudulent misrepresentations, and for general damages for breach of implied warranties; the alleged misrepresentations or warranties being that the piano was worth $500; that it was a first-class instrument; and as good as any Steinway or Chickering piano. The jury found for the plaintiff with damages.

Held, that the plaintiff could not succeed as to the false representation, for the evidence shewed that after she discovered the piano was not as represented, she did not disaffirm the contract, or offer to return the piano, but treated the contract as subsisting; nor could she recover in an action for deceit, for she failed to shew that the defendant did not believe the statements made to be true, or that they were made recklessly; and also no damages were shewn; and *semble* the statements were such as are properly styled simple commendation.

Held, also, that as the property had not passed an action for breach of warranty would not lie.

The facts in the case at bar are, however, very different from the facts in *Frye* v. *Milligan, supra.* In the case at bar, the Judge found that at the time of the sale the mare was of no value, but that as the plaintiff had admitted a value of $40, that the $74 tendered to the defendants before replevin, and subsequently paid into Court, was sufficient to pay the defendants' total claim after allowing the plaintiffs damages for breach of warranty. Damages for breach of warranty may be set up in diminution or extinction of the purchase price, and, in the result, by tendering the $74, the plaintiffs had paid for both animals in full.

I am, therefore, of the opinion that this action was properly brought, and that the appeal should be dismissed with costs.

Appeal dismissed.

B. C.

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STODDART v. SHIELDS LUMBER CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. April 15, 1920.

NOTICE (§ I—3)—TRUST DEED—CONDITION POSTPONING RIGHT TO ENFORCE —VALIDITY.

A condition in a trust deed postponing the debenture-holder's right to enforce his security until such time as the trustees fail after notice to take steps to protect the interests of the debenture-holders, is a valid condition and an action cannot be maintained in the absence of such notice.

[*Rogers & Co.* v. *British & Colonial Collier Supply Ass'n* (1898), 68 L.J.Q.B. 14, referred to.]

Statement. APPEAL by defendant from an order of Clement, J. Affirmed.

A. H. MacNeil and *W. J. Baird*, for appellant.

W. C. Brown, for respondent.

Macdonald, C.J.A. MACDONALD, C.J.A.:—The plaintiff sued upon a bond, one of a series issued by defendant company secured by a trust deed by way of mortgage. The individual defendant guaranteed payment of the bond. I am of the opinion that the conditions precedent to the plaintiff's right to recover his claim against the defendant company were performed with one exception. This condition is imposed in the following manner:—The bond refers the holder to the trust deed "for a particular description of the terms and conditions thereof *on which said bonds are issued and secured*," thus incorporating with the bond the conditions of the trust deed, so far as the above words are effective for that purpose.

Article 21 of the trust deed declares that no bondholder shall have the right to institute any proceedings for foreclosure of the trust deed, or for the execution of the trusts thereof, or for the appointment of a receiver, or for any other remedy under the trust deed, or the lien created thereby, *or otherwise*, without first giving notice to the trustee. The said article contains a further provision, partly a repetition of the above, reciting that it is agreed that no bondholder shall institute proceedings for foreclosure or for the appointment of a receiver, *or for the collection of any of the moneys evidenced by such bonds other than upon the terms and conditions and in the manner herein specified.*

This language seems to me to be sufficient to debar a right of action by the bondholder otherwise than in conformity with the conditions set forth in the bond, namely, the giving notice to the trustee. This seems to me to be even a stronger case in defendants'

favour than was *Rogers & Co.* v. *British & Colonial Colliery Supply Ass'n* (1898), 68 L. J. (Q.B.) 14, 79 L.T. 494, 6 Mans. 305, wherein it was held by Bruce, J., that the action could not be maintained in the absence of notice to the trustee.

As regards the guarantor, I think his liability to the plaintiff arose when default was made in payment of the bond and that, as to him, there is no obstacle in the plaintiff's way such as stands in his way in respect of the defendant company. The judgment against him should, therefore, not be disturbed. But as regards the defendant company, the appeal should be allowed.

Macdonald, C.J.A.

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

Martin, J.A.

GALLIHER, J.A.:—In the bond itself reference is made to the trust deed in these words:—

Galliher, J.A.

To which mortgage or deed of trust, reference is hereby expressly made *for a particular description of the terms and conditions thereof on which said bonds are issued and secured and for a description of the nature* and extent of the security therefor.

And when dealing with the rights of the bondholders the words are limited to "rights with regard to such security." The words "such security" refer to the security in the deed of trust.

Then, turning to the deed of trust, in article 21, at page 85, we find this language:—

It is hereby declared and agreed as a condition upon which each successive holder of all or any of said bonds, and all or any of the coupons for the interest of said bonds, receives and holds the same, that no holder or holder of any of said bonds or coupons shall have the *right to institute any proceeding in equity*, of any *character or kind*, for the foreclosure of this indenture, or for the execution of the trusts hereof, or for the appointment of a receiver, or for any other remedy under this mortgage or deed of trust or the lien hereby created, or otherwise, without first giving notice in writing to the trustee of default having been made and continued as aforesaid.

My view of that language is that what follows after the words "any proceedings in equity" is all linked up with such proceedings and is in respect of proceedings against the security, nor do I think any different conclusion should be reached from the following language which appears on page 86:—

and it is *also agreed* that no holder or holders of any of the said bonds, or any of the said interest coupons intended to be hereby secured, *shall institute* any suit, action or proceeding in equity for the foreclosure hereof, or for the appointment of a receiver, *or for the collection of any of the money* evidenced by such bonds or coupons otherwise than upon the terms and conditions and in the manner herein provided.

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STODDARD v. SHIELDS LUMBER CO.

Galliher, J.A.

Appellants relied upon the case of *Rogers & Co.* v. *British etc. Supply Ass'n*, 68 L.J. (Q.B.) 14, 79 L.T. 494, 6 Mans. 305.

In that case, the condition was endorsed on the bond and Bruce, J., held that the action to recover £105 due on the bond was not maintainable as the plaintiff had not complied with the condition. The words in the condition were:—

> The holder . . . (hereof) shall not commence any action or take any proceedings to enforce the security hereby created . . . (See head-note).

"The security hereby created" I think means the bond, while in the case at bar the security referred to is, the trust deed and in that the cases may be distinguishable but if not, I cannot (as I interpret article XXI) with every respect follow that case.

McPhillips, J.A.

McPHILLIPS, J.A.:—I cannot, with great respect, arrive at the same conclusion as that arrived at by the trial Judge. It is clear to me that the respondent, a debenture-holder, was precluded from bringing an action until the required steps were taken by him as contained in the trust deed. The trust deed suspends the debenture-holder's right to proceed, a condition being contained therein, postponing the debenture-holder's right to enforce his security until such time as the trustees after notice fail to take steps to protect the interests of the debenture-holders, and it has been held that this is a valid condition (see *Rogers & Co.* v. *British etc. Supply Asso.*, 68 L. J. (Q.B.) 14, 79 L.T. 494, 6 Mans. 305). The requisite notice was not given by the respondent. It is true that, ordinarily, where the principal is due, and default has taken place in payment, the debenture-holder is entitled to commence an action to enforce the debentures by foreclosure or sale, unless it be that his right to sue is qualified by a condition in the trust deed, and that condition is in the trust deed that calls for consideration in the present action, that is the right not only to enforce the debentures by foreclosure or sale, but the right to "institute any suit"—"or for the collection of any of the money evidenced by such bonds or coupons otherwise than upon the terms and conditions and in the manner herein provided." (See trust deed A.B., page 86). Therefore, the right to sue at all and for any relief is conditional. Turning to the trust deed, it is seen that the condition precedent to any action is the giving of notice to the trustees of the deed to protect the debenture-holders, and it is only after the lapse of the stated period, the trustees, failing to

take steps to protect the interests of the debenture-holders, that action might be brought. The condition is a reasonable one, as otherwise mere default in payment would precipitate a possible flood of actions against the company with the likely happening of bankruptcy ensuing, whilst on the other hand, the debenture-holders, giving notice as required, enables the trustees to take all proper steps to protect them and safeguards the company from a multiplicity of actions. The trust deed is in a form now generally in use and well understood in the flotation of debentures, and the terms are designed to not only protect the interests of the debenture-holders but to also give some reasonable time and protection to the company in case default in payment does take place. Of course, it is not the province of the Court to deny any enforceable right that the litigant may have but if there be restraint of enforcement until something be done, it is incumbent upon the Court to require due compliance with the agreed-upon condition. It has been found in practice that a personal judgment against a company, in respect to moneys due and in default, is seldom asked, because usually, as in the present case, all the property and assets stand charged by the security. Different considerations, of course, may arise if it be the case of a sole debenture-holder.

It is to be noted that North, J., in *Hope* v. *Croydon and Norwood Tramways* (1887), 34 Ch. D. 730, 56 L.T. 822, a case where the plaintiff was suing on behalf of himself and all other holders of mortgage bonds applied for payment for the total amount of the bonds, only made a declaration that the debenture-holders were entitled to stand, in the position of judgment creditors. It follows that the action was prematurely brought as against the company and the judgment as against the company should be set aside. As to the defendant Shields, the guarantor, the judgment should stand. The appeal, therefore, in my opinion, succeeds in part and fails in part.

Appeal dismissed.

CAN.
S. C.

UNION NATURAL GAS CO. v. CORPORATION OF DOVER.

Supreme Court of Canada, Davies, C.J., Idington, Anglin and Mignault, JJ. June 21, 1920.*

TAXES (§ VI—220)—ASSESSMENT—COMPANY OPERATING OIL AND GAS WELLS —ANNUAL INCOME—INTERPRETATION OF ASSESSMENT ACT, R.S.O. 1914, CH. 195, SEC. 40.

Expenditure on the sinking of new wells or the deepening of existing wells, is expenditure on capital account and is not deductible from earnings for the purpose of arriving at the "income" of a mine or mineral work, assessable under the Assessment Act (R.S.O. 1914, ch. 195, sec. 40).

Statement. APPEAL by the Union Natural Gas Co. from the decision of the Ontario Supreme Court, Appellate Division, 51 D.L.R., confirming the assessment of the Company in respect of income. Affirmed.

J. G. Kerr, for appellant.

J. M. Pike, K.C., for respondent.

Davies, C.J. DAVIES, C.J.:—I concur with Anglin, J.

Idington, J. IDINGTON, J.:—I think the result which each of the Courts below arrived at is in accord with the correct interpretation and construction of the Assessment Act, in question herein. To depart therefrom and attempt to apply the views maintained by appellant would lead to much confusion in many conceivable cases as, for example, the case of a company doing business in two different municipalities.

If, as it is quite conceivable, the section does an injustice and happens to produce results out of harmony with the general principles supposed to be underlying the definition of "income" in the Assessment Act, or in the legislation set forth in the Mining Act, it is not for us to interfere.

The language used is definite and express and is not, as I read it, in conflict with the literal definition as given of the word "income" though it may be a limitation thereof as to a specified case and a departure from the supposed principles had in mind by the draftsman of the definition.

There is nothing remarkable in that, when the subject matter of any legislation any place happens to be taxation.

The appeal should be dismissed with costs.

Anglin, J. ANGLIN, J.:—Sub-section 3 of sec. 36 of the Ontario Assessment Act of 1904, ch. 23, reads as follows:—

(3) In estimating the value of mineral lands, such lands and the buildings thereon shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes, but the income derived from any

*Duff, J., was present at the argument but took no part in the judgment.

mine or mineral work shall be subject to taxation in the same manner as other incomes under this Act.

By sec. 4 of ch. 41 of the statutes of 1907 the following words were added to sub-sec. 3:—

And the assessment on such incomes shall be made by and the tax leviable thereon shall be paid to the municipality in which such mine or mineral work is situate. Provided, however, that the assessment for income from each oil or gas well operated at any time during the year shall be at least twenty dollars.

As consolidated in the Revision of 1914 (ch. 195, sec. 40 (6)) these provisions now read:—

(6) The income tax from a mine or mineral work shall be assessed by, and the tax leviable thereon shall be paid to the municipality in which such mine or mineral work is situate. Provided that the assessment on income from each oil or gas well operated at any time during the year shall be at least $20.

An exemption for buildings, plant and machinery is provided by sub-sec. 4, and by sub-sec. 5 it is provided that mineral land is in no case to be assessed at less than the value of other land in the neighbourhood used for agricultural purposes.

Having regard to the history of this legislation, I am with great respect, unable to accept the view of Meredith, C.J.O., in the cases of oil and gas properties each well operated is to be deemed a distinct "mine or mineral work" and that the income therefrom must be assessed separately. I cannot regard the amendment made in 1907 as intended to do more, in addition to providing for the localization of the assessment, than to provide that the minimum tax on any gas and oil producing property shall be $20 for each well in operation at any time during the year on such property.

The expression "mine or mineral work" is not defined in the statute and what it may include must, I think, in every case depend on the circumstances. In the case at bar there is no evidence to enable us to determine whether each of the two wells assessed is in itself, or forms part of, a distinct mine or mineral working, or whether the two wells assessed are parts of the same "mine or mineral working."

But, however that may be, I agree with the view of Meredith, C.J.O., that expenditure on the sinking of new wells or the deepening of existing wells, whether productive or dry, is expenditure

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Anglin, J.

on capital account and is not deductible from earnings for the purpose of arriving at the "income" of the mine or mineral work assessable under sub-sec. 6 of sec. 40 of the Revised Statutes of 1914 ch. 195.

I am quite unable to appreciate the grounds on which the appellant contends that an adverse difference between receipts and expenditures in one year (the latter in this case including capital outlay), should be taken into account and deducted from earnings of a succeeding year in order to arrive at the "income" for the latter year. The definition of "income" in sec. 2 (2) as "the annual profit or gain derived (*inter alia*) from any business" in my opinion excludes any such deduction.

I would therefore dismiss the appeal.

Mignault, J.

MIGNAULT, J.:—On the ground that the expenditure incurred by the appellant in drilling wells where no mineral oil or natural gas was obtained, and which expenditure the appellant states was money totally lost, was properly capital expenditure for the development of the oil field, and not expenses which should be charged against the revenue derived from productive wells, I am of opinion that the appeal fails. With great deference, I cannot concur in the view of the Appellate Division that the proviso added in 1907 to sub-sec. 6 of sec. 40 of the Assessment Act (R.S.O. 1914, ch. 195) governs the construction of the first part of the sub-section which was enacted in 1904. This proviso merely determined a minimum amount for the assessment on the income from each oil or gas well operated at any time during the year, but, in my opinion, did not make it obligatory to consider each productive gas or oil well as a separate entity the income of which should be separately assessed. Whether it should be so considered is a question to be determined according to the circumstances of each case.

The appeal should be dismissed with costs.

Appeal dismissed.

REX ex rel KANE v. HAWORTH.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

1. PEDLERS (§ I—1)—HAWKERS AND PEDLERS ACT (SASK.)—CARRYING SPECIMENS OF WORK—MEANING OF ACT AS AMENDED.

A salesman who carries specimens of work done for the purpose of making a sale by such specimen is a hawker or pedler within the meaning of the Hawkers and Pedlers Act, 2 Geo. V. 1912 (Sask.) ch. 37, as amended by the Act of 10 Geo. V., 1919-20, ch. 54. [*Goad* v. *Nelson* (1919), 50 D.L.R. 61, 13 S.L.R. 72, referred to.]

Statement.

CASE stated by a magistrate as to whether the accused is a hawker and pedler under the Hawkers and Pedlers Act, 2 Geo. V., 1912 (Sask.), ch. 37, as amended by 10 Geo. V., 1919-20, ch. 54.

J. F. Frame, K.C., for appellant; *H. E. Sampson*, K.C., for the Attorney-General.

Haultain, C.J.S.

HAULTAIN, C.J.S., would affirm the conviction.

Newlands, J.A.

NEWLANDS, J.A.:—This is a case stated by a magistrate, and the question submitted is, whether the accused is a hawker and pedler under the Hawkers and Pedlers Act, 2 Geo. V., 1912 (Sask.), ch. 37.

The accused, who represented the Dominion Art Company, Ltd., a company incorporated under the laws of the Dominion of Canada, with its head office at Toronto, was soliciting orders for enlarging photographs, and he called at the home of Elias Traves and exhibited a painting to him. Traves gave the accused two photographs and signed the following contract:

Dominion Art. Company, Ltd., P.O. Milestone, Sask.
Toronto, Canada. Date April 29, 1920.

You will please make for undersigned from the photographs delivered to your agent this day one finely finished painting and deliver the same to me on or about June 5, 1920.

The price of the painting is $35.00 (It is understood that this order
Advertising allowance 20.00 cannot be countermanded.)
(Verbal agreements not recognised.)
Leaving a balance due of $15.00

which I agree to pay upon delivery. The above price does not include frames or glass.

This order is given you upon the further condition that your company will deliver the paintings so ordered in suitable frames which the undersigned is entitled to accept upon payment of a reasonable price, if the frames are satisfactory. In the event the undersigned does not accept the frames and pay for same, they are to be delivered forthwith to your company's delivery-man.

I am to receive one additional painting at no additional costs.

Received by H. A. HAWORTH, ELIAS TRAVES,
Advertising Salesman. Customer.

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REX EX REL KANE v. HAWORTH.

Newlands, J.A.

Since the decision in *Goad* v. *Nelson* (1919), 50 D.L.R. 61, 13 S.L.R. 72, the definition of a hawker and pedler has been amended, 10 Geo. V., 1919-20, ch. 54, to include persons carrying and exposing specimens of work done for the purpose of sale by such specimen, and notwithstanding that the sale includes an agreement to use artistic or mechanical skill in the production of the goods, wares and merchandise to be delivered. I think that the finished picture the accused carried with him and exposed was a specimen, and that he comes under the Hawkers and Pedlers Act if the above mentioned agreement is a contract for the sale of goods.

In *Goad* v. *Nelson*, *supra*, Haultain, C.J., held that such a sale was a sale of goods. One of the authorities he relied upon was *Lee* v. *Griffin* (1861), 121 E.R. 716, 1 B. & S. 272. In that case all the Judges agreed that the contract to make a set of artificial teeth was a contract for the sale of goods, wares or merchandise. Crompton, J., said, at page 275:

> The distinction between the two causes of action (*i.e.*, for work and labour or goods sold and delivered), is sometimes very fine; but, where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods.

And Hill, J., said, at page 276:

> Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labour.

And Blackburn, J., said, at page 277:

> If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but, if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered.

And they all agreed that the value of the skill and labour as compared to that of the material supplied was no criterion by which to decide whether the contract was for work and labour or for the sale of a chattel. Upon this point Blackburn, J., said, at page 278:

> For if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.

Now in this case the Dominion Art Company, Ltd., could not have sued for work and labour. Under their contract they

could only recover when they delivered the chattel to the purchaser. It is therefore, under the above decision, a contract for the sale of goods. The fact that the chattel in question is of no value to anyone else excepting the purchaser makes no difference, as a set of false teeth made to fit the mouth of the purchaser would certainly be useless to any one else, but still a contract to make and deliver same was held to be a contract for the sale of a chattel.

Newlands, J.A.

As the accused comes under the definition of a hawker and pedler, he must take out a license under the Hawkers and Pedlers Act. He did not have such a license, but excused himself from taking out one upon the ground that the Dominion Art Company, Ltd., his employer, had applied for a license and had been refused. I think under this Act the license is a personal matter. A company cannot go from house to house, only an individual, and it is the person who goes from house to house that requires the license.

I am therefore of the opinion that the questions submitted should be answered: that the accused is a hawker and pedler and should have taken out a license, and the conviction should, therefore, be confirmed.

LAMONT, J.A.:—I would affirm the conviction.

Lamont, J.A.

ELWOOD, J.A.:—This case, as stated by the Justice of the Peace, is as follows:

Elwood, J.A.

On April 29, 1920, John Kane, a police constable of the Provincial Police of Milestone, Sask., laid an information before me charging H. A. Haworth, of Winnipeg, Man., that the said H. A. Haworth on April 29, 1920, at Milestone in the Province of Saskatchewan, did unlawfully follow the calling of hawker and pedlar without having obtained a license therefor from the Provincial Secretary, contrary to the provisions of sec. 2 of ch. 37 of 2 Geo. V., 1912 (Sask.), as amended by ch. 54 of 10 Geo. V., 1919-20.

On April 30, 1920, the said H. A. Haworth appeared before me in answer to a summons served upon him, and the accused was remanded.

On May 3, 1920, the said H. A. Haworth appeared again before me and pleaded "Not Guilty" to the charge contained in the information.

On the evidence adduced I find the following facts:

(A) On April 29, 1920, the accused called at the home of Elias Traves in Milestone and shewed to him a painting and asked him to draw from some envelopes. Traves drew an envelope containing a coupon of which the following is a copy:

DOUBLE CERTIFICATE.

For Advertising Purposes this Certificate will be accepted as a

Re-Groups extra	TWENTY DOLLAR $20.	Re-Groups extra

payment on one of our New $35 Tritone Convex Paintings and one $35 Tritone Painting as a Reward.

DOMINION ART COMPANY Ltd.

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C. A.

REX EX REL KANE v. HAWORTH.

Elwood, J.A.

He then gave the accused two photographs to be enlarged and signed a contract in the following terms:

Dominion Art Company, Ltd., P.O. Milestone, Sask.
Toronto, Canada. April 29, 1920.

You will please make for the undersigned from the photograph delivered to your agent this day one finely finished painting and deliver the same to me on or about June 5, 1920.

The price of the painting is $35.00 (It is understood that this order
Advertising allowance 20.00 cannot be countermanded.)
(Verbal agreements not recognized.)
Leaving a balance due of $15.00

which I agree to pay upon delivery. The above price does not include frame or glass.

This order is given to you upon the further condition that your company will deliver the paintings so ordered in suitable frames which the undersigned is entitled to accept upon payment of a reasonable price, if the frames are satisfactory. In the event the undersigned does not accept the frames and pay for same, they are to be delivered forthwith to your company's delivery-man.

I am to receive one additional painting at no additional cost.

Received by H. A. HAWORTH, ELIAS TRAVES,
Advertising Salesman. Customer.

(B) On April 28, 1920, the accused called at the home of Mrs. John Kane in Milestone and exhibited a painting and allowed her to draw from a number of envelopes, and she drew one which contained a coupon similar to that set out in the next preceding paragraph. Mrs. Kane then gave the accused a photograph of herself and one of her boy and signed a contract similar to that signed by Elias Traves.

(C) On April 29, 1920, Constable Kane went to the hotel in Milestone and accosted the accused who was in the hotel along with three other solicitors for the Dominion Art Company, Ltd. The accused stated that he was soliciting orders for enlarging photographs; that he had not a provincial license and thought that he did not require one.

(D) Neither of the persons who gave the accused orders is a dealer in pictures by wholesale or retail.

(E) The Dominion Art Company, Ltd., is a corporation incorporated under the laws of the Dominion of Canada with head office at the City of Toronto in the Province of Ontario, and the following among other powers are contained in the letters patent of the said Company:—

(a) To manufacture, produce, buy, sell and deal in all kinds of drawings, prints, paintings and other pictorials, reproductions and representations and picture frames and all other articles of merchandise and generally to carry on the business of art dealers;

(c) To purchase, lease or otherwise acquire and to hold, exercise and enjoy all or any of the property, franchise, good-will, rights, powers and privileges held or enjoyed by any person or firm or by any company or companies carrying on or formed for carrying on any business similar in whole or in part to that which this company is authorized to carry on either in its own name or in the name of any such person, firm or company, and to pay for such property franchises, good-will, rights, powers and privileges wholly or partly

in cash, or notwithstanding the provisions of sec. 44 of the said Act, wholly or partly in paid up shares of the Company or otherwise and to undertake the liabilities of such person, firm or company.

(e) To carry on any other business (whether manufacturing or otherwise) which may seem to the company capable of being conveniently carried on in connection with its business or objects or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights.

(f) To apply for, purchase or otherwise acquire any patents, grants, copyrights, trade marks, trade names, licenses, concessions and the like conferring any exclusive or non-exclusive or limited right to use or any secret or other information as to any invention which may seem capable of being used for any of the purposes of the Company, or the acquisition of which may seem calculated directly or indirectly to benefit the Company, and to use, sell, assign, lease or grant licenses in respect of or otherwise turn to account the property, rights, interest or information so acquired.

(k) To procure the Company to be licensed, registered or otherwise recognized in any foreign country and to designate persons therein as attorneys or representatives of the company with power to represent the company in all matters according to the laws of such foreign country and to accept service for and on behalf of the company of any process or suit.

(n) To do all such other things as are incidental or conducive to the attainment of the above objects.

(o) To do all or any of the above things in Canada or elsewhere and as principals, agents or attorneys.

(p) The above objects, powers and purposes of the company shall be deemed to be several and not dependent on each other, and the company may pursue or carry on any one or more of such objects, powers or purposes without regard to the others of them, and no clause shall be limited in its generality or otherwise construed having regard to any other clause of such objects, powers or purposes.

(q) The business or purpose of the company is from time to time to do any one or more of the acts and things herein set forth and it may conduct its business in any Province or Territory of the Dominion of Canada and in foreign countries and may have one office or more than one office and keep the books of the company in any place in which the company may do business although outside the Dominion of Canada except as otherwise provided by law.

(F) The said company employs solicitors to take orders for making enlarged portraits from photographs and has at times twenty-five of such solicitors working in the Province of Saskatchewan. When the order is taken it is forwarded to the office of the Dominion Art Company in Toronto, Ontario, and from the photograph a painting is made by artists employed there by the company. The portrait consists of a painting on cardboard. The cardboard is valued at a few cents, and the finished painting at $35. The paintings, two in number in the present instances, are afterwards delivered to the customer by one of the company's deliverymen, in frames which may be accepted or rejected by the customer, the price of which ranges from $10 to $17, with an average price midway between.

(G) About the last part of February, 1920, the company's sales manager tendered $100 to the Provincial Secretary for Saskatchewan for a provincial

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license under the Hawkers and Pedlers' Act, but not thereby admitting that the company was subject to the provisions of the said Act. The Provincial Secretary refused to issue a license to the said company stating that individual licenses were required for its solicitors.

(H) The company has no place of business or establishment in Saskatchewan and is not registered under the provisions of the Saskatchewan Companies Act, 6 Geo. V., 1915, ch. 14.

The questions submitted for the opinion of the Court are:

(a) Whether the contract herein was a contract for the sale of goods, wares or merchandise, or the employment of an artist.

(b) Whether the picture carried by the accused is not a picture of another person designed to shew artistic skill of the artists and not a sample of goods or a pattern or specimen of work done.

(c) Whether the accused is a hawker and pedler within the meaning of the Act, seeing that the act of painting is the essential portion of the contract.

(d) Whether the accused is a hawker and pedler within the meaning of the Act, seeing that the subject matter of the contract is a family relic only and not an article of commerce.

(e) Whether the accused is not absolved from the necessity of taking out a provincial license under the Hawkers and Pedlers Act by the fact that his employer the Dominion Art Company, Ltd., tendered the necessary sum of money for a license for the company, which tender and which license were refused by the Provincial Secretary's Department at Regina.

(f) Whether the Act, in so far as it purports to place a tax upon persons residing in another Province and making contracts within Saskatchewan where the material and labour are all outside the Province, is not *ultra vires* as being an indirect tax and a restraint on interprovincial commerce.

(g) Whether the Act does not also contravene the power of the Dominion to incorporate companies—

(a) To do business in Saskatchewan;

(b) To carry on interprovincial trade.

(h) Whether the Act does not also contravene the power of the Dominion to regulate trade and commerce and the provisions in the British North America Act which provides for free admission in each Province of all articles of growth, produce or manufacture of any other Province.

It seems to me convenient to consider questions (a), (b), (c) and (d) together. Section 1 of the Act to amend an Act respecting Hawkers and Pedlers, 10 Geo. V., 1919-20, ch. 54, is, in part, as follows:

"Hawker" or "pedler" means a person who . . . carries and exposes for sale specimens of work done for purposes of sale by such . . . specimen . . . and upon the understanding that such goods, wares or merchandise will afterwards be delivered in the Province to any person who is not a wholesale or retail dealer therein . . . notwithstanding that the sale includes an agreement . . . to use artistic or mechanical skill in the production of the goods, wares or merchandise to be delivered.

It will be noted in paragraph (a) of the finding of facts, the Justice states that the appellant shewed a painting. He does

not state that it was work done by the appellant or the firm that he represented or for purposes of sale by such painting. No question in that respect was raised on the argument before us, and I think therefore, and particularly in view of the questions submitted to us, that I should assume that the painting in question is one which had been done by the company that the accused represented, and was shewn for the purpose of shewing the kind of work that the company was in the habit of turning out. If I am correct in so assuming, it seems to me that the painting so shewn comes within the words "specimen of work done," and that it was so shewn for the purpose of inducing a sale of the painting ordered to be delivered.

I am also of the opinion that the transaction which took place between the appellant and the persons with whom he dealt, constituted "sales of goods, wares or merchandise."

It will be noted that the section of the Act (sec. 1), as it now stands, has the following words; "notwithstanding that the sale includes . . . an agreement to use artistic or mechanical skill in the production of the goods, wares or merchandise to be delivered." The words I have just quoted were not in the Act when the case of *Goad* v. *Nelson*, 50 D.L.R. 61, 13 S.L.R. 72, was decided by us on December 3, 1919. These words, in my opinion, make the case against the appellant much stronger than was the case in *Goad* v. *Nelson*, and I am of opinion that the Act as it now stands covers a transaction such as the appellant in this case was engaged in. I therefore come to the conclusion that the appellant was a hawker and pedler within the provisions of the Act.

It was objected for the appellant that he was not acting on his own behalf, but merely for the company that he was representing, and that, if anybody should take out a license, it should be the company and not he, and that as he was merely a servant of the company he was not liable. In support of this proposition the case of *Williamson* v. *Norris*, [1899] 1 Q.B. 7, 68 L.J. (Q.B.) 31, was cited. In that case a servant of the House of Commons, while serving at a bar within the precincts of the House, sold intoxicating liquor to a person who was not a Member of the House contrary to sec. 3 of the Licensing Act, 1872.

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It was held that the servant was not liable, that he was not the person to be licensed. Lord Russell of Killowen, C.J., in 68 L.J. (Q.B.) at page 33, is reported as follows:

> Now, it is impossible not to see that in order to bring the innocent act of a waiter or barman within the section it is necessary to alter or at least to put a very strong gloss on those words. As I read them, it is clear that the Legislature was contemplating a sale by a person who ought himself to be licensed. The words used are "his license," but of course neither a barman nor a waiter holds a license, and therefore, as it seems to me, the person struck at is the principal, for whom the sale is effected and who receives the payment . . . It may well be that a sale by any person establishes a *primâ facie* case, and casts on that person the burden of shewing that he was merely an innocent servant; but when once that appears, there can be no offence by him against the Act. He is of course a party to the sale if he is knowingly accessory to it, and he would then be liable under sec. 5 of the Summary Jurisdiction Act, 1848, as a principal.

The difference between the case of *Williamson* v. *Norris, supra*, and the case at bar, as I view this case, is, that in the case at bar the Legislature was contemplating the licensing of the person who goes about hawking and pedling, and not his principal, and that the person who goes about hawking and pedling is the person who ought himself to be licensed. I do not think that the Act ever contemplated that a company, by taking out a license in its own name, could flood the Province with any number of employees without taking a license out in the names of those employees. In any event, the company, although it applied for a license, did not procure one, and not having procured a license it could not act as hawker or pedler. If it were entitled to take out a license, it might take steps to compel the granting of one; but until the license had actually been granted, if it were liable to take out a license it would be liable to the penalties prescribed by the Act.

Furthermore, the appellant cannot be said to be an innocent servant, as was the case in *Williamson* v. *Norris, supra*, because the stated case shews that the appellant well knew that no license had been taken out, but claimed that he did not require a license. In other words, he went ahead with his eyes wide open.

It was further urged that by the Interpretation Act, R.S.S. 1909, ch. 1, "person" includes "corporation," unless the context shews the contrary intention.

Without expressing any decided opinion as to whether the context shews a contrary intention, it is only necessary to say that

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the Interpretation Act, while it may include corporation does not exclude the appellant, or the person actually employed in hawking and pedling.

So far as the last three questions are concerned, the answers given to similar questions by Haultain, C.J.S., in the case of *Goad* v. *Nelson*, 50 D.L.R. 61, 13 S.L.R. 72, apply with equal force to these three questions; and I concur in the answers so given by the Chief Justice.

In my opinion, therefore, the conviction should be affirmed.

Conviction affirmed.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J. K.B.D., and White, J. June 2, 1920.

1. LEVY AND SEIZURE (§ III B—45)—SEIZURE OF WRONG GOODS—PARTY DIRECTING OFFICER—LIABILITY—PRINCIPAL AND AGENT.

If a party or his attorney in any way intervenes, directs or takes part in the acts of an officer under an execution, then the party so intervening, directing or taking part constitutes the officer his agent, for the purposes of that act, and is responsible for all matters ensuing as a result of the action of the officer.

Statement.

MOTION by defendant Sprague to have verdict entered against him, before Chandler, J., without a jury, set aside. Motion dismissed.

H. L. Smith, and *J. B. M. Baxter*, K.C., for defendant.

J. F. H. Teed, for plaintiffs.

The judgment of the Court was delivered by

Hazen, C.J.

HAZEN, C.J.:—This action was tried before Chandler, J., without a jury, and he ordered that a verdict be entered for the plaintiffs, Lida B. Robinson, Evelyn Robinson, Garda A. Robinson and Treva Robinson, against the defendant William A. Sprague, for the sum of $241 damages, with costs to be taxed, and directed that the costs should not include any costs incurred or caused by the joining of Bessie R. Graves and John L. Peck as parties to the action.

In the appellant's factum only one ground of appeal is taken, *viz.*, that the Judge was in error in holding the defendant Sprague responsible for the action of the constable under process issued out of the Justice's Court. The facts of the case as stated in the appellant's factum are as follows:—The action was brought practically against the defendant Sprague for breach of an agree-

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ment whereby it was alleged that he undertook, with the plaintiff Bessie R. Graves, to cut and make the hay on certain marsh land in the Parish of Harvey, in the County of Albert, formerly owned by the late Elijah H. Robinson, for the sum of $4 an acre. The plaintiffs allege that the defendant did not cut all the hay on the marsh as agreed, and that the hay he did cut was not properly made, and was injured by delay in cutting and making, and by wet weather, and claim as damages for the alleged breach of agreement the sum of $310. The trial Judge found in favour of the defendant on this ground, and no appeal is taken from his judgment thereon.

The other cause of action was for the value of 18 tons of hay converted by defendant Sprague to his own use, at $12 per ton, $216, and for damages for trespass to real estate, breaking open a barn, etc., $25.

It appeared from the evidence that in connection with the cutting and making of the hay mentioned in the first cause of action above stated, Bessie R. Graves, one of the plaintiffs, paid the defendant Sprague $92, and gave him a memorandum dated October 29, 1918, by which there was shewn to be due him $126.50. Mrs. Graves did not pay Sprague the balance of the amount which he claimed, $14.50, and he brought suit against her before a Justice of the Peace in the County of Albert and obtained judgment by default against her for $14.50 and costs, amounting in all to $18.60. An execution was issued on this judgment out of the Justice's Court, and under the execution a levy was made by a constable upon some of the hay which had been cut and made by Sprague and which was stored in a barn belonging to the Robinson property. The hay was sold by the constable, Sprague being present at the sale, for the sum of $22. The plaintiffs claim that the hay did not belong to Mrs. Graves, but was the property of the children of Elijah H. Robinson, the other plaintiffs in the action, and also claim that the entry on the land where the hay was stored was unauthorized, as it was the property of the said children.

The trial Judge found that the hay which was seized by the constable was the property of the other plaintiffs, the children of Elijah H. Robinson, and that the defendant Sprague had no right under the execution to cause the hay which was cut on their

property and stored in a barn on their property to be levied upon and sold, and found him liable in damages to those plaintiffs for the unauthorized act of seizing the hay and causing it to be taken away. He also found that the defendant Sprague was guilty in damages as trespasser for having unlawfully entered upon the land of the Robinson plaintiffs and entering their barn. He did not specifically say on what he based his finding with regard to the liability of Sprague for the value of the hay, and in his judgment he stated:—

I do not think the defendant Sprague had any right under the execution before mentioned to cause the hay which was cut on the property of the children of Elijah H. Robinson and stored in a barn on their property to be levied upon and sold, as was done. The hay was taken away after the sale, and I think the defendant Sprague is liable to answer in damages to the children of Elijah H. Robinson for this unauthorized act of seizing and causing to be taken away the hay belonging to them.

The sole question raised by the appellant on his appeal is as to whether or not there was in fact or in law conversion by the defendant William A. Sprague of the hay belonging to the Robinson plaintiffs. The question as to whether there was a trespass to their real estate or not is not raised by the appellant, no doubt because admittedly the defendant Sprague had gone upon the defendant's land with the constable, shewed him the hay which was seized and sold, and further went there on the day of the sale. With respect to conversion, the point involved is this—did the defendant Sprague personally take part in the seizure and sale of this hay under the execution? The authorities are clear that if a party or his attorney in any way intervenes, directs or takes part in the acts of an officer under an execution, then the party so intervening, directing or taking part constitutes the officer his agent for the purposes of that act, and is responsible for all matters ensuing as a result of the action of the officer. See Clerk and Lindsell on Torts, Can. ed., 1908, at page 198:—

Just as a party may make himself liable for what is done under process issued without jurisdiction by officiously intervening in its execution, so where the process is within the jurisdiction of the Court, if he takes on himself to give orders or directions to the officers entrusted with its execution and in consequence of those orders and directions a wrongful act is committed he will be liable since he will have made the officer his agent. . . . If the execution creditor positively affirm to the officer of the Court that a certain person is the man or that certain goods are the property of the man, . . . that amounts to an authority to the officer, and the creditor is answerable for the consequences of obeying his direction.

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Now in this case it appears from the evidence of the constable, Gough, that William Sprague and Squire Cannon employed him to seize some hay, and told him to go and levy on the hay that William Sprague put up, and sell it; that William Sprague went with him, told him what barn to go to, came down with him to the barn—"and Sprague went down and attended to the barn and said to levy on the hay in there." The defendant Sprague says he did not tell Gough to go and take the hay; that he told him that that was the hay that Mrs. Graves said was hers that he cut, and that she gave him her obligation to pay; that he was with Gough and went down and shewed him the hay but he did not know the barn or the hay he cut from anybody else's. It appears therefore that the defendant after delivering the execution to the constable took him down upon the land owned by the Robinson plaintiffs, shewed him the hay owned by the Robinson plaintiffs, and said that that was the property of Mrs. Graves, and in my opinion this constitutes a case of interference on the part of the defendant, and the respondent is answerable for the consequence of what the constable did in obeying his instructions. Reading all the evidence, I think it is clear that in levying on the hay that was the property of the Robinson children, the constable was acting under instructions received from the defendant Sprague. The trial Judge regarded Sprague's evidence as being unsatisfactory, and evidently attached little or no credence to it.

As stated before, the trial Judge did not specifically find as a fact that Sprague interfered with and directed the constable, but having found the defendant Sprague liable for the conversion, the Appellate Court will assume that he found the facts in favor of the respondent, and that judgment will not be disturbed if there is evidence to justify such finding. See *Johnson* v. *Jack* (1901), 35 N.B.R. 492. It is open to the Court in any event to draw inferences that might have been drawn by the trial Judge, and it is impossible to read the evidence in the case without coming to the conclusion that Sprague interfered in such a manner as to render himself liable for the action of the constable in improperly seizing the hay of the Robinson plaintiffs under an execution in a suit to which they were not parties, and there is ample evidence to support the Judge's finding as I understand it to have been, and it ought not, I think, to be disturbed.

There were also other considerations which may have influenced the trial Judge in coming to the conclusion which he did. It was contended on the trial on behalf of the plaintiff, and evidence was offered to shew, that the sale under the execution was not a *bonâ fide* sale to Owen Tippett, who bid in the hay for $22, and that Owen Tippett did not buy it in for himself, but on behalf of Sprague, and that Sprague subsequently converted it to his own use. Owen Tippett was the nominal purchaser at the sale, and for the 18 tons of hay the market value of which was fixed by the Judge at $12 per ton, he paid $22.50. Sprague denied that Tippett was acting as his agent, but admitted that his own son Arthur hauled much of the hay away, some of which was hauled to his, Sprague's barn, and that he did not buy it and never paid for it, and that Tippett got him to haul it. It was also contended that the judgment obtained by Sprague in the Magistrate's Court against Bessie R. Graves was not a valid judgment; that the plaintiff had desired that the action be tried by a jury according to the provisions of sec. 31 of Con. Stats. N.B., 1903, ch. 121, but the action was not tried or the damages assessed by a jury, but by the magistrate himself, and that the plaintiff had applied for a postponement, and the magistrate held that on the facts she was entitled to such, and yet improperly refused to allow it. These points were raised before the trial Judge and evidence given thereon, but in view of the decision I have come to, to the effect that the trial Judge was fully justified in ordering the verdict on the grounds heretofore stated, I do not consider it necessary to deal with them. *Motion dismissed.*

Re CROSSEN METAL WORKS, Ltd.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. August 5, 1920.

MORTGAGE (§ VI B—75)—SPECIAL CLAUSE AUTHORISING DISTRAINT—DEFAULT IN PAYMENT OF INTEREST—ACCELERATION OF PAYMENT OF PRINCIPAL BY MORTGAGEE—INTERPRETATION OF CLAUSE—RIGHTS OF PARTIES.

A mortgage contained a clause following a proper attornment clause as follows "and further that if I shall make default in payment of any part of the said principal or interest at any day or time hereinbefore limited for the payment thereof it shall and may be lawful for them and I do hereby grant full power and license to the mortgagee to enter, seize and distrain upon the said lands or any part thereof and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands as much of said principal and interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress as in like case of distress for rent."

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Held, *per* Perdue, C.J.M., and Cameron, J.A., that this clause was merely a device to obtain for the mortgagee further security, and assuming the legality of such a provision it should be very strictly construed, and that it did not refer to principal, the time for payment of which had been accelerated by the act of the mortgagee under an acceleration clause in the mortgage. That the mortgagee by his own act in accelerating the payment of principal could not create a new right of distress, and the mortgagee's right to distress was limited to the interest in arrear, and also that the clause came within the provisions of the Bills of Sale and Chattel Mortgage Act.

Held, *per* Fullerton and Dennistoun, JJ.A., that the clause should be given full effect, and that the mortgagee had a collateral license to distrain for arrears of interest and principal apart entirely from the existence of any tenancy, and that the clause did not fall within sec. 7 of the Bills of Exchange and Chattel Mortgage Act, R.S.M., 1913, ch. 17.

Statement.

APPEAL by a mortgagee from an order of Galt, J., confining the mortgagee's power of distress to interest in arrear under a mortgage. Affirmed by an equally divided Court.

J. B. Coyne, K.C., and *A. K. Dysart*, for appellant.

H. J. Symington, K.C., for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—The question involved in this appeal arises in the winding-up of the above named company under the Winding-up Act, R.S.C. 1906, ch. 144, and amendments. The Winnipeg Steel Granary and Culvert Company, Ltd. (incorporated under the Manitoba Companies Act, R.S.M. 1913, ch. 35), on March 1, 1919, mortgaged its premises situated in St. Boniface, Man., to William J. Crossen to secure a loan of $50,000, payable on January 11, 1924, with interest at 6% per annum payable yearly on January 11. In April, 1919, the name of the company was changed by an order-in-council to "Crossen Metal Works, Ltd." On January 11, 1920, an instalment of interest to the amount of $3,000 fell due and was not paid. On March 6, the mortgagee gave notice to the mortgagor that, because of default in payment of the interest, he declared the whole amount of principal due under the acceleration provision in the mortgage. Payment not being made the mortgagee distrained under the clauses in the mortgage for $53,000 and his bailiff took an inventory of the goods and chattels. A petition was filed to wind up the company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, and a winding-up order was made. On April 27, 1920, the plaintiff turned over the goods distrained to the liquidator in compliance with an order made by the Master of the Court, which order provided that such delivery should be without prejudice to the rights, powers, etc. of the mortgagee. A case was

stated upon an agreed statement of facts to ascertain the rights of the mortgagee. The Master made an order upholding the right of the mortgagee to distrain for the full amount of the principal and interest secured by the mortgage. On appeal Galt, J., confined the mortgagee's power of distress to the interest in arrear. From this last order the appeal is brought.

The statement of facts is fully set out by Galt, J., in the written reasons for his decision.

The mortgagee bases his right to distrain upon two clauses in the mortgage. They are as follows:

> And for the purpose of better securing the punctual payment of the interest on the said principal sum, I, the mortgagor, do hereby attorn tenant to the mortgagee for the said lands, at a yearly rental equivalent to the annual interest secured hereby, to be paid yearly on January 11, the legal relation of landlord and tenant being hereby constituted between the mortgagee and me, the mortgagor.
>
> And further, that if I shall make default in payment of any part of the said principal or interest at any day or time hereinbefore limited for the payment thereof it shall and may be lawful for them, and I do hereby grant full power and license to the mortgagee to enter, seize and distrain upon the said lands or any part thereof and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands as much of said principal and interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress as in like case of distress for rent.

Under the first of the above clauses the legal relationship of landlord and tenant is actually created between the mortgagee and the mortgagor. The rent reserved is the same as the interest on the mortgage. It is fair and reasonable and is payable at stated times. The agreement therefore is valid. *Trust & Loan* v. *Lawrason* (1881), 6 A.R. (Ont.) 286, 295, 296; affirmed (1882), 10 Can. S.C.R. 679; *In re Stockton Iron Furnace Co.* (1879), 10 Ch.D. 335.

The second of the above clauses does not attempt to create the relationship of landlord and tenant between the parties. That had already been done by the first clause. The second clause is inconsistent with the actual attornment clause and merely aims at conferring a license to distrain for a debt.

The second clause purports to give the mortgagee power to "enter, seize and distrain upon the said lands" and "to recover by way of rent reserved" as much of the principal and interest as shall be in arrear. This provision is quite inconsistent with

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the first clause. The first clause created a real tenancy. The second is merely a device to obtain for the mortgagee further security by enabling him to seize the chattels of the mortgagor. Assuming the legality of such a provision as between the mortgagee and the mortgagor, the strictest construction must be applied to an agreement so drastic and oppressive in its nature. The clause confers the right of distress only in case of "default in payment of any part of the said principal or interest *at any day or time hereinbefore limited for the payment thereof*," and is limited to the amount of principal and interest "as shall from time to time be and remain in arrear and unpaid" at any day or time so mentioned. It does not, as I construe it, refer to principal, the time for the payment of which has been accelerated by the act of the mortgagee under the option contained in the subsequent clause set out in the statement of facts. The acceleration clause forms no part of the license to distrain. If the mortgagee by his own act or declaration should accelerate the payment of principal he would be creating for himself a new right of distress different from that conferred by the clause.

In *Hobbs* v. *The Ontario Loan and Debenture Co.* (1890), 18 Can. S.C.R. 483, a mortgage of real estate to secure $20,000 was payable with interest at 7% per annum, instalments of $500 each being paid each 6 months and $15,500 at the end of 5 years. It contained a provision that the mortgagees leased the lands to the mortgagor from the date of the mortgage until the last payment of the moneys secured, the mortgagor paying such rent or sum in each year as equalled in amount the amount payable on the days appointed in the proviso for redemption. The goods of the mortgagor having been seized under an execution the mortgagee claimed payment of a year's rent under the Statute of Anne. An interpleader issue was directed. It was held by the majority of the Supreme Court that the relationship of landlord and tenant had not been created between the parties so as to give the mortgagee a right to distrain as against an execution creditor of the mortgagor. Strong, J., in giving judgment, said (18 Can. S.C.R. at pp. 492-493):

> It is well settled by authority that it is competent for the parties to a mortgage of real property to agree that in addition to their principal relation as mortgagor and mortgagee they shall also as regards the mortgaged lands

stand towards each other in the relation of landlord and tenant, the mortgagor thus remaining in possession as tenant of the mortgagee. It is, however, essential to the validity of such an arrangement that it should be so carried out as to comply with the requirements of the law prescribed for the creation of leases, and further that it should appear that it was really the intention of the parties to create a tenancy at the rental (if any) which may be reserved and not merely under colour and pretence of a lease to give the mortgagee additional security not incidental to his character of mortgagee.

The same eminent Judge (Strong, J.), said at p. 502:

It is, however, laid down in several cases lately decided by the English Court of Appeal, that, however binding these claims may be between the actual parties, it is open to third persons affected by their enforcement to impeach them in cases in which it may appear from the evidence that they were not intended to create a real tenancy, but were designed merely as a cloak for an additional security to the mortgagee.

He cites *Ex parte Williams* (1877), 7 Ch.D. 138; *In re Stockton Iron Co.* (1879), 10 Ch.D. 335; *Ex parte Jackson* (1880), 14 Ch.D. 725; *In re Threlfall* (1880), 16 Ch.D. 274; *Ex parte Voisey* (1882), 21 Ch.D. 442; as establishing the above principle. He expressed the opinion that the validity of a clause like the one in question may be attacked not only by assignees in bankruptcy but by other parties whose rights are affected by it.

It was strongly argued by Mr. Coyne that the liquidator is in no better position than the company itself to object to the action of the mortgagee. From the very meagre statement of facts agreed upon it appears that the mortgagor in this case is a trading corporation incorporated under the Companies Act of this Province, R.S.M. 1913, ch. 35. I take it that the winding-up order was granted on the ground of insolvency. The machinery provided by the Act is therefore to be applied to the administration and winding-up of the estate of an insolvent corporation. It has been held in *Shoolbred* v. *Clarke* (1890), 17 Can. S.C.R. 265, at p. 274, that, "in its compulsory operation upon incorporated companies the Winding-up Act is an insolvency law." I think this should be borne in mind in considering the provisions of the Act.

In *Re Canadian Shipbuilding Co.* (1912), 6 D.L.R. 174, 26 O.L.R. 564, it was held by Riddell, J., that a liquidator of a company, not being a creditor or a purchaser for valuable consideration, could not take advantage of the provisions of the Bills of Sale and Chattel Mortgage Act. That case was followed in

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Alberta by the Appellate Division in the case of *Security Trust Co., Ltd.* v. *Stewart* (1918), 39 D.L.R. 518, 12 Alta. L.R. 420 (Harvey, C.J. dissenting), the Court holding that a liquidator has not the right, on behalf of the creditors of the company, to attack a chattel mortgage made by the company on the ground of statutory defects. In the decision of these cases much turned upon the meaning of the word "creditors" in the Bills of Sale and Chattel Mortgage Act. The meaning to be given to the word "creditors" as used in that Act has been greatly extended by the recent judgment of the Supreme Court of Canada in *G.T.P. Ry. Co.* v. *Dearborn* (1919), 47 D.L.R. 27, 58 Can. S.C.R. 315. It is there held that the word "creditors" as used in the Act means all creditors of the mortgagor and not merely execution creditors, over-ruling *Parkes* v. *St. George* (1884), 10 A.R. (Ont.) 496, and other cases following that decision.

The same question was considered by Street, J., giving the judgment of the Divisional Court in *Re Canadian Camera Co.* (1901), 2 O.L.R. 677. He said at page 679:

> It is necessary to bear in mind the position in which a liquidator stands in a compulsory winding-up, *viz.*, that, while in no sense an assignee for value of the company, yet he stands for the creditors of the company, and is entitled to enforce their rights, because their right to prosecute actions themselves against the company and to recover their claims directly out of the property of the company is taken away by the Winding-up Act.

This case was followed by Teetzel, J., in *National Trust Co.* v. *Trusts and Guarantee Co.* (1912), 5 D.L.R. 459, 26 O.L.R. 279, a case decided two months prior to the decision in *Re Canadian Shipbuilding Co., supra*, but not referred to in the latter. In giving judgment Teetzel, J., said at page 468:

> The question of the right of the defendant as liquidator to contest the plaintiff's claim under the mortgage, and to hold the proceeds of the chattel property for the benefit of the creditors, has given me much trouble; but I have arrived at the conclusion that the defendant has that right. . . .
>
> Under sec. 33 of the Winding-up Act, the liquidator, upon his appointment, "shall take into his custody or under his control, all the property, effects and choses in action to which the company is, or appears to be entitled." Having done this, further general duties are, as stated in Palmer's Company Law, 9th ed., page 395, "to make out the requisite lists of contributories and of creditors, to have disputed cases adjudicated upon, to realise the assets, and to apply the proceeds in payment of the company's debts and liabilities, in due course of administration, and, having done that, to divide any surplus amongst the contributories, and to adjust their rights.

The same Judge cited with approval the paragraph above quoted from the judgment in *Re Canadian Camera Co.* (2 O.L.R. 677 at page 679), and went on to say, 5 D.L.R. at 469:

> Being therefore from the beginning, *primâ facie* lawfully in possession of the property in question, as an officer of the Court, and being charged with the duty of applying the proceeds in payment of the company's creditors in due course of administration, I hold that the defendant is entitled, in right of the creditors represented by it as liquidator, to contest in this action the validity of the plaintiff's mortgage.

Under sec. 34 of the Act the liquidator may, with the approval of the Court:

> (a) bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in his own name as liquidator or in the name of the company, as the case may be.

Riddell, J., in *Re Canadian Shipbuilding Co.*, 6 D.L.R. 174, 26 O.L.R. 564, placed reliance upon a dictum made use of by Lord Cairns in *In re Duckworth* (1867), 2 Ch. App. 578, which he cites as follows at p. 179: "The liquidator represents the creditors . . . but only because he represents the company." The actual words used by Lord Cairns are stated in the report, 2 Ch. App. at page 580, as follows:

> I do not forget Mr. Bayley's observation that the liquidator represents the creditors. No doubt he does, but only because he represents the company, and through the company the rights of the creditors are to be enforced.

The *Duckworth* case was one of set-off between the liquidator of a limited company and the trustees of a bankrupt contributory. It was held that under the bankruptcy enactments which governed the case, set-off applied. The dictum does not appear to me to be of importance in the consideration of the present case. *In re Duckworth, supra,* and *Waterhouse* v. *Jamieson* (1870) L.R. 2 H.L. Sc. 29 at page 38, where it was referred to, were both cases arising between the liquidator and a contributory. It was not a case of a third party setting up a claim to assets of the insolvent company under an agreement which operated as a preference over other creditors, if not as a fraud upon them.

In *Kent* v. *Communauté des Soeurs, etc.* [1903] A.C. 221, Lord Davey dealing with a case under the Canadian Winding-up Act said at page 226:

> The office of the liquidator has in fact a double aspect. On the one hand he wields the powers of the company, and on the other hand he is the representative for some purposes of the creditors and contributories. There are therefore many cases in which he may sue in his own name, as, *e.g.*, to impeach some act or deed of the company before the winding-up which is made voidable in the interests of the creditors and contributories.

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The device by which the mortgagee in the present case was given a power to distrain on default in payment of the interest, not only for the interest, but for the whole amount of principal, might, under the authority of the *Hobbs* case, 18 Can. S.C.R. 483, have been successfully attacked by creditors of the company on obtaining judgment and execution. It could also have been set aside by an assignee for the benefit of creditors, or, perhaps, in an action brought on behalf of all the creditors. The extended meaning to be given to the word "creditors" under *G.T.P.* v. *Dearborn*, *supra*, gives support to the suggestion last expressed. But the winding-up proceedings tied the hands of the creditors in taking any action against the company. The right to bring an action or legal proceeding passed to the liquidator (sec. 34 (a)). It was his duty to take into his custody or control all the property, effects and choses in action to which the company was or appeared to be entitled (sec. 33). If he found, as he did find, the mortgagee in possession of the company's property under the pretended right given by the clause in question, it was the duty of the liquidator to take steps to recover that property for the purposes of the winding up. In my opinion the Act enabled him to do so.

I have already pointed out that on a strict construction of the second clause set out in the statement of facts, the distress for the whole principal sum of $50,000 was unauthorised, because the time for payment of the principal fixed in the earlier portion of the mortgage had not arrived and the acceleration clause formed no part of the contract giving the power of distress. If this view is correct the company itself could object to the distress, and there could then be no question as to the right of the liquidator to contest the rights of the mortgagee.

There remains the question whether the license or power to distrain for principal and interest comes within the provisions of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1913, ch. 17.

In *Stevenson* v. *Rice* (1874), 24 U.C.C.P. 245, Hagarty, C.J., said at page 250:

> A covenant for a right to take possession of chattels on a prescribed default or contingency, etc., may be defeated as against creditors, if the Bills of Sale Act be not complied with.

I cannot find any later authority upon the question. In England a license to distrain is brought within the operation of

the Bills of Sale Act by special enactment: See 41-42 Vict. 1878, ch. 31. But it must be noted that the form of the English Bills of Sale Act differs from that of ours. The English Act has a clause declaring what a bill of sale includes. It is under that clause that the Act is made to apply to a license to distrain. In this Province we have no similar provision but a wide interpretation must be given to the words in sec. 5 of our Act: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels." Section 7 of the Act declares that a covenant, promise or agreement to make, execute or give a mortgage or conveyance intended to operate as a mortgage of goods and chattels, "in whatever words the same may be expressed shall be deemed to be a mortgage or conveyance within the meaning of the Act." This shews that the intention of the parties is the element that governs in deciding whether the instrument is a mortgage or not: See Barron & O'Brien on Chattel Mortgages and Bills of Sale, 2nd ed., pp. 7-9.

The clause in question in this case says in effect:

> If the mortgagor makes default in payment of principal or interest at any of the dates appointed for payment, the mortgagee may enter on the land before described and seize all distrainable goods found there and sell them and apply the money on the debt, the mortgagee in so doing to follow the proceedings of a landlord distraining for rent.

The intention of this agreement was, without doubt, to extend the security of the mortgage to the goods of the company on the mortgaged lands. It appears to me that this is a conveyance intended to operate as a mortgage of chattels or an agreement to give the equivalent of such a security, and that it comes within the provisions of the Bills of Sale and Chattel Mortgage Act.

I would dismiss the appeal with costs.

CAMERON, J.A., concurred with FULLERTON, J.A. Cameron, J.A.

FULLERTON, J.A.:—This appeal raises a difficult and at the same time a very important question for the opinion of the Court. The appellant Crossen loaned the respondent $50,000 on the security of a mortgage. The mortgage contained an acceleration clause. It also contained the following clauses: (see judgment of Perdue, C.J.M.) Fullerton, J.A.

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Default having been made in the payment of interest the appellant declared the whole amount of the principal and interest due and distrained the goods and chattels of the respondent on the premises for the full amount of principal and interest.

No dispute arises with regard to the first clause. It is conceded by both parties that it creates a valid tenancy at a yearly rental of $3,000.

The difficulty arises regarding the second clause.

Counsel for the respondent argues that both clauses must be read together and so reading them the result is an attempt to reserve a rental far in excess of the value of the property and thus the case is brought within that line of cases which hold that where the rent reserved is unreasonable, the validity of the lease may be attacked by third parties interested.

My view is that the first clause is complete in every particular. In so many words it constitutes the relation of landlord and tenant between the mortgagee and the mortgagor, and fixes the amount of the yearly rental.

The second clause does not purport to create the relation of landlord and tenant between the parties. It grants to the mortgagee in the event of default:

> full power and license . . . to enter, seize and distrain upon the said lands or any part thereof and by distress warrant to recover by way of rent reserved *as in the case of a demise of said lands* so much of said principal and interest as shall from time to time be or remain in arrear and unpaid together with all costs, charges and expenses attending such levy or distress *as in like case of distress for rent.*

The words: "As in the case of a demise of said lands" and "as in like case of distress for rent" shew clearly that the clause was not intended to create the relation of landlord and tenant which had in fact been created by the previous clause. This clause gives a collateral license to distrain for arrears of interest and principal apart entirely from the existence of any tenancy.

The words of the clause shew clearly that the distress is not to be for rent but for principal and interest to be recovered in the same way as rent.

It is said that this clause is unconscionable and should not be given effect to. It, however, is part of the contract between the parties and cannot be disregarded. The appellant was making

a large advance to the respondent and was entitled to secure himself by any legal provision in the contract however stringent.

Respondent raised the further contention that the instrument in question here is a Bill of Sale within the definition in the Bills of Sale and Chattel Mortgage Act, R.S.M. 1913, ch. 17.

Section 7 of that Act is as follows:—

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7. Every covenant, promise or agreement entered into to make, execute or give a mortgage or conveyance intended to operate as a mortgage of goods and chattels, in whatever words the same may be expressed, shall be deemed to be a mortgage or conveyance within the meaning of this Act, and, unless accompanied by an immediate delivery and an actual and continued change of possession of the goods and chattels mortgaged, shall be registered within the time and in the manner prescribed in the next preceding section, together with affidavits of *bona fides* and execution, otherwise such covenant, promise or agreement shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for good or valuable consideration.

I do not think that the clause in question falls within the meaning of the above quoted section. It is not a covenant either to make, execute or give a mortgage or conveyance. As I have already pointed out it is merely a license, on the happening of certain events, to enter and distrain.

A further question was discussed on the argument as to the right of the liquidator to take advantage of a defect in the mortgage. In the view that I take of the disputed clause it is unnecessary to discuss the point.

I would allow the appeal with costs and restore the order of the Master.

Dennistoun, J.A.

DENNISTOUN, J.A., concurred with Perdue, C.J.M.

Appeal dismissed, the Court being equally divided.

CURLEY v. BRIGGS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

BILLS AND NOTES (§ VI A—152)—BILLS OF EXCHANGE ACT—DEATH OF MAKER OF PROMISSORY NOTE—PRESENTMENT FOR PAYMENT—ACTION AGAINST ADMINISTRATOR.

The effect of sec. 167 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, is that from the date that the bank receives notice of the death of the drawer of a cheque, presentment for payment is dispensed with because nothing can be gained by such presentment, the bank's authority to pay the cheque being terminated by notice of the death and an action brought against the administrator for the amount due should be framed as for money advanced to the deceased, the right of the payee being subject to the conditions under which the payee received the cheque.

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APPEAL by plaintiff from the trial judgment in an action against the administrator of the estate of the deceased maker of a cheque.

P. G. Hodges, for appellant; *P. H. Gordon*, for respondent.

HAULTAIN, C.J.S.:—This action while, on the pleadings, an action on the cheques in question, was really fought out on the broader issue of the liability of the estate of Charles Briggs for the debt shewn to be represented by the cheques. Technically, the action was improperly framed. The statute (Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 167), if it is not a revocation in the strict sense of the word, brings about a similar result by making the "duty and authority" of the bank to pay a cheque cease on notice of the drawer's death. This leaves the right of the payee against the drawer's estate subject to the conditions under which the payee received the cheque. Where a cheque has been given in payment of a debt but payment of the cheque has been stopped, the debt and the position of the parties are left the same as if the cheque had never been given. *Cohen* v. *Hale* (1878), 3 Q.B.D. 371; *Elliott* v. *Crutchley*, [1903] 2 K.B. 476.

It is a most unfortunate thing that counsel for the plaintiff did not make the amendment suggested by the trial Judge. At the same time, on the evidence given and in view of the findings of fact of the trial Judge, I think that we should make such amendments as are necessary to decide the real question at issue between the parties as it was fully fought out at the trial, that there may be an end to this litigation. That question was not whether the cheques were given or presented for payment or dishonoured, but whether the money represented by them was *bonâ fide* lent to Briggs by the plaintiff, apart from any gambling transaction. I do not think that the defendant should have a new trial on account of the amendments being made. The question of gambling was fully gone into at the trial, and no evidence was offered for the defence.

The appeal should be allowed but without costs.

Judgment should be entered for the plaintiff for the amount of his claim and costs. As defendant recovered judgment below on his counterclaim, with costs, he should be allowed to set off the amount of that judgment, including costs, and his costs of this appeal.

NEWLANDS, J.A. (dissenting):—The plaintiff sued Charles Briggs, administrator of the estate of Thomas A. Drury, deceased, on five cheques given to him by Drury in his lifetime. Since the action was brought Briggs has died, and the respondents are administering his estate.

Newlands, J.A.

The defence to the action was, that the cheques were given in payment of a gambling debt. On this issue the trial Judge found for the plaintiff, and he stated:

> If there had been proof of the presentation of these cheques for payment I would have given judgment to the plaintiff on the claim, but there was no proof of such presentation,

and he gave judgment for defendant.

The plaintiff alleged presentment for payment and notice of dishonour. Both are denied by defendant.

Both presentment for payment and notice of dishonour are necessary allegations in plaintiff's statement of claim. Bullen & Leake, Precedents of Pleadings, 7th ed., page 94.

Frühauf v. *Grosvenor & Co.* (1892), 61 L.J. (Q.B.) 717. In this case, which was an action on a cheque by the holder against the drawer, Lord Coleridge, C.J., at 718, held that the statement on a specially endorsed writ was not complete without an allegation of a notice of dishonour, or of facts dispensing with it, and the Court approved of the order of the Master refusing leave to enter judgment thereon.

The same was held in *May* v. *Chidley*, [1894] 1 Q.B. 451, and *Roberts* v. *Plant*, [1895] 1 Q.B. 597.

If it is necessary to allege these particulars in the statement of claim, it is necessary to prove them when denied by defendant. As Wills, J., said in *May* v. *Chidley*, *supra*, at page 453, "a defendant in an action on a dishonoured cheque is not indebted unless notice of dishonour has been given."

I would, therefore, dismiss the appeal with costs.

Lamont, J.A.

LAMONT, J.A., concurred with HAULTAIN, C.J.S.

Elwood, J.A.

ELWOOD, J.A.:—This is an action brought against Charles Briggs, administrator of the estate of Thomas A. Drury, deceased, for five cheques given by Drury in his lifetime.

The defences raised upon this appeal are: (a) that the cheques were given in payment of a gambling debt, and (b) that there was no evidence of presentment for payment or dishonour.

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Elwood, J.A.

So far as the first defence is concerned, the trial Judge found, in effect, that the cheques were not given in payment of a gambling debt; and as to the second defence he says:—

If there had been proof of the presentation of these cheques for payment, I would have given judgment for the plaintiff on the claim, but there was no proof of such presentation, and although I find that he would be entitled on the evidence for money advanced to the deceased Drury he did not see fit to ask for an amendment to his pleadings and this in the face of the fact that I postponed giving judgment in order to give him an opportunity to do so.

The trial Judge then dismissed the claim, and allowed the counterclaim of defendant's.

So far as the first defence is concerned, that in my opinion is disposed of by the finding of the trial Judge that the cheques were not given for a gambling debt.

So far as the second defence is concerned, sec. 107 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, is, in part, as follows:—

Notice of dishonour is dispensed with as regards the drawer where— . . . (d) the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill; (e) the drawer has countermanded payment.

Section 167 of the Bills of Exchange Act in part is as follows:—

The duty and authority of a bank to pay a cheque drawn on it by its customer are determined by,— . . . (b) notice of the customer's death.

Section 166 of the Act is in part as follows:—

Subject to the provisions of this Act—

(a) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment, as between him and the bank, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such bank to a larger amount than he would have been had such cheque been paid.

The action in this case was brought after the death of the drawer of the cheques, and, therefore, at the time of the bringing of the action the duty and authority of the bank to pay the cheques was determined.

In *In re Bethell, Bethell* v. *Bethell* (1887), 34 Ch. D. 561, it was held that countermand of payment of a cheque excuses presentment, and that the Statute of Limitations begins to run at once from the date of the countermand.

I am of the opinion that the effect of sec. 167 is, that from the date of the death of the drawer of the cheque, or at any rate from the date that the bank would receive notice of the death, presentment for payment would be dispensed with, because nothing

could be gained by such presentment. Notice of the death, in effect, countermands the right of the bank to pay the cheque. Notice of dishonour is also dispensed with under sec. 107, because from the notice of the death the bank is, as between itself and the drawer, under no obligation to pay the cheque; in fact, it is not only under no obligation, but its authority to pay the cheque is determined.

If I am correct in the conclusions I have reached above, then it was not necessary in this case for the plaintiff to allege either presentment or notice of dishonour. It may be urged, however, that there should be at least some facts alleged which would dispense with the necessity for presentment or notice of dishonour.

I am of the opinion that sufficient facts are contained within the four corners of the statement of claim. The action is brought against the administrator of the estate of Thomas A. Drury, deceased, and it is alleged that the said Thomas A. Drury in his lifetime drew the various cheques sued upon. This seems to me to be a sufficient allegation of the death of the drawer of the cheques before the commencement of the action. The allegations in the statement of claim as to presentment and notice of dishonour may, in my opinion, be dispensed with as mere surplusage. The holder of the cheques would have the right to present them for payment at any time up until the Bank had received notice of the death of the maker, and the right of the holder to recover on the cheques would be subject, so far as this action is concerned, only to the provisions of sec. 166 of the Act above referred to. Under that, in part quoted section, I am of the opinion that the onus would be on the defendant to shew actual damage through the delay in presentment. No allegation was made and no proof of any damage was given consequent upon any delay in presentment.

In my opinion, therefore, the defence must fail. I would allow this appeal with costs, and judgment should be entered for the plaintiff for the amount of the claim sued for with costs of action.

There was no appeal against the judgment of the trial Judge allowing the defendant's counterclaim, and his judgment allowing that counterclaim and the costs in connection therewith should not be disturbed. One judgment should be set off against the other, and the one in whose favour the balance is should have the right to execution. *Appeal allowed.*

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REX v. MAH HONG HING et al.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. June 17, 1920.

TRIAL (§ I H—39)—CANADA EVIDENCE ACT—COMMENT BY JUDGE ON FAILURE OF ACCUSED TO GIVE EVIDENCE—NEW TRIAL.

Under sec. 4 (5) of the Canada Evidence Act, R.S.C. 1906, ch. 145, the presiding Judge in a criminal trial is prohibited from commenting upon the failure of an accused person to give evidence at the preliminary hearing, or at any time before the trial. Such comment is error in law for which a new trial will be granted.

[*Rex* v. *Maxwell* (1909), 73 J.P. 176, distinguished.]

Statement. CASE STATED by the trial Judge in a criminal trial, on a charge of wounding with intent to do grievous bodily harm.

F. Higgins, K.C., for appellant; *A. Leighton*, for the Crown.

Macdonald, C.J.A. MACDONALD, C.J.A.:—The accused were tried before Gregory, J., at the Nanaimo Assizes, on a charge of wounding with intent to do grievous bodily harm. The Judge deferred sentence and stated a case for the opinion of the Court of Appeal. The question submitted is: "Was I in error in my instruction to the jury as to the prisoners failing to disclose their defence before the trial?"

The instructions referred to are somewhat lengthy and I shall not set them out in full. It appears that the prisoners gave evidence at the trial on their own behalf and swore to an alibi. They had given no indication beforehand that that would be their defence. The Judge, *inter alia*, said in his instructions to the jury,

> that they tell this story of where they were for the first time here in this Court and I think it my duty to point out to you that when they did that they laid themselves open to a suggestion that they did it for a purpose.

The Judge read from Crankshaw's Criminal Code of Canada, 1915, 4th ed., at page 274, these words:—

> Where the accused, charged with murder, goes into the witness box on his own behalf and then and there for the first time makes known his claim that he was a mere eye-witness of the murder, the trial Judge may properly direct the jury that they may draw inferences from the prisoner's previous silence on the matter of such claim and consider whether the facts in evidence shew the motive for such silence to be founded on a consciousness of innocence or . . . to be a design founded on a knowledge of guilt.

This statement from Crankshaw is founded on *Rex* v. *Higgins* (1902), 7 Can. Cr. Cas. 68. The Judge continuing his instructions referred to *Rex* v. *McNair* (1909), 2 Cr. App. Rep. 2, and *Rex* v. *Maxwell* (1909), 73 J.P. 176, and quoted from the judgment in the latter case: "The jury were entitled to consider adversely to appellant his reticence in the Police Court and the fact that he reserved his defence."

He then goes on to say that to "reserve until the trial the story of where you were, keeps and prevents the Crown from investigating your story."

The fact is stated to be that the prisoners gave no evidence at the preliminary hearing in the Police Court. It is also stated as a fact that at the trial "the defence also called witnesses and the prisoners themselves to prove an alibi on behalf of the prisoners."

It was argued that it was error in law to instruct the jury that they might draw inferences unfavourable to the prisoners from the fact that they had made no statements with regard to their defence of alibi until they entered the witness box. It was also argued that the instructions aforesaid amounted to comment prohibited by sec. 4, sub-sec. 5, of the Canada Evidence Act, R.S.C. 1906, ch. 145, which reads as follows:—

> The failure of the person charged or of the wife or husband of such person to testify shall not be made the subject of comment by the Judge or by counsel for the prosecution.

Now, there is not in direct terms in the instructions aforesaid, a comment upon the failure of the accused to give evidence at the preliminary hearing in the Police Court. Apart from the quotation from *Rex* v. *Maxwell*, *supra*, the instruction might amount to no more than that in *Rex* v. *Higgins*, *supra*, which was held insufficient to justify the setting aside of the conviction, but on this phase of the case I do not propose now to express an opinion, since I have come to a conclusion on the other branch of the argument rendering it unnecessary to do so.

The reference by the Judge to the withholding of the defence until the accused entered the witness box at the trial, standing alone and without the quotation above referred to from *Rex* v. *Maxwell*, *supra*, might perhaps be considered as no infringement of the section quoted above, but when coupled with the reference to the Police Court contained in the quotation, the jury's mind would naturally be directed to the fact that the prisoners had not thought fit to give evidence in the Police Court and withheld their defence and they might well conclude that it was because of this that unfavourable inferences against them might be drawn. The section of the Evidence Act aforesaid is wide and general in its terms. Its meaning, I think, is not to be restricted to comment on an accused's failure to give evidence in the particular trial

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or inquiry in which the comment is made. It seems to me that the Judge is prohibited from commenting upon the failure of an accused person to give evidence at the preliminary hearing, as well as his failure to give evidence at the trial and if I am right in this construction of the section, and if my construction of what the Judge said to the jury is the true one, then it follows that the question submitted to us must be answered in the affirmative, and the conviction set aside and a new trial ordered.

With great respect, I think the Judge failed to note the distinction between *Rex* v. *Maxwell*, *supra*, and this case. Under the English Evidence Act, 1898, there is no prohibition against the Judge commenting upon an accused person's failure to give evidence on his own behalf, it is the Crown prosecutor who is so prohibited; but the most vital distinction between the two cases is this, that the Lord Chief Justice was not discussing the correctness of the instructions to the jury, but was referring simply to the silence of the accused in the Police Court and the reservation of his defence as a circumstance influencing the mind of the Appellate Court against granting him an indulgence which he was asking, namely, the lightening of the sentence because of the suggestion that his crime was induced by a desire to shield his brother. The case therefore has no application to a case like this, and the language quoted to the jury separated from its context was calculated to convey a wrong impression.

The evidence taken at the trial is included in the case stated by being attached thereto. We have on several occasions condemned this practice. It sometimes happens—*e.g.*, when the question of law submitted is as to the sufficiency of the evidence to make out a case for conviction—that the evidence must be included in the case, but such cases are comparatively rare. Where, as here, no such question is involved; the inclusion of the evidence in the reference to this Court puts the parties to a needless expense and as well incumbers the record with irrelevant matter. This Court has no duty in respect of the evidence. We must accept the facts as stated by the Judge below and decide the question of law with reference to those facts alone.

It is a matter of growing astonishment to me, that after so many warnings counsel continues a practice so senseless and costly. For example in this case, the cost of preparation of the

appeal books alone has for no purpose at all been increased by something over $300, a fact which borders on the scandalous.

MARTIN, J.A., and GALLIHER, J.A., agree in quashing the conviction.

McPHILLIPS, J.A.:—This is a stated case from Gregory, J., the question submitted is: "Was I in error in my instructions to the jury as to the prisoners failing to disclose their defence before the trial?"

With great respect to the Judge—this, in my opinion, was error in law. It is fundamental that in all proceedings under the Canadian Criminal Code no comment upon the fact that the person charged failed to give evidence at any time when evidence could have been given is permissible. The Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4, sub-sec. 5, reads:—

> The failure of the person charged or of the wife or husband of such person to testify shall not be made the subject of comment by the Judge or by counsel for the prosecution.

The trial Judge would appear to have thought that he had support for the right to comment—in view of decisions in England upon the point. (See *Rex* v. *McNair* (1909), 2 Cr. App. Rep. 2, —*Rex* v. *Maxwell* (1909), 73 J.P. 176), but the statute law is different in England—there the provision is:

> The failure of any person charged with an offence or of the wife or husband, as the case may be, of the person so charged to give evidence, shall not be made the subject of any comment by the prosecution. (See Archbold's Criminal Pleading, Evidence and Practice, 25th ed., 1918, page 445).

And we find it stated in Archbold's Practice, also at page 445:—

> Though counsel may not comment on failure by the defendant to give evidence the Judge may comment if in his discretion he thinks it proper to do so. *R.* v. *Rhodes*, [1889] 1 Q.B. 77, 83; and *Kops* v. *Regina*, [1894] A.C. 650. . . . The fact that the defendant did not give evidence before the justices may be matter for unfavourable comment. *R.* v. *Humphries* (1903), 67 J.P. 396. And the jury are entitled to draw inferences unfavourable to the defendant where he is not called to establish an innocent explanation of facts proved by the prosecution, which without such explanation tell for his guilt. *R.* v. *Corrie* (1904), 68 J.P. 294; *R.* v. *Bernard* (1908), 1 Cr. App. Rep. 218.

It is only necessary to refer to the procedure at the preliminary enquiry, sec. 684, sub-sec. 2, of the Criminal Code, to see that the accused is in effect invited to say nothing—yet if the comment which has occurred in the present case is permissible—it means

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that the accused is led into a trap. (See Tremeear, at pages 311 and App. page 1500. See *King* v. *Romano* (1915), 21 D.L.R. 195, 24 Can. Cr. Cas. 30.)

In my opinion, with great respect to the trial Judge, substantial wrong and miscarriage was occasioned at the trial by the comment made on the accused failing to disclose their defence before the trial—it was error in law and tended to prejudice the jury. (*Allen* v. *The King* (1911), 44 Can. S.C.R. 331.) It may be reasonably said that the observations of the trial Judge might have had the effect of producing in the minds of the jury the conclusion that the prisoners were guilty because of the delay in disclosure of their defence, *i.e.*, if innocent, the defence would have been immediately made known. This would be substantial wrong and the comment cannot be approved. It is fundamental, as I have already said, that there should be no comment of this nature—the spirit and intention of the Parliament of Canada is clear and whatever may be the decisions of other Courts based upon different statute law, the criminal jurisprudence of Canada does not admit of such comment.

In my opinion there has been a mistrial, and I would direct a new trial, the conviction to be quashed.

Conviction quashed.

N. S.
C. D.

CHAISSON v. CHAISSON

Nova Scotia Court for Divorce and Matrimonial Causes, Ritchie, E.J. August 14, 1920.

DOMICIL (§ I—1)—FOR PURPOSE OF INSTITUTING SUIT FOR DIVORCE.

In Nova Scotia, although it is a general principle of law that the husband's domicil is also that of his wife, she does not forfeit the rights she has, to assert against him when he is acting in violation of his marriage duties, and for the purpose of instituting a suit for divorce the wife may have a separate domicil from that of her husband.

[*Stevens* v. *Fisk* (1885), Cam. S.C. Cas. 392, at pages 426, 435, followed See also note at end of this case.]

Statement.

PETITION of January 19, 1920, for divorce *a vinculo* on the grounds of cruelty and adultery. Decree absolute for divorce.

John J. Power, K.C., for petitioner.

R. H. Murray, K.C., King's Proctor, contra.

Ritchie, E. J.

RITCHIE, E.J.:—The petitioner, being the wife, and the respondent her husband, were natives of Prince Edward Island and were

lawfully married there in September 26, 1911, the issue of the marriage being three children. After the marriage they resided in Prince Edward Island and in Boston, in the United States of America, in which places acts of adultery and cruelty relied on were committed. They both latterly returned to Prince Edward Island, where, after further acts of cruelty by the respondent, the spouses finally separated, the husband going to New Brunswick (where he was served in January, 1920, personally with the citation and petition) and the wife coming for the first time to Nova Scotia in July, 1919, where she since resided with the intention as she swore of making it her permanent domicil in order to more effectually support her three children, who had been placed by her in an educational establishment in the Province of Prince Edward Island. The husband had never been in the Province of Nova Scotia, and did not appear to or answer the petition which was undefended and the evidence in corroboration was supplied by the affidavits of parties in the Province of Prince Edward Island and in Boston. There is a Divorce Court in the Province of Prince Edward Island established by 5 Will. IV., ch. 10, and presided over by the Lieutenant-Governor-in-Council, who may depute the Chief Justice of the Supreme Court to act in its place, but the jurisdiction of that tribunal is effete, mainly on account of apprehended legal difficulties arising since that Province entered Confederation in 1873 as to whether or not the powers given by the Act are exercisable by the Governor-General-in-Council under sec. 12 of the B.N.A. Act, 1867, or by the Lieutenant-Governor-in-Council under sec. 129 of the same Act.

The wife is the petitioner and the grounds set up for the divorce are cruelty and adultery. The parties were married on September 26, 1911. As to the adultery, I have no doubt that this respondent committed adultery, but the evidence comes from the petitioner and there is no coroboration. I, therefore, cannot grant a divorce on this ground. As to the cruelty there is corroboration, and I find that the treatment of the petitioner by the respondent amounts to legal cruelty. On this ground the divorce will be granted. The petitioner is entitled to her costs and the custody of the children of the marriage. I had grave doubts on the question of the petitioner's domicil and I cannot say that I am now entirely

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free from doubt on this point; however, I follow the decision of the late Gwynne, J., in the case of *Stevens* v. *Fisk* (1885), Cam. S.C.Cas. 392, at pages 426, 435, and hold that under the circumstances of this case the petitioner has acquired a domicil here sufficient to give jurisdiction in a suit for divorce.

Decree absolute for divorce.

NOTE.—A very recent interesting case in which the Law of Domicil is generally very thoroughly discussed is that of *Lord Advocate* v. *Jaffrey* (1920), 36 T.L.R. 820, decided July 16. In this case a Scotsman married to a Scotswoman left Scotland for Australia at the instance of his wife and ceased to communicate with her. In Queensland he went through the form of marriage with another woman and lived with her for 16 years until her death, and he acquired a domicil in Queensland.

On the death of his wife in her husband's lifetime the Commissioners of Inland Revenue, for the purpose of establishing the liability of the wife's estate to legacy duty, claimed that her domicil was in Scotland. The House of Lords, composed of Lord Haldane, Lord Finlay, Lord Cane, Lord Dunedin, and Lord Shaw of Dunfermline, held that the general rule that the domicil of the wife was that of her husband applied, and that her domicil was in Queensland. In the absence of a decree for divorce or judicial separation, conduct by the husband which would have enabled the wife to obtain such a decree, if she had applied for it, could not, after her death, be sufficient to establish that she had a domicil of her own different from that of her husband. *Dolphin* v. *Robins* (1859), 7 H.L.C. 390, 11 E.R. 156; *Le Sueur* v. *Le Sueur* (1876), 1 P.D. 139; *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, and other leading cases discussed.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. July 6, 1920.

GIFT (§ I—4)—OF LAND—POSSESSION AND IMPROVEMENTS BY DONEE—BELIEF OF OWNERSHIP—DONOR ALLOWING IMPROVEMENTS TO BE MADE—INTENTION, RIGHTS AND LIABILITIES.

An unconditional gift of land, followed by possession and improvements on the land pursuant to the gift, and in the belief that the donee is the owner of the land, the donor standing by and allowing such improvements to be made, is binding although verbal, and the donee has a right to call on the donor to complete the imperfect gift.

[*Dillwyn* v. *Llewelyn* (1862), 4 De.G.F. & J. 517, at 521, 45 E.R. 1285, followed.]

Statement.

APPEAL by defendants from the trial judgment in an action for a declaration that the plaintiff is entitled to the occupation and possession of certain land and to be registered as the owner thereof. Affirmed.

A. McLeod Sinclair, K.C., and *A. L. Brockington*, for plaintiff.

A. A. McGillivray, K.C., and *J. W. Crawford*, for defendants.

Harvey, C.J.

HARVEY, C.J.:—I agree with my brother Beck that this appeal should be dismissed with costs on the grounds stated by him that the findings of the jury have sufficient evidence to support

them and that they justify a judgment for the plaintiff on the ground of gift.

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Where the situation differs in respect to the two quarters, in my opinion the jury was warranted on the evidence in finding a gift of the second homestead, the title to which was only acquired by the father in 1903.

To my mind it is all a question of intention and there being evidence of the father's expressed intention the jury could infer from his conduct a continuance of that intention so as to make effective at any time that he became the owner the intention long before expressed. Such being the case I see no ground upon which the jury's verdict in respect of the quarter constituting the second homestead can be set aside any more than in respect of the other quarter.

Stuart, J.

STUART, J.:—My view is that this appeal should be allowed with respect to the south-west quarter.

I agree that there was sufficient evidence to justify the jury in finding that there had been an oral gift by the mother to the plaintiff of the original homestead, and for the reasons given by Beck, J., I agree that the plaintiff is entitled to a decree vesting the title to that quarter in him.

But with regard to the south-west quarter, I think the situation is very different. At the time of the alleged gift the registered title to the homestead stood in the name of the mother but the title to the south-west quarter stood in the name of the Crown, and the father had only what was then known as a right of pre-emption, that is a right to purchase from the Crown. This right was cancelled at some time not definitely fixed in the evidence, but it must, at latest, have been in or before 1900, because the father secured his patent in 1903 to the quarter under a second homestead entry, the duties in connection with which included a residence on land in the neighborhood for 6 months in each of 3 years. If there ever was a gift to the son by mother or father of the south-west quarter it was surely subject to the duty of the son to protect the pre-emption right by payment, which apparently he did not do. Then the father, at least by 1900, made his entry on the land as a second homestead and this involved residence on land owned by the entrant in the neighbourhood (the Dominion Lands Act, R.S.C., 1906, ch. 55, sec. 132) or on his first homestead (sec. 130).

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It may be true that a gift of that to which the grantor has no title or a defective title will be held valid as against him when he does acquire title but I doubt very much whether that rule ought to be applied where the obligation lies upon the grantee to do that which is necessary to complete the title and he does not do so, with the consequence that even the defective title has lapsed, and the grantor subsequently acquires title on a different basis and *aliunde* on his own account.

No doubt the evidence shews that the son performed part of the homestead duties, with respect to the second homestead, which consisted in doing certain work on the land; probably breaking either 15 or 30 acres was the work required. But the father had to perform the residence duties at any rate.

These considerations make it necessary to examine very carefully the evidence, both of the alleged oral gift by the father and of the improvements by the son, which would make it inequitable to refuse to enforce the imperfect gift.

Now the son's evidence as to the gift was an account of a conversation between himself and his mother at which his father was present. He said reference was first made to the "mortgage on the *place*." The mortgage was, of course, only on the north-west quarter for which patent had issued. The witness, Hood, who told of the mother speaking of "the place" being Sam's, said that the mother had said that she had offered Sam "a deed of the place," The only deed she offered, or could offer, was for the north-west quarter. The plaintiff could not recall any words spoken by the father but merely stated that "he agreed." There was no evidence of admissions to outside parties by the father as there was of an admission by the mother. The statement of the plaintiff's wife was only that the father had said once that he had done well by Sam or words to that effect.

In these circumstances, where there must necessarily have been two gifts, one by the mother of what belonged to her (though she held it as a mere gift from her husband, a circumstance which would naturally make his assent desirable) and another by the father of what belonged to him, I think the evidence was altogether too meagre to go to the jury in regard to the latter gift. True, the father had given a transfer to the mother, not only of the original homestead but of the pre-emption, which latter,

of course, could not be registered. But the matter must be looked upon as either one gift or two. If it was one gift then it was by the mother and she herself held the south-west quarter merely by an imperfect gift which she, at any rate, never had any equitable right to ask the Court to specificially perform as against her husband.

There was altogether too much reason for believing that the gift by the mother was of the homestead alone, to make it possible for a jury reasonably to infer from a vague reference as to his having agreed, that the father was making a gift of the south-west quarter separately. And upon the facts, I think proof of a gift of that quarter by him was necessary to the plaintiff's case.

I cannot, moreover, discover in the evidence anything to shew that the son had done anything so serious in the way of improvements on the south-west quarter that it would be inequitable to refuse to perform in his favour the imperfect gift, even assuming one to have been proven. He undoubtedly got a great deal more advantage from the use of the place than would compensate him for value of the improvements he made. The plaintiff said "the other (*i.e.*, the south-west quarter) is a bit rough and is mostly useful for pasture."

There remains the question of 12 years undisturbed possession. No doubt if the title had been a single one the possession of and residence on the north-west quarter might be held to enure to the benefit of the plaintiff in respect of the whole of the half section. But when he is held to have possessed the north-west quarter in his own right by a gift now to be recognized and enforced by the Court and both the legal and the equitable title to the south-west quarter remained in the father and that father lived with the son during practically the whole of the 12-year period except the first year from 1903 to 1904, I do not think there was sufficient evidence of such a continued possession inconsistent with the father's title for the 12 years as would destroy the father's right.

I would, therefore, allow the appeal with costs and amend the judgment entered below by striking out the references to the south-west quarter and inserting a clause declaring that with respect to that quarter the action be dismissed.

This result would also, perhaps I may venture to say, be in consonance with what would appear to me to be the real justice of the whole case.

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BECK, J.:—This case was tried before Simmons, J., with a jury. The jury answered certain questions submitted to them and judgment was entered upon the jury's verdict declaring that the plaintiff is entitled to "the continued use, occupation and possession" of two contiguous quarter sections of land and that the plaintiff is entitled to become the registered owner thereof and directing the Registrar of the proper Land Titles Office accordingly.

The defendants appeal from the verdict of the jury and the judgment.

The plaintiff, who is a son of the two defendants (his father and mother), bases his claim (1) upon a gift and (2) upon title gained by 12 years' continuous possession in accordance with the English Statute of Limitations, the Real Property Limitation Act, 37-38 Vict., 1874, ch. 57, introduced as part of the law of the North-West Territories by Ordinance which became ch. 31 of Cons. Ords. of 1898.

The jury found among other things that the plaintiff was in uninterrupted possession of the lands for 12 years subsequent to 1896 to the exclusion of the defendants; that the defendants made a gift to the plaintiff of the lands and that the gift was unconditional; that the plaintiff entered into possession and made improvements on the land pursuant to the gift; that the defendants stood by and allowed the plaintiff to make improvements on the land, having reasonable ground for knowing that the plaintiff made the improvements believing that he was the owner or would become the owner of the land through some act of the defendants; that the value of the improvements made by the plaintiff since 1896 up to the commencement of the action was—on the north-west quarter $6,000 and on the south-west quarter $330; that a fair rental value of the land from December, 1896, until the commencement of the action was—north-west quarter $100 per year, south-west quarter $50 per year.

The defendant, James Brogden, came to Alberta in 1883. About September, 1883, he made a homestead entry for the north-west quarter section. At the same time he entered for the south-west quarter section as a pre-emption. He fulfilled his homestead duties on the former and obtained patent therefor in 1893. His entry for the pre-emption was cancelled on the

application of one Duke but it was eventually restored to him, apparently as a second homestead: when—does not appear. In May, 1893, the father executed a transfer of both quarters to the mother. As the title to the pre-emption still stood in the Crown—the transfer was in fact registered—at that time—only as to the north-west quarter. A patent for the south-west quarter was issued to James Brogden in May, 1903. The two quarter sections appear to have been used as a single farm, probably from the date of the original entries.

There is ample evidence upon which the jury could reasonably find a gift to the plaintiff by his mother and also by his father so far as that was needed.

Evidence of plaintiff—a gift had been mentioned.

Q. How did you come to go on there? A. The gift had been made and I went on and took possession and went to work and put in the crop in the spring (of 1897). Q. Because of this gift? A. Because of this gift—yes. . . . Q. Now go back to the year 1896, will you tell us what transpired that year, that concerns you in connection with these lands? A. This land in question was given to me. Q. Was given to you by whom? A. By my mother and my father assented to it. . . . Q. Then in that same year 1896 you say a gift was made to you? A. Yes. Q. Of the half section in question here? A. Yes. Q. By your father and mother? A. Yes. Q. Now tell under what circumstances and in what words that gift of this half section was made? A. There was a mortgage on the place at the time and my mother said that my father was going to pay the mortgage off and they were giving me the place and I was to go back on it. Q. What did your father say? A. He agreed to it.

He then explains that this took place in the home in Calgary where his father and mother had been living since 1892; that this conversation took place in December, 1896.

Q. Will you just tell us exactly, as near as you can, of course I do not expect you to remember the exact words now but as near as you can what words were used by the persons who made the gift to you? A. When I went in the house that morning my mother told me that my father was going to pay the mortgage off the place. Q. Yes? A. And that they were giving it to me and I was to go back on it and live. Q. That was all that was said, was it? A. Yes.

He then explains that at this time his father intended to pay the Government for the south-west quarter as a pre-emption, impliedly saying that his right in this respect had at this time been restored to him and that this quarter was then held as a pre-emption.

There was furthermore considerable corroboration of the plaintiff's story, by the plaintiff's wife of statements by the

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father and the mother; by one Anderson, a close neighbour in 1909, who said that the plaintiff was evidently in exclusive control of the farm and that the mother had told him in 1911, and again in 1914, that they had given the farm to the plaintiff; by one Hood, who gave similar evidence.

Besides all this was the large amount of evidence of the continued possession, occupation and control by the plaintiff.

The mother had died before the trial. The father emphatically denied the gift; but the jury refused to believe him.

Then the question is raised as to the legal effectiveness of the gift.

But the authorities are clear in favour of the binding character of even a merely verbal gift of land under such circumstances as exist in the present case. Counsel for the plaintiff referred amongst others to the following: *Dillwyn* v. *Llewelyn* (1862), 4 DeG. F. & J. 517, at 521, 45 E.R. 1285, where Lord Chancellor Westbury says:

> If A. puts B. in possession of a piece of land and tells him, "I give it to you that you may build a house on it," and B. on the strength of that promise with the knowledge of A. expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and to complete the imperfect donation which was made. The case is somewhat analogous to that of verbal agreement not binding originally for the want of the memorandum in writing signed by the party to be charged but which becomes binding by virtue of the subsequent part performance.

This proposition is affirmed in 15 Halsbury, page 430, tit. "Gifts" and the foregoing case cited. *Dillwyn* v. *Llewelyn*, *supra*, is cited with approval by Sir Arthur Hobhouse giving the judgment of the Privy Council in the case of *Plimmer* v. *Wellington* (1884), 9 App. Cas. 699, where he also quotes with approval the words of Lord Kingsdown in *Ramsden* v. *Dyson* (1866), L.R. 1 H.L. 129, at page 170.

> If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him lays out money upon the land a Court of Equity will compel the landlord to give effect to such promise or expectation.

My brother Judges hesitate, I believe, to express an opinion upon the second ground of the plaintiff's claim, namely: title by possession; and in the view I have taken it is clearly not necessary

to deal with it; but without going into a discussion of that question, in which, doubtless, some limitations would have to be indicated in view of our land titles system, I venture to express my personal opinion, entertained for many years, that upon the title of the registered owner becoming "extinguished" by continuous possession for 12 years, as it does by virtue of the statutory limitation, the occupant is entitled to ask the Court, in the exercise of its ordinary jurisdiction, to declare his title, and upon a judgment to that effect, procure himself to be registered as the owner of the land.

I find this to be the expressed opinion of Holroyd, J., of the Supreme Court of Victoria, in *Re Allen* (1896), 22 V.L.R. 24, cited in Hogg's Registration of Title to Land throughout the Empire (1920 ed.), at pages 78 and 87, where also is cited *Tuckett* v. *Brice*, [1917] V.L.R. 36, in which at page 60 the opinion expressed in *Re Allen* is referred to with approval.

I would, therefore, dismiss the appeal with costs.

IVES, J., concurred with Stuart, J.

Ives, J.

Appeal dismissed.

REX v. KOZAK.

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Ontario Supreme Court, Middleton, J. April 16, 1920.

INTOXICATING LIQUORS (§ I—1)—RIGHT TO CARRY LIQUOR FROM QUEBEC TO PRIVATE RESIDENCE—RIGHT TO ACT AS OWN CARRIER.

Under the Ontario Temperance Act (sec. 43) a person may lawfully carry or convey liquor from Quebec to his private residence in Ontario and in doing so it is no offence for him to act as his own carrier.

APPEAL by defendant from a conviction by a Police Magistrate for an offence under the Ontario Temperance Act. Conviction quashed.

Statement.

The facts of the case are as follows:

THE defendant was charged before the Police Magistrate for the City of Windsor with an offence against sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

Evidence was taken before the Police Magistrate on the 17th February, 1920. The magistrate's notes of the testimony of the witnesses were as follows:—

Robert W. Blair, sworn, states (examined by Mr. Rodd for the prosecutor):—

"Myself and detective MacNab went to the Grand Trunk depot last Sunday evening around six o'clock. We noticed the

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accused got off the train with the two grips (produced). He laid the grips down and went to the lavatory. We went away and followed another man, followed him to the corner of Sandwich street and Ouellette avenue, looked in his grip but found noth ng but clothing in it, so we returned to the station, and the accused was still in the waiting room with the two grips. I told him we were officers and produced my badge. He did not seem to understand. I then asked him to let us look into the grips, and he said it wasn't any use, for there was liquor in them. We then placed him under arrest and brought him to the station."

Mr. W. D. Roach, coun el for the defence (on behalf of the accused), admitted that the suit-case contained liquor.

Blair, cross-examined:—

"When I first saw the accused he got off the train with the grips, went into the waiting room, laid the grips down and went into the lavatory. We then went to Sandwich and Ouellette streets, came back and found the accused with the grips under the seat. We were away about ten minutes. He admitted having whisky."

Duncan MacNab, sworn, states (examined by Mr. Rodd): "I corroborate the evidence of P.C. Blair."

Cross-examined: "I was there when officer Blair asked him what was in the grips and he said 'whisky.'"

Joe Kozak, the defendant, sworn:—

"Live at 111 Marion avenue, went to Montreal to see my friend go to the old country. He lived in Montreal and married my sister. I was there one week. Had received circulars before I went to Montreal. Man in store told me I could take it myself. Went in to buy some. I told them I lived in Windsor; the liquor is for myself."

The magistrate found the defendant guilty.

The conviction as drawn up, was as follows:—

"Be it remembered that on the 17th day of February, 1920, at the city of Windsor . . . Joe Kozak is convicted before the undersigned, Police Magistrate in and for the City of Windsor . . . for that he, the said Joe Kozak, at the said city of Windsor . . . on the 15th day of February instant, did unlawfully have in his possession liquor in a place other than a private dwelling house, contrary to the provisions of the Ontario Temper-

ance Act. . . . I adjudge the said Joe Kozak for his said offence to forfeit and pay the sum of $500, to be paid and applied according to law; and to pay R. F. Cade, sergeant of police, the complainant, the sum of $18.50 for his costs in this behalf. And if the said several sums be not paid on or before the 17th day of February, 1920, I adjudge the said Joe Kozak to be imprisoned in the Ontario Reformatory, in the Province of Ontario, Burwash, . . . and kept at hard labour for the space of six months, unless the said several sums and all costs and charges of conveying the said Joe Kozak to the said Ontario Reformatory shall be sooner paid."

The defendant moved to quash the conviction on the following grounds:—

(a) That there was uncontradicted and conclusive evidence that the liquor found in the possession of the defendant was lawfully in his possession.

(b) That the magistrate erred in his interpretation of sec. 41 of the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50.

(c) That the magistrate wrongfully rejected and refused to hear evidence as to the character of the defendant's residence, to which residence the defendant deposed that he was conveying the said liquor.

(d) And upon other grounds appearing on the face of the said proceedings and from the affidavits and papers filed.

In support of the application the affidavit of W. D. Roach was filed. It was as follows:—

1. That I am a practising solicitor at the city of Windsor . . . .

2. That on the 17th day of February, I appeared before Alfred Miers, Police Magistrate for the City of Windsor, as counsel for the above-named defendant.

3. When the defendant was giving evidence, in addition to stating that he lived at 111 Marion avenue, and that the liquor was for himself, he stated that he was bringing it to his private residence at 111 Marion avenue. The magistrate's notes of the evidence do not shew this evidence as having been given in this particular manner. Then I proceeded to inquire from the defendant as to the nature of his residence, intending thereby to establish that his residence was a private dwelling within the

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meaning of such phrase under the Ontario Temperance Act. The presiding magistrate refused to admit such evidence, stating as his reason therefor that it was irrelevant.

"4. When the defendant had given his evidence in chief, neither the prosecutor nor the magistrate asked him any questions, and the magistrate immediately convicted the defendant. I then asked the magistrate the reasons for his convicting the defendant, and he stated that his finding was that the defendant had the liquor in a place other than a private dwelling house. I contended that the defendant was simply acting as his own carrier —and I used those words—bringing liquor from a place outside of Ontario to a place where he could lawfully receive and keep the same in Ontario, but the magistrate held and used words equivalent to the following, 'that the defendant could not, in such circumstances, act as his own carrier.' I then referred the magistrate to the statement of the law in *Rex* v. *Leduc* (1918), 30 Can. Cr. Cas. 246, 43 O.L.R. 290, pointing out that the suspicious circumstances in that case which prevented the defendant therein from satisfying the onus which was placed upon him of establishing that he was not keeping the liquor elsewhere than in his private dwelling, and no other suspicious circumstances, were found in the case being tried by him, and the magistrate replied that, with great respect to the opinion of the Honourable Mr. Justice Masten who heard the motion in the *Leduc* case, he did not agree with him.

"5. I then stated to the magistrate that in all probability I would move to quash his conviction; and, in order that the record of the conviction might shew the magistrate's reasons therefor, I requested him to include his reasons in the conviction, which he refused to do, and gave his conviction without embracing in it the reasons which he verbally stated to me.

"6. The liquor was contained in cans in two suit-cases. Each can was separately wrapped, and each container so sealed and corked that, when it was exhibited in the court-room, considerable difficulty was experienced in opening the can to discover what the contents were, and a knife was used by one of the police constables in the court-room to open the container. None of the cans of liquor had been opened, and they shewed no evidence of any attempt at any time having been made to open any of the cans.

"7. . On the evidence given, I believe that the defendant is not guilty of the offence charged."

In answer, an affidavit of Alfred Miers, Police Magistrate for the City of Windsor, was filed. It was as follows:—

"1. I did not refuse to admit evidence by the defendant that he was bringing the liquor to his alleged private residence. I merely suggested that such evidence was unnecessary, in view of other evidence which had been adduced in the case. The solicitor for the defendant acceded to my view, and did not ask further to put in said evidence.

"2. With regard to paragraph 3 of the affidavit of W. D. Roach filed herein, the deposition of the defendant was read over to the defendant, who signed the same, and at that time no objection whatever was taken to the fact that it did not contain the statement, if such statement were made, that he, the defendant, was bringing the liquor to his private residence.

"3. Upon the evidence I found that the defendant had liquor in his possession in a place other than in the private dwelling house in which he resided.

"4. The evidence given upon the defendant's behalf did not clearly establish that he did not commit the offence with which he was charged, as required by sections 85 to 88 of the Ontario Temperance Act.

"5. Evidence was adduced that the defendant carried the liquor in question, eight gallons in quantity, in two black oil-cloth suit-cases, each of which appeared specially designed to accommodate four one-gallon containers of liquor, and nothing else; that the defendant made no attempt to proceed directly to his residence, but continued, after the arrival of his train, to loiter about the Grand Trunk Railway depot at Windsor until taken into custody; that, at the time of his arrest, he did not state to the officers that he was proceeding to his private residence; that he declared he had gone down to Montreal merely to bid farewell to a compatriot who was leaving for Europe; and that the said suit-cases and containers were unlabelled, and designed to conceal the fact that they contained liquor; all of which evidence tended to raise against the defendant a very strong case of suspicion.

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"6. Because I was not satisfied upon the evidence that the presumption against the defendant had been rebutted, and the evidence of his having liquor in his possession being undisputed, I therefore found the defendant guilty of a breach of section 41 of the Ontario Temperance Act, and, upon the evidence adduced in the case, I believe that the defendant is guilty of the offence charged."

T. J. Agar, for the defendant.

F. P. Brennan, for the magistrate.

Middleton, J.

MIDDLETON, J.:—Motion to quash the conviction of the accused by the Police Magistrate at Windsor "for that he, the said Joe Kozak, . . . on the 15th day of February instant, did unlawfully have in his possession liquor in a place other than a private dwelling house, contrary to the provisions of the Ontario Temperance Act."

The accused had been to Montreal, and was returning with liquor in his "grip" to his residence in Windsor. At Windsor station he was arrested, and on trial convicted and fined $500. He sought to shew that this liquor was being taken by him to his private residence for his personal use, and to argue that this was not an infraction of the law. The magistrate refused to allow this, stating that the possession of the liquor shewed the offence, and the accused could not act as his own carrier. This is shewn by the counsel who defended—who has made an affidavit. The magistrate has made an affidavit in answer, but does not deny this—he says that the "evidence tended to raise against the defendant a very strong case of suspicion."

Under sec. 43, nothing in the statute "shall prevent common carriers or other persons from carrying or conveying liquor from a place outside Ontario to a place where the same may be lawfully received and lawfully kept in Ontario." It is not right to say that the accused was his own carrier—he was, upon the evidence, taking the liquor from a place out of Ontario to a place where the liquor lawfully might be, within Ontario—his own residence—unless his intention was to keep for sale, which is not suggested in the evidence.

This case differs from others where there is no evidence as to the view entertained by the magistrate, and where the conviction has to be sustained upon the theory that the statutory presump-

tion (sec. 88) has not been rebutted. Here the conviction is bad because the magistrate thought that to be an offence which is not forbidden by the law.

The conviction must be quashed; no costs; order for protection. *Conviction quashed.*

CANADIAN GRAIN Co., Ltd. v. NICHOL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

1. BROKERS (§ I—2)—INSTRUCTIONS TO SELL WHEAT—INTENTION TO DELIVER—INABILITY TO DELIVER—INSTRUCTIONS TO PURCHASE TO COVER SALES CONTRACTS—LOSS OF BROKER—RIGHT TO RECOVER.
One who instructs his broker to sell for him wheat which he agrees to deliver and which it is the intention of the parties shall be delivered, the broker causing sales to be made to various persons in consequence of these instructions, and who is unable to make delivery and authorises such broker to purchase sufficient other wheat to close out these transactions is liable to the broker for any loss which such broker sustains in carrying out such instructions.
[*Beamish* v. *Richardson* (1914), 16 D.L.R. 855, 49 Can. S.C.R. 595, 23 Can. Cr. Cas. 394, distinguished.]

2. CONTRACTS (§ I D—51)—SALE BY BROKERS REPRESENTING VENDORS TO OTHER BROKERS REPRESENTING PURCHASERS—BINDING CONTRACT.
When brokers representing the vendor on the grain exchange sell wheat of the vendor to other brokers representing purchasers, there is a binding contract entered into for the sale and purchase of such vendor's wheat.

Statement.

APPEAL by plaintiff from the trial judgment in an action by a grain broker to recover the sum lost by it in carrying out the defendant's orders, to buy wheat on the grain exchange, to replace wheat which had been sold by his instructions but which he was unable to deliver. Reversed.

B. H. Squires, for appellant; *E. S. Williams, for respondent.*

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Elwood, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—When the defendant found he could not deliver the wheat he ordered plaintiff to buy the same quantity to cover the sales made on his account. This in my opinion closed the whole transaction and made him liable for the loss occasioned by carrying out his orders. I express no opinion on any other question arising in this case.

Lamont, J.A.

LAMONT, J.A.:—I concur in the conclusions reached by my brother Elwood in his judgment. Notwithstanding argument at considerable length on several points, this case to my mind resolves itself to a simple proposition.

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In July, 1916, the defendant instructed the plaintiffs to sell on his account wheat for delivery in October, amounting to 9,000 bushels. The plaintiffs through their Winnipeg agents did so. The defendant, according to the finding of the trial Judge, intended to deliver this wheat. After this wheat was sold, the price of wheat rapidly rose. By the rules of the Winnipeg Grain Exchange, in accordance with which the defendant and plaintiffs contracted, it was necessary to put up margins to protect the contracts of sale against the rising price. The defendant did not have the money, and he asked the plaintiffs to supply it, which they agreed to do provided the defendant would undertake to deliver all the grain sold on his account, and indemnify them against any loss arising from his failure to so deliver. To this the defendant agreed in writing, and the plaintiffs put up the necessary sums to protect his contracts. On October 24, he notified the plaintiffs that he could not make delivery of any wheat, and on the same day instructed them to buy 9,000 bushels to fulfil the contracts of sale which they had made on his behalf. The plaintiffs bought 9,000 bushels at $1.81 per bushel. This action is for the difference between what the plaintiffs were obliged to pay for the wheat in October and the amount coming to the defendant from the purchasers to whom the plaintiffs had sold 9,000 bushels on his behalf.

As the defendant expressly instructed the plaintiffs to purchase 9,000 bushels to cover his contracts, and as they furnished the money for that purpose, I do not see any defence open to the defendant. Had he not authorised them to buy in the wheat necessary to settle his contracts, several of the arguments submitted to us on his behalf might have been material. But as he, in effect, asked them, to furnish the money to fulfil his contracts, he must now repay them the amount so expended.

The plaintiffs are, therefore, in my opinion entitled to judgment as stated by my brother Elwood.

Elwood, J.A.

ELWOOD, J.A.:—The plaintiff is a broker, dealing in grain. On July 19, 1916, the defendant instructed the plaintiff to sell for him on the Winnipeg market 5,000 bushels of wheat for October delivery at $1.14½ per bushel. On July 21, 1916, the defendant instructed the plaintiff to sell on the Winnipeg market 2,000 bushels for October delivery at $1.15 per bushel. On July 26,

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the defendant instructed the plaintiff to sell on the Winnipeg market 2,000 bushels for October delivery at $1.23, or better. These orders the plaintiff, through its Winnipeg brokers, the Norris Commission Co. Ltd., had executed through the Winnipeg Grain Exchange. The Norris Commission Co. Ltd. in reporting to the plaintiff the execution of these various sales, *inter alia*, stated as follows:

We beg to confirm the following transactions made by us to-day for your account: All purchases and sales made by us for you are made in accordance with, and are subject to, the Rules, By-laws, Regulations and Customs of the Winnipeg Grain Exchange and also of those of the Winnipeg Grain and Produce Exchange Clearing Association. This trade has been or may be cleared through the said Clearing Association and on being so cleared we will be the only persons to whom you can look for the carrying out of this trade. . . . These transactions are made subject to the rules and customs of the Exchange at the place of contract, and the right is reserved to close the transactions when the margins are exhausted, without giving further notice.

In connection with the first two sales made on behalf of the defendant, the defendant deposited with the plaintiff $350, on account of any increase which might take place in the price of wheat for October delivery. Some time in July, and after the market had reached a point at which the $350 was not sufficient to protect any further increase in price of October wheat, the defendant and one Vannatter, an official at Saskatoon of the plaintiff, had an interview in which the defendant asked Vannatter if there was not some way in which they could carry the sale for him, without his having to put up any further margins, and Vannatter informed the defendant that the plaintiff would be willing to carry the transactions, provided the defendant signed binding contracts obliging himself to make the deliveries of the wheat. The defendant agreed to this, and signed three several contracts, dated respectively on July 20, 21, and 27, 1916, covering the three sales. That covering the sale of 5,000 bushels is as follows:

This agreement made in duplicate July 20, 1916. Between the Canadian Grain Company Ltd., hereinafter called "the Company" of the first part, and D. Nichol of the City of Saskatoon in the Province of Saskatchewan of the second part, witnesseth that the parties hereto mutually agree as follows:—

(1) The Seller does hereby constitute and appoint the Company and the Company agrees to act, as the seller's agent to sell on the Winnipeg Grain Exchange and according to the rules and regulations thereof 5,000 bushels of wheat for delivery in the month of October at and for the price of 1.14½ cents per bushel . . . bushels of . . . for delivery in the month

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of . . . at and for the price of . . . cents per bushel . . . bushels of . . . for delivery in the month of . . . at and for the price of . . . cents per bushel.

(2) The seller hereby warrants that he has now under crop:

In wheat 140 acres of the S. W. Quarter Section 22 and N. W. Quarter Section 15-36-2-3 and, in wheat 200 acres of the N. Half Section 11-35-2-3 and in flax . . . acres of the . . .

(3) The seller covenants and agrees with the Company to deliver all grains sold by the Company on his behalf, and further covenants and agrees that all grain so delivered shall grade not lower than Number Three Northern.

(4) The seller covenants and agrees to indemnify and save harmless the Company from all loss or damage arising directly or indirectly from failure of the seller to so deliver.

(5) It is understood and agreed that delivery herein means that all grain sold by the Company on behalf of the seller shall be received in the terminal elevators at Fort William on or before the last day of the month named for delivery.

(6) The seller does further constitute and appoint the Company and the Company agrees to act as the seller's agent to market all shipments of grain made by the seller of all grain grown by the seller in the year 1916, and the seller agrees to consign all such shipments to the Company and to pay to the Company one cent for each bushel of grain so marketed.

In witness whereof the party of the First Part has hereunto affixed its corporate seal duly attested by the hands of its proper officers, and the party of the Second Part has hereunto affixed his hand and seal, the day and year first above written.

Witness the signature of
DAVID NICHOL.

S. Edwards.

For
THE CANADIAN GRAIN COMPANY, LTD.
Per C. R. Vannatter.
For the Seller,
David Nichol.

On or about October 24, 1916, the defendant informed the plaintiff that he would not be able to deliver the grain, and after some conversation the defendant finally, in writing, instructed the plaintiff to purchase in the Winnipeg market 9,000 bushels of wheat for October delivery, and to apply this purchase on the three contracts of sale which had been entered into on his behalf and referred to above. The plaintiffs, through the Norris Commission Co. Ltd., purchased these 9,000 bushels of wheat, and thereby closed out the three contracts to sell which had been entered into on behalf of the defendant.

In connection with these various transactions, the plaintiff on the defendant's behalf sustained the following loss: Amount paid by plaintiff to the Norris Commission Co. Ltd., being difference between the selling price in July of the 9,000 bushels above referred to and the purchase price on October 24, of the 9,000

bushels also referred to: $5,817.50, and a commission also paid to the Norris Commission Co. Ltd. of 1-16th of a cent per bushel. These sums, together with a further sum of $90, the plaintiff has brought this action for.

In three statements rendered by the plaintiff to the defendant on October 24, 1916, and referred to as Exhibit "X" at the trial, the total claim is put at $5,840.25. This sum includes $22.50 commission, which would agree with the evidence of Robb, that the plaintiff's commission is 1-4th of a cent a bushel; so that, if the plaintiff is entitled to anything, it would be entitled to $5,840.25, less the $350 paid by the plaintiff and above referred to; leaving a balance of $5,490.25.

The trial Judge found, and I think the evidence justified that finding, that, at the time the defendant gave the plaintiff instructions to sell his wheat, the plaintiff and defendant intended that the wheat was to be delivered.

The defences relied upon were: (1) that the contracts were illegal, being contrary to sec. 23 of the Criminal Code, and (2) that the plaintiff did not make privity of contract between two principals.

So far as the first objection goes, I agree with the trial Judge that that is disposed of by his finding of fact as to the intention of the parties, that there was to be a delivery of wheat by the defendant. The trial Judge, however, held that the plaintiff did not make privity of contract between two principals, and relied upon what was held in *Beamish* v. *Richardson* (1914), 16 D.L.R. 855, 49 Can. S.C.R. 595, 23 Can. Cr. Cas. 394.

The evidence in the case at bar shews that the Norris Commission Co. Ltd. made sales to several persons, whose names were given at the trial, covering the whole of the 9,000 bushels of wheat which the defendant ordered to be sold, and that these sales were made solely for the purpose of carrying out the orders so given by the defendant. The evidence shews that the whole of the sales ordered to be made for the defendant were open in the books of the Norris Commission Co. Ltd. from the dates they were entered into until October 24, and that the market differences covering that period were equalised by the Norris Commission Co. paying into the Clearing Association the amounts of money to keep these trades in good standing, and that the

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Norris Commission Co. Ltd. paid to the Clearing Association the sum of $5,817.50.

The plaintiff paid to the Norris Commission Co. Ltd. said sum of $5,817.50 on different dates, apparently partly on September 2, September 18, and October 24. Just how the Winnipeg Clearing Association figures in the transaction does not appear from the evidence, and we have more or less to conjecture. Percy B. Hicks, who gave evidence at the trial on behalf of the plaintiff, stated that he was floorman in July, 1916, in the Winnipeg Grain Exchange for the Norris Commission Co. Ltd., and conducted the actual sales, or at any rate, one or more of the sales made on behalf of the defendant upon the Exchange. In the course of his evidence he said this: "The Clearing House takes the purchase from the other party of that trade and offsets."

On the argument before us, counsel for the respondent seemed to assume that the facts which were before the Court in the case of *Beamish* v. *Richardson*, *supra*, were before us in this case. I do not think this is so, and, in the view that I take of the case, it does not seem to me to be necessary to inquire into how the Clearing Association is mixed up in the transactions. The undisputed facts are, that the defendant ordered the plaintiff to sell for the defendant 9,000 bushels of wheat which the defendant agreed to deliver; that it was intended by both plaintiff and defendant that this wheat should be delivered; that the plaintiff did cause sales to be made of this wheat to various persons, and that these transactions were open in the books of the Norris Commission Co. Ltd. until October 24, when the defendant ordered them to be closed by authorising the plaintiff to purchase on his behalf 9,000 bushels of wheat for the express purpose of closing out the sales which had been previously made on his behalf. The plaintiff did cause a purchase to be made of 9,000 bushels of wheat, and did in this way close out the whole of the transactions entered into by it on behalf of the defendant.

Under these circumstances, if the plaintiff sustained any loss in consequence of carrying out the orders of the defendant, I am of the opinion the defendant is liable to make good to the plaintiff any such loss.

So far as privity of contract is concerned, when the broker representing the defendant on the Grain Exchange sold the wheat

of the defendant to other brokers representing purchasers, then it seems to me, that there was a binding contract entered into for the sale and purchase of the defendant's wheat. Up until October 24, there was, in my opinion, always some person liable to the defendant for the purchase price of the wheat which he so agreed to sell.

Elwood, J.A.

The facts of the case at bar seem to me to distinguish this case very easily from the case of *Beamish* v. *Richardson*, *supra*. In that case the transactions were purely speculative; there was never any intention to deliver the commodities dealt in, and, further, it was held that the evidence failed to shew that the amounts claimed had been expended in carrying out the commissions according to the instructions one broker had received from the defendant, and therefore they were not entitled to recover the balance so claimed from him. In the case at bar, the finding is that there were sales of wheat actually intended to be delivered. The evidence further shews that in all of the transactions the plaintiff acted according to the instructions which he received from the defendant.

In my opinion this appeal should be allowed with costs, and the plaintiff should have judgment against the defendant for $5,490.25, and costs. *Judgment accordingly.*

HALPIN v. GRANT SMITH & Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. June 29, 1920.

AUTOMOBILES (§ III—150)—MOTOR VEHICLE ACT (ALTA.)—OPERATING CAR WITHOUT LICENSE—INJURY DUE TO NEGLIGENCE OF ANOTHER—RIGHT TO RECOVER DAMAGES.

One who is guilty of a violation of sec. 3 of the Motor Vehicle Act, 2-3 Geo. V. 1911-12, ch. 6, in operating an automobile which has not been properly registered as required by the Act, is not on that account prevented from recovering damages for injuries caused by the negligence of another.

APPEAL by plaintiff from the judgment of McCarthy, J., in an action for damages caused by motoring into an open ditch on a highway. Reversed.

Statement.

H. P. O. Savary, K.C., and *McKenna*, for appellant.

A. H. Goodall, for respondent.

HARVEY, C.J., concurred with Stuart, J.

Harvey, C.J.

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STUART, J.:—I agree with Beck, J., and Ives, J., that the defendant company was a proper party to sue in this case and that the trial Judge, therefore, erred in directing a non-suit on the ground that the plaintiff should have sued the man McKelvie.

The plaintiff was, I think, undoubtedly guilty of a violation of sec. 3 of the Motor Vehicle Act, 2-3 Geo. V. 1911-12, ch. 6. The admission of the fact made by the defendant seems to have been made somewhat inadvertently. The evidence seems to shew that the property in the vehicle had in fact passed to the plaintiff. It may be of course that if the plaintiff had not obtained the admission he would have adduced further evidence of what had occurred between him and McHafford, his vendor, with a view of shewing that the property had not actually passed to him.

But however this may be, I shall assume that the plaintiff had violated the Motor Vehicle Act. In my opinion, that violation does not deprive him of all his rights of whatever kind.

The purpose of such statutes is I think properly explained by Supreme Court of Massachusetts in *Holden* v. *McGillicuddy* (1913), 102 N.E. Rep. 923 at page 924, 215 Mass. 563, to be:

> for the particular protection of travellers upon the highways, to guard them against the dangers that might arise from the operation of improper machines to which the State would not grant the privilege of registration, and to afford them a means of redress in case of injury by enabling them readily to ascertain the name and address of the owner of an automobile from which they might suffer injury.

Perhaps in favour of other travellers who have not been guilty of a reckless or wanton act causing injury to the person violating the statute the latter is deprived of all the usual rights of a traveller upon the highway. But in the present case the defendant company was not a traveller. Under statutory authority they were constructing an irrigation ditch across a highway but so far as revealed in the evidence as it stood at the close of the plaintiff's case they had not complied with sec. 25 of the Irrigation Act, R.S.C. 1906, ch. 61, by keeping that highway open "for *safe* and convenient travel." I am unable to assent to the proposition that the effect of the Motor Vehicle Act is to relieve a company so acting from all duty whatever towards travellers who may appear to have omitted to comply with some of its provisions.

Even a private owner of land is under an obligation to refrain from setting a trap, *i.e.*, from creating some secret or with difficulty

discernable danger to persons who, though trespassers, he knows are in the habit of passing by the spot where the dangerous thing is placed. In the present case the defendants were not the private owners of property excavating a ditch on their own land. They were excavating it on the public highway and had not fulfilled even the statutory obligation to make the place safe. And I doubt if in such a case to refer to the analogy of a private owner, proof of knowledge in the defendants that persons travelling in automobiles do frequently omit to comply with everything exacted by the Motor Vehicle Act should be demanded of the plaintiff in order to substantiate his case.

Stuart, J.

Upon the evidence adduced, I think the defendants indeed went further than merely to omit to make the place "safe," which I imagine would be taken to mean "reasonably safe." The condition in which they left the highway overnight could I think quite reasonably be found by a jury to constitute a trap in the sense in which that expression has been used in the trespassing cases. I would, therefore, allow the appeal with costs and order a new trial and I would also give the plaintiff the costs of the first trial in any event on final taxation.

BECK, J.:—There is no room for doubt that the defendant company, although what is called an independent contractor, is liable to the plaintiff unless the plaintiff is—there being no evidence of wilful injury—precluded from recovering by reason of non-compliance with some of the provisions of the Motor Vehicle Act, 2-3 Geo. V. 1911-12, ch. 6. Sec. 17 of this Act says:—"No person shall operate a motor vehicle upon a public highway after this Act takes effect unless such person shall have complied in all respects with the requirements of this Act."

Beck, J.

Some of the obligations placed upon an owner of a motor vehicle by the Act are as follows:—(1) He must have a certificate of registration in his name with the number of the car &c. (2) He must carry a certain number and kind of lights operating in a certain way. (3) The motor must have adequate brakes and horns &c. (4) He is restricted as to speed and as to crossing streets. (5) He is restricted as to the persons whom he may permit to drive the motor. (6) He is restricted as to the use of the "muffler." (7) He is placed under obligation to observe a "rule of the road," and to stop under certain circumstances.

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Beck, J.

Penalties recoverable on summary conviction are imposed upon any person violating "any of the provisions" of the Act.

In my opinion all these provisions are what the books refer to as "Police Regulations." The fact is that they are contained in a statute rather than in regulations made pursuant to the statute or in municipal by-laws. The breach of any such provisions is of course not a criminal offence; crimes can be created only by Dominion legislation passed for that purpose.

Now, it is contended on behalf of the defence that inasmuch as the plaintiff was at the time of the accident in the state of guiltiness of a breach of one of these police regulations, *i.e.* was not registered, he is thereby prevented from recovering damages arising from the default of the defendant, that default being mere negligence although the plaintiff's breach of the particular police regulation in no way contributed to the accident.

The argument is that the plaintiff in such circumstances is a "trespasser" and that, to quote the law as laid down, *e.g.* in Halsbury, vol. 21, tit. "negligence," page 394, par. 664: "The occupier of premises owes no duty to persons who come upon them as trespassers." Or in 29 Cyc., tit. "negligence," page 442: "The general rule is that no duty exists towards trespassers, except that of refraining from wantonly or wilfully injuring them."

But is such a person a "trespasser" within the sense of the decisions upon which this proposition of law is founded?

In *Lowery* v. *Walker*, [1911] A.C. 10, the defendant had put a savage horse into his field without giving any warning, knowing that the public were *without leave* in the habit of crossing the field; the plaintiff while crossing the field *without leave* was injured by the horse. It was held he could recover.

The case was tried by a County Court Judge. The Judge had made a note of his decision in which he wrote: "No doubt the plaintiff was a trespasser." He afterwards added a note explaining what he meant. Lord Halsbury said at page 12:

> The learned Judge used an *ambiguous* word. I suppose nine out of ten people would distinguish between a person who was at a place as of right and a person who was as a mere trespasser. The learned Judge did, I think inadvertently, in the first instance use the word "trespasser," which would have carried the learned counsel for the respondent (defendant) all the way he wants to get to a somewhat difficult and intricate question of law upon which various views may be entertained. But seeing that there was a mis-

apprehension, or might be a misapprehension, in the sense in which he used the word "trespasser" the learned Judge himself points out in terms that he does not find, and did not intend to find—as I think the whole substance of his judgment shews he did not intend to find—that the injured man was *a trespasser in the sense in which that word is strictly and technically used in law.*

In view of the character and purpose of the Act I think that non-compliance with the provisions of the Act has not the effect of making the person failing to comply therewith a trespasser in any sense; but only to subject him to the penalties provided for in the Act.

But again the books distinguish between trespassers who are trespassers knowingly, deliberately or wilfully, and technical trespassers.

In 29 Cyc., page 443, it is said that a trespass that is purely technical has been held not to prevent recovery by reason of the defendant's negligence; and among other decisions cited is one (see note 13, 29 Cyc., page 443):

holding that if a person is injured through the negligence of defendant while committing a trespass shews that he did not know he was trespassing or that the trespass was purely technical and only such as he might reasonably suppose defendant would permit, recovery will not be prevented by reason of such negligence.

In 21 Hals., page 397, a note to sec. 668 says:—

In *Bedman* v. *Tottenham* (1887), 4 T.L.R. 22, the defendants kept a private way leading directly from a public road of which the private way was substantially a part, under a low archway dangerous to persons driving along the private way; and the plaintiff, by mistake, drove along it and was injured; held, that he could recover and *the fact that he was a trespasser at the moment made no difference, as the place was dangerous to people using the highway.*

It seems to me that the authorities fully justify the proposition that one who is merely a "technical trespasser" is not, by reason of his trespass, prevented from recovery in an action for negligence.

Assuming the plaintiff in this case to have been a trespasser—and I think he was not—he was, in my opinion, merely a technical trespasser, and that is not sufficient to prevent his succeeding in this action. The trial Judge having withdrawn the case from the jury, and dismissed the action with costs, the appeal of the plaintiff should be allowed with costs and a new trial directed, the costs of the former trial to be costs to the defendant in any event on final taxation.*

*See in addition to the authorities specially referred to the cases cited in Denton's Municipal Negligence, page 319 *et seq.*; *Davies* v. *Mann* (1842), 10 M. & W. 546, 152 E.R. 588, followed in *Siewert* v. *Brookfield* (1904), 35 Can. S.C.R. 494; *Breen* v. *Toronto* (1911), 18 O.W.R. 522.

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HALPIN v. GRANT SMITH & Co.

Ives, J.

IVES, J. (dissenting):—This is an appeal from the judgment of McCarthy, J., who tried the action with a jury and dismissed it at the conclusion of the plaintiff's evidence. The action is for personal injuries to plaintiff and damage to his automobile, resulting, as he alleges, from an open ditch across a public highway constructed by this defendant, and left unguarded, into which he drove.

The ditch was a part of certain irrigation works, the construction of which the defendant had undertaken for the Canadian Pacific Railway Co. The defendant, in turn, had sublet a portion of the works to one McKelvie who had actually done that part of the work where the accident occurred. On this work the defendant maintained its own superintendent. The plaintiff at the time was operating an automobile which had been conditionally bought by him and for which he had not paid in full and which was not registered by him under the provisions of the Motor Vehicle Act but which in fact was registered in the name of the man McHafford from whom it had been transferred under the terms of the conditional sale.

The first contention of the defendants is that they are not the proper parties, that no negligence on their part is shewn, and that they are not responsible for the conduct of their sub-contractor. It is true, I think, that liability does not attach to a contractor for the casual or collateral negligence of a sub-contractor but the law seems to be well settled that where the character of the work may be a source of danger to the public the one who undertakes it is bound to see that all reasonable precautions to assure the public safety are taken whether that one himself does the work or arranges with another by independent contract to do it. See *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q.B. 72, and *Holliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392. *McIntosh* v. *Simcoe County* (1914), 15 D.L.R. 731. I think the first contention fails and that an action lies against these defendants.

The next contention is that the plaintiff was not lawfully operating an automobile on this highway. The decision of this issue involves a construction of the Motor Vehicle Act, ch. 6 of Alta. Stats., 1911-12. Sec. 3 requires "Every person owning a motor vehicle" to file in the office of the Provincial Secretary a

statement containing his name and address with a description of the vehicle owned by him. Upon so doing, the Provincial Secretary shall forthwith issue and deliver to the owner a certificate of registration and two number plates with the registration numbers thereon. By sec. 7 this certificate of registration shall be effective from issue to the first day of January following. Sec. 10 requires the number plates to be attached to the motor vehicle, one in front and one in rear so as to be readily visible and sec. 10 (3), which was added by 4 Geo. V. 1913 (Alta. 2nd sess.), ch. 2, sec. 22 (3), provides that, "Except in the case of a re-issue under sec. 9 hereof a number plate shall not be used or exposed to view on any motor vehicle other than the one for which it was originally issued *or by any person other than the owner to whom the same was originally issued.*"

Sec. 9 provides that:

> Upon the sale *or transfer of ownership* of any motor vehicle registered pursuant to the provisions of this Act it shall be the duty of the person in whose name such motor vehicle is registered to immediately notify the Provincial Secretary of the name and address of the new owner, *and to return the registration certificate and number plates* . . .

to the Provincial Secretary who shall cancel the certificate of registration.

Sec. 17 forbids the operation of a motor vehicle upon a public highway by any person who has not complied in all respects with the provisions of the Act.

Sec. 51 provides that "no motor vehicle shall be operated or driven under any other number than that of its own registration."

The primary object of this Act is, on the one hand, to fix motorists with certain duties and responsibilities and on the other hand to protect the public and preserve its rights upon the public highways. In order that the intention of the Legislature may be effective, I think an elastic interpretation of the words "owner," "owned" and "owning" in the several sections I have referred to is both necessary and proper. In the case of *Wynne* v. *Dalby* (1913), 16 D.L.R. 710, at 714, 30 O.L.R. 67, Meredith, C.J.O., delivering the judgment of the Court, says, "The word 'owner' is an elastic term and the meaning which must be given to it in a statutory enactment depends very much upon the object the enactment is designed to serve," and this language of the Chief Justice was used in relation to a circumstance exactly in point,

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viz: whether under the Ontario Motor Vehicle Act the term "owner" was properly applicable to the person retaining the legal ownership by virtue of the terms of a conditional sale rather than to the person in possession and exercising dominion over the car. See also the case of *Hughes* v. *Sutherland* (1881), 7 Q.B.D. 160.

This plaintiff and no other had the dominion over his car. He had paid a part of the purchase price; he was in possession of it, and without his consent even McHafford could not drive it. I think there was a "transfer of ownership" within the spirit of those words as used in sec. 9 and if so, then under that section the certificate of registration issued to Halford must be deemed to have terminated when the "transfer of ownership" took place. True, section 9 casts an active duty upon the transferror, holding the certificate of registration, to return it and the number plates to the Provincial Secretary upon the transfer of ownership taking place but at the same time its effect is to notify the one to whom the vehicle is transferred that he cannot operate under his vendor's certificate nor use the old plates unless or until they are re-issued to him. If there be a doubt of this effect of the section, then I think the doubt is removed when we read sub-sec. 3 of sec. 10 which not only forbids the use of a number plate on any vehicle except that for which it was originally issued but forbids any person using it *other than the owner to whom it was originally issued.* Upon this construction I think the plaintiff must be held at the time of the accident to have been operating a motor vehicle without having complied with the provisions of section 3 and consequently was so doing directly in face of the prohibition in sec. 17. In the absence of malicious or wilful misconduct on the part of the defendant the action must fail. I think no such misconduct is shewn here. See *Etter* v. *City of Saskatoon* (1917), 39 D.L.R. 1, 10 S.L.R. 415; *Contant* v. *Pigott* (1913), 15 D.L.R. 358, and *Greig* v. *City of Merritt* (1913), 11 D.L.R. 852. See also *Bensley* v. *Bignold* (1822), 5 B. & Ald. 335, 106 E.R. 1214.

The appeal should be dismissed with costs.

Appeal allowed; new trial ordered.

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Ontario Supreme Court, Appellate Division, Magee, J.A., Clute, Riddell, Sutherland and Masten, JJ. March 26, 1920.

GIFT (§ III—15)—ASSERTION OF BY FATHER—SON IN POSSESSION AT FATHER'S REQUEST—VALIDITY—SPECIFIC PERFORMANCE — STATUTE OF FRAUDS.

An assertion by a father that he has given his farm to his son however frequently repeated does not amount to a contract on which an action for specific performance can be based, even though the son has taken possession at his father's request because his own house has burned down. The possession not being given in pursuance of any contract does not meet the requirements of the Statute of Frauds.

[*Orr* v. *Orr* (1874), 21 Gr. 397, followed.]

Statement.

APPEAL by defendant from the judgment of Falconbridge, C.J.K.B., in an action for specific performance of an alleged agreement to give a deed of conveyance. Reversed.

The judgment appealed from is as follows:

FALCONBRIDGE, C.J.K.B.:—The plaintiff became of age on or about the 25th November, 1900. From the time he was old enough to do so until 1910 he worked for the defendant in farming, lumbering, and saw-mill operations. I find the promise to give lots 12 and 13 well proved and well corroborated.

From about 1910 the plaintiff and defendant treated these lots as the plaintiff's property.

In 1911 the plaintiff got married, and in the same year he went into possession and began to clear the place and put it in shape for cultivation, and paid school-taxes on the same from that time to 1916.

In October, 1914, the plaintiff and defendant went to Parry Sound, and the defendant gave Mr. Haight, a solicitor, instructions to prepare a quit-claim deed of the lots to his son. This Mr. Haight did, and enclosed the deed and duplicate to the plaintiff in a letter dated the 23rd October, 1914, set out in para. 9 of the statement of claim.

The defendant, who was a drinking man, says that the plaintiff got a bottle of gin and made him (the defendant) drunk, and that, while in that condition, he gave Mr. Haight, on a street-corner, instructions for the deed. This is quite opposed to Mr. Haight's statement (filed as evidence in the case), and Mr. Haight is not the kind of man to take instructions from a drunken man on a street-corner.

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The defendant kept putting off the execution of the deed. The plaintiff had gone into possession under the agreement, so that there is no question of the application of the Statute of Frauds.

The plaintiff has had very few advantages in the way of schooling or otherwise. He is not endowed with much natural intelligence and is not in any sense a match for his father, who devised a scheme to obtain from the plaintiff a release or waiver of his title to the farm. The defendant told the plaintiff to come to his (the defendant's) house, and he would give him an agreement, and then he caused to be written out and delivered to the plaintiff a document purporting to be an agreement for a lease of the lots to the plaintiff for two years, and induced the plaintiff to sign an acknowledgment and acceptance of the agreement or lease.

If the plaintiff appeared to assent to this arrangement, he did so not understanding its nature and effect and without independent advice and being unduly influenced thereto by the defendant, who has always dominated the plaintiff.

The plaintiff, up to a year or two ago, has worked practically all his life for his father, receiving board and lodging, some clothes, and a little tobacco and pocket-money.

After the commencement of this action, the defendant took proceedings under the Overholding Tenants sections of the Landlord and Tenant Act, and ejected the plaintiff from the premises, under and by virtue of the two documents mentioned above. For this wrong no damages are recoverable, the order of the learned District Court Judge not having been appealed against: Holmested's Judicature Act, p. 1141, and cases there cited.

Since the evidence in this case was taken, and while it was standing for judgment, the defendant committed the atrocity of having his son (the plaintiff) prosecuted for perjury alleged to have been committed before me and at the examination for discovery.

A number of small cheques made by the defendant and endorsed by the plaintiff were produced, some of which, on their faces, purported to be given for wages. I accept the plaintiff's explanation of these. He is so stupid and uneducated that it was very easy to get him to fall into a trap of that kind.

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For the matters complained of in para. 16 of the statement of claim I allow the plaintiff $100. I disallow the defendant's counterclaim with costs.

There should be judgment for the plaintiff for specific performance and $100 and costs.

In case the plaintiff should hereafter be relegated to his claim for wages, I allow him to amend in accordance with his notice of motion, and refuse to allow the defendant any amendment.

Shirley Denison, K.C., for appellant.

M. H. Ludwig, K.C., for plaintiff, respondent.

The judgment of the Court was read by

RIDDELL, J.:—The plaintiff, born in 1879, is the son of the defendant, who was a farmer and lumberman in Ferguson township, in our back country. The son lived with the father until 1911, working for him on the farm and in the bush (he had run away from home when 15, but the father, with a full sense of his parental duty, came after him with a horsewhip and drove him home). Riddell, J.

Some time about 1909 or 1910, the son was promised the old homestead by his father for "staying home and working"—this promise, which I interpret as meaning that the son was to have the old homestead at his father's death if he remained at home and worked for his father till that time, the father renewed several times.

In 1911 the son married a widow with a family (much against his father's wish) and went to work as a sectionman on the Canadian Northern Railway, living with his wife on her property. He so worked a few days, when, as he says: "Father came after me and wanted me to go home again and drive team. He said he had to have some one and he would sooner pay me than anybody else; and I went back and drove team for him."

For the years 1911, 1912, 1913, and 1914, the plaintiff lived on his wife's place, had his meals either at home or at his father's, went back and forth morning and evening (about two miles) and worked for his father—for the later years nearly altogether at lumber and in the saw-mill.

At some time after the marriage—apparently during some of the years 1912-1914—the father told the son that he gave him the farm, and thereafter the son considered that he owned the farm,

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but he did nothing about it, except cutting some brush, clearing up logs and rubbish, seeding down a little, and fixing the fences.

In 1915, the house of the plaintiff's wife burned down; the father told him to move on to the old homestead, and he did so; the father, shortly after, said that now the son could build his own place, have a better place for cattle, and be nearer to school. The plaintiff repaired and improved the house and continued to live there with his wife and her family. The wife was never *persona grata* with her father-in-law; and in the fall of 1917, the son still working for his father, "he ordered me off the place, told me I would have to get off his place. He said my wife and family would have to get off, then he said I would have to get off too." The son refused, and the father "sheriffed" him off.

What happened seems to be that the defendant, in August, 1916, gave his son a writing purporting to make him a tenant for one year; and on the expiration of the term he took proceedings under our statute against him as an overholding tenant.

At the time the farm was promised to the plaintiff there was no question of wages, the plaintiff was not working for wages—he was "simply living at home like the rest of the family, working along the same as the rest of them;" but in 1914 the wages were fixed at $40 per month and paid thereafter at that rate.

At one time, when the defendant, as he says, was the worse of liquor, he had a deed of the homestead drawn up by a solicitor; the deed was not executed, but was sent by the solicitor to the plaintiff, unsigned. The defendant was not satisfied with the deed, "he wanted it changed a little bit about the timber," and told his son, "Some time when we are going to the Sound I will go down and have it completed." (The "Sound" was Parry Sound, where the solicitor had his office.) The deed never was executed.

The above are the facts as given by the plaintiff. He backs up his own evidence by that of several witnesses who swear that the defendant said that he had given the farm to George, and the like.

On that evidence, the Chief Justice of the King's Bench gave judgment for specific performance of the promise to give the homestead.

The defendant (now his representative by order to proceed) appeals.

It seems fairly clear that the defendant intended to give the plaintiff the farm at some time, but that is not enough. The rules to be followed in such cases as this are laid down most carefully and conclusively in the leading case of *Orr* v. *Orr*, (1874), 21 Gr. 397, in Appeal, and it cannot be necessary to restate them at length.

Even if we assume that the Statute of Frauds is met by the possession—and the plaintiff would have great difficulty in that regard, as it is admitted that the possession was taken at the father's instance because the plaintiff's house was burned down, and there can be no pretence that the possession was given or taken in pursuance of any contract—the plaintiff is not advanced. An assertion that he had given the farm, however frequently repeated, does not amount to a contract: *Orr* v. *Orr*, 21 Gr. at p. 410; and the plaintiff fails to come up to the stringent requirements of that case: see *per* Street, J., in *Smith* v. *Smith*, (1898), 29 O. R. 309 (affirmed in (1899) 26 A.R. (Ont.) 397); *Jibb* v. *Jibb*, (1877), 24 Gr. 487; *Campbell* v. *McKerricher*, (1883), 6 O.R. 85, 95, and similar cases.

I do not, as at present advised, think that the plaintiff is estopped by reason of his alleged tenancy: *Hillock* v. *Sutton*, (1883), 2 O.R. 548. At the worst, he might have a declaration of his rights if the facts justified such a course.

But he fails *in limine:* and, notwithstanding *Biehn* v. *Biehn*, (1871), 18 Gr. 497, I think we are concluded by *Smith* v. *Smith* from giving him a claim for his alleged improvements.

I would allow the appeal on this point, with costs throughout.

The plaintiff is entitled to recover any balance of wages due to him after the contract for wages was definitely made. If counsel cannot agree, it may be referred to the Local Registrar to take the accounts and determine what amount, if any, is due: if such reference is had, the costs thereof should be in the discretion of the Referee, but there should be no other costs on this branch of the case.

It is to be hoped that there will be no more heard of this unpleasant family dispute.

Appeal allowed.

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C. A.

McKAY v. LOUCKS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

ANIMALS (§ I D—35)—LAWFULLY AT LARGE—DAMAGE TO UNENCLOSED CROP—LIABILITY OF OWNER.

The owner of cattle lawfully entitled to run at large under a rural municipality by-law is not liable for any damage which his cattle may do on the unenclosed lands of another, provided that the damage is such as it is in the nature of cattle ordinarily to do; and is not traceable to some negligence on the part of the owner.

Statement. APPEAL by plaintiff from the judgment at the trial in an action to recover damages for injuries caused to grain by cattle lawfully at large. Affirmed.

J. C. Martin, for appellant; *M. A. Miller*, for respondent.

Haultain, C.J.S. HAULTAIN, C.J.S.:—I agree that the appeal should be dismissed with costs.

Newlands, J.A. NEWLANDS, J.A.:—The plaintiff had grain in stook during the season of the year when animals were allowed to run at large. Some of this grain was destroyed by defendant's cattle, and plaintiff brings this action for damages.

At common law an owner of cattle must keep them off another man's premises at his peril. One exception being that, when cattle were being driven along a highway, the owner was not liable if they strayed on to premises adjoining the highway that were not fenced, provided that he did not allow them to remain there an unreasonable length of time. *Goodwyn* v. *Cheveley*, 4 H. & N. 631, 157 E.R. 989, 28 L.J. (Ex.) 298; *Tillett* v. *Ward*, (1882), 10 Q.B.D. 17.

By the Stray Animals Act, 6 Geo. V. 1915, ch. 32, animals are allowed to run at large within the Province; they, however, become estrays and are liable to be distrained by the owner of any crop damaged by them when they have strayed from their accustomed forage ground, or break into premises enclosed by a lawful fence. Sec. 2, sub-sec. (2), ch. 53, 9 Geo. V. 1918-19.

Kruse v. *Romanowski* (1910), 3 S.L.R. 274, was decided before the above Acts were passed. In that case, Johnstone, J., in giving the judgment of the Court, at page 278, said:—

> The only legislation in this Province encroaching upon the common law is contained in the Ordinances and the Act referred to, and in none of these is the entry of an animal of a stranger upon the lands of another other than the owner of the animal made lawful, nor can there be created the relationship of licensor and licensee: *Arthur* v. *Bokenham* (1708), 11 Mod. 148, 88 E.R. 957. There is no statutory law in this Province permitting cattle to run at large. Whether or not there was a by-law allowing such does not appear.

The fact that there was no law allowing animals to run at large is also mentioned by Howell, C.J., in *Watt* v. *Drysdale* (1907), 17 Man. L.R. 15, and I take it from the judgments of both these Judges, that because animals were not allowed to run at large was one of the reasons why they held the owner of the animals liable.

Killam, C.J., in *Garrioch* v. *McKay* (1901), 13 Man. L.R. 404 at 406, says:—

> It is not disputed that, at common law, the owner of cattle is liable for their trespasses except such as are due to defects in fences, which the complainant is bound as between himself and such owner to keep up.

Now the above mentioned Acts alter the common law by making it lawful for animals to run at large, making them estrays and their owner liable for the damage they commit when they are away from their accustomed forage ground, which was not the case here, and when they break into land enclosed by a lawful fence. The crops in question were not enclosed by a fence. To keep these animals from being estrays the proprietor of the crop should have fenced; not having done so, it seems to me to bring this case under the exception stated by Killam, C.J., that the owner of the cattle is not liable for their trespass when the complainant is bound to fence his crop.

To permit animals to run at large, is to allow them to do what they ordinarily would do, and there is no doubt that the eating of unprotected grain would be a natural consequence of animals running at large. Knowing this, and knowing also that such animals could only be distrained if the crop was enclosed by a lawful fence, I think the law throws upon the owner of grain the duty of so protecting it, otherwise he cannot recover from the owners of animals, which animals have not strayed from their natural forage grounds, damage done to such unprotected crop.

I would therefore dismiss the appeal with costs.

Lamont, J.A.

LAMONT, J.A.:—Between November 1 and 15, 1919, the defendant's cattle entered upon the plaintiff's land and, along with other animals, destroyed some of the plaintiff's crop. The defendant's cattle, under the Stray Animals Act, were entitled to run at large. The question here is simply this: Is the owner of cattle rightfully running at large liable for any damage his cattle may do while so at large?

At common law the rule as to domestic animals was well settled. In 1 Hals., page 375, par. 819, the rule is stated as follows:

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The owner of animals *domitæ naturæ* is bound to keep them under control, and is liable, if they escape, for such damage as it is ordinarily in their nature to commit. The liability is an absolute liability independent of negligence, unless the escape or trespass was involuntary or caused by an act of God, or was due to the act or default of the plaintiff, or of a third person for whom he is not responsible.

An exception to this rule existed in the case of cattle trespassing from the highway while lawfully there for the purpose of passing and re-passing and using it as a highway. In such cases it was necessary to prove negligence, and in the absence of negligence the owner of the cattle was not liable for the damage. *Luscombe* v. *Great Western Ry. Co.*, [1899] 2 Q.B. 313; *Tillett* v. *Ward* (1882), 10 Q.B.D. 17.

At common law, therefore, the defendant in this case would be clearly liable. The common law however has been altered by statute.

Section 4 of the Stray Animals Act reads as follows: "Subject to the provisions of this Act it shall be lawful to allow animals to run at large in Saskatchewan." "Running at large" is defined, sec. 2, sub-sec. 16, as:—

not being under control of the owner either by being securely tethered or in direct and continuous charge of a herder or confined within any building or other inclosure or a fence whether the same be lawful or not.

The right to run at large entitled the defendant's cattle to wander or stray, not only upon the highway, but over any private land to which they had access. It is a well-known fact that cattle straying upon such land will, in all probability, destroy any crops they may find there. The Legislature must be taken to have been well aware of this fact when the Stray Animals Act was passed. I conclude therefore that the intention of the Legislature in permitting animals to run at large was to permit them, without liability on the part of their owner, to do that which the Legislature knew they naturally would do. I am therefore of opinion that the common law rule has been abrogated to this extent; that, under our statute, the owner of cattle which are entitled to run at large is not liable for any damage which his cattle may do on the unenclosed lands of another, provided that damage is such as it is in the nature of cattle ordinarily to do; except, of course, where the statute otherwise provides, or where the damage is traceable to some negligence on the part of the owner of cattle, as, for example, where he wilfully drives them onto the land of another.

In the present case, there is no evidence of any negligence on the part of the defendant. The damage done was such as cattle would naturally do. The plaintiff therefore is not entitled to recover. If he does not wish cattle lawfully at large to destroy his crop, he must protect it.

The appeal must therefore be dismissed with costs.

ELWOOD, J.A.:—This was an action brought by the plaintiff to recover from the defendant damages which he alleged were sustained through cattle and horses belonging to the defendant having, between November 1 and 15, 1919, gotten upon the plaintiff's land and destroyed a portion of the plaintiff's crops.

At the trial it was admitted that there was a by-law of the rural municipality in which the plaintiff's land is situated, permitting cattle and horses to run at large from October 16th. Judgment was given at the trial for the defendant, and from that judgment this appeal has been taken.

Section 4 of the Stray Animals Act, being ch. 32 of 6 Geo. V. 1915 (Sask.), was originally as follows:—

Subject to the provisions of this Act, it shall be lawful to allow animals to run at large in Saskatchewan.

(2) Nothing in this Act contained shall derogate from, destroy, or in any wise affect the rights or remedies which a proprietor or other person has, or but for this Act would have, at common law or otherwise, for the recovery of damages for trespass committed on, or injury done to, his property by any animal whether lawfully running at large or not.

By sec. 45, sub-sec. 3, of ch. 34, of 7 Geo. V. 1917 (1st sess.), sub-sec. (2) of sec. 4 was struck out. So that, in considering the effect of sec. 4, it should be considered as though sub-sec. (2) had never been enacted.

Sub-sec. (16) of sec. 2 of the Act defines running at large as follows:—

"Run at large" or "running at large" means not being under control of the owner either by being securely tethered or in direct and continuous charge of a herder or confined within any building or other inclosure or a fence whether the same be lawful or not.

I cannot bring myself to the conclusion that animals lawfully running at large are so running at large at the peril of the owner, or that they are permitted to be so running at large merely on the highway. One of the characteristics of an animal running at large is to stray upon adjoining land, and I apprehend that when passing the statute the members of the Legislature had that characteristic in mind.

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The liability of cattle on a highway to stray to adjoining land is commented on in *Goodwyn* v. *Cheveley* (1859), 4 H. & N. 631, 157 E.R. 989, 28 L.J. (Ex.) 298. The facts contained in the headnote (28 L.J. (Ex.) 298) are as follows:—

Cattle of the plaintiff were being driven along a road in the dark; some of them strayed into a field of the defendant's, through a gap in the fence; the driver went on with the rest and put them in a place of safety, and then returned to take those which had strayed, but which the defendant by that time had distrained. The defendant, in an action of trespass for the taking, pleaded that he had distrained the cattle damage *feasant*, and that he had not distrained until a reasonable time had elapsed to remove them:—Held (*dissentiente* Bramwell, B.), that a reasonable time meant not merely a reasonable time for the act of removal, but what was reasonable under all the circumstances of the case, and that this was for the jury to determine.

At page 303 (28 L.J. (Ex.) 298), Pollock, C.B., is reported as follows:—

And then the question is, if a man who has land adjoining a highway will not do as persons who, if they have any valuable crop growing upon it, usually do, by fencing, guard the land from the encroachment of cattle going along the highway, the question is, whether he is entitled to require that the drovers—(and I must assume that there were on this occasion the proper and reasonable number required for the cattle on the road)—shall remove the cattle immediately from his land on which they have strayed without reference to any other consideration upon the whole earth.

And at page 302, Martin, B., is reported as follows:—

It is said that the defendant in this case was not to blame. I do not say he is to blame. I am not aware that he could be indicted for not fencing his field from the road, though most people in this country put fences between their fields and the road. If a man, however, will not do that, it seems to me he must put up with some of the inconveniences consequent upon it. Now, one of the inconveniences is, that cattle being driven upon the road, will stray.

It was suggested that the effect of the Act was, that the owner of an animal lawfully running at large would not be liable to have it impounded, and would not be liable for trespass. If he is liable for damage, I cannot see why he would not be liable for trespass; and I cannot bring myself to the conclusion that the only benefit intended to the owner of an animal lawfully running at large is, that he is not liable to have his animal impounded.

I have come to the conclusion that the defendant is not liable for the damage which the plaintiff sustained through the defendant's cattle straying upon his crop, and that he is protected from liability by the provision of the Act and the by-law of the municipality permitting the animals to run at large.

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Elwood, J.A.

The opinion I have come to is somewhat strengthened by a perusal of sec. 7 of the Act, which empowers the council of a municipality in which animals are restrained from running at large during a portion of the year only, to extend or shorten such time by any period not exceeding 6 weeks during the months of September, October, November and December, according to the progress that is being made with threshing operations, the conditions of pastures, or for other like consideration, and by sec. 53 of the Act, which provides as follows:—

The owner of an animal which breaks into or enters upon any land inclosed by a lawful fence, shall compensate the proprietor for any damage done by such animal.

(2) If such trespass occurs within access to a pound the proprietor shall proceed as set forth in secs. 13 to 18 inclusive hereof whether such animal is lawfully running at large or not.

(3) If no pound is accessible from the place where such trespass occurs the proprietor shall proceed as set forth in secs. 39 to 49 inclusive hereof whether such animal is an estray or not.

If the owner of an animal lawfully running at large were to be held liable for any damage which the animal did while so running at large, I cannot see why sec. 53 should have been confined to damage done by an animal which breaks into or enters upon land enclosed by a lawful fence.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

ONT.

S. C.

Re SIMONTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. June 25, 1920.

POWERS (§ II—5)—OF APPOINTMENT—EXECUTION OF.

A bare power of appointment by will, given to two persons by name, cannot be executed by the survivor.

Statement.

APPEAL by an executor from a judgment of Orde, J., construing certain wills and upon certain questions affirmed.

W. S. MacBrayne, for appellant.

S. Denison, K.C., for Sarah Sterch, *et al.*

E. C. Cattanach, for the infants.

J. M. Pike, K.C., for the Toronto General Trusts Corporation.

Meredith, C.J.O.

MEREDITH, C.J.O.:—I agree with the conclusion of my brother Maclaren as to the disposition to be made of this appeal.

The interest on the corpus of the fund is given to those who are to receive the income of it during their lives and the life of the survivor of them.

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Meredith, C.J.O.

The cases cited by counsel for the appellant would support his argument if the fund had been given to them followed by the provisions which the will contains as to investment of the fund, payment of the income and the power to appoint, but the fund is not given to them; they are only recipients of the income with power to appoint the corpus.

The distinction between the two classes of cases is pointed out in Farwell on Powers, 3rd ed., page 62, and the cases cited fully support the statement of the result of them which is:

> If an estate for life be first given and a power of disposition by deed or will added this does not amount to an absolute gift so as to vest the property in the donee for an estate that will devolve upon his representatives if he do not exercise his power of appointment.

I agree that the power of appointment which the will gives is a joint power and that it could not be exercised by the survivor alone.

No disposition in the events that have happened having been made of the corpus of the fund it fell into the residue.

Maclaren, J.A.

MACLAREN, J.A.:—This is an appeal by J. W. Simonton, the executor of the will of the late W. H. Simonton, from an order of Orde, J., of March 6, 1920, construing the will of the late William Simonton.

The clause of the will to be construed is contained in the following direction to his executors:

> To pay to Ebenezer W. Scane . . . $4,000, which I hereby bequeath to him in trust to invest the same and pay the interest yearly to William Henry Simonton, son of my said brother Hugh, and Christy Simonton, daughter of my said brother Hugh, in equal parts during the lifetime of said William (Henry) and Christy Simonton and the survivor of them, and after the death of said William (Henry) and Christy Simonton, then to the use of such person or persons as the said William (Henry) Simonton and Christy Simonton may by will appoint and nominate.

The said Christy Simonton died on April 12, 1892, intestate, and without having made any appointment or nomination with respect to said fund.

The said William Henry Simonton died on September 17, 1918, leaving a will which set out the above bequest of $4,000 and the said power of appointment and the fact that Christy Simonton had died intestate without having exercised the appointment. It then proceeds to exercise the power "to the extent to which I am entitled as such survivor," and distributes the corpus of the fund among certain relatives of the testator.

The trial Judge held that the attempt by William Henry Simonton, alone, to make such nomination, appointment and distribution was ineffective, and that the corpus of the fund fell into the residue of the estate of William Simonton and should be distributed as directed by his will. In support of this conclusion he has cited a large number of authorities.

Counsel for the appellant, J. W. Simonton, argued very strongly before us that such nomination and appointment were effective; that William Henry Simonton and Christina Simonton being given an unrestricted right to receive the income from the fund during their lives and the life of the survivor, with a right of disposition by will at death, gave them an absolute interest in the fund; and that they held as joint tenants and not as tenants in common, and consequently the survivors had the right to dispose, by will, of the whole fund.

The plain answer to such a claim is that W. H. Simonton and Christina Simonton never held this fund either as joint tenants or as tenants in common; that neither of them had any right or claim in or upon the corpus, and had no estate whatever therein; their sole claim being the right to receive the income during their respective lives, and to nominate and appoint by will the person or persons to receive the corpus upon the death of the survivor.

The cases cited by counsel in support, when examined, are found to be inapplicable; the facts being widely different from those of the present case. Most of them refer to the carrying out of trusts rather than to the exercise of powers. W. H. Simonton and Christina Simonton were in no sense trustees.

Counsel further argued that as there was no resulting trust, the legatees were to be treated as absolute owners. The answer to this is that, on the failure to nominate and appoint by will, the corpus, on the death of the survivor, became part of the residue of the estate of William Simonton and should be divided among his residuary legatees as directed by his will.

In Sugden on Powers, 8th ed., at page 126, it is said "that a naked authority given to several cannot survive." There is no legislative or other authority given to donees of powers similar to that given by R.S.O. 1914, ch. 121, sec. 27, to surviving trustees.

In *Re Bacon*, [1907] 1 Ch. 475, Swinfen Eady, J., says, at pages 478, 479:—

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Maclaren, J.A.

No doubt, where it is a naked power given to two persons, that will not survive to one of them, unless there be express words or a necessary implication upon the whole will, shewing it to be the intention that it should do so.

Farwell on Powers, 3rd ed., page 512, says:

Mere powers as distinguished from trusts are strictly construed, and can only be exercised by the persons who are, either expressly or by reference, designated as donees of the power.

23 Halsbury, page 16, par. 36, lays down the rule as follows:—"Mere powers are strictly construed and can be exercised only by the persons designated either expressly or by reference as donees of the power."

See also *Cole* v. *Wade* (1807), 33 E.R. 894, 16 Ves. 27, at page 45: and *Townsend* v. *Wilson* (1818), 106 E.R. 223, 1 B. & Ald. 608.

In my opinion Orde, J., laid down the correct rule of interpretation of this will, and counsel for the appellant has not satisfactorily controverted his reasoning or the authorities cited him.

The appeal should be dismissed, costs of all parties except the appellant to be paid out of the estate, those of the respondent the Toronto General Trusts Corporation between solicitor and client.

Magee, J.A.

MAGEE, J.A.:—Out of the proceeds of his estate, William Simonton bequeathed to various relatives, twenty-four pecuniary legacies of specific sums varying from one to $4,000 and amounting in all to about $50,000.00. Twenty-two of these were simple absolute bequests—and of these seven were to different children of his brother Hugh. The bequest of $4,000 here in question was for William and Christy—two other children of the same brother—and instead of being, like the others, made direct to them, it was made to a trustee, and has been quoted by my brother Maclaren.

The will was dated 1886, and the testator died in 1888. The niece Christy died in 1892 intestate and the nephew William died in 1918. Presumably the testator would expect that either William or Christy or both might have families whom each might wish to benefit. At all events even if they should have no children it is quite evident he intended that no one else should have, as against them, any right to the principal of the $4,000, but it should be at their own absolute disposal to bequeath to children or strangers, and he evidently considered them quite capable of intelligent disposition of it.

It is difficult to believe that he intended that if either should leave children the other should nevertheless get the whole of the

income of the $4,000 or that either one should have a right of disposal of the principal of the whole. It is still more difficult to believe that he intended that either one should have the right to say to the other: "I will not join you in making a joint disposition of any part of this fund and I will prevent your children and my own from gaining any benefit from it." It seems to me evident that he intended to give really two legacies of $2,000 each, but for some reason not giving them absolutely to this particular nephew and niece as he did to their brothers and sisters, but giving each the income for life, and the power of deciding where the principal should go after his or her decease. Unfortunately, as these two relatives were being treated alike, the money intended for them was given in one fund to the trustee, Mr. Scane, and hence arose the somewhat peculiar wording of the bequest.

No reason has been suggested why, if Christy should die first, leaving children, William should get the whole income to their exclusion, or why if William should die first she should exclude his children, nor has any suggestion been made of any reason why both should be required to join in a disposition of the whole fund, when by the accident of death of either or the obstinacy of either the testator's intention to place it at their disposal might be wholly frustrated; and above all things what possible reason can be suggested for the two persons making that disposition only by a joint will. The difficulty, it seems to me, arises wholly over the use of the words "and the survivor," but I think the key to the interpretation is in the words "in equal parts."

The will directs the income to be paid yearly to William and Christy in equal parts during the lifetime of the said William and Christy. When he got thus far, it would occur to the draftsman that if either died, the other should not lose his or her half of the income, and to guard against the possibility of it being so constructed as to give the income only during the joint existence of William and Christy, he added the words "and the survivor." The true reading of the bequest I think is that the interest is to be given "in equal parts" and this is to continue during the joint lives and the life of the survivor. It is not that the survivor is to have the whole of the interest, but that he or she is to have the half of the interest not only during the joint lives but also during his or her survivorship.

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Then after the death of William and Christy, the will declares the trust to be to the use of such person or persons as the said William and Christy may by will appoint. It only requires this to be construed as meaning as beyond doubt the testator intended it to mean "as they may respectively by will appoint." A joint will which after the death of either the other might revoke, cannot have been in the contemplation of the testator. There would be no difficulty in that interpretation—if it were clear that there were two sums of $2,000 each and not a single undivided fund of $4,000.

It is clear that the income is divided, but it is not equally clear that the principal is also. The only way in which the will might be read which would divide the principal into two funds appears to me to be this: The executors are to pay to William Scane $4,000 which is bequeathed to him "in trust to invest the same" and "to pay the interest thereof yearly" to William and Christy "in equal parts" during the lifetime of them and the survivor after the death of William and Christy "then to the use of such person or persons" as William and Christy may by will appoint. Does this mean that Mr. Scane is, after the death of William and Christy, to "pay the interest" in equal shares "to the use of" the appointees—or does it mean that he is to hold the $4,000 "to the use of" the appointees? Grammatically the words "to the use of" appear to follow and apply more properly to the payment of interest. If so, then the unrestricted gift of the interest carries with it the gift of the principal. Where the obvious intention of the testator accords with the strict grammatical construction, I do not see why that should not be adopted though another construction might be open under other circumstances. So, reading the whole will strictly, literally and interpreting the appointing to the equal halves of the principal fund as meaning respectively appointing, I think we give effect to the testator's manifest intention. The result is in my view that William or William Henry Simonton the nephew had a power of appointment by will over one-half of the fund, and as he has by his will expressly exercised that power, his appointment as to that half should take effect, and as to that I would allow the appeal. As to the other half, which would have been in Christy Simonton's disposition, I agree that the appeal fails.

Ferguson, J.A.

FERGUSON, J.A., agrees with Maclaren, J.A.

Appeal dismissed.

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S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. June 29, 1920.

SET-OFF AND COUNTERCLAIM (§ II—40)—DAMAGES AGAINST VENDOR FOR BREACH OF CONTRACT—JUDGMENT—HOLDER OF NOTES IN DUE COURSE—UNCONDITIONAL ACCEPTANCE—NO NOTICE OF BREACH OF CONTRACT.

Damages recovered in an action for breach of contract against a vendor cannot be set off against the amount due to an assignee of such vendor in an action by such assignee on bills of exchange, of which such assignee is the holder in due course and which have been accepted unconditionally by the purchaser, the assignee having no notice of any breach of contract by the vendor at the time of discounting the notes.

APPEAL by defendants from a judgment of Simmons, J., in an action to recover the amount due on certain bills of exchange. Affirmed. Statement.

J. B. Barron and *S. J. Helman*, for appellant.

A. H. Clarke, K.C., and *P. Carson*, for respondent.

HARVEY, C.J.:—I agree with the views expressed by my brother Ives, with the exception that I do not feel the doubt he expresses about the plaintiffs being the holders in due course of the bills sued on. There is no evidence that when the bank discounted the bills, it had any notice of any breach of contract on the part of Arnett or of any other matter which would give the defendant any claim against Arnett. The plaintiffs in this action rest nothing on the agreement which was assigned to them and, in my opinion, they are not affected by notice of anything more than they would have been if Arnett had merely told them just what his arrangement under the agreement was. Harvey, C.J.

I would dismiss the appeal with costs.

STUART, J.:—The divergence of view in this case revealed in the judgments of the other members of the Court, which I have had the advantage of reading, seems to me to me to arise out of the problem whether the facts are such as to justify the Court in declaring that the document sued upon should not be treated as negotiable commercial paper subject only to the law laid down in the Bills of Exchange Act, but merely as orders given by a creditor to his debtor to pay the debt to his assignee and given simply in pursuance of, or as a fulfilment of, the assignment; in other words, as in effect nothing more than as *notices* of the assignment. Stuart, J.

Upon consideration, I am unable to conclude that the bills of exchange sued upon ought to be deprived of their essential

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character with the legal consequences dependent thereon. In neither *Young* v. *Kitchin* (1878), 3 Ex. D. 127, nor in *Newfoundland* v. *Newfoundland R. Co.* (1888), 13 App. Cas. 199, was there any negotiable paper involved. I, therefore, concur in the views of the Chief Justice and Ives, J., and would dismiss the appeal with costs.

BECK, J. (dissenting):—The claim which the defendant seeks to set off against the claim of the plaintiff bank in this action is one which undoubtedly could have been set off, had the plaintiff's assignor been the plaintiff. It is a claim arising out of the very transaction itself, by virtue of which the assignor had a claim against the defendant. The plaintiff bank was not merely an assignee of the debt owing by the defendant to the assignor, with notice of the then presently effective equities and the then presently existing contingent equities attaching to the debt, but was the assignee of the very agreement under which that debt came into existence and thus had full knowledge of the terms and conditions of that agreement. Not only so but it was subsequent to, and in consequence of, the plaintiff bank having thus placed itself in the shoes of the assignor under the agreement, with all the rights and benefits accruing thereunder to the assignor (*e.g.*, for instance the right of lien upon the subject matter of the agreement which was the consideration for the debt) that the bill of exchange drawn by the assignor upon the defendant, which was expressly in accordance with the terms of the agreement, was made payable to the bank, evidently at its instance, as a means of procuring the payment of the debt to the bank in pursuance of the assignment. The bank was, in my opinion, substituted, as far as could be, for the assignor as a party to the agreement, that is, it was entitled to all the benefits to be derived from the agreement, but it took it, subject to all rights of the debtor, to be derived from the agreement itself whether those rights had as yet been infringed; subject only to this that any set off to which the debtor then was, or might become, entitled could only be set off against such amount as remained unpaid by the debtor and that any excess of amount found owing to the debtor could be recovered only from the assignor. In my opinion, neither the making of the draft in favour of the bank under these circumstances, nor the acceptance of the draft by the defendant, placed the plaintiff

bank in any better position than if some other form of getting the debtor's recognition of the substitution of the bank for the assignor, for instance, a covenant to pay had been taken; and, therefore, that the law as to bills of exchange and a holder in due course has no application to the case. I have used the word "set off" throughout; but the word is ambiguous; it is not a case of technical legal set off under some English statutory provision introduced as part of the English law of 1870; nor is it, perhaps, as restricted as "equitable set off" as defined by the jurisprudence of the Court of Chancery; but is a right of deduction or diminution of a creditor's claim or, to use an American expression, recoupment, in favour of the debtor, which was in fact largely, if not fully, recognized in the Courts of common law.

In *Young* v. *Kitchin*, 3 Ex. D., page 127, the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract. The defendant pleaded by way of set off *and counterclaim*, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at a specified time. The Court held that the defendant was entitled by way of *set off or deduction* from the plaintiff's claim to the damages but could not counterclaim against the plaintiff for any excess of damages over the amount of the plaintiff's claim.

In *Newfoundland* v. *Newfoundland R. Co.*, 13 App. Cas., which was a case of a construction contract, the Judicial Committee of the Privy Council approve of *Young* v. *Kitchin*, *supra*. They approve also of a proposition of Bovill, C.J., in *Watson* v. *New Wales R. Co.* (1867), L.R. 2 C.P. 593, at 598, as follows:—

> No case has been cited to us where equity has allowed against the assignee of an equitable chose in action a set-off of a debt arising between the original parties *subsequently to the notice of assignment*, out of *matters not connected with the debt claimed nor in any way referring to it.*

The implication from that proposition is that the Court will allow a set off as between the debtor and the assignee in respect of a claim *arising subsequently to the assignment;* provided that the claim sought to be set off arises out of matters connected with the debt sued for, and the Board so held and applied the rule in the case before him. In 4 Hals., page 388, par. 823, "Choses in action," it is said: "He (the debtor) may set-off a debt which has

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accrued since notice of assignment if it has arisen out of a transaction inseparably connected with the original debt."

I applied the principle at trial in *First National Bank* v. *Matson* (1909), 11 W.L.R. 663.

In my opinion, it is clear that the acceptance of the draft by the debtor in favour of the assignor, had there been no assignment, would not have prevented such a right of set off or deduction as against him though before the fusion of the Courts of common law and equity procedure might possibly have created some difficulties.

It is possible, though I think not, that, had the agreement itself not provided for the making of drafts, the acceptance by the debtor might have been taken as a waiver of his right of set off, but inasmuch as provision is made in the agreement itself for that course being adopted, I think the bank, standing in the assignor's shoes, is kept in the same position as the assignor and the principle of estoppel can have no application.

I would, therefore, allow the appeal and set aside the judgment of the trial Judge so far as it disallows the defendant's claim for a set off or counterclaim to the extent of the plaintiff's claim. The amount found due on the plaintiff's claim is, I understand, not disputed. We are told that an action is pending by the defendant against the assignor for damages for the breach of the contract. The liability and the damages can be settled either in this action, the assignor being added, or in the other action, the bank being added, or the two actions can be consolidated. I think that either party should have liberty to apply to a Judge for an order in the sense above indicated and that the plaintiff's judgment in this case be stayed till the defendant's set off is determined, when the rights of the parties will be dealt with by the trial Judge in accordance with the principles which I have set forth. I would allow the appeal with costs. I would leave the costs of the trial in this action to be dealt with by the Judge dealing with the defendant's claim of set off.

Ives, J.

IVES, J.:—The defendants appeal from the judgment of Simmons, J. The facts clearly established would seem to be these:—On February 10, 1919, the defendants and one Arnett entered into an agreement in writing whereby in consideration of $5,800 Arnett undertook to manufacture and instal on defendants'

premises certain restaurant and ice cream parlour fixtures. In this agreement, the defendants undertook to pay the purchase-price by acceptance of drafts with bills of lading attached drawn upon them by Arnett upon arrival of the goods, payable at a future date one month apart.

Arnett was a customer of this plaintiff bank and at the time was indebted to the bank and obtained additional advances to enable him to carry out his agreement with these defendants. As a security for such indebtedness Arnett, on April 19, 1919, assigned all his interest in his contract with the defendants, and all moneys payable thereunder, to the bank and delivered to the bank the memorandum of agreement. There is no doubt that at this time the bank became aware of the terms of Arnett's undertaking with the defendants as disclosed by the memorandum.

In course of time Arnett, whose factory is at Souris, Manitoba, completed his manufacture of defendants' goods and shipped them to defendants at Calgary, at the same time attaching bills of lading to the bills of exchange sued upon and delivering them to the branch of the Union Bank at Souris, where his business with the plaintiff was carried on. The bank upon receipt of these bills credited Arnett's account with the proceeds and forwarded them, with the bills of lading attached, to its branch in Calgary where defendants accepted them on June 23, 1919, and received the bills of lading.

On July 21, 1919, the defendants commenced an action in this Court against Arnett for damages for alleged breach of his contract with them and that action was tried in March, 1920, with the result that defendants recovered a judgment for damages, the amount whereof was ordered to be the subject of a reference to the Master in Chambers. The bank was not a party to that action.

This action which was on the bills in question was commenced on the 18th of September, 1919, and judgment recovered on May 17, 1920. The issue in this appeal arises upon the contention of the defendants that the bank must be restricted to its rights as Arnett's assignee and therefore that it can recover only what Arnett could recover. In other words, the defendants desire to set off their judgment for damages against Arnett against the claim of this plaintiff.

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Upon the face of the bills sued upon appear the words "Hold for arrival of goods," and because of them it is urged that these documents are not bills of exchange, R.S.C. 1906, ch. 119. Considering all the circumstances that I have outlined, I think the words are well within the provision of par. (*b*), sec. 17 (3). The words simply identify the transaction and are but a direction to the Calgary branch of the bank as to when to present the bills to the defendants for acceptance. In the case of *Quebec Bank* v. *Mah Wah* (1917), 33 D.L.R. 133, 10 Alta. L.R. 413, the judgment does not decide whether the additional words effected a destruction of the document's character of a promissory note but went upon the ground that the payee could not repudiate, when he did, his promise under an agreement to pay for land that he had bought.

That the plaintiff is the "holder" of the bills I have no doubt under the definition of "holder" as found in sec. 2 (g) of the Act, but that it is the "holder in due course" I doubt. A requisite to so constitute the bank is, among others, that at the time it took the bills from Arnett, it had no notice of any defects in Arnett's title. Remembering that the bank is the assignee of the Arnett contract, that it actually was in possession of the document which evidenced that contract, and that such contract provided for payment in the following words:—

> In lieu of 30 day payment I agree to pay $800 per month from date of shipment. I agree to accept drafts or sign notes for all payments, said drafts or notes to bear interest at 8% per annum and bank charge for collection. It is also agreed that upon receipt or tender of goods or tender of bill of lading for same I will accept drafts or execute notes, etc.

The inference of the bank's knowledge that the drafts negotiated to it by Arnett and now sued upon were incidents of the contract of which it was assignee is irresistible. But in my view of this case I think it unnecessary to decide whether or not the bank under the circumstances I have outlined comes within the definition of "holder in due course." That the bank is the "holder" of the bills sued upon is certain. As such holder its right to recover is affected only by the equities attaching to the bills themselves and *not* the equities of the parties drawer and acceptor. See the leading case of *Re Overend, Gurney & Co.; Ex parte Swan* (1868), L.R. 6 Eq. 344, and the cases there collected. See also the case of *Young* v. *MacNider* (1895), 25 Can. S.C.R. 272. In

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the latter case the Chief Justice, who delivered the majority judgment of the Court, approves the judgment in *In Re European Bank; Ex parte Oriental Commercial Bank* (1870), 5 Ch. App. 358, which in turn approves the judgment of Sir R. Malins, V.-C., in *Ex parte Swan, supra*. But the *ratio decidendi* upon which the judgment in *Young* v. *MacNider, supra*, proceeds is that of estoppel and applies here I think. While it may be urged here that the bank knew that the bills were incidents of the contract between Arnett and the defendants at the time they were negotiated to it the subsequent unqualified acceptance by the defendants, without any complaint or protest, must preclude them from any right to set off against the bank a claim other than such as arises in their contractual relationship with the bank. The defendants by their acceptance entered into a contract with the bank, not with Arnett. Their right of set off, if any, must arise out of this contractual relationship. It is admitted they have no claim for a damage against the bank. It must follow that they cannot set off against their promise to the bank a damage which they can only recover against Arnett. See *Oulds* v. *Harrison* (1854), 10 Exch. 572, 156 E.R. 566.

The appeal should be dismissed with costs.

Appeal dismissed.

SMITH v. CANADIAN PACIFIC R. Co.

SASK.

K. B.

Saskatchewan Court of King's Bench, Embury, J. June 12, 1920.

RAILWAYS (§ IV—91)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE —FAILURE TO STOP, LOOK, AND LISTEN.

Where a man approaches a railway crossing, the railway track being in full view, knowing that the crossing is there, and that an approaching train can be seen for a long distance and fails to look and gets upon the crossing and is injured, he is guilty of such contributory negligence as will exonerate the railway company even if it failed to blow the whistle and ring the bell before approaching such crossing.

Statement.

MOTION for a non-suit in an action for damages for injuries caused by plaintiff's automobile being hit by defendant's train. Motion granted.

G. H. Barr, K.C., and *C. M. Johnston*, for plaintiff.

L. J. Raycraft, K.C., and *J. A. Allan*, K.C., for defendant.

Embury, J.

EMBURY, J.:—I am assuming that I have to treat a motion for a non-suit in a case of this kind with the same respect as I would

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treat the giving of a judgment at the close of a trial, and that I should not be influenced by the convenience of allowing the case to go to the jury if I come to the conclusion that it should not go to the jury.

I consider that, on the authorities, the principle of the law governing a case of this kind is, that when negligence is proved, and there is evidence of contributory negligence, based on facts as to which there is no dispute, which would answer the charge of negligence, it is my duty to take the case away from the jury.

In this case the evidence of negligence is as follows: that the bell did not ring and that the whistle did not blow as provided by the statute. In dealing with the question of contributory negligence one must consider the natural situation of the ground: at a point three-quarters of a mile south of a bend in the defendant's railway, the railway is crossed almost at right angles by a road which runs itself for something less than half a mile to another railway, the Grand Trunk Pacific Railway. A train on the said C.P.R. track approaching from the north, from the time it passes the bend till it gets to the crossing, is continuously in view of any person who is coming along this road from the Grand Trunk Pacific railway crossing. There is evidence that it takes a minute and a quarter for the train to travel the distance, and that there is nothing whatsoever in the nature of an obstruction to the view.

In cases where the evidence is such that a man approaches a railway crossing in full view in an automobile, knowing that the crossing is there, knowing that he can see for a long time, and he does not look, and gets on to the railway crossing and is injured and suffers loss, then I take it, on the authorities, the fault is his own even if the bell did not ring and the whistle did not blow, unless there are some other surrounding circumstances which make that rule no longer applicable.

In this case I should have thought it might be possible that the apron having been on the automobile might be one such circumstance, had it not been that the plaintiff himself says it did not restrict his view in any respect. The only other suggested contributing circumstance is that when the plaintiff got to within 40 or 50 feet of the railway, and, having at that time made up his mind to cross, started going up the slight grade, he heard a

"honk" behind him and went forward, and so perhaps might have been a little distracted. Now here is a man who has travelled quite a considerable distance in full view of this railway and there is no evidence that he has looked up. Would there be any option but for me to direct the jury in such a case that they should find that there was contributory negligence? I cannot see that I would have any option. A man deliberately goes on to a crossing on which he knows well that a railway train is accustomed to approach silently, at which he knows it has a slightly accelerated speed—although not high even at that—which he has crossed many times, and with the track in full view of him for three-quarters of a mile; and the evidence of all the witnesses is that if he looked to see the train, though on merely a casual observation he might not see it—if he looked to see the train he must have seen it; and there is no evidence that he ever looked at all, and the only excuse that can be given for his not having seen the approaching train is that during the last fifty feet of his approach to the railway, an automobile horn sounded behind him. I can see no grounds on which a jury could find that he was not guilty of such contributory negligence as would exonerate the defendants.

I will refer to some of the cases that have been quoted to me.

In *Wabash Railroad Co.* v. *Misener* (1906), 38 Can. S.C.R. 94, I refer first to the citation of facts as set forth at page 96:—

> There was no evidence that deceased looked more than once, and the substantial point in the case is whether, under the circumstances, his failure to look again is fatal, the defendants contending at the trial and before us that such failure to look again was conclusive proof of contributory negligence, and that the case should have been withdrawn from the jury.

In that case he had looked once, and the question to be decided was whether he was negligent in not looking again. In this case, it seems to me, that in approaching a railway you would look when you first had an opportunity to look, or you would look from time to time. You are approaching a railway crossing practically in front of you; you would think that you would be more or less conscious of looking at it all the time as you went forward unless you were trying not to look at it. In the *Wabash* case *supra* he looked once, and the question for the jury was whether it was negligence on his part that he did not look again. In this connection, I want to refer to the judgment of the Chief Justice on the appeal, and to one or two observations which he made. He begins, at page 96:—

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This is certainly "as weak a case as can well be conceived," and almost involves the proposition that, "given an accident at a railway crossing of a nature consistent with the absence of negligence, the company is presumed to be guilty of negligence in respect of it." I concur in the judgment, but with much hesitatio

And then, at page 99:—

For all these reasons, I entertain grave doubt, and, were it not for the conclusion reached by the careful and learned trial Judge, adopted by the Court of Appeal, I would have held that the Judge, on a preliminary question of law, should have decided that there was no evidence on which the jury could properly find for the plaintiffs, but I defer to my brother Judges and adopt their view.

And then, in the judgment of Davies, J., at page 101:—

The only question open to us to consider is whether the findings are such as, under the circumstances of the case, reasonable men might fairly find.

Now, if I am of the opinion that reasonable men could not, on this evidence, do otherwise than find such contributory negligence as would exonerate the defendants, I should withdraw this case from the jury; and I am of that opinion. The judgment of Davies, J., in that case was the judgment of the Court. The reason for taking the case out of the rule is further stated in the following paragraph, on page 101:—

There were two or three points in the case to which the appellants did not seem to me to attach sufficient importance. One was that the railway crossed at an acute angle and not at right angles and that a traveller going north-westerly, when crossing the railway tracks, would have his back turned almost to the approaching train. Another was the unwonted speed with which the unattached engine which killed the deceased approached the highway, and another, that he could not have seen the approaching train until he was past the railway fence at the crossing.

In this particular case, the only thing that would take it out of the rule would be that someone "honked" a horn of an automobile when he was within 50 feet of the crossing of the track. There is, in my judgment, no comparison between the two cases.

I will refer also to the case of *G.T.R. Co.* v. *Griffith* (1911), 45 Can. S.C.R. 380—which was referred to by both counsel—judgment of Anglin, J., at page 400:

The moment the decision is reached that the statutory signals, if given, might have prevented the accident, and there is evidence of their omission, it is not proper for the trial Judge to withdraw the case from the jury (unless, indeed, what is incontrovertibly contributory negligence is admitted or is so clearly proved in the plaintiff's own case that it would be proper to direct the jury to find it).

I consider that is this case, and the application for non-suit will be allowed. *Judgment accordingly.*

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Ontario Supreme Court, Appellate Division, Magee, J.A., Clute, Riddell, Sutherland and Masten, JJ. March 26, 1920.

PLEADING (§ I S—145)—STRIKING OUT—VEXATIOUS—JURISDICTION OF COURT—RULE 124—WHEN ACTED ON.

The inherent jurisdiction of the Court, independent of any general orders, to prevent abuse of its process and merely vexatious actions, is partly embodied in Rule 124, which allows pleadings to be struck out if disclosing no reasonable cause of action or defence or if the defence is shewn to be vexatious or frivolous, but this rule should only be acted on when the Court is satisfied that the case is one beyond doubt and that there is no reasonable cause of action or defence. The plaintiffs claim for reformation of insurance policies, and to recover thereunder was not barred by the judgment in the former action (1917), 39 D.L.R. 528, 41 O.L.R. 108, and (1918), 46 D.L.R. 1, 58 Can. S.C.R. 169.

[*Erie County Natural Gas and Fuel Co.* v. *Carroll*, [1911] A.C. 105, specially referred to; *Poulett* v. *Hill*, [1893] 1 Ch. 277, distinguished.]

Statement.

APPEAL by plaintiffs from an order of Middleton, J. (1919), 50 D.L.R. 356, 46 O.L.R. 291, staying an action for reformation of insurance policies and to recover thereunder. Reversed.

H. J. Macdonald, for appellants.

Shirley Denison, K.C., for defendants.

Magee, J.A.

MAGEE, J.A.:—The plaintiffs appeal from an order dismissing their action. The defendants gave notice of motion to strike out the statement of claim or stay proceedings or have security for costs or to have such other relief as might be just. The grounds stated in the notice were: (1) that the cause of action had already been disposed of in another action between the same parties; (2) that, the fire having occurred more than a year prior to the issue of the writ, the plaintiffs cannot recover; (3) that the statement of claim shews no cause of action.

The previous action referred to is that reported as *Ross* v. *Scottish Union and National Insurance Co.* (1917), 41 O.L.R. 108, 39 D.L.R. 528, and (1918), 58 Can.S.C.R. 169, 46 D.L.R. 1, in which the plaintiffs sued upon ten policies of insurance, issued in 1913, for $12,000, upon 10 houses burned in 1916, and failed as to five of the policies, on the ground that the houses covered by these policies were vacant at the time of the fire. Fortunately for the defendants, whether fortuitously or not, a printed slip attached to each policy had on it, after the description of the property, the printed words "while occupied by . . . as a dwelling." The blank had not been filled nor was the clause altered or deleted but left in that incomplete state. The result was that a majority of the Supreme

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Court held that the word "by" might be eliminated as surplusage, and by the very terms of the contract the houses would be insured only while occupied from time to time, though probably insured before being fit for occupancy. The policies had issued while all 10 houses were unoccupied, and while in fact in course of completion, and each house had after completion been occupied at some time or times.

Neither in their pleading nor in their particulars nor in the questions for the jury prepared by their counsel nor in the trial Judge's charge to the jury, nor even in the subsequent notice of appeal to the Divisional Court, do I find that the defendants put this unfilled clause forward as the construction to be placed upon the contract. On the contrary, they did, as they were entitled to do, press, among a number of other defences, one which was in a measure inconsistent with it, that is to say, that the vacancy of each house was a change material to the risk, which, under the second statutory condition, avoided not merely the policies upon the adjoining houses but that policy upon that vacant house. It could not well be a change material to the risk if by the contract there was no risk; and, if it was a hit or miss policy, such as afterwards contended for, it would be a change beneficial to the defendants. The jury found—and in the circumstances, as it would seem, not unreasonably found—that vacancy was not a material change as to any of the risks, and found against the other defences, and the plaintiffs obtained judgment for $12,000. It should be said that in the charge to the jury reference was made to the unfilled clause as bearing upon misrepresentation as to one policy on the southerly house, which had a shop on the ground-floor; and on a motion for nonsuit a reference was made as bearing on misrepresentation, but that very reference made more impressive the silence as to the clause in other respects. The answer of the company's Toronto representative, Mr. Medland, at the trial (at p. 121 of the appeal-book before the Supreme Court of Canada), shews only reliance upon the statutory condition. But in the Divisional Court the unfilled clause certainly did come into prominence to the plaintiffs' undoing. In the Supreme Court of Canada, Anglin, J., who delivered the judgment of the majority of the Court, said (58 Can. S.C.R. at p. 181, 46 D.L.R. at p. 9): "The defence which succeeds is purely one of law arising from the construction of the policy."

Having thus as to 5 vacant houses failed upon the wording of the policies issued to them, the plaintiffs bring this second action, asking in their writ for a declaration that they applied for and were entitled to receive from the defendants insurance upon houses which were vacant to the defendants' knowledge and without any stipulation as to occupancy thereof, and for payment of the amount insured. Their statement of claim amplifies this and invokes the 8th statutory condition, whereby, after application for insurance, it shall be deemed that any policy sent to the insured is intended to be in accord with the terms of the application unless the company points out in writing the particulars wherein the policy differs from the application. The statement of claim, which I need not set out, also alleges that the defendants, by withholding notice of their subsequent contention as to the meaning of the words, and charging and receiving payment of premiums on the basis of insurance not so restricted, worked a fraud upon the plaintiffs by which the plaintiffs were induced to pay; and, in the alternative, they claim damages occasioned by the fraud and concealment, and they ask for such and other relief as the nature of the case may require.

The application was certainly not in evidence in the former action when it was before the Divisional Court. The Chief Justice, manifestly having in mind the 8th statutory condition, said that no application inconsistent with the words of the policies had been proved; and in the Supreme Court, Anglin, J., said that answered the argument based on that condition. It is true that the statement of defence contained a general denial of the statement of claim, which alleged that the defendants had issued the policies. It thus became necessary for the plaintiffs to produce and prove the policies. If the applications were indeed actually a part of the policies, then it might be said that the plaintiffs did not produce the whole policy, and should then have done so. But, if the application was not a part of it, but was a document by which it was to be corrected, if need should arise from some contention of the defendants, that is another matter. It may well be argued that the 8th statutory condition is not a statutory enactment declaring that the policy must be read in accordance with the application, but is one clause, worded by statute, of a contract, which clause the parties may or may not qualify or by

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not qualifying adopt. And this clause does not say that the policy shall be deemed to be in accordance with the application, but that it shall be deemed to be so intended. If it is not drawn as it was intended, then it should be reformed, but until reformed would appear as the contract. There was, therefore, nothing before the Divisional Court by which to grant the plaintiffs the relief of reformation which they now seek. So long as a party does not (as the Erie company did not in *Carroll* v. *Erie County Natural Gas and Fuel Co.*, to be referred to) seek to take advantage of a mistake in written documents, the mistake is obviously immaterial, and does not call for rectification, though it may be dangerous to let it go uncorrected too long. There is no indication that the defendants, until after trial and judgment, ever set up this unfilled, incomplete, and, as the plaintiffs allege, unintended and improper clause, which on its face is insensible; and, as Idington, J., said, might be filled up with the words "anybody" or "nobody." Assuming for the present, as we are bound to do, that the plaintiffs' allegations are true, it would seem that it is the conduct of the defence, and not the attack, which partakes of the nature of vexation and abuse.

It may be admitted that it is in the public interest that there should be an end to litigation, and under the Judicature Act, sec. 16, it is the duty of the Court to grant all such remedies as the parties may be entitled to in respect of every legal and equitable claim properly brought forward, so that all matters so in controversy may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided. But the matters must be in controversy and must be properly brought forward; and, while it is the duty of the Court to dispose of such matters so brought forward, the parties are not always bound to avail themselves of all their rights in one action. A plaintiff need not join several existing causes of action, though he may do so. A defendant may, but need not, avail himself of a right of set-off, nor need he always counterclaim, but may bring separate actions.

As pointed out by Middleton, J., on granting the present order, a plaintiff in equity, before the fusion of the Courts, was not barred from reformation because of judgment against him at law on the unreformed contract. His course in the previous action

might be a matter for consideration as to the propriety of reforming. The fusion, while it widened the jurisdiction so that parties had not to go to different tribunals to obtain the necessary relief, did not and was not intended to deprive a party of relief when occasion for it arose; but I do not know that a litigant is bound to a greater extent than before to avail himself of such facilities as may be open to him.

In 1843, in *Henderson* v. *Henderson* (1843), 3 Hare 100, 67 E.R. 313, Wigram, V.-C., said, at pp. 114, 115:—

" . . . I believe I state the rule of the Court correctly, when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." In that case he allowed a demurrer to the plaintiff's bill of complaint, but gave leave to amend.

In *Hunter* v. *Stewart* (1861), 4 DeG. F. & J. 168, at p. 179, 45 E.R. 1148, Lord Chancellor Campbell said:—

"It is indeed true that the case made by the second bill must be taken to have been known to the plaintiff at the time of institution of the first, and might have been then brought forward, and it may be said, therefore, that it ought not now to be entertained; but I find no authority for this position in civil suits, and no case was cited at the bar, nor have I been able to find any in which a decree of dismissal of a former bill has been treated as a bar to a new suit seeking the same relief but stating a different case, giving rise to a different equity."

Now, having in view that previous state of the law, what are the circumstances in the present case? Here was an incomplete,

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indefinite, ambiguous clause, which, if it was as alleged not in accordance with the application, could not have binding effect. The defendants had not even filled it up, and gave no intimation that they relied upon it, and, as already mentioned, set up an inconsistent defence, and for the first time, after the evidence necessary to meet the issues raised, after trial and judgment, and after the lapse of the year within which the action may be brought under the 24th statutory condition, put forward what, if the plaintiffs are right, would be a dishonest contention. Until that was done, the plaintiffs would not know that they had any cause for seeking rectification, and it might indeed be said they had till then no cause for such an action, and the company might well say, in answer to such an action, that it had never contended contrary to the intention, and that of course the policy was to be in accordance with the application.

The case is very different from *Poulett* v. *Hill*, [1893] 1 Ch. 277 (referred to in the Court below), where the mortgagees, pending their foreclosure action, in which they claimed and were entitled to a personal order for payment, also brought a separate personal action against the mortgagor for payment.

The plaintiffs here are in fact in the position of the plaintiffs Carroll *et al.* in *Erie County Natural Gas and Fuel Co.* v. *Carroll*, [1911] A.C. 105, as detailed at p. 111. They had in 1891 made an agreement for sale to the Erie company of gas-wells, with a clause reserving a free supply of gas for their lime-kilns and works, and the agreement had been followed by a conveyance which did not contain that clause. The Erie company, however, had lived up to it and supplied the gas, but in 1894 sold out to the Provincial company, who refused to do so. The plaintiffs thereupon sued the Provincial company to enforce the clause, but their action (*Carroll* v. *Provincial Natural Gas and Fuel Co. of Ontario* (1896), 26 Can. S.C.R. 181) was dismissed after appeal, as it was considered that their conveyance had superseded the agreement. Then, in 1896, they brought a second action against the Provincial company, joining the Erie company as defendants, to obtain reformation and damages. Rectification was granted in a series of appeals (*Carroll* v. *Erie County Natural Gas and Fuel Co.* (1899), 29 Can. S.C.R. 591), and leave to appeal further was refused by the Privy Council, and damages were assessed by the Master at a sum over

$100,000, but, after a third series of appeals, reduced, for want of proof, to nominal damages, but yet damages, and these were awarded against the Provincial company, the defendants in the first action. In [1911] A.C. at p. 116, it is pointed out that the omitted clause, on rectification, amounted to a contract of the Erie company binding on the Provincial company. In 29 Can. S.C.R. at pp. 593 and 594, the Supreme Court said:—

"No case for rectification having been made by the first action, . . . it is impossible upon any recognised principle applicable to the defence of *res judicata* to hold that such an answer to the" (second) "action can be maintained. . . . It is not material to say that the appellants might, if they had so elected, have made an alternative case for relief on the ground of mistake in their first action; it is sufficient to say that they did not in fact do so and that no such question was there in issue."

If it was not open there, it would not be open here, and, if not *res judicata*, I am unable to see any other respect in which it is either vexatious or frivolous. It certainly does not present itself to me as a case in which what has been called the "might and ought" principle should be applied, on the ground that the plaintiffs had fair opportunity and might and ought to have brought this up in the former action.

The Court has inherent jurisdiction, independent of any general orders, to prevent abuse of its process and merely vexatious actions. This was made use of in *Lawrance* v. *Norreys*, (1890), 15 App. Cas. 210, affirming the judgment of the Court of Appeal, (1888), 39 Ch. D. 213, but it was pointed out (p. 219) that it should be very sparingly exercised, and only in very exceptional cases, and Lord Watson characterised its use as exceptional treatment in that case. The Court was careful to say that it did not act under the Rule corresponding to our Rule 124, or any order or rule, nor because of the dismissal of the previous action with refusal of application to amend, nor because the statement of claim did not disclose a good cause of action if proved, nor because the story therein of a seventy year old fraud was highly improbable and one which it was difficult to believe could be proved, but because in the circumstances it was a myth which had grown during the litigation and was incapable of proof. That inherent jurisdiction is partly embodied in our Rule 124, which allows pleadings to be struck out if disclosing no

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reasonable cause of action or defence, and thereby, in such case, or if the action or defence is shewn to be vexatious or frivolous, the action may be stayed or dismissed or judgment be entered accordingly. The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence. But, looking at the cases already referred to and others, I think it can hardly be said here that the facts disclosed as to the former action bring the case within such a category that the plaintiffs should be turned out of Court upon an interlocutory motion made in Chambers, though after argument given the status of a motion in Court.

On the other ground for the motion, that the action is too late, the plaintiffs perhaps are on weaker footing. By Rule 222, a party may at any stage apply for such judgment or order as he may upon any admission of facts be entitled to or where the only evidence consists of documents. The defendants have put in the appeal-book setting out the policies. The present pleading shews that the fire was more than three years before the new action. The policies shew that they contain the 24th statutory condition without any variation. That condition bars any action for the recovery of any claim and by virtue of the policy after one year. The plaintiffs allege that they applied for policies subject to those statutory conditions. If therefore the policy were rectified, the plaintiffs would still be seeking to recover by virtue of it, and would be too late by its terms. But it appears that these policies were issued in 1913 and renewed in 1916, a three years' premium being paid upon each occasion. It may well be that the plaintiffs may be able to shew such facts as to estop the defendants from setting up the time-limitation, in the face of the course they pursued. If one party has deliberately induced another to believe that a contract has a different meaning until by its terms it is too late to claim under it, I would be loath to think that the law could not in any state of facts give relief. This does not seem to me a case in which the defendants should be relieved from pleading in the ordinary way or the plaintiffs prevented from setting up such reply as the facts may seem to them to justify, and having the issues of law or fact disposed of in the due ordinary course. I do not know whether there is any reason for asking rectification apart from recovery of

the money. If there is, it may well be questioned whether the 24th condition would apply.

As to the alternative relief of damages asked for by the plaintiffs by reason of their being induced to receive and act upon a policy as meaning something different from what it appeared to be, there is no reason that I know of why such an action should not lie. To justify the use of Rule 124, a statement of claim should not be merely demurrable, but it should be manifest that it is something worse, so that it will not be curable by amendment: *Dadswell* v. *Jacobs* (1887), 34 Ch. D. 278, 281; *Republic of Peru* v. *Peruvian Guano Co.* (1887), 36 Ch. D. 489; and it is not sufficient that the plaintiff is not likely to succeed at the trial: *Boaler* v. *Holder* (1886), 54 L.T.R. 298.

On the face of things, these plaintiffs shew a meritorious claim to relief of some sort. It may be that they will not ultimately succeed, but they are, I think, entitled to have all the facts dealt with and not have their action snuffed out thus summarily.

I would allow the appeal, give the defendants time to plead, and the plaintiffs, if they desire it, leave to amend; costs in the cause throughout.

Clute, J.
Sutherland, J.

CLUTE and SUTHERLAND, JJ., agreed with MAGEE, J.A.

Riddell, J.

RIDDELL, J.:—The plaintiffs sued upon twelve separate policies of insurance in the same form. Relying upon their interpretation of the policies, they proceeded through the Courts to the Supreme Court of Canada with the result that it was held that they had misinterpreted the contracts in a particular which was material in the case of some (six) of them. The misinterpretation was immaterial as to the others, and the plaintiffs have judgment on these.

They now bring an action to rectify the policies on which they failed. Mr. Justice Middleton dismissed the action as an abuse of the process of the Court, and the plaintiffs now appeal.

In my view, the stage at which the defendants first raised their successful contention as to the true meaning of the policies is wholly immaterial—equally so the omission of the plaintiffs to ask for an amendment of their pleading as suggested in the Appellate Division.

That there was a contract of insurance between the parties is undoubted (I treat all the policies as one for convenience); and

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it is also beyond question that the contract contained within itself a canon of interpretation: statutory condition 8—"After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application . . ." Consequently, whatever may be the form, the wording, of the policy, it must be interpreted as being in accordance with the application. In many cases the application is almost, if not quite, as important as the formal policy itself. Therefore, where the plaintiff sues on an insurance policy, the application is always competent evidence; it may indeed be unnecessary because the plaintiff may rely upon the precise wording of the policy itself, but it could not be rejected, as it is really a part of the contract, being the dictionary by which the words of the formal policy are to be interpreted. It can in no case be necessary to ask for an amendment or rectification of the formal policy; whatever its wording, it must be interpreted by the application.

Had then the plaintiffs put in or proved the application at the trial, they would, on the record as it stands, have had all the relief they can obtain in the new action.

I agree with Mr. Justice Middleton in his reasons, and add the above, which was suggested by my brother Magee on the hearing of the appeal.

The complaint that the defendants did not specifically set up the interpretation upon which they succeeded until the case was in appeal is much pressed by the plaintiffs, but I am unable to see any cogency in the argument based upon it.

A defendant when sued on a special contract is not bound to plead its terms or the interpretation he puts on it: *Lake Erie and Detroit River R.W. Co.* v. *Sales*, (1896), 26 Can. S.C.R. 663. See especially *per* Gwynne, J., giving the judgment of the Court, at p. 677. The meaning of the contract is always an issue unless it be specifically admitted. And it certainly would be an alarming doctrine to say that, because a litigant did not at the trial thoroughly appreciate his rights under a written document, he should be precluded from asserting them in an appellate Court: this would be a reactionary step, in view of the liberalising of our practice of enabling litigants to obtain their rights irrespective of slips and mistakes.

In the view I take of the case, the plaintiffs must be considered as saying: "Our case really depended on the application; we made a mistake and did not give evidence of the application. Therefore we failed. Let us have another trial so that we may put in the application."

Without saying what might have been done if the action were still pending in the Courts of Ontario, this could not be allowed after having been heard and determined in the Supreme Court of Canada.

As to a claim for damages—there can be no doubt that an action lies for fraud in inducing a contract, although the contract itself must stand: *S. Pearson & Son Limited* v. *Dublin Corporation*, [1907] A.C. 351.

This was not argued before us, but such a claim is at least indicated in the statement of claim, and that part should not be dismissed.

To that extent only the appeal should be allowed, without costs here and below.

MASTEN, J.:—But for the fact that the Supreme Court of Canada has otherwise determined, I should have been of opinion that since the Ontario Judicature Act came into force it was incumbent on a plaintiff making a money demand to put forward all the several alternative claims pursuant to any one or more of which he claimed to recover, and, failing to do so, that he would not be permitted to bring a second action.

But I am unable to distinguish the present case from *Carroll* v. *Erie County Natural Gas and Fuel Co.*, 29 Can. S.C.R. 591, and I think we are bound under the authority of that case to hold that reformation of the policy of insurance may be sought in the present action, notwithstanding the dismissal of the former action, wherein the plaintiffs claimed to enforce the contract without reformation.

I cannot think that the plaintiffs ought to be debarred from their present action because, in the course of the argument of the appeal in the former action, a suggestion was thrown out by the Court which might have enabled the question of reformation to be raised in that action; more especially so when it was not further referred to or noticed in the reasons for judgment.

But I think it plain on the record that this action is, under the 24th statutory condition, too late, and I am unable to understand

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what facts the defendants could plead to establish an estoppel. No basis for such an amendment of the claim or for a reply was suggested by Mr. Macdonald in his very able argument, and I confess I am unable to imagine them.

I agree that the Court should be chary of summarily disposing of an action on a motion such as this; but, on the argument, counsel for the appellants, having a very complete grasp of the case, stated quite frankly that on this branch no further facts could be presented at a trial.

Under the circumstances, a refusal of the motion would be tantamount to a declaration that Rule 124 is practically abrogated.

I would dismiss this appeal and confirm the order of Middleton, J., so far as it relates to the branch of the action which seeks to reform the policy and to claim on the policy so reformed.

As regards the claim for damages for fraud, I think that the principle of *Carroll* v. *Erie County Natural Gas and Fuel Co.*, 29 Can. S.C.R. 591, applies, and that this claim is not barred by the result of the former action.

If the plaintiffs deem it worth while to proceed with that branch of their case, I think they are entitled to do so. I would allow the appeal to that extent, without costs.

Order as stated by MAGEE, J.A. (RIDDELL *and* MASTEN, JJ., *dissenting in part*).

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MICHAUD v. EDWARDS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. July 12, 1920.

NEGLIGENCE (§ I B—5)—SCAFFOLD ERECTED FOR PLASTERING PURPOSES —FALLING OF——PRIMA FACIE EVIDENCE OF NEGLIGENCE OF DEFENDANT—WITHDRAWING CASE FROM JURY.

The fact that a scaffold erected by defendant for plastering purposes gave way under the weight placed upon it, is *primâ facie* evidence of the failure of the defendant to provide a reasonably safe scaffold; that is, of negligence on his part, with this *primâ facie* evidence established the case cannot properly be withdrawn from the jury.

Statement.

APPEAL by plaintiff from the trial judgment withdrawing the case from the jury in an action for damages for injuries caused by the falling of a scaffold erected for plastering purposes.

W. F. A. Turgeon, K.C., for appellant.

The judgment of the Court was delivered by

LAMONT, J.A.:—The question involved in this appeal is: was the trial Judge justified in withdrawing the case from the jury.

The defendant was a sub-contractor under agreement to do the plastering of a church, of which J. P. Tremblay and J. A. Tremblay were the contractors. The plaintiff was employed by the defendant to plaster, and for this purpose was directed to work upon a certain scaffold. The plaintiff did so, the scaffold fell down, and the plaintiff was precipitated to the floor of the church, a distance of some 30 ft., sustaining serious injuries, for which he now claims damages on the ground that the defendant was in duty bound to furnish him with a safe place in which to work, and that he failed so to do.

The defence set up was, that, under the defendant's contract with the Tremblays, the latter were to supply the scaffolding required by the defendant for his work, and, in fact, did supply it; and the defendant had, therefore, a right to assume that the scaffolding erected by the Tremblays was proper scaffolding for plastering purposes.

The evidence shews that the scaffold in question had been erected by the Tremblays for their work in the erection of the church, and that for such work it was sufficient. It also shewed that the defendant's work in plastering placed a much heavier load upon the scaffold than did the work of the Tremblays, and that the scaffold broke because it was not strong enough to carry the weight of mortar and the men the defendant placed upon it. In addition the evidence disclosed that the defendant examined the scaffold and thought it too light for his work. He admits that he had a conversation with Father Maillard in which he told Father Maillard that it was too light. Father Maillard goes further, and says that not only did the defendant admit that it was too light, but that he said that he would see about it. A number of witnesses testified that, from the bending of the scaffold boards under the load placed upon it, it appeared over-loaded.

At the close of the plaintiff's case, the trial Judge held that there was no evidence of negligence on part of the defendant, and he withdrew the case from the jury and dismissed the plaintiff's action.

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The argument pressed by counsel for the defendant upon the trial Judge, according to the appeal book and upon us, was, that under the defendant's contract with the Tremblays, they were under obligation to erect for the defendant the scaffolding necessary for the purposes of his sub-contract, and that the defendant was justified in assuming that the scaffold was strong enough, particularly as the foreman for the main contractors had assured him that it was.

The defendant's duty was to provide a reasonably safe scaffold for his employees to work upon. *Ainslie Mining & Ry. Co.* v. *McDougall*, (1909), 42 Can. S.C.R. 420. He did not perform that duty. The scaffold provided was not reasonably safe.

In *Great Western Ry. Co.* v. *Braid* (1863), 1 Moo. P.C.C. 101, 15 E.R. 640, Lord Chelmsford, in giving the judgment of the Privy Council, says, at page 116:—

> There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *primâ facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it.

In the present case, not only was there an allegation of the improper construction of the scaffold, and that it gave way, but there was the positive testimony that it gave way because it had not been constructed sufficiently strong for the work it was called upon to do. This was *primâ facie* evidence of the failure of the defendant to provide a reasonably safe scaffold; that is, of negligence on his part. With this *primâ facie* negligence established, the case could not properly be withdrawn from the jury. The establishment of a *primâ facie* case placed the onus upon the defendant of shewing circumstances which justified or excused his failure to provide a safe scaffold for his men. That onus he did not discharge, as no evidence was given on his behalf. The only justification or excuse offered was, that under the circumstances he had a right to assume that the Tremblays had erected a proper scaffold. Whether under the circumstances he was entitled to act upon that presumption, was a question of fact for the jury. In determining that question, the jury would have to take into consideration the fact that the defendant had examined the scaffold himself and that he believed, and had reasonable

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grounds for believing, that the Tremblays had not erected a scaffold sufficiently strong for his work.

I am therefore of opinion that there was evidence to go before the jury, and that the trial Judge erred in withdrawing the case from it.

The appeal should, therefore, be allowed with costs, the judgment in the Court below set aside and a new trial ordered. Costs of the former trial to be costs in the cause.

Judgment accordingly.

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BRYANS v. PETERSON.

Ontario Supreme Court, Appellate Division, Magee, J.A., Clute, Riddell, Sutherland and Masten, JJ. March 26, 1920.

PRINCIPAL AND SURETY (§ I B—11)—CHATTEL MORTGAGE—NOTE AS COLLATERAL—FAILURE TO FILE STATEMENT—NEW MORTGAGE TAKEN —EXTENSION OF TIME—RELEASE OF MAKERS OF NOTE.

In order to make a chattel mortgage a valid security for all purposes, it must be filed and before the end of the year a renewal statement must be filed. Failure to file the renewal statement, and the granting of time to the debtor by taking a new mortgage for amount of the debt, releases the makers of a promissory note given as collateral to the first chattel mortgage.

[*Croydon Gas Co.* v. *Dickinson* (1876), 2 C.P.D. 46; *Egbert* v. *National Crown Bank*, 42 D.L.R. 326, [1918] A.C. 903, referred to.]

Statement.

APPEAL by plaintiffs from the judgment of Kelly, J., in an action upon a promissory note given as collateral security to a chattel mortgage. Affirmed.

The judgment appealed from is as follows:

KELLY, J.:—The following facts will help to a proper understanding of the reasons for the conclusion I have come to:—

The plaintiffs are the executors of the will of William Bryans, deceased, and sue to recover upon a promissory note made by the defendants Peterson and Rickaby and one John Knight, of whose will the defendants Richard Knight and Christina Knight are executors. The note, which contains terms additional to the usual form, is as follows:—

"$1,000.00 Bruce Mines, Ont., February 20th, 1914.

"One year after date, we jointly promise to pay Mr. William Bryans or order at his place of residence in the Town of Bruce Mines, Ont., the sum of one thousand dollars, for value received, with interest at 6% per annum till paid. This promissory note

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is given as collateral security to a chattel mortgage bearing even date herewith and given by David B. Tees to William Bryans to secure payment of $2,700 and interest as therein provided, and this note is given as an accommodation note on behalf of the said David B. Tees.

"John Knight.
"F. W. Rickaby.
"N. H. Peterson."

William Bryans had been a prominent farmer in the Township of Plummer and a leading man in the community in which he resided; and at the time of the transactions which have given rise to this action he had retired to and was living in the Town of Bruce Mines, of the municipal council of which he was a member in 1913. Though deficient in education, he was an intelligent, shrewd business man, who looked after his own business affairs. David B. Tees, a young man, then residing in Bruce Mines, contemplated purchasing a store-business in the early part of 1914. Tees not having the necessary money to do so, William Bryans was approached and asked to advance what he required. Bryans had known Tees intimately and held him in high regard, as did other residents of the town. Bryans agreed to lend Tees $2,700 on the security of a chattel mortgage on the stock in trade of the store-business which he proposed to purchase and on new goods to be brought into the stock, the amount to be further secured by a mortgage upon a vacant lot in the Town of Sudbury which Tees owned.

The defendant Peterson, a solicitor then and still practising his profession in Bruce Mines, was retained to draw the necessary documents; the defendant Rickaby, a publisher, who, as he put it at the trial, engages in real estate "on the side," was interested in behalf of Tees' vendor in making the sale to Tees of the store-business. On the 20th February, 1914, a chattel mortgage for $2,700 upon the stock of goods, and a mortgage for $800 on the Sudbury lot from Tees to Bryans, were executed. Peterson then informed Bryans of the necessity of renewing the chattel mortgage within the year from its registration if not paid off by that time; and he also suggested that the land mortgage be registered; but Bryans was reluctant that this should be done, lest it embarrass Tees in making a sale of the land, which, to Bryans'

knowledge, he contemplated. Tees was not present when the question of registration was brought up. Bryans then, in Peterson's office, asked if a note could not be given him in lieu of the land mortgage. Peterson communicated with Rickaby and then with Knight, both of whom came to Peterson's office, when it was arranged that a note should be given by these three, but on the understanding that Peterson should retain, as security for the makers of the note, possession of the mortgage, also drawn and executed in Bryans' favour on the Sudbury lands. The note now sued upon was then prepared and signed. At the same meeting, a memorandum, of which the following is a copy, was also prepared, and signed by Bryans:—

"Memorandum of understanding had between William Bryans and F. W. Rickaby, John Knight, and N. H. Peterson respecting an accommodation note given by last three above named in favour of William Bryans on behalf of David B. Tees, said note bearing even date herewith.

"In the event of the said David B. Tees paying the said William Bryans the sum of $2,000, at least, on account of a chattel mortgage given by said Tees to said Bryans, within one year from date hereof, and in the event of the said Tees keeping up his stock in trade to the amount or value of $2,700, with same covered by fire insurance in favour of said Bryans, then, in such events, the said William Bryans covenants, for himself, his heirs, executors, administrators, or assigns, jointly with said Rickaby, Knight, and Peterson, to deliver up to said lastly named parties, the accommodation note this date signed by them on behalf of David B. Tees.

"Dated this 20th day of February A.D. 1914."

This was retained by Peterson for the makers of the note, and a copy (unsigned) was then given to Bryans and was produced by the plaintiffs at the trial. Tees had no knowledge of the giving of the note or of this memorandum until after William Bryans' death, which occurred on the 26th February, 1916, and until after the fire which destroyed his stock of goods in June, 1917. Prior to the end of 1914, Tees made several payments, aggregating $500, on the principal of the chattel mortgage, thus reducing it to $2,200: payment of interest was also kept up. On the 1st February, 1915, Bryans made a further loan of $500 to

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Tees, and assumed to advance it on the security of the chattel mortgage of the 20th February, 1914. Peterson had nothing further to do with this chattel mortgage or with the dealings between Bryans and Tees from the time the chattel mortgage was made until the 25th February, 1915, when Bryans came to his office and produced the chattel mortgage, evidently with the intention of having it renewed; on it being pointed out that it had expired, he gave instructions to Peterson for a new chattel mortgage from Tees for $2,700, covering such of the goods formerly mortgaged as Tees still had in his possession and his new goods and new fixtures in the new store of which he had recently taken possession. The new mortgage was prepared and executed on the 25th February, 1915, and was registered, and Bryans retained possession of it. All this was without the knowledge of the makers of the note, except Peterson, who acted only in a professional capacity.

On instructions from Bryans, a discharge of the chattel mortgage of the 20th February, 1914, was drawn, and it was executed by him and registered on the 6th March, 1915. In the latter part of 1915, Bryans made a further loan to Tees on his promissory note; so matters stood when Bryans died on the 6th February, 1916.

In February, 1916, and February, 1917, the plaintiffs filed renewal statements of the mortgage of the 25th February, 1915. After William Bryans' death, the question of enforcing payment of the mortgage, then overdue, came up for consideration by the executors, and the matter was discussed between them and their mother, William Bryans' widow, when it was decided to give Tees further time for payment. Then the fire occurred in June, 1917, causing a total loss of the mortgaged goods, which were not insured; the plaintiffs, though they applied for insurance, did not or could not procure it.

The defendants have set up that they are released by reason of the manner in which the mortgagee and the plaintiffs dealt with the debtor, Tees, and the security of the chattel mortgage; and also because of the conditions upon which the note was given. The plaintiffs say that the makers of the note did not become mere sureties for Tees or his indebtedness to William Bryans, but that they became primarily liable to the extent of

the note as collateral and additional security for the chattel mortgage and the debt it represented. Even on that hypothesis, the creditor owed a duty to the makers of the note so to deal with the chattel mortgage as not to prejudice them if he desired to hold them liable. The note on its face is collateral security to the chattel mortgage of the 20th February, 1914. Not only did Bryans neglect to renew that mortgage within the statutory time, thus rendering it null and void as against creditors and subsequent purchasers and mortgagees in good faith for valuable consideration, but he deliberately destroyed it and put it out of existence as a security for the debt it represented. The new mortgage was to secure a sum different from the amount unpaid on the earlier mortgage at the time of its expiry and on different terms of payment. By the terms of the earlier mortgage, $2,000 of the principal became due on the 20th February, 1915. Had the mortgagee insisted on prompt payment by the mortgagor according to its terms, and had payment been refused, resort to proceedings on the mortgage would, no doubt, have realised the amount of the mortgage-debt, the evidence shewing that the mortgaged goods were ample to meet the total then unpaid. Taking the new mortgage operated as payment of the prior mortgage, and the mortgagee's remedy was therefore upon the latter mortgage, to which the note was not collateral.

But I am of opinion, when all the evidence is considered, that the note was not merely collateral. "Collateral" in its literal sense means "situate at the side of," hence "parallel or additional," and not, unless the nature of the transaction requires that a different meaning should be given it, secondary: *In re Athill, Athill v. Athill* (1880), 16 Ch.D. 211. It is a question of construction, having regard to the nature of the transaction and of the securities and the manner of the dealings of the parties with them. I do not think that, when it was proposed that the note should be given and having regard to the circumstances in which it was given, it was the intention that these two securities (the chattel mortgage and the note) should contribute ratably, but rather that the chattel mortgage should be available and be resorted to in priority to the note. If that is the correct view, and I think it is, then the note was collateral, not in its literal signification, but in its secondary sense—it was auxiliary, and

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only to be resorted to in aid of the principal security. Bryans' manner of dealing with Tees lends additional support to this construction. On these grounds alone the makers would have been released, and the case might rest here. But there is another and more positive reason why the defendants should be held discharged.

In the negotiations in Peterson's office, which followed Bryans' proposal for the note, there was a verbal understanding that if at any time he decided to take the land mortgage that would be in satisfaction of the note.

When the chattel mortgage and the note were executed, Bryans took and thereafter retained possession of them; but the land mortgage was retained by Peterson for the defendants in pursuance of the agreement, and remained in his custody until a later date, when Bryans informed him that he had decided to take it; then it was sent to the registry office for registration, but was returned because of some objection raised by the Registrar. From that time it was held, not for the defendants, but for Bryans, and since his death the plaintiffs have received a conveyance of the Sudbury property in lieu of that mortgage thereon, and to the time of the trial they had retained the ownership of the property.

Even if the defendants had not been released by the discharge of the chattel mortgage and by the manner of Bryans' dealing with the principal debtor, Tees, they undoubtedly were released when they gave up the benefit of the security of the Sudbury property. I have not overlooked what was urged in respect of the memorandum which was executed by Bryans when the original mortgage was given. The verbal agreement that on Bryans taking over the Sudbury mortgage the note would be delivered up was a separate and distinct agreement and is not affected by the terms of the memorandum. Nor have I disregarded the conflict between the evidence of Peterson and that of Mr. Williams, solicitor for the plaintiffs, as to what took place between them early in 1918, when the latter demanded payment of the note: it is not on what then took place that the case is to be decided, and it is unnecessary to decide which of them is mistaken.

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As against Bryans' estate there is ample corroboration of the evidence of Peterson and Rickaby from the documents themselves and from the evidence of Tees. Rickaby's evidence I accept without reserve; it was given with candour and straightforwardness. Peterson's also I have no reason to discredit on any of the happenings in William Bryans' lifetime. It is consistent with other parts of the evidence.

The action will be dismissed with costs.

Grayson Smith, for appellants.

J. E. Irving, for respondents.

RIDDELL, J.:—The facts in this case are set out in detail in the reasons for judgment of Mr. Justice Kelly: the material facts are few and simple; in my view they are these:— Riddell, J.

The defendants—one of them, Peterson, being a solicitor—gave a promissory note for $1,000 to the deceased Bryans as collateral security for a chattel mortgage for $2,700 given by one Tees to Bryans, part due in one year and the balance at a later day. Bryans filed the chattel mortgage, but omitted to file a statement of renewal. On consulting Peterson, Bryans was advised to take a new chattel mortgage, and did so, receiving a chattel mortgage for $2,700, payable at a later day.

The plaintiffs as executors of Bryans bring action on the note, and, failing at the trial, now appeal. As against all but Peterson, it is plain that the granting of time by the second chattel mortgage releases the sureties. That indeed, while it is not explicitly admitted, is scarcely controverted by Mr. Smith. He argues, however, that Peterson is not thereby released, as he advised the whole transaction and did not warn his client, Bryans, of the effect. I agree in that contention. A solicitor is not allowed to advantage himself by his own neglect or ignorance: *Gemmill* v. *Macalister* (1863), 7 L.T.R. 841; *Bulkley* v. *Wilford* (1834), 2 Cl. & F. 102, at p. 177, 6 E.R. 1094 at 1122; *Beevor* v. *Simpson* (1829), Taml. 69, 48 E.R. 28; *Horan* v. *MacMahon* (1886), 17 L.R. Ir. (Ch.) 641.

But, before the default on the part of Peterson, and irrespective of the substitute mortgage transaction, I think he had been released. It is clear law that the creditor must keep his securities from the debtor in the same condition as when the guaranty was given; and that, if registration or the like be necessary to make them valid and effective, he must register, etc.,

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etc.: *Watson* v. *Alcock* (1853), 1 Sm. & G. 319, 65 E.R, 138; *Wulff* v. *Jay* (1872), L.R. 7 Q.B. 756; *Pledge* v. *Buss* (1860), Johns. 663, 70 E.R. 585.

To make a chattel mortgage a valid security for all purposes it must be filed; and before the end of the year a renewal statement, etc., must be filed. The chattel mortgage was filed, but no renewal statement was filed. Thereupon it was effective only between mortgagor and mortgagee, and the rights of creditors became paramount. This may have done no harm in fact, but that is not the test.

The Judicial Committee, in discussing the effect of an alteration in the contract, says: "If it is not self-evident that the alteration is unsubstantial, or one that cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett, L.J., in *Croydon Gas Co.* v. *Dickinson* (1876), 2 C.P.D. 46 at 51: "*Egbert* v. *National Crown Bank*, [1918] A.C. 903, at pp. 908, 909, 42 D.L.R. 326, at pp. 328, 329.

I can see no difference (to the disadvantage of the surety) between an alteration in the express contract between creditor and debtor and in the implied contract between creditor and surety. Here the creditor desires the surety to accept a chattel mortgage invalid against creditors for one valid against creditors. That is not a case where "it is, without inquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety:" [1918] A.C. at p. 908, 42 D.L.R. at p. 329; and I think the surety is relieved.

The subsequent conduct of Peterson may give rise to some other and different right in the plaintiffs, but we are not called upon to express any opinion on that point.

I would dismiss the appeal.

MAGEE, J.A., and CLUTE and SUTHERLAND, JJ., agreed with RIDDELL, J.

MASTEN, J.:—I agree with the conclusion and with the reasons therefor of my brother Kelly, also with what has fallen from my brother Riddell in this Court, and I desire to add but one word.

It must be clearly borne in mind that the term "collateral security" is not a legal but a commercial term, of somewhat loose and vague import, and that in the present case the agreement on which this action is founded is collateral in the sense that it is ancillary and subsidiary not only to the personal obligation of Tees, the primary debtor, but ancillary and subsidiary to the original chattel mortgage taken by Bryans from Tees to secure the loan.

In my view, the conclusion of the Court rests fundamentally on that circumstance.

Appeal dismissed.

KELLER v. SCHULTZ.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

HOMESTEAD (§ IV A—33)—HOMESTEAD ACT (SASK.)—INTENTION—SALE OF WITHOUT WIFE'S CONSENT—RIGHT OF WIFE TO POSSESSION.

The intention of the Homestead Act, 6 Geo. V. 1915 (Sask.), ch. 29, is to prevent the husband from selling or otherwise parting with the homestead without his wife's consent, so that she may be insured her home, and where a transfer and certificate of title is set aside for want of such consent the wife is also entitled to an order for possession as against the purchaser.

APPEAL by defendant from an order granted to plaintiff for possession of her husband's homestead, which had been sold without her consent. Affirmed. Statement.

D. Buckles, for appellant; *C. E. Bothwell*, for respondent.

HAULTAIN, C.J.S., concurred with ELWOOD, J.A. Haultain, C.J.S.

NEWLANDS, J.A.:—The plaintiff, the wife of one Fred Keller, brought this action to set aside a transfer from her husband to defendant of the south-east quarter 28-20-25-W3rd, claiming the same to be her husband's homestead, and that she had not signed the transfer as required by the Homestead Act, 6 Geo. V. 1915 (Sask.), ch. 29. She further asked for possession of the said land. The trial Judge found that the land in question was her husband's homestead, set aside the transfer, and gave her an order Newlands, J.A.

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for possession of the land. From the order for possession the defendant appeals.

From the finding that the land in question was the homestead of the plaintiff's husband the defendant has not appealed. A homestead, under the Exemptions Act, 9 Geo. V. 1918-19, ch. 24, is the home of the person in question, and is exempt from seizure under execution so that the debtor can make a living. This is shewn by the fact that, in addition to a homestead of 160 acres, there are sufficient cattle, horses, implements, seed grain, etc., exempt to work the same. That it is also for the benefit of his wife and children is shewn by the fact that it is also exempt from seizure for his debts after his death while they reside thereon.

The intention of the Homestead Act is to prevent the husband from selling or otherwise parting with his home without his wife's consent, and as this consent is required after his death before his personal representative can dispose of the same, I think that the intention of the Act is to insure a married woman her home. As it would be useless to her as a home if she could not live in it, I think she must necessarily be entitled to possession, and, therefore, the order of the trial Judge was right, and the appeal should be dismissed with costs.

Lamont, J.A.

LAMONT, J.A., concurred with ELWOOD, J.A.

Elwood, J.A.

ELWOOD, J.A.:—The plaintiff is the wife of Fred Keller, who was the owner of the south-west quarter 28-20-25-west of the 3rd Meridian in the Province of Saskatchewan. In or about the month of November, 1917, the said Fred Keller, without the knowledge or consent of the plaintiff, transferred said land to the defendant, who subsequently became the registered owner thereof under certificate of title. This action was brought to set aside said transfer under the provisions of 6 Geo. V. 1915, ch. 29, as amended by 6 Geo. V. 1916, ch. 27.

The trial Judge found that the land in question was the homestead of the said Fred Keller within the meaning of said ch. 29 and ordered said transfer and certificate of title to the defendant to be set aside and possession of said land to be delivered to the plaintiff. From the portion of the judgment ordering possession to be delivered to the plaintiff, this appeal is taken.

The transfer and certificate of title issued to the defendant having been set aside, the title to the land would become revested

in the plaintiff's husband. The land has been found by the trial Judge to be the homestead of the plaintiff's husband. So long as it is the homestead of the plaintiff's husband, the plaintiff and her family have the right to reside thereon, and I apprehend that that right can only be interfered with when the plaintiff's husband has acquired a domicile different from the land in question, with the right to compel the plaintiff to reside with him, the land then would cease to be the homestead.

The plaintiff at the present time, however, having the right to reside upon this land, she, in my opinion, has the right to possession of it as against the defendant.

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

Re BURNSLAND Ltd.; BARR'S CASE.

Alberta Supreme Court, Walsh, J. June 24, 1920.

COMPANIES—(§ V D—205)—SUBSCRIBER FOR SHARES—MISREPRESENTATION ENTITLING TO RESCISSION—AGREEMENT TO SELL SHARES TO OTHER MEMBERS OF COMPANY—RIGHT TO HAVE NAME REMOVED FROM REGISTER.

A subscriber for shares in a company issued to him upon misrepresentations sufficient to entitle him to rescission, is not entitled to have his name removed from the register if he has entered into an agreement to sell his shares to other members of the company. The agreement expressly keeps the shares alive and recognises them as his property.

Statement.

APPLICATION by a subscriber for shares in a company to have his name removed from the register. Application refused.

S. W. Field, for applicant.

A. H. Clarke, K.C., and *W. C. Robertson*, for liquidator.

Walsh, J.

WALSH, J.:—In the settling of the list of contributories on the winding-up of this company, a special case has been stated for the opinion of the Court, and this has, by the Master, with the consent of the parties, been referred to a Judge for his decision.

The facts may be concisely stated as follows: Barr, to whom I will refer as the applicant, with others of his class, subscribed for shares in the company. A couple of years later, they claimed to have learned of some facts in connection with the purchase of the land for the acquisition of which the company had been formed, and with respect to the constitution and distribution of the company's shares with which they were not theretofore familiar, and they brought action in this Court against the company and

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some of its directors and others asking, amongst other things, an injunction restraining the company from ratifying the purchase of the lands, or any other acts of the directors requiring ratification by the shareholders to render them valid and a declaration that they never became shareholders in the company or liable for calls on any shares therein. On the same day, an interim injunction was granted in the terms of the above prayer. Two days later a settlement of the action was arrived at, the terms of which were embodied in a written agreement between the plaintiffs therein of the one part and certain of the individual defendants therein of the other part. The company was not a party to this agreement. By it, to put it shortly, these individual defendants agreed to buy the shares of these dissatisfied shareholders at the prices paid by them therefor with interest and to pay all calls made or to be made on them and to indemnify them against all liability therefor. Each of the shareholders agreed to transfer his shares to the nominee of the defendants upon payment in full therefor and not to vote on the same until after default had been made by the purchasers.

Shortly after this agreement was made, two special resolutions were passed by the company repealing the original articles of association and adopting new articles in their place and altering the division and value of the shares of the company's capital though the injunction which forbade the passing of such resolutions had not then been dissolved.

The shareholders who were parties to the above agreement, seven months after its date, brought action against the other parties to it for specific performance of it in which they afterwards obtained a judgment for specific performance with a personal judgment against the defendants therein for the amounts respectively owing to them under this agreement. The company was not a party to this action. This judgment directed a rectification of the company's share register by removing therefrom the names of these dissatisfied shareholders and substituting therefor the nominee of the purchasers of their shares. The company refused to obey this order and a motion at the instance of the plaintiffs in that action including the applicant to compel it to do so was cut short by the winding-up order.

The first question submitted for my opinion is whether or not the applicant, who was one of the plaintiffs in each of the above

mentioned actions and a party to the above mentioned agreement, is, in view of the facts and proceedings above set out, entitled to have his name removed from the list of contributories. It is assumed, for the purposes of this case, that shares were issued to him upon misrepresentations sufficient to entitle him to rescission, and that he has not waived his rights arising therefrom, or estopped himself from setting them up as a defence otherwise than by reason of the facts contained in the submission and the accompanying documents.

The applicant's right to rescind was lost by the commencement of the winding-up proceedings unless before then he had repudiated his shares and had commenced proceedings for recission. The bringing of the first action in which he was a plaintiff was a proceeding brought for the rescission of his contract to take these shares and it was an effective repudiation of them. It is contended, however, for the liquidator, that what followed the bringing of that action makes it impossible now for him to insist upon that repudiation. He says that the applicant by his above mentioned agreement recognized these shares as his property for he contracted to sell them and has procured a judgment of this Court for the specific performance of this contract by these purchasers and a personal judgment against them for the amount owing to him in respect thereof. The applicant's answer to that is that, having elected to rescind, his election was not affected by this agreement or by the proceedings afterwards taken by him to enforce it, for his election having been once made was finally made. The agreement, moreover, he submits, was not made or intended as a recognition of his contract to take shares but was the result of an endeavour on his part to obtain relief from liability in respect of it from the men who induced him into it, who promoted and incorporated the company and who in fact constituted it.

In re Brimsmead; Tomlin's case, [1898] 1 Ch. 104, is the authority principally relied upon in support of the applicant's position. In that case, an applicant for shares gave notice of motion for an order for the rectification of the register on the ground that he had applied for shares on the faith of misrepresentations in the company's prospectus. Before the motion could be heard a winding-up petition was presented. He gave notice of his inten-

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tion to appear as a contributory on the hearing of the petition and oppose it and he did appear on the hearing of and opposed the petition and was a party to an appeal from the decision. Wright, J., held that there was nothing in this amounting to a deliberate election to alter his position and that he did not intend to render himself liable for the shares but that he was throughout endeavouring to obtain relief from liability and so he ordered his name taken off the list of contributories.

In *Foulkes* v. *Quartz Hill Co.* (1883), 1 Cab. & El. 156, which contains the report of the judgment of the Court of first instance, the Court of Appeal held, according to the note appended to it, that "the issue of the writ" (claiming rescission of the contract) "was a definitive election to rescind and that this election was not affected by the subsequent voting at the meeting." This reference is taken from Palmer's Company Precedents, 11th ed., part 1, page 201, the judgment of the Court of Appeal never having been reported. Wright, J., in *Tomlin's* case, [1898] 1 Ch. at 107, doubted whether the Court meant to lay down the rule so absolutely as is stated in the above note, to which the learned author replies on this same page of Palmer (201) that it is "difficult to see how so well-settled a rule could be laid down otherwise than absolutely." The judgments in *Clough* v. *L. & N.W. Ry.* (1871), L.R. 7 Ex. 26, and *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, are to the same effect. I think that the rule thus laid down must mean that the person entitled to make the election is bound by it once it is made so that he cannot afterwards of his own motion withdraw it and adopt the other alternative that was originally open to him but it surely must be that he may thereafter so act with reference to it as to entitle the other party to say that he cannot insist on this repudiation, for it must be open to both parties either by conduct or express agreement to concur in the withdrawal of the original election and substitute the other alternative for it.

The case of *Re Metropolitan Coal Consumers' Association Ltd.*, (1891), 64 L.T. 561, is much more like this one in principle than any I have been able to find though the acts relied upon there as evidencing the intention of the shareholder to withdraw his repudiation of his shares were much more inconclusive than the acts here relied upon for that purpose.

The motion was for rectification of the register by the removal of the applicant's name therefrom on the ground of misrepresentation in the prospectus and it was met by the argument that after it was launched the applicant had attended a meeting of the company and had attempted to sell his shares. Kekewich, J., whose judgment it is, says, at p. 562

> Then, it is said, he cannot avoid his contract, because, notwithstanding his notice of motion given on May 8, he determined to abide a shareholder and two cases have been quoted that if a man has expressed a wish in a solemn way to avoid his contract and has then done acts inconsistent with such a wish, a serious question arises whether he has abided by his election. . . . Now, when one is asked to consider for this purpose whether a man acted as a shareholder, one must inquire whether he acted as a shareholder towards the company; if he acted otherwise than towards the company, his action must be viewed in an entirely different light. If he goes to a meeting and votes, or if he receives a dividend, then it is extremely hard to say that he can insist on repudiating his contract. . . . The other point taken was that Mr. Edwards attempted to sell his shares after he had elected to avoid his contract. I can see no objection to a man who has made a bad bargain and repudiated it endeavouring to get rid of it so long as he does nothing towards the company.

Though this judgment was given after all of the cases above cited except *Tomlin's* case, there does not appear to have been any doubt in the mind of the Judge that circumstances might arise which would disentitle one who had repudiated his contract to insist on such repudiation. In that I quite agree. His opinion fits the facts of this case very aptly, except that he was there dealing with what was alleged to be a mere attempt of the applicant to sell his shares, while I have to deal with an actual agreement to sell, of which specific performance has been decreed at the suit of the applicant. In this case, the applicant most definitely repudiated his contract by the bringing of his action. He sought by it escape from his position as a shareholder. Then those whose acts he relied upon to entitle him to this relief offered to pay him back his money with interest and indemnify him from further liability if he would transfer his shares to them and this he agreed to do. In this way, he thought that he had accomplished what he set out to do though by a different method, and thus got rid of a bad bargain. In one sense, nothing that was thus done was done "towards the company" for it was no party to this agreement. But in another sense it was. If the applicant had persisted in his original course of action and succeeded in it, the result would

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have been that his shares would have been wiped from the register entirely, and this transaction would have been as though it had never taken place. By reason of his agreement and of the judgment, which he has procured for the specific performance of it, the shares were expressly kept alive and the purchasers of them became entitled to have them transferred to them upon compliance with the company's requirements in that behalf. The applicant's right to have his name removed from the register and from the list of contributories is based entirely upon his claim that he is entitled to rescission of his contract. It is impossible for him to make *restitutio in integrum* because of his agreement to sell his shares and he, therefore, is not entitled to rescind. His claim for rescission is absolutely inconsistent with his recognition of his contract in his agreement to sell his shares, his insistence upon that agreement by his action to enforce it and his subsequent attempt to continue his original contract by having the purchaser of them registered in the books of the company as the owner of them.

It is contended that the applicant's agreement to sell his shares is not binding because the company was not a party to it. In view of his judgment for the specific performance of it I do not think that argument is open to him even if but for that there was any force in it, which I very much doubt.

It is further contended that the company, by the passing of the special resolutions to which I have referred, recognized the agreement, as otherwise it would not have passed them in disobedience of the injunction restraining it from doing so. I think that is probably so, but I do not see how that recognition can avail the applicant for I do not think that it amounts to more than this, that the company, knowing as it undoubtedly did that the litigation was ended by the agreement, doubtless felt that the injunction had lapsed, and so it was at liberty to pass these resolutions. I do not see how, by any possibility, that can be construed into a recognition by it of the agreement which bound it to remove the applicant's name from the register.

Finally, it is argued that the agreement contemplated that the company would be bound by it and a clause to that effect should be read into it. The remark of Lord Loreburn in *Tamplin S.S. Co.* v. *Anglo-Mexican, etc. Co.*, [1916] 2 A.C. 397 at 404, is quoted as authority for this, namely: "The Court . . . can infer from

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the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted" and also the words of Scrutton, L.J., in *Compton Commercial* v. *Power, etc. Co.*, [1920] 1 K.B. 868 at page 900:

> Being told the surrounding circumstances and any facts shewing their importance, the Court must determine whether the parties must have intended that the contract should only continue in force if certain circumstances continued to exist, which the parties must have treated as essential to performance, or to the necessary common purpose of the parties in performance.

The difficulty in applying these principles here is that the company is not a party to the agreement and I cannot make it one and that the other parties to it are not before me now and I cannot in their absence read into it something which is not there especially when the applicant has procured the judgment of this Court for specific performance of it as it stands.

In my opinion, the applicant is, for the reasons given, not entitled to have his name removed from the list of contributories.

The other point submitted deals with the application of the liquidator to have the judgment for specific performance above referred to varied by striking from it the direction that the company's share register should be rectified by striking the names of the plaintiffs from it and substituting therefor the nominee of the defendants. Mr. Field conceded on the argument that this judgment was not binding on the company and stated that no attempt would be made to compel obedience to it. In view of this, it seems unnecessary to make any order with respect to it but if the liquidator so desires a declaration that it is not binding may go.

The case is silent on the question of costs. If I am to dispose of them the liquidator, having entirely succeeded, is entitled to his costs from the applicant. *Judgment accordingly.*

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Nova Scotia Supreme Court, Harris, C.J., Drysdale, J., and Ritchie, E.J. April 15, 1920.

SALE (§ II C—35)—OF GOODS INTENDED AS FOOD—IMPLIED WARRANTY AS TO FITNESS—DURATION OF.

Where a person undertakes to supply another with goods which are not specific goods, and which are intended to be used as human food, there is an implied warranty that the goods shall be fit for the purpose for which they are intended to be used, and such warranty continues until the purchaser has a reasonable opportunity of dealing with them in the ordinary course of business.

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[*Beer* v. *Walker* (1877), 46 L.J. (C.P.) 677 followed; *Burrows* v. *Smith* (1894) 10 T.L.R. 246; *Winnipeg Fish Co.* v. *Whitman Fish Co.* (1909), 41 Can. S.C.R. 453; *Barnes* v. *Waugh* (1906), 41 N.S.R. 38, referred to.]

Statement.

APPEAL from the judgment of Longley, J., in favour of plaintiff in an action for goods sold and delivered. The goods in question consisted of hams and bacon shipped by plaintiff from Charlottetown, P.E.I., consigned to defendant at Halifax. The defence was that the goods were not of merchantable quality and were of an inferior quality and were unfit for use and unsaleable. The trial Judge found on the evidence that the goods were shipped in proper condition and having been sold f.o.b. Charlottetown, there was no further responsibility on the part of plaintiff. He also found that defendant was at fault in not giving prompt notice to plaintiff of the condition in which the goods were received. Reversed.

S. Jenks, K.C., for appellant.

R. H. Murray, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—The plaintiffs were pork packers in Charlottetown, P.E.I., and defendants carried on business in Halifax as retail dealers in meats, groceries, etc. Defendants purchased from plaintiffs for their trade a quantity of hams and bacon to the value of $309.84. The goods were purchased f.o.b. Charlottetown and were shipped in three different lots.

The plaintiffs sued for the amount of their account and the defendants paid into Court the sum of $172.82, alleging that this was the purchase price of part of the goods which had arrived in good order, but as to the balance, they set up the defence that the hams and bacon when received in Halifax were wormy, slimy, and unfit for food.

The trial Judge gave judgment for the plaintiff for the full amount claimed with costs, holding in effect that the implied warranty as to the quality of the goods was satisfied if the goods were in good condition when shipped—as to which he accepted as satisfactory the evidence of the plaintiff's manager. The defendants appeal.

Defendants' counsel contends that the evidence of the plaintiff's manager does not establish that the goods were shipped in good condition. This witness admitted that he could not tell anything about the particular shipments in question, but his evidence was that it was the custom of the firm to smoke their hams and

bacon for 24 hours or thereabouts after receipt of an order, and then they were inspected and packed; and he thought it was impossible that any hams or bacon not in good condition could be shipped from their establishment. The trial Judge accepted this evidence as sufficient proof of the fact that the hams and bacon were in good order and condition when shipped. I think there is much weight in defendant's criticism, but as I view the authorities the plaintiffs cannot recover even assuming that they have satisfactorily established the goods to have been in good condition when shipped. The evidence of a number of witnesses called by the defendant is to the effect that the goods were slimy, wormy and unfit for food when they reached Halifax. This evidence is uncontradicted and the trial Judge says he believed "all the evidence put in by the defendants was true;" and again—"It is quite clear from the evidence furnished on the part of the defendants that most of these goods were in bad condition; one barrel especially was found to be quite bad when opened."

I must confess that there are some things about defendants' case which do not impress me favourably, but I am unable to say that the findings of the trial Judge as to the condition of the goods when they arrived in Halifax were not justified and I accept them.

There is nothing to shew that anything unusual or exceptional happened to the goods in transit to account for their condition.

On this state of facts the case is, I think, concluded by authority: In *Beer* v. *Walker* (1877), 46 L.J. (C.P.) 677, the plaintiff contracted to send weekly from London by railway to defendant at Brighton a quantity of rabbits, the cost of the railway carriage and the price of the rabbits being paid by the defendant. The rabbits were in good order and condition when shipped by the plaintiff, but when they were opened on arrival at Brighton and the rabbits in one cask out of two were found to be in bad condition and unfit for food, the County Court Judge gave judgment for the plaintiff and this was reversed on appeal. Grove, J., at page 679, said:

> It cannot, I think, be contended that when a person undertakes to supply another with goods which are not specific goods, there is not an implied warranty that the goods shall be fit for the purpose for which they ordinarily would be intended to be used, and that with regard to animals used for human food they are fit to be so used; the case of *Bigge* v. *Parkinson* (1862), 7 H. & N. 955, 158 E.R. 758, is a strong authority to that effect. Then the second,

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and in fact the only question which is really arguable in this case is, whether such a warranty was satisfied by the delivery to the railway company at their station in London, or whether the warranty was not such that if nothing happened out of the ordinary course, the rabbits should reach the person for whom they were destined in good order and fit for human food. Now I am of opinion that the implied warranty extended to the time at which, in the ordinary course of transit, the rabbits should reach the defendant, and not only to that time, but that it continued until the defendant should have a reasonable opportunity of dealing with them in the ordinary course of business. Our judgment, therefore, will be for the appellant.

Harris, C.J.

This case was approved in *Burrows* v. *Smith* (1894), 10 T.L.R. 246, and was cited with approval by Fitzpatrick, C.J., in *Winnipeg Fish Co.* v. *Whitman Fish Co.* (1909), 41 Can. S.C.R. 453, and by Graham, E.J., in *Barnes* v. *Waugh* (1906), 41 N.S.R. 38. See also 25 Hals. 224, and Benjamin on Sales, 639, 640 and 1005. The decision in *Barnes* v. *Waugh* (*supra*), was for the plaintiff because there the evidence shewed that the oysters, although shipped in good condition, were killed in transit by being frozen, or were injured by some other exceptional or accidental cause; but there is nothing here to justify such a finding.

The case is, I think, governed by *Beer* v. *Walker* (*supra*), and I would therefore allow the appeal. The trial Judge gave judgment for the whole amount claimed. The defendants admitted their liability for $172.82 and paid that amount into Court. The judgment below will be reduced to $172.82 and the plaintiff will have costs of the action to the time of the payment into Court. The defendants will have the costs of the action after the payment into Court and the costs of the appeal.

Drysdale, J. Ritchie, E. J.

DRYSDALE, J., and RITCHIE, E.J., agree with Harris, C.J.

Appeal allowed with costs.

SASK.

K. B.

OLSON v. MINOT AUTO Co.

Saskatchewan King's Bench, McKay, J. July 4, 1920.

WITNESS (§ V — 67) — FOREIGN — EXPERT — FEES ALLOWABLE — SASKATCHEWAN RULE 734.

In taxing the fees to be allowed to a foreign witness who is beyond the jurisdiction of the Court the practice in Saskatchewan is to tax only the fees allowed by the tariff. Under Rule 734, schedule 3, item 6, professional men called to give expert evidence are only allowed $5.00 per day and railway fare or mileage, and any sum in excess of this amount paid to a foreign lawyer will not be allowed.

Statement.

APPEAL from the Local Master of Weyburn upon review of the taxation of the plaintiff's bill of costs.

H. J. Schull, for appellant; *J. W. Corman*, for respondent.

McKAY, J.:—As to the first six items, they appear to be necessary attendances, letters and disbursements, and are authorized by the tariff, and I allow the same.

As to the next seven items, from "item 17, page 7, paid wire to H. M. Lewis $0.96, to and inclusive of item 23, page 7, paid wire to H. M. Lewis $1.08," these items were incurred by plaintiff's solicitor when arranging to get a lawyer from Montana to attend at the trial to give evidence as to the law of the State of Montana. This particular lawyer Lewis did not attend, but it appears he handed over this correspondence to lawyer Babcock who gathered from this correspondence what was required and did attend. It thus obviated any correspondence with Babcock. I think these items should be allowed under Item 124 of Schedule 1 of the Tariff of Costs, and I allow the same.

As to the next item at the top of page 2 of the Notice of Appeal, this was not pressed by defendant's counsel, and nothing was produced before me why it should not be allowed. I allow this item.

As to the last two items $80, and $18.82, the eighty dollars are part of $100, allowed for witness Babcock, a lawyer from the State of Montana, who gave evidence as to the law of the State of Montana. He was beyond the jurisdiction of the Court and could not be compelled to attend by subpœna, and he would not consent to attend as a witness unless he were paid $25 a day from the time he left home until he returned thereto, and all expenses, and plaintiff was unable to obtain a witness to give the required evidence at a less expense. The $18.82 are the hotel and incidental travelling expenses of said witness. The $25 a day for 4 days, railway fare $16.18, and hotel bill, etc. $18.82, together amounting to $135. were paid to the witness Babcock by plaintiff. The question is, is plaintiff entitled to tax these items against defendant, or only $5 per day witness fees and railway fare $16.18? An expert witness, subject to the jurisdiction of the Court, may be compelled to attend by subpœna for $5 per day and railway fare or mileage.

In England, a reasonable allowance in costs may be made for the loss of time of a necessary foreign witness, who is not accessible to a subpœna, and who will not attend without compensation.

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Widdifield Law of Costs, 2nd ed., page 241: *Lonergan* v. *Royal Exchange Assoc.* (1831), 7 Bing. 729, 131 E.R. 282.

In Ontario the same practice is followed.

Widdifield Law of Costs, 2nd ed., 241: *Ball* v. *Crompton Corset Co.* (1886), 11 P.R. (Ont.) 256, *Boyle* v. *Rothchild* (1908), 16 O.L.R. 424.

Our practice has been to tax only the fees allowed by the tariff Item 6 of Schedule 3.

Our rule 734 is as follows:—

734. Court reporters, witnesses, jurors, interpreters and parties when appearing as witnesses shall be entitled to the fees and remuneration set out in Schedule 3 of the Tariff of Costs.

Schedule 3, Item 6, is as follows:—

6. For barristers and solicitors, physicians and surgeons, civil engineers, surveyors, chartered accountants, and architects, when called to give evidence in consequence of any professional services rendered by them, or to any witness called to give expert evidence, per day $5.

It seems to me that the language of our rule and tariff includes a foreign witness. The rule speaks of "witnesses" and the tariff says that any witness called to give expert evidence is to be paid $5 per day, with mileage or railway fare. In my opinion, the rule and tariff precludes me from allowing anything more than what is therein stated. In *Manders* v. *Moose Jaw* (1915), 32 W.L.R. 683, Brown, J., now Chief Justice, held that this tariff applied to foreign witnesses, and that the successful party could tax only the items set out in the tariff.

In my opinion then the $80 and $18.82 items should not be allowed, and should be taxed off the bill.

The defendant will be entitled to the costs of this appeal.*

Judgment accordingly.

*Since writing above my attention has been drawn to the fact that I did not deal with the question of the costs in the review of taxation before the Local Master. In my opinion the defendant's cost of that review should be paid by the plaintiff.

HINCHCLIFFE v. BAIRD.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. August 5, 1920.

PRINCIPAL AND AGENT (§ II C—20)—UND'SCLOSED PRINCIPAL—SUB-CONTRACT—BREACH OF TRUST—CONSIGNOR AND CONSIGNEE—RIGHT TO FOLLOW GOODS OR PROCEEDS.

The purchaser of a commodity such as grain, who has bought it for value in good faith and in the ordinary course of business, and unaware of any breach of trust connected with it, cannot be called upon to restore the property or again pay for it, where the vendor is shewn to have committed a breach of trust.

[*New Zealand, etc. Land Co.* v. *Watson* (1881), 7 Q.B.D. 374, followed.]

Statement.

APPEAL by plaintiff from the judgment at the trial in an action to recover the sum of $19,745.30 fraudulently obtained by certain grain brokers. Affirmed.

J. B. Coyne, K.C., *D. Forrester*, and *A. T. Hawley*, for plaintiff.

W. A. T. Sweatman, and *W. P. Fillmore*, for defendant.

Perdue, C.J.M.

PERDUE, C.J.M.:—During the period in which the matters in question in this action arose the plaintiff owned and operated a grain elevator at Strassburg, Saskatchewan. The defendants, Baird & Botterell, are a firm of grain dealers and brokers in the City of Winnipeg, and the Regina Grain Company, Ltd., is a corporation carrying on a similar business at Regina. During the fall of the year 1915 the plaintiff handled some 200,000 bushels of grain grown by farmers in the vicinity of Strassburg. He alleges that it was agreed between him and the defendant company that the company would act as the agent of the plaintiff in handling all cash grain forwarded by the plaintiff for his customers whether obtained on track or through the plaintiff's elevator at Strassburg. It was also agreed, as plaintiff alleges, that Baird & Botterell should act only as the agents of the defendant company in offering for sale grain forwarded by the plaintiff for his customers and that the plaintiff sent bills of lading of the grain to the company with instructions to obtain the best current price obtainable on the Winnipeg grain market.

The plaintiff claims that by reason of press of work he did not keep a proper record of each transaction but relied on the defendant company to do so. He complains that Baird & Botterell (whom I shall call "the firm") and the defendant company were one and the same concern, that the firm "wrongfully and contrary to law" assumed to act as purchasers of the grain, that the price was not the best procurable and that the plaintiff thereby suffered loss

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and damage. He charges that the defendants thereby secretly and corruptly received for themselves large profits, and have not accounted for them; that the firm and the company entered into a conspiracy to wrongfully and unlawfully obtain undue advantage of the plaintiff and his customers; and, in the alternative, that the firm wrongfully converted the grain to its own use. But the main complaint of the plaintiff is that the defendant company transferred the sum of $19,745.30 from the plaintiff's cash grain account "to a pretended account, which the company kept under the plaintiff's name for customers in the Strassburg district in their trading in futures in grain, stocks or other commodities." He claims that this was done wrongfully and without authority.

In the alternative the plaintiff claims that the transactions last above mentioned in which he was charged with the above sum were gambling transactions or were contracts or agreements made by defendants with intent to make a gain or profit by the rise or fall in price of grain sold or purchased in respect of which no delivery of the thing sold or purchased was made or received and there was not any *bonâ fide* intention to make or receive such delivery, that the same were void or were made in contravention of sec. 231 of the Criminal Code. Plaintiff complains that by reason of the alleged improper actions of the defendants he was unable to pay the farmers for their grain and he was compelled to discontinue his elevator business, that he was damaged in his reputation and suffered great financial loss. The concluding allegation is that in respect of the complaints made, in which the plaintiff is beneficially interested, he sues in his personal capacity, and in respect to the moneys due to the sundry farmers, *the plaintiff sues on behalf of and as trustee for said sundry farmers.*

In the prayer the plaintiff claims the above sum of $19,745.30, an accounting of the grain received and profits made, interest, damages for conversion of the grain, loss sustained by plaintiff and said sundry farmers by reason of the alleged fraudulent and improper conduct of the defendants, and damages for the plaintiff's loss of business and reputation.

The plaintiff did some track-buying and he also had grain of his own. His elevator contained 13 bins and appears to have had a capacity of about 45,000 bushels. He states that the greater part of the grain received was specially binned and storage tickets

therefor would be issued to the farmers storing it. See the Grain Act, 2 Geo. V. 1912 (Dom.), ch. 27, sec. 157 (e). He states that he handled 200,000 bushels through his elevator in a little over two months. There would therefore be over 100,000 bushels of grain specially binned in an elevator of less than half that capacity. According to his own story he accomplished this feat in the following manner: As fast as he could procure cars he shipped the grain forward, whether it was specially binned or not. He got the farmers to sign orders for cars and turn them over to him. According to his own statement, if he could get cars he could specially bin 50,000 bushels in two days. He simply shipped out the specially binned grain without orders, sold it, received the money and made room for more specially binned grain. He signed the great majority of the bills of lading in his own name as shipper. This enabled him to consign the grain to his own agents and to receive the proceeds. Of the bills of lading put in evidence 91 were signed by the plaintiff as shipper, 44 were signed by farmers and 16 by the plaintiff as agent for the shipper. The grain was consigned in the great majority of the transactions to the defendants the Regina Grain Company. Even where farmers signed bills of lading as shippers they usually indorsed them to the plaintiff. He got farmers to indorse shipping bills in blank which he could fill up as he pleased. The farmers who had instructed the plaintiff to sell generally received from him an advance of part of the price, but much of the grain belonging to farmers which was stored and specially binned was sold without their authority and the proceeds were received by the plaintiff.

According to the plaintiff's story, in order to protect himself against claims by farmers whose grain he had shipped out and sold without authority, he bought May wheat through the Regina Grain Company. This would be a protection to the farmers and himself should there be a rise in price. The company had a private wire to Strassburg and the plaintiff could constantly obtain information as to the market fluctuations. He arranged with the company to take orders for dealing in futures in the grain market. On these transactions he was to collect from customers at Strassburg 5 cents a bushel as margins. A certain amount of speculation appears to have been done. The plaintiff collected considerable sums from the parties investing. In other cases he

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charged against the proceeds of grain in his hands held on behalf of farmers sums expended in the purchase of options, or said to have been so used. Some of these charges were improperly made. In one case $510 was charged to the account of a man who lived 30 miles from Strassburg; was not speculating and had no option account. The truth of the matter was, as I gather it from the evidence, that the plaintiff himself speculated heavily in the wheat market and with disastrous consequences to himself and to the farmers whose grain was in his hands.

The Regina Grain Co. received the wheat consigned to it by the plaintiff or for his account, sold it through their agents Baird & Botterell, and placed the proceeds to his credit in his cash grain account in their books. In respect of all the dealings in futures engaged in by the plaintiff either for himself personally or for customers at Strassburg who had put up their margins with him, he sent to the Regina Grain Co. only $100 to secure them in these transactions. The company therefore transferred from his cash grain account to his option account, sums of money from time to time to make good the losses he had sustained. I have no doubt that this was done with his knowledge and consent. He was constantly in communication with the company, received from them statements shewing how his accounts stood from time to time and personally saw their manager on several occasions at Strassburg and at Regina while these speculations were going on. He certainly received notice of the first transfer as early as September 22, 1915, by the company's letter of that date. Although he knew the transfers were being made he took no objection, but on the contrary acquiesced in the practice.

The consequences of the plaintiff's reckless and fraudulent dealings with his customers' property culminated at the end of December. Farmers who had stored grain were demanding it. The plaintiff hurriedly left Strassburg. The farmers broke open the elevator and found it empty.

This plaintiff is now suing on behalf of himself and of the farmers whom he defrauded to recover from the defendants, if possible, the amount of his defalcations. The only evidence we have that he received any authority from his former customers to bring this suit is his own unsupported evidence. I think the trial Judge was fully justified in declining to take this as sufficient.

After a careful reading of the plaintiff's evidence I find it full of contradictions, of glaring improbabilities and allegations shewn to be untrue. I think it is most likely that the plaintiff, without authority from those whose cause he pretends to champion, brought this suit in the hope of diverting from himself a scrutiny which might possibly lead to legal proceedings, not necessarily of a civil nature. But even if the injured farmers have acquiesced in the bringing of this suit by the plaintiff, not one of them came forward and proved any claim, or the nature of it, or the loss sustained. The plaintiff himself does not know what became of the wheat of any particular customer. A car ordered from the railway company by a farmer was used to ship out any wheat that might be in the elevator. Some of the farmers who instructed the plaintiff to sell were paid or partly paid. Others who had stored their grain lost it.

In regard to the defendants Baird & Botterell there was no privity between them and the plaintiff or between them and the farmers who supplied the grain. The firm received the cars of grain in the ordinary course of their business as grain brokers, sold them by the instructions of the consignees and remitted to the latter the proceeds, less ordinary charges. There is not the slightest suggestion of any irregularity or negligence. It is admitted that the bills of lading and the indorsements upon them are regular and that there is nothing upon the documents themselves to arouse suspicion in any person dealing with them.

Mr. Coyne argues that under the Grain Act, 2 Geo. V. 1912 (Dom.), ch. 27, the plaintiff was a bailee of the specially binned grain, that *Lawlor* v. *Nicol* (1898), 12 Man. L.R. 224, and the case it follows, *South Australian Ins. Co.* v. *Randell* (1869), 6 Moo. P.C.C. 341, 16 E.R. 755, no longer apply. He argues that a bailee is a trustee and that the specially binned grain as trust property may be followed into the hands of persons subsequently dealing with it. He cited Beal on Bailments, 45-47; *Carson* v. *Sloane* (1884), L.R. Ir. 13 Ch. 139; *Price* v. *Blakemore* (1843), 6 Beav. 507, 49 E.R. 922; *Burdick* v. *Garrick* (1870), 5 Ch. App. 233; *Reid-Newfoundland Co.* v. *Anglo-American Tel. Co.*, [1912] A.C. 555; *Roblin* v. *Jackson* (1901), 13 Man. L.R. 328; *Ex parte Cooke* (1876), 4 Ch. D. 123, and other cases. I cannot find in any of the decisions cited authority for the proposition that the

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purchaser of a commodity such as grain who has bought it for value in good faith, in the ordinary course of business, and unaware of any breach of trust connected with it, may, if the vendor is shewn to have committed a breach of trust, be called upon to restore the property or again pay the value of it. Some of them shew the very opposite.

Maspons v. *Mildred etc. Co.* (1882), 9 Q.B.D. 530, affirmed in the House of Lords (1883), 8 App. Cas. 874, was much relied upon by plaintiff's counsel. In that case an English firm traded with D., a Spanish shipping agent at Havana. The plaintiffs, who were Spanish merchants at Havana, consigned a cargo of goods to the defendants through the agency of D. The defendants knew that D. was acting for a third party whose name was not disclosed. Defendants in London insured the ship in the name of themselves and for the benefit of all parties interested. The ship having been lost the policy money was paid to the defendants, and D. being insolvent, the plaintiffs claimed the whole money after deducting premiums and expenses. It was held by the Court of Appeal (1) that the questions must be determined under English law; (2) that the insurance was for the benefit of the plaintiffs, subject to the lien of the defendants and D. in respect of the cargo consigned to defendants; (3) that there was privity of contract between the plaintiffs and defendant and that plaintiffs had a right of action against defendants for the balance of the policy moneys; (4) that defendants had no lien on the money, or right of set off for the balance of general account due from D. The case turned on the fact that the defendants knew that D. was an agent for a principal, although the name of the principal was not disclosed. In the House of Lords the decision was affirmed, 8 App. Cas. 874. There Lord Selborne, L.C., at page 888, put the gist of the case in these words:—

> The fact that the appellants (defendants) had notice of the respondents' interest before they had done anything for valuable consideration on the footing and faith of the property in this insurance belonging to Demestre Chia & Co. (the agent), so that their general lien against that firm could attach upon it, is enough, in my opinion, to decide this case.

There was no evidence in the present case shewing that either of the defendants was aware that Hinchcliffe was committing a breach of trust in connection with any of the shipments of grain made by him. He had grain of his own to sell and he also pur-

chased grain as a track buyer. In all cases he had apparent authority to sell. It would be impossible to carry on the grain trade if each purchaser of a bill of lading were required to go behind it and ascertain whether the shipper had a right to sell and whether he was principal or merely agent. But the main difference between the present case and the cases relied upon by the plaintiff's counsel is this: each of the defendants had paid in good faith for every carload of grain received, before any claim was made by the farmers who had delivered grain to the plaintiff. Also, the set off of sums due by him to the Regina Grain Co. had been made and agreed to before any other parties laid claim to the moneys in the company's hands.

Even if some of the transactions in futures made through the defendant company were in contravention of sec. 231 of the Criminal Code the parties were equally in fault and *in pari delicto potior est conditio possidentis* and the plaintiff's claim for the return of the margins paid must fail: *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309; *Harse* v. *Pearl Life Assce. Co.*, [1904] 1 K.B. 558.

The principle to be applied in a case like the present is stated in *New Zealand Land etc. Co.* v. *Watson* (1881), 7 Q.B.D. 374. The plaintiffs in that case shipped wheat to England taking bills of lading deliverable to themselves in London and indorsing these bills of lading to factors at Glasgow with instructions to sell the wheat in London. The factors were in the habit of indorsing the bills of lading to the defendants in London for the purpose of selling the wheat. The indorsement of bills of lading by the plaintiffs to their factor was in each case for the purpose of selling the wheat and not with the intention of passing the property. The plaintiffs knew that the sales made in London were made by brokers employed by the Glasgow factors but were in no way parties to the particular contracts of sale nor were their names disclosed upon them. The Glasgow brokers also carried on a business at Leith and employed the defendants in respect of this business also, and when they stopped payment they were indebted to the defendants upon the Leith account but not on the Glasgow account. The plaintiffs sued the defendants for the net balance of cargoes of wheat after deducting the remittances made by the Glasgow brokers in respect thereof, but without giving credit due

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to them from the Glasgow firm on other transactions. The jury found that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the wheat, and also, that defendants knew, or had reason to believe, that the Glasgow firm were acting in the sales as agents for a third person. It was held in the Court of Appeal, 7 Q.B.D. 374, that the plaintiffs were not entitled to recover, as there was no privity of contract between them and the defendants and the defendants did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendants' hands, and that whatever right the plaintiffs might have had as owners to claim the wheat before it had been sold, they had no right, after such sale, to the proceeds, without giving credit for the sum due to the defendants from the Glasgow firm on their general account.

It appears to me that this case affords sufficient authority for dismissing the plaintiff's action. It is directly in point and has not, so far as I can find, been qualified or questioned in any subsequent decision. In regard to the proposed application of the doctrine of trusts to the bailment of the grain and the subsequent transactions, I would cite a passage from the judgment of Bramwell, L.J., in the same case. He says, 7 Q.B.D., at pages 381-382:—

> Then another point in the judgment is that the second finding of the jury (which I also think was a perfectly correct one), namely, that the defendants knew, or had reason to believe, that Matthews & Thielman (the Glasgow factors) were acting as agents, was in the opinion of Field, J., rightly relied on by the counsel for the plaintiffs, as conclusively entitling the plaintiffs to judgment in respect of their rights as owners of the cargoes to follow the proceeds of their property in the hands of the defendants in their fiduciary character of agents and trustees. Now I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions, and an agent in a commercial case turned into a trustee with all the troubles that attend that relation. I think there is no ground for holding that these defendants have any fiduciary character towards the plaintiffs. They are the sub-agents of Matthews & Theilman, and there is nothing in the nature of a trust that I can see in the case.

I think the trial Judge was right in dismissing the action. I would dismiss the appeal with costs.

Fullerton, J.A.

FULLERTON, J.A.:—During the grain season of 1915 the plaintiff operated a grain elevator at Strassburg, Saskatchewan. The grain received into the elevator was shipped out from time to

time and consigned to the defendant company, who sold it through the defendants Baird & Botterell, who were brokers carrying on business at Winnipeg. During the season grain of the value of $153,242.21 was so shipped. The defendant company paid the plaintiff $133,496.91 in cash and the balance of $19,745.30 by crediting amounts due the defendant company in connection with transactions in grain futures carried on by the plaintiff through the defendant company during the season of 1915. In June, 1917, the plaintiff, claiming that certain farmers whose wheat had been consigned to the defendant company had not been paid, launched this action.

The statement of claim alleges that the defendants Baird & Botterell did not sell the various consignments of grain on the Winnipeg grain market but purchased it themselves, paying less than could have been procured on the Winnipeg grain market "and thereby secretly and corruptly received for themselves large profits." I may say here that there is not a line of evidence in the case to support the above allegation.

Paragraphs 21, 22 and 23 in substance allege that defendants did not pay for said grain on the basis of their pretended sales but transferred the sum of $19,745.30 from the plaintiff's cash grain account to the "futures" account, that the plaintiff never authorised the defendants to trade in "futures" and that such trades were gambling transactions and illegal.

Paragraph 24 alleges that by reason of the improper actions of the defendants the plaintiff was unable to pay the sundry farmers and that there are still large amounts due to said farmers.

Paragraph 24 reads as follows:—

> In respect of the complaints herein, in which the plaintiff is beneficially interested, the plaintiff sues in his personal capacity *and in respect of the monies due to the said sundry farmers, the plaintiff sues on behalf of and as trustee for said sundry farmers.*

The relief claimed is to recover the sum of $19,745.30, an account, etc.

The trial Judge has found, and his finding is fully supported by the evidence, that the plaintiff ratified the transfer of the sum of $19,745.30 from the plaintiff's cash grain account to the "futures" account.

This finding is a complete answer to any claim of the plaintiff in his personal capacity.

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There remains only to consider what, if any, rights he has to recover in this action as trustee for and on behalf of the unpaid farmers.

At the conclusion of the plaintiff's case, counsel on behalf of the defendants Baird & Botterell moved for a nonsuit which the trial Judge granted.

His decision was placed on two grounds:

(1) That as between the plaintiff and the defendants Baird & Botterell there was no privity of contract; (2) that even if there was privity of contract the plaintiff had failed to make out any case.

I think the trial Judge was clearly right. It is not alleged in the statement of claim that the defendants Baird & Botterell were the agents of the plaintiff. The evidence shews that the defendant the Regina Grain Co. employed Baird & Botterell as its agents to dispose of the grain. As between plaintiff and the Regina Grain Co. the latter was under no obligation to employ Baird & Botterell. The Regina Grain Co. could as well have employed any other broker.

In Smith's Leading Cases, vol 2, 12th ed., at page 368, the law is stated as follows:—

> A distinction must further be noted between the case where an agent makes a contract on behalf of his unknown principal and so establishes privity between his principal and the other party, and the case where the so-called agent having a contract with his principal effects a sub-contract with a third party to carry out his own. In the latter case no privity of contract is created between the principal and the third party. See *New Zealand Land etc. Co.* v. *Ruston* (1880), 5 Q.B.D. 474, reversed 7 Q.B.D. 374 (*sub-nom New Zealand Land Co.* v. *Watson*); *Maspons* v. *Mildred etc. Co.* (1882), 9 Q.B.D. 530; (1883), 8 App. Cas. 874; *Ireland* v. *Livingstone* (1872), L.R. 5 H.L. 395, 408, *per* Blackburn, J.

In 1 Hals. at page 171, par. 373, the rule is stated thus:—

> There is as a general rule no privity of contract between the principal and a sub-agent, the sub-agent being liable only to his employer the agent. The exception is where the principal was a party to the appointment of the sub-agent, or has subsequently adopted his acts, and it was the intention of the parties that privity of contract should be established between them.

After evidence had been given on behalf of the defendant company the trial Judge dismissed the action as against it.

He held that the plaintiff was not a trustee for his customers and therefore could not maintain the action.

While a bailee may in a sense be said to be a trustee I do not think he is a trustee in the sense that he can sue for a breach of trust committed by himself. The evidence of the plaintiff is most unsatisfactory and unreliable and so full of contradictions and absurdities that it would be impossible in any event to rely on it as a basis for a judgment. If we give it any credence at all it shews that bills of lading for the several cars of grain were either drawn in his own name or in the name of the farmer and indorsed by the latter to the plaintiff, that in the case of each car a draft was drawn by the plaintiff on the defendant company for from 75% to 80% of the value of the car, that the bill of lading indorsed by the plaintiff was then attached to the draft, and that when the car was sold and the adjustments made the balance due on the car was sent to the plaintiff.

It also would appear from the plaintiff's evidence that a considerable quantity of grain was shipped out without the authority of the owners. The whole difficulty arises from the fact that the plaintiff instead of paying the proceeds of the grain to the several owners, was from time to time using the money to finance his speculations in "futures" which were unsuccessful and resulted in the loss of the amount claimed in this action.

He dealt in "futures" through the defendant company, who from time to time, as margins were required, transferred monies from his cash grain account to his "futures account."

As against the plaintiff personally, as has already been pointed out, the findings of the trial Judge that he had ratified the transfers from his cash grain account to his "futures" account is conclusive. Can he then maintain this action as a trustee?

Gibson v. *Winter* (1833), 5 B. & Ad. 96, 110 E.R. 728, appears to be directly in point. The head-note to that case reads as follows:—

> A trustee suing as a plaintiff in a Court of law, must be treated in all respects as a party to the cause, and any defence against him is a defence in that action against the *cestui que trust*, who uses his name; and therefore, where a broker, in whose name a policy of insurance under seal was effected, brought covenant, and the defendant pleaded payment to the plaintiff according to the tenor and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them, it was held, that although that was no

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payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants, and therefore an answer to the action.

While the case is that of a trustee suing in a Court of law and the present case is that of a plaintiff suing in a Court which administers both law and equity, I cannot draw any distinction as to the principle which should be applied.

If the plaintiff were to fail here on the merits the cause of action would not be *res judicata* as against the persons he claims to represent and they would be at liberty to put the defendants to the expense of fighting the matter all over again.

This consideration alone is sufficient to shew that the plaintiff cannot maintain the action as a trustee.

Moreover, we have nothing but the plaintiff's word for his authority to represent the parties he claims to represent.

Apart from the inability of the plaintiff to maintain the action against the defendant company as a trustee and assuming that the evidence of the plaintiff could be believed, which is by no means the case, in my view the evidence given on behalf of the plaintiff falls far short of what is necessary to justify a verdict in his favour.

None of the farmers whom the plaintiff claims are unpaid were called at the trial, nor does the evidence shew even their names or the amount of their respective claims. The only evidence is that of the plaintiff himself, who says that "somewhere around $10,000 or $12,000 is due the farmers."

We are left entirely in the dark as to the names of the farmers, the amount of grain shipped by each, the amount paid on account of each car, the balance due—in fact, we have nothing whatever to go on save the general indefinite statement of the plaintiff above quoted.

In my view such evidence is entirely too vague and indefinite to justify a Court in giving a judgment for the plaintiff.

I would dismiss the appeal with costs.

Cameron, J.A. Dennistoun, J.A.

CAMERON, J.A., and DENNISTOUN, J.A., concurred in the result. *Appeal dismissed.*

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Re SURROGATE JUDGE.

Saskatchewan King's Bench Brown, C.J.K.B. May 13, 1920.

1. JUDGES (§ II—15)—SURROGATE COURT JUDGES—APPOINTMENT—REMOVAL.
District Court Judges are appointed by the Dominion Government and Judges of the Surrogate Courts by the Provinces. The fact that the Surrogate Judge is also a Judge of the District Court does not any the less make his appointment as Surrogate Judge a provincial appointment, and the Legislature which makes it can also cancel such appointment.

2. QUO WARRANTO (§ IV—43)—RELIEF UNDER—DISCRETION OF COURT—ATTEMPT OF RELATOR TO QUESTION STATUTE UNDER WHICH HE HAS HELD OFFICE.
The granting of an application in the nature of *quo warranto* is discretionary in the Court, and that discretion will not be exercised in favour of a relator, who for years has exercised the functions of an office by virtue of an appointment under a provincial statute, the validity of which he seeks by such proceedings to question.
[*The King* v. *Parry* (1837), 6 Ad. & E. 810, 112 E.R. 311; *The King* v. *Cudlipp* (1796), 6 Term Rep. 503, 101 E.R. 670; *The Queen* v. *Lofthouse* (1866), L.R. 1 Q.B. 433, followed.]

Statement.

APPLICATION for an information in the nature of a *quo warranto* to be exhibited against James W. Hanron at the instance of Reginald Rimmer.

C. E. Gregory, K.C., for the relator.

Hon. W. F. A. Turgeon, K.C., for the defendant.

Brown, C.J.K.B.

BROWN, C.J.K.B.:—This is an application on the part of Reginald Rimmer, Judge of the District Court for the Judicial District of Cannington, for an information in the nature of a *quo warranto* against James W. Hannon to shew by what authority the said James W. Hannon claims to exercise the office of Judge of the Surrogate Court for the Judicial District of Cannington.

The grounds on which the application is based are as follows:—

(1) The above named Reginald Rimmer is and has been since 1907 the Surrogate Court Judge for the said district.

(2) That by the provisions of the Surrogate Courts Act there can be only one Judge for said District.

(3) That the above named Reginald Rimmer is the only Judge who has authority to act as Surrogate Court Judge in the said District of Cannington.

(4) That on or about October 11, last past and divers other days and times since and more particularly on February 28, 1920, you, the said James W. Hannon, undertook to act and did act as Surrogate Court Judge in the said District without proper or lawful authority, without being duly and properly appointed as Surrogate Court Judge of the said District.

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(5) And because you, the said James W. Hannon, are continuing to exercise and propose to exercise the duties and functions of Judge of the Surrogate Court for the said District.

(6) Because said Reginald Rimmer having been duly appointed Judge of the District for the Judicial District of Cannington, and having been duly sworn in as Judge of said Court and also as Judge of the Surrogate Court of the said District, has never been dismissed or relieved of office.

(7) Because neither the Local Legislature of the Province of Saskatchewan nor the Governor-in-Council of said Province has any power to appoint Surrogate Court Judges in the Province of Saskatchewan.

(8) Because neither the Legislature of the Province of Saskatchewan nor the Governor-in-Council of the said Province has any power to dismiss any Surrogate Court Judges of the said Province heretofore appointed or holding office as Surrogate Court Judges in the said Province.

(9) Because chapter 28 of the Statutes of the Province of Saskatchewan, 1918-19, is *ultra vires*.

The relator was appointed Judge of the District Court for the Judicial District of Cannington in November, 1907. At that time there was in force the Surrogate Courts Act (1907), R.S.S. 1909, ch. 54 of the Province. Sec. 3, 6 and 8 of that Act are as follows:—

3. In and for every judicial district as the same are from time to time established under the District Courts Act there shall be a Court of Record to be called the "Surrogate Court" of each respective district over which Court one Judge shall preside; and there shall also be a clerk and such officers as may be necessary for the exercise of the jurisdiction to the said Court belonging.

6. The Judge of each District Court in the Province shall be the Judge of the Surrogate Court for the judicial district in which the District Court of which he is Judge is situated.

8. Every Judge of a Surrogate Court shall, before executing the duties of his office, take the following oath before some one authorised by law to administer the same:

I, . . . do swear that I will duly and faithfully according to the best of my skill and power execute the office of Judge of the Surrogate Court of the Judicial District of . . . So help me God.

The relator, upon receiving his appointment and commission as Judge of the District Court, took the oath of office required in such case under the District Courts Act, R.S.S. 1909, ch. 53, and also took the oath of office of Judge of the Surrogate Court for his judicial district. Upon taking such oaths of office the relator entered upon his duties and continued at least until sometime recently to perform the functions of the double office. On February 5, 1919, the Legislature repealed sec. 6 of the Surrogate Courts Act above referred to and substituted therefor the following (Sask., 1918-1919, ch. 28, sec. 1):—"6. The Judge of the Surrogate Court shall be appointed by the Lieutenant-Governor-

in-Council. (2) This section shall come into force on the first day of April, 1919."

On November 12, 1919, the Lieutenant-Governor-in-Council, under the powers conferred by the above amending legislation, appointed James W. Hanron, Judge of the District Court for the Judicial District of Regina, as Judge of the Surrogate Court for the Judicial District of Cannington. It is not necessary to the case, in the view I take of it, to set out the reasons that influenced the Lieutenant-Governor-in-Council in making the latter appointment. It is sufficient to state that in the opinion of the Lieutenant-Governor-in-Council there were good and sufficient reasons for doing so, and it is this appointment that the relator complains of.

The ancient writ of *quo warranto*, which is now obsolete, but upon which the information of the present day is founded, was in the nature of a writ of right for the King against him who claims or usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine his right.

The modern information is exhibited either by the Attorney-General, *ex officio*, or in the name of the King's coroner and attorney at the instance of a private prosecutor, by leave of the Court. Short & Mellor on the Practice of the Crown Office, 2nd ed., page 172.

Leave to exhibit an information is not necessarily granted merely because a reasonable doubt may be raised as to the validity of the defendant's title to the office. If that were the only consideration I would unhesitatingly grant the application in view of the very important question raised by the relator under ground No. 7 aforesaid. Authorities clearly shew that where the question of the status, motives, or conduct of the relator is raised the granting of the relief asked for is discretionary and that the Judge or Court may on any of these grounds refuse to interfere. This is sufficiently indicated by the following cases: *The King* v. *Parry* (1837), 6 Ad. & E. 810, 112 E.R. 311; *The King* v. *Cudlipp* (1796), 6 Term. Rep. 503, 101 E.R. 670; *The Queen* v. *Lofthouse* (1866), L.R. 1 Q.B. 433.

In *The King* v. *Parry*, *supra*, the defendant's title to the office of town councillor in the City of Hereford was called into question. The ground of objection to his title was that the burgess-roll for one of the wards in that city had not been revised pursuant to the statutory provisions. Lord Denman, C.J., in giving the judgment of the Court said, at page 820:—

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But the argument at the Bar, in support of the present rule, did not and could not stop short of denying all discretion in this Court as to originating proceedings in *quo warranto*. It was, in effect, asserted that, wherever a reasonable doubt is raised as to the legal validity of a corporate title, we are bound to grant leave to file the information. This proposition, however, is wholly untenable. Every case (and they are most numerous), which has turned upon the interest, motives, or conduct of the relator, proceeds upon the principle of the Court's discretion; however clear in point of law the objection may have been to the party's abstract right to retain his office, yet the Court has again and again refused to look at it or interfere upon one or other of these grounds.

In *The King* v. *Cudlipp, supra*, Lord Kenyon, Ch.J., in giving the opinion of the Court said, at page 508-9:—

This was an application for leave to file an information in nature of a *quo warranto* against the defendant, who holds an office in the Corporation of Launceston, on affidavits which impeach his title for a defect that would deserve a great deal of consideration could it be now inquired into. But a preliminary objection was taken, which has always been held to be fatal in cases to which it applied, namely, that the persons who make this application all stand in the same situation as the defendant, and that they have no title to their respective offices if the objection to the defendant's election were to prevail.

In *The Queen* v. *Lofthouse*, L.R. 1 Q.B. 433, the defendant's title to membership in a Local Board of Health was questioned on the ground that the voting papers used in his election did not comply with the statute in that behalf. The relator, Mr. Maw, had been a member of the Board, and when such had taken part in elections conducted in a similar manner and had used similar voting papers. Blackburn, J., at page 440, says:—

But there is another ground why we ought not to make the rule absolute, and that is, that in the exercise of our discretion to grant this prerogative writ we ought not to grant it to Mr. Maw, under the circumstances shewn by the affidavits. We must see that the relator is a fit person to be intrusted with this prerogative process of the Crown. In the present case, it appears from the affidavits that the present chairman has been chairman from the first constitution of the board, and has been returning officer on previous occasions; and he says that he issued the voting papers in a similar way; that Mr. Maw has also been a member of the board from its formation, and has taken part in the previous elections, which were conducted in a similar manner, and also himself used the voting papers in which the number of votes was not filled up before delivery; nevertheless he kept his objection back until after he was defeated on the present occasion. That is a matter that disentitles Mr. Maw to become a relator.

Mellor, J., in the same case, at page 441, says:—

I am of the same opinion. The last ground is conclusive against the relator. The circumstances stated in the affidavits bring him precisely within the rule which is very correctly stated in Corner's Crown Practice, page 184:

"The relator must not be disqualified by having acquiesced or concurred in the act which he comes to complain of, or in similar acts at former elections."

And Shee, J., the remaining Judge who heard the case, at page 444, says:—

He therefore comes precisely within the rule enunciated by Lord Kenyon, C.J., in *Rex* v. *Clarke* (1800), 1 East 38, 102 E.R. 15: "The Court have on several occasions said, and said wisely, that they would not listen even to a corporator who has acquiesced or perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose; and so far I think we have determined rightly." And there are other cases to the same effect. The present relator has concurred in the very act he now complains of, for he has used voting papers in blank in this very election and in others. Therefore, in the exercise of our discretion, we ought not to assist him.

In the case at bar, whatever interest or status the relator has by virtue of which he claims the right to question the defendant's title to office, was secured under sec. 6 of the Surrogate Courts Act. His commission from Ottawa does not in any way constitute him a Judge of the Surrogate Court. By it he is appointed Judge of the District Court for the Judicial District of Cannington and that alone. The Surrogate Courts Act creates a special Court called the Surrogate Court, and by sec. 6 the Legislature appointed the relator as Judge of the Surrogate Court for the Judicial District of Cannington by virtue of the fact that he was appointed by the Dominion a Judge of the District Court for that judicial district. In other words, the Legislature not only created the Court which undoubtedly they had the right to do, but they also by sec. 6 appointed the Judges of that Court. The mere fact that the appointee is a Judge of the District Court, appointed as such by the Dominion, does not any the less make his appointment as Judge of the Surrogate Court a provincial appointment. To hold that the appointment under such circumstances was a Dominion appointment would mean that the Legislature which had enacted sec. 6 was powerless to repeal same. The Legislature having appointed the relator to office as Judge of the Surrogate Court would have the right to cancel his appointment, which they did, by repealing sec. 6 and by appointing the defendant under the substituted clause. It, therefore, follows that if the defendant has no title to the office in question, the relator has not, and never did have, any better title. If, therefore, ground 7 is well taken, it not only affects the title of the defendant, but is destructive of the status of the relator, and puts him out of Court.

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RE SURROGATE JUDGE.

BROWN, C.J.K.B.

It is suggested that sec. 6 of the Surrogate Courts Act is not appointive in its character, but simply confers Surrogate Court jurisdiction on the Judges of the District Court. A perusal of the Act does not, in my opinion, support this suggestion, but, in any event, the relator's status is not thereby improved. The Legislature having conferred jurisdiction had the power to take it away and this they did effectually by repealing the legislation conferring same. Then again, assuming that I am right that the relator received his appointment as a Judge of the Surrogate Court from the Provincial Legislature, he, having for years exercised the functions of the office by virtue of such appointment, did so in recognition of the power of the Legislature to make the appointment, and, therefore, in view of the authorities, which I have already referred to, he cannot now be regarded as qualified to raise the important question as to the right of the Province to appoint Judges of the Surrogate Court.

For the reasons aforesaid, the application is refused with costs.

Application refused.

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POWER v. EDMONTON LUMBER EXCHANGE.

Alberta Supreme Court, Walsh, J. June 19, 1920.

PRINCIPAL AND AGENT (§ I D—27)—AGENT CONTRACTING WITH PARTNERSHIP—KNOWLEDGE OF AGENT THAT PARTNERSHIP TO BE INCORPORATED AS COMPANY—AGENT CONTINUING TO ACT FOR COMPANY—CONTRACT NOT RATIFIED BY COMPANY—LIABILITY OF MEMBERS OF PARTNERSHIP.

Where an agent enters into a contract with one of the members of a partnership for the sale of goods on a commission basis, with full knowledge of the fact that the partnership is shortly to be incorporated as a limited company, and continues under the contract after the formation of the company without the contract being ratified by the company, the members of the partnership are only liable for commissions earned before such company is incorporated.

[*Re Dale and Plant*, (1889), 61 L.T. 206, referred to.]

Statement.

ACTION by an agent selling goods on a commission basis, for commissions claimed to be due. Action dismissed.

K. C. Mackenzie, for plaintiff; *H. R. Milner*, for defendants.

Walsh, J.

WALSH, J.:—The defendants Cavanaugh and Nierengarten carried on business in partnership as lumber merchants under the name of the Edmonton Lumber Exchange from the 22nd to the 26th of August, 1919, on which latter date one Shore was admitted as a member. The partnership agreement which was entered into when Shore came in recites that the original members

Cavanaugh and Nierengarten were at its date taking out letters of incorporation and intended to carry on the business as a limited company as soon as the same could be incorporated and it expressly limited the term of the partnership until the incorporation could be effected. On September 6, 1919, whilst this partnership was still subsisting, and before the company was incorporated, the defendant Cavanaugh entered into an agreement with the plaintiff in the name of the partnership under which the plaintiff undertook the sale of coal, lumber and other products in Manitoba and Saskatchewan on a commission basis. He has earned commissions under this agreement in respect of which a balance of $685.55 remains owing to him. He alleges that it is the partnership that owes him this money and he has, therefore, sued it and its two original members Cavanaugh and Nierengarten for the same. Cavanaugh has not defended the action but Nierengarten defends on behalf of himself and the partnership.

His first defence is that the plaintiff's employment was negotiated by Cavanaugh alone, that it was an employment of him not for the purposes of the partnership but for those of the company about to be incorporated, that the agreement was, therefore, one beyond the scope of the partnership and as it was made by Cavanaugh alone it is not binding on him or the firm. Though I see no reason to doubt the accuracy of his statement that he never saw or knew of the existence of the written document on which the plaintiff sues until after his employment under it was terminated, I am convinced that he knew and approved of his employment and its terms and that he recognized and acted upon it. I do not think that it is open to him now to dispute Cavanaugh's authority to bind the firm by it. In addition, I am inclined to think that this employment was within the scope of the partnership in view of the fact that the firm was admittedly promoting the company and preparing the way for its operations.

The larger question is whether or not any personal liability is imposed upon the defendants under it. The agreement shews upon its face that the plaintiff was to operate on behalf of the company that was then in process of incorporation and which was to have the same name as that of the partnership with the addition of the word "Limited." It is in the form of a letter signed in the partnership name *per* Cavanaugh and addressed

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to the plaintiff which begins as follows: "Pursuant to our conversation and verbal agreement regarding your selling coal and lumber for the Edmonton Lumber Exchange Ltd. . . . you will operate on behalf of the Edmonton Lumber Exchange Limited in the City of Winnipeg," etc. The only thing in the document that seems to import any personal liability on the part of the firm is that in which it says, "We agree to pay you 50c. per thousand feet on all lumber sold . . . and 15c. per ton on all coal sold in your district," but this is counteracted by the concluding sentence which says "in connection with other commodities such as shingles, posts, etc., that your commission on same will be one half of the net profit received on same by the company." The plaintiff knew all about the steps that were then on foot to incorporate the company and that so soon as its incorporation was completed the business would be turned over to it and the partnership would cease to exist. The company was to open an office in Winnipeg of which he was to be the manager. He was seriously considering taking some stock in it. The paper on which his contract is written bears the name Edmonton Lumber Exchange Limited. The order forms with which he was supplied carry the same heading. Two expense cheques were issued to him, one of the partnership before the incorporation for $50 and one of the company after incorporation for $100. He was advised by letter, on October 14, that the incorporation had been completed, the first meeting had been held, all formal banking arrangements had been made and the capital had been paid up. This was acknowledged by him under date of October 21, his reference to it being that it sounded good. A good deal of correspondence on matters relating to his end of the business passed between him and the company. On both sides the company was referred to in this correspondence indiscriminately as the Edmonton Lumber Exchange, its partnership name, and the Edmonton Lumber Exchange Limited, its corporate name. I do not think any inference is to be drawn against either of them on this account as each of them used these two names interchangeably. In the account that was finally made up by the plaintiff for presentation, and in the covering letter, the name of the company appears as the debtor, but I am not disposed to attach any importance to that in the face of Mr. Speer's explanation of it. I am satisfied and

in fact it is practically undisputed that when the plaintiff entered into this arrangement he quite understood that the partnership was acting for the company that was then in process of formation and that after its incorporation he would be acting for it and not for the partnership. I do not think that it was ever agreed or even intended that the partnership should pay him for selling the company's products.

It is said for the plaintiff that the defendants could not by their contract bind a non-existent company and the company could not upon coming into existence adopt the contract thus made for it and the defendants therefore made themselves personally liable for the plaintiff's commission for which he could not in law hold the company. A great many authorities were cited to me by Mr. Mackenzie in support of this contention but the great majority of them have to do with contracts of a vastly different character from that here in question. In such a case as this, the plaintiff, if pressing his claim against the company for commissions earned after its incorporation, would not be bound to prove an express contract on the part of the company to pay for the same. The mere fact of the services being performed by him and accepted by it would raise an implied contract on its part to pay him what those services were worth, so that if the contract now sued upon had never been entered into I should say that simply by the rendering and acceptance of his services he could have held the company liable on a *quantum meruit* and in all probability the basis of compensation fixed by the contract would have been accepted in determining what those services were worth. *Re Dale and Plant*, (1889), 61 L.T. 206. The principle upon which the liability of the defendants is urged is that by entering into this contract on behalf of this non-existent company they, impliedly, warranted their authority to do so and when, in fact, they had no such authority they made themselves liable under that implied contract. That may very well be so and doubtless is so where one contracting in ignorance of the facts and in reliance upon this assumed authority enters into a contract which because of lack of authority in him who assumed it he is unable to enforce against the other party to it. If in this case the plaintiff's right to recover from the company depended solely upon the contract made with

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him by the defendants there would be a great deal of force in the contention that as that contract never was and could not be made legally binding upon the company liability for the plaintiff's claim must rest upon these defendants. But when the company's liability in no sense depended upon this contract I cannot see how this principle can be invoked against these defendants. For the commissions earned before the incorporation, I think the defendants are liable but they are more than paid for by the $50 payment made by them. For the commissions earned after the incorporation I am unable to hold them liable.

A claim is made for the plaintiff's expenses in travelling from Winnipeg to Edmonton at the end of his contract. If that sum is recoverable at all, it is a liability of the company and not of the defendants.

In the result, the action must be dismissed, and with costs if asked. The plaintiff is certainly entitled to be paid by some one and I think by the company, for his claim is an honest one, and the company has had the benefit of his services. I sincerely hope that those who are managing its affairs will see to it that this claim is paid without further delay or expense.

Action dismissed.

MAN.

C. A.

THE KING v. SEGAL.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. June 25, 1920.

EVIDENCE (§ II B—111)—INTOXICATING LIQUOR—MANITOBA TEMPERANCE ACT—PRESUMPTION AND BURDEN OF PROOF—POSSESSION OR CONTROL.

Goods on a dray standing in a lane in the rear of accused's house, and being part of a consignment similarly marked, which has been partly unloaded and placed in the house are in the possession or charge or control of the accused, within the meaning of the Manitoba Temperance Act, 6 Geo. V. 1916, ch. 112, sufficiently to justify a conviction under the Act, one of the cases of the consignment having been subsequently opened and found to contain intoxicating liquor.

Statement.

APPEAL from a conviction by a magistrate under the Manitoba Temperance Act, 6 Geo. V. 1916, ch. 112. Affirmed.

Ward Hollands, for appellant.

John Allen, Deputy Attorney-General for the Crown.

Perdue, C.J.M. Cameron, J.A.

PERDUE, C. J. M., and CAMERON, J. A., concurred with Dennistoun, J.A.

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FULLERTON, J.A.:—The conviction in this case is for keeping liquor for sale. Officers of the Temperance Department armed with a search warrant visited Segal's house and found 9 cases in the kitchen which had just been unloaded from a dray standing in the lane at the rear of the house. There were 27 cases still on the dray. The 9 cases were replaced on the dray and all were taken away and stored in a warehouse. The cases were all marked "G. W. Special," but no examination was made at the time of any of them. Shortly before the trial one of the cases was opened and found to contain rye whiskey. Fullerton, J.A.

Section 91 of the Manitoba Temperance Act, 6 Geo. V. 1916, ch. 112, provides as follows:—

> If, in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the . . . keeping for sale . . . of liquor, *primâ facie* proof is given that such person had in his possession or charge or control any liquor in respect of, or concerning which, he is being prosecuted, such person shall be obliged to prove that he did not commit the offence with which he is so charged.

The sole question then is whether the Crown has proved that the liquor in question here was in the possession or charge or control of Segal.

There is, of course, evidence that one out of the 36 cases contained liquor, but whether that particular case was in the kitchen or on the dray does not appear from the evidence. The contention is made that the cases on the dray were, if not in the possession, at least under the charge and control of Segal. The evidence does not shew whether the lane in question was a public or private lane. If the former, I am at a loss to understand how, under the facts proved in this case, the liquor in question can be said to have been in the charge or control of Segal.

I think the Crown has failed to give the *primâ facie* evidence required by sec. 91, and it follows that the conviction is bad and should be quashed.

DENNISTOUN, J.A.:—There was in my opinion *primâ facie* evidence upon which the magistrate could find that the accused had in his possession or charge or control intoxicating liquor and under the provisions of sec. 91 of the Manitoba Temperance Act, 6 Geo. V. 1916, ch. 112, the onus was cast upon the accused of proving that he did not commit the offence with which he was Dennistoun, J.A.

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charged. There was undoubtedly a case of whiskey upon the waggon which stood in the partially covered-in lane between Segal's house and bakeshop. There were in all 36 cases similarly marked "Gooderham & Worts Whiskey" on the waggon but only one of them was examined. It was all one consignment. Nine of the cases had been transferred to Segal's kitchen when the Government officers intervened and took possession of the lot, 27 cases on the waggon and 9 in the kitchen, and carried them off to a storage warehouse. Counsel for the accused argues that there was no evidence that any of the 9 cases which had been placed in the kitchen did as a fact contain intoxicating liquor. That may be true. The single case which was examined and found to contain whiskey may have been in the kitchen or it may not have left the waggon; but I think the magistrate was justified in holding that in any event it was under the control of the accused. The explanation which the accused gave was not believed and the magistrate had good grounds for refusing to believe his improbable story that he knew nothing about the whiskey or the delivery which was being made when the officers came on the scene.

I would affirm the conviction. *Conviction affirmed.*

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CANADIAN LUMBER YARDS LIMITED v. DUNHAM et al.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

1. COURTS (§ II A—151)—DISTRICT COURTS—JURISDICTION UNDER MECHANICS' LIEN ACT (SASK.)—TITLE TO LAND INVOLVED.

The effect of sections 26 and 30 of the Mechanics' Lien Act, R.S.S. 1909, ch. 150, is to confer upon the Judge of the District Court jurisdiction to try, in a mechanics' lien action, all questions of title necessary for the determination of the interest of the owner in the land upon which the lien-holder has his lien. This includes jurisdiction to determine whether or not a mortgage which stands on the title in priority to the lien, and which, being a charge on the land covered by the lien, purports to cut down the interest which the owner would otherwise have therein, is a valid charge thereon.

2. PLEADING (§ I S—146)—APPLICATION TO DETERMINE JURISDICTION—RIGHT TO STRIKE OUT STATEMENT OF DEFENCE.

On an application before a District Court Judge to determine whether he has jurisdiction to try an issue, he is not justified in striking out a statement of defence.

Statement.

APPEAL by one of the defendants from an order of a District Court Judge striking out the statement of defence in a mechanics' lien action. Reversed.

P. H. Gordon, for appellants.

H. J. Schull, for respondent.

HAULTAIN, C.J.S., concurred with Lamont, J.A.

NEWLANDS, J.A.:—This is a mechanics' lien action. In addition to the claim on the mechanics' lien the plaintiff set out that there is a prior mortgage in favour of defendant McLean, which mortgage is void under the Dominion Lands Act, 7-8 Ed. VII. 1908, ch. 20, having been executed prior to the issue of the patent from the Crown to defendant Dunham, and they ask for a declaration as against them that this mortgage is void.

The defendant McLean pleaded that the Court had no jurisdiction to decide this issue. The question of law was then set down to be heard by the District Court Judge, who decided he had jurisdiction. This was subsequently turned into a motion for judgment and the defence struck out. From this judgment defendant McLean appeals.

As a preliminary objection plaintiff contended it was an appeal from an interlocutory order and should be to a Judge of the Court of King's Bench. This objection was overruled by the Court, because the order striking out defendant McLean's defence ended the action as far as he was concerned, and if the judgment had been the other way, that is, that the Court had no jurisdiction to try this issue, the action would also have been terminated.

In *In re Herbert Reeves & Co.*, [1902] 1 Ch. 29, Romer, L.J., at page 33, following *Salaman* v. *Warner*, [1891] 1 Q.B. 734, said:—"The test is to be arrived at by considering as a matter of substance what was the matter in dispute—and if the order made would, in either way it was made, dispose of the matter in dispute, it is a final order." And in *Bozson* v. *Altrincham Urban District Council*, [1903] 1 K.B. 547, Lord Alverstone, C.J., said at 548:

> Does the judgment or order as made finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion, an interlocutory order.

Under either of these tests the order in question is a final order, and therefore the appeal is to this Court.

The appeal is on the ground that the trial Judge was wrong in deciding that he had jurisdiction to try the issue between plaintiff and defendant McLean.

Sec. 30 of the Mechanics' Lien Act, R.S.S. 1909, ch. 150, provides:

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30. Notwithstanding anything contained in the Judicature Act (now the King's Bench Act), and the District Courts Act all actions to realise under a lien irrespective of the amount involved or that the title to land is called in question shall be brought, tried and determined in the District Court in the same manner and subject to the same right of appeal as ordinary actions in the Court.

Sec. 26 of the District Courts Act, R.S.S. 1909, ch. 53, provides that, that Court shall not have jurisdiction in "(a) actions in which the title to land is brought in question."

These two provisions taken together mean that in a mechanics' lien action any question in which the title to land arises may be decided by the Court. It does not however give the plaintiff the right to add to a mechanics' lien action an issue in which the title to land is in question, distinct from that action, and in which parties who would not necessarily be parties to the mechanics' lien action have to be made defendants. In other words, an issue which raises the question as to the title to land cannot be added to a mechanics' lien action, but that question must arise in the mechanics' lien action itself and between the parties necessarily parties to that action. To hold otherwise would be to infringe Rule 34 of the Rules of Court as to joinder of defendants. The effect of this Rule is, as was decided in *Smurthwaite* v. *Hannay*, [1894] A.C. 494, that you cannot bring plaintiffs—and by parity of reasoning you cannot bring defendants—before the Court, where the causes of action vested in the different plaintiffs or the causes of action that exist against the different defendants are separate. In this action the causes of action against the defendants are entirely separate; against the defendant Dunham to enforce a mechanics' lien, and against the defendant McLean to set aside his mortgage. Neither party is a necessary party in the action against the other, the causes of action are separate, and the relief claimed is different in each case.

This action to set aside the mortgage of McLean is an action where the title to land is brought in question, it is a separate cause of action, it cannot therefore be added to a mechanics' lien action against Dunham. It does not therefore come under the exception mentioned in sec. 30 of the Mechanics' Lien Act, and the District Court Judge has therefore no jurisdiction to try the same.

The appeal should be allowed with costs.

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LAMONT, J.A.:—This matter comes before us in a very unsatisfactory shape. The plaintiffs brought a mechanics' lien action against the defendants, and made one A. P. McLean a party thereto. McLean had a mortgage registered against the property covered by the plaintiffs' lien and prior thereto. The plaintiffs in their statement of claim set out that this mortgage was void under the Dominion Lands Act, 7-8 Ed. VII. 1908, ch. 20, and they asked for a declaration that the mortgage is void as against them.

The only defence set up by McLean in his statement of defence was, that the District Court Judge had no jurisdiction to try the issue. The plaintiffs set down the question of jurisdiction for argument. The District Court Judge held that he had jurisdiction. The solicitors for the respective parties then seem to have considered that the decision of the Judge did not go far enough to enable them to raise on appeal all the questions they desired to have disposed of, so they apparently appeared before the Judge without any further notice of motion or formal application, with the result that the Judge added to his former fiat an order striking out McLean's statement of defence. The formal order reads:

It is hereby ordered that the defence of the defendant Alexander Philip McLean be and the same is hereby struck out.

It is further ordered that the costs of and incidental to this application and order be costs to the plaintiff company payable forthwith after taxation.

From that order McLean now appeals.

On the argument before us, counsel for both parties treated the matter not simply as an appeal from the order striking out the defence, but as an appeal from the Judge's decision that he had jurisdiction to try the validity of McLean's mortgage. To McLean's appeal the plaintiffs take a preliminary objection that the order was not a final one, and should, therefore, have been taken before a King's Bench Judge in Chambers, and much argument was expended on that point.

In view of the fact that the parties obtained from the Judge an order striking out the defence without any notice of motion or formal application being made therefor, and particularly when they obtained it for the purposes of getting the questions involved before the Court in appeal, I will not give effect at this stage to any technical objection as to the right of appeal. What constitutes a final order has now been authoritatively settled by the

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Privy Council in *Goverdhandas Vishindas Ratanchand* v. *Ramchand Manjimal et al.*, [1920] 1 W.W.R. 850.

I therefore will consider the appeal properly before this Court, and will deal with the jurisdiction of the District Court Judge to try the validity of the mortgage, although that matter is not referred to in the order appealed from.

Sec. 26 of the District Courts Act provides that that Court shall not have jurisdiction in:— "(a) actions in which the title to land is brought in question;" but sec. 30 of the Mechanics' Lien Act provides:

> 30. Notwithstanding anything contained in the Judicature Act and the District Courts Act all actions to realise under a lien irrespective of the amount involved or that the title to land is called in question shall be brought, tried and determined in the District Court in the same manner and subject to the same right of appeal as ordinary actions in the Court.

The effect of these two sections in my opinion is to confer upon the Judge of the District Court jurisdiction to try, in a mechanics' lien action, all questions of title necessary for the determination of the interest of the owner in the land upon which the lien-holder has his lien. This includes jurisdiction to determine whether or not a mortgage which stands on the title in priority to the lien, and which, being a charge on the land covered by the lien, purports to cut down the interest which the owner would otherwise have therein, is a valid charge thereon.

But the fact that the District Court Judge has jurisdiction to try the validity of the mortgage, does not entitle the plaintiff to judgment. The mortgage is prior to the plaintiff's lien, and the plaintiff must establish its invalidity. This, to my mind, involves a consideration of the meaning of sec. 29 of the Dominion Lands Act, 7-8 Ed. VII. 1908, also whether or not that section would be operative after the Dominion had parted with its title to the land; and, if so, whether or not such legislation would be *ultra vires* of the Parliament of Canada, in view of the fact that legislation as to the effect of a mortgage is legislation on the subject of property and civil rights, which legislation is within the exclusive jurisdiction of the Provincial Legislature. I mention these merely to indicate that in my opinion the validity of the mortgage is still a question to be tried. Something may also depend upon the facts. Did the mortgagor, after the receipt of his duplicate certificate of title, give it to McLean to enable him to then register

his mortgage? If so, would that be a re-issuing of the mortgage?

As the only application before the Judge was one to determine his jurisdiction, I do not think on that motion he should have struck out the statement of defence, and I would give the defendant leave to put in a new defence.

The appeal should, therefore, be allowed, but without costs, and the matter referred back to the trial Judge to determine the validity of the mortgage.

Lamont, J.A.

ELWOOD, J.A., concurred with Lamont, J.A.

Elwood, J.A.

Appeal allowed.

REX v. HAGEN.

Ontario Supreme Court, Orde, J. April 19, 1920.

1. INTOXICATING LIQUORS (§ III I—91)—ONTARIO TEMPERANCE ACT—EVIDENCE ON WHICH MAGISTRATE CAN CONVICT—APPLICATION TO QUASH—RIGHT OF JUDGE TO REVIEW DECISION.

Where there is evidence on which a magistrate can convict under the Ontario Temperance Act it is not open to a Judge on an application to quash a conviction to review such magistrate's decision on the evidence before him that the accused was guilty. The presence of liquor in defendant's dwelling house constitutes *primâ facie* evidence of guilt under sec. 88 of the Act.

[*Rex* v. *Le Clair* (1917), 28 Can. Cr. Cas. 216, 39 O.L.R. 436, followed.]

Section 70 of the Act does not create an offence under the Act, it merely provides how, under certain circumstances, liquor which is seized while unlawfully in transit shall be dealt with. There is nothing in this section to prevent the simultaneous seizure of liquor intransit and the prosecution of the offender under sec. 41.

MOTION to quash a conviction of the defendant by the Police Magistrate for the Town of Welland for offences against the provisions of the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50. Affirmed.

Statement.

L. B. Spencer, for the defendant.

F. P. Brennan, for the magistrate.

ORDE, J.:—On the night of the 20th February, 1920, at Welland, one John Whalley, in company with one William Urquhart and one or two other men, called with a sleigh, of which Urquhart was the driver, at the private dwelling houses of John Toyne, Harvey Dawdy, and Charles R. Hagen, the defendant, and removed certain quantities of intoxicating liquor, placed them on the sleigh, and drove away with them. Shortly afterwards the liquor was seized by the License Inspector, and the seizure

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was followed by a search of the dwelling houses from which the seized liquor had been taken. A quantity of liquor was found in Hagen's house.

Hagen was charged in general terms with having unlawfully violated secs. 40 and 41 of the Ontario Temperance Act.

At the hearing before the Police Magistrate for the Town of Welland, after the evidence of the seizure of the liquor upon the sleigh and of the finding of liquor in Hagen's house had been given, Hagen swore that he was absent from his house on the evening in question, and that Whalley had not taken the liquor from his house with his consent. He said he was not a partner of Whalley's and had nothing to do with him. He did not claim in his evidence that the liquor had been stolen from his house, but his counsel so claimed on the argument of the motion. Hagen admitted having got 25 cases of liquor on the 3rd February, 1920, and that there were still 7 cases left in his cellar.

Hagen was convicted "for that he . . . on the 20th day of February A.D. 1920 . . . in his premises unlawfully did, in contravention of the Ontario Temperance Act, section 40, expose or indirectly barter or sell liquor, section 41, in that he did have by one William Urquhart, his clerk, servant or agent, liquor in other than his private dwelling in which he resides, namely, in a sleigh on the public highway." The conviction covers at least two separate offences or classes of offences, which are respectively defined by secs. 40 and 41. This, however, is permissible under sec. 98.

The first ground on which the application to quash was made was that there was no evidence to support the conviction, and Mr. Spencer relied on *Rex* v. *McKay* (1919), 46 O.L.R. 125. If the conviction had been confined to the offence of having liquor in a place other than a private dwelling, under sec. 41, it might reasonably be held that there was no evidence upon which to convict. There was no evidence that Urquhart was Hagen's clerk, agent or servant, or that Whalley had any authority from Hagen to employ Urquhart. And, while there was abundant evidence to establish that some of the liquor upon the sleigh was Hagen's, there was no evidence that he was in any way responsible for its presence there.

But the accused is also convicted of an offence under sec. 40. The presence of liquor in his dwelling house constituted *primâ*

facie evidence of guilt under sec. 88. There was, therefore, evidence on which the magistrate could convict, and it is not open to me to review his decision, upon the evidence before him, that the accused was guilty: *Rex* v. *Le Clair* (1917), 39 O.L.R. 436, 28 Can. Cr. Cas. 216.

It was further argued that, as the liquor seized upon the sleigh had been confiscated and destroyed under sec. 70, no other penalty could be imposed in respect of the liquor so seized. It is perhaps unnecessary to deal with this objection, because it can have no bearing upon the conviction under sec. 40; but, even as to an offence under sec. 41, I cannot see the force of this argument. There is nothing in sec. 70 to prevent the simultaneous seizure of liquor in transit and the prosecution of the offender under sec. 41. Section 70 does not create an offence at all. It merely provides how, under certain circumstances, liquor which is seized while unlawfully in transit shall be dealt with. The destruction of the liquor is not a penalty for any offence, but is one of the consequences of the impounding of the liquor, which, by reason of its unlawful possession or its unlawful destination, has become a prohibited article. See *Rex* v. *Le Clair*, 39 O.L.R. 436, 28 Can. Cr. Cas. 216.

The third ground of objection was that Whalley had been convicted of the same offence, and that under sec. 84, as amended by 7 Geo. V. ch. 50, sec. 30, the conviction of one of them was a bar to the conviction of the other. Whalley was convicted under both sections, 40 and 41, in that he "did have liquor other than in a private dwelling house and did sell liquor contrary to the said Ontario Temperance Act."

There is nothing in the conviction to shew that Whalley's offence had any connection with Hagen whatever. Confining Hagen's conviction to an offence under sec. 40, there was ample evidence that Whalley was guilty of an offence under sec. 41. Even if Whalley's conviction were to be confined to an offence under sec. 40, there was ample evidence to justify it as to Toyne's and Dawdy's liquor, and without any reference to Hagen's liquor at all. Section 84, as amended, can have no application to Hagen's conviction under such circumstances.

The motion must be dismissed with costs.

Judgment accordingly.

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REX v. NAT BELL LIQUORS Co. Ltd.

Alberta Supreme Court, Walsh, J. June 29, 1920.

INTOXICATING LIQUORS (§ I A—18)—ALBERTA LIQUOR EXPORT ACT—EXPORTER TO MAKE RETURN OF LIQUOR RECEIVED—LIQUOR STOLEN—NO RETURN MADE—LIABILITY—CARELESSNESS IN MAKING RETURN—LIABILITY.

Under sec. 4 of the Alberta Liquor Export Act, 8 Geo. V. 1918, ch. 8, an exporter is required to make a return of all liquor received. Where a barrel of gin has been tampered with in transit, the gin being taken from the barrel and water substituted in its place, it is not liquor received within the Act and failure to include it in the return is not an offence under the Act.

It is no defence to a prosecution under the Act that the failure to make a return on two kegs of whiskey received was due to mere oversight on the part of the clerk who prepared the return and of the president of the company in not checking it up when he made the affidavit verifying it.

Statement. MOTION to quash the conviction by a police magistrate for failure to make the necessary returns under the Alberta Liquor Export Act. Affirmed.

H. A. Friedman, for the motion.

W. G. Harrison and *A. E. Popple*, contra.

Walsh, J. WALSH, J.:—The defendant moves to quash its conviction by a police magistrate at Edmonton for breach of sec. 4 of the Liquor Export Act, 8 Geo. V. 1918 (Alta.), ch. 8 (amended, 1920), which requires every person within the scope of the Act to make on the first day of every month a return to the Attorney-General verified by an affidavit shewing a statement in detail of all liquor received by him during the month immediately preceding, the kind and brand of the same, the quality and amount thereof and the source from which the same was obtained. Under sec. 6, any person who refuses or neglects to give and furnish such particulars thereby commits an offence against the Act for which he is subject on summary conviction to a penalty of not less than $500 nor more than $2,000. In the return made by the defendant under sec. 4 which is complained of, he omitted all reference to a barrel of gin and two kegs of whiskey which came into its warehouse during the month for which the return was made. The conviction is attacked mainly upon the ground that the omission of the gin from this return was not a breach of the Act, because the evidence shews that, though it was shipped to the company as gin it was found on its arrival at the warehouse that it had been tampered with by the withdrawal of the gin from the barrel and the substitution of water for it, and that the failure to report the two kegs

of whiskey was due to mere oversight on the part of the clerk who prepared the return, and of the president in not checking it up when he made the affidavit verifying it.

If the conviction rested alone upon the failure to include the barrel of gin, I would, without hesitation, say that it could not stand. The exporter is required to make a return of all liquor received, and water is not liquor under the Act. As a matter of policy, the president should have made some reference to it in his return, for it was checked into the warehouse as gin, and knowing as he did the close watch that was being kept on these importations by the authorities, he would have shewn better judgment by explaining in his return the conversion of this gin into water in transit to him. His company cannot, however, be fined for this indiscretion.

The omission of the whiskey from the return is an entirely different matter. I take it, from the reasons given by the magistrate for his judgment, that he accepted the evidence offered for the defence that this omission was the result of a mere oversight, and I will deal with the case on that understanding.

Mr. Friedman's contention is that no offence was committed because of the lack of intention on the part of the company to commit one. He cited a large number of criminal cases to support his contention that the absence of a *mens rea* is a good answer to a charge of a criminal or quasi-criminal or penal character, the onus of proving it being upon the accused. In a great many cases that is undoubtedly so, but they are for the most part, if not entirely, cases in which a man is charged with doing something unlawful, and not simply with neglecting to do something which he should have done. It is a very common thing for a man to be made to face a criminal charge and to be convicted of it and imprisoned upon it when his offence consisted of nothing more than a neglect on his part to do something which he was under a duty to do. A motorist who neglects to sound his horn and in consequence runs over and kills a pedestrian who, if warning had been given, could have got out of the way, could properly be convicted of manslaughter, even if he proved ever so conclusively that he had not the slightest intention in the world of killing the man. If he had such intent he would be guilty of murder. It is the lack of intent or, in other words, the absence of the *mens rea* that in such a case

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reduces the offence to that of manslaughter. In such a case evidence that his failure to sound his horn was simply the result of an oversight on his part would not, in law, afford him any defence, for that would be the only reason for his prosecution. Illustrations of this character might be multiplied, but this will suffice. Under sec. 6 it is one who refuses or neglects to give the required particulars that is subject to prosecution. There is no question of refusal here. It is a plain simple case of neglect. None of the meanings given to this verb in Murray's New English Dictionary read into it any question of intent. Under each one of them it is the mere failure to do a thing that constitutes neglect, such as "to leave out, omit, discard"—"to omit through carelessness, to fail through negligence to do something." The only case at all like this that I have been able to find, for none was cited to me, is *King* v. *Burrell* (1840), 12 A. & E. 460, 113 E.R. 886, in which it was held that an overseer who neglected to sign the burgess list delivered by him under a certain statute incurs the penalty imposed by the Act, though his neglect was neither wilful nor corrupt. Lord Denman, C.J., said, at pages 466-7: "Then it is said, the neglect must be wilful . . . But it is unnecessary either to allege or prove it."

Patteson, J., said, at page 468:—

> Then it is contended that the qualification of wilfulness must be imported into the section. Every day I see the necessity of not importing into statutes words which are not to be found there. . . . What, then, is neglect? It is the omission to do some duty which the party is able to do. The defendant could have signed the list, that is not denied, but he did not sign. He has, therefore, neglected to sign.

Williams, J., said, at page 469:—

> Where no *vis major* or inability intervenes, omitting to do what ought to be done is neglect. Why then should we be called upon to introduce new terms into the statute?

And Coleridge, J., said, at page 469:

> The defendant has contravened the Act by omitting to sign the list without shewing any lawful excuse. This is a "neglect" within the Act. Forgetfulness or carelessness is no such lawful excuse.

With these remarks, I so thoroughly agree that it is unnecessary to say more than this that it is of course not every failure to make the return that constitutes neglect. The serious illness of the exporter, the destruction of his warehouse and his records by fire or other circumstances of a like character making it a physical

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impossibility for him to do so would not be neglect, but no such conditions are suggested here. The objection with which I have been dealing is one which does not justify a quashing of the conviction.

The defendant was fined $1,700 and costs. It is objected that this is excessive and I agree that it is, but it is one which it was within the magistrate's power to impose as the section authorises a fine up to $2,000, and so I cannot interfere. The magistrate said that he had set the standard last week and would abide by that, meaning presumably that he had fixed $1,700, as the standard fine for breach of this section and so he would impose it in this case. That is, in my opinion, an entirely wrong principle upon which to proceed. The spread of $1,500 between the minimum and the maximum fine is of course meant to give the magistrate a chance to vary it according to the circumstances under which the breach occurred, and it does not seem right to me that he should adopt an arbitrary amount as the proper fine to impose in every case regardless of its circumstances. If I had the power to do so, I would reduce the penalty to the minimum fine of $500 but as I think I have not the power, especially in the light of the fact that there is an appeal from such conviction in which the District Court Judge would undoubtedly have that right, I am unable to help the defendant. No question as to the constitutionality of the Act was raised before me, though I drew attention of counsel to the fact that that question is now under the consideration of the Appellate Division.

The motion is dismissed with costs.

Motion dismissed.

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SECURITY LUMBER Co. v. ROSS.*

Saskatchewan District Court, Ouseley, D.C.J. June 4, 1920.

EXECUTORS AND ADMINISTRATORS (§ II A—24)—CONTRACTS MADE IN EXECUTION OF DUTY—PERSONAL LIABILITY—NOT AN OBLIGATION OF TESTATOR.

Executors and administrators are personally liable on the contracts which they make in the execution of their duty. The contract is made with the executor personally although made for the purposes of the estate and although such executor may be entitled to be indemnified out of the estate for amounts which he is lawfully called upon to pay.

[Review of authorities.]

*See also *Security Trust Co.* v. *Wishart*, 51 D.L.R. 614, a decision given by the Appellate Division of Alberta, April 22, 1920, which is on all fours with the above case and was handed down while this judgment was being written.

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ACTION to recover the price of goods sold and delivered to the defendant.

H. J. Schull, for plaintiff; *Emile Gravel*, for defendant.

OUSELEY, D.C.J.:—The statement of claim in this action alleges that on or about March 21, 1917, the plaintiff sold and delivered to the above-named defendant under a contract a certain bill of lumber and building materials to the value of $252.35, and further that no part of the purchase-price for the said lumber and building materials has been paid. The plaintiff claims interest at the rate of 10% per annum.

The statement of claim further alleges another sale of lumber and building materials to the value of $78.15 under a certain implied contract; alleges delivery and receipt of the lumber by the defendant, a demand for payment and the fact that no payment was made. There is a further claim for interest on the second sale amounting to $14.55, being interest at the rate of 10% per annum from the date of the sale to the date of the issue of the writ.

The defence alleges a general denial, and in the alternative the defendant sets up that if she did purchase the lumber and building materials referred to in the statement of claim that "she didn't buy the same personally but as the duly appointed administratrix of the Estate of Turbin Offerson, deceased, to the knowledge of the plaintiff."

The defendant was examined for discovery and the following evidence was elicited:—

Q. 1. You are the defendant in this action . . . ? A. Yes, I am Jennie Mable Ross. Q. 2. During the season of 1917, about the month of March, did you purchase any lumber and building materials from the Security Lumber Co.? A. No, not for myself. Q. 3. But did you purchase them yourself? A. I did for the estate. Q. 4. What estate do you speak of? A. The estate of Turbin Offerson. Q. 5. The estate of Turbin Offerson. Were you at that time or was your name at that time Jennie Mable Offerson? A. Yes. Q. 6. You were the widow of Turbin Offerson? A. Yes. Q. 7. Now when did Turbin Offerson die? A. About April 23, 1916. Q. 8. April 23, 1916, and he left an estate? A. Yes, he left an estate. Q. 9. And you are his widow? A. Yes. Q. 10. Can you tell us what land Turbin Offerson held? A. Yes, the south west 27-4-5, w. 3rd. Q. 11. What else? A. The north west 22-4-5. Q. 13. And no other. That is, he left a half section of land. For what purpose was this lumber bought? A. For a barn on the estate. Q. 14. To build a barn on the estate, that is, to build an entirely new building? A. That is, I happen to have . . . Q. 15. For the

purpose of erecting a new building, a new barn? Then tell us what it is that you are disputing, about these accounts. A. I never disputed about anything. Q. 16. That is, you claim that you are not liable personally, but just as administratrix. That you were acting at that time for the estate, but outside of that there is nothing disputed between you. Is that it? A. Yes, sir. Q. 20. But you signed this document or a document like this. You signed this estimate in the lumber yard? A. I will see first what date it is, if I were there or not, March 22nd, 1917. Yes, I signed at one time what they would build me a barn for. I won't say for sure. It looks like mine. Yes, I signed a document but I won't say that that's my signature. Q. 21. That is the way you used to sign. It is Mrs. Jennie Mable Offerson? A. I don't remember. I took two loads out you see. Q. 44. Now, I understand your position Mrs. Ross in this matter, you do not dispute, you admit that this lumber which you bought was all delivered but that you simply claim that the estate is liable, and not you? A. Yes. Q. 45. You admit that the bill of lumber is alright aside from that? A. Yes, as far as I know. The lumber was all brought and built on the north-west of 22. Q. 46. Your whole dispute is here, that the estate should be claimed from and not from you? A. Yes. Q. 47. Now, Mrs. Ross, at the time you purchased this lumber you were Mrs. Turbin Offerson, the widow of the deceased, Offerson? A. Yes. Q. 48. You subsequently married Mr. Ross, your present husband? A. Yes. Q. 49. He is living? A. Yes. Q. 56. Now, where was this lumber and building material used? A. It was used on the N.W. 27. Q. 57. On the north-west of 27. Whose land was that? A. The estate's. The pre-emption of the estate. Q. 67. In any case you received the lumber that was charged for, and you say that you are not liable for the estate and that is your only dispute? A. I built it there. I didn't build it on my land, I built on the estate. Q. 68. Now about the estate? Is it closed up yet? A. No, not yet. Q. 93. I just want to ask you one more question Mrs. Offerson. I shew you a letter dated October 20, 1917, addressed to the Security Lumber Co. at Moose Jaw, and signed by Mrs. J. M. Offerson. I ask you if this is your letter? A. Yes, that is my signature.

After the filing of the defence and the examination for discovery was had, plaintiff moves for judgment on an application to determine the point of law raised in the pleadings, namely, "that even had the defendant bought the material sold to her by the plaintiff and for the purchase price of which this action was brought in her capacity as administratrix of Turbin Offerson, deceased, and not in her personal capacity which the plaintiff admits for the purpose of this motion only, she would, nevertheless, be personally liable to the plaintiff for the purchase price thereof."

Under our rules 219 and 220 it is provided:—

219. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial;

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Provided that, by consent of the parties, of by order of the Court or a Judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

220. If, in the opinion of the Court or a Judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim or reply therein, the Court or Judge may thereupon dismiss the action or make such order therein as may be just.

Our rules 219 and 220 correspond with English rules 282-283.

The debt sued for in this action having been incurred since the death of the testator or intestate, is the remedy of a creditor of the business for such a debt against the executor or administrator personally or against the estate of the deceased? The answer to this question disposes of the whole action, and I think the plaintiff was quite within his rights in making his motion under rules 219-220.

The English authorities in my opinion seem to be quite decisive in the matter. In Williams on Executors, 10th ed., vol. 2, pp. 1634-1635, the rule is laid down as follows:—

> The remedy of a creditor of the business for a debt incurred since the death of the testator or intestate, is against the executor or administrator personally, and not against the estate of the deceased; and the creditor's remedy is by action at law against the executor or administrator, and he has no right to have the estate of the deceased administered. But a creditor of the business whose debt has been incurred since the decease, can make the executor render to him an account of the assets of the deceased which have been employed in the business since the death.

Halsbury, vol. 14, page 295, par. 683, has the following rule:—

> The remedy of a creditor for a debt contracted after the death is against the executor, and not against the estate; but the creditor is in equity entitled to stand in the place of the executor, and to claim the benefit of his right to an indemnity.

Cyc, vol. 18, pp. 881, 882 and 883.

Let us see now how far the decided cases have followed the text laid down by the authorities. In *Farhall* v. *Farhall* (1871), 7 Ch. App. 123, at page 125, James, L.J., lays down the following rule:—

> In this case it seems to me quite clear that there was no legal debt due from the estate to the bank. The executrix borrows money as executrix, says that she is executrix, and the bank debit her as executrix. To say that this charges the estate would give executors power to create debts to an unlimited extent. The executor has the power to realize the personal estate and to pledge specific assets, which is one mode of realizing them. Here the executor has also power to pledge the realty; and I have myself, by a former order, given the bankers the full benefit of the charge they had on part of the

real estate, and held them not answerable for any devastavit the executrix committed as to the moneys raised by that mortgage. But to say that the executrix can, by borrowing money, enable the person who has lent it to stand as a creditor upon the estate, is a position supported by no authority and no principle. The contract is with the executrix; there is no loan to the estate; there is no credit given to the estate; the credit is given only to the person who borrows, though the money may be borrowed for the purposes of the estate.

Mellish, L.J., at page 126, says:—

I am of the same opinion. It appears to me to be settled law that, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as executor so as to get execution against the assets of the testator.

In *Re Johnson, Shearman* v. *Robinson* (1880), 15 Ch.D. 548, at page 552, Jessel, M.R., says:—

With regard to the point that has been argued, I understand the doctrine to be this, that where a trustee is authorised by a testator, or by a settlor—for it makes no difference—to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say, "I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade." The first right is his general right by contract, because he trusted the trustee or executor; he has a personal right to sue him and to get judgment and make him a bankrupt.

See also *In Re Evans, Evans* v. *Evans* (1887), 34 Ch.D. 597, at page 600.

See also *In Re Frith, Newton* v. *Rolfe*, [1902] 1 Ch. 342, at 345.

Turning now to the Canadian cases, in *Campbell* v. *Bell* (1869), 16 Gr. 115, at 116, Mowat, V.-C., says:—"Executors are personally liable on the contracts they make in the execution of their duty, and the estate is not liable on them."

In *Lovell* v. *Gibson* (1872), 19 Gr. 280, at 281, it is held that:—"The assets of a deceased person are not liable for debts incurred by an executor or administrator in continuing the deceased's trade."

In *Braun* v. *Braun* (1902), 14 Man. L.R. 346, at page 352, Killam, C.J., says in part:—

If, then, the goods in question had been supplied in the ordinary course upon a simple order of the executor, the personal liability would have been

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his, and the vendor would have no claim upon the estate except upon the principle of subrogation as enunciated by Kekewich, J.

(Referring no doubt to what Kekewich, J., said in *In re Frith*, (*supra*).)

In *Dean* v. *Lehberg* (1907), 17 Man. L.R. 64, Perdue, J.A. follows *Farhall* v. *Farhall*, 7 Ch. App. 123; *Corner* v. *Shew* (1838), 3 M. & W. 350, 150 E.R. 1179; Williams on Executors, 10th ed., vol. 2.

In *Re Breckenridge Estate* (1918), 14 Alta. L.R. 377, at page 380, Walsh, J., after referring to the earlier cases, particularly to the judgment of Mellish, L.J., in *Farhall* v. *Farhall*, 7 Ch. App. 123, at page 126, says:—

> I can find no later authority on the point than this, and it was approved by the Manitoba Court of Appeal in *Dean* v. *Lehberg*, 17 Man. L.R. 64, though that case was for work done and not for money lent.

He also says at page 379:—

> I think that this application might very properly be disposed of on the ground that the claim of the company represents a debt for which the estate is not legally liable.

I have been referred to no Saskatchewan case on the subject, nor can I find any. The authorities I have cited do not seem to me to be in conflict with any of our statutes, and I have reached the conclusion, therefore, that the plaintiff is entitled to final judgment in the action against the defendant personally, and that the defendant has the right to be indemnified out of the estate for any amount which he may be lawfully called upon to pay.

Costs to the plaintiff. *Judgment accordingly.*

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun JJ.A. August 5, 1920.

RELIGIOUS SOCIETIES (§ III A—20)—FORMATION OF, TO PROMOTE CERTAIN RELIGIOUS DOCTRINES—ACQUISITION OF CHURCH PROPERTY—TRUST—DIVERSION OF PROPERTY TO INCONSISTENT USES.

Where a church organisation is formed for the purpose of promoting certain defined doctrines of religious faith which are set forth in its corporate articles or constitution, the church property which it acquires is impressed with a trust to carry out that purpose, and a majority of the congregation cannot divert the property to inconsistent uses, against the protest of a minority however small.

[*Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515, followed.]

Statement.

APPEAL by defendants from the trial judgment in an action in which the plaintiffs ask, *inter alia*, an injunction restraining the defendants from carrying out a proposed union with another religious society, or from in any way interfering with the plaintiffs in their use of church property. Affirmed.

J. T. Thorson and *W. H. Trueman*, K.C., for appellants.

H. A. Bergman, *G. L. Lennox*, *G. A. Axford*, for respondents.

Perdue, C.J.M.

PERDUE, C.J.M., concurs with CAMERON, J.A.

Cameron, J.A.

CAMERON, J.A.:—In 1894 a congregation of the Icelandic Lutheran Church was organised in Winnipeg as a voluntary religious association, with the name of "The Winnipeg Tabernacle" and a written constitution in the Icelandic language. A proposal was made January 14, 1919, that the "First Icelandic Unitarian Congregation" and "The Winnipeg Tabernacle" unite in one congregation on the ground that the views of these congregations were the same. Negotiations were entered on and meetings were held at which opposition was manifested. It was at a meeting on May 15, 1919, that the offer of the Unitarians was finally accepted.

The defendants are trustees elected at the meeting of January 30, 1919, and they hold a certificate of title to the church property.

At a meeting subsequent to that of May 15, 1919, those of the congregation opposed to the union with the Unitarians held a meeting denouncing those who were parties to the union as seceders from the faith, declaring the office of trustees vacant and electing the present plaintiffs new trustees with authority to commence this action.

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The object and character of this litigation is to be gathered from the following allegations in the statement of claim:—

18. The defendants threaten and intend, unless restrained from so doing, to immediately proceed to carry out the said proposed union of the said congregation with the First Icelandic Unitarian Church of Winnipeg and to use the church building, property and records of the congregation for the benefit and promotion of Unitarian doctrines and beliefs and contrary to and in violation of the constitution and faith of the congregation and contrary to and in violation of the faith, doctrine and practice of the Lutheran Church, and threaten and intend to conduct, or permit to be conducted in the church, and in the name and under the auspices of the said congregation religious services at which Unitarian clergymen officiate.

19. The doctrines, beliefs, rites and forms of worship of the Lutheran Church and of the said congregation are vitally, essentially and fundamentally different from those of the Unitarian Church. One of such fundamental doctrinal differences is that the Lutheran Church and the said congregation adhere to and believe the Trinitarian doctrine of the Godhead and adhere to and believe in the divinity of Jesus Christ, while the Unitarian Church teaches and believes the Unitarian doctrine of the Godhead and denies the divinity of Jesus Christ.

The plaintiffs ask for a declaration that the meeting of the congregation of May 15, 1919, was illegal; a declaration that a division has occurred in "The Winnipeg Tabernacle" within Article XI of the constitution, that the defendants are seceders and no longer members; a declaration that the plaintiffs are duly elected trustees of the congregation and entitled to possession of its property; and an injunction restraining the defendants from carrying out the proposed union or from in any way interfering with the plaintiffs in their use of the property.

In the statement of defence, the defendants admit the passage of a resolution at the meeting held May 15, 1919, that the offer of the First Icelandic Unitarian Church for amalgamation be accepted and they further admit that they intend to give effect to such resolution, but deny that they intend to use the church building in violation of the constitution and faith of the congregation and in violation of the faith, doctrines and practices of the Icelandic Lutheran Church.

The action was tried before Mathers, C.J.K.B., who gave judgment for the plaintiffs in the terms asked in the statement of claim. From that judgment, in which the facts and documents are fully set forth, this appeal is taken.

It will be seen that the questions involved in the litigation are of great importance. We are fortunate in having for our guidance

the decision of the House of Lords in *Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515. That case, after an argument extending over 8 days, was ordered reargued and the reargument took 9 days (page 559). The history of the Free Church of Scotland which was founded in 1843 by secession from the Established Church of Scotland as a protest against interference by the State in matters spiritual is set forth in the report. Its two main doctrines were the Establishment principle and the unqualified acceptance of the Westminster Confession of Faith. For several years an attempt was made to bring about a union between the Free Church and the United Presbyterian Church, which was in its essence opposed to the Establishment principle and did not uphold the Westminster Confession in its entirety. In 1900 Acts of Assembly were passed by the majority of the Free Church and the Free Church property was conveyed to new trustees for the benefit of the new Church. The minority of the Free Church objected that it (the Church) had no power to change its doctrines, or unite with a body that did not confess those doctrines and complained of a breach of trust and asked for a declaration that they were entitled to the property.

It was held that the Establishment principle and the Westminister Confession were distinctive tenets of the Free Church, which had no power, where property was concerned, to alter or vary the doctrines of the Church; that there was no true union and the representatives of the minority were entitled to the property held by the Free Church for its benefit and on its behalf.

Lord Halsbury, in his judgment, [1904] A.C. at 613, makes some instructive and authoritative remarks:—

> Now, in the controversy which has arisen, it is to be remembered that a Court of law has nothing to do with the soundness or unsoundness of a particular doctrine. Assuming there is nothing unlawful in the views held—a question which, of course, does not arise here—a Court has simply to ascertain what was the original purpose of the trust.
>
> My Lords, I do not think we have any right to speculate as to what is or is not important in the views held. The question is what were, in fact, the views held and what the founders of the trust thought important.

This last observation is to be borne in mind when the doctrine of the Free Church in respect of Establishment is considered. To the ordinary mind it is difficult to see by what line of reasoning Dr. Chalmers and the other founders of Free Church, holding that it was the duty of the Government to provide funds for the

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support of the Free Church minority, could make that belief a dogma, a doctrine of faith, an article of the creed of the Free Church itself. But as Lord Halsbury says the Courts have no authority to speculate as to what is or is not important in the views held. The question is, what, in fact, were the views. He gives those of the United Presbyterian Church which exclude State aid altogether and points out the irreconcilability of the two positions.

Lord Halsbury then goes on to deal with the Calvinistic doctrine of predestination from which it was alleged there was a departure in the proposed terms of union, and on this second ground he holds the minority also entitled to succeed.

The Lord Chancellor discusses the argument that every Christian Church has the inherent power to change its doctrines. He disposes of that unanswerably at page 626:—

> I do not suppose that anybody will dispute the right of any man or any collection of men to change their religious beliefs according to their own consciences; but when men subscribe money for a particular object and leave it behind them for the promotion of that object, their successors have no right to change the object endowed.

The Lord Chancellor expresses his strong inclination to believe that there was no real union between the two bodies, that their administrations have been united but not their doctrines. He says, [1904] A.C. at page 628:—

> It becomes but a colourable union, and no trust fund devoted to one form of faith can be shared by another communion simply because they say in effect there are some parts of this or that confession which we will agree not to discuss, and we will make our formularies such that either of us can accept it. Such an agreement would not, in my view, constitute a Church at all, or it would be, to use Sir William Smith's phrase, a Church without a religion. (See citation at page 616, from *Dill* v. *Watson* (1836), 2 Jones Rep. (Ir. Ex.) 48, 91.) Its formularies would be designed not to be a confession of faith, but a concealment of such part of the faith as constituted an impediment to the union.

In the argument addressed to us on behalf of the appellants the ground was taken that the Winnipeg Tabernacle was or had become a creedless church and that there was, therefore, nothing whatever unusual or unauthorised in its accepting or absorbing members of the Unitarian Church which is also a creedless organisation. It was urged that the proposed union was not so much a union as an enlargement of the Winnipeg Tabernacle by the addition of Unitarian membership. It was further urged that the Tabernacle congregation never regarded the creeds as binding,

upheld the right of individual interpretation and withdrew from the Lutheran Synod on that ground. From this point of view a union with the Lutheran Synod was really more objectionable than one with the Unitarians.

It was further contended that the substance of the transaction was that the Unitarian Church was being effaced and absorbed in the Tabernacle. Both congregations deny the plenary inspiration of the Scriptures and both hold that the creeds are not binding and there can, therefore, be no objection to their union.

Counsel for the appellants made what seemed to me on the argument a strong presentation of the appellants' case from these points of view. But the matters here involved are in the main matters of fact. I consider the plaintiffs have established the truth of the allegations made in the statement of claim, more particularly those in the paragraphs above set forth. The finding of Mathers, C.J.K.B., that the proposed basis of union with Unitarian Church would, if carried out, constitute a fundamental departure from the doctrinal position of the Tabernacle as set forth in its constitution, seems to me unassailable.

As I read the judgments of the House of Lords in the *Free Church* case, [1904] A.C. 515—I refer particularly to those of Lord Halsbury, Lord Davey, and Lord James—they seem to me to preclude any possibility of upholding such a transaction as that attempted by the defendants in this case.

We were referred to a number of interesting cases in the American reports, in which reliance is placed on the English decisions which are cited in the *Free Church* case.

In *Kniskern* v. *Lutheran Churches* (1844), 1 Sandf. Ch. (N.Y.) 439, a grant of land was made in 1789 to the trustees of an Evangelical Lutheran congregation, consisting of two churches, "for the common use and benefit of the said Lutheran congregation forever." A house of worship was erected by each church—their standard of faith being the Augsburg Confession. In 1830 they joined the Hartwick Synod of the Evangelical Lutheran Church. In 1837, they dissolved their connection with the Hartwick Synod and with other churches formed a new Synod, adopting a confession of faith essentially variant from the Augsburg Confession in three cardinal particulars. It was held that these proceedings were a perversion of the trust and an unlawful diversion of the property.

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In *Princeton* v. *Adams* (1852), 64 Mass. 129, a legacy to a church and society "so long as they maintain their present essential doctrines and principles of faith and practice," which were then Unitarian, is forfeited by a change to a Trinitarian system of faith and practice. See page 132 of the report:—

From the early days of Christianity they (the Trinitarian and Unitarian schools) have always been deemed as they have in our day antagonistic systems. And Courts have decided that funds given to support the teaching of one of them, are misemployed and perverted when applied to support the teaching of the other, and have redressed such misemployment.

In this case as in the *Kniskern* case we find cited *Att'y-Gen'l* v. *Pearson* (1817), 3 Mer. 353, 36 E.R. 135; *Shore* v. *Wilson* (1842), 9 Cl. & F. 355, 8 E.R. 450; *Att'y-Gen'l.* v. *Drummond* (1842), 1 Dr. & W. 353, and other well-known English authorities.

In *Baker* v. *Ducker* (1889), 21 Pac. Rep. 764, it was held that a majority of the society (First Reformed Church of Stockton), could not change the purpose for which the property was purchased by adopting the different doctrine of a different Church and changing its name. In *Lindstrom* v. *Tell* (1915), 154 N.W.R. 969, a similar holding was made. A majority of the congregation cannot make such a diversion of the property to other inconsistent uses against the protest of a minority, however small.

Rottman v. *Bartling* (1887), 35 N.W.R. 126, arose in Nebraska. There certain officers and members of the Evangelical Lutheran Church, without giving the required notice, joined "Die Erate Deutsche Evangelische Zions Gemeinde;" it was held that, having ceased to be members of the Lutheran Church, they were not entitled to possession of the property of such church.

The controlling question in this case is whether the plaintiffs and their associates, or the defendants and their associates, constitute the true and legitimate First Evangelical Lutheran Church of Nebraska City. In our view, the testimony clearly shews that the plaintiffs and their associates constitute the First Evangelical Lutheran Church at Nebraska City. In determining the question of legitimate succession of a religious society, where a separation has taken place, a Court will adopt the rules of such society, and enforce its policy in the spirit and to the effect for which it was designed. *Harrison* v. *Hoyle* (1873), 24 Ohio St. R. 254. If this were not so, it would be possible for a faction in any church, by concerted effort, to change its doctrines and form of government.

The leading case upon this subject is *Att'y-Gen'l* v. *Pearson*, 3 Mer. 353, 36 E.R. 135, where it was held that if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant dissenters, promoting no doctrines contrary to law, it is then the duty of the Court to carry such trust into execution, and to administer it

according to the intent of the founders. In the same case, page 400, the Chancellor says: "Where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the Court. And to refer to any other criterion (as the sense of the existing majority) would be to make a new institution, which is altogether beyond the reach and inconsistent with the duties of the Court. The cases of *Craigdallie* v. *Aikman* (1813), 1 Dow. 1, 3 E.R. 601; *Foley* v. *Wontner* (1820), 2 Jac. & W. 245, 37 E.R. 621; *Leslie* v. *Birnie* (1826), 2 Russ. 114, 38 E.R. 279; *Davis* v. *Jenkins* (1814), 3 Ves. & B. 156, 35 E.R. 436; and *Milligan* v. *Mitchell* (1837), 3 My. & C. 72, 40 E.R. 852 (and (1833), 1 My. & K. 446, 39 E.R. 750) recognises the same principles."

. . . . .

The same principle applies in this case. The fact that these defendants did not move off in a body, but sought to retain possession of the church building, does not change the rule. All the testimony tends to shew that they have seceded from the Lutheran Church, and as such seceders have no right to the property of the church. *Kniskern* v. *Lutheran Churches*, 1 Sandf. Ch. (N.Y.) 439; *Harrison* v. *Hoyle*, 24 Ohio St. R. 254; *Field* v. *Field* (1832), 9 Wend. (N.Y.), 395; *Gable* v. *Miller* (1844), 10 Paige (N.Y.) 627, and (1845), 2 Denio. (N.Y.) 492; *Methodist Episcopal Church* v. *Wood* (1831), 5 Ohio 283.

In *Schnorr's Appeal* (1870), 67 Pa. St. R. 138, the judgment of the Court was delivered by Sharswood, J., who held that where a church has been organised and endowed, whether by donation or subscription, as belonging to any particular sect or in subordination to any particular form of Church government, it cannot break off from that connection and government, citing *Att'y-Gen'l.* v. *Pearson*, 3 Mer. 353, 36 E.R. 135. He then goes on to make these observations at page 146:—

In church organisations those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation and corporation, if incorporated: *Winebrenner* v. *Colder* (1862), 7 Wright (Pa.) 244. The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began, are the standards for determining which party is right: *McGinnis* v. *Watson* (1861), 5 Wright (Pa.), 9. If the opinion of Lowrie, C.J., in this last case may seem to controvert any of these positions, and to hold that a congregation may change a material part of its principles or practices without forfeiting its property on the ground that to deny this "would be imposing a law upon all churches that is contrary to the very nature of all intellectual and spiritual life"; and because the guarantee of freedom to religion forbids us to understand the rule in this way, I ask leave most respectfully to enter against it my dissent and protest. I do so the more freely because it was entirely extrajudicial to any question in the case. Courts which have the supervision and control of all corporations and unincorporated societies or associations, must be guided by surer and clearer principles than those to be derived from the nature of intellectual and spiritual life. The guarantee of religious freedom has nothing to do with the property. It does

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not guarantee freedom to steal churches. It secures to individuals the right of withdrawing, forming a new society, with such creed and government as they please, raising from their own means another fund and building another house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves. The law of intellectual and spiritual life is not the higher law, but must yield to the law of the land.

In *Gudmundson* v. *Thingvalla, Lutheran Church*, (1914-15), 150 N.W.R. 750, there was a discussion as to the effect of the clause in the constitution of the Church providing: "If a division occurs in the congregation, the property shall belong to such portion as adheres to this constitution" and it was pointed out that this would have been the rule, even had there been no constitutional provision (page 769, where a passage from 34 Cyc. 1167 is also cited). The doctrinal question in issue in the disputes out of which this action arose was that of plenary inspiration.

All these authorities strengthen the conclusion that we cannot regard this Winnipeg Tabernacle as a creedless church or as a religious organisation with such designedly ill-defined and flexible doctrines and beliefs as to be, so far as the Christian world is concerned, all inclusive. It was and is plainly not so and it had and has all the outward and visible characteristics of a Christian church. As stated by Lord Halsbury in the *Free Church* case, [1904] A.C. at pages 612-13:—

> Speaking generally, one would say that the identity of a religious community described as a church must consist in the unity of its doctrines. Its creeds, confessions, formularies, tests, and so forth are apparently intended to ensure the unity of the faith which its adherents profess, and certainly among all Christian churches the essential idea of a creed or confession of faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community.

The legality of the notice calling the meeting of May 15, 1919, when the offers of the First Icelandic Unitarian Congregation for amalgamation were accepted by a vote of 38 to 16, was questioned as not sufficiently stating the business to be transacted thereat. In addition to the cases cited in the judgment of Mathers, C.J.K.B., I refer to *Pacific Coast Mines* v. *Arbuthnot*, 36 D.L.R. 564, [1917] A.C. 607. I think there can be no question whatever as to the invalidity of the notice, though, in my view, the matter does not really turn on that consideration but on the question of departure.

I was at first impressed with the argument that the judgment had gone too far. The Court interferes in these matters only

because property rights are invaded. Why then should the judgment not be restricted to the property alone? It was, therefore, urged that there was no necessity for the declaration in the second paragraph of the formal judgment that the defendants have seceded from the congregation, are no longer members thereof and have forfeited all their rights to the property. Yet in the light of the decisions, this is exactly what has happened to the defendants. And they have brought this state of affairs upon their own heads by their own actions deliberately undertaken and in the face of persistent opposition. I am struck with the remarks of Sharswood, J., in *Schnorr's Appeal, supra*, which I have quoted. The defendants must takes the consequences of their actions and of their disregard of the rights of others.

I would affirm the judgment appealed from and dismiss the appeal with costs.

FULLERTON, J.A., concurs with CAMERON, J.A. Fullerton, J.A.

DENNISTOUN, J.A.:—I am in full agreement with the statement of facts and reasons for judgment of Mathers, C.J.K.B., who tried this case and with the formal judgment which has been entered. This appeal has been argued exhaustively and much theological learning and research were displayed by counsel. Mr. Thorson, who was not present at the trial and had but a short time to prepare for appeal, presented the case for the appellants with great ability. Dennistoun, J.A.

A large part of the argument dealt with the binding effect of the three Ecumenical Creeds, the Augsberg Confession and Luther's Shorter Catechism upon the Tabernacle Congregation, and I agree with the trial Judge that by the Constitution of 1894 they were adopted by the congregation and have never been abrogated. Even if effect be given to the argument of the appellants that great latitude of view and freedom of judgment were permitted to members of the congregation, the fact remains clearly established that this was a congregation founded and always maintained upon a Trinitarian belief and upon no other. This to my mind is the deciding factor in the case quite apart from the variations of interpretation which are given to that belief by the creeds and quite independently of any of them.

The effort made by a portion of the Tabernacle congregation to unite with a congregation of professed Unitarians, upon the understanding that there was to be no surrender of belief on the

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part of either, but against the protest of a very substantial portion of the Tabernacle congregation, was certain to disrupt the congregation as it did.

The basis of union which was adopted was nothing more than an agreement to submerge the fundamental differences of belief which divided these separated Christians and to conduct the affairs of the new congregation upon a financial basis profitable to both under the guidance of a pastor (if one could be obtained), who would keep clear of offence to the susceptibilities of either.

Such a congregation might possibly be formed by persons who were entirely like minded, but in my humble opinion a substantial portion of a congregation adhering generally to the Lutheran conception of the Trinity of the Godhead, cannot be compelled to share its church property with a large body of persons whose conception of the Deity is essentially different.

It is not the duty of the Court to concern itself with the mysteries and niceties of theological doctrine except in so far as may be necessary for the determination of the legal rights of the parties concerned. It was argued that the congregation of the First Unitarian Church of Winnipeg does recognise in certain portions of its liturgy the Father, the Son, and the Holy Ghost, but (it was admitted) with marked qualifications and differentiations of and from the views of the Trinitarians.

Disputations on this and kindred subjects have taken place among professing Christians for centuries and history is full of them. Controversies have raged round the shades of meaning to be given to tenets and doctrines with the result that there is to-day a multitude of Christian bodies into which the disciples who have grouped themselves in accordance with their common views have been segregated.

These common and conscientious views are entitled to respect, and the Courts have always given full effect to them when dealing with trusts which owe their existence to the tenets and beliefs of the founders. It is only necessary to ascertain what those tenets and beliefs are and having done so to protect those who remain steadfast from the domination of those who would throw off the old chains and forge lighter ones.

In the case at bar there is no difficulty in determining that the plaintiffs stand fast upon the Trinitarian doctrines of the Lutheran

Church and that the defendants are prepared to surrender to a congregation professing Unitarian doctrines, and who may form a majority of the new congregation, full rights of membership and a full share in the church property with power to mould the constitution of the congregation as the union of members may see fit. The fact that the Unitarians bring their church property into the merger only complicates the situation and makes it necessary for the Court to interfere before the intermingling of assets can take place.

A notable case very much in point is *The Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515, in which it was held that the identity of a religious community described as a church consists in the identity of its doctrines, creeds, confessions, formularies and tests. The bond of union of a Christian association may contain a power in some recognised body to control, alter, or modify the tenets or principles at one time professed by the association; but the existence of such a power must be proved.

There is no evidence that power was reserved by the founders of this congregation to themselves and their successors to alter the undoubted Trinitarian characteristics of the congregation possessed from its inception.

The Tabernacle congregation is an independent organisation owning allegiance to no organised church, synod, bishop or other governing body. The constitution by which it is controlled was adopted by vote of the members in 1894. Article XI. under the heading "Property" is as follows:—

> The property of this congregation can not pass into hands of others (individuals or societies) except it be so ordered by a $\frac{2}{3}$ vote of all present at a meeting of the congregation. A notice shall have been moved and discussed to this effect, at a meeting next prior thereto. In the event the congregation breaks up then that portion of it that adheres to this constitution shall retain the property.

Article XIII. makes provision for "Amendments" as follows:—

> No amendments shall be made to this constitution except such amendments be consented to by a $\frac{2}{3}$ vote at a meeting of the congregation. A notice of motion to this effect shall be given and discussed at the next meeting prior thereto.

No amendment of the constitution was made or attempted before the union with the Unitarian congregation was discussed and voted on, the view of those who desired the union no doubt being that as they were surrendering none of their individual beliefs or tenets, no amendment was necessary.

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In my humble judgment they were in error in so thinking. The character of the congregation as a whole was being fundamentally altered and no mental reservations on the part of individual members could preserve the characteristics given to it by its founders.

So soon as the union was complete a new constitution was to be adopted upon the basis of the Bergman draft and the conditions attached thereto by the joint committee of both congregations. Before such new constitution could be adopted the former constitution must of necessity be abrogated and its references to the confessions of the Lutheran Church of Iceland modified or eliminated.

This would involve a radical departure, a schism, a breaking up, and under Article XI. of the constitution "that portion of the congregation that adheres to this constitution shall retain the property."

Article XI. contemplates a transfer of the church property by a $\frac{2}{3}$ vote, the congregation remaining intact, and acting lawfully under the constitution. It also contemplates what has occurred here, and makes provision for the ownership of the property in the event of a "breaking up" of the congregation.

The $\frac{2}{3}$ vote required by Article XI. is quite separate and distinct from the $\frac{2}{3}$ vote required by Article XIII. These articles deal with totally different sets of circumstances, and methods of procedure.

The defendants have proceeded to deal with the church property in a manner not contemplated by the constitution and without amending the constitution have attempted to overthrow it.

The plaintiffs have resisted and a "breaking up" has taken place as contemplated by Article XI. The plaintiffs, and those whom they represent, have "adhered to the constitution" and the defendants and their following have departed from it, and I concur with Mathers, C.J.K.B., of the King's Bench, that the constitution must govern and the property be awarded in accordance with its express provisions.

Where a church organisation is formed for the purpose of promoting certain defined doctrines of religious faith which are set forth in its corporate articles or constitution, the church property which it acquires is impressed with a trust to carry out

that purpose, and a majority of the congregation cannot divert the property to inconsistent uses against the protest of a minority however small.

The following decisions of Courts in the United States are very much in point and several of them almost on all fours with the case under consideration: *Princeton* v. *Adams*, 64 Mass. 129; *Kniskern* v. *Lutheran Churches*, 1 Sandf. Ch. (N.Y.) 439; *Baker* v. *Ducker*, 21 Pac. 764; *Lindstrom* v. *Tell*, 154 N.W.R. 969; *Rottman* v. *Bartling*, 35 N.W.R. 126; *Ramsey* v. *Hicks* (1909), 87 N.E.R. 1091, 89 N.E.R. 597; *Schnorr's Appeal*, 67 Pa. State Rep. 138.

I would dismiss the appeal with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Riddell, Sutherland and Masten, JJ. May 4, 1920.

1. HIGHWAYS (§ IV B—176)—DAMAGES—INJURIES CAUSED BY DEFECTIVE GRATING IN SIDEWALK—LIABILITY OF CITY—LIABILITY OF ABUTTING OWNER.

A city corporation which has had judgment rendered against it for damages caused by a pedestrian falling into a grating in the sidewalk, cannot recover over against the owner or tenant of the building with which the grating connects where such grating forms part of the highway and with which neither such owner or tenant have any right to interfere, and where neither can be said to have "left or maintained the opening" within the meaning of sec. 464 (2) of the Municipal Act, R.S.O. 1914, ch. 192.

Statement.

APPEAL by the Corporation of the City of St. Catharines the defendants, from the judgment of the Judge of the County Court of the County of Lincoln dismissing the appellants' claim for indemnity over against one Ingersoll, trustee of the Neelon estate, and against Swayze Brothers, both brought in as third parties.

The action was brought to recover damages from the defendant corporation because of injury to the plaintiff by reason of her foot slipping into an opening in a grating on St. Paul street, a public highway in the city of St. Catharines, the grating being in front of the premises occupied by the third parties, Swayze Brothers.

By third party notice the corporation brought in the third parties, claiming indemnity over against them.

The learned trial Judge found the corporation liable for the condition of nonrepair of the street, and awarded the plaintiff $200

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damages and costs, but dismissed the claim against the third parties; and the appeal was from such dismissal.

A. Courtney Kingstone, for appellant.

J. H. Campbell, for the respondent Ingersoll.

G. F. Peterson, for the respondents Swayze Brothers.

MULOCK, C.J.Ex.:—The corporation rest their claim for indemnity over chiefly on sec. 464, sub-secs. 1 and 2, of ch. 192, R.S.O. 1914, the Municipal Act. These sub-sections are as follows:—

"(1) Where an action is brought to recover damages sustained by reason of any obstruction, excavation or opening in or near a highway or bridge, placed, made, left or maintained by any person other than the corporation or a servant or agent of the corporation, or by reason of any negligent or wrongful act or omission of any person other than the corporation or a servant or agent of the corporation, the corporation shall have a remedy over against such other person for, and may enforce payment of, the damages and costs which are recovered against the corporation.

"(2) The corporation shall be entitled to such remedy over in the same action, if the other person is a party to the action, and it is established in the action as against him that the damages were sustained by reason of an obstruction, excavation, or opening so placed, made, left or maintained by him."

The facts are as follows:—

Louisa L. Neelon was the owner of the premises in question, on which was a store-building. In front of it was a sandstone sidewalk, and in this sidewalk, and almost in contact with the building, was a grating, 3 feet 11 inches by 18 inches, for the purpose of affording light and ventilation to the basement of the building. The grating consisted of parallel iron bars about 3½ inches apart. One of these bars became broken, and disappeared, and was replaced by a wooden slat. This was the condition of the grating in June, 1913, when the defendant corporation replaced the sandstone sidewalk with a cement sidewalk, not disturbing, but on the contrary firmly cementing, the grating in its then position. Such also was the condition of the grating when the Swayze Brothers became tenants and occupants of the premises, under a lease dated the 23rd June, 1913, made by Louisa L. Neelon, the owner, to them. Before the expiry of this lease, Louisa L. Neelon

made to them another lease of the premises for the term of eight years from the 1st April, 1914.

Having entered into possession under the first mentioned lease, the Swayze Brothers have ever since continued and still are in possession of the demised premises as such lessees. Each lease was made in pursuance of the Short Forms of Leases Act, and contained the statutory covenant to repair.

The accident in question happened on the 19th May, 1919. The wooden slat in the grating had sufficiently served its purpose from June, 1913, until about a week before the accident, when it disappeared. Thereupon the Swayze Brothers caused a board to be placed over the opening in the grating, but in a day or two the board disappeared, and the accident in question occurred by reason of the female plaintiff's foot slipping through the opening formerly occupied by the slat.

Under these circumstances, the question is, whether the third parties are, or either of them is, liable over to the defendant corporation.

First, then, as to the liability, if any, of the owner, now represented by the third party Ingersoll, as trustee of the Neelon estate. Apart from the statute relied on by the defendant corporation, if the owner of premises leases them when they are, as the premises in question were, in a condition free from a nuisance, and the tenant enters into possession, and then a nuisance is created by the tenant or another, the owner is not liable until he is able to regain possession and thereby become enabled to abate the nuisance: *Chauntler* v. *Robinson* (1849), 4 Exch. 163, 154 E.R. 1166; *Gandy* v. *Jubber* (1864), 5 B. & S. 78, 122 E.R. 762.

The grating was not constructed by the owner, and was not in disrepair when either lease was made, nor did it fall into disrepair until a day or two before the accident, and it does not appear that the owner became aware of its having fallen into disrepair until after the accident. Thus there was no negligence on his part, and at common law he is not liable. To make the owner liable under the statute, it must be shewn that he "placed, made, left or maintained" the nuisance complained of, or was guilty of some "negligence or wrongful act or omission" which caused the injury. It does not appear who repaired the grating with the wooden slat, and there is no evidence shewing that the

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grating was not sufficiently repaired. The slat has served its purpose for many years, and there is no evidence shewing why the slat disappeared, or at whose instance. The disappearance of the slat, not its being placed in the grating, was the cause of the accident.

As already stated, it was not shewn that the owner was aware before the accident of the slat having disappeared. It therefore cannot be found as a fact that the owner either placed, made, left or maintained the nuisance complained of or was guilty of any negligence or wrongful act or omission. Therefore he is not liable under the statute.

Then as to the tenants' position, it was argued that they were liable under their covenant to repair, and at common law, and under the statute. There are authorities to the effect that where a tenant, in possession of premises to which is appurtenant, as here, an easement *viâ* a highway, covenants with a landlord to keep the premises in repair, he, and not the landlord, is liable if the highway falls into disrepair because of the condition of the easement. This seems to have been the view of the Common Pleas in *Pretty* v. *Bickmore*, (1873), L.R. 8 C.P. 401; and in *Gwinnell* v. *Eamer*, (1875) L.R. 10 C.P. 658; but those were actions against the landlords only, and merely determine that the landlords under the circumstances of those cases were not liable. Observations that the tenants were liable were *obiter*.

In *Horridge* v. *Mackinson* (1915), 84 L.J. (K.B.) 1294, the facts were that the local authorities had raised the pavement in front of the premises occupied by the defendant. Before it was raised, there was an opening in it for a coal shoot into the defendant's cellar, with a covering. Later, the authorities raised the pavement but not the covering, thus leaving a depression of 11 inches over the covering. It remained in this condition for 13 years, the defendant in the meantime using the shoot for the purpose of his premises. Then the plaintiff put her foot in the hole, fell, and was injured, and in disposing of the case Bailhache, J., says: "There is no duty on a frontager to keep in repair a highway . . . Not only is there no duty; there is no power in him to do repairs to the highway." I accept this as being a correct statement of the law and follow it. To succeed at common law, the defendant corporation must shew that the tenants were guilty of

actionable negligence which caused the injury. They did not construct the grating or put the slat in it when the iron bar disappeared, nor did they remove the slat the removal of which was the cause of the accident. So far as appears, the grating was in a safe condition until two or three days before the accident, and then for the first time it fell into the condition which caused the accident. I fail to see what the tenants were bound to do or had a right to do which would have prevented the slat disappearing, or what they should have done in order to repair the grating.

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It was argued that, under the covenant to repair, the tenants were liable to the corporation. There is no privity between the corporation and the tenants, the covenant being with the landlord only, and a stranger to the covenant can take no benefit under it.

For another reason the covenant cannot enure to the benefit of the corporation. Being made with the landlord only, and the landlord not being liable to the corporation, the tenants cannot be liable (under their covenant) to the corporation. If the parties to the covenant required the tenants to repair the highway, they would have no right to make such repairs, for in doing so they would be wrongdoers. The corporation have passed no by-law authorising a frontager of his own motion to repair a highway. The covenant therefore was to do an unlawful act, and was therefore void.

Mr. Kingstone strenuously urged that the tenants had "left or maintained" the defective grating on the highway. They had no control over it, no right to amend it or remove it. Any such interference with it on their part would have been an unlawful act. They therefore cannot be held to have either laid or maintained the defective grating.

For this reason, the claim of the corporation against the third parties fails, and the appeal should be dismissed with costs.

Sutherland, J.

SUTHERLAND, J., agreed with MULOCK, C.J.Ex.

Riddell, J.

RIDDELL, J.:—The plaintiff recovered a judgment against the Corporation of the City of St. Catharines for damages for defect in a sidewalk, and that judgment is not complained of here. But the corporation claimed over against the landlord and tenants of a certain building, under secs. 464 and 483 of the Municipal Act, R.S.O. 1914, ch. 192; the learned County Court Judge dismissed this claim; and the city corporation now appeal.

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The facts of the case, so far as relates to relief over, were not fully brought out at the trial—perhaps they could not be—but no one asks for a new trial or for leave to supplement the evidence under Rule 232, and we must deal with the facts as they are made to appear.

The Neelon estate is the owner of a certain building on the north side of St. Paul street—there is an opening on the south side of the building in the street, which furnishes light and ventilation to the basement of the building occupied as a store. There is no evidence how, when, or by whom this opening was made, though there can be no doubt that it was for the advantage of either the owner or the occupant of the store at the time.

The opening consisted of an area-way, built of brick, and covered by an iron grating, 3 feet 11 inches x 18 inches, the bars of the grating running at right angles to the building, and the grating itself being close up to the wall and extending some 18 inches out in the sidewalk. The tenants took a lease of the store on the 31st March, 1914, for eight years from the 1st April, 1914—the lease containing the ordinary covenants and being under the Short Forms of Leases Act.

Before that time, the city corporation laid down a concrete sidewalk, June, 1913, on the north side of St. Paul street, and consequently opposite the building in question. Finding the grating *in situ*, the city's contractor, who was working under the direction of the city engineer, placed the concrete around the grating in such a way that the grating was firmly imbedded in the concrete.

The exact condition of the grating at that time does not appear: but on the 31st March, 1914, when the tenants took their lease, the third bar to the east had been broken out and a block of wood inserted—by whom does not appear.

About a week before the present accident, a little girl caught her foot in the grating, and it was discovered that the block had been knocked out, how, when, and by whom does not appear. The tenants telephoned to the person who, they were informed, did repairing for the landlord, but it was not repaired. Then a gentleman, Mr. Hawke, caught his heel in the grating, and complained to the tenants, who again telephoned as before, and were told to insert a board, and so fix it up temporarily, and instructions

would be given to have the grating repaired with iron. They accordingly put on a board, but that was shifted in some way in the night. (It should perhaps be said that there is some confusion in the evidence, and Mr. Hawke's accident may have been after and not before the board was removed.)

The female plaintiff, a day or so afterwards, stepping up to the store window, got her foot and lower leg through the grating, and was injured.

There is no question here of a right of action by the plaintiff against the tenant or landlord: she has chosen her defendant, and obtained judgment against the city corporation.

The sole question is, whether the city corporation can claim reimbursement from landlord or tenants, under the provisions of the Municipal Act, secs. 464 and 483.

Section 464 gives the city corporation such a right if the accident occurred by reason of an "opening in . . . a highway . . . placed, made, left or maintained by any person . . . or by reason of any negligent or wrongful act or omission of any person . . ."

As the city corporation claim against such other person, it is plain that the onus must lie on the city corporation to prove the facts constituting the liability over, especially as the provision in the statute is in derogation of the common law.

There is no evidence that the opening was placed or made by either landlord or tenants—it certainly was not placed or made by the tenants. Then as to the questions whether the opening was left or maintained by either, they are not determined by the consideration whether it is for their benefit and advantage: *Macpherson* v. *City of Vancouver*, (1912), 2 D.L.R. 283, 19 Can. Cr. Cas. 274. 17 B.C.R. 264.

I am of opinion, too, that the statute does not justify penalising landlord or tenant for leaving undone what it would be a crime or a tort to do. No doubt the Legislature could compel a person to pay damages for doing what he was compelled to do, or for leaving undone what he could not do for physical or legal reasons, but that is because the Legislature has powers of expropriation and confiscation: *Florence Mining Co. Limited* v. *Cobalt Lake Mining Co. Limited* (1909), 18 O.L.R. 275, affirmed in the Privy Council (1910), 43 O.L.R. 474.

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Riddell, J.

To justify the Court in holding that any statute has such an unusual and stringent effect, the Legislature must use words unambiguous and apt—so that any other interpretation is excluded.

In the present case, the Act should be read so as to contain the implication that the leaving or maintaining must be of such a character that the person to be charged may fail to leave or maintain without committing crime or legal trespass.

The city corporation, in 1913, cemented the grating into their sidewalk, we must assume, lawfully: and thereby must, in my opinion, be considered as making the grating their own, and preventing any one interfering with it. Neither landlord nor tenant could rightfully interfere with the grating—thus part of the sidewalk and public highway. Nor had either any right to interfere with, stop up, etc., the opening. Consequently, I think that they neither "left or maintained" the opening, within the meaning of the statute.

As to the second ground of alleged liability, i.e., negligence—it has been pointed out again and again that there is in law no such thing as negligence at large—negligence, to give a cause of action in law, must be neglect of duty toward some one: *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491, and similar cases. Negligence against whom? Not against the city corporation; the corporation have not called and cannot call upon the landlord or tenant to do anything to mend the corporation's sidewalk; nor against the foot-passenger—it is the city corporation's duty to keep its sidewalk in repair.

The act of the tenants in placing the board, etc., over the grating was pressed upon us. It is to be observed that this was done by the tenants at the instance of a person believed to be in the employment of the landlord, and was only temporary. Assuming that the tenants did undertake the covering or repair of the grating, and admitting that it is clear law that a person undertaking any work, however particular and beyond the scope of his duty, is liable in damages for negligent performance of that work, the city corporation are not advanced. The cover was to be only temporary in any case, and it had been removed, and the grating had been reduced to its former defective condition, some time before the accident in question in this action took place. It was not any defect in the covering or any right given in performing

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the work which caused the accident, but the original defect. Had the accident been caused by the cover, the case might be different.

Section 483 does not apply—there is no by-law.

The city corporation have only themselves to blame for their loss: there is no legal difficulty in securing protection for the corporation in all such cases.

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

Riddell, J.

MASTEN, J.:—The plaintiff has recovered against the defendant corporation alone for breach of their statutory duty to keep their streets in repair, and the plaintiff's claim has been satisfied. The only question on this appeal is as to the right of the defendant corporation to be indemnified by the third parties, or one of them. The third parties are the owner and tenants respectively of the adjoining premises, served for light and ventilation by the area-way in the sidewalk, which occasioned the accident.

Masten, J

The third parties are not liable to the defendant corporation as joint tort-feasors, nor is there any contract of indemnity between those parties, and there was no evidence of a breach of any duty owed by either of the respondents to the appellant corporation.

At common law the recovery on a judgment by the plaintiff against the defendant corporation would, under these circumstances, be the end of the matter; but sec. 464 of the Municipal Act gives to the corporation a right of indemnity against any person where damages have been sustained by reason of an opening in a highway "maintained" by such person.

In the circumstances which appear before us, it seems to me that the only question is, "What is the construction of the statute?" Was the area-way in question "maintained" by the third parties or either of them? Evidence as to the origin of the area-way and as to the obligation to repair might be relevant if the plaintiff had sued the third parties or either of them directly; but, as regards the right of the corporation to indemnity, the sole question seems to me to turn on the construction of the words of the statute which, it is contended, impose a liability on the third parties.

If the defendant corporation had shewn by their evidence that the third parties had acquired, as against the corporation, a prescriptive right to the easement in question, I would have been for allowing the appeal, on the ground that, having acquired such

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a prescriptive right as appurtenant to their premises, they were, by continuous use and enjoyment of the easement, maintaining their right thereto within the meaning of the statute. For such a definition of "maintain," see the Standard Dictionary and 25 Cyc. 1664. Also (if it has any cogency) I think that the ownership of such an easement would carry with it, by implication, the right to repair the grating.

However, in view of the legislation respecting ownership of the soil in highways, it seems improbable, perhaps I should say impossible, that a prescriptive right to enjoy this area-way could have been acquired by the owners of the adjoining premises. Certain it is that the evidence in this case fails to establish such a right, and I see no reason why the defendant corporation could not close up the area-way to-morrow and cement it over. That being so, and there being no evidence that the third parties have ever interfered with the area-way or done more than passively enjoy its advantages, it cannot, I think, be said that the area-way is maintained by the third parties or either of them.

The case of *Macpherson* v. *City of Vancouver*, 2 D.L.R. 283, 17 B.C.R. 264, 19 Can. Cr. Cas. 274, was relied upon by the appellants, but, in my opinion, was successfully distinguished by counsel for the respondents. In that case Chief Justice Macdonald and Mr. Justice Galliher based their judgment upon the fact that the defendant corporation, when replacing the old sidewalk, took the old wooden grating which had been in use for five years, and replaced and utilised it, and that the third party had nothing to do with the matter. It is true that Mr. Justice Irving founded his judgment on a different view, but he himself expressed grave doubt as to the correctness of his conclusion. I only refer to the case for the purpose of indicating that, speaking for myself, I do not think that the Court in that case intended to determine that enjoyment of a right by a third party for his own use and convenience may not bring him within the words of the statute. If it did so intend, I do not agree with it.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

OGLOFF v. DANIS, BLEWETT and McINTOSH.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

COSTS (§ I—12)—CERTIORARI PROCEEDINGS—JURISDICTION TO GIVE COSTS AGAINST PROSECUTOR—CROWN PRACTICE RULE NO. 40 (SASK.).

In certiorari proceedings the Court has jurisdiction under Crown Practice Rule No. 40, to give costs against the prosecutor.

[*Rex* v. *Standall* (1919), 12 S.L.R. 282, 31 Can. Cr. Cas. 144; *"The Friedeberg"* (1885), 10 P.D. 112; *Badishe Anilin etc.* v. *Levinstein* (1885), 29 Ch. D. 366, referred to.]

Statement.

APPEAL by informant from a judgment of Bigelow, J., quashing a conviction and ordering the costs to be paid by the informant. Affirmed.

W. G. Ross, for appellant; *L. McK. Robinson*, for respondents.

The judgment of the Court was delivered by

Haultain, C.J.S.

HAULTAIN, C.J.S.:—In this case Bigelow, J., made an order quashing the conviction made against Ogloff, with costs to be paid by the informant. Leave to appeal on the question of costs was given by the Judge, and the informant has appealed on the following grounds:—

(1) That the said order in so far as it relates to costs is against the law, evidence and the weight of evidence. (2) That the costs should not have been awarded against the Crown or the informant herein. (3) That it was not within the discretion of the said Judge to award costs against the Crown or against an informant being an officer of the Crown.

In granting leave to appeal the trial Judge made the following observations:—

On this application for leave to appeal from my decision on the question of costs the applicant contends that I should consider the other grounds advanced at the argument against the validity of the conviction. I would agree with this contention, but for the fact that I think the whole question of costs against the informant or the Crown in *certiorari* proceedings should be settled by the Court of Appeal; the decision of Brown, C.J., in *Rex* v. *Standall* (1919), 12 S.L.R. 282, 31 Can. Cr. Cas. 144, altered what has been the practice in this Province of only giving costs where there has been misconduct on the part of the justice or informant.

In the case of *Rex* v. *Standall*, 12 S.L.R. 282, 31 Can. Cr. Cas. 144, Brown, C.J.K.B., reviews the cases on the question of costs in *certiorari* proceedings, and holds, in my opinion correctly, that the Court has jurisdiction to give costs against the prosecutor on *certiorari* proceedings.

Our Crown Practice Rule No. 40 is as follows:—

40. In all proceedings under these rules the costs shall be in the discretion of the Court or Judge who shall have full power to order either the applicant or the party against whom the application is made or any other party to the proceedings to pay such costs or any part thereof according to the result.

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This rule leaves the question of costs to the discretion of the Court or Judge before whom the application is made. That means that the discretion should be exercised in each individual case according to the special facts and circumstances of that case. It would therefore be undesirable and, in my opinion, beyond the powers of this Court to attempt to lay down a general rule which could in any sense have the effect of fettering the discretion thus given. *"The Friedeberg"* (1885), 10 P.D. 112; *Badishe Anilin etc.* v. *Levinstein* (1885), 29 Ch. D. 366, at page 419.

In this case the Judge appealed from has granted costs to the applicant according to the result, and has not, in my opinion, exercised the discretion given to him by the rules on any wrong principle.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

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DeROUSSY v. NESBITT.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. June 25, 1920.

1. STATUTES (§ II D—125)—SALE OF LAND—COMMISSION—MEMORANDUM IN WRITING, ALTA. STATS, 6 EDW. VII. 1906, CH. 27—AMENDMENT 1920—EXCEPTION IN CASES OF COMPLETED SALE—ACT NOT RETROSPECTIVE.

An amendment to 6 Edw. VII. 1906, ch. 27 (Alta.), was passed in 1920, ch. 4, sec. 38, which excepted from the general rule, that there must be a memorandum in writing to support an action to recover for services in selling an interest in lands, cases, *inter alia*, in which the sale had been actually effected and completed.

Held, by Harvey, C.J., and Stuart, J., that the amendment was not retrospective and did not affect an action which was pending before such amendment was enacted.

Held *per* Beck and Ives, JJ., that the amendment was retrospective in the sense that it became immediately applicable to contracts made before it was passed.

2. CONTRACTS (§ II B—135)—VERBAL FOR SALE OF LEASEHOLD AND CHATTELS —SEVERABILITY.

The plaintiffs' claim being for commission earned in effecting a sale of certain property of the defendant a portion of which was leasehold and part chattels, Harvey, C.J., and Stuart, J., held that although plaintiff could not recover the commission on the sale of the land, the compensation in the contract not being for a fixed sum but a rate per cent. of the amount obtained, the contract was divisible and the plaintiff could recover the commission on the sale of the chattels.

Ives, J., held that the contract was indivisible.

Beck, J., concurred in the disposition of the case by Ives, J., although not agreeing that the contract was indivisible.

Statement.

APPEAL by plaintiffs from a judgment of Hyndman, J., in an action to recover commission on the sale of land and chattels. Reversed.

A. H. Clarke, K.C., for plaintiffs; *J. W. Crawford*, for defendant.

HARVEY, C.J.:—The plaintiffs' claim is for commission earned in effecting a sale of certain property of the defendant. A portion of the property was a lease of land. There was no memorandum in writing of the agreement between the parties and Hyndman, J., who tried the case, held that as ch. 27, 6 Edw. VII. 1906 (Alta.), rendered it impossible for the plaintiffs to recover in respect of service for sale of the lease it being an interest in land they could not recover anything because in his opinion the contract was indivisible.

It appears that shortly before the trial, though without the knowledge of the parties, the Statute in question had been amended by excepting from the general rule, that there must be a memorandum in writing to support an action to recover for services in selling an interest in lands, cases, *inter alia*, in which the sale had been actually effected and completed, which is the situation in the present case. It is contended on behalf of the plaintiffs that the amendment applies to this case and that by virtue thereof the plaintiff is entitled to succeed.

In my opinion the authorities are quite against this contention.

In *Wright* v. *Hale* (1860), 6 H. & N. 227, 158 E.R. 94, 30 L.J. (Ex.) 40, Wilde, J., at page 43 (30 L.J. (Ex.)), said:—

> Where you are dealing with a right of action, and an Act of Parliament passes, unless something express is contained in that Act the right of action is not taken away; but where you are dealing with mere procedure, unless something is said to the contrary and the language in its terms applies to all actions whether before or after the Act, there I think the principle is that the Act does apply without reference to the former law of procedure.

Pollock, C.B., in the same case, at page 42 (30 L.J. (Ex.)), said:—

> I have always understood that there is a considerable difference between laws which affect the vested rights and interests of parties and those laws which merely affect the proceedings of Courts, as for instance, declaring what shall be deemed good service, what shall be the criterion of the right to costs, how much costs shall be asked, the manner in which witnesses shall be paid or what witnesses the party shall be entitled to, and so on,

and stated that as to the latter the general rule that pending actions were not affected did not apply.

In *Kimbray* v. *Draper* (1868), L.R. 3 Q.B. 160, it was held that an enactment declaring that in certain cases upon failure to give security for costs in an action in the Supreme Court the action

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would be transferred to the County Court when the costs would be the usual costs of that Court, was to be construed as retrospective and as applying to an action already begun. Blackburn, J., at pages 162-3, said:—

> The canon of decision in *Wright* v. *Hale*, *supra*, is that when the effect of an enactment is to take away a right, *primâ facie* it does not apply to existing rights: but where it deals with procedure only, *primâ facie* it applies to all actions pending as well as future.

In re Joseph Suche & Co. (1875), 1 Ch. D. 48, it was held by Jessel, M.R., after consulting several of the other Judges that a provision of the Judicature Act, 1875, which directed that in the winding-up of an insolvent company the same rules should apply as under the law of bankruptcy, was not retrospective. At page 50 he says:—

> It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights and it is suggested here that the alteration made by this section is within that exception. I am of opinion that it is not. This is an alteration not merely in procedure but in the right to prove for a debt which is not distinguishable in substance from a right of action before winding-up, being simply a legal proceeding to recover a debt against a company in liquidation.

In *Colonial Sugar Refining Co.* v. *Irving*, [1905] A.C. 369, the Privy Council held that an Act altering the right of appeal was not one merely of procedure but affected the rights of the parties and was not to be given a retrospective effect so as to apply to an action then pending. From all these cases it is apparent that the question to be considered is not simply whether the enactment is one affecting procedure but whether it affects procedure *only* and does not affect substantial rights of the parties.

The legislation under consideration no doubt affects procedure in a sense in that it provides what kind of evidence is necessary to maintain an action but it does much more, for the original Act provided that in the absence of a writing no right of action whatever existed and the amendment confers a right of action in certain cases where it did not exist before.

Without disregarding all the authorities I do not see how it can be held to be retrospective in its operation. Our decision in *Chapin* v. *Matthews* (1915), 24 D.L.R. 457, 9 Alta. L.R. 209, in my

opinion has no application. There the legislation had conferred on the Court the power to construe agreements as regards their reasonableness. There could be no retroactive effect because the Act only applied where the agreement came before the Court which, of course, must be after the passing of the Act and there was nothing in the Act to suggest that the power of the Court to construe agreements was to be confined to those agreements which had been made after the Act was passed.

I am of the opinion, therefore, that the appellants cannot succeed on this ground, and that they are not entitled to recover compensation for their services in selling the lease. But it does not necessarily follow that they cannot recover for their services in selling the chattels.

The trial Judge says:

> What they were to do was to sell the whole of the defendant's property out there consisting of the grazing lease and the goods and chattels. There was no arrangement or intention to sell one part of the property without the other. In other words, everything went together and in that respect it was an indivisible contract.

In my opinion the indivisibility that is here discussed is more particularly that of the proposed contract between the vendor and the purchaser to be obtained, but as Fry on Specific Performance points out, at page 404, par. 824:

> Where properties are of two descriptions—as, for example, a ship and the freight—the fact that they are both included in one instrument, and dealt with for one entire sum, does not seem conclusively to render the contract indivisible.

The contract sued on is not that contract but the contract creating the agency.

As to the latter I find no evidence whatever to indicate that the plaintiffs were to receive nothing unless they performed all the services by selling all the property. Defendants' counsel admits that if they had sold the goods alone for a sum which the defendant was willing to accept he would have been bound to pay commission. Their right would have been on this contract and if they would have been entitled to be paid an appropriate part of the commission for selling a part of the property it would seem that the contract is divisible. Then the compensation was not a fixed sum for all services but was to be at a rate per cent. of the amount obtained which serves to indicate that there was no implied, as certainly there was no express, term that the plaintiffs should

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receive nothing but one fixed sum for all their services. The fact that part of the property was land and part chattels can have no effect upon this question other than to confuse. If it had all been goods and only part sold under an agency to find a purchaser the compensation for services in doing which was to be, at the rate of 3% of the amount of the purchase price, it appears to me that no one would question the right of the agent to recover even though when the agency was created only one price was fixed and that for the whole lot.

The contract between the parties was, that for finding a purchaser of the property at the sum of $75,000, the plaintiffs were to receive 3% of the purchase price. The Statute says that for their services in selling the leasehold they can recover nothing because there is no memorandum of the terms of the contract in writing, but the services rendered were not merely in selling the land but also in selling the goods, which were of much greater value than the land. There is no law which says they may not recover for those services and as there appears to be nothing to make it necessary to conclude that the compensation for each cannot be separated I think they are entitled to recover for the latter services and I see no reason why the rate fixed should not apply to determine the amount of compensation. The evidence shews that at the outside the value of the leasehold interest could not have exceeded $25,000 so that the fair proportionate value of the goods would be at least $50,000.

I would, therefore, allow the appeal with costs and direct judgment for the plaintiffs for $1,500 with costs.

Stuart, J.

STUART, J.:—The distinction between a vested right derived from actual substantive law and an advantage enjoyed in consequence of the existence of a rule of evidence is necessarily in many cases a difficult one to discern. Originally I imagine rules of procedure largely created substantive rights.

Undoubtedly many authorities refer to the Statute of Frauds as dealing only with procedure but it is noticeable that the originator of it, Lord Nottingham, in *Ash* v. *Abdy* (1678), 3 Swan. 664, 36 E.R. 1014, that it ought not to be applied to a contract entered into before it was passed and he there states that the Court of King's Bench had just so decided in another case.

In a case of doubt, which this certainly is, I think the proper course is to hold against the retroactivity of the Act.

As to the divisibility of the contract of agency I agree with the view taken by Harvey, C.J., and therefore concur in the result of his judgment.

BECK, J.:—I concur with my brother Ives in the view that the amendment of 1920 (Alta. Stats., ch. 4, sec. 38), to the Statute, which in its original form required a contract of engagement of a real estate selling agent to be in writing, is not retroactive or retrospective in the strict sense but instantly applicable to contracts made before the passing of the amending Act.

The reasoning in *Chapin* v. *Matthews* (1915), 24 D.L.R. 457, 9 Alta. L.R. 209, and the authorities therein cited fully support, in my opinion, this conclusion. I am not however prepared to concur in the view of Ives, J., that the contract was indivisible in such sense that, inasmuch as the commission for the sale of the land (apart from the amendment) is not recoverable, compensation for services rendered in respect of the sale of the personal property cannot be recovered.

Contracts may properly be treated, I think, for some purposes as divisible and for others indivisible or entire; while on the other hand separate contracts may for some purposes be considered to be one. See *Wright* v. *Weeks* (1919), 46 D.L.R. 322, 14 Alta. L.R. 467, and Fry on Specific Performance, 5th ed., pages 403 *et seq.*

Pulbrook v. *Lawes* (1876), 1 Q.B.D. 284, was a case of an agreement for a lease of land by the defendant to the plaintiff. One of the terms of the agreement was that certain improvements should be made upon the premises partly by the plaintiff and partly by the defendant. The agreement went off because of the defendant failing to do his part of the improvements. The plaintiff sued for damages for breach of the agreement and on a *quantum meruit* for the expenses he had incurred in making improvements. The Court held that the plaintiff could not recover damages for the breach of the agreement because it was not in writing but held the plaintiff entitled to recover on the *quantum meruit*. It is true the Court put their decision on the ground that it was like as if the plaintiff had paid to the defendant the cost of the improvements and the consideration having failed he was entitled to recover on that principle. The Court found a way to do justice. Blackburn, J., said, at page 289:—

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The argument of Mr. Baylis is that, as the agreement is one concerning an interest in land, and is not in writing, it cannot be given in evidence. But an agreement which cannot be put in evidence, such as an unstamped document, may be looked at for a collateral purpose. It would be very unjust if the plaintiff were not paid for what he has done at the defendant's request simply because the Statute of Frauds prevents the agreement being given in evidence and, in spite of the Act, I think he may recover under a *quantum meruit*.

I venture to submit that evidence of an oral agreement concerning an interest in land—it is not made void by the Statute—is not absolutely in all circumstances incapable of being "given in evidence" and that "sustain an action" would better express the idea intended by the learned Judge quoted. See Leake on Contracts, 6th Canadian ed., pages 202-3. Here the real agreement has in fact been proved and under the circumstances properly so in my opinion. The defendant refuses to fulfil his express contract. He cannot by reason of the Statute be forced to fulfil it. It seems in accordance with principle that a contract should be "implied in law, independently of agreement," imposing upon defendant the obligation to compensate the plaintiff in the fair value of the services he has rendered in respect of the personal property, the express contract being repudiated by the defendant and the Statute not being directed against contracts concerning personal property. See Leake on Contracts, page 42.

I concur in the disposition of the case made by my brother Ives.

Ives J.

IVES, J.:—This is an appeal from the judgment of Hyndman, J., dismissing the action.

The defendant was the owner of large leasehold and chattel property. The trial Judge found the following facts, *viz:* an oral authority from defendant to plaintiffs to procure a purchaser of the entire property at a price of $75,000; a promise to pay a commission to plaintiffs for so doing in the sum of 3% of the price so fixed. The trial Judge also finds that the contract between the parties was an entire one and not divisible with respect to the real and personal property; that the consideration of 3% was for a sale of all the property and not of the leasehold or chattels alone.

The defendant contends that as part of the property consists of interests in land, the whole contract is within the Statute 6 Edw. VII. 1906, ch. 27, and therefore, in the absence of any memorandum in writing, the action must fail.

That the contract is within the Statute I have no doubt and that it is indivisible I am equally convinced. Under the authorities I cannot come to any other conclusion.

But I think the amendment to the Statute passed in 1920 (Alta. Stats., ch. 4, sec. 38), and assented to on April 10, last, upon a proper construction enables the plaintiffs to succeed. This amendment is by way of an addition to sec. 1 in the following words:—

> Or unless the person sought to be charged has as a result of the services of an agent employed by him for such purpose effected a sale . . . and has executed a transfer . . . , or has executed an agreement of sale of lands . . . signed by all necessary parties, entitling the purchaser to possession . . . and has delivered the said agreement to the purchaser.

I think this amendment is retrospective in its effect. It deals, as the Statute does, with evidence and not with substantive rights. Like the Statute of Frauds, our Statute does not affect the validity of the contract but only makes a particular kind of proof necessary to enable the action to be brought. See *In re Hoyle*, [1893] 1 Ch. D. 84, Lindley, L.J., at page 97, Bowen, L.J., at page 99, and A. L. Smith, L.J., at page 100, and see *Gardner* v. *Lucas* (1878), 3 App. Cas. 582, *per* Lord Blackburn at pages 602-3.

Maxwell on Statutes, 5th ed., 1912, pages 366, 369, and the cases there noted are authority for the general rule that enactments which alter procedure (*i.e.*, the kind of evidence necessary to enable the action to be brought), are always retrospective unless there be some good reason against it.

But the defendant says that in the case of this amendment the general rule is not applicable because of sec. 2 of the Statute which provides that,

> this Act shall not apply to or affect any action or proceeding pending or any right or rights of action existing at the date when this Act is passed.

The Statute was passed (assented to) on May 9, 1906. Section 2 only fixes the date of the Act's application, to wit, May 9, 1906, and does not affect an amendment, or impliedly declare it prospective only.

I would allow the appeal with costs, order the claim to be amended to include in the contract sued upon the leasehold as found by the trial Judge, and direct judgment to be entered for the plaintiffs for the sum of $2,250.00 and costs.

Appeal allowed.

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CITY OF SARNIA v. McMURPHY.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Clute, Riddell, Sutherland and Masten, JJ. May 5, 1920.

MUNICIPAL CORPORATIONS (§ II C—66)—LOCAL IMPROVEMENTS UNDER LOCAL IMPROVEMENT ACT—ESTIMATE OF WORK—PROPORTIONING OF COST—COMPLETION ACCORDING TO CONTRACT—SECOND CONTRACT TO FURTHER COMPLETE—NO PETITION—VALIDITY.

A valid petition having been signed by a requisite number of ratepayers a by-law was passed authorising the construction of a drain within a municipal corporation as a local improvement under the provisions of the Local Improvement Act, R.S.O. 1914, ch. 193, the total estimate of the work being fixed and the cost proportioned between the residents of the abutting land and the corporation. The corporation, after completion of this work according to the terms of the contract, cannot treat the work, as incomplete and as only providing for part of the work, and authorise a second contract as supplemental to the first to complete the work. The work done under a second contract forms no part of the work initiated by the petition and is not therefore done as a local improvement, and a by-law assuming to assess the owners for a proportion of the cost of the work done under the second contract is void, the lack of a petition being a fundamental defect which cannot be remedied despite the scope of secs. 38 and 44 of the Local Improvement Act.

Statement.

APPEAL by the defendant from the judgment of TAYLOR, J., in the First Division Court of the County of Lambton, in favour of the plaintiffs, the Municipal Corporation of the City of Sarnia, in an action to recover $17.48, a portion of the taxes alleged to be due by the defendant for the year 1918, in respect of a lot fronting on Confederation street in the city. Reversed.

J. M. McEvoy, for appellant.

J. Cowan, K.C., for respondents.

Sutherland, J.

SUTHERLAND, J.:—In this action the Municipal Corporation of the City of Sarnia obtained a judgment against the defendant, a ratepayer therein, for the sum of $17.48 and cost, in an action in the First Division Court of the County of Lambton. It is said to be a test case, on the result of which claims against other ratepayers depend.

The trial Judge states that, pursuant to the Division Courts Act, R.S.O. 1914, ch. 63, sec. 125 (*c*), the parties filed a written consent before trial that either might appeal to a Divisional Court.

The action arises out of work undertaken by the muncipality under the authority of the Local Improvement Act, R.S.O. 1914, ch. 193. Section 3(1) (*d*) provides that the construction of a sewer is one of the works that may be undertaken as a local improvement, and the interpretation section, 2 (*t*), states that the term "sewer" shall include a drain. The initial statutory requisite

before a by-law may be passed for undertaking the work, if it is proposed to proceed under sec. 8(1), as was the case here, is a petition which must conform to sec. 12, providing that the petition shall be signed by at least two-thirds in number of the owners representing at least one-half of the value of the lots liable to special assessment: see also sec. 16.

A valid petition, bearing date the 10th July, 1916, was signed by the defendant and other owners, and presented to the council, embodying the following statement and request:—

"That it is expedient to construct a concrete tile drain upon Confederation street from the east side of Christina street to the east limit of the City of Sarnia, and that such work be constructed as a local improvement under the Local Improvement Act."

The council has authority, by sec. 22(1), by a vote of three-fourths of all the members, to "provide that a certain sum per foot frontage shall be specially assessed upon the land abutting directly on the work and that the remainder of the cost of such sewer shall be borne by the corporation."

The proposed work was to take the place of a tile drain already in existence. On the 14th June, 1916, the engineer of the corporation had made a written report to the council, in which he stated that he had "made an examination and survey of the 4th line or Confederation street drain, with a view to its improvement;" that the drain was "badly in need of improvement;" that he would recommend . . . "that the tile at present in use from Christina to Queen street be removed and that 36″ tile be employed throughout the whole work," etc. In the report he gives an estimate of the cost of the work as follows:—

"From Christina street to Queen street, removal of tile and replacing same with 36″ tile 525′ at $3.00	$1,575.00
"From Queen street to the eastern boundary of city, 4,940′ of 36″ tile at $2.00	9,880.00
"Filling from Queen street to eastern boundary of city, 10,063 yards at 50 cents	5,031.50
"Engineering, superintending, etc	250.00
	$16,736.50"

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With this report specifications were submitted, from which I quote as follows:—

"*Description.* The work to be performed under these specifications consists in the deepening of the 4th line or Confederation street drain as shewn on the plan and profile accompanying these specifications, removal of old tile and placing tile as herein specified and covering over with excavated earth taken from the drain and filling to 18" . . ."

"Should the earth excavated from the drain be insufficient to fill the drain to 18" over tile when laid, the contractor shall be required to furnish the necessary filling and properly fill the dran to the required level."

On the 18th July, at the request of the Chairman of the Board, the engineer submitted an estimate of the cost of constructing a 3-foot tile for the said drain, similar to the estimate already mentioned, with the exception that the last item, namely, $250, is reduced to $150, making the total estimated cost $16,636.50, instead of $16,736.50. This estimate contained the following additional statement:—

"The lands abutting and facing directly on the work should pay 50% or $8,318.25 towards the cost of the work, and the corporation should pay 50% or $8,318.25. The special assessment levied to raise the cost of the work should be made payable in twenty instalments."

The old drain, which the new and improved drain was to replace, lay along the bottom of a deep ditch, which, on the completion of the proposed work and on the covering of 18 inches being put upon the new 3-foot tile, would still leave the open ditch largely as it was before, that is to say, with a considerable space unfilled from the top of the work thus to be done to the top of the banks of the ditch.

The council passed its by-law No. 916 on the 21st August, 1916, "to authorise the construction of a concrete tile drain on Confederation street from the east side of Christina street to the east limit of the City of Sarnia, as a local improvement under the provisions of the Local Improvement Act." It recites: "And whereas it is equitable and desirable that the city should bear a considerable share of the cost thereof;" and it enacts: "(2) That the sum of dollars and seventy eight and four-fifths cents

per foot be specially assessed upon the land abutting directly on the work, to raise part of the sum required to pay for the construction of the said drain, and that the remainder of the cost of such concrete tile drain shall be borne by the Corporation of the City of Sarnia at large."

It authorises a contract to be let for the construction of the work and "for the levying of a special assessment to be paid in twenty annual instalments." It provides that the by-law "shall come into force immediately from and after the passing thereof by a vote of three-fourths of all of the members of the Municipal Council of the City of Sarnia." It was duly adopted.

Tenders were invited for the construction of the work, and that put in by the B. Blair Company Limited was accepted. In it the said firm offered to perform the work and furnish all material and labour, and complete it in accordance with the plan and specifications, etc., prepared by the engineer, and to conform to all conditions appended thereto, at and for the prices given below, viz.:—

Description of work.	Price per unit.	Total.
1. For removal and replacing 36" tile from Christina to Queen street, 525 feet	$3.85 per lin. foot	$2,021.25
2. From Queen street to eastern limit 36" tile, 4,940 feet with 18" covering	$2.84 per lin. foot	14,029.60
3. Receiving-basins with 8-inch vitrified pipe		
4. Man-holes as per specifications (three)	$40.00	120.00
		$16,170.85

A contract was entered into between the corporation and the contractors, bearing date the 11th September, 1916, in which the latter agreed to construct the work in strict accordance with the plan, profile, and specification and tender respectively, which were incorporated and made to form part of the contract, and that they would do all the excavation and filling-in required to be done by the said specification and form of tender, etc.; that the work should be commenced at once and prosecuted vigorously and be completed on or before the 31st December, 1916.

"That the corporation, in consideration of the construction of the said work by the contractor, covenants and agrees to pay to

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the contractor the sum of sixteen thousand one hundred and seventy dollars and eighty-five cents. . . ."

The work under the said contract was proceeded with and completed.

The minutes of the meeting of the council held on the 8th January, 1917, contains the following record:—

"Mr. McArthur said that the Board of Works were exceedingly anxious to complete the filling-in of the Confederation street *ditch*, the present contract only required an 18-inch covering for the tile, and the committee had since asked for tenders for filling the ditch up to the level of the ground. The tender of B. Blair & Co. at $10,065 was very much the lowest tender, owing to the company having secured lots in the neighbourhood from which they could obtain the material, and also having on the ground the necessary plant for moving the material cheaply."

It is to be noticed that the reference is to the filling-in of the Confederation street *ditch*, not *drain*, the word consistently used theretofore.

A second contract bearing date the 12th January, 1917, was entered into between the corporation and the Blair company, under which the latter agreed to "fill in the Confederation street ditch," etc., and that there should be "sufficient earth deposited therein so that the grade line of the top when completed and earth settled" should "correspond to the average level of the lands on the north and south sides of said ditch," and that they should "procure all earth" and "have the entire work completed on or before the 1st day of May, A.D. 1917."

The contract-price therefor was $10,065. In the report and estimate of the engineer dated the 4th June, 1916, the filling-in is estimated to cost $5,031.50; the same figure appears in his estimate of the 18th July. In the tender of the contractors under the first contract, the figures appear to be combined in a different way, but the total estimate was approximately the same.

In the contract of the 11th September, 1916, the consideration for the work is put at the lump sum of $16,170.85. It is nevertheless contended that the additional filling-in provided to be done under the contract of the 12th January, 1917, should be regarded as part of the work undertaken in pursuance of the

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original petition and covered by by-law No. 916, the tender and specification, that is to say, that the first agreement of September, 1916, only provided for part of the work, and the second was supplemental thereto, and was not for new and additional work.

I think it quite impossible so to regard it. The petition does not ask for or contemplate a filling-in to the top of the ditch. Neither the report, estimate, or specification of the engineer seems to suggest or imply this. They plainly refer to the replacing of an old tile drain by a new one, with a covering of 18 inches of earth. It appears to me to be perfectly clear that the work intended to be done and done under the contract of the 12th January, 1917, formed no part of the work initiated by the petition. It was not, therefore, done as a local improvement under the procedure provided for by sec. 8 (1) (*a*) of the Local Improvement Act.

On the 26th November, 1917, the city engineer had made a report on the construction of the drain, in which it was set out that the total cost thereof, according to plan, profile, and specification, was $27,863.88, o' which amount $13,931.94 should, in his opinion, be assessed "against the property immediately fronting and adjoining" the drain, and the balance, $13,931.94, should be assessed against the city as its proportion of the work to be done. Paragraphs 2 and 3 are as follows:—

2. The amount of the total cost of the aforesaid work is made up as follows:—

Totals.	525′ Christina to Queen at $3.85	$ 2,021.25
	5,281 Queen to easterly limit at $2.84	14,998.04
	3 man-holes at $40.00	120.00
	Extras for retaining wall and private con.	164.09
	Total second contract for filling in drain	10,065.00
	Engineering	495.00
		$27,863.88.

3. The assessable frontage on the north side of Confederation street is 5,159 feet and on the south side is 5,148 feet, and annexed to this report is a schedule shewing the respective owners of the said frontages and the respective property-owners for whom the work was done.

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The report had annexed to it a schedule of the names of the owners of the land abutting on the drain and their respective frontages.

On the 25th February, 1918, the council, by a three-fourths vote of the members, passed by-law No. 1000. It provides "that fifty per cent. of the cost of the . . . drain . . . be . . . assumed and . . . paid by the Corporation of the City of Sarnia at large," etc.

A Court of Revision followed, and the defendant herein received notice of his proposed assessment along with the others concerned. The assessment roll was revised and confirmed. The defendant did not appeal therefrom, under sec. 39.

The council, upon completion of the second contract, passed a by-law, No. 1022, on the 29th April, 1918, for the purpose of borrowing the sum of $29,265 upon debentures to pay for the construction as local improvements of the following drains, viz., one on Confederation street and another on Exmouth street. The by-law recites that, pursuant to construction by-law No. 916, the said drain on Confederation street had been constructed; that the cost of the work on Confederation street was $28,594.20, of which $14,297.10 is the corporation's proportion and the same amount the owners' proportion. It provides that "for the payment of the owners' proportion of the respective cost of said respective works and interest thereon the respective special assessment rolls are hereby imposed upon the lands liable therefor, as therein set forth, which said special assessment, with sums sufficient to cover interest thereon at the rate aforesaid, shall be payable in twenty equal annual instalments of $1,327.99 each, and for that purpose the special rate per foot frontage set forth in the schedule thereto attached are hereby imposed upon the lots entered on said special assessment rolls according to the assessed frontage thereof, over and above all other rates and taxes, and the said special rates shall be collected annually by the collector of taxes," etc. This by-law was duly registered, and no motion to quash was made.

The trial Judge came to the conclusion that by-law No. 916 was sufficient to authorise the work being done. He also refers to the fact that no report was made by the engineer until the work had been completed, and that the report shewed "that the work done was pursuant to the petition."

I am unable to see that by-law No. 916 gave any warrant or authority to specially assess the land abutting directly upon the work of the Confederation street drain beyond the 78⅘ cents per foot therein authorised to be assessed thereon to raise that part of the sum required to be paid by the owners. That by-law authorises and provides "that the remainder of the cost of such tile drain shall be borne by the corporation." The assessable frontage on each side of the drain was 10,307 feet in all. If this were multiplied by 78⅘ cents per foot, it would fix the total amount to be paid by the owners at a sum slightly less than $8,318.25, the amount mentioned in the engineer's estimate of the 18th July, already referred to. While that estimate also indicated that the corporation and the owners should each pay a like sum, that each would pay half, it was the one-half of a total estimate of $16,636.50. The petition, estimate, and specification would not warrant the by-law in going further than that, and the work to be done at that cost was and could be only the 3-foot drain and the covering thereon to 18 inches according to the plain construction of sec. 2 of the said by-law. The 78⅘ cents per foot to be specially assessed upon the abutting lands of the owners was the provision for raising that part of the money required to be paid by them for the construction of the drain, and the remainder of the cost thereof was to be borne by the corporation at large. In that view also, the work done under the second contract is properly chargeable against the corporation at large, and not, as attempted to be done to the extent of the one-half thereof by by-law No. 1022, by special assessment against the owners.

I am, therefore, of opinion that by-law 1022, assuming as it does to assess the owners for the half of the cost of the work done under the second contract, is without legal warrant or authority and is void. That work was not done under the authority of the Local Improvement Act at all. The lack of a petition is a fundamental defect, which cannot be remedied despite the scope of secs. 38 and 44: *Mackay* v. *City of Toronto* (1918), 43 O.L.R. 17, affirmed by Privy Council 48 D.L.R. 151, [1920] A.C. 208; *Fleming* v. *Town of Sandwich*, (1918), 46 D.L.R. 613, 44 O.L.R. 514; *Anderson* v. *Municipality of South Vancouver*, (1911), 45 Can. S.C.R. 425, at pp. 446-461.

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I do not think that the fact that the defendant was a member of the council at the times referred to, or any failure on his part in attacking the assessment or moving to quash the by-law, can be deemed to amount to an estoppel. The debentures issued upon the presumed validity of the by-law and said to have been sold and disposed of may be validated under sec. 44 of the Act, in so far as liability or obligation incurred by the corporation to purchasers is concerned.

It was suggested by counsel for the respondents that he could invoke the aid of secs. 5, 9, and 10, or one of them, in support of the judgment. Upon the facts it is plain that the work that was done under the second contract, and which is in question herein, was not done under the authority of any of these sections, and they cannot be made to apply.

The appeal should be allowed and the judgment set aside with costs here and below.

Mulock, C.J.Ex. Clute, J. Riddell, J.

MULOCK, C.J.EX., and CLUTE, J., agreed with SUTHERLAND, J.

RIDDELL, J.:—In and before 1916, a deep, open drain ran along the south side of Confederation street, in the city of Sarnia, to the river, being a continuation westward of a ditch in the township of Sarnia, known as the 4th line ditch.

On the 10th July, 1916, the defendant and others petitioned the council of the city for a concrete tile drain to be constructed as a local improvement, under the Local Improvement Act, from the east side of Christina street to the eastern limit of the city on the south side of Confederation street—it is common ground that this was to be in the same position as the existing open drain.

This petition followed a report made to the council, upon their instructions, by the engineer, who estimated the cost of the proposed work at $16,736.50. The engineer made a new report, on the 18th July, 1916, estimating the work at $16,636.50 (reducing the engineering, etc., charges by $100): he recommended that the land-owners "should pay 50 per cent. or $8,318.25 towards the cost of the work, and the corporation should pay 50% or $8,318.25."

By-law No. 916 was accordingly passed on the 21st August, 1916, for the construction of the work—this contained a clause as follows:—

"2. That the sum of dollars and seventy-eight and four-fifths cents per foot be specially assessed upon the land

abutting directly on the work, to raise part of the sum required to pay for the construction of the said drain, and that the remainder of the cost of such concrete tile drain shall be borne by the Corporation of the City of Sarnia at large."

The council probably intended to charge one-half of the estimated cost of the work to the land-owners and to pay the balance out of the city funds: but this was not the provision in the by-law —the council saw fit to assess the land-owners with a specific sum, and to take the chance of the work proving less costly than the estimate, or more so. That they had the right to do so is undoubted.

A contract was let, on specifications prepared by the engineer, and the work was completed by the end of the year.

The specifications, however, did not call for filling up the trench to the top: the ditch was left open as before, but not to the same depth as before.

Early in the year 1917, the council decided to fill in the ditch, and called for tenders, when the tender of the Blair company was accepted, on a motion seconded by the defendant, who was a member of the council for 1917. The work was completed at a cost of $27,863.88; and the council of 1918 passed a by-law, No. 1000, directing that the property-owners should bear half the expense.

Assessments were made accordingly, a Court of Revision convened, and the regular procedure taken. On the 29th April, 1918, by-law No. 1022 was passed for a special assessment to pay the city's share, and also the land-owners' share. The by-law was registered and debentures issued, and no appeal has been taken under sec. 39 to the County Court Judge.

The defendant refused to pay the amount assessed against him, the city sued, and the Judge in an action in the First Division Court of the County of Lambton held the city entitled to recover; the defendant now appeals.

Were it not for the proceedings subsequent to the filling-in of the ditch, I should have thought the question scarcely arguable.

By sec. 8(1) (*a*) of the Local Improvement Act, the council is authorised to pass a by-law for such a work as that originally contemplated, on petition; and the by-law No. 916 was thus passed. Section 22 enables the council to provide that "a certain

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sum per foot frontage shall be specially assessed upon the land abutting directly on the work and that the remainder of the cost . . . shall be borne by the corporation;" and that was done. When the council determined to fill in the ditch, further proceedings required to be taken—the first petition was *functus*, exhausted, dead, and if the new work was to be a "local improvement" the provisions of the statute must be followed. There is and can be no pretence that the case comes within sec. 5, 9, or 10 of the Act—there was no petition under sec. 8(1) (*a*), and the only other way to make this a local improvement was to follow the "initiative plan" of sec. 8(1) (*b*). Admittedly this plan was not followed, and consequently the work was not a "local improvement" at all.

The case in this Court, *Fleming* v. *Town of Sandwich*, 44 O.L.R. 514, 46 D.L.R. 613, and the cases cited on p. 521 of that report, shew the strictness with which the Court requires the statutory provisions to be complied with.

In my opinion, there was no authority in the city to pass by-law No. 1000: and the same was invalid and void *ab initio* as against the land-owners.

The provisions of the Local Improvement Act, R.S.O. 1914, ch. 193, under the caption "Procedure for making Special Assessment," secs. 30 *et seq.*, are explicit in case of a work part of whose cost is to be paid by the owners, and have no reference to a work all of whose cost falls on the municipality: and I cannot see how any of the proceedings can affect the defendant—they were wholly based upon the hypothesis that the council had the legal power to compel the land-owners to pay part of the cost of the filling-in.

Nor is this the case of a mere "defect, error or omission" under sec. 38—such cases as *Pelly* v. *Chilliwack*, (1916), 30 D.L.R. 651, 23 B.C.R. 97, do not apply, but rather such cases as *Anderson* v. *South Vancouver*, 45 Can. S.C.R. 425 (see *per* Duff, J., at p. 446) are more in point. I am unable to see that an act by councillors regularly met which is beyond their powers can have any more effect than an act admittedly within their powers but done when the councillors had not the power to act.

No doubt the debt on the debentures still exists; it is not, however, a debt of the land-owners but of the city corporation; and

the city council has the power, under sec. 44, to rectify the mistake.

There is no estoppel.

I would allow the appeal, with costs here and below.

MASTEN, J., agreed in the result and with the reasoning of both RIDDELL, J., and SUTHERLAND, J.

Appeal allowed.

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PARROTT v. WESTERN CANADA ACCIDENT & GUARANTEE INS. Co.

SASK.
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Saskatchewan Court of Appeal, Newlands, Lamont and Embury, JJ.A. July 12, 1920.

INSURANCE (§ VI E—400)—COMPANY DEFENDING IN ACTION FOR DAMAGES—ADMISSION OF LIABILITY—SUBSEQUENT REPUDIATION.

An accident insurance company which undertakes a defence to an action for damages for injuries sustained admits liability and cannot afterwards repudiate liability on the ground that the loss was one not covered by the policy.

[*Fairbanks Canning Co.* v. *London Guaranty & Acc. Co.* (1911), 123 S.W. 664, followed.]

APPEAL by plaintiff from the trial judgment in an action against an accident insurance company to recover the amount of damages recovered in an action against him, by an employee injured in a mangling machine. Reversed. Statement.

G. H. Yule, for appellant; *J. W. Estey*, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.A.:—The plaintiff in this action took out a policy in the defendant company to indemnify him against accidents to his employees in the business he was engaged in, that of a steam laundry. In his application he stated that his machinery was guarded, and paid a premium based upon that fact. On August 11, 1914, during the currency of the policy, one Jessie Oxenham, an employee, had her hand injured in a mangling machine that was not guarded. Newlands, J.A.

The plaintiff set out in his statement of claim that the stipulation in the policy that the said machine should be guarded was waived by the defendants by entering into negotiations with the said Jessie Oxenham for the settlement of her claim, and by paying her certain moneys on account thereof, and, further, by taking charge of the defence to an action brought by her for damages for the injuries she sustained. This action was brought by her

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against the plaintiff and was decided against him, and he, having paid the amount of said judgment, brings this action against the defendants to recover the amount so paid under the policy above mentioned.

Defendants deny their liability on account of said machinery not being guarded, and counterclaim for the amounts they paid under the policy and to their solicitor for defending the action by Jessie Oxenham against the plaintiff. They succeeded both as to their defence and counterclaim. Against this judgment the plaintiff appeals.

The Chief Justice based his judgment upon his opinion that there was no waiver of the condition by defendants. Speaking as to defendant's knowledge of the unguarded machinery, he says:—

> It is not quite clear from the evidence at what stage knowledge of the unguarded condition of the mangling machine may be attributed to the defendants. I am inclined to think that the company may be held to have had that knowledge first at the time the solicitor for the present defendant, in the *Oxenham* action, became aware of the fact on the examination for discovery of Parrott. The fact that the defendant continued to conduct the defence of the *Oxenham* action after discovering that fact, does not, to my mind, suggest any waiver of the conditions of the policy.

The defendants had therefore knowledge of the machinery being unguarded before the trial of *Oxenham* v. *Parrott*, and continued to defend the action until after judgment was obtained therein.

I think I may say that Parrott would have had a much greater chance to compromise the action against him before the trial than after, and that defendant, by continuing to defend the action after knowledge of the machinery being unguarded, would lead Parrott to believe that they were assuming liability under the policy, making it therefore unnecessary for him to attempt a compromise.

Under this state of affairs it seems to me that Parrott has so changed his position as to estop the defendants from denying that they had waived the condition of the policy as to unguarded machinery.

I can find no cases in our Courts dealing with this subject, but there are several cases in the American Courts so holding.

In Macgillvray on Insurance Law, 1912 ed., page 969, it says: "If the company undertakes a defence it thereby admits liability

on the policy and cannot afterwards repudiate liability on the ground that the loss was one not covered by the policy." Several cases are cited for this proposition.

In *Fairbanks Canning Co.* v. *London Guaranty & Acc. Co.* (1911), 133 S.W. 664, the facts were that the policy excepted liability in cases of injuries to minors. A boy named James Stamp under the age of 14 years was injured and the defendant company took charge of the defence. Ellison, J., said, at page 666:

Defendant discovered in the manner we have already stated that James Stamp was under that age (14), and it now insists upon such fact as a complete bar to the plaintiff's claim; and it is conceded it would be, but for its conduct, which plaintiff designates as a waiver of such defence, or as an election on its part to regard the policy as binding and as entitling the plaintiff to reimbursement if Stamp was hurt in such circumstances as would render it liable to him. Defendant answers this by the argument that there can be no estoppel *in pais* without knowledge and that, as it did not know Stamp was under 14 years of age until after the action had been taken which is claimed to constitute the estoppel, none could arise against it. Defendant is not entirely correct in saying it must have had knowledge before its acts could estop it from making use of a fact establishing its non-liability. A party in the position that defendant occupied in this case may carelessly choose to act without knowledge, or it may regard the matter about which it is concerned as of doubtful character, and may choose to act by taking charge of the case. In either instance the assured would have the right to assume that he was acquainted with the situation and was taking such action as was deemed most prudent for his own interest. Such action is sometimes said to constitute an estoppel *in pais* (*Royle Mining Co.* v. *Fidelity Co.* (1907), 103 S.W. 1098; *Glens Falls P.C. Co.* v. *Trav. Ins. Co.* (1900), 56 N.E. 897); sometimes it is denominated an election of position which cannot afterwards be changed (*Tozer* v. *Ocean Acc. Corpn.* (1905), 103 N.W. 509); sometimes it is said to be a contemporaneous construction of the contract by the party claimed to be bound (*Employers Liability Co.* v. *Chicago, etc.* (1905), 141 Fed. 962); and yet again it is called a waiver (*Glen Falls P.C. Co.* v. *Trav. Ins. Co.* (1896), 42 N.Y.Supp. 285). But in whatever way it may be designated it is such conduct on the part of the insurer as will cut him out of a defence he might have made had he insisted upon it at a time when the other party might have taken care of himself to his complete exculpation or, at least, a betterment of his condition. If, instead of relying upon his right when the claim was first brought to his attention, he, without due investigation, assumes himself to be liable, sets the assured aside and claims the right of control of the defence, he cannot afterwards ignore the right the assured has acquired by reason of such action merely because he has made a belated discovery of fact, or law, which he thinks puts the case outside the terms of the policy.

The above reasoning appeals to me as a fair statement of the case, and, although those cases are not authorities in our Courts, I see no reason why we should not follow them if we consider the

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C. A.

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Newlands, J.A.

reasoning sound and a fair statement of the law as applying to such cases.

I would therefore allow the appeal. As to the counterclaim, the appeal as to it should also be allowed. As to it I would point out that defendants cannot recover as money paid to plaintiff moneys they paid to their solicitors for defending the action of *Oxenham* v. *Parrott*, and this would be the case even if defendants were not liable under the policy. Money paid to a third person cannot be recovered as money paid under a mistake of facts.

The appeal should therefore be allowed with costs.

Appeal allowed.

MAN.

K. B.

ROMANICA, CHODAECZK AND KRYSKEW v. THE GREATER WINNIPEG WATER DISTRICT.

Manitoba King's Bench, Galt, J. July 14, 1920.

1. DAMAGES (§ III J—201)—CONSTRUCTION OF PUBLIC WORKS—AUTHORISED BY LEGISLATURE—DAMAGE TO CROPS AND LAND—LIABILITY OF COMPANY.

Where by legislative enactment a company or corporation is authorised to construct certain public works, and in the construction of such works, damage is occasioned to the land and crops of individuals in the neighbourhood of the works, the works being constructed without negligence on the part of the company, such individuals are not entitled to damages for such injuries unless provision is made for compensation in the Act of incorporation of the company.

[*Herdman* v. *North-Eastern Ry. Co.* (1878), 3 C.P.D. 168, applied; *Geddis* v. *Proprietors of Bann Reservoirs* (1878), 3 App. Cas. 430, referred to.]

2. ARBITRATION (§ I—7)—PROVISION AS TO IN ACT INCORPORATING COMPANY —DUTY OF COMPANY—FAILURE TO ACT AS PROVIDED—RIGHT OF INJURED PERSON TO BRING ACTION.

Where arbitration is provided in the incorporating Act as the method of ascertaining the amount of compensation for damages caused by the construction of certain public works it is the duty of the constructing company, on complaint of damage, to institute an arbitration under the Act, and where this is not done the injured party is not debarred from bringing an action for such injuries.

[*Saunby* v. *Water Commissioners of London, Ontario*, [1906] A.C. 110, followed.]

Statement.

ACTION for damages for injuries to plaintiffs' lands and crops, caused by the construction of certain works for supplying water to the City of Winnipeg. Judgment for plaintiffs.

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

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

Galt, J.

GALT, J.:—These three cases were tried before me a week ago, and this being the last day before vacation it is advisable to dispose of them, although, owing to the congestion of work in the

Courts and the difficulty in obtaining the assistance of a stenographer, I have not been able to prepare a written judgment.

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

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

The works are constructed from Shoal Lake, an offshoot of the Lake of the Woods, to the City of Winnipeg a distance of about 90 miles.

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

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

In para. 6 it is stated:—

During the years 1913 to 1919, both inclusive, the defendant constructed or caused to be constructed, on the said lands or right of way, a steam railway and aqueduct or line of pipes and conduit running from Shoal Lake to the City of Winnipeg, for the purpose of conveying and supplying water to the inhabitants of a certain district located in and about the City of Winnipeg, and has ever since kept and continued the said works so constructed, and intends to continue the same.

Paragraph 10 of the statement of claim sets out:—

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

In para. 12 it is stated:—

As a result of such floods and the probable annual repetition of the same, the land of the plaintiff has been rendered worthless for farming, and the value thereof much diminished.

The defendants, in para. 7 of their statement of defence, state:—

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

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In para. 15 the defendants plead that they are riparian owners of the banks of the said river, and as such have a right to get rid of the water coming upon them.

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

The particular damage claimed for in this action arose in July, 1919. At that time the defendants had constructed ditches all along their right-of-way for the aqueduct, and also for the adjoining railway, which runs along the south side of the aqueduct. It also appears that there was a large territory to the east of this particular district, consisting of boggy land, from which water oozes continuously, but very slowly. The slope from Shoal Lake to the Boggy River is very slight indeed, and it is stated to be something like 1/10 of a foot in 10,000 feet, so that any natural flow of water in that district would, necessarily, be slow. The ditches are so constructed that the water sometimes flows easterly, and sometimes westerly, according to the local situation, but in each case it is drained off and empties into either the Boggy or the Birch River, according to the slope of the particular locality. The evidence of the expert witnesses on both sides satisfied me that the flow of water, which is on either side, is greatly accelerated by flowing over the comparatively smooth surface of the drain, rather than over the wide expanse of almost level and boggy ground, covered, no doubt, with a certain amount of vegetation.

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

destroyed the plaintiff's crops. I think Romanica said that it rose to about 6 inches high on the floor of his house on the banks.

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

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

The defendants, on the other hand, rely most strongly upon *The Hammersmith Ry. Co.* v. *Brand* (1869), L.R. 4 H.L. 171. The Judges were summoned to give their opinions to the House, and the opinion of Blackburn, J., was accepted to that of five other Judges. Blackburn, J., said, at page 196:—

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

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

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man v. *North-Eastern Ry. Co.* (1878), 3 C.P.D. 168. There, the statement of claim alleged

that the surface of the defendants' land had been artificially raised by earth placed thereon, and that in consequence rain-water falling on the defendants' land made its way through the defendants' wall into the adjoining house of the plaintiff, and caused substantial damage,

and it was held, upon demurrer, "that the statement of claim disclosed a good cause of action."

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

For the purposes of our decision, we must assume that the plaintiff has sustained substantial damage, and we must construe the statement as alleging that the surface of the defendants' land has been raised by earth and rubbish placed thereon, and that the consequence of this is that the rain-water falling on the defendants' land has made its way through the defendants' wall into the house of the plaintiff, and has caused the injury complained of. The question is, are the defendants, admitting this statement to be true, liable to the plaintiff?; and we are of opinion that they are. The heap, or mound, on the defendants' land must, in our opinion, be considered as an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against anyone who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned (in respect to mines), if any one, by artificial erection on his own land causes water, even though arising from natural rain-fall only, to pass into his neighbour's land and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured, and this view agrees with the opinion expressed by the Master of the Rolls in the case of *Broder* v. *Saillard* (1876), 2 Ch. D. 692 at page 700.

At the conclusion of his judgment, page 175, His Lordship says:—

We are of opinion that the maxim *sic utere tuo ut alienum non laedas* applies to and governs the present case, and that as the plaintiff, by his statement of claim, alleges that the defendants have, by artificial erections on their land, caused water to flow into the plaintiff's land in a manner in which it would not but for such erection have done, the defendants are answerable for the injury caused thereby to the plaintiff.

In the *Geddis* case, 3 App. Cas. at page 438, Lord Hatherley says:—

The case which seems to have most affected the minds of the Judges in the Court below is the case of *Cracknell* v. *The Corporation of Thetford* (1869), L.R. 4 C.P. 629. If a company in the position of the defendants there, has done nothing but that which the Act authorised—nay, may in a sense be said to have directed—and if the damage which arises therefrom is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously

affected by that which has been done, must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers.

In the present case the Legislature certainly authorised the construction of the works and ditches, the result of which is complained of by the plaintiffs. Is there then, in the defendants' Act of Incorporation, anything which gives the plaintiffs compensation for the loss that they suffered? In 1915, 5 Geo. V. ch. 30, the Legislature amended the defendants' Act by repealing sec. 24, and substituting a section from which I quote the following:—

It also shall and may be lawful for the corporation to construct, erect and maintain in and upon any lands taken or acquired by it, all such reservoirs, dams, conduits, waterworks and machinery and plant and equipment of every kind requisite for the said undertaking; . . . and, for better carrying out and accomplishing the objects, undertaking and requirements of the corporation, and for better effecting the purposes aforesaid, the corporation, its agents, servants and employees, are hereby empowered to enter and pass upon and over the said grounds and lands intermediate as aforesaid, and the same to repair, cut or dig up if necessary, and to lay down the said pipes . . . , *and to set out, ascertain, use and occupy such part or parts thereof as the corporation shall think necessary and proper for the making, draining and maintaining of the said works*, plant and equipment, or for the protection of the said works, etc. . . . doing as little damage as may be in the execution of the powers hereby granted to them, and making reasonable and adequate satisfaction to the proprietors, to be ascertained in case of disagreement by arbitration as aforesaid.

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

It shall be lawful for the corporation, its agents, servants and workmen, from time to time, and at such times hereafter as they shall see fit, and they are hereby authorised and empowered to enter into and upon the lands of any person or persons, bodies politic or corporate, and to survey, set out and ascertain such parts thereof as they may require for the purposes of waterworks, or for the purpose of conveying electric motive force or other power for the operation of same, and also to divert and appropriate any spring, stream or body of water thereon, as they shall judge suitable and proper; the corporation shall pay to the owners or occupiers of the said lands, and those having an interest or right in the said water, reasonable compensation for any land or any privilege that may be required for the purposes of the said waterworks, or for conveying of electric motive force or power; and in case of any disagreement between the corporation and the owners or occupiers of such lands, or any persons having an interest in the said water, or the natural flow thereof, or any such privilege as aforesaid, respecting the value thereof or as to the damages such appropriation shall cause to them or otherwise, the same

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shall be decided by three arbitrators to be appointed as hereinafter mentioned, namely, the corporation shall appoint one, the owner shall appoint another, and such two arbitrators shall, within ten days after their appointment, appoint a third arbitrator; but, in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, the Court of King's Bench, or a Judge thereof, shall, on application by either party, appoint such third arbitrator. . . . The arbitrators to be appointed as hereinafter mentioned shall award, determine, adjudge and order the respective sums of money which the corporation shall pay to the respective persons entitled to receive the same, and the award of the majority of the said arbitrators shall be final. And the said arbitrators shall be and they are hereby required to attend at some convenient place at or in the vicinity of Winnipeg, to be appointed by the corporation, after 8 days' notice given for that purpose by the corporation, then and there to arbitrate and award, adjudge and determine such matters and things as shall be submitted to their consideration by the parties interested, and each arbitrator shall be sworn before some one of His Majesty's Justices of the Peace, or other officer authorised thereunto, well and truly to assess the value or damages between the parties to the best of his judgment.

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

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

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

In giving judgment Lord Davey says, at page 115:—

Their Lordships are of opinion that, before the Commissioners can expropriate a landowner, they must first set out and ascertain what parts of his land they require, and must endeavour to contract with the owner for the purchase thereof. In other words, they must give to the landowner notice to treat for some definite subject-matter. And a similar procedure seems to be necessary where the Commissioners desire to appropriate a person's water rights, or to acquire some easement over his property. The arbitration clauses only come into operation on disagreement as to the amount of pur-

chase-money, value, or damages, which, in itself, implies some previous treaty or tender involving notice of what is required. Their Lordships, therefore, are of opinion that the Commissioners have not put themselves into a position to compel the appellant to go to arbitration. Provisions for that purpose, such as are found in the present Act, are only applicable to acts done under the sanction of the Legislature, and in the mode prescribed by the Legislature. In this instance the Commissioners have not proceeded in accordance with the directions of their Act; and, consequently, the appellant has not lost his ordinary right of action for the trespass on his property. In coming to this conclusion their Lordships follow the principles laid down by this Board in *The Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602, and *North Shore Ry. Co.* v. *Pion* (1889), 14 App. Cas. 612, though the provisions of the Acts in question in those cases were somewhat different.

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

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

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

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

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

Judgment accordingly.

N. S.

S. C.

GIRROIR v. SYMONDS.

Nova Scotia Supreme Court, Longley, and Drysdale, JJ., and Ritchie, E.J. April 5, 1920.

COSTS (§ I—16a)—ORIGINATING SUMMONS FOR CONSTRUCTION OF WILL—RIGHT OF EXECUTOR TO TAKE OUT—COSTS OF.

Where any reasonable doubt exists as to the true or proper construction of a will the executor or person charged with the burden of the trust can take an originating summons for the purpose of obtaining a judicial determination as to the proper construction of the will, and the costs of the parties necessarily brought before the Court in such proceedings should be made payable out of the estate.

Statement. APPEAL from the judgment of Harris, C.J., as to the costs of an originating summons taken out by an executrix to have certain clauses in a will construed. Varied.

C. J. Burchell, K.C., for appellant; *D. C. Chisholm*, for respondent.

Longley, J. LONGLEY, J.:—I do not say that I am differing from the opinion of my brother Judges in their decision in this case but I am still of opinion that for the reasons urged by Harris, C.J., his judgment allowing the costs to the plaintiff was correct.

Drysdale, J. DRYSDALE, J.:—This appeal involves a question of costs only. The plaintiff as executrix of Laura McLennan took out an originating summons for the construction of certain clauses of the will. A copy of the will and the questions submitted follow:—

This is the last will of me, Laura McLennan of Linwood in the County of Antigonish.

First. I give and devise to my niece Ethel Symonds, all my real estate at Linwood for her use until she marries, the same to then become the property of my nephew Aubrey Symonds.

Second. I give and devise to my said niece, Ethel Symonds the interest on Town of Antigonish debentures, Nos. 1 and 2, amounting to $1,000, which I now hold, to be paid to the said Ethel Symonds during her lifetime, the principal thereof to be disposed of by the said Ethel Symonds by will as she thinks best.

Third. I give and bequeath to my nephews Harry, Elmer and Aubrey Symonds the interest on Town of Antigonish debentures Nos. 3, 4 and 5 respectively, amounting to $500, to each of them, which I now hold, to be paid to the said Harry, Elmer and Aubrey during their lives, the principal of each of said debentures to be disposed of by will by each of the above named donees.

Fourth. I give and bequeath to the chapel warden at Linwood, Antigonish, town debenture No. 6 in trust for the following purpose, *i.e.*, to form a fund for the benefit of the resident clergyman of Trinity parish, Antigonish, the interest thereof to be paid half yearly to the said resident clergyman whoever he may be.

Fifth. On the maturity of the said debentures I direct that the principal of the said debentures be reinvested in good municipal debentures in the

Province of Nova Scotia, preferably Antigonish town or county debentures, the interest to be paid and the principal to be disposed of as above set forth.

Sixth. On payment of my just debts and the expenses of the probate of my will and of administration of my estate, I direct that my executor purchase with the balance of my estate a memorial window for Bayfield Church in memory of my grandmother, Mary Tuttle Randall, and her husband Elisha Randall, and one for Linwood church in memory of my sister Sara M. Sutherland and her husband Donald M. Sutherland and their daughter Clara Elizabeth all interred at Linwood. Also something to be placed in Linwood Church in memory of my sisters F. Carolyne, and Lena Augusta Symonds, the principal cost of each to be left to the discretion of my executor.

Seventh. I appoint E. Lavin Girroir sole executor of this my last will and testament.

Dated at Antigonish this 10th day of July, 1912.

Signed, etc.

2. The said Harry Symonds, donee under the third clause of the said will of the said Laura McLennan deceased, did by deed of assignment dated July 17th A.D., 1918, assign transfer and set over to the Eastern Automobile Company, doing business at Antigonish, Nova Scotia, all his real and personal property, credits and effects, except such as is exempt from levy on execution, in trust for the payment of the sum of $109.36 due by the said Harry Symonds to the said company.

3. The questions for the opinion of the Court and the matters which the Court is asked to determine and declare with respect to the said bequest are:

(*a*) Whether under the construction of the said will the said Harry Symonds acquired a present vested interest in the said Town of Antigonish debenture No. 3, and whether he is entitled to immediate possession of the said debenture.

(*b*) Whether under the construction of the said will the said Harry Symonds has a life interest only in said debenture No. 3 with a power of disposition by will of the said debenture.

(*c*) Whether under the terms of the said above mentioned assignment, the executor of the estate of the said Laura McLennan is required to hand over to the said Eastern Automobile Co. the said Town of Antigonish debenture No. 3 or any part thereof or the interest thereon.

(*d*) Directions as to the costs of this application and proceedings thereunder.

(*e*) Such further relief as the nature of the case may require.

Dated at Antigonish this 13th day of August, 1918.

This summons is taken out by D.C. Chisholm, of Main Street, Antigonish, Nova Scotia, solicitor for the above named executor, E. Lavin Girroir.

The defendants may appear hereto by entering an appearance either personally or by solicitor at the prothonotary's office at Antigonish, Nova Scotia.

(Signed) G. M. WALL, Prothy.

Harris, C.J., who heard the summons, decided that Symonds took a life interest only in the bond in question and directed that the will be so interpreted. From this decision there is no appeal. But in granting the order thereon Harris, C.J., refused to allow the

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costs of and incidental to the said summons out of the estate, and directed that the same be paid by the defendant the automobile company, and refusing the said Symonds his costs therein. From this decision as to costs an appeal is taken by the company and by Symonds.

It is, I think, a settled rule that where any reasonable doubt exists as to the true or proper construction of a will the executor or person charged with the burthen of the trust can take an originating summons for the purpose of obtaining a judicial determination as to the proper construction of the will and that the costs of the parties necessarily brought before the Court in such proceedings ought to be made payable out of the estate.

Here the executor took out the summons, but it is argued that there was no reasonable doubt as to the question submitted and nothing in substance for judicial interpretation in the question submitted, that the company behind the demand made upon the executor ought to be mulcted in the costs. In short, that there never was any doubt as to the proper interpretation of the will and consequently the executor was not justified in asking for the summons and determination called for thereby; that the costs are not a proper charge on the estate and ought to be imposed on the defendant company, treating such company as a losing litigant.

The general rules that ought to govern costs in such cases are well collected and stated by Kekewich, J., in *Buckton* v. *Buckton*, [1907] 2 Ch. 406 at 413. I am disposed to think that this was not a case so plain on its face that the executor was not warranted in having the interpretation judicially determined. I think it was a reasonable thing for him to do under the circumstances; that as a prudent trustee he acted reasonably in the course he pursued and is entitled to have the costs of and incident to the said summons made payable out of the estate, such costs to include the hearing before Harris, C.J., but only one bill to be taxed for the automobile company and Symonds on such hearing.

The appeal is allowed and with costs against the estate and the order as to costs varied as herein directed.

Ritchie, E. J.

RITCHIE, E.J.:—I agree. *Order as to costs varied.*

GOLD SEAL Ltd. v. DOMINION EXPRESS Co.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, Ives and Hyndman, JJ. July 5, 1920.

INTOXICATING LIQUORS (§ I A—5)—LIQUOR ACT (MAN.)—LIQUOR EXPORT ACT—INTERPRETATION—RIGHT TO EXPORT AND IMPORT LIQUOR—DUTY OF CARRIER TO RECEIVE AND CARRY LIQUOR RECEIVED BY HIM FROM PROPER WAREHOUSE.

According to the proper interpretation of the Liquor Act, 6 Geo. V. 1916 (Alta.), ch. 4, and the Liquor Export Act, 1920 (Alta. Stats., ch. 7), a company incorporated under the Dominion Companies Act for the purpose, *inter alia*, of exporting liquor from the province in which it has a warehouse, has the right to export liquor in a *bonâ fide* transaction with a person in another province. Such warehouse is a place where liquor may be lawfully received and stored within such province, and a common carrier for hire is bound to receive and carry to such company liquor tendered to it for the use of the company in the ordinary course of its business as an exporter and is also bound to receive from such company any shipment of such liquors for delivery to such company's customers at places outside the province at which such carrier carries on business as a common carrier.

[Review of legislation and authorities.]

Statement.

APPEAL by way of case stated for the opinion of the Supreme Court, Appellate Division, by Hyndman, J., as to the Interpretation of the Alberta Liquor Act and Liquor Export Act.

The facts are fully set out in the judgment of Stuart, J.

A. A. *McGillivray*, K.C., for appellant; *G. A. Walker*, K.C. for respondent; *A. H. Clarke*, K.C., for Attorney-General.

The facts of the case appear fully in the judgments.

Harvey, C.J.

HARVEY, C.J. (dissenting):—I agree with my brother Stuart and have little to add.

It occurs to me however that perhaps the issue is clouded by the fact that the subject matter of the dispute is something of very great interest.

If it were found that in this province some food for cattle was being furnished by dealers which was considered to be injurious, would it likely be doubted that the Legislature could prohibit its sale and in order to make such prohibition effective, could prohibit every one from having the article in question in his possession?

That would be as much an interference with trade and commerce as the Act under consideration is, though no doubt it would not be an interference with as much trade and commerce. The Privy Council has said quite clearly that the Provincial Legislature may absolutely prohibit trade in liquor which is entirely in the province. Such prohibition is no doubt a greater interference with trade and commerce than any restriction or prohibition upon

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any dealings between persons within and those without the province and if, and so far as reasonably necessary to make effective the prohibition of an entirely provincial traffic, legislation which is not aimed at but does in fact restrict interprovincial traffic must be within the power of a Provincial Legislature as a necessary corollary of its right to pass effective legislation to prohibit provincial traffic.

The question we have to consider is not the wisdom or reasonableness of the legislation but its legal validity. The former is for the consideration of the electors, the latter only for the Courts.

As my brother Stuart points out the subject which is exclusively assigned to Dominion legislation is not "trade and commerce" but "the regulation of trade and commerce," which trade and commerce must, of course, be legally permissible trade and commerce.

"Banking and the incorporation of Banks" is a subject expressly reserved to the Dominion but the Privy Council held in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, that banks authorised by the Dominion were subject to provincial laws upon the subjects assigned to the province. In that case, it was contended that the province could not impose a tax on a bank based upon its paid up capital and the number of its offices and that, to uphold its right to do so, "would permit it to nullify the power of the Dominion Parliament to erect banks by laying on taxes so heavy as to crush a bank out of existence." But the legislation and not this contention was upheld. What is comprehended by the words "regulation of trade and commerce" was under consideration by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96, and at page 113, it is stated as follows:—

> Construing, therefore, the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain, on the present occasion, from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province
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> . . .

It would appear from that statement that the exclusive authority of the Dominion Parliament under this head is not nearly as comprehensive as some of the arguments would seem to assume, and that, having regard to subsequent decisions, in the absence of competent legislation by Parliament, with which it would conflict, provincial legislation to control or prohibit the use of liquor within the province, which it has been authoritatively declared the province may enact, would be valid provided only that it is intended and is reasonably suited to that purpose.

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What I have just said indicates the difference between the situation we are dealing with and that being dealt with in the Province of Saskatchewan in *Hudson Bay Co.* v. *Heffernan* (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322. The first section of the only Act there under consideration was as follows: "No person shall expose or keep liquor in Saskatchewan for export to other provinces or to foreign countries." The rest of the Act deals with exceptions and penalties.

The purpose of an Act is to be gathered from its terms and if the purpose of that Act was to prevent the traffic in liquor within the province it could not have been more effectually concealed by its terms. Upon its face, it is an Act to prevent something which is not of a local and private nature and therefore not within the competence of the Provincial Legislature. What we are dealing with here in the final analysis is the prohibition of the Liquor Act from which it is clear that the purpose is to properly regulate and deal with a matter of a local and private nature, the Liquor Export Act being only looked at and of importance to see if there is an exception from that general prohibition.

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STUART, J. (dissenting):—This action began as an action for damages against a common carrier for refusal to receive, carry and deliver as requested certain goods, *viz*: certain consignments of intoxicating liquors which had been tendered to the defendant for carriage. The defendant company had refused the shipment on the ground that such carriage would be illegal and that by doing so it would render itself liable to certain penalties.

Inasmuch as the case involved the question of the proper interpretation and the validity of the Liquor Act, 6 Geo. V. 1916 (Alta.), ch. 4, and the Liquor Export Act, 1920 (Alta. Stats., ch. 7), both Provincial Acts, the parties agreed to submit the question to

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the Court in the form of a special case wherein all the material facts are admitted. The matter was presented to Hyndman, J., who referred it to the Appellate Division.

When the case came on for argument, counsel for the plaintiff proceeded to attack the constitutionality of the second of the Acts above mentioned. Counsel for the defendant stated that it was a matter of indifference to his client which way the question was decided provided the law was authoritatively declared so that the company might know what was the lawful course for it to pursue. The Court in these circumstances directed that the Attorney General should be served with a copy of the special case and notified of the time the argument should be continued. Counsel for the Attorney-General appeared in pursuance of this notice and supported the validity of the legislation and the defendant company took no further part in the argument.

It is desirable first to refer briefly to the main provisions of the Liquor Act, 1916.

Section 23, 6 Geo. V. 1916, ch. 4, as amended by sec. 5 of 7 Geo. V. 1917, ch. 22, is the general section prohibiting keeping for sale or selling liquor except as authorised by the Act. Section 24 enacts that no person shall have, keep or give liquor in any place wheresoever other than in the private dwelling house in which he resides except as authorised by the Act, and a clause, sec. 24 (*a*), added by sec. 7 of 7 Geo. V. 1917, ch. 22, limited the amount that could be kept in a private dwelling house. Then sec. 25, 1916 Stats., ch. 4, says that nothing in sec. 24

> shall prevent common carriers or other persons from carrying or conveying liquor from a place outside of the province to a place where the same may be lawfully received and lawfully kept within the province or from a place where such liquor is lawfully kept and lawfully delivered within the province to a place outside the province or from a place where such liquor may be lawfully kept and lawfully delivered within the province to another place within the province where the same may be lawfully received and lawfully kept, or through the province from one place outside of it to another place outside of it.

Sec. 26 declares that nothing in the Act shall prevent persons duly licensed by the Government of Canada to manufacture liquor from keeping liquor manufactured by him in any building where the manufacture is carried on (subject to a certain proviso), or from selling liquor therefrom to a person in another province or in a foreign country or to a "vendor" under the Act.

Then sec. 27, now repealed, provided that nothing in the Act should prevent any person from having liquor for export sale in his liquor warehouse provided such liquor warehouse and the business carried on therein complied with the requirements of the Act or from selling from such liquor warehouses to persons in other provinces or in foreign countries. Sub-sec. 2 made provision for the manner in which such warehouses should be constructed and equipped and stipulated that no other commodity than "liquor for export from the province" was to be kept there and that no other business was to be carried on therein except that of keeping or selling liquor for export from the province.

Section 72 of the Act, now repealed, reads as follows:—

While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Alberta except as specially provided by this Act and restrict the consumption of liquor within the limits of the Province of Alberta it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the Province of Alberta and a person in another province or in a foreign country and the provisions of this Act shall be construed accordingly.

In 7 Geo. V. 1917, ch. 22, sec. 9, sec. 27 of the Act was repealed and nothing was substituted for it. In 8 Geo. V. 1918, ch. 4, sec. 72 was repealed, and at the same time a separate Act, 8 Geo. V. 1918, ch. 8, was passed which was entitled "An Act to provide for the Regulation of Liquor Export Warehouses." This Act in substance provided that manufacturers of liquor duly licensed by the Government of Canada and every other person

who has or keeps in his possession liquor for shipment or export to, or sale in, any other part of Canada or a foreign country . . . shall . . . register with the Attorney-General without further notification and at the same time give and furnish the Attorney-General the particular location and site of the office, shop, warehouse or place of trade or business (hereinafter called "the registered premises"), used by such person for or in connection with his business (sec. 3).

It also prescribed the manner of construction and equipment of these "registered premises," stipulated that no other trade or business should be carried on there and prescribed the hours during which these registered premises could be kept open. It further enacted that such person must keep his liquor in these registered premises "until required for transportation or shipment out of Alberta" and that when so required the liquor should

be taken and conveyed direct by the shortest convenient route from such registered premises . . . to the office or place of business of the common

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carrier receiving the same for transportation and shipment out of the province to a place where such liquor may legally be consigned (sec. 3, sub-sec. 3).

The provisions of this Act of 1918 which was assented on April 13, 1918, were largely superseded by the Act of 1920, but I have referred to them as giving part of the history of the legislation and possibly furnishing some assistance in arriving at the purpose and intention of the later Act. It may not be irrelevant also to observe that under the powers granted to the Governor-General-in-Council under the War Measures Act, 5 Geo. V. 1914 (Dom. 2nd sess.), ch. 2, an Order-in-Council had been passed which became effective on April 1, 1918, and which prohibited both the transportation of liquor into a prohibited area and the selling of any liquor to be delivered in a "prohibited area" the latter term being defined as including among other places a province wherein the sale of intoxicating liquor was prohibited under any federal or provincial law.

This Order-in-Council, however, ceased to be in force sometime in the present year.

In 1920, the Liquor Export Act was so largely amended as to make it practically a new Act (1920 Stats., ch. 7). By sec. 1, sub-sec. 2 (*b*), the expression "bonded liquor warehouse" is defined to mean "a place where liquor is lawfully lodged, kept and secured under the authority of the Statutes of the Parliament of Canada."

Sec. 3 reads as follows:—

No person shall within the Province of Alberta by himself, his clerk, servant or agent have, expose or keep liquor for export sale either directly or indirectly, or upon any pretence or device sell, barter or offer to any person any liquor for export sale unless such liquor is kept in a bonded liquor warehouse.

(2) Such bonded liquor warehouse shall not be located elsewhere than in an incorporated city in the Province of Alberta.

(3) Such bonded liquor warehouse shall be suitable for the said business and shall be so constructed and equipped as not to facilitate any violation of this Act and not connected by any internal way or communication with any other building or any portion of the same building and shall be a warehouse or building wherein no other commodities or goods than liquor for export from the province are kept or sold and wherein no other business than the keeping or selling liquor for export from the province is carried on.

Section 4, a new section, reads as follows:—

Any person, firm or corporation having within the Province of Alberta quantities of liquor formerly held under the Liquor Export Act shall be allowed thirty days after the passing of this Act in which to dispose of the stocks which they have on hand.

(2) In the event of their not disposing of all their stocks on hand within the said period of 30 days or not acquiring or possessing a bonded liquor warehouse the said stocks of liquors shall be stored in a warehouse or warehouses to be designated by the Attorney-General and exported under the direction of the commissioner of the Alberta Provincial Police.

Section 5 (*a*) enables the Lieutenant-Governor-in-Council, so far as it is within the jurisdiction of the province so to do, to make regulations regarding the premises and kind of premises in which liquor shall be kept for export purposes, inspection of the said premises and the liquor kept therein, the kind and quality of liquor so kept and providing for the registration by all persons carrying on a liquor export business and returns by all such persons of liquor received, sold and on hand and generally all such matters and things incidental to or in any way connected with the liquor export business and the method and manner of conducting the same.

It does not appear in the case that any regulations have been made in pursuance of the authority given by this section.

The facts set forth in the special case are, concisely stated, as follows:—

The plaintiff company is a body corporate incorporated by letters patent under the Dominion Companies Act, R.S.C. 1906, ch. 79. These letters patent authorise the plaintiff company to carry on, in and throughout Canada or elsewhere, the business of wholesale and retail grocers, wholesale and retail druggists, bonded or other warehousemen, general traders, wholesale and retail merchants, brewers, maltsters, distillers, manufacturers, importers, exporters, etc., distributors of all kinds of wines, spirits, malt liquors, etc., and to maintain, carry on and control warehouses. The plaintiff's head office is at Vancouver, B.C., and it has a branch office and private warehouse at Calgary which is an incorporated city in the province. The plaintiff, prior to and on May 28, 1920, had and still has a large quantity of wines, spirits and malt liquors in this warehouse imported into Alberta both before and after April 10, 1920, for the purpose of sale and delivery and exporting to its customers resident outside of Alberta upon which no duties either under the Dominion Customs Act, R.S.C. 1906, ch. 48, and Inland Revenue Act, R.S.C. 1906, ch. 51, or under any other Act are owing or payable: and the company has been carrying on an interprovincial business throughout Canada as importer, exporter and distributor of all kinds of liquor and the business of warehouseman in connection with the same. The defendant company is a common carrier for hire from all points to all points in Canada touched by the Canadian Pacific Railway and has always professed to carry and, in fact, carried "all kinds of liquor." On May 28, 1920, the plaintiff, pursuant to a *bonâ fide* transaction in such liquor with a person in British Columbia, out of the goods in its warehouse, tendered to the defendant, as such common carrier at Calgary, a package of liquor, and requested the defendant to carry it to Clayburn in British Columbia, a place to which defendant has, at all times, acted as a

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common carrier for hire, and the plaintiff tendered the proper hire in that behalf. The package was properly labelled and addressed to a *bonâ fide* person at his private dwelling house and was to be lawfully used by the consignee. The defendant, though quite able to carry the goods as requested, refused to do so, and refuses to carry any other such goods for the plaintiff to any person outside of Alberta, whether the said goods were imported before or after the Act of 1920. On the said May 28, the defendant also refused to carry and deliver to the plaintiff at its warehouse in Calgary, a shipment of liquor upon which no Customs or excise duty was payable from the plaintiff's head office at Vancouver. The plaintiff is, by these refusals, prevented from carrying on its business as an importer and exporter of liquor to and from points where the defendant is the exclusive common carrier and as there is no other means of conveyance available the plaintiff, so it is alleged, has suffered grave damage. The plaintiff's warehouse at Calgary is neither a private dwelling house, nor the premises of an authorised vendor, chemist or druggist, or other place specially excepted from the prohibitions in the Liquor Act of 1916, 6 Geo. V. ch. 4, and it is not a warehouse established or designated or controlled under the provisions of the Customs Act, R.S.C. 1906, ch. 48, or the Inland Revenue Act, R.S.C. 1906, ch. 51, of the Dominion, or under regulations in pursuance of either of those Acts but the warehouse does comply with the requirements of sec. 3 (3) of the Liquor Export Act, 8 Geo. V. 1918, ch. 8. None of the liquor tendered for carriage was from a stock of liquor stored pursuant to sec. 4 (2) of the Liquor Export Act and none of it was tendered for export under the direction of the Commissioner of the Alberta Provincial Police. The refusal of the defendant was on the ground that plaintiff's warehouse is not a place where the liquor may be lawfully received or delivered within Alberta.

Two questions of law were submitted to the Court for its decision:—

1. Is the plaintiff's warehouse at Calgary aforesaid a place where such liquor from outside of the Province of Alberta may be lawfully received and lawfully kept and a place to which such liquor from outside the Province may be lawfully carried for the purpose of export to its customers outside of the Province of Alberta and a place from which such liquor may be lawfully delivered and exported to places outside of the Province of Alberta ? 2. Is the defendant bound to receive and carry to the plaintiff at Calgary aforesaid from outside the Province of Alberta any such liquors tendered to it for the use of the plaintiff in the ordinary course of its business as an exporter and is the defendant bound to receive from the plaintiff at Calgary aforesaid, any shipment of such liquors for delivery to the plaintiff's customers at places outside the province at which the defendant carries on business as a common carrier?

The first question to be considered is the validity in point of jurisdiction of the Liquor Act of 1916. I think this can give little difficulty in view of the decision of the Judicial Committee of the Privy Council in *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders Association*, [1902] A.C. 73. A Manitoba Act, 1900, prohibiting the sale of intoxicating liquors was there in question.

The statement of facts on page 74 of the report says that the enactments of the statute "include divers prohibitions and restrictions affecting the importation, exportation, manufacture, keeping, sale, purchase and use of such liquors." The full text of the statute is not available here but the report of the judgment of the Court of King's Bench of Manitoba, *In re the Liquor Act* (1901), 13 Man. L.R. 239, sets forth in full the sections of the Act upon which the objections to its validity were chiefly based. These sections, *viz*: 47, 48, 49, 50, 51, 52, 53, 54, 55 and 56, are in substance the same as and indeed are followed very closely in wording by secs. 21, 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the Alberta Act. Section 119 of the Manitoba Act is also, undoubtedly, the source from which sec. 72 of the Alberta Act was taken, as the two are practically identical in wording.

Aside, therefore, from a possible change in the situation due to the repeal of sec. 27 in 7 Geo. V. 1917, ch. 22, sec. 9, and of sec. 72 in 8 Geo. V. 1918, ch. 4, sec. 55 (22), it is, in my opinion, absolutely clear that the decision of the Judicial Committee upon the Manitoba Act would apply to the Liquor Act of 6 Geo. V. 1916, ch. 4, and that the latter Act was undoubtedly *intra vires* as it stood when originally passed.

The repeal of sec. 27 in 1917, however, does give rise to some doubt whether the situation then remained the same. It was by that section alone, apparently, that the right of a wholesale dealer in liquor who kept it purely for export sale, *i.e.*, sale for delivery outside the province to keep a stock of liquor, without restriction as to quantity, in his warehouse was preserved. After the repeal of the section, a mere wholesale dealer was undoubtedly forbidden from having in his possession in his warehouse any intoxicating liquor at all. This was the situation as understood by Ives, J., in *Gold Seal* v. *Dominion Express Co.* (1917), 37 D.L.R. 769. In that case, the constitutionality of the Act was upheld apparently merely on the strength of sec. 72 then still in force. See also the decision given by Harvey, C.J., in *Rex* v. *Western Wine & Liquor Co.*, (1917), 39 D.L.R. 397, 29 Can. Cr. Cas. 307, 10 S.L.R. 322.

In 1918, as I have stated, sec. 72 was repealed, but concurrently, a separate Act was passed which directly restored the possibility of a wholesale dealer keeping liquor in a warehouse or "registered

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premises" within Alberta for export sale but the conditions under which this could be done were obviously more stringent than those imposed by sec. 27 of the Act of 1916. Again the, Act of 1920 continues the conditions in a modified form, and possibly adds somewhat to their stringency.

Now it is to be observed that the imposition by the Manitoba Act of 1900 of certain limitations upon the right to keep liquor in a wholesale warehouse for export sale was not sufficient to lead the Judicial Committee to declare that Act *ultra vires*. It is true that they referred very specifically to sec. 119 (our sec. 72). But, upon a careful reading of their judgment, I conclude that the result would have been the same if sec. 119 had not existed. Of course, the repeal of sec. 72 makes it perhaps impossible to consider the decision in the Manitoba case as absolutely binding upon us in the present instance. But reading as well the prior judgment in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, [1896] A.C. 348, and keeping in mind the principles there laid down, which ought to guide us, I am led to the conclusion that the Liquor Act itself, even without sec. 27 or sec. 72 and without any assistance from the Liquor Export Act, is quite *intra vires* of the Provincial Legislature; which is to say, in effect, that a Provincial Legislature has jurisdiction to enact a law forbidding anyone in the province, except manufacturers and distillers and certain other specified persons among whom wholesale dealers are not included, from having intoxicating liquors in his possession, which, again, is to say, that it may totally forbid the possession of intoxicating liquor by a person whose sole object is to engage in wholesale trade even with persons outside the province.

Some misapprehension, I think, existed upon the argument with regard to the question of "trade and commerce." It is not merely because a provincial Act interferes with "trade and commerce" that it is *ultra vires*. It is because its provisions infringe upon a field of legislation which is reserved to the Dominion Legislature. The exclusive jurisdiction of the Federal Parliament granted by sec. 91 (2) is in regard, not to "trade and commerce" but to the "*regulation* of trade and commerce." The Judicial Committee in *Att'y-Gen'l for Ontario v. Att'y-Gen'l for the Dominion*, [1896] A.C. at page 363, said:—

The object of the Canada Temperance Act of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view their Lordships are unable to regard the prohibitive enactments of the Canadian Statute of 1886 as regulations of trade and commerce.

Other portions of the judgment shew that it was merely by virtue of the general power to make laws for the peace, order and good government of Canada, and not under any of the classes of subjects specifically enumerated in sec. 91, that the Federal Parliament had jurisdiction to pass the Canada Temperance Act of 1886. They declare, inferentially, if not expressly, that the power to regulate trade and commerce refers merely to a power of regulating trade and commerce in commodities which are properly and legally in existence and, therefore, legally capable of being in any one's possession. Whether any such commodities shall be permitted to exist at all or to be in any one's possession at all is not, according to the passage I have quoted and others of similar purport in the same judgment, a matter to be decided by a law merely regulating the trade in such commodity.

The judgment also states, at pages 361-362, directly that "an Act restricting the right to carry weapons of offence or their sale to young persons within the province would be within the authority of the Provincial Legislature." In this passage, we find possibly the nearest approach that is to be found in the judgments to an appreciation of the clear distinction between selling and dealing in a commodity, on the one hand, and the bare having of that commodity in possession, on the other.

Throughout both judgments, the attention of the Committee was directed almost entirely to the question of sale, *i.e.*, of transactions between two parties in the commodity in question. For example, at page 364, ([1896] A.C.) the following occurs:—

> A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries concerns property in the province which would be the subject matter of the transactions if they were not prohibited and also the civil rights of persons in the province.

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It was this passage which was apparently adopted as the basis for the wording of sec. 119 of the Manitoba Act and of sec. 72 of our Act of 1916. The reference is entirely to "transactions" and not to mere possession.

It was, I think, to a large extent because of this almost complete direction of attention to the matter of sale, to "transactions" between parties rather than to the matter of bare possession, that the Judicial Committee refrained from any definite decision as to whether the Ontario statute which was before them in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, *supra*, fell within the category of "property and civil rights" (No. 13 of 92) or under that of "generally matters of a local or private nature within the province" (No. 16 of 92).

It appears to me to be clear from the judgments that there is not to be found among the classes of subjects specifically enumerated in sec. 91 any class which can be held to cover the matter of the mere possession of intoxicating liquors. As I have said, even the Canada Temperance Act of 1886 which dealt only with matters of sale was held to be constitutional solely because it fell within the reserve power of the Dominion to pass laws "for the peace, order and good government of Canada." And the exception from sec. 92 which is enacted by the concluding words of sec. 91 does not apply to Dominion laws passed merely under this reserved power. If a provincial statute comes within any of the clauses of sec. 92 (other perhaps than 16) and does not clash with any law properly enacted by the Dominion under one of the enumerating sections of 91 then the provincial Act is perfectly valid, and cannot be overridden by any Federal Legislation whatever. And if the provincial statute falls within No. 16 of 92 and does not fall within any of the classes of subjects enumerated in 91 then it is in only exceptional cases that a federal law passed under the reserved authority to pass laws "for the peace, order and good government of Canada" can override it. The Judicial Committee said in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, [1896] A.C. at page 360:—

> These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in sec. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance and ought not to trench

upon provincial legislation with respect to any of the classes of subjects enumerated in sec. 92.

The situation here is simply this, that it does not appear that the power to prohibit the possession of intoxicating liquors, except under certain restrictions, falls within any of the enumerated classes of 91 and there is in existence no Dominion law passed under the general reserved power, except the Canada Temperance Act of 1886, which in any way conflicts with the prohibitory provisions in regard to the possession of liquor contained in the Liquor Act of 1916 as it now stands. And as shewn in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, *supra*, it is only when the Act of 1886 is actually voted on, carried, and accordingly proclaimed that a conflict could arise. The consequence is that the real problem is probably reduced to this:—

Is the Liquor Act, as it now stands including the prohibitory clauses as to possession of liquor a matter of a local or private nature in the province within the meaning of No. 16 of sec. 92? I say "probably" because I am not sure, as I have already said, that owing to the matter being one of mere "possession" and not of traffic or sale, it might not be said to fall strictly within No. 13—that is "property and civil rights." I think a great deal could be said for that view.

But leaving that aside, is a statute which on its face prohibits by means of certain restrictions the possession within the province of intoxicating liquors either in small or large quantities anything more than a statute dealing with matters of a local or private nature in the province merely because the prohibition makes it impossible for a person who does not desire to sell within the province to keep in his possession within the province a wholesale stock for the purpose of sending it to customers outside the province? In *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion* the Judicial Committee said, at page 361:—

> Their Lordships do not doubt that some matters in their origin local and provincial might attain such dimensions as to affect the body politic of the Dominion and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial and, therefore, within the jurisdiction of the Provincial Legislature and that which has ceased to be merely local or provincial and has become a matter of national concern, in such a sense as to bring it within the jurisdiction of the Parliament of Canada.

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And then follows the passage in regard to weapons which I have already quoted. And in the same judgment they say, page 367, "In the present case the Parliament of Canada would have no power to pass a prohibitory law for the Province of Ontario," *i.e.*, obviously meaning for that province only. So, I think, the Parliament of Canada would have, generally speaking, no power to pass a law prohibiting the possession of liquor in Alberta only, although conceivably, of course, in case of some national emergency which centred in Alberta such a power might be exercised, but purely in the *national* interest.

Admittedly the province has the power to prohibit absolutely the sale, either by wholesale or by retail, if the transactions are wholly within the province, of intoxicating liquor. To be effective, it seems to me that this power must involve as well the power to control the possession of such liquor within the province. For it would be of little use attempting to stop the sale in the province of an article if any person in the province could have as much of it in his possession as he pleased and without restraint on the mere suggestion that his purpose was to sell it outside the province. And the problem reduces itself to this, merely because this prohibition of possession affects, not the rights of any person at all outside of the province to do any act he pleases outside the province, or any right of property existing outside the province, but solely the right of a person, within the province, to obtain, from someone outside the province, and possess, a large quantity of liquor, *i.e.*, merely because the person possessing in the province has a purpose or intention only to send the commodity out of the province, does the prohibition cease, therefore, to be a matter of a local or private nature in the province when the prohibition is obviously considered, and is quite reasonably so considered, by the Legislature to be essential to the effective enforcement of its own admittedly constitutional prohibitory law as regards sales and transactions in the province? In my opinion, it does not cease to be so. To adapt the language in *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders' Ass'n*, [1902] A.C. 73, at page 79, this prohibition of bare possession is

not excluded from the category of "matters of a merely local or private nature" because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province or may or must

interfere with the sources of Dominion revenue, *and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.*

It must be remembered that it is the use and possession of intoxicating liquor that is ultimately being struck at. Mere sales in themselves do no harm. Hundreds and thousands of transactions or deals in liquor could take place wholly in Alberta and yet the evil struck at by the legislation would not be created or continued at all thereby in Alberta if the liquor which was being dealt in existed in other provinces or in a foreign country and was only there being delivered and possessed. Nothing, on the other hand, could so easily facilitate the breach of the statute and the continuance of the evil (here I merely assume the point of view of the Legislature and am expressing no personal opinion), than the possession of large quantities of intoxicating liquors by persons who might merely give a specious assurance that their purpose was to send the liquor outside of the province.

It is somewhat difficult to understand why a person who is anxious to engage in the sale of liquor in Canada entirely outside of Alberta, should desire to keep his stock *within* Alberta.

Moreover, it is difficult to make a distinction between wholesale and retail trading. The statutes make no suggestion of a distinction. And it is a very pertinent enquiry to ask where a sale really takes place when an order is given by mail. Apparently, what is happening is this—when two adjoining provinces have each a valid prohibitory liquor Act forbidding sales within the province, it is being attempted to avoid infringement of the law of Province A. by keeping a stock of liquor in Province B. and accepting orders in Province B. for delivery in A.; and reversely, to avoid the infringement of the law of Province B., by keeping a stock of liquor in Province A., and accepting orders in Province A. for delivery in Province B. These orders may be for as small quantities as are desired. Theoretically, of course, the purpose of the two respective laws is being carried out, inasmuch as there is no delivery in the province where the liquor is stored. But, obviously, this system renders a breach of the local law much easier and harder to detect and a perfectly legitimate method of meeting the difficulty is to forbid "possession" no matter what the alleged purpose of the possession may be. No doubt, the result is that a person in Alberta cannot keep his stock of liquor

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in Alberta for the purpose of delivery across the provincial line, but when the absolute prohibition of possession in Alberta will contribute so greatly to the effective enforcement of a law that forbids sale and delivery in Alberta, and when, so far as anything the Legislature of Alberta has said is concerned, there is complete freedom to engage in the trade outside of Alberta providing the stock is kept outside of Alberta, I cannot see that there has arisen such an interference with trade and commerce and general industrial pursuits as to make the provincial law anything more than one dealing with a matter of a local or private nature in the province.

Of course, the idea underlying the objection is that a resident or citizen of Alberta is also a resident or citizen of Canada, and that in the latter capacity he must not be prevented or even hampered by any provincial law from engaging freely throughout Canada in his commercial pursuits. But that theory is in direct conflict with many decisions, not only *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, [1896] A.C. 348, as already quoted, but many others, which have upheld the validity of different provincial enactments, which necessarily hampered or restricted the liberty of action which is here invoked.

My opinion, then, is that quite aside from the provisions of the Liquor Export Act as amended in 1920, the Liquor Act itself as it now stands, is *intra vires*, even though its effect is to restrict the possession of intoxicating liquor within the province to manufacturers, official vendors, physicians, druggists and in limited quantities in private houses, and to prohibit the possession in wholesale quantities by persons desiring to export it from the province.

But the Liquor Export Act does ostensibly, at least, make it possible for a person to have a stock of liquor in his possession for extra provincial trade. It was obviously intended to be read along with the Liquor Act, as will appear from various references in it. The two Acts should be taken together "as forming one system," *Palmer's Case* (1784), 1 Leach C.C. (4th ed.) 355. Craies' Hardcastle, 2nd ed., 137.

This gives the result that there is not now any absolute prohibition of possession but merely a restricted one, and the restrictions are quite obviously meant to assist in the enforcement of the

prohibitory clauses of the Liquor Act with respect to sales. It may be that, owing to the peculiar wording of sec. 2 (*b*), defining the expression "bonded liquor warehouse" there cannot be found to be any warehouse at all which would fulfil the description and that the result is to leave the matter where it would be without the existence of the Liquor Export Act at all. But, in view of what I have said with regard to such a situation, the result would, in my opinion, be the same.

It is admitted in the special case that the plaintiff's warehouse is not a warehouse established or designated or controlled under the provisions of the Customs Act, R.S.C. 1906, ch. 48, or the Inland Revenue Act, R.S.C. 1906, ch. 51, or under regulations made thereunder. Upon the argument we were not referred, with the exception presently to be referred to, to any statute of the Parliament of Canada other than these two just mentioned under whose authority liquor may be lawfully lodged, kept and secured in a particular place. I assume, therefore, that there is no such Act. If there were, the statement of facts in the special case would be deficient as not stating whether or not the plaintiff's warehouse in fact came within the necessary category.

The consequence, probably, is that, except with respect to the question of the letters patent, the case falls back to the position with which I have already dealt, viz.: that the plaintiff is under an absolute prohibition against having the stock of liquor in question in his possession. To be sure, the Act does not pretend to forbid the possession in any warehouse provided for by the Federal Inland Revenue and Customs Act and, to that extent, the absolute prohibition of possession is modified as it is also by the permission given to manufacturers, druggists, vendors, etc., to keep liquor under certain conditions.

My opinion, therefore, is that the legislation as it stands is within the jurisdiction of the Provincial Legislature.

There remains the question, however, of the effect of the letters patent which is a question not of legislative jurisdiction but of interpretation of the meaning of the defining clause, sec. 2 of the Liquor Export Act and of the interpretation of the words of the letters patent themselves.

Does an authority and power given by letters patent issued under the Dominion Companies Act, R.S.C. 1906, ch. 79, "to

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engage in and carry on in Canada the business of wholesale and retail grocers, bonded or other warehousemen, brewers, maltsters, distillers, importers, exporters, distributors of all kinds of wines, spirits, malt liquors . . . and other drinks, to do all such other things as are incidental or conducive to the attainment of the above objects and to maintain, carry on and control warehouses" lead to the result that a particular warehouse containing a stock of liquor established by the plaintiffs in Alberta is "a place where liquor is lawfully lodged, kept and secured under the authority of the Statutes of Canada" within the meaning of the definition? I am of opinion that it does not. First, I would point to the special words used in the definition, viz.: "lodged, kept *and secured*." I think it is fairly obvious that these words have reference to some lawful security being involved as a means of control and this is supported by the use of the word "bonded" in the expression which is being defined. Admittedly, no such characteristic is attached to the warehouse in question so far as the Statutes of Canada are concerned. It seems to me, also, to be clear that the definition refers to some particular type of warehouse specified directly in some Statute of Canada. A mere granting of power by letters patent under the Companies Act, R.S.C. 1906, ch. 79, to keep wholesale liquor warehouses is not, in my opinion, within the meaning of the words of the definition.

I would, therefore, answer the both questions submitted in the negative.

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BECK, J.:—The ultimate decision of the important and far-reaching constitutional question involved in this case must, in the ordinary course of things, be looked for from the Judicial Committee of the Privy Council.

That Judicial Board has, in the course of the many years which have elapsed since the British North America Act, 1867, made numerous pronouncements upon it with regard to the respective legislative jurisdictions of the Dominion Parliament and the Provincial Legislatures in relation to a variety of subjects. Those pronouncements have laid down a number of large general rules to be adopted in the interpretation of the Act and have resulted in fixing the constitutional law upon a quite limited number of more or less precise questions, which have already arisen.

As to the deductions to be drawn from existing decisions, the Board itself has indicated that, while any judicial decision cited

as establishing any proposition of law put forward in the ordinary class of case, must always be taken to have been decided having in view the special facts and circumstances involved in the particular case, and may not have been intended and must not always be taken as laying down as unrestricted a proposition as the words used by the Court would seem to express, the same caution but to a much greater degree ought to be used in drawing deductions from its decisions upon the interpretation of the Canadian Constitutional Act, which lays down a scheme of federal government of which the interoperation of the parts from time to time present difficulties towards the solution of which not merely principle and precedent but experience of the results of actual operation must concur. The Board for instance in *Citizens' Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96, said, at pages 108-109:—

> In these cases, it is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. . . . In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

And again in *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders Ass'n*, [1902] A.C. 73, at page 77:—

> Mindful of advice often quoted (*Citizens' Ins. Co.* v. *Parsons*, 7 App. Cas. 96), but not perhaps always followed, their Lordships do not propose to travel beyond the particular case before them.

The decision of the Judicial Committee of the Privy Council which most closely affects the question which we are called upon to consider is *Att'y-Gen'l (Man.)* v. *Manitoba License Holders Ass'n, supra*. The Provincial Act passed upon by that decision was the pattern upon which was framed the Alberta Liquor Act *in its original form*. The Board in that case answered affirmatively the question: Had the Legislative Assembly of Manitoba a jurisdiction to enact the Liquor Act?

Several of the propositions laid down by the Board, [1902] A.C. at page 77, call for careful consideration in the present case:—

> (1) The drink question, to use a common expression which is convenient, if not altogether accurate, is not to be found specifically mentioned either in the classes of subjects enumerated in sec. 91 and assigned to the Legislature of the Dominion or in those enumerated in sec. 92 and, thereby, appropriated to Provincial Legislatures. . . .

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(2) On the one hand, according to *Russell* v. *Regina*, (1882), 7 App. Cas. 829, it is competent for the Dominion Legislature to pass an Act for the suppression of intemperance applicable to all parts of the Dominion.

The Act dealt with in *Russell* v. *Regina*, 7 App. Cas. 829, was the Canada Temperance Act, 1878. The effect of the Act is stated by the Board as follows, at page 835:—

The effect of the Act when brought into force in any county or town within the Dominion is, describing it generally, to prohibit the sale of intoxicating liquors, except in wholesale quantities, or for certain specified purposes, to regulate the traffic in the excepted cases, and to make sales of liquors in violation of the prohibition and regulations contained in the Act criminal offences, punishable by fine and for the third or subsequent offence by imprisonment.

In holding that matters dealt with in the Canada Temperance Act did not fall within the topic of "Property and Civil Rights," the Board said, at page 839.—

Laws of this nature designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada *and have direct relation to criminal* law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada.

In holding that the Act did not invade the exclusive jurisdiction of the Provinces by reason of the subject: "Generally all matters of a merely local or private nature in the province," the Board said, at page 841:—

Parliament deals with the subject as one of general concern to the Dominion upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it. *There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local or exists only in one province and that Parliament, under colour of general legislation is dealing with a provincial matter only.* It is, therefore, unnecessary to discuss the considerations which a state of circumstances of this kind might present. The present legislation is clearly meant to apply a remedy to an *evil which is assumed to exist throughout the Dominion.*

The Canada Temperance Act is still in force and of general application throughout the Dominion—as the Board says at page 842: "The provision for the special application of it to particular places does not alter its character."

Reverting to the *Att'y-Gen'l (Man.)* v. *Manitoba License Holders Ass'n*, [1902] A.C. 73, at page 77, I extract a further proposition:—

(3) On the other hand, according to the decision in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, [1896] A.C. 348, it is not incompetent for a

Provincial Legislature to pass a measure for the repression, or even for the total abolition, of the liquor traffic within the province, *provided the subject is dealt with as a matter "of a merely local nature" in the province and the Act itself is not repugnant to any Act of the Parliament of Canada.* . . .

(4) The controversy, therefore, seems to be narrowed to this one point: Is the subject of "the Liquor Act" a matter "of a merely local nature in the Province" of Manitoba, *and does the Liquor Act deal with it as such?* The judgment of this Board in the case of *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion, supra,* has relieved the case from some, if not all, of the difficulties which appear to have presented themselves to the learned Judges of the Court of King's Bench (of Manitoba). This Board held that a Provincial Legislature has jurisdiction to *restrict* the *sale* within the province of intoxicating liquors, so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada, and which may be in force within the province or any district thereof. It held further that, *there might be circumstances,* in which a Provincial Legislature might have jurisdiction to *prohibit* the *manufacture* within the province of intoxicating liquors and the *importation* of such liquors into the province. For the purposes of the present question it is immaterial to enquire what those circumstances may be. The judgment therefore as it stands, and the report to Her Late Majesty consequent thereon, shew that in the opinion of this tribunal matters which are "substantially of a local or of private interest" in a province—matters which are of a local or private nature "*from a provincial point of view,*" to use expressions to be found in the judgment—are not excluded from the category of "matters of a merely local or private nature," because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.

Their Lordships then quoted sec. 119 of the Manitoba Act which word for word is made sec. 72 of the Alberta Act and then says, at page 80:—

Now that provision is as much a part of the Act as any other section contained in it. It must have its full effect in exempting from the operation of the Act all *bonâ fide* transactions in liquor which come within its terms.

Inasmuch as the Judicial Committee professed to found their conclusions upon their earlier decision in the case of *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion, supra,* it is necessary to examine that decision as interpretative of the later decision. Their Lordships first gave their consideration to the 7th question submitted to them which was in effect, whether the Ontario Legislature had jurisdiction to pass a *local-option* Act authorising a municipality to pass by-laws for *prohibiting* the *sale* by *retail* of spirituous, fermented or other manufactured (intoxicating) liquors in any tavern, inn, or other house or place of public entertainment,

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and for prohibiting altogether the *sale* thereof in shops and places other than houses of public entertainment.

The validity or effectiveness of this Act was first considered having regard to the Canada Temperance Act—also a local-option Act. It was held that both Acts were valid; but that upon the Canada Temperance Act being brought into effect in any locality, any local-option legislation brought into effect by virtue of the Provincial Act would become ineffective.

It is to be noted that the Act in question dealt only with the *sale* and that *by retail* within *local* subdivisions of the Province.

Question 3 was, [1896] A.C. 348, at page 349: "Has a Provincial Legislature jurisdiction to *prohibit* the *manufacture* of such liquors within the province"?

The answer given at page 371 was:—

In the absence of conflicting legislation by the Parliament of Canada, their Lordships are of opinion that the Provincial Legislatures would have jurisdiction to that effect, *if it were shewn* that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely *local* matter *in* the province.

Question 4 was (page 349): "Has a Provincial Legislature jurisdiction to *prohibit* the *importation* of such liquors into the province?"

The answer at page 371 was:—

No. It appears to them that the exercise by the Provincial Legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament.

(5) Distinction is made in the Ontario case in considering the jurisdiction of a Provincial Legislature with reference to the subject: "Generally all matters of a merely local or private nature in the province" between "local" as referring to the whole province and as referring to particular localities in the Province.

The Board says, at page 365 ([1896] A.C.):—

It is not impossible that the vice of intemperance may prevail in *particular localities within a province* to such an extent as to constitute its cure by restricting or prohibiting the *sale* of liquor a matter of a merely local or private nature and therefore falling *primâ facie* within No. 16.

(6) In the Ontario local-option case the Board said, at page 365:—

In sec. 92 No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada, so far as supplementary of the enumerated subjects,

fulfils in sec. 91. It assigns to the Provincial Legislature all matters, in a provincial sense local or private, which have been omitted from the preceding enumeration, and although its terms are wide enough to cover, they are obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated.

(7) Again in the Ontario Local Prohibition Act case the Board said, page 361:—

> Their Lordships do not doubt that some matters, *in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion* and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial and therefore within the jurisdiction of the Provincial Legislatures, and that which has ceased to be merely local or provincial and has become matter of national concern in such sense as to bring it within the jurisdiction of the Parliament of Canada.

This pronouncement obviously refers to the Dominion Parliament taking upon itself to occupy the field of legislation which in its default might fall to the Provincial Legislatures; but it seems to me that the like obligation is sometimes cast upon the Courts, *e.g.*, where it is a question of an indirect mode of doing what cannot be done directly or of a colourable exercise of power by one or other legislative jurisdiction. *Madden* v. *Nelson & Fort Sheppard R. Co.*, [1899] A.C. 626; *Brewers & Maltsters Ass'n* v. *Att'y-Gen'l for Ontario*, [1897] A.C. 231 at 237; Lefroy's Legislative Power in Canada, Propositions 32, 33 and 34, pages 372 *et seq.*

The decision of the Judicial Committee of the Privy Council upon the Manitoba Liquor Act doubtless must be taken as a pronouncement, binding upon this Court upon the Alberta Liquor Act in *its original form*; subject to this, that the latter Act cannot be said to have been the expression of opinion and intention of the Legislature of Alberta as the Manitoba Act was rightly necessarily taken as the expression of the opinion intention of the Legislature of Manitoba, inasmuch as the Alberta Act became law not by virtue of the deliberation and resolutions of the members of the Legislature but because the members of the Legislature for the time being felt bound to accept the terms of a proposed Act and on an affirmative vote of the electors to pass it "without amendment," save such amendments as might be certified to by the Speaker as not constituting a substantial alteration therein or as not changing the meaning, effect or intent thereof pursuant to the Direct

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Legislation Act, 3 Geo. V. 1913 (Alta. 1st sess., ch. 3); an Act corresponding in effect with the Initiative and Referendum Act of Manitoba declared to be *ultra vires* by the Court of Appeal of Manitoba in *Re Initiative and Referendum Act* (1916), 32 D.L.R. 148, 27 Man. L.R. 1, whose decision was affirmed by the Judicial Committee of the Privy Council, 48 D.L.R. 18, [1919] A.C. 935. In the result, the similar method of procuring a repeal or modification of the Liquor Act has ceased to be effective.

Furthermore, the Legislature in abdication of their privileges and duties and unconstitutionally having passed the Liquor Act in its original form, without amendment, have since dealt with it as capable of amendment only in the way of making its provisions from time to time more stringent and drastic and more nearly approaching what is called "bone-dry" legislation, following the trend of the opinion, of what is probably only an apparent majority of the people, presently prevailing especially in the United States of America and Canada in favour of absolutely total prohibition of intoxicating liquors so as to make even the possession of an intoxicant for beverage purposes a criminal offence.

The Liquor Act was amended in many important respects in 1917, 7 Geo. V. ch. 22. I note some of the more important. Sec. 24 of the Act which prohibited any ordinary inhabitant from having liquor elsewhere than in his private dwelling house was amended (sec. 7) by adding a subsection limiting the quantity which could be had in a private dwelling house to "one quart of spirituous liquor and two gallons of malt liquor."

Section 27 of the Act was repealed (sec. 9), together with the reference to that section made in other sections of the Act. That section declared that nothing contained in the Act should prevent any person from having liquor for export sale in his liquor warehouse under certain conditions.

Section 40 was amended (secs. 12 and 13) by making the penalties for infraction of sec. 23—the general prohibitive section—much more severe; the punishment for a third or subsequent offence being imprisonment at hard labour for a long term without the option of a fine.

New sections numbered 75 to 84 were added to the Act (sec. 15). Section 75 enacted that:—

Everyone is a party to and guilty of an offence against this Act who—(*a*) Actually commits it; (*b*) Does or omits any act for the purpose of aiding any person to commit the offence; or (*c*) Abets any person in commission of the offence; or (*d*) Counsels or procures any person to commit the offence.

Section 76 authorises the Attorney General or his appointee or any member of the Alberta Provincial Police Force to inspect the freight and express books and records and any documents in the possession of a railway or express company doing business within Alberta for the purpose of obtaining information in connection with matters dealt with by the Act.

Section 77 enacts that:—

Where a person is found upon a street, highway or in any public place in the province in an intoxicated condition he shall be guilty of an offence against this Act and shall be liable to a penalty not exceeding $20, and upon any prosecution for such offence he shall be compellable to state the name of the person from whom and the place in which he obtained the liquor, which caused the intoxication, and in case of refusal to do so he shall be imprisoned until he discloses such information not exceeding three months.

Section 78 enacts that:—

It shall be unlawful for any person to canvass for, receive, take or solicit orders for the purchase or sale of any intoxicating liquor or to act as agent for the purchase, or sale of same.

(2) It shall be unlawful for any person to distribute, publish or display any advertisement, sign, circular, letter, poster, handbill, card or price list, naming, representing, describing or referring to any intoxicating liquor or the quality or qualities thereof or giving the name or address of any person manufacturing or dealing in intoxicating liquor or stating where any such liquor can be obtained.

Section 79 enacts that a magistrate, if satisfied on oath of an officer that there is reasonable ground for belief that liquor is being kept for sale or disposal contrary to the Act in a house or place within his jurisdiction, may issue a search warrant. The officer executing the search warrant may break open doors, etc., and in the event of liquor being found unlawfully kept on the premises to arrest the occupant and seize and remove the vessels containing the liquor, which upon conviction are forfeited to the Crown. The officer is also authorised to demand the name and address of any person found in such premises and such person if he refuses the information is made liable to a penalty.

Section 80 provides for summoning the shipper, consignee or owner of the liquor before a magistrate and trying the ownership of the liquor and in case it is found to be the property of a person

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who did not intend it to be sold or kept for sale in violation of the Act the liquor is to be restored to him, otherwise to be forfeited to the Crown.

Section 81 introduces another new rule of presumptive evidence.

Section 82 makes the certificate of analysis of liquor by a Dominion or Provincial analysis conclusive evidence of the facts stated in the certificate.

Section 83 restricts very drastically the right of *certiorari*—the original Act having destroyed the right altogether except in an extremely limited number of cases.

Section 84 anticipates that the Liquor Act may be pronounced by some Court of competent authority to be unconstitutional and therefore invalid and to meet that contingency enacts that:—

> If for any reason any section or provision of the Liquor Act be questioned in any Court and shall be held to be unconstitutional or invalid, no other section or provision of the said Act shall be affected thereby.

In 1918, the Legislature evidently desiring to make its liquor legislation still more drastic, still more nearly "bone-dry" and evidently still entertaining doubts of the constitutionality of the Act owing to the numerous amendments made to it, and fearing that the additional legislation proposed would jeopardise the Act as a whole passed the Liquor Export Act, 8 Geo. V. 1918, ch. 8. At the same time it amended the Liquor Act in several respects (8 Geo. V. 1918, ch. 4, sec. 55). None of the amendments are of much importance except that sec. 72 of the Liquor Act is repealed (sec. 55 (22)). That, it will be remembered is the section which is a copy of sec. 119 of the Manitoba Act, upon which the Judicial Committee of the Privy Council laid so much stress as a ground for holding the Manitoba Act not *ultra vires*.

In 1919, there were amendments to the Liquor Act but these were of little consequence, 9 Geo. V. 1919, ch. 4, sec. 39. There were none to the Liquor Export Act.

In 1920 the Liquor Export Act, now treated as legislation distinct from the Liquor Act, was most materially amended. The Liquor Export Act, 1920, as it now stands (Alta. Stats., ch. 7), apart from the provisions as to penalties, etc., is as follows:—

> 2. (*a*) The word "liquor" shall have the same meaning as in the Liquor Act, being ch. 4 of the Statutes of Alberta, 1916;
>
> (*b*) The expression "bonded liquor warehouse" means a place where liquor is lawfully lodged, kept and secured under the authority of the Statutes of the Parliament of Canada;

(c) The expression "vendor" has the same meaning as in the Liquor Act; . . . .

3. No person shall, within the Province of Alberta, by himself, his clerk, servant or agent, have, expose, or keep liquor for export sale either directly or indirectly, or upon any pretence, or device, sell, barter, or offer to any person any liquor for export sale unless such liquor is kept in a bonded liquor warehouse.

(2) Such bonded liquor warehouse shall not be located elsewhere than in an incorporated city of the Province of Alberta.

(3) Such bonded liquor warehouse shall be suitable for the said business and shall be so constructed and equipped as not to facilitate any violation of this Act, and not connected by any internal way or communication with any other building or any portion of the same building, and shall be a wareroom or building wherein no other commodities or goods than liquor for export from the province are kept or sold, and wherein no other business than the keeping or selling liquor for export from the province is carried on.

4. Any person, firm or corporation having within the Province of Alberta quantities of liquor formerly held under the Liquor Export Act shall be allowed 30 days after the passing of this Act in which to dispose of the stocks which they have on hand.

I must now epitomise and emphasise some of the outstanding provisions of the Liquor Act as it now stands:—

(1) No one may expose or keep for sale or sell, barter or offer to any other person any intoxicating liquor, except;

(a) *A government vendor*, who may under most stringent restrictions sell in limited quantities to certain "privileged persons" (sec. 2 cl. n), namely: chemists, druggists, persons engaged in mechanical business or scientific or manufacturing pursuits, incorporated public hospitals, physicians, dentists, veterinary surgeons and Ministers of the Gospel; and these privileged persons can buy from no one but the government vendor; and both the government vendor and these privileged persons are prohibited from selling and the purchaser is prohibited from buying liquor for the purpose of being used as a beverage.

(b) A chemist or druggist selling on prescription for strictly medicinal purposes.

(2) No person, other than a government vendor or privileged person may have liquor anywhere in any place other than in the private dwelling house in which he resides, the term dwelling house being given an extremely restricted meaning—not including, for instance, apartment houses or boarding or lodging houses where more than 3 boarders or lodgers are kept—and the quantity is extremely limited as already stated.

(3) A brewer or distiller may manufacture under very considerable restrictions in addition to those imposed by Dominion regulation but he may not sell within the province.

(4) The only person who is permitted to keep liquor for beverage at all, namely, a resident householder, is prohibited from purchasing the liquor he desires within the province and must not have at any one time more than one quart of spirituous liquor and two gallons of beer.

(5) So far as the Liquor Act goes (apart from the Liquor Export Act), the person who should propose to import and export liquors is exterminated.

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(6) The character of crime is stamped upon the numerous offences created by the Act.

It seems to me highly improbable that the Judicial Committee of the Privy Council, if they had had before them such an Act as the present Alberta Liquor Act instead of the Manitoba Liquor Act which they had before them in 1901 should have held it to be within the competence of a Provincial Legislature. Surveying the whole Act and considering, as I think I am entitled to do, the history, not only of the legislation of this Province but also the general history of the liquor question throughout Canada as a whole and the several provinces and other countries, during the nearly 20 years which have since elapsed, it is, in my opinion, impossible to assert that the evident purpose of such legislation as the Liquor Act is not prohibition within the province of the use of intoxicating liquor except to an almost negligible extent to be followed doubtless by an elimination of the few exceptions and the annihilation of the interprovincial import and export trade and impossible to deny that the legislation is founded not upon any special conditions existing in this province or in any locality within it, which can justify the jurisdiction of the Provincial Legislature in so dealing with the question as a matter of a local nature, but upon a theory of morals quite independent of time or place which asserts that the taking of intoxicating liquor internally is either morally wrong *in se* or, at least, results in such a degradation of *public morality* that it must be prohibited. If that be the case, the subject of the legislation falls, in my opinion, within the subject of criminal law which lies exclusively within the legislative jurisdiction of the Dominion Parliament.

In its present form too, it invades, in my opinion, another subject lying within the exclusive jurisdiction of the Dominion Parliament, namely: "The regulation of trade and commerce." It prohibits the import and export of several great subjects of world-wide trade and commerce commonly carried on on an enormous scale.

The criminal law in its widest sense is reserved for the exclusive authority of the Dominion Parliament, *Att'y-Gen'l for Ontario* v. *Hamilton Street Railway*, [1903] A.C. 524.

"A province cannot by simply restricting the operation of it territorially, validly enact legislation that, in its real scope and

purpose, deals with a subject committed exclusively to the *Dominion Union Colliery Co. of B.C.* v. *Bryden*, [1899] A.C. 580 at page 587," so interpreted in *City of Montreal* v. *Beauvais* (1909), 42 Can. S.C.R. 211 at p. 215.

How then is the question affected by the present Export Act? Assuming the Export Act to be valid, is its existence sufficient to support the Liquor Act if invalid in itself or are the two Acts to be read as one and the two Acts to stand or fall together?

What is the meaning of the words in the Liquor Export Act defining a "bonded liquor warehouse" as "a place where liquor is lawfully lodged, kept and secured under the authority of the Statutes of the Parliament of Canada?" Is it a "warehouse" or a "Customs warehouse" under the Customs Act, R.S.C. 1906, ch. 48, which in the first place is under the control and direction of officers of the Dominion Government for the sole purposes of the Customs Act (see, *e.g.*, secs. 28, 92, 221 *et seq.*, 286 (*g*)) and in the second place is applicable only to goods coming into Canada from a foreign country and, therefore, presumably could not be utilised for goods which it was desired should be transported from one province to another. If it is, the Act seems indirectly to prohibit all trade and commerce between provinces. Or does it mean a "bonded manufactory" under the Inland Revenue Act, R.S.C. 1906, ch. 51. It is impossible to see how it can be supposed to refer to the latter.

The Liquor Export Act has, in my opinion, attempted to do something and in the attempt has created a position which makes the Act impossible to be complied with and even if there could be discovered some class of warehouse to which the meaning of the Act could be attached, I am of opinion that the provision would be *ultra vires* in placing an important part of the administration of the Act in the hands of persons over whom the legislation has no control.

The result of the Export Act, in my view, utterly prohibits the import and export of liquors from province to province by removing any legal right to have liquor within the confines of the province.

In the reasons which I have indicated, rather than fully developed, I am of opinion that both the Liquor Act and the Liquor Export Act in the forms which they have now been cast are *ultra vires* of the Provincial Legislature.

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The result evidently, so far as my opinion goes in the present case, is that both questions asked by the stated case should be answered in the affirmative.

IVES, J.:—I concur in the result.

HYNDMAN, J.:—I concur in the answers given by BECK, J.

I wish it clearly understood, however, that I am not in any way holding the Liquor Act to be *ultra vires*, which was not contended for or argued before me. I find merely that the Liquor Export Act (Alta. Stats. 1920, ch. 7), quite distinct and apart from the Liquor Act, as regards local traffic only, is *intra vires*, is ineffective to prohibit the keeping of liquor for purely export purposes. *Judgment accordingly.*

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REX v. BELL.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, Ives and Hyndman, JJ. July 5, 1920.

Harvey, C.J.

The judgment of the Court was delivered by

HARVEY, C.J.:—This is a motion to quash a conviction for selling liquor contrary to the provisions of the Liquor Act.

The only question argued before us was the validity of the Statute which the applicant contended to be *ultra vires*. The reasons given by the majority of the members of the Court in *Gold Seal* v. *Dominion Express Company*, *ante* page 547, in which judgment is given to-day are against this contention.

The application is, therefore, dismissed.

Formal judgment not to be entered without leave before the October sittings of the Court.

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REX v. COPPEN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, JJ.A., Masten, J., and Ferguson, J.A. April 26, 1920.

1. TRIAL (§ I D—16)—CRIMINAL TRIAL—RIGHT OF COUNSEL FOR PROSECUTION TO SUM UP—WAIVER OF RIGHT.

Under sec. 944 of the Criminal Code, the counsel for the prosecution in a criminal trial is not obliged to sum up before counsel for the prisoner addresses the jury. The language of the section is clearly permissive and the right or privilege may be waived, and such waiver cannot prejudice the prisoner in the eye of the law.

[*Rex* v. *O'Donnell* (1917), 12 Cr. App. R. 219, referred to; *Rex* v. *Keirstead* (1918), 42 D.L.R. 193, 30 Can. Cr. Cas. 175; *Rex* v. *Lee Guey* (1907), 15 O.L.R. 235, applied.]

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2. TRIAL (§ I D—22)—CANADA EVIDENCE ACT—COMMENT OF CROWN PROSECUTOR ON FAILURE OF TESTIMONY.

The provisions of the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4 (5), are not violated by the Crown prosecutor stating to the jury that all the evidence is given by the Crown and that certain facts have appeared from the evidence, and that no explanation of these facts has been offered, and no explanation is possible.

CASE STATED by Latchford, J. after the trial and conviction on a charge of murder. Conviction affirmed.

The facts of the case are as follows:—

The questions submitted are:—

"(1) Was I right in my interpretation of sub-sec. 3 of sec. 944 of the Criminal Code, and was the accused prejudiced in his defence by his counsel being refused the privilege of addressing the jury last, subject to the right of counsel for the Attorney-General to reply?

"(2) Were the provisions of sub-sec. 5 of sec. 4 of the Canada Evidence Act violated by the Crown prosecutor stating to the jury that all the evidence was given by the Crown, and that certain facts had appeared from the evidence, and that no explanation of these facts had been offered, and no explanation was possible?

"(3) Did I fail sufficiently to instruct the jury upon the distinction between murder and manslaughter?

"(4) Should I have directed the jury that on the charges laid they could find one of three verdicts, namely, "murder," "manslaughter," or "not guilty?"

"(5) Was there a misdirection or nondirection of the jury by the use by me of the following words:—

"'I am simply pointing out certain facts established in the evidence here. It is for you to believe them and give them such force as you think proper.'

"'But in any case if she' (referring to the deceased) 'were overcome by smoke, how do you account for the clothing heaped and the other stuff that was heaped up and around her body? You have to account for that, it seems to me.'

"'Now it seems to me that there is a circumstance here that excludes absolutely the explosion of the lamp. A circumstance like that you cannot get away from.'

"(6) Should I have put to the jury the defence suggested by counsel for the prisoner and brought to the jury's attention the medical testimony on this point?

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"(7) Did I misdirect or omit to direct the jury on the doctrine of reasonable doubt to the benefit of which the prisoner was entitled?"

T. A. Gibson and *T. J. Agar*, for the prisoner.

Edward Bayly, K.C., and *F. P. Brennan*, for the Crown.

MEREDITH, C.J.O.:—It is clear, I think, that the ruling which, according to the shorthand notes, was as follows, "My ruling must be that the statute is clear in the matter. The Crown counsel is not obliged to address the jury first. He may waive, as the statute calls it, and confine his whole address to what he has the absolute right to do—reply—" was right.

The provision of the Code (sec. 944*) is that if at the end of the case for the prosecution the prisoner's counsel, where the prisoner is defended by counsel, does not announce his intention to adduce evidence, "the counsel for the prosecution may address the jury by way of summing up;" and the section also provides that "the right of reply shall be always allowed to the Attorney-General or Solicitor-General, or to any counsel acting on behalf of either of them."

I see no reason for construing the section as meaning that counsel for the prosecution must sum up before counsel for the prisoner addresses the jury, and I agree with the learned trial Judge that counsel for the prosecution may waive that right or privilege: the language of the section is that he "may," not "shall," and "may," as used, is, I think, clearly permissive.

I would answer the first branch of question 1 in the affirmative, and it follows that it is unnecessary to answer the second

*944. If an accused person, or any one of several accused persons being tried together, is defended by counsel, such counsel shall, at the end of the case for the prosecution, declare whether he intends to adduce evidence or not on behalf of the accused person for whom he appears; and if he does not thereupon announce his intention to adduce evidence, the counsel for the prosecution may address the jury by way of summing up.

2. Upon every trial for an indictable offence, the counsel for the accused, or the accused if he is not defended by counsel, shall be allowed, if he thinks fit, to open the case for the defence, and after the conclusion of such opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence.

3. If no witnesses are examined for the defence the counsel for the accused, or the accused in case he is not defended by counsel, shall have the privilege of addressing the jury last, otherwise such right shall belong to the counsel for the prosecution: Provided, that the right of reply shall be always allowed to the Attorney-General or Solicitor-General, or to any counsel acting on behalf of either of them.

branch. It would be necessary to answer it only if a negative answer had been given to the first branch of the question.

My brother Ferguson has dealt at some length with the unfairness to the prisoner of the course that was pursued, and I therefore will say a few words as to it. I am unable to see how the prisoner was prejudiced or that he was put at any disadvantage because his counsel had not the advantage of hearing a summing up by counsel for the Crown before himself addressing the jury.

There were but two questions to be answered by the jury:—

(1) Was the deceased woman murdered?

(2) If so, was the prisoner the one who murdered her?

The evidence adduced by the prosecution was designed to negative (1) death by accident, (2) death by suicide, (3) the death having been caused by some one who had entered the house from the outside; and the various facts and circumstances relied on to negative these causes were fully developed in the examination of the witnesses.

Evidence was also adduced for the purpose of shewing that the room in which the woman was when she met her death must have been entered from the other part of the house in which the prisoner dwelt.

Evidence was also led for the purpose of shewing that the prisoner had a motive for killing this woman, and to shew that, although he knew that his wife was in the burning building, he did not tell the firemen that she was there, and that that was inconsistent with that regard for her which, if he were innocent, he would have had; and there were other circumstances of a perhaps less important character which, it was suggested, pointed to his guilt.

The evidence was designed to shew that the condition in which the body was found, negatived suicide or death by accident, and pointed to the conclusion that the woman had been killed or rendered insensible by a blow with an iron instrument found in the room in which her body lay, or by choking, and that the premises had been set on fire for the purpose of destroying the evidence of the crime that had been committed.

What the Crown relied on must have been manifest to counsel for the prisoner, and, indeed, in addressing the jury, he dealt

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with what, as I have said, was brought out by the evidence, advanced the theory of death by suicide or by accident, and combatted the inferences which it was evident that the Crown relied on as pointing to the conclusion that the prisoner was guilty of murdering the woman.

Much was attempted to be made by Mr. Agar of the fact that counsel for the Crown had argued that the evidence pointed to the conclusion that the woman had been struck with the iron bar, but I may point out that it would have been strange indeed, if counsel at the trial had not recognised that that argument would be presented to the jury, and that he was not guilty of giving it the go-by, but addressed an argument to the jury with reference to it.

The second question must, in my opinion, be answered in the negative.

What sec. 4 (5) of the Canada Evidence Act* forbids is the commenting on the failure of the person charged to testify. It was argued that this provision had been violated by counsel for the prosecution in his address to the jury. What was said by him, after discussing the evidence, was:—

"I say to you, taking these facts, you have the record of a crime: you have the record of an act wrongfully done upon that woman which resulted in her death: you have the record of murder. No explanation has been offered and no explanation is possible of these facts that will exculpate the criminal whom we have not yet inquired as to in regard to that act."

It is evident that, in making these observations, counsel was referring to the address of counsel for the prisoner, and to his not having suggested any theory as to the cause of the woman's death that would explain the condition in which her body was found, which, according to the case of the Crown, indicated that she had been murdered.

Question 3 must also be answered in the negative. Indeed, upon the evidence, if the woman was killed, there could be no question as to its being anything but murder, and there was no suggestion by counsel for the prisoner of manslaughter. The

*R.S.C. 1906, ch. 145, sec. 4 (5): "The failure of the person charged . . . to testify, shall not be made the subject of comment by the Judge, or by counsel for the prosecution."

defence was that the prisoner had no part in the killing, if she was killed.

I would also answer questions 4, 5, 6, and 7 in the negative.

What was said by Lord Coleridge in *Rex* v. *Wyman* (1918), 13 Cr. App. R. 163, 165, is apposite to the contention put forward by counsel for the prisoner in his argument before us. Referring to "particulars of misdirection" that had been furnished by counsel for the prisoner, that learned Judge said:—

"They were evidently the creation or conception of some learned person, who, having the transcript of the shorthand notes of the evidence and of the summing up, directed much ingenuity and industry to picking out from a long and careful summing up a number of small points, most of which are frivolous. On these we are asked to upset the conviction if we can find any possible slight oversight or error of statement or some inference to be possibly drawn from a chance phrase or possible immaterial misconstruction of evidence. The Court does not deal with matters of this kind. We are here to deal only with substantial points of misdirection. We strongly object to this practice which is growing, and we hope that in the future it may be more honoured in the breach than in the observance. It is not fair to learned Judges and others who have to sum up in elaborate cases for their remarks to be subjected to the minute scrutiny which has been applied in this case."

The observations made by the learned trial Judge upon the evidence are not open to objection. He clearly pointed out to the jury more than once that they and they alone were the judges as to all questions of fact, and his observations as to how he viewed the evidence did not go beyond what it was proper for him to say. Upon this point I may refer to the following passage from the judgment of the Lord Chief Justice in *Rex* v. *O'Donnell* (1917), 12 Cr. App. R. 219, 221:—

"In regard to the second point, it is sufficient to say, as this Court has said on many occasions, that a Judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of fact to the jury to determine. A Judge obviously is not justified in directing a jury, or using in the course of his summing up such language as leads them to think that he is directing them, that they must

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find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. He is entitled to tell the jury that the prisoner's story is a remarkable one, or that it differs from accounts which he has given of the same matter on other occasions. No doubt the Judge here did express himself strongly on the case, but he left the issues of fact to the jury for their decision, and therefore this point also fails."

It may be pointed out that the 6th question is stated in an unsatisfactory and improper form. It is not said what the defence suggested by counsel for the prisoner was, and it is impossible to say what the question means. It is sufficient, however, to say that in his charge the learned Judge dealt with and placed before the jury every theory suggested by counsel for the prisoner.

In my view, the case was fairly and properly conducted by counsel for the Crown, and the charge of the learned Judge indicated clearly to the jury what their functions were and the conclusion to which they must come before pronouncing the prisoner guilty—that they must, in order to justify a finding of guilt, reject the theories put forward on behalf of the prisoner and come to the conclusion that it was established beyond all reasonable doubt that the woman had been murdered and that the prisoner had murdered her.

Maclaren, J.A.
Magee, J.A.
Ferguson, J.A.

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

FERGUSON, J.A.:—Case stated by Mr. Justice Latchford, pursuant to an order of a Divisional Court dated the 8th March, 1920.

The prisoner was tried before Mr. Justice Latchford, with a jury, at the Toronto Assizes in February last, upon a charge of murder. The jury returned a verdict of "guilty." The prisoner offered no evidence. Crown counsel claimed the right to waive the privilege of summing up the evidence, and to reserve what he had to say to the jury for his reply. Counsel for the prisoner objected, and, in the face of his objection, the learned trial Judge ruled as follows:—

"My ruling must be that the statute (sec. 944 of the Code) is clear in the matter. The Crown counsel is not obliged to address the jury first. He may waive his privilege, as the statute

calls it, and confine his whole address to what he has the absolute right to do—reply."

The first question stated for our opinion reads:—

"(1) Was I right in my interpretation of sub-sec. 3 of sec. 944 of the Criminal Code, and was the accused prejudiced in his defence by his counsel being refused the privilege of addressing the jury last, subject to the right of counsel for the Attorney-General to reply?"

Upon the argument some discussion took place as to whether, in exercising his right of reply, the Crown counsel, having waived his right to sum up, could reply generally on the whole case, or was limited to answering the arguments of the prisoner's counsel; Mr. Bayly contended that this question was not raised in the stated case. I think he was right, and for that reason refrain from discussing that phase of the argument.

The evidence on which the prisoner was convicted was all circumstantial, affording opportunity for grouping the facts in various ways; for the making of different combinations of circumstances; for the drawing of different inferences and conclusions; and for the presentment of different arguments, depending on the skill and ingenuity of counsel.

Counsel for the prisoner call attention to the following statement of Crown counsel, made in opening his reply:—

"It is my function at this stage not to inflame your minds, but to summarise for you the testimony which we have been taking for more than two days. The Crown has taken great care during the giving of this evidence, all of it given by the Crown, to make no comment upon the evidence, to indicate in no way the bearing of the facts which it was laying before you. I have left that for a few minutes, which I shall devote to a review of the testimony."

This statement, counsel says, substantiates his complaints to the jury:—

"I do not know what my learned friend's theory of the crime is. I am at a disadvantage" (p. 19 of the transcript of evidence).

"But the difficulty I am labouring under at the present time is that I do not know exactly what the Crown prosecutor is trying to prove" (p. 20).

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Before us, it was argued that the failure of the Crown to sum up the evidence left the prisoner's counsel, in a matter of life and death, to grope in darkness for the inferences, arguments, and ultimate theories of the prosecution, or to waste his time and efforts in speculating as to the Crown's inferences, arguments, and theories, and in gathering up every piece of evidence, arranging, re-arranging, and dovetailing them in hypothetical cases built according to his own conceptions, for the purpose of assailing them, and tearing them to pieces, hoping in this way to hit upon the Crown's case, theories, and arguments, and to destroy them. This, the prisoner's counsel contends, was unjust and unfair, and not in keeping with the honour and dignity of the Crown, or in keeping with the duty of the Crown counsel to porsecute with open hand and fairness—to secure justice to the accused—to give him the right to be heard by counsel and to make known to him the grounds on which the Crown demands his life.

I must confess that these arguments appealed strongly to my humanity and sense of what is fair; but it does not follow that the course pursued was illegal.

Counsel for the prisoner was able to refer us to numerous cases for statements made by learned Judges pointing out and discussing the duty, in the sense of the propriety, of Crown counsel doing this or that: for instance, *Regina* v. *Berens*, (1865), 4 F. & F. 842; *Regina* v. *Puddick*, (1865), 4 F. & F. 497; *Regina* v. *Holchester*, 10 Cox C.C. 226; *Rex* v. *Banks*, [1916] 2 K.B. 621, in the latter of which cases it is stated "that prosecuting counsel ought not to press for a conviction . . . they should regard themselves rather as ministers of justice assisting in its administration than as advocates."

All of these cases seems to me to fall short of deciding that, if prosecuting counsel fails to observe the high standards of professional conduct suggested by the learned Judges as proper, he thereby acts illegally. The result, as I see it, is that, while it is within the province of the Court to express an opinion on the propriety or impropriety of the course pursued by Crown counsel, it is not within the jurisdiction of the Court to control his actions in matters of ethics or etiquette.

Neither at the trial, nor on the argument before us, did Crown counsel see fit to disclose the reasons which prompted counsel

at the trial to decline to sum up; yet I refuse to believe that he was prompted by a desire to obtain an advantage, or that he acted as he did knowing or appreciating that the accused might be thereby embarrassed, or that any such claim would be made.

Mr. Bayly did not discuss the fairness or unfairness of the trial. He contented himself with arguing that what had been done was legal, and for that proposition relied upon a decision of the New Brunswick Court of Appeal, *Rex* v. *Keirstead*, (1918), 42 D.L.R. 193, 30 Can. Cr. Cas. 175, holding that the Crown, in a case where the prisoner has offered no evidence, may waive its right to sum up, and may address the jury last; and upon a case of *Rex* v. *Lee Guey*, (1907), 15 O.L.R. 235, 239, 240, on which case he argued that, if the point now presented for our consideration was determined by the New Brunswick Court, we ought to follow its decision.

I am not satisfied that the *Keirstead* case decided or purported to decide that the right to sum up could be waived in a case where the prisoner might be prejudiced by such a course of action: for White, J., delivering the opinion of the Court, at pp. 200, 201, makes the following statement:—

"Having regard to the facts of the present case, it is difficult to say what useful purpose could have been served by compelling the Attorney-General to sum up the evidence for the prosecution before the prisoner's counsel addressed the jury; or in what way the prisoner can have been prejudiced by the failure of the Attorney-General to so sum up, assuming that he was under no obligation to do so. It was not in dispute before us, and under the evidence could not be disputed, that the prisoner killed his wife under circumstances which render him guilty of murder, provided he has failed to establish his defence of insanity. The onus of establishing that defence was upon him."

None of the other cases referred to on the argument deal with or decide the exact point now under consideration, which, as I see it, is, "May the Crown refuse to sum up and make known to the prisoner the reasons why, on the evidence presented, it asks a verdict, if by so doing the prisoner is placed at a disadvantage or prejudiced in the presentation of his defence?"

The history of sec. 944 is discussed in *Rex* v. *Martin* (1905), 9 Can. Crim. Cas. 371, and *Regina* v. *LeBlanc*, (1893), 6 Can. Crim.

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Cas. 348; and the history of similar legislation in England in *Regina* v. *Berens, supra;* a perusal of these authorities, and of the authorities therein considered, convinces me that the Courts have always looked upon the right to sum up as a privilege which the Crown could and in most cases should waive, certainly never as a right involving an obligation on the part of the Crown to sum up. Counsel did not refer us to any case, and I have been unable to find any case, to support the proposition that it is within the jurisdiction of the Courts to place upon the Crown an obligation or duty to sum up, on the theory that the prisoner is entitled to a trial conducted according to what may be the Court's ideas of natural justice, humanity, or what is fair.

For these reasons, I am of opinion that our law gives the Crown counsel a right to decline to sum up, and that the trial Judge was right in so ruling; that, if the prisoner was prejudiced in fact, he was not prejudiced in the eye of the law, and I would answer the question accordingly.

On the other questions I agree in the conclusion of my Lord the Chief Justice.

Masten J.

MASTEN, J., agreed with FERGUSON, J.A.

Conviction affirmed.

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C. A.

REX v. KALICK.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

BRIBERY (§ I—4)—TO INDUCE OFFICER NOT TO PROCEED FOR VIOLATION OF TEMPERANCE ACT—INTERFERENCE WITH ADMINISTRATION OF JUSTICE —INDICTABLE OFFENCE—CRIMINAL CODE, SEC. 157.

A bribe given in order to induce a police officer not to proceed against the accused for violation of the Saskatchewan Temperance Act, is given with intent to interfere with the administration of justice under sec. 157 of the Criminal Code and is an indictable offence.

[*The Queen* v. *Union Colliery Co.* (1900), 31 Can. S.C.R. 81, 4 Can. Cr. Cas. 400; *Brousseau* v. *The King* (1917), 39 D.L.R. 114, 56 Can. S.C.R. 22; *The King* v. *Elnick, Clements and Burdie* (1920), 53 D.L.R. 298, referred to.]

Statement.

CASE RESERVED for the opinion of the Court of Appeal (Sask.), on a conviction for bribing a police officer.

H. E. Sampson, K.C., for the Crown; *J. F. Bryant*, for accused.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—In view of the opinion expressed by Fitzpatrick, C.J., Davies, J., and Anglin, J., in *In re McNutt*

(1912), 10 D.L.R. 834, 47 Can. S.C.R. 259, I should not care to concur in the view expressed by my brother Lamont that a violation of the provisions of the Saskatchewan Temperance Act is not a crime.

In all other respects I agree with his reasoning and conclusions, and would answer the question submitted to us in the affirmative. I would also add that, in my opinion, the facts stated in the charge constitute an indictable offence at common law. From the earliest times the corruption of judicial and other public officers has been a crime at common law. 3 Co. Inst. 144-148; Stephen's History of Criminal Law, vol. 3, page 251; Russell on Crimes, 7th ed., 627. In Archbold's Criminal Pleading 1918, 25 ed., page 1148, the cases of *R.* v. *Richardson* (1890), 111 Cent. Crim. Ct. Sess. Pap. 612; and *R.* v. *Lehvess* (1904), 140 Cent. Crim. Ct. Sess. Pap. 731, are referred to as instances of trials of offences of this nature, and the forms of indictment (common law) are given. These cases are cited in Russell at page 627 (see also 9 Hals. 484), as authorities for the statement that it is an indictable misdemeanour at common law to bribe any person holding a public office, and that, "it is immaterial whether the office is an office of the State or in a public department or is judicial or ministerial or municipal or parochial."

Haultain, C.J.S.

As I have already said, the facts stated in the charge in this case constitute the indictable offence of bribery, and the conviction may be supported on that ground. *Union Colliery Co.* v. *The Queen* (1900), 31 Can. S.C.R. 81, 4 Can. Cr. Cas. 400; *Brousseau* v. *The King* (1917), 39 D.L.R. 114, 56 Can. S.C.R. 22; *The King* v. *Elnick, Clements and Burdie* (1920), 53 D.L.R. 298.

NEWLANDS, J.A. (dissenting):—The accused having been guilty of an infraction of the Liquor Act, a Provincial Statute, corruptly paid $1,000 to a Provincial police constable to prevent an information being laid against himself for such offence.

Newlands, J.A.

The following question was submitted for the opinion of the Court:

> Was a bribe given in order to induce a police officer not to proceed against the accused for violation of the Saskatchewan Temperance Act, 7 Geo. V. 1917, ch. 23, given with intent to interfere with the administration of justice under sec. 157 of the Criminal Code?

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Section 157 of the Code, R.S.C. 1906, ch. 146, under which he was prosecuted is as follows:

157. Every one is guilty of an indictable offence and liable to 14 years, imprisonment who,—

(*a*) Being a Justice, Peace Officer, or Public Officer, employed in any capacity for the prosecution or detection or punishment of offenders, corruptly accepts or obtains, or agrees to accept or attempts to obtain for himself, or for any other person, any money or valuable consideration, office, place or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime; or,

(*b*) Corruptly gives or offers to any officer aforesaid any such bribe as aforesaid with any such intent.

This section provides for several offences by a peace officer: (1) Receiving money with the intent to interfere corruptly with the due administration of justice; or (2) to procure or facilitate the commission of any crime; or (3) to protect from detection or punishment any person having committed or intending to commit any crime, and makes the person who corruptly gives the money guilty of the same offence.

The intention of this section in my opinion is, that one who does one or other of these things is guilty of the crime specified and that each offence is a distinct and different offence, and that, therefore, the giving of money to protect from detection any one committing a crime before any proceedings have been instituted for the prosecution of that crime, is not the first offence specified in that section, *viz.*: that of corruptly interfering with the due administration of justice.

The offence committed would therefore not come within the first offence there specified.

The protection which the accused paid the money for, was to prevent his detection or punishment for an offence under a Provincial Statute which is not a crime under sec. 164 of the Crim. Code as our Statute provides a punishment for this offence (sec. 39), and he should have been prosecuted under that Statute and not under the Criminal Code. The question should therefore be answered in the negative, and the conviction quashed.

Lamont, J.A.

LAMONT, J.A.:—The case reserved is as follows:

On February 5, 1920, at Swift Current, the accused was found guilty by a jury on the charge:

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For that he, the said J. Kalick, on December 20, 1919, with intent to interfere corruptly with the due administration of justice, did corruptly give to one Abraham Weder, a police officer, a bribe, to wit: the sum of $1,000 in order to induce the said Abraham Weder not to proceed against the said J. Kalick, for violation of the Saskatchewan Temperance Act.

The question submitted for the opinion of the Court is:—

Was a bribe given in order to induce a police officer not to proceed against the accused for violation of the Saskatchewan Temperance Act, given with intent to interfere with the administration of justice under sec. 157 of the Criminal Code?

Section 157 makes it an indictable offence for any person to corruptly give or offer to a peace officer employed in any capacity for the prosecution or detection or punishment of offenders any money or valuable consideration with intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit a crime.

It will be observed that the last clause relates to protection from the detection or punishment of any person having committed or intending to commit a crime.

A violation of the Saskatchewan Temperance Act is not, in my opinion, a crime punishable on indictment. Disobedience to an Act of a Provincial Legislature is made an indictable offence only when no penalty or other mode of punishment is expressly provided by law. Cr. Code, sec. 164.

The Temperance Act itself provides for the punishment of a breach of its provisions. The intent of the accused did not, therefore, bring him within the last clause.

For the accused it was argued that there could be no intent to interfere corruptly with the due administration of justice until after some proceeding had been taken—such as the laying of an information—to bring the offender to justice.

For the Crown it was contended that the words "administration of justice" should, in this section, be given the wide meaning which they have in sec. 92 of the B.N.A. Act, 1867. By that section exclusive jurisdiction is given to the Provincial Legislatures to make laws respecting the administration of justice in the Province. (Sub-sec. 14.)

In *Regina* v. *Bush* (1888), 15 O.R. 398, Armour, C.J., at page 401, said:

Laws providing for the appointment of Justices of the Peace are, it is contended, and I think rightly, laws in relation to the administration of justice,

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for the appointment of Justices of the Peace is a primary requisite to the administration of justice;

And in the same case Street, J., at page 405, said:

The administration of justice could not be carried on in the Provinces effectually without the appointment of Justices of the Peace and Police Magistrates, and the conclusion seems to me to be irresistible that it was intended that the appointment of these and other officers, whose duty it should be to aid in the administration of justice, should be left in the hands of the Provincial Legislatures.

It is beyond question, therefore, that the words "administration of justice" used in sub-sec. 14 are not restricted to what takes place after an information has been laid for the purpose of bringing an offender to punishment. The words as used in sec. 157 must be given their natural and ordinary meaning, and, in my opinion, that meaning includes the taking of the necessary steps to have a person who has committed an offence brought before the proper tribunal and punished for this offence; in other words, to have him brought to justice.

Under sec. 157 the persons who must not be bribed are, a Justice, a peace officer, or public officer employed in any capacity for the prosecution, detection or punishment of offenders. The officer bribed in this case was employed in the detection of offenders. He found that the accused had been guilty of a violation of the Temperance Act. Knowing that, the accused gave him $1,000 to refrain from taking the necessary steps to bring him to justice for his offence. In doing so, he had, in my opinion, the intent to corruptly interfere with the due administration of justice.

I would answer the questions submitted in the affirmative.

Elwood, J.A.

ELWOOD, J.A., concurred with Lamont, J.A.

Conviction affirmed.

N. B.

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McNEISH v. STEVENS.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. June 2, 1920.

PLEADING (§ I S—146)—JURISDICTION OF COUNTY COURT—ABANDONMENT OF PART OF CLAIM TO BRING WITHIN—AMOUNT ABANDONED NOT SET OUT IN PARTICULARS—APPLICATION TO DISMISS ACTION.

Where a party abandons part of his claim in order to bring it within the jurisdiction of the County Court, as provided by sec. 66 of the County Courts Act (R.S.N.B. 1903, ch. 116), but does not set out the amount so abandoned in his particulars of claim, so that the damage claimed discloses a total want of jurisdiction, the defendant may at once take out a summons calling upon the plaintiff to shew cause why the writ should not be set aside and the action dismissed. He is not compelled to wait until the day of trial before making his application.

[*Chapman* v. *Doherty* (1885), 25 N.B.R. 271, followed.]

APPEAL by defendant from a judgment of the Judge of the Restigouche County Court on a summons, to set aside the writ and dismiss the action. Reversed.

A. T. LeBlanc, for appellant; *J. B. M. Baxter*, K.C., *contra*.

The judgment of the Court was delivered by

HAZEN, C.J.:—The respondent brought an action against the appellant in the Restigouche County Court to recover $250 damages, the value of a horse alleged to have been hurt by the appellant's negligent driving of an automobile on a public road. Section 10 of the County Courts Act provides that those Courts shall have jurisdiction in actions of tort when the damages claimed do not exceed $200. The amount claimed, therefore, was in excess of the jurisdiction.

The appellant took out a summons calling upon the respondent to shew cause why the writ should not be set aside and the action dismissed with costs. This was argued by counsel on the return of the summons before the County Court Judge, who decided that sec. 66 of the County Courts Act, R.S.N.B. 1903, ch. 116, covered the objection taken by the defendant, and dismissed the summons with costs. The section referred to by the Judge of the County Court provides that the plaintiff shall have the right to abandon any part of his debt or claim in order to bring the same within the jurisdiction of any of the said County Courts, and that the amount so abandoned may be set out in the particulars of the plaintiff's demand or the same may be abandoned at the trial. No abandonment was set out in the particulars of the plaintiff's demand, and the time for trial had not arrived, and as the damage claimed in the particulars disclosed total want of jurisdiction the question arises as to whether or not the application was premature, and the appellant was compelled to wait until the day of trial before making his application. I cannot see on what principle it can be successfully claimed that he should have done so, and am of opinion that the Judge was wrong in holding that the application was premature. In a case decided by this Court in 1885, involving a point that was practically similar, Allen, C.J., in *Chapman* v. *Doherty* (1885), 25 N.B.R. 271, said at page 274:—

I think the words of the Act "damages claimed" mean the damages claimed as appears by the pleadings. Whatever a man may have lost by the

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wrongful or negligent act of another, if he makes up his mind to bring an action for it in the County Court, he can only claim damages to the extent of $200. If he claimed a larger amount in his declaration it would be demurrable.

In the same case it was held that the power given to a plaintiff by Con. Stats., ch. 51, sec. 41, which is similar to sec. 66 of ch. 116, Con. Stats., 1903, to abandon a part of his claim did not apply in actions of tort, and on this point Allen, C.J., said, at page 274:—

> I do not think this was a case in which the plaintiff could abandon part of his claim under sec. 41 of ch. 51 of the Consolidated Statutes. I do not see how that section can apply to actions of tort, where the damages are entirely uncertain. What amount could he abandon in such a case before commencing the suit, to bring his claim within the jurisdiction of the County Court?

Subsequently the respondent gave notice of discontinuance of the action, and it is claimed that having done so the action was at an end and the defendant had no right to appeal against the judgment dismissing the application to set aside the writ. I cannot accede to this view. The result would be that the appellant would under the judgment of the Judge of the County Court have to pay the costs of the application, although in the opinion of this Court the judgment was made in error and he would thereby be done undoubted injustice.

I am of the opinion that the appeal should be allowed with costs. *Appeal allowed.*

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In re ESTATE of IVER QUAAL.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

1. WILLS (§ IV—200)—SUIT TO CONSTRUE—APPLICATION OF SEC. 197 OF THE LAND TITLES ACT (SASK.).

Section 197 of the Land Titles Act, 8 Geo. V. 1917 (Sask.), 2nd sess., ch. 18, is of general application and is not confined to the interpretation of instruments that can be registered under the Act, and the word "assurance" in the section is used in its broadest sense and includes a will.

2. WILLS (§ III G—120)—DEVISE TO WIFE AND FAMILY—ILLEGITIMATE CHILD—RIGHT TO INHERIT.

When by a will property is granted, transferred, conveyed or assigned to two or more persons, they take as tenants in common and not as joint tenants unless an intention appears on the face of the will that they are to take as joint tenants.

Statement.

APPEAL by the Official Guardian from a judgment of Embury, J. (1920), 51 D.L.R. 720, on an originating summons to interpret a will. Affirmed.

H. Fisher, for appellant; no one *contra*.

The judgment of the Court was delivered by

NEWLANDS, J.A.:—In this case the administrator with the will annexed took out an originating summons to interpret the following will:

I, Iver Quaal, wish to after death leave all property right and title of all my possessions to my wife and family.

The question asked of the trial Judge, Embury, J., was, whether the parties interested, the wife and family of the deceased, took as joint tenants or tenants in common ((1920), 51 D.L.R. 720).

Since the death of the testator his widow had an illegitimate child. If the widow afterwards died. If the devise of the real estate created a joint tenancy, then only the testator's own children could take the estate, but if a tenancy in common was created, the illegitimate child of the widow would take its proportion of her share.

The trial Judge, 51 D.L.R. 720, held that the word "family" meant "children," and that the widow and children took as tenants in common, and he based his decision on sec. 197 of the Land Titles Act, 8 Geo. V. 1917 (2nd sess.), ch. 18.

From this decision the Official Guardian appealed on behalf of the children of the testator, and instructed counsel to appear on behalf of the illegitimate child of the widow.

Section 197 of the Land Titles Act is as follows:

197. Whenever, by letters patent, transfer, conveyance, assurance or other assignment, land or an interest therein is granted, transferred, conveyed or assigned to two or more persons, other than executors or trustees, in fee simple or for any less estate legal or equitable, such persons shall take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, conveyance, assurance or other assignment, that they shall take as joint tenants.

This section is one of general application and is not confined to the interpretation of instruments that can be registered under the Land Titles Act. This is shewn by the use of the words "conveyance, assurance and other assignment," which are words of wider meaning than "letters patent or transfer," both of which are registerable under that Act.

Wharton's Law Lexicon defines "Conveyance" as:

An instrument which transfers property from one person to another, defined for the purposes of the Conveyancing Act, 1881, as including "assign-

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ment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property."

And "Assurances" as:

the legal evidences of the transfer of property are called the *common assurances* of the kingdom whereby every man's estate is assured to him and all controversies, doubts, and difficulties are either prevented or removed, 2 Bl. Com. 294. The term, which is usually confined to transfers of land, is defined in the Mortmain and Charitable Uses Act, 1888, which regulates assurances of land to charitable uses, as including "a gift, conveyance, appointment, lease, transfer, settlement, mortgage charge, incumbrance devise, bequest, and every other assurance by deed, will or other instrument."

The English Encyclopedia of Laws, 2nd ed., vol. 1, at page 579, under the heading of "Assurances," says:

The word *assurance* is used to denote and comprise every act in the law, and every instrument, whereby any estate or interest in realty may be conveyed *de novo* to a stranger, or whereby any estate or interest which is liable to impeachment or defeasance may be discharged from such liability, or whereby any estate or interest may be enlarged into a greater estate or interest. The general subject of assurances may be divided into various ways. The fourfold division of Blackstone into (1) by matter *in pais*; (2) by matter of record; (3) by special custom; and (4) by devise, is well known (2 Black. Com. 294).

and at page 581, para. (3):

So far as regards the bulk of the lands in the kingdom, a will comes under this head; for there existed no general power to devise lands until the enabling statutes, 32 Hen. VIII. ch. 1, followed by the explanatory Act, 34-35 Hen. VIII. ch. 5, which are commonly called the Statutes of Wills. They are now superseded by the Wills Act, 1837.

I am of the opinion that the word "assurance" in sec. 197 of the Land Titles Act, 8 Geo. V. 1917 (2nd sess.), ch. 18, was used in its widest sense, and therefore includes a will.

It follows then that, when by a will property is granted, transferred, conveyed, or assigned to two or more persons, they take as tenants in common and not as joint tenants, unless an intention appears on the face of the will that they were to take as joint tenants. There is no such intention here, and, therefore, I think that the widow and the testator's children took as tenants in common.

I do not think that the fact that, by the Wills Act, the property goes to the personal representatives and does not vest in the devisees until transferred to them by such personal representatives, affects the question, because the devisees get their right to the property under the will, and it is only by virtue of the will that the personal representatives can transfer to them.

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I would therefore dismiss the appeal, and as I am of the opinion that the Official Guardian should not have appealed in this case, I would not allow him any costs, but he should pay the costs of the solicitor representing the illegitimate child.

Newlands, J.A.

Appeal dismissed.

WALKER v. GRAND TRUNK RAILWAY Co.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Masten, JJ. May 4, 1920.

RAILWAYS (§ II D—38)—MOTOR CAR APPROACHING RAILWAY CROSSING—FREIGHT TRAIN ON CROSSING—FAST PASSENGER TRAIN DUE—RAILWAY EMPLOYEES COMPLYING WITH RAILWAY REGULATIONS—LIABILITY FOR INJURIES TO MOTORIST.

It is the duty of a driver of a motor car to approach a railway crossing with due regard for his own safety. The "cutting" of a freight train on a crossing in accordance with the railway regulations is not an invitation to the motorist to cross, and if the statutory warnings are given by an approaching, fast passenger train, the company is not liable for damages by such motorist taking such cutting of the freight train as a signal that the road is clear and attempting to cross the track and being struck by the passenger train, although he may have mistaken the freight brakesman's signal as an invitation to cross and that the road was clear.

[Review of authorities.]

Statement.

APPEALS by the plaintiffs in this and four other actions from the judgment of ROSE, J., at the trial (without a jury) at a Toronto sittings, dismissing the actions.

The actions were all based on the alleged negligence of the defendants, resulting in an accident on the 11th August, 1917, at a highway level crossing of the defendants' railway near the town of Bowmanville, in which the driver of a motor-car and four of the other five occupants were killed and the fifth, the plaintiff Walker, injured.

The plaintiff Walker's wife was one of the occupants, and his action was to recover damages, under the Fatal Accidents Act, for the death of his wife, and damages for his own personal injuries. The other actions were brought, under the Act, in one case by the mother and in the other cases by the widows and children of the other deceased persons.

J. R. Roaf, for appellants.

I. F. Helmuth, K.C., and *W. E. Foster*, K.C., for respondents.

Sutherland, J.

SUTHERLAND, J.:— This is one of five actions tried together without a jury by Rose, J., all based on alleged negligence of the defendants, resulting in an accident on the 11th August, 1917, at a railway crossing on a highway known as the Wharf road,

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near the town of Bowmanville, in which the driver of a motor-car with four of the other five occupants were killed and the fifth injured.

This action is brought by the surviving husband of one of the deceased, and himself one of those in the car at the time, to recover damages with respect to his own personal injuries, and he also sues for damages under the Fatal Accidents Act, R.S.O. 1914, ch. 151, by reason of the death of his wife. The other actions, under the same Act, are by the mother in one case and in the other cases the widows and children of the other deceased persons.

At the crossing in question four lines of the defendants' tracks intersect the highway. The two centre lines are the main tracks of the railway, west-bound trains using the more northerly. The track to the north of these is what is known as a passing track, to which trains from the main line may be transferred or shunted so that other trains on the main line may pass. The track to the south of the two main lines is also a passing or shunting track.

A freight train had reached a point opposite the semaphore to the east of the highway in question, and Harry J. Pidgen, an experienced brakesman and one of its train-crew, had gone back and placed two torpedoes on the rails in pursuance of one of the operating rules of the defendant company for "train movement," namely, rule 99, which is as follows:—

"99. When a train stops or is delayed on the main track under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop-signals, a sufficient distance from the train to insure full protection at least . . . take up a position where there will be an unobstructed view of him from an approaching train of, if possible, 500 yards (10 telegraph poles), first placing two torpedoes not more than 200 or less than 100 feet apart on the rail on the same side as the engineer of an approaching train 100 yards (2 telegraph poles) beyond such position. The flagman must remain in such position until recalled or relieved."

Rule 15, referring to what are known as "Audible Signals," states:—

"The explosion of one torpedo is a signal to stop; the explosion of two not more than 200 and not less than 100 feet apart is a signal to reduce speed, and look out for a stop-signal."

These rules are plainly to prevent the "pitch in" or collision of trains, and not for the protection of persons or vehicles using highways at railway intersections.

After placing the torpedoes, Pidgen returned to the freight train, which then pulled up westerly past the station, which lay to the west of the crossing, and then backed down again on to the passing track, to a point where it stood across the highway. Pidgen then started to walk forward on the top of the train from the rear until he came to a low car, when he descended from it to the ground on the south side.

The train consisted of about 63 cars, and on alighting he was still about 25 car-lengths from the crossing, towards which he began to walk. At this time he saw the motor-car in question standing 10 or 15 feet to the south of the southerly passing or switching track. The driver of the motor-car had left the other five persons in the car, and was coming towards him as he approached the crossing. He spoke to Pidgen and asked him how long he was going to keep the crossing blocked, intimating that he wanted to get up town to catch the Canadian Pacific Railway train. He was told in answer that the limit for a train to block a crossing was 5 minutes, but an opening would be made as quickly as possible. The brakesman stepped in between the cars to separate the air-hose, and then stepped out again to the south side of the train, and gave a signal to the engine-driver to back. Getting no reply, as apparently the engine-driver did not see him, he crossed over the draw-bars, which were tight, to the north side of the train, and renewed the signal. When in this position he could no longer see the motor-car. Having given the signal to the engine-driver to slack back, which was immediately done, the brakesman proceeded to raise the locking bar, giving the engine-driver the signal to go ahead. This signal was given by waving one hand forward. The front end of the train then moved forward, thus creating an opening between the cars at the crossing and clearing it. Meantime the driver of the motor-car had returned to and started his car, and, without the brakesman's knowledge, crossed the southerly switching track and the southerly main track, and was approaching or had reached the northerly main track. Just at this moment, through the opening in the freight train at the crossing, the brakesman caught sight of the front of

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the automobile, and at the same instant heard the passenger train No. 1 coming from the west at a rapid rate. He shouted, "My God! look out for No. 1," but the train was immediately upon and struck the motor-car, with the result already indicated.

The plaintiff Walker testified that the brakesman when he was signalling to the engine-driver was looking west, and gave a half turn looking to the south towards the driver of the motor-car, and gave a wave of his hand to come across; that the motor-driver thereupon started to make the crossing in the usual way, and when the car had got on the third track was struck by the rapidly approaching passenger train. He also stated that the first thing he saw was the engine "practically right on the automobile." The brakesman says he gave no signal of any kind to the driver of the motor-car.

The negligence which the several plaintiffs charge against the defendant company consisted in an alleged invitation on the part of the officials of the defendant company, meaning thereby the brakesman, extended to the occupants of the car, to cross the tracks after the separation of the train at the crossing. It was further charged that, as there had been previous accidents at the crossing to the knowledge of the defendants, they were guilty of negligence with reference to the accident in extending an invitation to cross. On particulars being requested by the defendant company, they were furnished, and therein it was alleged that "the crossing of the said highway where the death of the deceased took place, at a high rate of speed and without the stoppage or slowing up of the said locomotive and without giving any warning to the deceased of the approach and speed of said locomotive," was negligence.

It is clear from the evidence, and the trial Judge so found, that the statutory warnings by whistle and bell of the approach of the passenger train were given. He also came to the conclusion that it was "quite impossible to find that Pidgen gave any signal to the driver of the motor-car to go forward." This finding of fact we could not, upon the evidence, disturb, and it prevents the plaintiffs succeeding on any alleged invitation on the part of the defendants through their brakesman. It also made it unnecessary for the trial Judge, as he himself states, to consider the further question which might have arisen had he come to a different

conclusion, namely, whether, if there had been such an invitation, it could he held to be negligence for which the company would be liable to the plaintiffs. The duty which the brakesman and the other employees in charge of the defendant company's freight train had to discharge at the time was to clear the crossing, in compliance with sec. 311 of the Railway Act, 1919, 9 & 10 Geo. V. (Dom.), ch. 68 which is as follows:—

"Whenever any railway crosses any highway at rail level, the company shall not, nor shall any of its officers, agents or employees, wilfully permit any engine, tender or car, or any portion thereof, to stand on any part of such highway, for a longer period than five minutes at one time."

That did not cast any duty on the railway company, through the brakesman or otherwise, to notify the driver of the motor-car that the train was separated and that he might cross in safety. The motor-car driver was in a position to see for himself when the crossing had been cleared. It was his duty to cross with due regard to his own safety and that of the others in the car with him. It was a negligent thing to leave the place of safety, where he was, to the south of the four lines of track, and bring his car in close proximity to or upon one of the main tracks and in a position of danger during the process of the separation of the freight train and before it had actually occurred. There was a plain view for nearly a mile up the track in the direction from which the passenger train was coming, and it seems extraordinary that none of the occupants of the car had observed its approach.

The engine-driver of that train testified that he was running at a speed of from 50 to 55 miles an hour when the engine ran over the two torpedoes, and he thereupon "answered them and reduced speed somewhat." Before he got to the whistling post, which is about a quarter of a mile east of the crossing, he saw the freight train on the passing track, and thereupon released the brakes to prevent the engine losing any more speed. He than gave the statutory signals for the crossing, namely, two long and two short whistles, starting the automatic bell on the engine. Neither he nor his fireman saw anything of the motor-car until they were almost upon it, when the latter shouted, and the engine-driver immediately threw his brakes into emergency. It was then too late to avoid the accident.

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The trial Judge dealt in a clear and satisfactory way with the question of speed, as follows:—

"There was a suggestion that the train was travelling at an excessive rate of speed, not an unlawful rate of speed, because sec. 309 (*c*) of the Railway Act, which requires the train to slow down to 10 miles an hour at the crossing if there has been at the crossing an accident since the 1st January, 1905, has no application, but excessive because the railway company knew that a long time ago persons had met their death at that crossing. I allowed, subject to objection, evidence to be given that persons had met their death at the crossing many years ago. The evidence that was given was very meagre. If it really established that persons were killed at the crossing, it leaves us entirely in the dark as to the circumstances under which they were killed, and the mere fact that they were killed cannot be evidence, as it seems to me, that the crossing is a dangerous crossing, or is a crossing which it is dangerous to pass over at a high rate of speed.

"On the other hand, there is evidence that the crossing is a safe one. Those who were killed there, if any were killed, may quite well have been killed through their own fault, and not because of anything that is wrong with the crossing, or from any negligence on the part of the company."

Reference to *Grand Trunk R.W. Co.* v. *McKay* (1903), 34 Can. S.C.R. 81, at pp. 89, 90.

But it was argued that, even though there was no duty as to the rate of speed otherwise, when the torpedoes were heard the engine-driver of the passenger train should have slowed down to a lower rate of speed than he did, and that, had he done so, the accident might have been avoided. He did hear and heed the warning of the torpedoes in so far as it was his duty to do so, namely, until he saw that the freight train was off the main and on to the passing track. When he felt assured of this, he had the right to proceed as usual, which he did—certainly unless he saw some danger ahead in time to do something to avoid it. Here, when the imminence of the accident became apparent, he did all he could, but it was too late.

The duty to respond to the signal of the torpedoes for the purposes indicated, and to which proper response was apparently made, cannot be effectually appealed to by the plaintiff so as to

make the defendants liable on the score that if the engine-driver had, on account thereof, slowed down more, the accident might not have occurred: *Walsh* v. *International Bridge and Terminal Co.* (1918), 45 D.L.R. 701, 44 O.L.R. 117.

I am unable to see from the evidence that negligence on the part of the defendants could properly be found, and I would therefore affirm the judgment of the trial Judge dismissing the actions, and would dismiss the appeals, with costs, if asked.

Sutherland, J.

MULOCK, C.J. Ex., agreed with SUTHERLAND, J.

Mulock, C.J.Ex.

RIDDELL, J.:—The accident out of which these five cases arose is of the kind which has been occurring from time to time for more than half a century, and may be expected to recur so long as the exigencies of life require speedy transportation, and our poverty or our indifference tolerates the continuance of the death-trap known as the level crossing.

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Leading from the town of Bowmanville to the summer colony on the shore of Lake Ontario is the Wharf road: this crosses the line of the Grand Trunk Railway south of the town, and at this crossing—level, of course—are four lines of rail. The regular double track is found running from the east across the Wharf road, making the second and third lines of rail at that place. The southerly of these two lines, at a point over 1,500 feet east of the road, and a short distance east of the whistling post, throws off a line to the south, and this line runs west across the road, forming the first line (counting from the south). There is also a switch-line to the north of these three lines, forming the fourth line—this was the "passing track," i.e., the track upon which trains were placed to allow the passing of faster trains on the main tracks.

On the 11th August, 1917, a freight train of 63 cars came from the east towards Bowmanville station on track No. 3, arriving about 4.15 p.m.; it stopped on this track until an east-bound passenger train, then at the station, pulled out on its way east. This stop was about the semaphore.

The "Limited," a fast passenger train from the east, was timed to arrive on the same track in a short time, and consequently the freight train was "delayed on the main track under circumstances in which it may be overtaken by another train," and rule 99 of the railway company came into force. This requires the

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flagman to go back immediately a sufficient distance from his train to insure full protection and place two torpedoes on the rail not more than 200 or less than 100 feet apart on the rail on the same side as the engine-driver of the approaching train. This the flagman, Pidgen, did: he then had to go to his own train, which was about to go forward in order to go upon the "passing track," No. 4—of course, the object of this rule is the protection of the trains, and it has no reference to crossings, etc., being the same whether there were or were not crossings in the vicinity.

The freight pulled west to the switch for the "passing track," and then backed down on the "passing track" to await the passing of the "Limited;" and it stood across the highway of the Wharf road, having about 35 or 40 cars east of the road.

The train having stopped, the flagman, who was at the rear, moved westward along the train, "with the intention of making an opening"—to cut the train at the road. Of course, it was his plain duty to do this to allow any travellers to pass: the statute, sec. 311, gives the maximum time, the superior limit of the time, during which traffic can be obstructed lawfully, as five minutes; but, irrespective of the statute, the railway company have no right to stop the highway for a longer time than is reasonably necessary—or when it is not reasonably necessary. The freight train could not go forward until the express train had passed, and it could not be necessary for it to be fully coupled until that time.

Moreover, while it is not so stated in so many words, it would seem that the five-minutes' limit was reached or about reached—rule 86 provides that "an inferior train must clear the time of a superior train in the same direction not less than five minutes;" if this rule was obeyed, and there is nothing to indicate that it was not, the statute applied.

However that may be, it was the duty of the train-crew to cut the train at the Wharf road.

An automobile came along the Wharf road from the south toward the crossing, with six persons, including the driver, Fletcher; and stopped about 10 or 15 feet south of the south track. Fletcher, after a stop of two or three minutes, got out of his car and went east along the train toward the caboose—the automobile passengers were in a hurry to catch a train for Toronto on the Canadian Pacific Railway, which passes the town further north than the

Grand Trunk Railway. Fletcher and Pidgen had a short conversation, given by the latter thus: "He asked me how long I was going to keep the crossing blocked. I replied that we had five minutes to block the crossing, and I think that he said that he wanted to get up town to catch a C.P.R. passenger train, and with that I replied I would make the opening as quick as I could."

Pidgen then separated the air-hose from the south side of the train, and gave a signal to back the train, in order to slack the draw-bars, and enable him to uncouple. He received no answer to this signal—the engine-driver was on the right side of his engine, and therefore on the other side of the train, out of view of the flagman's signal. Pidgen then crossed over to the north, took a few steps to the east to where the cut was to be made east of the travelled way, signalled for a slack, the signal was answered from the engine, the engine-driver gave the slack, Pidgen "raised the locking block on the car," and thereby made the cut, signalled to the engine-driver to draw ahead, the signal was obeyed, and the cars were pulled west over the crossing, leaving part of the train to the east and a clear passage along the highway.

The automobile had not waited for this movement to be completed: Pidgen, when an opening was made and the railway cars were just pulling over the crossing, caught sight of the front of the automobile upon the west-bound track No. 3; at the same moment he heard the rush of the "Limited;" he shouted, "Look out for No. 1," but neither he nor any one else could then do anything—the engine of the "Limited" struck the automobile, killing five of its occupants on the spot, and seriously injuring the sixth, Frank Walker.

These actions were brought against the Grand Trunk Railway Company in consequence: they were tried together before Mr. Justice Rose without a jury at Toronto, in November last, and resulted in a verdict for the defendants; the plaintiffs now appeal.

The appeal was argued with very great skill and the utmost candour by Mr. Roaf for the plaintiffs; but I am unable to find any error in the judgment complained of.

The first ground of complaint is the speed of the "Limited."

As was pointed out in *Grand Trunk R.W. Co.* v. *Hainer* (1905), 36 Can. S.C.R. 180, at p. 199, "the question of speed is not as a

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rule very important. The accident could not have happened unless the person was at that particular moment on that portion of the line. Had the train been faster he would not have been there; had the train been slower he would not have been there; had he been faster or slower he would not have been there." The significance of the speed of the train is rather on the question of contributory negligence—a very fast train may acquit the plaintiff of negligence in not avoiding the accident after he saw or should have seen the danger.

So far as concerns those using a highway at a railway crossing, it has been laid down by authority by which we are bound that no action can be based upon alleged excessive speed: *Grand Trunk R.W. Co.* v. *McKay*, 34 Can. S.C.R. 81. There the findings of the jury were that the rate of speed was dangerous for such locality—the Supreme Court of Canada held that it was not for a jury to pass upon the rate of speed—Sedgewick, J., at p. 89: "I think . . . there is no limitation to speed unless it is prescribed by the Railway Committee." Davies, J. (now C.J.), at p. 101: "The rate of speed at which the train could run across the level highway crossing was a matter for the determination of the Railway Committee." Killam, J., agreed with Davies, J., as did the Chief Justice, Sir Henri Elzéar Taschereau.

This law was adopted by this Court in *Minor* v. *Grand Trunk R.W. Co.* (1917), 35 D.L.R. 106, 38 O.L.R. 646.

Follick v. *Wabash R.R. Co.* (1919), 48 D.L.R. 526, 45 O.L.R. 528, was cited as opposed to this view—that was not a case of a highway crossing. The duty owed to a traveller on the highway and that to others may be entirely different—are entirely different in many cases. That is what my brother Maclaren has in mind in his language in *Follick* v. *Wabash R.R. Co.*, at p. 535: "It cannot surely be pretended, for instance, that a high rate of speed would not be negligent where the state of the road-bed or some other known circumstance made such speed dangerous"—my learned brother is not questioning the decision in *Minor* v. *Grand Trunk R.W. Co.* and *Grand Trunk R.W. Co.* v. *McKay*, but is pointing out that the duty to different persons may be different. A bad track does not increase the danger of a fast train to travellers on the highway, but it does to those on the train: accordingly, *quoad* the latter, great speed may be a breach of duty and negligence,

although not to the former. Of course, there is no such thing as negligence at large—negligence must necessarily be a breach of duty toward some one. "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence:" *per* Lord Esher, M.R., in *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491, at p. 497; *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685, especially at p. 694, *per* Bowen, L.J.; *Daniels* v. *Noxon* (1889), 17 A.R. (Ont.) 206, 211; *Woodburn Milling Co.* v. *Grand Trunk R.W. Co.* (1909), 19 O.L.R. 276, 281; *Bondy* v. *Sandwich Windsor and Amherstburg R.W. Co.* (1911), 24 O.L.R. 409, 412.

We are not concerned with the duty owed to employees of the railway company or to passengers—or to any one other than one using the highway at a level crossing: to such a person, speaking generally, there is no duty as to speed. This is not to say that if the railway company or their employees knew of any special circumstance of danger they could omit the common law duty of ordinary care—it is simply to say that, in the absence of special circumstances, a traveller on the highway cannot call speed an absence of proper care toward him. To hold otherwise would, in my view, be to disregard plain decisions of Courts by whose authority we are bound.

Mr. Roaf with great earnestness pressed upon us the circumstance that the torpedoes placed by the freight flagman called upon the engine-driver to go at a slower rate. The rules, which are as effective as a statute, impose upon the engine-driver certain duties when he hears torpedoes. But these duties are imposed not in view of a highway crossing—the existence of a highway crossing near has no effect upon the duties—the duties are imposed for the protection of the trains to prevent a pitch-in.

In *Walsh* v. *International Bridge and Terminal Co.*, 45 D.L.R. 701, 44 O.L.R. 117, this Divisional Court, and in *Smith* v. *Ontario and Minnesota Power Co. Limited* (1918), 45 D.L.R. 266, 44 O.L.R. 43, the First Divisional Court, pointed out that where a duty is created by statute for the purpose of preventing mischief of a particular kind, a person who by neglect of this duty suffers a loss of a different kind is not entitled to maintain an action for damages in respect of such loss—we followed such cases as *Stevens* v.

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Jeacocke (1848), 11 Q.B. 731, 116 E.R. 647; *Gorris* v. *Scott* (1874), L.R. 9 Exch. 125; *LeMay* v. *Canadian Pacific R.W. Co.* (1890), 17 A.R. (Ont.) 293, 300. I confess that I should be better satisfied had the rule been laid down that a violator of a statute is liable for any damage of any kind caused by his neglect to obey the law—but the rule above stated is too firmly and authoritatively fixed for us to change or question it.

In any case, however, I am unable to see that the servants of the company failed in their statutory duty.

Rule 99 provides for the flagman going back a sufficient distance to insure full protection and placing the two torpedoes—this he did: then he remains at the stop until relieved or recalled—that he did, as he was recalled to look after his own train. When a train is approaching he must display stop-signals—one torpedo is a stop-signal (Rule 15, p. 63)—and, where the stopped train is likely to move soon, two are laid down.

Mr. Roaf argued that it was the duty of the flagman to remain in a position to have an unobstructed view of the incoming train and make another stop-signal—but that is a misinterpretation of the rules. He was to remain only until relieved or recalled: and he would be violating his duty if he stopped the "Limited" after his own train was in safety. So long as the train was in the way, the semaphore should have been set against the "Limited"—no doubt it was—there is no evidence upon the point, and *omnia præsumuntur rite esse acta*—there is no complaint on this ground.

To complete the investigation as to the duties of the servants of the company in respect of the "stop-signals"—the rules provide (15) that "the explosion of two (torpedoes) not more than 200 and not less than 100 feet apart is a signal to reduce speed and look out for a stop-signal."

When the engine-driver heard the torpedoes, he reduced speed, having first given notice by whistling twice that he understood the warning—see rule 14, engine whistle signals, No. *g*, pp. 61, 62; rule 29, p. 20. The fireman "saw everything clear," and, there being no danger, the brakes were raised that the engine should lose no more speed—the engine-driver himself saw that the freight train was on the "passing track" before he got to the whistling post, a quarter of a mile east of the crossing, and had he

further checked the speed he would have been violating his duty to his employers.

Then it is argued that the engine-driver was called upon to stop by rule 27, p. 65: "A signal improperly displayed or the absence of a signal at a place where a signal is usually shewn must be regarded as a stop-signal, and the fact reported to the proper officer." It is most ingeniously argued that it was usual for a flagman to stay near his torpedoes and give a stop-signal; and that, as there was nothing of the kind here, the engine-driver should have considered the omission as a stop-signal and stopped accordingly. But this involves two errors—the rule does not refer to such signals as may be made sometimes at one place and sometimes at another, but to fixed signals, semaphores and the like, to be found at certain places. If no such signal is shewn where it is to be expected, this indicates that there is something wrong with the plant—for the greater caution the engine-driver must act as though it had been shewn, and report the occurrence so that the plant may be put in order if defective, or, if the signal has been intentionally omitted, the fact may be made clear. The other error is that it is supposed that it is usual for a flagman to await and stop-signal an incoming train when his own train is safe on a passing track.

Next must be considered the conduct of Pidgen at the crossing, for it has been argued that what he did was an invitation to the traveller to cross.

The doctrine of implied invitation is generally applied against the owner of property who permits its use by others or another: he may be held to have impliedly represented that it was safe so to be used. But that doctrine has no application here: so far as cutting the train is concerned, it was merely the performance of a duty, common law or statutory, by the company, in removing an obstruction out of the way of those desiring to use the highway, who had the right to use the highway, a right higher than the right of the company to obstruct—an action would lie against the company for an unreasonable delay in cutting the train: *Boyd* v. *Great Northern R.W. Co.*, [1895] 2 I.R. 555.

No doubt where gates should be closed in case of danger, the opening of them is an implied assurance that there is no danger—see such cases as *Roberts* v. *Delaware and Hudson Canal* (1896),

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177 Pa. St. 183; *Wilson* v. *New York New Haven and Hartford R.R. Co.* (1894), 18 R.I. 491; *North Eastern R.W. Co.* v. *Wanless* (1874), L.R. 7 H.L. 12; *Stapley* v. *London Brighton and South Coast R.W. Co.* (1865), L.R. 1 Exch. 21, and similar cases; but that is because the gates are supposed to be closed when there is danger and are placed where they are to protect from danger.

But there is nothing of that in a train obstructing a highway: it is not there as a protection from danger: it is a nuisance in common parlance, and after a time becomes a nuisance at law—how can it possibly be thought that the removal of this obstruction was an implied assurance that there was no train approaching? There was nothing more done by the flagman which could be construed as an invitation—the learned Judge has so found, and rightly found. Moreover, it is hard to see how the railway company could possibly be held liable for this. The relying upon so-called implied invitation is not favoured in our Courts: see such cases as *Grand Trunk R.W. Co.* v. *Mayne* (1917), 39 D.L.R. 691, 56 Can. S.C.R. 95; *Canadian Pacific R.W. Co.* v. *Hay* (1919), 46 D.L.R. 87, 58 Can. S.C.R. 283.

It was suggested, rather than argued, that it was negligent on the part of Pidgen not to warn the travellers that a train was expected. If he had thought that they would go upon the track without seeing that all was clear and no train approaching, common humanity would call upon him to warn. But when he saw them they were some distance south of the south track in a place of perfect safety, and he had no thought or notice that they would proceed north: when he next saw them they were on the west-bound track, No. 3, and death was imminent.

We cannot make a legal duty out of what a person of extraordinary caution would or might do for the protection of others, and I fail to find anything in this case making it the duty of Pidgen or the company to warn.

In my view, there was no negligence on the part of the defendants: it therefore becomes unnecessary to say anything of contributory negligence—it may be that the last word has not been said of the position of the travellers other than the driver as to contributory negligence.

I would dismiss the appeals with costs if insisted upon.

Masten, J.

MASTEN, J.:—I agree, and have nothing to add.

CLUTE, J. (dissenting):—Appeals from the judgments pronounced by Mr. Justice Rose on the 21st November, 1919, dismissing the five actions without costs. The actions were tried together without a jury on that day, and the appeals were argued together.

The plaintiffs in the five suits claim damages as follows: Frank Walker for the death of his wife, Florence Walker, and for injury to himself; Helen Normoyle for the death of her husband, James Patrick Normoyle; Stella Connolly for the death of her husband, Joseph Connolly; Mary Johnston for the death of her son, William Johnston; and Annie Fletcher for the death of her husband, H. Fletcher.

These persons were killed on a crossing of the Grand Trunk Railway near the town of Bowmanville, by an engine or locomotive of the defendant company crashing into the automobile in which the said Florence Walker, James Patrick Normoyle, Joseph Connolly, William Johnston, Joseph H. Fletcher, and Frank Walker were travelling.

The motor-car, containing the above-named persons except Frank Walker and Florence Walker, was coming from the south going north and the persons in the motor-car were anxious to reach the Canadian Pacific Railway station in time for a train, which was soon expected, for Toronto. When they came to the crossing at Bowmanville, Frank Walker and his wife, Florence Walker, who were going north, were asked to ride in the automobile.

A freight train had come in from the east and stood across the highway on which the plaintiffs and other passengers were travelling. Harry J. Pidgen was brakesman on that train. The train was 63 cars long. When the train made a stop at the semaphore, Pidgen placed two torpedoes on the rail, while he was still on the west-bound track; he placed them not more than 200 feet apart and not less than 100 feet apart east of the semaphore, and when he had done that and had come back the train was still on the west-bound track. He did no signalling at that time. He then started to pull up the train over the switch, that is, the caboose past the switch. That was just east of the station, but the engine would be "a good deal west of the station;" that would leave some of the cars blocking the crossing of the Wharf road, on which the pas-

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sengers referred to were proceeding. Pidgen was on the rear-end of the train when it stopped—on top of the caboose. When the train was stopped, Pidgen started to walk towards the front of the train; he walked over the tops of 10 or 12 box-cars; he then came to a low car, and got down on the south side of the train; he was some 25 car-lengths away, at that time, from the crossing. He was going to the crossing with the intention of making an opening on the highway, called "cutting" the crossing. He saw an automobile standing there about 10 or 15 feet south of the tracks. Pidgen and one of the men from the automobile, the driver, exchanged a few words:—

"Q. Did that party appear to have anything to do with the automobile? A. I think that he was riding in the car or had been. He was out upon the ground at that time.

"Q. What did he want? A. He asked me how long I was going to keep the crossing blocked. I replied that we had five minutes to block the crossing, and I think he said that he wanted to get up town to catch a C.P.R passenger train, and with that I replied I would make the opening as quickly as I could."

Pidgen then moved towards the train and separated the air-hose from the south side and gave the signal from the south side of the train; that was for the train to back up; the draw-bars were tight. He did not get any reply, and he then went to the north side of the train; he got over between the box-cars, over the draw-bars, to the north side, and took a couple of steps east in order to be opposite to where the opening would be made; that took him opposite the car that was immediately adjoining where he came over, and that car was between him and the south. He then gave the signal to the engine-driver to slack back. The engine-driver immediately gave slack, and when he gave slack Pidgen raised the locking block on the car and gave him the signal to go ahead. He gave this signal from the same position just described. The train then started to move ahead. He saw the automobile just as the cars were pulling over the crossing, that is, the cars the engine was attached to. The automobile, when Pidgen caught sight of it, was upon the west-bound main line. He says that he had given the automobile no signal at all at this time, and the signals above described were the only signals he gave. Just at that instant he heard the rush of No. 1. He thinks he said, "My God! look out

for No. 1:" he turned his head away as the engine struck the motor. The portion of the freight train that pulled out had not stopped at that time; he does not remember giving the engine-driver the signal to stop; he could not see the automobile when the crossing was first begun to be cut; he was just past the corner of the car, that is, the car that was stationary on the eastern portion of the train.

All the passengers in the automobile were killed except the plaintiff Walker.

The trial Judge found that there was no liability on the part of the defendants. He says: "Upon the evidence there could not be, and there is not, any claim made that the employees of the company failed in any duty that they owed to the occupants of the motor-car to give the statutory warnings of the approach of the train. It is perfectly clear that those warnings were given."

The train was travelling from 50 to 55 miles an hour, which the plaintiffs contend was an excessive rate of speed under all the circumstances, but which the trial Judge says was not an unlawful rate of speed, because sec. 309 (*c*) of the Railway Act, which requires the train to slow down to 10 miles an hour at the crossing if there has been at the crossing an accident since the 1st January, 1905, has no application. The contention is that the speed was excessive because the railway company knew that a long time ago persons had met their death at that crossing. This pleading was allowed subject to objection, the trial Judge holding that the mere fact that persons were killed could not be evidence that the crossing was dangerous or that it was dangerous to pass over at a high rate of speed. He says:—

"There is, then, it seems to me, only one question, or perhaps there are two questions in the case: (1) whether Pidgen did anything that was negligent; and (2) whether, if he was negligent, his negligence was in the performance of his duty so as to make the company responsible.

"Upon the evidence I think it is quite impossible to find that Pidgen gave any signal to the driver of the motor-car to go forward. Walker, who thinks—I say thinks because I credit him with doing his best to give a faithful account of the occurrence—Walker thinks that Pidgen cut the train from the south side, gave his signal to the engine-driver from the south side, and from the same

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south side gave a signal to the driver of the motor-car to advance. Upon Pidgen's own evidence, corroborated as it is by the engine-driver, I think it is quite impossible to escape the conclusion that, while Pidgen had given a signal from the south side, which was unseen by the engineman, who was in his proper place on the right hand side of the cab, the effective signal was given from the north side. I think, then, that if, after the train was cut, Walker saw any movement of Pidgen's arms, what he saw was Pidgen's signal to the engineman to go forward, or possibly the signal which the engineman thinks Pidgen gave him to stop after he got clear of the crossing. Where Pidgen was standing, it is quite possible that, as the motor-car advanced, Walker, sitting where he was in the car, could see Pidgen give these signals to the engineman; and he may have thought that they were signals directed to the driver of the motor-car."

The trial Judge expressly finds that no signals were given by Pidgen to the motor-driver, and that the latter acted erroneously in mistaking the signal directed to the engineman for the signal directed to himself.

The plaintiffs' counsel contends, however, that Pidgen, knowing that these people were waiting to cross the track, and telling them that he would make an opening as quickly as he could, and then making the opening, thereby invited them to cross, notwithstanding the proximity of the oncoming train, which for some reason or other they failed to observe. The trial Judge says that with this he is unable to agree. He then refers to sec. 311 of the Railway Act, which provides: "Whenever any railway crosses any highway at rail level, the company shall not, nor shall any of its officers, agents or employees, wilfully permit any engine, tender or car, or any portion thereof, to stand on any part of such highway, for a longer period than five minutes at one time." "It was therefore the duty of Pidgen and the rest of the train-crew to break the train and clear the crossing within five minutes of the time of their arrival. Pidgen promised to endeavour to break the train and clear the crossing in less than five minutes, and he probably succeeded in so doing."

In effect, the trial Judge holds that the removal of the train, it being Pidgen's duty to remove it in order to leave the highway clear, cannot be construed into a representation that the travellers

were now free to proceed, without looking at the through track to see whether a train was approaching. He holds also that there was no negligence brought home to the company, and does not deal with the question of contributory negligence. Fletcher was the driver of the car, and he finds that Fletcher was guilty of negligence, and that his widow cannot succeed. He says: "The others, I take it, would not be affected by negligence on the part of Fletcher, but would be affected by negligence on their own individual parts . . . The suggestion is that they were guilty of negligence in allowing Fletcher to proceed without warning him of the danger into which he was running."

It will be seen that the trial Judge takes the view that the question rests upon whether or not Pidgen was guilty of negligence.

In my view of the case, the action of the driver of the "Limited" and the action of Pidgen as above described should be considered together, and the question is, whether one or both were guilty of negligence that caused the accident; and, if so, whether the defendants are responsible for that negligence. The case, as it presents itself to my mind, is as follows:—

The facts are undisputed; the finding that no direct signal was given to the driver of the motor-car is conceded; but it is contended that, upon the undisputed facts, there is negligence on the part of Pidgen or the driver of the "Limited" train, or both, for which the defendants are responsible, as well as excessive speed.

The case cannot be properly viewed without realising exactly what was done and what its natural effect was. Pidgen placed the torpedoes as above described. Johnson, the engine-driver of the "Limited," who has had 38 years' experience, says he was running in the neighbourhood of 50 to 55 miles an hour, and that when he was east of the whistling post he came on two torpedoes. That called for an answer by two whistles and for reduced speed. He reduced the speed about 5 miles an hour, and said that if the fireman saw everything clear it is then his duty to release the brakes; he released the brakes to allow the engine not to lose any more speed. He blew the whistle for the crossing—two long and two short.

"Q. You started your bell . . .? A. . . . it seemed to me just about an engine-length, my fireman called to me to 'whoa.' I think those were the words he used, so I know there

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was some danger there, and I immediately threw my brakes into emergency, and no sooner had I done that than I felt the crash."

He says he saw a freight-train on the "passing track" before he got to the whistling post. He applied sand to the rails.

"Q. But, notwithstanding that, you ran into this car? A. Oh, yes.

"Q. You were going too fast? A. Yes, and too close a call." (Meaning, I suppose, that he was going too fast to stop the train.)

Rule No. 15 of the Grand Trunk Railway Company's operating rules provides: "The explosion of one torpedo is a signal to stop; the explosion of two not more than 200 and not less than 100 feet apart is a signal to reduce speed, and look out for a stop-signal." Rule 99 provides among other things that "when a train stops or is delayed on the main track under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop-signals, a sufficient distance from the train to insure full protection, at least . . . The flagman must, after going back a sufficient distance from the train to insure full protection, take up a position where there will be an unobstructed view of him from an approaching train. The flagman must always on the approach of a train display stop-signals, and, if not already done, place two torpedoes on the rail, as before described, and then return 100 yards (2 telegraph poles) nearer the protected point."

The way the case presents itself to me is this: The men in charge of the freight train thought it necessary and proper to protect that train from the oncoming "Limited," by placing torpedoes beyond the whistling post: this was done for their own protection. It was while the torpedoes were so placed, and while the freight train was blocking the highway, that Pidgen, acting in the ordinary course of his duty, was applied to by the driver of the automobile. It is a fair inference, almost unavoidable, that he must have known that the "Limited" was coming on, and that it was sufficiently close to make it necessary to clear the main line in order to protect himself. With that knowledge, he got his train clear of the road, and, when applied to by the driver of the motor-car, replied as above stated, viz., that he would make the opening as quick as he could. At this time he was acting for the railway company; he had knowledge that the "Limited" was coming. Although his first duty was, under the statute and rules,

to clear the highway, he had a further duty to perform, in my opinion, to the public. Having knowledge of his duties, it must be presumed that he was familiar with the trains. Knowing that the "Limited" was coming on, and so near as to endanger his own train, he placed the cautions (torpedoes). When applied to by the driver of the automobile, it was his duty—a duty which he owed to those in the motor-car as part of the public—to state to them, or to the person who applied, the danger they were running in crossing the track at that time. In my opinion, it was gross negligence upon his part, when he had the knowledge within himself and was acting upon it, not to give that same knowledge to the public who were in danger. If he thought that the torpedoes placed by him were a sufficient protection, and if they were a sufficient protection to stop the train, then the driver of the "Limited" was guilty of negligence in not acting upon this notice and slowing down. It is said that he was excused for this, because no danger-signal was up. The answer is that, if he had a right to disregard the notice and drive ahead 45 to 50 miles an hour, then Pidgen, who was cutting the freight-train to clear the highway, should have known, and did know, that when he cleared the main line of his train the express would come on, and therefore, acting as a reasonable man should act, he should have given notice to those waiting to cross. What he did by his action and by his word was to invite the motor-car to cross when the opening was made: it was a trap into which the motor-driver ran; set no doubt innocently in the sense of non-intention, but nevertheless a trap.

In my opinion, it is erroneous to hold that there was no duty cast upon Pidgen and the driver of the "Limited" at this stage. I take it that, aside from the rules and statutes, men in the employment of a company such as the Grand Trunk Railway Company have a duty to perform, and that is, upon occasions which arise, to act with reasonable care, not only towards the company, but towards the public, in order that lives may not be endangered. Could it be said that, if Pidgen had seen the "Limited" coming, he should stand by as an employee of the company and do nothing to protect life? Does it make any difference that, although he did not see the train at this moment, he knew it was coming and was so near, and still did not take the reasonable precaution which was obvious to any ordinary man, I think, to notify the motor-car

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and its occupants that it was dangerous to cross at this moment? In my judgment, on the undisputed facts, there is strong evidence of negligence on the part of the railway company, through their employees or employee, which caused the accident, and none of the plaintiffs are responsible for any negligence on the part of Fletcher, the driver of the motor-car, as they were simply passengers in the car.

In the case of *Ham* v. *Grand Trunk R.W. Co.* (1860), 11 U.C.C.P. 86, at p. 90, Draper, C.J., in giving the judgment of the Court, says:—

"I do not interpret these provisions to mean that if the company have on their locomotive a bell or whistle, and ring the one or sound the other as is set forth, they are consequently freed from responsibility for damages that may be occasioned by the use of their locomotives upon the railway, but rather to make it imperative that these precautions shall be adopted, and that the absence of them shall entitle any person suffering damage from the neglect or omission, to recover compensation. There may be many other acts of negligence which will entitle a sufferer to compensation, though these requirements are exactly fulfilled."

I think the appeal should be allowed and the judgment of Mr. Justice Rose set aside in all the cases. The question of damages was not argued: that should be spoken to or a new trial granted to have them assessed in case the parties cannot agree.

In the case of Fletcher, the question of contributory negligence was not tried. There should be a new trial with costs to the plaintiff of this appeal, and of the former trial. The plaintiffs in the other cases are entitled to the costs of the action and of this appeal.

Appeals dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

IMPRISONMENT (§ I—1)—WHAT CONSTITUTES.

In order to constitute an imprisonment there must be an actual detention, a limitation of the freedom of motion in all directions, although the detainer need not be forcible, and assumption of control may constitute imprisonment.

[*Grainger* v. *Hill* (1838), 4 Bing N.C. 212, 132 E.R. 769; *Arrowsmith* v. *Le Mesurier* (1806), 2 Bos. & P. (N.R.) 211, 127 E.R. 605; *Berry* v. *Adamson* (1827), 6 B. & C. 528, 108 E.R. 546, referred to. *Bird* v. *Jones* (1845), 7 Q.B. 742, 115 E.R. 668, followed.]

APPEALS by defendant from the trial judgments in two actions for false arrest and imprisonment. Reversed.

T. P. Morton, for appellant.

F. F. MacDermid, for respondents.

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HAULTAIN, C.J.S.:—This is an action for false imprisonment, and I think the appeal should be allowed on the ground that, under the facts of the case, there was no imprisonment at all.

The facts of the case are shortly as follows:

An information was laid before the defendant charging the plaintiff with theft. The defendant thereupon issued his warrant for the arrest of the plaintiff, and it was sent to the provincial police at Saskatoon for execution. The defendant was not at that time a Justice of the Peace, and had no authority to take an information or issue a warrant. The only evidence as to the facts constituting the alleged false imprisonment is that of the plaintiff himself, which is as follows:

Q. What was the first intimation you had of the warrant? A. On June 17, 1918. Q. What happened? A. The provincial police telephoned me to go down to their office, they had this warrant. Q. At which place? A. Saskatoon. Q. Who was the officer in charge there? A. Inspector Smith. Q. You were telephoned and as a result of that you went to see Smith? A. Yes. Q. And did he shew you the warrant? A. He told me he had a warrant, and he took my recognizance together with surety and let me out on bail. Q. Where is the recognizance, do you know? A. I left it with the inspector. Q. Did you see the warrant at that time? A. Yes, he had it with him. Q. Inspector Smith had the warrant? A. Yes.

This evidence does not, in my opinion, disclose an actual or constructive imprisonment. There was no detention or loss of freedom in this case. See Lord Macnaghten in *Syed Mahamad Yusuf-ud-din* v. *Sec'y of State for India in Council* (1903), 19 T.L.R. 496, at page 497.

"Nothing short of actual detention and complete loss of freedom would support an action for false imprisonment."

There must be a detainer and it must absolutely limit the freedom of motion in all directions. The detainer need not be forcible, as by laying on of hands, for assumption of control—as in *Grainger* v. *Hill* (1838), 4 Bing N.C. 212, 132 E.R. 769—may constitute imprisonment. There seems to me to be an essential difference between the case of a man voluntarily going with a police officer who says, "You are my prisoner," and that

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of a man who voluntarily responds to a telephone request to call at the police office. In the one case there is at least a constructive imprisonment brought about by the "assumption of control" by the police officer acquiesced in by the party. In that case there is a constructive imprisonment, although no force is exercised. The party arrested feels that he is obliged to go with the police officer.

Haultain, C.J.S.

In the other case, the party's freedom to go wherever he pleases is not interfered with. He has an escape open to him. That is the situation in this case, and on the authority of *Bird* v. *Jones* (1845), 7 Q.B. 742, 115 E.R. 668, I would hold that no false imprisonment has been proved. See also *Arrowsmith* v. *Le Mesurier* (1806), 2 Bos. & P. (N.R.) 211, 127 E.R. 605; *Berry* v. *Adamson* (1827), 6 B. & C. 528, 108 E.R. 546.

The appeal should, therefore, be allowed with costs, the judgment below set aside, and judgment entered for the defendant with costs.

Newlands J.A.

NEWLANDS, J.A.:—This is an action for false imprisonment. The plaintiff Ferguson's evidence as to his arrest is as follows:

A. The provincial police telephoned me to go down to their office, they had this warrant. Q. At which place? A. Saskatoon. Q. Who was the officer in charge there? A. Inspector Smith. Q. You were telephoned and as a result of that you went to see Smith? A. Yes. Q. And did he shew you the warrant? A. He told me he had a warrant, and he took my recognizance together with surety and let me out on bail.

The plaintiff went down to Unity the next day and appeared before the defendant, was remanded to another day and gave further bail to appear on that day, when he appeared and the case against him was dismissed.

In *Berry* v. *Adamson*, 6 B. & C. 528, 108 E.R. 546, Lord Tenterden, C.J., said at page 530:

This was an action against the defendant, for arresting the plaintiff and keeping him in prison. Now, has he either actually or constructively been arrested and kept in prison? The case of *Arrowsmith* v. *Le Mesurier* shews that he has not. That case was much more favourable to the idea of a constructive arrest than this. There a constable went to the plaintiff with a warrant to arrest him on a charge of conspiracy, and exhibited the warrant, and afterwards the plaintiff accompanied the constable to the magistrate, and yet it was held that the warrant had been used only as a summons, and that there was no arrest. Here the officer's man did not take a warrant with him, nor did he tell the plaintiff that he came to arrest him, but merely gave notice of the writ, and asked him to fix a time for giving bail. I think, therefore, that the nonsuit was right.

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In *Arrowsmith* v. *Le Mesurier*, 2 Pos. & P. (N.R.) 211, 127 E.R. 605, above referred to, Mansfield, C.J., said at page 211:

> I can suppose that an arrest may take place without an actual touch, as if a man be locked up in a room; but here the plaintiff went voluntarily before a magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant, but did not arrest the plaintiff. How can a man's walking freely to a magistrate prove him to be arrested? I think that the jury have done justice.

Newlands J.A.

I think the circumstances in this case are similar to the above two cases, and that the warrant was only used as a summons.

The appeal should, therefore, be allowed with costs.

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HAULTAIN, C.J.S.:—This appeal should be allowed for the reasons given in the case of *Ferguson* v. *Jensen*, ante page 616. Haultain, C.J.S

In this case there is absolutely no evidence of imprisonment at all. The plaintiff was never communicated with by the police, but, on information given to him by Ferguson, voluntarily proceeded to Unity to appear in the magistrate's Court.

Appeal allowed with costs. Judgment below set aside, and judgment entered for defendant dismissing action with costs.

NEWLANDS, J.A.:—In *O'Brien* v. *Jensen*, which was consolidated with *Ferguson* v. *Jensen*, for the purposes of trial and appeal, the alleged arrest was, according to the evidence of O'Brien, the plaintiff, made in the following manner: Newlands, J.A.

> A. I went to Saskatoon on the 18th for some material for the house. Q. Yes? A. And I met Ferguson on the street, and "Hello," he says, "There is a warrant out for your arrest, you have got to come to Unity with me." That is the first I heard of it. Q. That is the first you heard of it? A. Yes. Q. And were you arrested? A. Well, . . . Q. What happened to you? A. I thought Ferguson was running some kind of game on me, till I saw Ferguson beckoning to me with Provincial McCauley. Q. Sergeant McCauley? A. Yes, and I went over, they beckoned me across, and Sergeant McCauley says to me, "You are going to Unity to-day" and I said "Yes, sir," and Ferguson says "Yes, he is going up with me." Q. And did you enter into recognizances there? Did you give bond? A. Not right there. Q. Did the officer take you? A. No, but from the way he spoke I knew I had to go or he would take me. Q. And where did you go? A. He went to Ferguson and said "He is to go up with you," and Ferguson said "Yes." Q. And did you go to Unity with Ferguson? A. Yes, sir.

He then gave bail and the case against him proceeded in the same manner as the *Ferguson* case, and was dismissed in the same way.

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In this case also, the warrant was used as a summons, and there was no arrest either actual or constructive, and in this case also, the appeal should be allowed with costs.

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LAMONT, J.A.:—This is an action for false imprisonment. The gist of such an action is the imprisonment. So far as Ferguson is concerned, what took place is this: the defendant, who had ceased to be a Justice of the Peace, issued a warrant for his arrest and forwarded it to Saskatoon for execution. The officer who received it in Saskatoon telephoned Ferguson to come down to his office, that he had a warrant for his arrest. Ferguson did so, and entered into a recognizance to appear at Unity before the magistrate. So far as O'Brien is concerned, he learned from Ferguson that a warrant had issued for him also; so he voluntarily went with Ferguson to Unity to appear before the magistrate on the day on which Ferguson, under his recognizance, was to appear. Do these facts shew imprisonment of either of the plaintiffs? The law on the point is summed up in the notes found in 27 Hals., page 878, note to para. 1551, as follows:

> Mere words cannot constitute an imprisonment. If C. gives D. in charge to a police officer, but the officer does not take D. into custody, there is no imprisonment . . . *Berry* v. *Adamson*, 6 B. & C. 528, 108 E.R. 546. . . . To constitute an imprisonment there must be a detention (*Whalley* v. *Pepper* (1836), 7 C. & P. 506. . . . If a police officer tells the person charged that he must go with the officer, and the person charged submits and goes, this is an imprisonment, although there is no touching of the person. . . . *Chinn* v. *Morris* (1826), 2 C. & P. 361. . . . If a person charged goes voluntarily with a police officer to the police station without being taken in charge or told that he must come, this is no imprisonment. *Arrowsmith* v. *Le Mesurier*, 2 Bos. & P. (N.R.) 211, 127 E.R. 605.

In my opinion, Ferguson's going to the police station in response to a telephone conversation was a voluntary act on his part. If he had not gone, he probably would have been arrested. It was to avoid the arrest that he went. His voluntary attendance at the police station was not, in my opinion, an imprisonment, for which an action will lie. Nor is there any evidence of anything taking place at the police station which could be called an imprisonment.

As for O'Brien, his attendance at Unity was purely voluntary.

There was nothing at any time which could reasonably be said to amount to an imprisonment on his part.

The appeal in both cases should be allowed with costs.

ELWOOD, J.A.:—These are two actions for false arrest and imprisonment brought by the plaintiffs against the defendant, in which judgment in the *Ferguson* action was given for $100 general damages, and $180 special damages, and in the *O'Brien* case for $100 general damages, and $80 special damages.

On June 15, 1918, the defendant, purporting to act as a Justice of the Peace, on the information of one McVety charging the plaintiffs and others with stealing three head of cattle, issued warrants for the arrest of the plaintiffs and handed the said warrants to a police constable for execution. The commission to the defendant as a Justice of the Peace had, unknown to the defendant, been cancelled in the preceding February, and at the time the defendant did the acts complained of he was not a Justice of the Peace, although he was still unaware of the cancellation of his commission and believed that he was a Justice of the Peace.

A day or so after the issuing of the warrant, a police inspector in Saskatoon telephoned Ferguson to go down to their office, that they had a warrant. Ferguson went to the office of the provincial police, when he entered into a recognizance and was allowed out on bail. Ferguson subsequently went to Unity, where the case was to be tried, first on the 18th when the case was remanded and he entered into a further recognizance, and then on the 22nd, when apparently the case was dismissed.

So far as O'Brien is concerned, the only arrest—if any—that took place, was under the following circumstances: On June 18, he went to Saskatoon for some material for a house. He met Ferguson on the street. Ferguson said: "There is a warrant out for your arrest. You have got to come to Unity with me." He thought Ferguson was running some kind of a game on him till he saw Ferguson beckoning to him with police constable McCauley. McCauley said, "You are going to-day?" and he said "Yes, sir." Ferguson said, "Yes, he is going out with me." He was asked, "Did the officer take you?" and he said, "No, but from the way he spoke I knew I had to go or he would take me." Apparently Ferguson and O'Brien went to Unity together on

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the 18th, when both cases were remanded until the 22nd, and a bond was entered into by both of them on the 18th. On the 22nd they went again to Unity and the cases were dismissed.

It was contended for the appellant that, the trial Judge having found that the defendant acted *bonâ fide* throughout, no action lies against him. No authority was cited to us for this proposition, and I am of the opinion that the defendant, having no jurisdiction at all to in any way act as a Justice of the Peace, is responsible for the warrants which he issued and for anything that was done under those warrants.

It was further contended that, in any event, there was not any arrest or imprisonment of the plaintiffs; that what took place was not an arrest in their case. So far as the *Ferguson* case is concerned, I am of the opinion that the conversation which Ferguson had with the police inspector in Saskatoon and the subsequent action of Ferguson in going to the police office in Saskatoon and entering into bail, constituted an arrest of Ferguson.

In *Wood* v. *Lane et al.* (1834), 6 C. & P. 774, the facts were that an attorney's clerk accompanied a creditor to his debtor and pretended that he was a sheriff's officer. In consequence the debtor went away with them, not willingly, but supposing they had power to compel him. It was held that it was a sufficient arrest to maintain trespass for false imprisonment. Tindal, C.J., in summing up, at page 776, is reported as follows:

> If the plaintiff was acting as an unwilling agent at the time, and against his own will, when he went to his own house from that of Sanders, it was just as much an arrest as if the defendants had forced him along.

In *Peters* v. *Stanway* (1835), 6 C. & P. 737, Alderson, B., at page 739, is reported as follows:

> There is a great difference between the case of a person who volunteers to go in the first instance, and that of a person who, having a charge made against him, goes voluntarily to meet it. The question, therefore, is, whether you think the going to the station-house proceeded originally from the plaintiff's own willingness, or from the defendant's making a charge against her; for, if it proceeded from the defendant's making a charge, the plaintiff will not be deprived of her right of action by her having willingly gone to meet the charge.

In *Chinn* v. *Morris*, 2 C. & P. 361, Best, C.J., at page 362, is reported as follows:

I should think it an imprisonment if a constable told me that I must go to Union Hall, for I should know that if I refused he would compel me. I think it amounts to a trespass.

In *Arrowsmith* v. *Le Mesurier*, 2 Bos. & P. (N.R.) 211, 127 E.R. 605, reported in the note to *Chinn* v. *Morris*, *supra*, and also in the note to *Wood* v. *Lane*, *supra*, it was held that, where a constable shewed the plaintiff a warrant and the plaintiff went with the constable to a magistrate, there was no imprisonment as the warrant was only used as a summons.

This case was commented upon in *Wood* v. *Lane*, *supra*, by Tindal, C.J., as going to the very extreme point, "but," he adds, "in that case the jury found that the plaintiff went voluntarily with the officer."

As I view that case, it decides nothing more than that, in the circumstances of that case, the accused went with the constable to the magistrate without compulsion. He went voluntarily and therefore there was no arrest. As I view the case at bar, however, when the police inspector at Saskatoon telephoned Ferguson to go down to their office, that they had a warrant; and he went to their office in obedience to that telephone message, he was just as much under arrest as though he had accompanied a police officer to the police office in consequence of a police officer having come to him personally and stated that he must go down to their office, that he had a warrant. It seems to me that *Wood* v. *Lane*, *Peters* v. *Stanway*, *and Chinn* v. *Morris*, are authority for the view which I have just expressed.

I am of the opinion, however, that the imprisonment ceased upon entering into the first recognizance. This view, to my mind, seems to be supported by the case of *Syed Mahamad Yusuf-ud-din* v. *Sec'y of State for India in Council* (1903), 19 T.L.R. 496. The head-note to that case is as follows:

> Where a prisoner has been arrested under a warrant on a criminal charge and is released on bail pending the hearing of the charge, and the warrant is subsequently set aside, the time for bringing an action for false imprisonment runs from the date of the release on bail and not from the date of the warrant being set aside.

At page 497, Lord Macnaghten is reported as follows:

> But their contention was that the imprisonment continued until the warrant was set aside. So long as the restraint of bail lasted—and it might be taken that it lasted until the warrant was set aside—the appellant, they said, was not a free man; he was even liable to be actually imprisoned through

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the action of his surety, or possibly by reason of the intervention of the Government. All that might be very true. But the counsel for the appellant did not cite any case in support of their contention. The whole weight of authority was the other way. Nothing short of actual detention and complete loss of freedom would support an action for false imprisonment. The leading case on the subject was *Bird* v. *Jones*, 7 Q.B. 742, 115 E.R. 668, in which Coleridge, Williams and Patteson, JJ., differed from Denman, C.J. "Some confusion" said Coleridge, J., "seems to me to arise from confounding imprisonment of the body with mere loss of freedom; it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own." Williams, J., spoke of imprisonment as being "entire restraint," and Patteson, J., added, "Imprisonment is, as I apprehend, a total restraint of the liberty of the person for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him." The old authorities cited in that case were to the same effect. In their Lordships' opinion it was perfectly clear that the appellant's imprisonment did not last one moment after he was liberated on bail. The very object of granting bail was to relieve him from imprisonment.

The question of when the imprisonment determined is important in determining the amount of damages. The whole of the special damages were incurred after bail was given at Saskatoon, and consisted in expense and loss in going to and from Unity and in arranging for the trial.

If I am correct in my opinion, the plaintiff Ferguson is not entitled to any of these special damages, and his judgment should therefore be reduced by $180.

So far as the plaintiff O'Brien is concerned, the view that I take of the evidence is, that there was never any attempt made to execute the warrant against him. It is quite true that he knew that a warrant had issued against him, and he does say that, from the way the officer spoke he knew he had to go or he would take him; but there was nothing in the conversation that took place with the officer to indicate that the officer intended to take him, or that the officer with whom he had the conversation was in possession of the warrant, and I think it would be stretching the case very far to hold, as would practically be done in this case, that, where the warrant for the arrest of a person issues, and that person hearing of the warrant, in the way in which O'Brien did, goes to the place appointed for trial, there has been an arrest and imprisonment.

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In my opinion, therefore, in the case of O'Brien against the defendant, the appeal should be allowed with costs and the judgment entered in the original case dismissing the plaintiff's claim with costs. The appellants should have the costs of this appeal.

Appeals allowed.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. June 10, 1920.

PRINCIPAL AND AGENT (§ III—33)—CONSIGNMENT OF GRAIN TO BROKER—INSTRUCTIONS TO SELL—SALE—PAYMENT TO WRONG PERSON—NEGLIGENCE—LIABILITY OF AGENT.

A grain merchant who has had a consignment of grain sent to him with instructions to sell, and who sells such grain and carelessly, and without making any proper investigation as to its right to receive the money, pays the purchase money to another company, who represented that the grain should have been shipped to it and upon its production of the bill of lading and representation that it had settled with the shipper, is liable to such shipper for the amount of the purchase money.

The Factors Act, 6 Geo. IV. 1825, ch. 94, sec. 2, even if in force in Manitoba (which is not decided), does not apply where the bill of lading itself furnishes notice that the party claiming to be the owner of the wheat is not in fact the owner.

Statement.

APPEAL by defendant from the trial judgment in an action to recover the value of a carload of wheat consigned to the defendants. Affirmed.

G. R. Coldwell, K.C., for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—This is an action to recover the value of a carload of wheat consigned by the plaintiff to the defendants. Macdonald, J., who heard the case, decided it in favour of the plaintiff and entered judgment for $1,854.81. The parties agreed as to the main facts which are embodied in the following admissions put in at the trial as EX. 1:—

Admissions.

The facts about which there is no dispute are:—

(1) The plaintiff is a farmer residing at Ralston, Manitoba, and the defendant is a Dominion company, with office in the City of Winnipeg and carrying on business in the Province as grain merchants, and licensed under the Grain Act as commission merchants and track buyers.

(2) The plaintiff loaded a car of No. 2 Northern Wheat at Ralston, Manitoba, and shipped it on November 13, 1917, consigned to Port Arthur to the order of the defendants, and the plaintiff received a bill of lading therefor from the Canadian Northern Railway.

(3) The car was delivered on November 27 by the C.N.R. to the Port Arthur Elevator Co., the outturn being 894 bushels of No. 2 Northern Wheat and 1,105 pounds of screenings. The Port Arthur Co. made out a warehouse

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receipt for the wheat in the name of the defendants on November 28 and notified the defendants of the outturn. The price of wheat was fixed at that time, at $2.18 Fort William, for that grade, No. 2 Northern, per bushel.

(4) The Brandon Grain Co. bought and sold grain and had a track buyer's license for the year beginning September 1, 1917, under the Grain Act.

(5) On November 14, 1917, the Brandon Grain Co. wrote to the defendants: "We have been advised to-day that C.N.R. car of wheat No. 70958 shipped from Ralston was billed to your order in place of ours, and we shall be glad if you will watch this car and advise us the day that it is inspected."

(6) On November 29 the defendants notified the Brandon Grain Co. of the grade and outturn of the wheat.

(7) Within a few days his brother informed the plaintiff that the Brandon Grain Co. had 'phoned to say that the car ran 894 bushels No. 2 Northern and 1,105 pounds screenings. The plaintiff claimed there was more wheat in the car.

(8) On December 18, the plaintiff came into Brandon, called at the Brandon Grain Co. office, signed a declaration as follows:—

Brandon Authorized capital $40,000 Winnipeg
Brandon Grain Co., Limited
Successors to John R. Brodie
Direct Private Wire with Winnipeg, Chicago and Minneapolis.
Phone 241 Head Office Opposite Post Office
Brandon, Man.

I hereby certify that I loaded into C.N.R. Car No. 70958 not less than 1,000 bushels of wheat and I only received outturns for 894 bushels. I shall be glad if you will look into this and see if you can recover the difference from the Canadian Northern.

Declared before me at the City of Brandon, in the Province of Man., this 18th day of Dec. 1917. (Sgd.) A. Stewart.

(Sgd.) A. J. Abbey, Commissioner.

and left with the Brandon Grain Co. his bill of lading.

(9) On the same day the Brandon Grain Co. wrote the defendants, and enclosed the documents referred to:—

"We enclose herewith bill of lading covering C.N.R. car No. 70958 along with affidavit as to shortage. We have made settlement for this car and shall be glad if you will forward settlement by return."

(10) On December 19, the defendants delivered the bill of lading, after endorsing the same as now appears on the bill, to the Port Arthur Elevator Co., paid freight, interest and storage and received the warehouse receipt. On the same day, the defendants sold the wheat to the Wheat Export Co. and the screenings to the Port Arthur Elevator Co. and endorsed the warehouse receipt to the purchasers. The defendants received payment therefor and remitted the proceeds to the Brandon Grain Co., $1,860.81.

(11) On January 21, 1918, A. J. Facey, manager and secretary-treasurer of the Brandon Grain Co. disappeared and the company ceased to carry on business.

(12) On January 28, the plaintiff's solicitors wrote to the defendants enquiring about the car, referred to the shortage in weight which he claimed and asked how the matter then stood.

(13) The plaintiff claims the defendant converted his wheat and asks damages and other claims.

The bill of lading referred to in the above admissions is in the form approved by the Board of Railway Commissioners by Order No. 14591 of August 18, 1911. It is signed by the plaintiff as shipper and by the agent of the Canadian Northern Railway Co. at Ralston. On its face, it consigns to the defendants at Port Arthur car No. 70958 purporting to contain 1,000 bushels of wheat. The only indorsement on the bill is one made by the defendants to the Port Arthur Elevator. The name of the Brandon Grain Co. does not appear anywhere on the bill.

The plaintiff states that on the day he shipped the grain he requested a friend, one Palmer, to notify the defendants of the shipment and for this purpose he gave him the number of the car and other particulars. Palmer says he did notify the defendants as requested but the trial Judge is convinced this is not the case. Palmer appears to have had many dealings with the Brandon Grain Co. and instead of notifying the defendants of the shipment he sent the information to that company. The defendants shew that they received no notification from the plaintiff. The Brandon Grain Co. received from some source particulars of the shipment so that its manager became possessed of the information which enabled him to write to the defendants the letter of November 14, and prepare the way for the fraud that he subsequently carried out. Palmer, no doubt, was the source of this information. But the fact that he did not notify the defendants of the shipment as requested by the plaintiff and without authority sent the particulars to another person, does not in itself create an estoppel against the plaintiff in respect of the subsequent conduct of that person. The disclosure of the fact that the plaintiff had consigned from Ralston a carload of wheat to the defendants is an innocent piece of information. That it would be afterwards used as the instrument of a fraud was not to be expected. No authority was at any time given by the plaintiff to the Brandon Grain Co. to sell, dispose of, or otherwise deal with the wheat in question. The sole authority conferred on that company or its officers was to make claim on his behalf against the railway company for the shortage in the outturn from the car and to adjust the loss. It was for this purpose alone that he left the bill of lading with the Brandon company.

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No authority was given by the plaintiff to the defendants to sell the wheat. They sold it under what they assumed to be instructions from the Brandon Grain Co. They sent the proceeds of the sale to that company although its name did not appear either on the front or the back of the bill of lading. The close relationship of the defendants with the Brandon company, they being preferred shareholders to a large amount and exercising more or less supervision over its affairs, would tend to lull suspicions that would have arisen had they been dealing with strangers. There were suspicions circumstances appearing in the transaction which should have put the defendants on enquiry before they parted with the proceeds of the wheat. In addition to the fact that the Brandon company's name does not appear anywhere on the bill of lading and that the grain had been consigned directly to the defendants, the company's letter of December 18, contains this statement: "We have made settlement for this car and shall be glad if you will forward settlement by return." Now, if the car belonged to the company, why was it necessary to state that they had made settlement for it? They say they have made settlement, presumably with the shipper, although they enclose with the letter a document called an "affidivat" made by him claiming a shortage of over a hundred bushels. This document is set out in para. 8 of the admissions. The plaintiff states in it that he "only received outturns for 894 bushels." This shewed that he was interested in the outturn from the car when it was unloaded at Fort William, notification of which was sent to the defendants and by them to the Brandon company. The document is written on a sheet of the Brandon company's letter paper under their letter heading. It is presumably addressed to them. It contains this request: "I shall be glad if you will look into this and see if you can recover the difference from the Canadian Northern." That is, the plaintiff, the shipper, desires them to recover for him the shortage on his carload of wheat. The defendants put in a claim against the railway company on behalf of the Brandon Grain Co. for shortage amounting to $159.10.

The defendants rely on the fact that the plaintiff handed his bill of lading to the Brandon company and, by so doing, enabled its manager to commit the fraud. They rely upon the Imperial statute, 6 Geo. IV. 1825, ch. 94, sec. 2. The effect of that section is as follows:—

Any person or persons entrusted with and in possession of any bill of lading . . . shall be deemed and taken to be the true owner or owners of the goods . . . described and mentioned in the said . . . documents . . . so far as to give validity to any contract or agreement thereafter to be made . . . by such person or persons so intrusted and in possession as aforesaid with any person . . . for the sale or disposition of the said goods; provided such person (the purchaser) . . . shall not have notice by such documents or either of them, or otherwise, that such person or persons so intrusted . . . are not the actual and *bonâ fide* owners . . . of such goods; any law, usage or custom to the contrary . . . notwithstanding.

In *Cole* v. *North Western Bank* (1875), L.R. 10 C.P. 354, Blackburn, J., said at page 363:—

And the possession of bills of lading or other documents of title to goods did not confer on the holder of them any greater power than the possession of the goods themselves. . . . The transfer of the document of title by means of which actual possession of the goods could be obtained, had no greater effect at common law than the transfer of the actual possession.

He points out the general purpose of 6 Geo. IV. 1825, ch. 94, and other Factors' Acts was to make it the law that where a third person has entrusted goods, or documents of title to goods, to an agent, who, in the course of such agency, sells or pledges the goods he should be deemed by that Act to have misled any one who *bonâ fide* deals with the agent and makes a purchase from him or an advance to him, without notice that he was not authorised to sell or procure an advance.

I will assume, for the purpose of this case, but without deciding the point, that sec. 2 of 6 Geo. IV. 1825, ch. 94, was introduced into Manitoba as a part of the English law as it stood on July 15, 1870: R.S.M. 1913, ch. 46, sec. 11. How then does this enactment protect the defendants? The proviso in the section excludes from the protection afforded by it persons who have notice by the documents, or otherwise, that the person entrusted with the bill of lading, etc., is not the actual owner. In *Johnson* v. *Credit Lyonnais Co.* (1877), 3 C.P.D. 32, Bramwell, L.J., says, at page 45:—

It (sec. 2) provides that it shall not apply, where by the document or otherwise, there is notice that the person intrusted is not the true owner of the goods. So that possession by A. of a bill of lading to the order of B. would not be within the section. . . . I believe the documents specified in the statute always mention the name of the person entitled, so that if the true owner has indorsed the document, or allowed it to be made out in another's name, there is ground for saying that he is by his own act no longer the true or apparent owner of the goods, or has given the power or apparent power of disposing of these goods to the holder of the warrant.

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Now, the bill of lading in the present case shews that the plaintiff has consigned a carload of wheat to the defendants. There was no endorsement, order or direction of any kind either upon the document or accompanying it which in any way affected the terms of it or gave the Brandon company authority to receive the proceeds of the carload. According to the bill of lading the owner of the wheat is either the plaintiff or the defendants. The Brandon Grain Co. in no way appears on the bill and their possession of the document gives them no right over the goods mentioned in it. They were in the position of a person who had illegally obtained possession of a cheque or promissory note payable to another person and not endorsed.

I think the bill of lading itself furnished notice to the defendants that the Brandon company was not the owner of the wheat. That company's letter of December 18, and the document of same date signed by the plaintiff, gave notice to the defendants that the plaintiff still had or claimed to have an interest in the goods.

The Brandon Grain Co. had a track buyer's license under the Canada Grain Act, 2 Geo. V. 1917 (Dom), ch. 27. By sec. 219 of the Act certain duties are imposed on every licensed track buyer, one of which is that he shall deliver to the vendor of each carload of grain a grain purchase note, retaining a duplicate of it himself. This note, amongst other matters of information, shall express upon its face an acknowledgment of the receipt of the bill of lading issued by the railway company for such carload shipment, the amount advanced on account, etc. Also the vendor shall indorse upon this grain purchase note his acceptance of the terms of the sale and his receipt for payment of the money advanced. When the defendants found the bill of lading in the condition in which it was, they should have demanded inspection of the duplicate purchase note which, if there were one, would have given the particulars of the purchase. The inquiry in this regard would have disclosed the fraud that was being perpetrated.

I think the trial Judge arrived at the proper conclusion and that the appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—The defendants contend that they were justified in remitting the proceeds of the sale of the car of wheat in question to the Brandon Grain Co., as they could look to the indicia of authority only which the grain company possessed in

the bill of lading. On that bill of lading the plaintiff appeared as shipper and the defendants as consignees.

Reliance is placed on the Factors Act, 6 Geo. IV. 1825, ch. 94, sec. 2, which provides: (See judgment of Perdue, C.J.M., *ante* page 629.)

For the first time, in this Court at any rate, it is alleged that this Act is in force in this province. The observations of Haliburton, C.J., of Nova Scotia, quoted in Clement's Canadian Constitution, 3rd ed., 1916, at page 277, are instructive:

> Every year should render the Courts more cautious in the adoption of laws that had never been previously introduced into the colony, for prudent Judges would remember that it is the province of the Courts to declare what is the law, and of the Legislature to decide what it shall be.

In *Reg.* v. *Porter* (1888), 20 N.S.R. page 352 at a much later date, the Supreme Court of Nova Scotia emphasized the need of caution enjoined by Haliburton, C.J., and held that the English statute, 13 Geo. II. ch. 18, requiring a certain notice in *certiorari* cases, was not in force in that province. It was pointed out that that Act was not obviously applicable and necessary and that the Provincial Legislature had undertaken to legislate in *certiorari* matters and had enacted many provisions of the English statutes, omitting those contained in the Act of Geo. II. This last observation is important and relevant in this case in view of our own provincial legislation on the subject of mercantile agents without any attempt to re-enact the above sec. 2, to which I shall subsequently refer.

I would refer to the judgment of Lord Watson in *Cooper* v. *Stuart* (1889), 58 L.J. (P.C.) 93, where it was held that the English common law rule against perpetuities could not be invoked in New South Wales to hamper the Crown in dealing with public lands. Lord Watson at page 96 then quotes the oft-quoted observation of Sir William Blackstone that:—

> colonists carry with them only so much of the English law as is applicable to the condition of an infant colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people . . . are neither necessary nor convenient for them, and, therefore, are not in force.

The Act of 6 Geo. IV., 1825, ch. 94, was amended in 1842 by 5-6 Vict. (Imp.), ch. 39. In 1889, 52-53 Vict. (Imp.), ch. 45, these two Acts were repealed as well as the Act of 4 Geo. IV.

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ch. 83, and the Act of 1877, 40–41 Vict. ch. 39. Sec. 2 of 6 Geo. IV. ch. 94 is reproduced with amendments in sec. 2 of the Act of 1889, 52–53 Vict. ch. 45.

In the English Sale of Goods Act, 1893, 56–57 Vict. (Imp.), ch. 71, we find secs. 8 and 9 of the Factors Act of 1889 reproduced with a slight alteration. By sec. 25 (3) of the English Sale of Goods Act it is provided that in it the term "mercantile agent" has the same meaning as in the Factors Act. In our Sale of Goods Act, R.S.M. 1913, ch. 174, sec. 25 of the English Sale of Goods Act is reproduced as sec. 26. There is an added sub-sec. 3, of no importance here. By sub-sec. 4 the term "mercantile agent" is defined as it is defined in sec. 1 of the English Factors Act of 1889, 52–53 Vict. ch. 45. In our Act we have in sec. 2 a definition of the term "document of title to goods" not found in the English Sale of Goods Act but taken from sec. 1 of the Factors Act of 1889, which in turn was taken from sec. 4 of the Act of 1842, 5–6 Vict. ch. 39.

In the case of the Act of 6 Geo. IV. ch. 94, we have, therefore, this situation: That Act, passed in 1825, was repealed in 1889. The Court of Queen's Bench was constituted by the Province of Manitoba in 1874 by an Act providing that the Court should decide all matters of controversy relative to property and civil rights according to the laws existing in England as the same were on July 15, 1870, so far as the same could be made applicable to matters relating to property and civil rights in the province. This enactment has been re-enacted from time to time and is now sec. 11, ch. 46, R.S.M. 1913. In 1889 the English Act, repealing ch. 94, 6 Geo. IV., enacted secs. 8 and 9 as parts of the substituted Act, and these sections are reproduced in our Sale of Goods Act, as pointed out. In our Sale of Goods Act we also find the definition of "mercantile agent" as set out in the English Act of 1889 and of "documents of title" as found in the same Act and in the Act of 1842.

At common law a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. *Cole v. North Western Bank*, L.R. 10 C.P. at p. 362.

There is an exception in the case of sales in market overt and an apparent exception where the person in possession had a title defeasible on account of fraud, which did not preclude the owner when there was notice.

And the possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves.

Blackburn, J., in *Cole* v. *North Western Bank*, L.R. 10 C.P., at p. 363.

Now sec. 2 of Geo. IV. ch. 94 made an important alteration in the law as by it the possession of bills of lading or other documents of title gave a power of selling or pledging the goods to those dealing *bonâ fide* with the possessor beyond any which by common law the possession of the goods gave. *See* Blackburn, J., L.R. 10 C.P., at page 367.

Is it possible that sec. 2 of the Act of 1825, repealed in England in 1889, never re-enacted or recognized by our Legislature, which has, however, re-enacted in substance other English legislation on the same subject, is nevertheless in force in this province? Its existence as part of the law of this land has never been heretofore publicly asserted. We must proceed cautiously in assuming a function that really belongs to the Legislature which has hitherto abstained from exercising it in this particular matter, and I feel impressed with the view that sec. 2, in so far as it is an alteration of the common law, is not in force in this province. In my view of the case, however, it is not necessary to make an express holding on this point.

If we take the definition of "document of title" as found in the English Act of 1842 (which is no doubt declaratory on the subject) can the bill of lading in this case be said to be a document used in the ordinary course of business as proof of the possession or control of goods? "Possession" or "control" obviously means possession or control by the holder for the time being of the document and in this case the document indicates no proof of possession or control by the Brandon Grain Co. as on its face it shews the plaintiff as the owner of the wheat, and the defendants as the consignees. It does not name the Brandon Grain Co. It most certainly does not authorise or purport to authorise, by endorsement or delivery, the possessor of the document to transfer or receive the wheat thereby represented.

In *Johnson* v. *Credit Lyonnais Co.* (1877), 3 C.P.D. 32, Bramwell, L.J., subjects the language of the English statutes to a critical examination which is of the greatest interest and value, commencing

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with the Act, 4 Geo. IV. ch. 83. In dealing with 6 Geo. IV. ch. 94 he analyzes sec. 2, which was that on which the case there before the Court depended. He says at page 45:—

> This section applies to all cases where persons are intrusted with, and in possession of bills of lading . . . which suppose a right (that is, I take it, create a presumption of a right) to the possession of goods. It does not mention "goods" themselves. It provides that it shall not apply where, by the document or otherwise, there is notice that the person intrusted is not the true owner of the goods. So that the possession by A. of a bill of lading to the order of B. would not be within the section.

This last sentence is, in my judgment, conclusive. Outside the powers conferred by the possession of the documents by the statute, the mere possession of them by the agent is, so far as the defendants are concerned, meaningless. If confers no rights on them other or greater than would be given by the possession of the goods, to which at common law, the person in possession can give no better title than he himself had. These documents are not within the statute and by virtue of them the Brandon Grain Co. could confer no better title than it itself had, which was none at all.

Now, did the plaintiff by his acts or conduct enable the Brandon Grain Co. to hold itself out as having authority to receive the proceeds of the consignment of wheat? We may call this estoppel or an application of the rule that, where one of two innocent persons must suffer, the person who rendered it possible for the wrongdoer to do the wrong should suffer rather than the one who suffers from the agent having the opportunity.

In *Johnson* v. *Credit Lyonnais Co.*, 3 C.P.D. 32, the plaintiff had left both the tobacco and the indicia of title, the dock-warrants, with the broker and dealer from whom he had purchased the goods. It was contended (1) that by so doing he was estopped from denying the right to deal with the goods and (2) that even if the property did not pass the plaintiff was guilty of negligence and the defendants counterclaimed for damages. As to the first ground, Cockburn, C.J., held that the leaving of the goods or the indicia of title with the vendor did not, in the circumstances, divest the owner of his property, or estop him from asserting his right to it. As to the counterclaim for negligence, the Chief Justice held at pages 42-43:—

> The law is, in my opinion, correctly stated by Blackburn, J., in *Swan* v. *North British Australian Co.* (1863), 2 H. & C. 175 at page 181, 159 E.R. 73,

where, after referring to what was said by Parke, B., in *Freeman* v. *Cooke* (1848), 2 Exch. 654, 154 E.R. 652, namely, that "negligence to have the effect of estopping the party must be the neglect of some duty cast upon the person guilty of it," he goes on to say: "This, I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, except in market overt." The same principle would obviously apply to the case of goods fraudulently sold or pledged by a person left in possession of them. The rule thus laid down is applicable here. The plaintiff may have been negligent, and his negligence may have brought on the defendants the loss of the money they have advanced. But the plaintiff owed no duty to the defendants—at least no duty which the law can recognise—either as individuals or as members of the general public. . . . This being so, I am of opinion that the negligence of the plaintiff neither estops him from claiming the goods in question from the defendants, nor gives the latter a counterclaim for the money which they have advanced to Hoffman on the security of the goods.

Now, in that case the broker and dealer was in possession both of the goods and of the indicia. Here the Brandon Grain Co. had the indicia only. There, the negligence complained of was the omission by the owner to have followed the prudent and usual course of having the goods in question transferred to his own name and the indicia transferred to him. Here, it is alleged that the plaintiff was in fault in omitting to notify the defendants of the facts. Obviously the facts in the *Credit Lyonnais* case were stronger against the plaintiff's assertion of his rights of ownership than in this case. The plaintiff's position and rights in this matter were disclosed on the bill of lading. This he retained in his possession until he was notified of the out turn of his grain and it was only then that he handed it to the Brandon Grain Co. for the sole purpose of making a claim against the railway company for an adjustment of loss sustained by him owing to the shortage which appeared according to the railway company's return. The bill of lading was sent by the Brandon Grain Co. to the defendants along with the plaintiff's declaration of loss. The defendants chose to shut their eyes to the contents of the documents before them and there was no duty whatever in the matter that I can see owed by the plaintiff to the defendants.

On the facts, as found by the trial Judge, the case is not within that class of cases where it has been held that where a

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principal intrusts his agent with the possession of the title deeds of any property and authorises him to raise money on the security thereof, a security given by the agent for a larger amount than that authorised, who fraudulently appropriated the difference is valid as against the principal. See *Brocklesby* v. *Temperance Permanent Society*, [1895] A.C. 173. This case comes rather within *Farquharson* v. *King*, [1902] A.C. 325. The Brandon Grain Co. had no authority to raise money on the wheat. They had no authority to dispose of it. By the terms of the bill of lading that could only be done by the defendants. The bill of lading came into the Brandon Grain Co.'s possession merely for the purpose of being used in connection with the plaintiff's claim for shortage and his letter in reference to it contains no authority to the railway company to pay the proceeds to any agent. The defendants alone were by the terms of the bill of lading authorised to receive the proceeds of the sale and no authority, express or to be implied from the acts or conduct of the plaintiff was given them to pay the amount to any other person than the plaintiff.

The right and title to the grain and its proceeds remained in the plaintiff throughout and he is entitled to his money. I would affirm the judgment of Macdonald, J., and dismiss the appeal.

Fullerton, J.A.

FULLERTON, J.A.:—At common law the possession of a bill of lading confers no greater power than the possession of the goods themselves and a person in possession of goods can confer no better title than he himself has. If, however,

> the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bonâ fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited. Blackburn, J., in *Cole* v. *North Western Bank*, L.R. 10 C.P., at page 363.

In the *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, at page 215, Lord Herschell said:—

> The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shewn, a good title is acquired by personal estoppel against the true owner.

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Sec. 23 of the Sale of Goods Act, R.S.M. 1913 ch. 174, provides as follows:—

> Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, *unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.*

As I see it, the only question in this case is whether the plaintiff is, by his conduct, precluded from denying the authority of the Brandon Grain Co. to authorise the sale of the grain in question and to receive the proceeds.

The carload of wheat in question was shipped from Ralston, Manitoba, consigned to the order of the defendants on November 13, 1917. On the same day plaintiff says he requested one Palmer to write to the defendants and advise them of the shipment. Palmer, who was called by the plaintiff, stated in his evidence that he wrote to the defendants as requested but the trial Judge has found that he in fact wrote to the Brandon Grain Co. The letter was not produced at the trial but secondary evidence was given of its contents. Peacock, the president of the Brandon Grain Co., says that the letter stated he (Palmer) was getting the car from Stewart and getting him (Facey, the manager of the Brandon Grain Co.) to handle the car. On November 14, the Brandon Grain Co. wrote to the defendants as follows: "We have been advised to-day that C.N.R. car of wheat No. 70958 shipped from Ralston was billed to your order in place of ours, and we shall be glad if you will watch this car and advise us the day that it is inspected." The car was delivered to the Port Arthur Elevator Co. on November 27, the out-turn being 894 bushels of No. 2 northern wheat and 1,105 pounds of screenings. The defendant was advised of the out-turn and on November 29 notified the Brandon Grain Co. Peacock telephoned the out-turn to the store at Terence run by a brother of the plaintiff and later the plaintiff called Peacock on the telephone and asked him about the grain. Plaintiff said there must be some mistake as "the car had been filled up about the wheat line and they generally run over a thousand bushels." Peacock replied that he had heard nothing about the shortage but would send papers up for the plaintiff to sign, making a claim, which he subsequently did, but as there was some mistake in them the plaintiff did not sign them.

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Plaintiff further says that Peacock told him if he would send the shipping bill in to them there would not be any storage on the wheat. Plaintiff also says, "I did not say anything about that for I was not going to hold the wheat and storage did not matter." The fact is that the price of wheat in 1917 was fixed and there was no object in holding it.

About a week after the telephone conversation on December 18, 1917, plaintiff went to Brandon, and he and his brother visited the office of the Brandon Grain Co. Plaintiff's account of the interview he there had with the officers of the Brandon Grain Co. is as follows:—

Q. Tell us what occurred with Peacock? A. He (his brother) introduced me to Mr. Peacock when he came in there and I shewed him these papers where the mistake was and he turned them over to Mr. Facey and introduced him to me at the time and he took these papers and re-wrote them again. Q. Did you sign them then? A. I signed the paper.

The paper which he signed is on the letter paper of the Brandon Grain Co. and reads as follows:—

I hereby certify that I loaded into C.N.R. car No. 70958 not less than 1,000 bushels of wheat and I only received out-turns for 894 bushels. I shall be glad if you will look into this and see if you can recover the difference from the Canadian Northern.

Declared before me at the City of Brandon in the Province of Man. this 18th day of Dec. 1917.

A. Stewart.

A. J. Abbey, Commissioner.

Plaintiff says Facey asked him to leave the bill of lading, which he did.

On the same day the Brandon Grain Co. forwarded it together with the declaration to the defendant with the following letter:—

Messrs. Jas. Richardson & Sons,
Winnipeg, Man.

We enclose herewith bill of lading covering car No. 70958 along with affidavit as to shortage. We have made settlement for this car and shall be glad if you will forward settlement by return.

Brandon Grain Co., Ltd.,
per F.

Acting on these instructions, the defendant sold the wheat and remitted the proceeds to the Brandon Grain Co., which shortly afterwards made an assignment for the benefit of its creditors. The statement in the above letter that the Brandon Grain Co. "have made settlement for this car" was false, the plaintiff never having received a dollar.

The plaintiff had been farming for 25 years and during the last ten years had been shipping grain by carloads, and was familiar with the methods of inspection, grading, storage, etc. He admits that he intended to sell the wheat in question promptly. He never communicated in any way with the defendant until after the Brandon Grain Co. had assigned. Palmer, whom he says he requested to write to the defendant, wrote to the Brandon Grain Co. Plaintiff never asked Palmer if he had heard from the defendant and he himself never at any time received any communication from the defendant. Plaintiff had seen circulars of defendant the fall before, but admits there was nothing on them about the Brandon Grain Co. representing the defendant. He further admits that no one connected with the Brandon Grain Co. had ever told him that the latter company was the agent of the defendant, nor does he anywhere in his evidence say that he believed the Brandon Grain Co. was such agent. When the Brandon Grain Co. advised him of the out-turn, one would naturally think he would at once inquire what that company had to do with his grain. He admits he made no inquiries but he visited their office and signed the declaration in connection with the alleged shortage. He also took with him his bill of lading and handed it over to the Brandon Grain Co. on request. He says no reasons were given for the request, but he supposed the bill of lading would be required in connection with his claim for shortage. The trial Judge has found, and his finding is fully supported by the evidence, that the defendants acted in good faith in paying over the proceeds of the car to the Brandon Grain Co.

I was at first strongly impressed with the view that the plaintiff was estopped by his conduct from denying the agency of the Brandon Grain Co., but a consideration of the provisions of the Dominion Grain Act has convinced me that there is no estoppel in this case.

By the Canada Grain Act, 2 Geo. V., 1912 (Dom.), ch. 27, sec. 2, s-s. (t), a "commission merchant" is defined as follows: "'Commission merchant' means any person who sells grain on commission." Under the provisions of secs. 210 to 213 any person desiring to carry on the business of grain commission merchant is required to make application to the Board of Grain Commissioners for Canada for a license to sell grain on commission and before such license

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is issued a bond is required to be given for the benefit of persons entrusting such commission merchant with consignments of grain to be sold on commission.

The Brandon Grain Co., to the knowledge of the defendant, had no such license and, therefore, could not legally sell the grain in question as the agent of the plaintiff on the terms of receiving a commission.

Moreover, the statement in the letter from the Brandon Grain Co. to the defendant of December 18, above quoted, that the Brandon Grain Co. "have made settlement for the car" would be notice to the defendant that any agency which may have previously existed in reference to the car had ceased and that the Brandon Grain Co. had purchased the car and were claiming the proceeds as such purchaser.

The Brandon Grain Co. had, however, a track buyer's license. A "track buyer" under the Canada Grain Act "means any person, firm or company who buys grain in car lots on track." They also are required to file a bond and take out a license. By sec. 219 of the Act a track buyer is required to deliver to the vendor of each carload lot of grain a grain purchase note, retaining himself a duplicate thereof, which note shall bear on its face the license season, the license number of such track buyer's license, the date and place of purchase, the name and address of such track buyer, the name and address of the vendor, the initial letter and number of the car purchased, the approximate number of bushels and kind of grain contained therein and the purchase price per bushel in store at Fort William, Port Arthur or other destination; such grain purchase note shall also express upon its face an acknowledgement of the receipt of the bill of lading issued by the railway company for such carload shipment, the amount of cash paid to the vendor in advance as part payment on account of such car lot purchase, also that the full value of the purchase money shall be paid to the vendor immediately the purchaser shall have received the grade and weight certificates and the railway expense bill. Every such grain purchase note shall be signed by the track buyer or his duly appointed agent, and the vendor shall indorse his acceptance of the terms of the sale thereon as well as his receipt for payment of the money advanced him on account of such carload lot sale.

Now, there are only two ways in which the Brandon Grain Co. could have legally purchased the grain in question: (1) as licensed track buyers; (2) by paying the full purchase price to the vendor before the time of the receipt of the grain, in which case under sec. 218 (3) a track buyer's license is not necessary.

Before paying over the proceeds of the car to the Brandon Grain Co., it was clearly the duty of the defendant to require that company to furnish evidence of the truth of their statement that they "had made settlement for the car." If the Brandon Grain Co. had purchased the car as track buyers then the grain purchase note would be the evidence of the purchase. On the other hand, if they had paid for the car in full before the receipt of the grain, there should have been an assignment of the interest of the plaintiff in the bill of lading. The defendant accepted the statement of the Brandon Grain Co. without any inquiry and without demanding any evidence of title. I think, under these circumstances, they cannot resist the claim of the plaintiff.

I would dismiss the appeal with costs.

Dennistoun, J.A.

DENNISTOUN, J.A.:—The plaintiff consigned a car of wheat to the defendants. The bill of lading shewed the plaintiff as shipper. There were no indorsements or assignments to shew an interest in any other person. The defendants received the wheat and sold it. Instead of accounting to the plaintiff for the proceeds they sent the money, $1,854.81, to the Brandon Grain Co. The plaintiff did not receive it and the Brandon Grain Co. being insolvent, the plaintiff has recovered judgment for the amount against the defendants.

The defendants appeal, and it is clear that the onus is upon them of satisfying the Court that they were justified in making payment to the Brandon Grain Co., and in disregarding the shipper.

The trial Judge finds, and there can be no doubt upon the evidence, that the defendants were imposed upon by the Brandon Grain Co., that there was lying, fraud, and possibly theft which induced the defendants to treat the Brandon Grain Co. as owners of the wheat and as such entitled to the proceeds of the sale.

The defendants urge that the plaintiff Stewart and themselves being innocent parties it was Stewart who made it possible for

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the Brandon Grain Co. to deceive the defendants and that the plaintiff should suffer the loss in accordance with the well-known rule.

In support of this contention, the defendants say they had no communication with the plaintiff until after the money had been remitted to the Brandon Grain Co., and that they received all the instructions upon which they acted, together with the bill of lading, which enabled them to deal with the grain, from the Brandon Grain Co., and had, therefore, a right to assume that they were entitled to the purchase-price of the wheat.

The Brandon Grain Co. had written to the defendants, falsely and fraudulently, that the grain had been consigned to the defendants by the shipper in error, that the shipment was intended for the Brandon Grain Co. When they sent the bill of lading to the defendants they falsely said that they had settled for the grain. The defendants no doubt believed these statements. They were closely connected with the Brandon Grain Co., held a substantial portion of its stock, received monthly balance sheets of its affairs, and represented it on the Winnipeg Grain Exchange. These assurances were apparently sufficient to satisfy the defendants that the Brandon Grain Co. should receive the proceeds of the grain when sold and they remitted the money without any enquiry as to why the bill of lading shewed no indication of a transfer of the shipper's interest, or why it was not accompanied by some document to indicate that the shipper had parted with his right *ex facie documenti* to receive the sale price.

The defendants rely on the receipt of the bill of lading as in itself sufficient. They quote the statute, 6 Geo. IV., 1825, ch. 94, sec. 2, which provides:—(See judgment of Perdue, C.J.M. *ante* page 629.)

Assuming for the purpose of the argument that this statute passed in England almost 100 years ago is applicable to and in force in the Province of Manitoba, the evidence shews clearly that it does not affect the case at bar.

The word "intrusted" has been discussed in many cases and held to mean much more than mere delivery of possession of a document. In this case the Brandon Grain Co. were never "intrusted" with the bill of lading for any such purpose as they put it to, nor was the document in order to enable them to use it as they did.

It was left with them for the purpose of having a claim made upon the railway company for a shortage in the grain which was alleged to have taken place in transit. It was not intended by the plaintiff that the grain should be sold at that time and it was not intended to give any assignment of the purchase-price to the Brandon Grain Co.

The statute does not apply because the bill of lading was not "intrusted" for the purpose claimed, and for the much stronger reason that its possession did not indicate that the Brandon Grain Co. had acquired any right to receive the proceeds of the sale. Upon its face, it shewed that Stewart, the plaintiff, was the shipper and that he had neither endorsed it, nor attached a draft to it, as he would have done had he intended to transfer to the Brandon Grain Co. his right to the money: *Johnson* v. *Credit Lyonnais*, 3 C.P.D. 32; *Cole* v. *N. W. Bank* (1875), L.R. 10 C.P. 354; *Phillips* v. *Huth* (1840), 6 M. & W. 572, 151 E.R. 540; *Hatfield* v. *Phillips* (1842), 9 M. & W. 647, 152 E.R. 273.

There is no question here as to the validity of the sale which the consignees made upon receipt of the bill of lading nor as to the title of any of the parties to the grain itself. We are concerned only with the payment of the money after the grain was sold.

As I understand the mercantile practice, when a shipper desires to part with the right to receive the price of goods which he consigns, he treats the bill of lading as the document which, when in order, carries title to the goods and passes that title to others, but the right to collect the debt is a chose in action which is distinct from and independent of the delivery of the goods and passes only by assignment. The shipper, therefore, when desirous of assigning his right to the price does so by attaching to the bill of lading a draft which indicates the payee, or by endorsing the bill of lading so as to shew that he has parted with his right to payment as well as to the title to the goods, or by executing an independent memorandum of assignment, and until the consignee receives notice that the shipper has assigned his right to the price the consignee remits it to any other party at his peril.

I can find no authority that mere possession of a bill of lading in the hands of a person who has intervened between the original shipper and the consignee and is in no way identified with the transaction except by possession of the document can give him

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any authority to give a valid discharge for the money payable by the consignee: Daniel on Negotiable Instruments, 6th ed., page 1953; Bennett on Bills of Lading (1913), pages 19-20; Porter on Bills of Lading, sec. 496.

The defendants were deceived by the Brandon Grain Co., but that was not due to any laches or negligence on the part of the plaintiff. The defendants relied on the letter sent them by the Brandon Grain Co. to the effect that they had settled for the grain. An examination of the documents forwarded by the Brandon Grain Co. to the defendants would have disclosed the fact that there was no evidence to corroborate this false statement, and that upon the face of the bill of lading the plaintiff had done nothing to divest himself of his right to the money which the document clearly shewed to be his. I concur with the finding of the trial Judge that the defendants relied on the statements of their business associates the Brandon Grain Co. in which they were principal shareholders with a representative, Mr. Davies, of their firm, on the board of directors, and another representative Mr. Withers, making regular inspection of the company's books of account. Had the defendants been dealing with strangers they would have scrutinized the documents submitted and declined to remit the money in their hands until the proper evidences of assignment were produced. The loss which has occurred was not due to the acts of Stewart but to their own misplaced confidence: Blackburn, J., in *Cole* v. *N. W. Bank*, L.R. 10 C.P. 354, at pages 372, 373.

I would dismiss the appeal with costs.

Haggart, J.A.

HAGGART, J.A., concurred in the result.

Appeal dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

CONTRACTS (§ II D—145)—AGREEMENT SET OUT IN LETTER—RIGHT TO CUT HAY IN RETURN FOR KILLING GOPHERS—INTERPRETATION—SALE OF INTEREST IN LAND—SUBSEQUENT SALE OF LAND—RIGHTS OF PURCHASER.

An agreement set out in a letter giving a person the right to cut the hay on certain lands in return for which he is to kill the gophers on the said land, entitles such person to the exclusive enjoyment of the crop growing on the land during the proper period of its full growth and until it is cut and carried away, and is an agreement for the sale of an interest in land, and possession having been taken for the purpose of carrying out the terms of the agreement, a purchaser of the land from the owner, takes subject to such interest.

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APPEAL by plaintiff from the trial judgment in an action for the price of hay wrongfully cut and removed from certain lands. Reversed.

D. Buckles, for appellant; *C. E. Bothwell*, for respondent.

HAULTAIN, C.J.S.:—In April, 1918, the plaintiff entered into an agreement with one F. J. Scott, the terms of which are set out in the following letter written by Scott to him:

Mr. R. B. Kirk, April 26th, 1918.
Waldeck, Sask.

Dear Sir:—

You are hereby authorised to cut the hay on the West-Half Section 13-17-13-3, also the East-Half Section 21-17-13-3 and South-Quarter and South-Half of North-West Quarter Section 1-17-13-3.

It is understood that in return you are to kill the gophers on said land.

No one has any right to the hay privilege and you may use this letter as your authority for such purpose.

Yours very truly,
(Sgd.) F. J. Scott.

At that time, and thereafter up to the date of the trial of this action, Scott was the registered owner of the land in question.

In pursuance of the terms of the agreement the plaintiff entered on the land and poisoned the gophers.

On July 26, 1918, the defendant purchased the land from Scott under an agreement of sale, which gave him immediate possession of the land. According to the evidence, the defendant was informed in May of the same year by the plaintiff's hired man, who was on the land and engaged in poisoning gophers, that the plaintiff had an agreement for the hay in consideration of destroying the gophers. Shortly after the defendant had entered into the agreement with Scott, the plaintiff notified him that the hay belonged to him and ordered him not to cut it, but the defendant claimed the right to the hay under his agreement, and went and cut it. The plaintiff thereupon brought this action for the value of the hay.

On the trial of the action the trial Judge found in favour of the defendant, and gave the following reasons for his decision:

As neither party here has sought or secured any protection or advantage from registration, they are left to their common law remedies. The defendant under his contract had a right to possession and to cut the hay. He was the first to enter into possession for the purpose of cutting the hay, and he did cut and take possession of the same. I am of the opinion that, under the circumstances, while the plaintiff may have a claim against Scott, he has none as against the defendant. There will therefore be judgment in the defendant's favour with costs on the low scale of the King's Bench tariff.

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The plaintiff now appeals.

The whole case seems to me to depend on the nature of the right or interest of the plaintiff under the letter above referred to. In my opinion, the transaction between the plaintiff and Scott gave the plaintiff an interest in land which involved the right to enter upon the land and to cut the hay growing on it.

Grove, J., says, in *Marshall* v. *Green* (1875), 1 C.P. 35, 45 L.J. (C.P.) 153, at page 156:—

> In all cases of this description the nature of the bargain is to be considered and many of the cases may be reconciled by keeping in view what was the object which the parties contemplated.

In this case it must have been contemplated by the parties that the grass or hay "was to remain on the land for the advantage of the purchaser" (Kirk.), "and were to derive benefit from so remaining."

The decision in *Crosby* v. *Wadsworth* (1805), 6 East 602, 102 E.R. 1419, is to the effect that the purchaser of a crop of grass, unripe, and which he is to cut, takes an exclusive interest in the land before severance, and, therefore, the sale is a sale of an interest in land. See also *Carrington* v. *Roots* (1837), 2 M. & W. 248, 150 E.R. 748; *Scorell* v. *Boxall* (1827), 1 Y. & Jerv. 396. Note to *Duppa* v. *Mayo* (1463), 1 Wm. Saunders 275 at page 276, 85 E.R. at page 343.

As between these parties, then, who are both entitled to equitable interests in the land in question, the doctrine as to privity of a purchaser for value without notice does not apply. In such a case as this, the legal rule *nemo dat qui non habet* applies, and the defendant, having only an equitable interest in the land, takes subject to all other equitable interests which are prior to his in point of time. *Qui prior est tempore potior est jure.* *Cave* v. *Cave* (1880), 15 Ch.D. 639.

The appeal should, therefore, be allowed with costs, and the case be referred to the trial Judge for the purpose of assessing damages.

Newlands, J.A.

NEWLANDS, J.A.:—Plaintiff alleges that one F. J. Scott was the owner of certain lands; that on April 26, 1918, by agreement in writing, he sold to plaintiff all the hay on said land; that defendant on or about August 1, 1918, entered upon the said premises and removed the hay from a part thereof.

The defendant admits that Scott was the owner of the land, but says that he did on July 26, 1918, purchase the same from Scott under an agreement of sale, and that he was entitled to the possession of the land and the hay thereon.

The agreement in writing under which the plaintiff claims is as follows: (See judgment of Haultain, C.J.S., *ante* page 645.)

This document was not registered, neither was the agreement of sale to defendant. Plaintiff had gone upon the land to kill the gophers, but he had not entered for the purpose of cutting the hay, and defendant cut the hay before plaintiff attempted to do so.

On the part of the plaintiff it was contended that the agreement between himself and Scott gave him an interest in land. I am of opinion that this is correct, if the agreement became effective. *Crosby* v. *Wadsworth* 6 East 602, 102 E.R. 1419; *Warwick* v. *Bruce* (1813), 2 M. & S. 205, 105 E.R. 359. But though this agreement would give him an interest in land, to be effective it must be either registered under the Land Titles Act, or, if it is a lease for a term less than 3 years, which in effect it is, the plaintiff must have gone into possession. Neither of these things happened.

The section of the Land Titles Act, 8 Geo. V. 1917 (2nd sess.), ch. 18, is as follows:

> 58.—(1) After a certificate of title has been granted no instrument shall until registered pass any estate or interest in the land therein comprised, except a leasehold interest not exceeding 3 years where there is actual occupation of the land under the same, or render such land liable as security for the payment of money except as against the person making the same.

Now the plaintiff's agreement not having become effective, the defendant, under his agreement, entered and cut the hay. At best both estates were equitable estates. Neither had become effective under the Land Titles Act, but, as defendant had entered and cut the hay before plaintiff's agreement had any effect, I think that he got thereby the better equity.

If the plaintiff could have obtained a good legal title by entering and cutting the hay, I see no reason why defendant, who bought the land, without notice of the plaintiff's claim, would not, by entering and cutting the hay, obtain in himself as good a legal title thereto. If, therefore, the defendant obtained the

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legal title to the hay, the plaintiff has no action against him, but is relegated to his claim against Scott for breach of contract.

The appeal should, therefore, be dismissed.

LAMONT, J.A.:—At all times material to the questions raised in this action, one F. J. Scott was and still is the owner of the South half of the North-west quarter of 1-17-13-W3rd. In April, 1918, the said Scott gave to the plaintiff the following letter: (See judgment of Haultain, C.J.S., *ante* page 645.)

It is not disputed that the plaintiff entered on the said lands and poisoned the gophers. On July 26, 1918, before any hay had been cut, the defendant purchased the said land from Scott under an agreement of sale, under seal, by virtue of which he was entitled to immediate possession. A few days later the plaintiff saw the defendant and told him that the hay belonged to him, and notified the defendant not to cut it. The defendant claimed the hay as his own as he was now the owner of the land, and he immediately proceeded to cut it and convert it to his own use. The plaintiff then brought this action for the value thereof.

The trial Judge held that, as neither party had secured any protection from registration, they were left to their respective common law rights, and as the defendant had first entered into possession for the purpose of cutting the hay, and did cut it, he was entitled to it. From that judgment the plaintiff now appeals.

The contention of the plaintiff is, that the letter of April 26 gave him an interest in the land in question which was not determined by the defendant's agreement of sale. While the defendant's contention is, that the letter gave the plaintiff nothing more than a license, revocable by the grantor, and which was revoked by a sale of the land.

It is necessary, in my opinion, in dealing with this appeal to ascertain, in the first place, what right Scott and the plaintiff understood should be conferred by the letter of April 26, and the legal category under which such right falls. The letter, in my opinion, was understood to give, and did give, the plaintiff the right to enter upon the said land for the purposes of the agreement, to cut at the proper season all the hay growing thereon, and to take the same away. Does that right amount to an interest in land, a sale of goods, or a mere revocable license?

At common law, an agreement for the sale of a standing crop of hay, then growing, was considered a sale of an interest in land and not of chattels. This was held in *Crosby* v. *Wadsworth*, 6 East 602, 102 E.R. 1419. In that case the plaintiff, on June 6, 1804, entered into a parol agreement with the defendant for the purchase of a standing crop of mowing grass, then sown in a close of the defendant's, for the sum of 20 guineas. The grass was to be mowed and made into hay by the plaintiff, but the parties did not fix upon any time at which the mowing was to be begun. On July 2, following, the defendant notified the plaintiff that he would not allow him to have the hay, and he sold the hay to one Carver for 25 guineas. In an action for damages against the defendant, Lord Ellenborough, C.J., said, (6 East at page 611, 102 E.R. at page 1423):

> I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least, an interest concerning lands.

This decision was followed in numerous cases. See Benjamin on Sales, 7th ed., page 117 *et seq.*

The case is authority for the proposition that the agreement herein set out by which the plaintiff bought the hay entitled him to "the exclusive enjoyment of the crop growing on the land during the proper period of its full growth and until it was cut and carried away," and that such an agreement is an agreement for the sale of an interest in land.

In *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405, it was held by the Privy Council that a license to cut timber, granted under an Act which gave the licensee a right to the exclusive possession of the lands on which the timber was growing, conferred an interest in land. Lord Davey, in giving the judgment of the Court, at page 408, said:

> If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.

This decision was followed by the same Court in *McPherson* v. *Temiskaming Lumber Co.*, 9 D.L.R. 726, [1913] A.C. 145.

The Manitoba Court of Appeal has considered the effect of a license to cut hay on three occasions. In *Fredkin* v. *Glines* (1908), 18 Man. L.R. 249, it was held, that a right to cut hay,

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given at a time when the hay was grown and about ready to cut, to a person who was to cut it and remove it the same season, was a sale of goods.

In *Decock* v. *Barrager* (1909), 19 Man. L.R. 34, the defendant by an agreement dated November 6, 1907, obtained from the Hudson's Bay Company, a permit "to cut and take the hay" from certain described lands for the season of 1908. In January, 1908, the Company leased a portion of the land to Decock, who, during the season of 1908, cut part of the hay. The defendant took away a portion of the hay cut by the plaintiff, and the plaintiff brought an action for damages. The Court held, that the defendant's permit gave him an interest in the land and that he was entitled to the hay, including that cut by the plaintiff. In giving the judgment of the Court, Perdue, J.A., at page 37, said:

> The hay permit given by the Hudson's Bay Company to the defendant gave him the exclusive right to cut the hay which would grow upon the lands mentioned in it during the season of 1908. This was more than a mere license; it was a *profit à prendre*; *Duke of Sutherland* v. *Heathcote*, [1892] 1 Ch. 483. It was an actual interest in land, and gave the defendant a right to maintain trespass for any acts of violation of his enjoyment of the crop.

This decision was followed in *Sharpe* v. *Dundas* (1911), 21 Man. L.R. 194 at page 195, where the Court distinguished the case of *Fredkin* v. *Glines*, *supra*, on the ground that:

> At the time the permit was given, there was no actual growing crop of grass which was destined to be cut and made into hay. There was then no grass or hay attached to or forming part of the land which was to be severed under the contract of sale.

Prior to the Sale of Goods Act, R.S.S. 1909, ch. 147, it was well settled that *fructus naturales*, such as grain, fruit, growing trees, were part of the soil before severance, and an agreement, therefore, vesting an interest in them in the purchaser while still growing was an interest in land, coming within sec. 4 of the Statute of Frauds. But if the interest was not to be vested until they were to be converted into chattels by severance, then the agreement was considered an executory agreement for the sale of goods. Benjamin on Sales, 7th ed., 125.

By the Sale of Goods Act, R.S.S. 1909, ch. 147, "goods" are defined as follows:

> 9. "Goods" includes all chattels personal other than things in action or money. The term includes emblements industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

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In order to bring the agreement in question within this definition, it must be held that the hay was attached to or forming part of the land, and that the contract of sale provided for its severance. There is no doubt that the agreement did provide for the severance of the hay by the plaintiff, but, in my opinion, as the hay in question was not in existence at the time the agreement was entered into, it cannot be said to be a thing "attached to or forming part of the land" at that time.

In view of the definition and of the above authorities, I am of opinion that the right to cut the hay, conferred upon the plaintiff by the letter of April 26, was neither a sale of goods or a mere personal license determinable by a sale of the land. It gave to the plaintiff the exclusive enjoyment of the hay and such exclusive possession as was necessary for the protection of the rights he purchased; it was, therefore, an interest in land. That interest, under *Glenwood* v. *Phillips*, *supra*, amounted to a lease. Pursuant to that lease he entered upon the land to carry out the terms thereof. The plaintiff knew this, for he does not deny the testimony given by William Kozella, the plaintiff's hired man, who says he had a conversation with the defendant on the land about the end of May while he was poisoning gophers, in which he told the defendant that Kirk was to have the hay for poisoning the gophers. Whether the defendant had or had not notice of the plaintiff's claim is, in my opinion, immaterial. The undisputed fact is that the plaintiff went upon the land for the purpose of carrying out the terms of his lease; namely, to poison the gophers. That, in my opinion, is taking possession, although the hay was not then ready to cut. In buying from Scott, therefore, all the defendant could get was just what Scott had to sell, which was the land subject to the plaintiff's interest.

As between the plaintiff and defendant, the plaintiff, in my opinion, was entitled to the hay.

I would, therefore, allow the appeal with costs, and refer the matter back to the trial Judge to assess the damages.

ELWOOD, J.A., concurred with HAULTAIN, C.J.S. Elwood, J.A.

Appeal allowed.

B. C.

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ROWLANDS AND JOHNSTONE v. HOLLAND.

British Columbia County Court, Swanson, Co. Ct. J. September 3, 1920.

STATUTES (§ II D—125)—SOLDIER SETTLEMENT ACT, 9-10 GEO. V. 1919, CH. 71 (CAN.)—CONSTRUCTION—PROSPECTIVE NOT RETROSPECTIVE.

Section 61 of the Soldier Settlement Act, 9-10 Geo. V. 1919 (Can.), ch. 71, which forbids the enhancing of the price of land sold to the Crown, by the adding of commission fees by agents, or the collection of such commissions, is not retrospective, and does not deprive a real estate agent of his right to collect a commission on a sale completed before the Act came into force.

[*Reg.* v. *Vine* (1875), L.R. 10 Q.B. 195, 44 L. J. (M.C.) 60, distinguished.]

Statement.

ACTION by a firm of real estate agents to recover balance due on co mision for the sale of certain real estate to a returned soldier, the commission having been earned before the passing of the Soldier Settlement Act. Judgment for plaintiff.

P. McD. Kerr, for plaintiff; *R. M. Chalmers*, for defendant.

Swanson, Co.Ct.J.

SWANSON, CO. CT. J.:—Plaintiffs are real estate agents at the City of Kamloops in this county, and defendant was the former owner of the lands in question, situate about two miles from Pritchard, B.C. In April, 1919, Holland listed his farm for sale with plaintiffs at price of $6,000. On May 11, 1919, the plaintiffs procured a purchaser in the person of Chas. Coles, a returned soldier, for the lands at price named. An "option" (as Johnstone one of the plaintiffs calls it), was then and there on May 11, 1919, signed by both Holland and Coles, concluding the agreement to purchase at price named. Johnstone said he then considered that his work as far as the sale was concerned was completed, and I think it was. The usual commission is 5% on sale of farm property. Plaintiffs were entitled to their commission $300, $200 of which was subsequently paid by cheque of Holland leaving balance $100 for which action was entered herein. The deed of conveyance of the property was dated and executed June 13, 1919, and application to register same in Land Registry Office was made June 28, 1919. Coles was being financed by the Soldier Settlement Board, who actually paid the purchase price although the so-called "option" or agreement of sale was made between Coles and Holland. The title passed under deed of conveyance June 13, 1919, from Holland direct to his Majesty the King, in the right of the Dominion of Canada as represented by the Soldier Settlement Board of Canada. The summons herein was issued July 9, 1919.

The chief, and indeed the only serious, defence is that payment of commission in question is illegal under sec. 61 of the Soldier Settlement Act, 9-10 Geo. V. 1919 (Dom.), ch. 71, which was assented to July 7, 1919. This Act was not pleaded in the original dispute note, which was amended at the trial permitting defendant to plead the Soldier Settlement Act. Mr. Kerr on behalf of the plaintiffs argues that this section can have no retrospective application to the plaintiffs' right of action, which was a thing complete in itself, before the Act of 1919 came into operation. There is nothing in the Act to make this section *expressly* retrospective. The argument on behalf of defendant is that the Act being framed in the public interest this section must be construed as being retrospective in force, as a protection to the public. I have considered the many authorities with much care and I am quite satisfied that the defence cannot be maintained.

At the time Johnstone affected sale of Holland's place to Coles the Soldier Settlement Act of 7-8 Geo. V. 1917, ch. 21, was in force. This Act did not contemplate the purchase of the land on which the soldier settler was to be settled by the Board, but by the soldier. Sec. 5 states: "The Board may *loan* to a settler, and etc." The soldier acquired title to the land and the Board "loaned" him money to establish him on the land. The purport of the Act of 1919 is essentially different in practice. Under the latter Act the Board "acquires, holds, conveys" title to the land (see sec. 4.) The Board then "*sells*" the land to the soldier-settler under an agreement very liberal as to terms of repayment. See Part 2, secs. 16 and 18.

The money to purchase such lands is public money, the money of the Canadian Government.

The Act of 1919 seeks to protect the Crown against an excessive price for the land. Section 61 forbids the enhancing of the price to the Crown by the adding of commission fees by agents. That is no doubt the object aimed at, the protection of the public against such charges.

Section 61. (1) No person, firm or corporation shall be entitled to charge or to collect as against or from any other person, firm or corporation any fee or commission or advance of price for services rendered in the sale of any land made to the Board, whether for the finding or introducing of a buyer or otherwise.

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(2) No person, firm or corporation shall pay to any other person, firm or corporation any such fee or commission or advance of price for any such services.

(3) [Board may require any person selling land to furnish affidavit on form E on Schedule.]

(4) (*a*) (Provides for consequences of payment by or to any person of fee or commission). (*b*) (Fee or commission or advance in price paid may be recovered by the Board by suit, etc.)

62. (Provides fine and imprisonment for any wilful breach or non-observance of any provision of Act, where no penalty specially provided.)

All the evils aimed at are nominally present here. The sole point, however, is, does the above section 61 apply to a transaction which was complete, and in respect to which a legal right in the plaintiffs had become vested by law as it stood before the passing of this Act? Has this section a retrospective effect to declare illegal the transaction in question, one perfectly legal before this Act, and to summarily deprive plaintiffs of their legal right to collect their commission, which they had undoubtedly earned in full? I do not think this Act can be so construed.

Dr. Lushington in "The Ironsides," (1862), 31 L. J. (P.) 129 at page 130, said:—

> As a general rule all statutes should be construed to operate prospectively and especially not to take away or affect vested rights; but true as these rules are —indeed admitted on all hands as founded on common justice and authority— no one denies the competency of the Legislature to pass retrospective statutes if it thinks fit, and many times it has done so. Bearing in mind this general principle, the question must always be what intention has the Legislature expressed in the Statute to be construed? The presumption is that it is *not* retrospective: a presumption which is more or less strong, according to the circumstances of each particular case. This doctrine indeed seems to have operated upon the mind of Parker, B., when he assented to the opinion of the majority of the Judges in the case of *Moon* v. *Durden* (1848), 2 Exch. 22, 154 E.R. 389, and as I think, one of the circumstances entitled to most weight is the consideration whether the Statute is remedial or not. I certainly assent to the opinion of the Court of Exchequer in the case of *Moon* v. *Durden*, and the other cases cited. . . . The construction must depend upon the words of the particular Statute itself to be construed, and the special nature of the case.

In *Gardner* v. *Lucas* (1878), 3 App. Cas. 582 at p. 601, Lord O'Hagan said: "Unless there is some declared intention of the Legislature—clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective and is not retrospective." Bowen, L.J., in *Reid* v. *Reid* (1886), 31 Ch.D. 402 at 408, said: "The particular rule of construction which has been referred to,

but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim: '*Omnis nova constitutio futuris temporibus formam imponere debet non præteritis*' (Lord Coke Institutes, 2 Inst. 292), that is, that, except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights."

Lord Watson in *Young* v. *Adams*, [1898] A.C. 469, said at page 476:

It does not seem to be very probable that the Legislature should intend to extinguish by means of retrospective enactment, rights and interests which might have already vested in a very limited class of persons, consisting so far as appears, of one individual, *viz.*, the respondent. In such cases their Lordships are of opinion that the rule laid down by Erle, C.J., in *Midland Ry. Co.* v. *Pye* (1861), 10 C.B. (N.S.) 179, 142 E.R. 419, ought to apply. They think that in a case like the present the Chief Justice [of N.S. Wales] was right in saying that a retrospective operation ought not to be given to the statute "unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment." The ratio is equally apparent when a new enactment is said to convert an act wrongfully done into a legal act, and to deprive the person injured of the remedy which the law then gave him.

Erle, C.J. in *Midland Ry. Co.* v. *Pye*, 10 C.B. (N.S.), 179, 142 E.R. 419, said at page 191:—

Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the Legislature that it should be so construed is expressed in clear plain and unambiguous language; because it manifestly shocks ones' sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law; and whenever it is possible to put upon an Act of Parliament a construction not retrospective, the Courts will always adopt that construction.

The one case on the other side of the line which I have considered very carefully is *Regina* v. *Vine* (1875), L.R. 10 Q.B. 195, 44 L.J. (M.C.) 60. In this case the question was whether the enactment that "every person convicted of felony shall forever be disqualified from selling spirits by retail" affected a person convicted of felony *before* the passing of the Act, the Court held that it *did* affect him, and rendered his license void: "The object of the enactment," said Cockburn, C.J., at page 199, "is not to punish offenders, *but to protect the public* against public-houses in which spirits are retailed being kept by persons of doubtful character." And at page 200, he said: "On looking at the Act,

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the words used seem to import the intention to protect the public against persons convicted in the past as well as the future." Lush, J., however, dissented on the ground that the intention of the Act was not clear. Mellor, J., and Archibald, J., in brief judgments, agreed with the Chief Justice in holding the Act retrospective. Mr. Poland for the appellant quoted in the argument the above words of Erle, C.J., in *Midland Ry. Co.* v. *Pye*, *supra*. The old legislation and new enactment are set forth "in extenso" in the Law Journal report at page 62.

The Chief Justice was apparently impressed with the difference in the language of the two opposing sections. At page 63 he says: "Looking to the purpose of the Act, I come to the conclusion that the words used import that the Legislature intended to *protect the public* against persons convicted of felony before the Act as well as after, and that the words are, in fact, synonymous with the expression 'convicted felon.'"

The language seems to be precise and positive, and the only question the magistrate had to determine was, whether this person was convicted of felony. In the preceding Acts we have language *quite different, and pointing to the future*, but here, with the former statutes before him, the person who framed this Act has *omitted those words*, and the Legislature has adopted the section with these omissions. They might have made exceptions to meet cases of hardship but they have not done so. See also Hardcastle, 3rd ed., pages 353, 354, 357, and also Maxwell, 3rd ed., pages 298, 299, 310. The most recent English case on question of "retrospective effect of a new Act" is *In re Hale's Patent*, [1920] W.N. 295, decided July 23, by Sargant, J. The Attorney-General (Sir Gordon Hewart), argued that the Patents and Designs Act 1919, 9-10 Geo. V. ch. 80, sub-secs. 8, 21, was not retrospective.

Sargant, J., held:

that the Act of 1919 had not only altered the tribunal to which matters under sec. 8 had to be referred, but had also altered the rights of the parties—both the patentee and the Crown—and as to matters which had taken place before the new Act came into operation sec. 8 did *not* apply, but they were to be dealt with in accordance with the previously existing law, whereas those matters which occurred after the time when the Act of 1919 came into operation were to be dealt with under that Act.

Stuart, J. (in Appellate Division of Supreme Court of Alberta), in *De Roussy* v. *Nesbitt*, *ante* page 514, dealing with this subject

says: "In a case of doubt, which this certainly is, I think the proper course is to hold against the retroactivity of the Act." See also *Hudson Bay Co.* v. *Dion* (1917), 38 D.L.R. 477, 28 Can. Cr. Cas. 265, 52 Que. S.C. 69; 27 Halsbury, pages 159, 160 (paras. 305 & 306).

I have been shewn the copy of a judgment by Ruggles, J., of the County Court of Vancouver, dealing with sec. 61 of the Act in question, in which the Judge held that the section has not a retrospective (or retroactive) effect. *Wooley* v. *Smith*, No. 852-19, decided 7th November, 1919.

It is clear to my mind, notwithstanding *Reg.* v. *Vine* (above mentioned), that I must hold sec. 61 of the Act in question has no retrospective effect so as to destroy the right of action which plaintiffs possessed under the old law, and which, I think, has not been affected by the new enactment.

On the merits it is quite clear that plaintiffs earned their commission, $300, that they never agreed to accept $200 in full, that the taking and cashing of the cheque for $200 described by Mr. Rowlands does not stop plaintiffs from suing for balance of $100. Exhibit 2 is a frank acknowledgment of the debt by defendant, and the defendant's conduct in trying to free himself from responsibility is not praiseworthy in my opinion.

The plaintiffs are entitled to judgment for the balance of their claim, $100, and costs. *Judgment accordingly.*

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

CRIMINAL LAW (§ IV G—136)—PROSECUTION—PRIVATE PROSECUTOR—POWER OF COURT TO SUSPEND SENTENCE—CRIMINAL CODE, SECS. 873 (A) AND 1081 (2).

In the Province of Saskatchewan where, under the provisions of sec. 873 (a) of the Criminal Code as amended by 6-7 Edw. VII 1907, ch. 8, the trial of any person is commenced by a formal charge instead of an indictment the charge may be preferred by the Attorney-General or by any person with the written consent of the Judge of the Court, or of the Attorney-General, or by order of the Court. If the charge is preferred by some private person with the necessary consent, the case would presumably be conducted by counsel for the private prosecutor, or counsel appointed by the Court, unless the Attorney-General intervened, and in such a case counsel for the prosecution, however appointed, would, on the authorities, be "Counsel acting for the Crown in the prosecution of the offender" within the meaning of sec. 1081 (2) of the Criminal Code.

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CASE STATED for the opinion of the Court of Appeal, by a Police Magistrate as to his authority to direct a suspended sentence on a conviction for theft. Reversed.

J. A. Allen, K.C., for appellant.

Russell Hartney, for respondent.

HAULTAIN, C.J.S.:—The following case is stated for the opinion of the Court by F. M. Brown, Esq., Police Magistrate in and for the City of Saskatoon:

Case reserved by the undersigned, Fred M. Brown, Police Magistrate, in and for the City of Saskatoon, Province of Saskatchewan, on request of Mr. J. M. Stevenson, counsel for the informant. The accused, Percy Boulding, was tried before me at the City of Saskatoon, Province of Saskatchewan, on March 16, 1920, on information laid by one D. McLeod, G.T.P. Co., Edmonton, on March 10, 1920, before C. M. Smith, a Justice of the Peace in and for Saskatchewan, whereby the said Boulding was charged that on or about November 2, 1918, he did steal one barrel of alcohol, the property of the Grand Trunk Pacific Railway in transit at South Saskatoon in the said Province contrary to the Criminal Code of Canada.

The said Boulding elected for summary trial before me as Police Magistrate under the provisions of sec. 777, Part 16, of the Criminal Code.

At the trial the said Boulding pleaded guilty to the charge whereupon I did convict him of the offence charged and instead of sentencing him at once to any punishment, I directed that he be released upon entering into a recognizance in the sum of $1,000, with one surety, during a period of one year to appear and receive judgment when called upon and in the meantime to keep the peace and be of good behaviour.

The said Boulding complied with my order and was then discharged from custody.

Subsequently, on April 20, 1920, an application was made to me by the informant through his counsel and solicitor, Mr. J. M. Stevenson, for a reserved case on a point of law, namely the question as to whether or not I had the power to suspend sentence on the said Boulding on the ground as he then contended that I had no power to suspend sentence without the concurrence of counsel acting for the Crown in the prosecution of the offender.

The informant was represented at the hearing by his counsel and solicitor, Mr. J. M. Stevenson, who refused at said hearing to consent to suspended sentence being directed.

There was no counsel acting for the Crown in the prosecution of the offender present at the hearing or any part of the proceedings.

The question I now submit for the opinion of the Court is: Had I the power to suspend sentence on the said Percy Boulding?

I would answer the question in the negative for the following reasons:

The Court only has power to suspend sentence in cases punishable with more than two years' imprisonment "with the concurrence of counsel acting for the Crown in the prosecution of the offender." The Criminal Code, sec. 1081, sub-sec. 2.

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In view of the conclusion at which I have arrived, it will not be necessary to discuss the question as to the power of the Court to suspend sentence when there is no counsel acting for the Crown in the prosecution of an offender. My own opinion is, however, that such concurrence is an essential condition to the exercise of the power. But in this case, I am of opinion that, there was counsel acting for the Crown in the prosecution of the offender. It is quite true that the prosecution was conducted by counsel for the railway company which was the private prosecutor, but it was a "criminal prosecution instituted for the interests of the public in the name of the King and not to gratify the objects of an individual." *Rex* v. *Brice* (1819), 2 B. & Ald. 606, 106 E.R. 487.

See also *Reg.* v. *Page* (1847), 2 Cox C.C. 221, *Reg.* v. *Littleton* (1840), 9 C. & P. 671.

This opinion can be justified on historical grounds. The King's Peace in the Middle Ages, by Sir Frederick Pollock in Select Essays in Anglo-American Legal History, vol. 2, page 406, says:—

> It was well understood in the 13th century that the criminal "appeal" was no longer a mere act of private vengeance. The King had to be satisfied for the breach of his peace as well as the aggrieved party for the injury. Hence, as Bracton expressly tells us, the death or default of the appellor did not make an end of the proceedings. On the contrary, the effect was to send the accused to be tried by a jury without the option of battle. The King takes up the charge on behalf of his own peace, as he well may and ought, for the words of the appeal are that the act complained of was done wickedly and in felony against the peace of our Lord the King.

The old form of indictment for simple larceny concluded with the words: "feloniously did steal, take and carry away, against the peace of our Lord the King, his crown and dignity."

In England, in all proceedings in a criminal case, both prosecutor and accused are allowed to be represented by counsel. Both at Assizes and Quarter Sessions the ordinary case is conducted by solicitors and counsel retained by the prosecutor and provision is made for paying the prosecutor the costs of the trial. In Bowen-Rolands Criminal Proceedings, etc., 2nd ed., at page 84, we find:

> From the earliest times the Crown has always been represented by counsel, the obvious reason being that it was impossible for the nominal prosecutor, the Sovereign, to appear personally and conduct criminal prosecutions and a private prosecutor is not entitled to conduct his case himself (that is, in person). *Rex* v. *Brice*, 2 B. & Ald. 606, 106 E.R. 487; *Reg.* v. *Gurney* (1869), 11 Cox C.C. 414, note (*a*) at page 422.

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In the case of *Rex* v. *Stoddart*, Dickensons Quarter Sessions 122, referred to in the note to *Reg.* v. *Gurney*, in refusing to permit the private prosecutor to address the jury, Lord Tenterden, L.C.J., made the following observations (see note to *Reg.* v. *Gurney*, 11 Cox C.C. at page 422):

If it be your intention to address the jury, it is a course which you will not be permitted to pursue. It has been determined by all the Judges of the Court of King's Bench, and that determination has been publicly expressed on more than one occasion, together with the concurrence of many of the other Judges, that a prosecution by indictment is not, in point of law, the suit of an individual. If any individual seeks redress—personal redress for personal injury—the course that he is to pursue is to bring an action for damages. If, instead of electing to bring his action for the redress of a personal injury, he thinks fit to put the law in motion in the name of the King, for the sake of public justice, it is not his suit, but it is the suit of His Majesty. Where a person, therefore, chooses to proceed by indictment, he has no right to address the jury, unless he is a gentleman at the bar. That opinion has been solemnly pronounced by all the Judges of the Court of King's Bench. We have at every assizes, and under every commission of gaol delivery in London, at every Court of Quarter Session holden throughout the country, a great number of prosecutions, instituted certainly by private individuals, in which the name of His Majesty is used; but in none of them it is even thought that the person prosecuting has a right to address the jury.

See also *Rex* v. *Boultbee* (1836), 4 Ad. & E. 498, 111 E.R. 874.

The conclusion I have arrived at seems to be supported by a consideration of a number of sections of the Criminal Code.

In secs. 859, 871, 873 (1) and (2), 877, 918, 925, 929, 933, 935, 939, 944 (1), the expressions "the prosecutor," "counsel for the prosecution," "the Crown," are used indifferently. Section 872 is the only section in which the words "counsel acting on behalf of the Crown" have a more restricted meaning. In this province where, under the provisions of sec. 873 (a), of the Criminal Code as amended, 6-7 Edw. VII. 1907, ch. 8, the trial of any person is commenced by a formal charge instead of an indictment, the charge may be preferred by the Attorney-General or by any person with the written consent of the Judge of the Court, or of the Attorney-General, or by order of the Court. If the charge is preferred by some private person with the written consent of the Court, or of the Attorney-General or by order of the Court, the case would presumably be conducted by counsel for the private prosecutor or counsel appointed by the Court, unless the Attorney-General intervened, either in person or by

agent. In such a case counsel for the prosecution, however appointed, would, on the authorities I have cited, be "counsel acting for the Crown in the prosecution of the offender."

In this case, the railway company "put the law in motion in the name of the King for the sake of public justice," and it was not its suit but the suit of the King. Counsel prosecuting, though retained by the railway company, was, therefore, in my opinion, "counsel acting for the Crown in the prosecution of the offender," and the sentence could only be suspended with his concurrence. As that concurrence was not obtained, the sentence cannot stand, and the prisoner should be brought up before the magistrate again to receive such sentence as he may deem proper to pronounce under the circumstances.

Haultain, C.J.S.

NEWLANDS, J.A., concurred with HAULTAIN, C.J.S.

Newlands, J.A.

LAMONT, J.A.:—In this case the accused pleaded guilty before the police magistrate to a charge of having stolen a barrel of alcohol from the Grand Trunk Pacific Railway Company. The magistrate suspended sentence. He says there was no counsel acting for the Crown in the prosecution of the offender, although there was counsel representing the private prosecutor, the railway company.

Lamont, J.A.

The question submitted for the opinion of the Court is: Had the magistrate power to suspend sentence on the accused under the circumstances?

Section 1081 of the Code provides that where the offence is punishable with not more than two years' imprisonment, the Court shall have the power to release the accused upon his entering into a recognizance to appear when called upon to receive sentence. Sub-sec. (2) then reads as follows:

> 2. Where the offence is punishable with more than 2 years' imprisonment the Court shall have the same power as aforesaid with the concurrence of counsel acting for the Crown in the prosecution of the offender.

The language of this section makes it clear, to my mind, that the jurisdiction of the Court to suspend sentence on the accused, where the offence is punishable with more than two years' imprisonment, is dependent upon the concurrence of counsel acting for the Crown. Without such concurrence the magistrate has no jurisdiction.

It was argued that as counsel for the private prosecutor was present, he had represented the Crown, and, therefore, the magis-

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trate's finding that no counsel for the Crown was present could not be taken as the fact.

I am of opinion that counsel representing the private prosecutor cannot be said to be counsel acting for the Crown in the prosecution of an offender within the meaning of the section. Under the Code, and our practice, "counsel acting for the Crown" has, to my mind, a definite meaning. It means, counsel instructed by or on behalf of the Crown. Under our system of administering criminal law, prosecutions are in most cases begun by individuals.

In Stephen's Criminal Law of England, vol. 1, at page 419, the author says:

> In all other countries the discovery and punishment of crime has been treated as pre-eminently the affair of the Government, and has in all its stages been under the management of representatives of the Government. In England it has been left principally to individuals who considered themselves to have been wronged, the Judge's duty being to see fair play between the prisoner and the prosecutor, even if the prosecutor happened to be the Crown.

A private prosecutor, it is true, has the same rights, as far as the conduct of the prosecution is concerned, as if it were being conducted by the Crown.

In *Re McMicken* (1912), 8 D.L.R. 550, 20 Can. Cr. Cas. 334, 22 Man. L.R. 693, the headnote in part is as follows:

> Where a prosecution for a criminal offence was instituted by a private prosecutor and he is still in charge of the prosecution, he has the same right to be heard on the trial, both as to the question of guilt and the *quantum* of punishment, as the Attorney-General would have on a Crown prosecution.

This, however, does not, in my opinion, lead to the conclusion that the counsel representing the private prosecutor is counsel "acting for the Crown," within the meaning of sec. 1081 (2).

In *Rex* v. *Dominion Drug Stores, Ltd.* (1919), 31 Can. Cr. Cas. 86, 14 Alta. L.R. 384, Stuart, J., at page 107, makes the following observations: "In a magistrate's Court where the Crown appears and prosecutes, counsel for the Crown owes a special duty both to the Court and to the defence to guide the proceedings upon principles of fairness."

This is a clear recognition of the fact that in some cases before a magistrate the prosecution is not conducted by the Crown, but by the private prosecutor, although the proceedings are carried on in the name of the King.

Where an accused person is committed for trial by the magistrate and an indictment is preferred against him, the prosecution under the indictment is, according to our practice, conducted by the agent or counsel instructed by or on behalf of the Attorney-General, notwithstanding the fact that counsel may have appeared in the Court below for the private prosecutor.

Counsel instructed by the Crown in a criminal case occupies a different position from counsel representing a plaintiff in a civil case, and also, in my opinion, from counsel representing the private prosecutor in a criminal case. His position is *quasi* judicial. He should regard himself more as a minister of justice than as an advocate for a party. *Reg.* v. *Berens* (1865), 4 F. & F. 842.

The Crown does not desire to secure a conviction unless the evidence establishes that the accused has been guilty of the offence charged. The duty of counsel for the Crown is to bring out and place before the Court all the evidence, whether such evidence be in favour of or against the accused. It is because the Crown has no private ends to serve, no private feelings to satisfy, that counsel representing the Crown is in a position to act with the utmost impartiality, and with an eye single to the ends of justice. Counsel employed by a private prosecutor must pay some attention to the wishes of his client, who has a private interest in the prosecution and cannot, therefore, be as impartial as the Crown. It is, in my opinion, on account of the *quasi* judicial position of counsel instructed on behalf of the Crown, and the absence of any feelings or desire on the part of his employer other than the attainment of justice, that he has been entrusted with the authority, in his discretion, of concurring in the release on suspended sentence of the convicted person. Further, it appears to me that counsel representing a private prosecutor would feel himself bound by his instructions. If his client, feeling himself to have been wronged, did not want the convicted person released on suspended sentence, counsel instructed and paid by such client would not be likely to concur in such release, and if he would not, then such concurrence would mean simply the concurrence of the private prosecutor himself. To my mind this never was intended.

I am, therefore, of the opinion that "counsel acting for the Crown," whose concurrence is necessary under sec. 1081 (2), is

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a counsel instructed on behalf of the Crown, and a magistrate has no jurisdiction to release on suspended sentence a person convicted of an offence punishable with more than two years' imprisonment, unless there is a counsel instructed to represent the Crown acting for the prosecution. This excludes the magistrate's jurisdiction not only where no counsel acts for the prosecution, but also where the only counsel so acting is the counsel for the private prosecutor.

Elwood, J.A.

ELWOOD, J.A., concurred with Haultain, C.J.S.

Judgment accordingly.

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Re MELLON ESTATE.

Alberta Supreme Court, Simmons, J. September 7, 1920.

STATUTES (§ II A—96)—LIFE INSURANCE POLICY—COMPANY INCORPORATED BY DOMINION ACT—PROVINCIAL LAW GOVERNING PAYMENT—INTERPRETATION.

Section 43, ch. 8, 5 Geo. V. 1915, which provides that the moneys payable under any policy of life insurance . . . "shall . . . be payable in the Province" where the assured is or dies domiciled therein, does not purport to do more than declare where the debt is payable; it cannot be construed as holding that the law of the province governs in the construction of the contract when made in another province.

Statement.

APPLICATION by executors for advice as to the distribution of life insurance policies.

S. C. Stanley Kerr, for the executors and trustees;

D. W. Mackay, for the Confederation Life Association.

S. S. Cormack, for Amelia McCrum.

J. A. Ross, for Alice Evelyn Mellon and minor children.

Simmons, J.

SIMMONS, J.:—Application is made by the executors of the estate of John J. Mellon, deceased, by way of originating notice for advice in respect of the distribution of two policies of life insurance on the life of the deceased.

The Confederation Life Association on June 3, 1887, issued a policy for $1,000 on the life of John J. Mellon in favour of himself, and on May 5, 1897, the insured executed a declaration in which he appointed his wife, Amelia Mellon, and daughter, Amelia Elizabeth Mellon (now Amelia Elizabeth McCrum), beneficiaries under said policy. His wife predeceased him and the insurance company paid the proceeds of the policy to his daughter, Amelia Elizabeth McCrum, surviving beneficiary.

The Grand Orange Lodge of B.N.A. issued a policy on the life of the said Mellon for $1,000 payable to himself and the proceeds of such policy were paid into Court pursuant to an order of Scott, J., and the insurer released from any further liability in respect of same.

The questions raised are:

(1) Does the will make a valid disposition of the proceeds of said policies or either of them. (2) Does the law of Alberta or the law of Ontario govern in determining the disposition of the proceeds of the said policies? (3) Does the law as it was at (*a*) the execution of the contract of insurance, or (*b*) at the date of the will, or (*c*) at the date when deceased became insane, or (*d*) at the date of his death govern in regard to the said distribution?

The Confederation Life Ass'n policy provided that: "In all cases of claims under this policy the law of Ontario shall govern."

At the date of his death Mellon was a resident and domiciled in the Province of Alberta.

On March 25, 1914, Mellon became insane and died in a Sanitarium in Guelph, Ontario, on March 4, 1918.

It will be convenient to arrive at a conclusion to question (2) as it has an important bearing upon (1) and (3). The law of Ontario in regard to the distribution of the proceeds of insurance policies was modified in 1897 and 1914 and that of Alberta in 1915 and 1916. The Confederation Life Ass'n was incorporated by Acts of the Parliament of Canada, 34 Vict. ch. 54, 37 Vict. ch. 88, and 42 Vict. ch. 72, and was registered under the provisions of the Alberta Insurance Act, 5 Geo. V. 1915, ch. 8. Section 43 of the Alberta Act, 1915, provides that:

the moneys payable under any policy of life insurance already issued or that may hereafter be issued by an insurance corporation that has already become or may hereafter become registered under the provisions of this Act . . . shall in all cases be payable in the Province where the assured is or dies domiciled therein, notwithstanding anything contained in any policy or the fact that the head office of the insurance corporation is not within the Province.

The operative words of the section, "Shall be payable in the Province" do not purport to do more than declare the situs of the debt shall be in the Province and I think it is reading into the section that which is not contained therein to hold that the law of Alberta should apply in determining the construction of the contract especially when to do so is to go to the root of the contract and so modify it as to alter the declared intention of the parties when the contract was entered into. To adopt the

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view that the laws of Alberta would apply in the construction of a contract made in another Province by a company which is the creation of the Parliament of Canada would raise very grave and far-reaching conclusions on constitutional law, which I do not think necessary to be dealt with in my view, that the application of the section under a liberal construction does not involve any more than a declaration as to the place of performance of the obligation arising out of the contract.

The Confederation Life Ass'n raises no objection to payment of the moneys within the Province.

I conclude therefore that the provision in the contract whereby the parties agreed that the law of Ontario should govern in regard to the distribution of moneys under this policy is applicable.

It is not a case where the application of the foreign law is against public policy or in contravention of the general laws of the Province but in considering the general laws of the Province it must be borne in mind that the Dominion Parliament conferred upon the insurance company the powers which it exercised in the usual and ordinary course of business.

R.S.O. 1897, ch. 203, became the law of Ontario on April 13, 1897, as 60 Vict. ch. 36, and the assured executed the declaration in favour of his wife and daughter on May 15, 1897, and the insured must be presumed to have known the law as it existed then.

It would appear that so far as the declaration in this policy is concerned sub-sec. 8 of sec. 159 of ch. 203, R.S.O. 1897, and sub-sec. 7 of sec. 178, R.S.O. 1914, ch. 183, the law is the same and the daughter as a surviving preferred beneficiary was entitled to the entire proceeds of the policy.

Sec. 176 of ch. 183, R.S.O. 1914 (amended 4 Geo. V. 1914, ch. 30, sec. 10), provides that sec. 178 shall be retroactive. The fact however that the effect of the law in Ontario in 1897 and 1914 is similar in so far as it affects the circumstances in regard to this policy render it unnecessary to consider the effect of the assured becoming insane on March 25, 1914, although it may be observed that the law as declared by sec. 178 of ch. 183 of 1914 was in force on and after March 1, 1914, and the assured became insane subsequent to that date.

The will makes no reference either general or specific of either policy in question, and under the law of Ontario the declaration of the assured stands as an efficient and complete disposition of the moneys in question in favour of the daughter as sole surviving preferred beneficiary, in so far as the Confederation Life Ass'n policy is concerned, *In re Cochrane* (1908), 16 O.L.R. 328, and *Arnold* v. *Dominion Trusts Co.* (1918), 41 D.L.R. 107, 56 Can. S.C.R. 433.

The policy in the Orange Grand Lodge of B.N.A. is not available but it seems to be assumed by all the parties to the reference that the contract was made in Ontario and applying the principles above referred to the law of Ontario would govern.

As there was no surviving preferred designated beneficiary it appears the law in Ontario in 1897 was altered. The Insurance Act, R.S.O. 1914, ch. 183, was in force on March 1, 1914, before the assured became insane and he is presumed to have known the law and made no subsequent declaration altering the apportionment, and R.S.O. 1914, ch. 183, governs.

The children surviving are preferred beneficiaries pursuant to sub-sec. 2, sec. 178 of R.S.O. 1914, ch. 183.

The effect, however, of sub-sec. 7 of sec. 178 would seem to create a trust in favour of preferred beneficiaries although not designated in the declaration of the assured in the case where the preferred designated beneficiary or beneficiaries had pre-deceased the insured and there was no subsequent declaration by the assured.

Re Lloyd and Ancient Order etc., (1913), 14 D.L.R. 625, at p. 626, 29 O.L.R. 312, *per* Hodgins, J. A.

> There are only two ways in which the interest of the preferred beneficiary when once established can be effected. In the first place the assured is given power to restrict, revoke, extend, transfer, limit or alter the "benefits of the insurance" provided he does not go outside the preferred class while any of those of its members in whose favour the contract or declaration was made are living. In the second place the share of a preferred beneficiary predeceasing the assured if not dealt with by him is controlled by statutory provisions.

The will, in my opinion, does not in manner control the disposition of these moneys.

In the result then the proceeds of the policy in the Grand Orange Lodge of B.N.A. belong to the four surviving children in

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equal shares and are to be paid out accordingly, and in the event that any of them are not 21 years of age the moneys are to be paid to the Official Guardian for their benefit and use.

The costs of the solicitors for the respective parties are to be paid by the executors and trustees out of the estate moneys.

Judgment accordingly.

MAN.

K. B.

BRUNSTERMAN v. WINNIPEG ELECTRIC R. Co.

Manitoba King's Bench, Macdonald, J. June 15, 1920.

STREET RAILWAYS (§ III B—25)—MOTORMAN—FAILURE TO SEE SMALL STONE ON HIGHWAY—PASSENGER ALIGHTING INJURED BY—NEGLIGENCE.

It is not negligence on the part of a street car motorman, that he fails to notice a small stone lying on the boulevard, and stops his car so that a passenger in alighting steps on the stone and is injured, the boulevard being under the charge and control of the city and the place being otherwise a safe and proper place for passengers to alight.

Statement.

ACTION for damages for injuries received when alighting from a street car. Action dismissed.

C. P. Wilson, K.C., and *E. D. Honeyman*, for plaintiff.

R. D. Guy, for defendants.

Macdonald, J.

MACDONALD, J.:—This action arises out of an accident to the plaintiff in alighting from a street car of the defendant company on May 17, 1917, in the daytime. The plaintiff was a passenger travelling east on Broadway Ave. and when approaching Edmonton St., which runs at right angles to Broadway, she gave the usual signal for the car to stop. The car overran the crossing at the point at which it usually stops but it is admitted by the plaintiff and it is a fact that it is not unusual for the car to overrun the crossing. She did not leave her seat until the car stopped. The conductor opened the door and the plaintiff stepped out at the rear exit. She stepped on a stone which rolled under her foot causing her to fall and causing her injury.

There is no question as to the proper conduct of the plaintiff and the manner in which she alighted, there was no negligence on her part. She thinks that the car had gone 15 ft. beyond the granolithic walk at which point it is the endeavour of the motorman in charge of the car to stop, but this distance is a mere guess. The motorman says it was only 2 ft. This, however, is not important.

I find as a fact that the accident occurred by reason of the plaintiff stepping on a stone, which I believe to be the stone pro-

duced in Court (Ex. 3), and that the stepping on this stone caused her to fall and was the cause of the injuries which she sustained. The question arises, is the defendant company legally liable?

The property in the boulevards on either side is vested in the City of Winnipeg but the care of the boulevards is in the Parks Board. In clearing the snow off the tracks in the winter time, small stones and pebbles are thrown on to the boulevards by the street railway sweepers and in the spring of each year the Street Railway Co. have the boulevards thoroughly raked and swept, taking every reasonable care to have the boulevards free from stones and pebbles. This is followed by the Parks Board mowing the grass on the boulevards once a week during the summer and seeing that they are clean and tidy and free from debris; they are also examined once a day.

The stone upon which the plaintiff slipped could not, because of its size and weight, be thrown by the defendant company's sweeper on to the boulevard and how the stone got there it is impossible to say.

The contention of counsel for the plaintiff is that the motorman in charge of the car should have taken precautions that a place of safety was reached upon which the plaintiff might alight; that the motorman should have seen the stone which caused the plaintiff the injury, and not having done so, the defendant company is guilty of negligence and must be held liable for the injuries suffered.

In 10 Corp. Jur., page 913, para. 1339, it says:—

> If by custom the carrier recognises a proper place for getting on board or alighting, which is not the usual place especially provided for that purpose, the duty to provide reasonably safe approaches exists, . . . it being the duty of the carrier to look after the safety of the place at which passengers are invited to get on or off the train, and this rule applies also to street cars.

And in 10 Corp. Jur., page 914, para. 1340 :—

> In general, with reference to the place afforded to the passenger for getting on board or alighting, it is the duty of the carrier to use reasonable care to see that it is a safe place, whether it is the usual place or not, if it is one at which the passenger is expressly invited to get on or off the train or car.

In *Conway* v. *Lewiston, etc., Co.* (1897), 90 Me. 199, 38 Atl. Rep. 110: "A street railway company which has no regular stations, but stops its cars at or near street crossings, having no control over the location of its tracks, nor over the street between its tracks and the curb, is not liable for any injury to a passenger

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received by stepping on a rolling stone in the street between the track and the curb when alighting from a car, where it does not appear that the place was so unusually dangerous or unsuitable as to render the stopping of the car there negligent."

In Nellis on Street Railways, 2nd ed., vol. 2, page 774, sec. 365:—

A passenger on a street car has the right to expect that street where he alights is in a safe condition; and if he alight without looking to see where he is stepping and is injured thereby, he is not necessarily negligent.

In *Conway* v. *Lewiston, etc., Co.*, 90 Me. 199, 38 Atl. Rep. 110, the plaintiff in alighting from one of the defendant's cars in the evening a short distance from a street crossing stepped on a rolling stone lying in the street between the car and the sidewalk and sustained a fracture of the ankle. She recovered a verdict of negligence imputed to the defendant company by reason of the failure of the conductor to stop the car at the crossing and his invitation and proffered assistance for her to alight at a point described as a ditch and a dangerous and unsuitable place. Held, that the evidence failed to establish any liability on the part of the defendant. Under the circumstances and conditions the failure of the conductor to stop the car precisely at the crossing cannot be deemed legally culpable; nor was the place of alighting so difficult and unsuitable to render it actionable negligence to permit a vigorous young woman to step down from the sideboard of the car, either with or without assistance.

Indeed, it is not insisted in argument that the mere failure to stop the car so that the passenger could alight on the crossing was improper. Nor is it claimed that the existence of a small rolling stone by the side of the track would necessarily render the street at that point a dangerous place to alight. (page 203.)

In the present case, however, it is contended by counsel for the plaintiff that to the knowledge of the defendant company there is a place adjoining their tracks where stones are and that from time to time the stones get on the boulevards and with the knowledge that the stones are in the vicinity the company should take every possible precaution when inviting passengers to alight on the boulevards that there are no stones there and that the company must provide a safe place to alight and that this is an established duty when such dangerous elements are liable to get on to the boulevards.

There are many stones of various sizes, some smaller and some larger than the stone causing the damage herein, along the track of the defendant company and there is less chance of such stones getting on to the boulevards than there is of the smaller stones used as ballast. A stone such as Ex. 3 could not be blown or swept by the sweeper on to the boulevard. It is fair, I think, to assume that it was carried or thrown there.

These stones are brought on to the streets, some mixed with the gravel ballast used in the maintenance of the roadbed and some brought by the city, by whom stones are placed on the boulevards at the points where the grass has worn off by passengers getting off the street cars.

The defendant company has nothing to do with the boulevards as they are under the charge and control of the Parks Board.

It being the duty of the Parks Board to see that the boulevards are free from debris, and in view of the care and attention exercised in the carrying out of that duty, it is reasonable to assume that the motorman in charge of the car running along the centre of the boulevard would not be very alert in watching for stones or any other extraordinary body or matter on the boulevard.

The stone causing the injury is not a large one; its colour is not such as to attract attention, it is much the colour of the ground and if lying in the grass it would require more than ordinary watchfulness to detect it. I fail to see where there has been any negligence on the part of the motorman.

It was one of those unfortunate fortuitous mishaps causing much suffering and serious consequences but as to which as I view it the defendant company is in no way liable.

The action must therefore be dismissed with costs.

Action dismissed.

THE KING v. PORTER; Ex parte HAMILTON.

New Brunswick Supreme Court, King's Bench Division, Crocket, J. August 26, 1920.

INTOXICATING LIQUOR (§ III H—90)—INTOXICATING LIQUOR ACT, N.B.—SEIZURE AND DESTRUCTION—JURISDICTION OF MAGISTRATE.

Under the New Brunswick Intoxicating Liquor Act, 6 Geo. V. 1916, ch. 20, a magistrate has no jurisdiction to hear an application for the destruction of liquor where none of the facts indicated in sec. 145 of the Act as conditions precedent to his right to hear such application exist.

The magistrate has no jurisdiction under section 146 to hear an application on a notice dated July 9, the liquor having been seized on May 7, and the applicant having claimed the same on May 19.

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THE KING v. PORTER; EX PARTE HAMILTON.

Crocket, J.

APPLICATION by way of *certiorari* to quash an order made by a magistrate under the Intoxicating Liquor Act, for the destruction of liquor seized. Order quashed.

Thane M. Jones, shews cause against an order *nisi*.

J. C. Hartley, K.C., *contra*, supports order.

CROCKET, J.:—In the month of May last, R. Willard Demmings, an inspector under the Intoxicating Liquor Act, 6 Geo. V. 1916, ch. 20, seized seven cases and nine bottles of intoxicating liquor in the office of the Dominion Express Co., at Canterbury Station, in the County of York. This liquor had been shipped by William McIntyre Co., of Montreal, on the order of the applicant, Hamilton, who resides at Forest City, in the County of York. Canterbury Station is the nearest point in Canada at which there is a railway station and express office. On May 8, Hamilton made an affidavit setting forth that he had ordered the liquor on or about April 28, to be shipped to him by the Dominion Express Co. for his personal use; that it was for his own personal use, and for no other purpose whatsoever; that the liquor arrived at Canterbury Station on or about May 6; that he was notified by the agent of the express company of its arrival and seizure by Demmings on or about May 7; and that he was desirous that the matter be inquired into. On May 19, Demmings was served with a copy of this affidavit and a written notice demanding the return of the liquor. No action was taken upon Hamilton's claim until July 9, when Demmings addressed a letter to him at Fosterville, York County, directing him to appear before the above named Jerome E. Porter, a Justice of the Peace for the County of York, at Meductic, to give evidence in reference to the importation of the said liquor into the Province. This letter having been addressed to Hamilton at Fosterville instead of at Forest City, was not received by him until July 13, but he nevertheless appeared before the magistrate at Meductic on the following day, and gave evidence upon oath in support of his claim. No other witness was examined, and at the conclusion of his evidence the magistrate announced that the claimant had failed to prove to his satisfaction his right to the said liquor, and ordered the liquor to be destroyed. A formal order having been made to this effect, application was made to me for an order for a writ of *certiorari* to bring up the proceedings before the magistrate, and an order *nisi* to quash the order

for destruction of the liquor. I granted the order on two grounds, viz:

1. The magistrate had no jurisdiction to hear an application for the destruction of the liquor, none of the facts indicated in sec. 145 as conditions precedent to his right to hear such application or make such an order having existed. 2. The magistrate had no jurisdiction to hear the application on a notice dated July 9, the liquor having been seized on May 7, and the applicant having claimed the same on May 19.

I am of opinion that the first ground is well taken. It is quite true, as contended by Mr. Jones, that any inspector or constable may, under sec. 153, for the purpose of preventing or detecting the violation of any of the provisions of the Act, without a warrant, enter into any place, other than a private dwelling, and make search in every part thereof, and that, under sub-sec. 1 of sec. 154, he may seize any liquor which he may find on such search which in his opinion is unlawfully kept for sale or disposal contrary to the Act, but there is no provision in the Act which authorises a magistrate to make an order for the destruction of any liquor so seized, or of any liquor seized upon search of a private dwelling under a search warrant, except upon the conviction of the occupant of such house or place, or some person, for keeping liquor for sale or unlawfully having and keeping liquor in such house or place, as provided by the said sub-sec. 1 of sec. 154. It is only under the provisions of secs. 145 and 146 that a magistrate may make such an order without first making a conviction against some person for some offence against the Act in relation to such liquor. Section 145 reads as follows:—

In case any liquor seized under any of the provisions of this Act does not have clearly marked on the outside of the package or vessel containing the same the name and address of the person for whom the same is intended or if the name or address of such a person is fictitious or not known, or if the person to whom the same is addressed cannot be found at such address given, or if on such package shall not be specified the fact that liquor is contained in such package, or if the bill of lading of such package shall not contain the same information, it shall be *primâ facie* proof that such liquor is intended to be sold or kept for sale in violation of this Act, and if no claim is made to such liquor and no notice thereof given to the inspector within 30 days after such seizure, the inspector shall apply to a magistrate, justice or justices for an order that such liquor be destroyed, and the magistrate, justice or justices on receiving an affidavit of such facts shall order that such liquor be destroyed, and the inspector shall thereupon cause the same to be destroyed.

(1) If such liquor, or any part thereof, was shipped as other goods, or was covered or concealed in such manner as would probably render discovery of the nature of the contents of the vessel, cask or package in which the same was

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contained more difficult, it shall be *primâ facie* evidence that the liquor was sold or shipped, or was intended to be sold or kept for sale in contravention of the provisions of this Act.

Taking the principal section first, it is perfectly clear, notwithstanding its confused composition, that it confers no jurisdiction upon a magistrate to order the destruction of any liquor seized under the provisions of the Act until an affidavit is received by him of certain facts regarding the liquor sought to be destroyed. The operative words, so far as the magistrate is concerned, are the words of the 16th, 17th and 18th lines: "and the magistrate . . . on receiving an affidavit of *such facts* shall order that *such liquor* be destroyed." The words "such facts" must refer to facts previously stated in the section. These facts are: either that the liquor which has been seized under any of the provisions of the Act has not "clearly marked on the outside of the package or vessel containing the same the name and address of the person for whom the same is intended," or that "the name or address of such person" (presumably the person for whom the seized liquor is intended), "is fictitious or not known," or that the person to whom the seized liquor is addressed "cannot be found at such address given," or that "on such package" is "not specified the fact that liquor is contained in such package," or that "the bill of lading of such package" does "not contain the same information" (presumably as such package),—any one of which facts, the section provides, shall be *primâ facie* proof that such liquor is intended to be sold or kept for sale in violation of the Act—and the fact that no claim has been made to "such liquor" and no notice thereof given to the inspector within 30 days after such seizure. The words "such liquor," in the 16th and 18th lines of the section, must likewise refer to liquor seized under any of the provisions of the Act, with reference to which one or more of such facts exist, which the section provides shall be *primâ facie* proof that *such liquor* is intended to be sold or kept for sale in violation of the Act. It is therefore only such liquor, the destruction of which a magistrate has authority to order on "receiving an affidavit of such facts," when no claim is made thereto and no notice is given to the inspector within 30 days after its seizure.

Sub-section 1 of sec. 145, though manifestly contemplating deliberate fraud and concealment in the shipment and keeping

of liquor, gives no authority to a magistrate to order the destruction of any liquor so shipped or concealed, but stops with making such a fraudulent shipment or concealment *primâ facie* evidence that such liquor was sold or shipped or was intended to be sold or kept for sale in contravention of the provisions of the Act. Its provisons, therefore, could have effect only in relation to a prosecution upon an information charging an offence against some of the prohibitive sections of the Act. I confess my inability to discern any purpose in this sub-section, seeing that the provisions of the principal section, that if any liquor seized does not have clearly marked on the outside of the package or vessel containing the same the name and address of the person for whom the same is intended, or that if on a package containing liquor there is not specified the fact that liquor is contained in such package, either of such facts shall be *primâ facie* proof that such liquor is intended to be sold or kept for sale in violation of the Act, must necessarily include any liquor which may be shipped as other goods or which "may be covered or concealed in such manner as would probably render discovery of the contents of the vessel, cask or package in which the same was contained more difficult." Whatever the object of the sub-section may be, however, it cannot alter the meaning of the principal section, and it is in connection with the principal section that sec. 146, under which the order for destruction complained of on this application was made, must be read. This section reads as follows:—

> If any claim to such liquor seized be made and notice thereof given to the inspector within said 30 days, the inspector shall notify the person claiming the same to appear before a magistrate, justice or justices, and prove his right thereto, to the satisfaction of the magistrate, justice or justices, and also to prove that such liquor was imported into the Province, or was brought or sent from one locality in the Province to another, as the case may be, for a lawful purpose, and was not intended to be sold or kept for sale in violation of the provisions of this Act, and in the event of such claimant failing to appear before such magistrate, justice or justices, as required by such notice, or failing to prove his right to such liquor, or that such liquor was imported into this Province, or brought or sent from one locality in the Province to another locality therein, as the case may be, for a lawful purpose and not intended to be sold or kept for sale as aforesaid, the magistrate, justice or justices shall order such liquor to be destroyed.

As sec. 145 provides, as I have pointed out, for the destruction of any liquor seized under any of the provisions of the Act,

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with reference to which one or more of the facts stated therein exist, which are made *primâ facie* proof that such liquor is intended to be sold or kept for sale in violation of the Act, if no claim is made thereto and no notice of such claim given to the inspector within 30 days after such seizure, upon an affidavit of such facts, sec. 146 provides for a hearing before the magistrate "if any claim to such liquor seized be made and notice thereof given to the inspector within said thirty days." The words "said thirty days" obviously refer to the thirty days in which the claim and notice mentioned in sec. 145 must be made and given, and it is equally clear, I think, that the words "such liquor," in the opening sentence of the section which I have quoted, must be construed in the same way as the words "such liquor" as used in sec. 145, *i.e.*, liquor seized under the provisions of the Act, with reference to which one or more of the facts stated in the preceding principal section exist, which are made *primâ facie* proof that such liquor was intended to be sold or kept for sale in violation of the Act. One or other of these facts must exist as a condition precedent to the magistrate's right to order the destruction of any liquor seized either on his "receiving an affidavit of such facts," if no claim is made and no notice given to the inspector, as provided in sec. 145, or as a condition precedent to the inspector's right to notify the person claiming the liquor to appear before a magistrate and prove his right thereto, and to the magistrate's right to conduct a hearing upon such a claim and order upon such hearing the destruction of the liquor claimed under sec. 146. There was no pretence that any of such facts existed in connection with the liquor which Demmings seized in this case. The magistrate acted wholly without jurisdiction in making the order for its destruction. The order *nisi* to quash the magistrate's order of destruction will therefore be made absolute and the magistrate's order quashed.

Judgment accordingly.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. January 26, 1920.

DESCENT AND DISTRIBUTION (§ I C—11)—DEATH OF BASTARD, UNMARRIED AND INTESTATE—MOTHER DECEASED LEAVING LEGITIMATE AND ILLEGITIMATE CHILDREN—RIGHT OF ILLEGITIMATE CHILDREN TO INHERIT.

In Saskatchewan, both the real and personal estate of a bastard who dies intestate and unmarried, and whose mother has predeceased him, will descend through the mother to her other illegitimate child or children, but the legitimate children of the mother cannot inherit as they could only claim to take as collaterals in their own right as next of kin to the intestate and a bastard can have no collateral kindred.

[The Land Titles Act (Dom.), the Saskatchewan Act (Dom.), the Devolution of Estates Act (Sask.), discussed and reviewed.]

Statement.

APPEAL by the King, in the right of the Dominion, against that part of a judgment holding that the Crown in the right of the Province was entitled to the personal estate of an intestate bastard. Reversed.

F. W. Turnbull and *C. P. Plaxton*, for Attorney-General of Canada.

H. E. Sampson, K.C., for Attorney-General of Saskatchewan.

H. Fisher, for Western Trust Company.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—Enos Stone, an illegitimate son of one Sarah Newton, died on or about January 13, 1918, intestate and unmarried. At the time of his death he was domiciled in Saskatchewan. His estate consisted of real and personal property situated in the Province of Saskatchewan. The land comprised in the estate was—on the coming into force of the Saskatchewan Act, 4-5, Ed. VII. 1905 (Dom.), ch. 42—Crown land within the Province, vested in the Crown and administered by the Government of Canada for the purposes of Canada, and was patented to Stone at a later date.

On September 23, 1918, letters of administration to his estate were granted to the Western Trust Company as official administrator for the Judicial District of Swift Current.

Sarah Newton, the mother of the intestate, was also the mother of another illegitimate son called William Stone, who is living and resides at Medelia, in the State of Minnesota. After the birth of the two illegitimate sons, Sarah Newton was married to one Walter E. Stone, who predeceased her, and bore nine children to him. Seven of these children are still alive. Two of the children are dead, but have left issue surviving them. Sarah (Newton) Stone died on October 16, 1890.

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Claims were made to the estate by William Stone and the legitimate children and grandchildren of Sarah Newton, as well as on behalf of the Attorney-General for Canada and the Attorney-General for Saskatchewan. An application was made under the rules in that behalf by the administrator for the opinion, advice and direction of the Court of King's Bench on the following questions:—

(1) What persons, if any, are entitled to share the estate of the said deceased? (2) In the event of none of the said persons being entitled to share the estate of the said deceased, whether the property of the said estate will escheat to the Crown, in the right of the Dominion of Canada, or in the right of the Province of Saskatchewan.

The matter was heard by Bigelow, J., in Chambers, who held against the claims of William Stone and the legitimate children of Sarah Stone. The Judge also held that the lands of the intestate escheated to the Crown in the right of the Dominion. As to the personal property, it was held to be *bona vacantia* and to belong to the Crown in the right of the Province, after the payment of all claims of creditors, solicitor's costs and administration fees.

The present appeal is brought on behalf of the King in the right of the Dominion, against that part of the judgment which holds that the Crown in the right of the Province is entitled to the personal estate of the intestate.

During the course of the opening argument, on behalf of the appellant, it was suggested to counsel that it appeared to the Court that the children, legitimate and illegitimate, of Sarah Stone might have some claim in respect of the land of the intestate, and that if it so appeared, after argument heard and due consideration, the Court would give such judgment as in its opinion ought to have been made, although the parties concerned have not appealed. (See Rules Supreme Court 654.)

Before, therefore, considering the question which is formally before us, I will deal with the rights of these parties and of the Crown in relation to the lands of the intestate. These lands were, at the date of the coming into force of the Saskatchewan Act, 4-5 Ed. VII. 1905 (Dom.), ch. 42, Crown lands within the Province vested in the Crown, and administered by the Government of Canada for the purposes of Canada. By sec. 21 of the Saskatchewan Act it was enacted that all Crown lands and royalties

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incident thereto should continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada.

It must be held to be settled law that, under this section, escheats arising in this Province in respect of lands belonging to the Crown at the date of the establishment of the Province belong to the Crown in the right of the Dominion. *Att'y-Gen'l of Ontario* v. *Mercer* (1883), 8 App. Cas. 767; *Trusts & Guarantee Co.* v. *The King* (1916), 32 D.L.R. 469, 54 Can. S.C.R. 107:—Escheat is an inevitable consequence rather than an "incident of the principle of tenure," Jenks Short History of English Law, page 36. The intestate, as grantee of the Crown, had an estate of fee simple to be held in free and common socage. By virtue of his grant he held the land as tenant in fee under the King as lord paramount by service of mere fealty. He only had an estate which could descend to his heirs or be transferred during his lifetime or disposed of by his will. His estate could descend to his heirs in *infinitum*, but his interest did not amount to absolute ownership. He was not the owner of the land, but only of an estate in the land, and on the determination of the estate by failure of heirs the land falls back or escheats to the lord. "When there is no longer any tenant the land returns, by reason of tenure to the lord by whom or by whose predecessors in title the tenure was created." *Att'y-Gen'l of Ontario* v. *Mercer*, 8 App. Cas. at page 772.

Has there been a failure of heirs in this case?

Under the common law if a bastard dies unmarried and intestate, there are no heirs and his lands escheat to the lord. This was the law in force in the North West Territories up to January 1, 1887. But the Territories Real Property Act, 49 Vict. 1886, (Dom.), ch. 26, made some very important changes in the law relating to inheritance by and from illegitimate children.

Secs. 16 and 17 of the Act were as follows:

16. Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any property or estate which she would, if living, have taken by purchase, gift, devise or descent from any other person.

17. When an illegitimate child dies intestate, without issue, the mother of such child shall inherit.

These sections reappear, with some modifications, in the amending and consolidating Act of 1894 (the Land Titles Act,

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1894). The sections in the Act of 1894, 57-58 Vict., ch. 28, are as follows:—

14. Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any land which she would, if living, have taken by purchase, gift, devise, or descent from any other person.

15. When an illegitimate child dies intestate, without issue, the mother of such child shall inherit any land which the said child was the owner of at the time of his death.

The course of succession generally was also changed by this Act, and the heir was superseded by the next of kin by sec. 3, which is as follows:—

3. Land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes and be dealt with and distributed as personal estate.

The provisions of this Act were part of the body of the law which existed in the territory established as the Province immediately before the coming into force of the Saskatchewan Act and which, by sec. 16 of that Act, was continued in the said Province. The effect of this legislation was to change the law of inheritance, and, by sec. 15, to constitute the mother of an intestate bastard, dying without issue, his lawful heir. It must also be taken as an explicit waiver by the Crown of its right of escheat in favour of the mother.

Section 14 effects a further change in the law in favour of illegitimate children. By this section illegitimate children

inherit from the mother as if they were legitimate and through the mother, if dead, any land which she would, if living, have taken by purchase, gift, devise, or descent from any other person.

It was argued on behalf of the Dominion that land which would have been inherited by a mother under sec. 15 is not land which she would, if living, have "taken by descent" from any other person, that is, that "descent" does not include or mean inheritance by a lineal ancestor. Prior to the enactment of the Inheritance Act, 3-4 Wm. IV., 1833 (Imp.), ch. 106, the lineal ancestor was excluded from the succession, though the uncle or aunt was not, according to the maxim that "an inheritance may lineally descend but not ascend." Litt. s. 3; Co. Litt. 10 b. 11 a. The Inheritance Act altered the law both as to lineal ancestors and collaterals.

In the Inheritance Act, "descent" is interpreted, sec. 1, as the title to inherit land by reason of consanguinity as well where

the heir shall be an ancestor or collateral relation as where he shall be a child or other issue.

Sections 14 to 32 of the North-West Territories Act, 1875, ch. 49, enacted and declared the law relating to the descent of real estate, and similar provisions were contained in the amending and consolidating Act, the North-West Territories Act, 1880, ch. 25. These provisions were taken *verbatim* from ch. 82 of the Consolidated Statutes of Upper Canada, and constituted what was formerly known as the Statute of Victoria. In that statute the same interpretation is given to the word "descent." Although the word is not interpreted in the North-West Territories Act, 1880, it is quite plain that the word was used there in its new and wider significance. See secs. 23, 28, 32, 33, 34 and 35, the North-West Territories Act, 1880.

I think, therefore, that when Parliament was later on changing the law of inheritance by amending legislation, it must be taken to have used the word "descent" with the same meaning attached to it as it had in the earlier legislation on the same subject. See 27 Halsbury 139.

I am, therefore, of the opinion that ever since the coming into force of the Territories Real Property Act, 1886, the lands of an unmarried and intestate bastard have not been liable to escheat as against his mother, or as against, at least, her illegitimate children. The position of legitimate children of the mother will be discussed later on.

The subsequent repeal of the Land Titles Act, 1894, in so far as it applied to Saskatchewan, by Order-in-Council of July 23, 1906, under the authority of 4-5 Ed. VII. 1905 (Dom.), ch. 18 (An Act to amend the Land Titles Act, 1894), cannot, in my opinion, affect this question. The law as enacted by the Land Titles Act, 1894, was by sec. 16 of the Saskatchewan Act declared to "continue" in the Province, and after the establishment of the Province could only be repealed, abolished or altered by the Legislature of the Province.

The law as it was declared or enacted by secs. 3, 14 and 15 of the Land Titles Act, 1894, therefore became a part of the substantive law of the Province on the establishment of the Province on September 1, 1905, and was subsequently re-enacted by the Provincial Legislature by the Devolution of Estates Act, 1907,

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ch. 16) and is now found in substantially the same form in R.S.S. 1909, ch. 43, sub-secs. 21, 23 and 24. [Repealed 9 Geo. V. 1918-19 (Sask.), ch. 20.]

It will now be necessary to determine the destination of the lands of Enos Stone. I think it is desirable to deal with the lands separately, as the question relating to the personal estate stands on an entirely different footing.

If the foregoing conclusions are correct, the land of Enos Stone will descend and be distributed as if it were personal estate under the provisions of the Devolution of Estates Act, R.S.S. 1909, ch. 43. Apart from the special provisions of secs. 23 and 24 of that Act relating to illegitimate children, Enos Stone being a bastard and have died intestate, without wife or issue, can have no next of kin. Being *nullius filius* he has no ancestors, and, therefore, no collateral kindred derived from the same common ancestor.

"A bastard is *terminus a quo*, he is the first of his family, for he hath no relation of which the law takes any notice." *The Queen* v. *Chafin*, (1702), 3 Salk. 66; 91 E.R. 695.

Apart from the special provisions, therefore, there is a total failure of heirs and next of kin. This condition, however, is changed by secs. 23 and 24 of the Act.

Section 24 (R.S.S. 1909, ch. 43) provides that the whole of the property of an intestate illegitimate son who dies leaving no widow or issue shall go to his mother. This section, by recognising the mother, but not the father, puts the mother in the same position as a lawful mother would be under sec. 8 of the Act.

As Sarah Stone predeceased Enos Stone, we have now to deal with the case of a man dying intestate and leaving no widow or issue, or father or mother. Apart from the question of illegitimacy this case would fall within the provisions of sec. 9. But collaterals take in their own right as next of kin, and Enos Stone, being a bastard, can have no collateral kindred; so that sec. 9 does not apply. In *Re Standley's Estate* (1868), L.R. 5 Eq. 303.

Section 23 provides that:—

illegitimate children shall inherit *from* the mother as if they were legitimate, and *through* the mother, if dead, any real or personal property which she would, if living, have taken by purchase, gift, demise or descent from any other person.

That Sarah Stone, if living, would have taken the land of Enos Stone "by descent" I have already attempted to shew.

Her legitimate children can only claim to take as collaterals in their own right as next of kin to the intestate, and, as I have shewn above, a bastard can have no collateral kindred. It therefore follows that William Stone, the illegitimate son of Sarah Stone, is entitled through her to inherit the land which she, if living, would have taken from Enos Stone by descent, under the provisions of sec. 24.

The question with regard to the personal estate now remains to be considered.

The right to the personal estate of persons dying intestate without leaving husband or wife and without kindred, has from the earliest times been vested in the King in the right of the Crown. *Middleton* v. *Spicer* (1783), 1 Bro. C.C. 201, 28 E.R. 1083, *Taylor* v. *Haygarth* (1844), 14 Sim. 8, 60 E.R. 259; *Dyke* v. *Walford* (1846), 5 Moo. P.C.C. 434, 13 E.R. 557.

The term "*bona vacantia*" includes such personal estate as well as all other goods and chattels in which there is no one to claim a property (7 Hals., page 209, para. 442).

Under the common law an unmarried bastard who died intestate had no next of kin, and consequently his personal estate belonged to the Crown as *bona vacantia*. This was the law in force in the North West Territories at the date of the establishment of the Province, except in so far as it was affected by section 4 of An Ordinance respecting the Devolution of Estates, being chapter 13 of the Ordinances of the North West Territories, 1901. The facts of this case make it unnecessary to consider the effect or validity of that Ordinance.

There can be no question that up to the date of the establishment of the Province the right to *bona vacantia* in the Territories belonged to the Crown in the right of the Dominion.

In view of the conclusions I have arrived at, it will not be necessary to consider the right to *bona vacantia* as between the Province and the Dominion.

The Devolution of Estates Act, R.S.S. 1909, ch. 43, applies to both real and personal estate, and the personal estate will, in my opinion, go to William Stone in the same way and for the same reasons as the land, if it is competent for the Provincial Legislature to amend the law of descent, or distribution, so as to

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decrease the occasions of escheat or *bona vacantia* which otherwise would have arisen under the law as it stood at the date of the establishment of the Province.

It has been held over and over again that the power of a Provincial Legislature as to legislation with regard to any subject within its exclusive jurisdiction is as absolute as that of the Imperial Parliament over a similar subject.

See *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, at page 132,

When the B.N.A. Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion.

In another case, *Liquidators of The Maritime Bank of Canada* v. *Receiver-General of N.B.*, [1892] A.C. 437, after quoting the foregoing passage from *Hodge* v. *The Queen*, Lord Watson added, at page 442, that:—

The Act places the constitutions of all Provinces within the Dominion on the same level; and what is true with respect to the Legislature of Ontario has equal application to the Legislature of New Brunswick.

In Re *The Initiative and Referendum Act*, 48 D.L.R. 18, at page 22, [1919] A.C. 935:—

Subject to this [the qualification has no bearing on the present discussion] each Province was to retain its independence and autonomy, and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.

The devolution of estate is a matter coming within the subject of property and civil rights in the Province which, by sec. 92 (13) of the B.N.A. Act, 1867, is a subject of exclusive provincial legislation. It was held by the Court of King's Bench in Quebec that the Provincial Legislature has exclusive power "to make laws with regard to succession" and "to restrict or extend the degree of relationship beyond which parties will cease to inherit."

In *Att'y-Gen'l of Quebec* v. *Att'y-Gen'l of The Dominion* (1883), 2 Que. L.R. 236, 3 Cart. Cas. 100, *per* Dorion, C.J., at page 101:—

The right to regulate the transmission of property by inheritance falls within the powers of the Legislatures of the several Provinces, as affecting rights of property and civil rights. For instance, the Provincial Legislatures may restrict or extend the degrees of relationship beyond which parties will cease to inherit; they may, as is the case in France, decree that in default of legitimate heirs the estate of the deceased shall descend to his illegitimate offspring.

Per Tessier, J., at p. 104:—

The law of escheat is only a rule of civil law; and the Legislature of Quebec has exclusive power to make laws in regard to the degree and mode of succession, so that there would be nothing to prevent if from passing an Act to extend the right of succession to illegitimate children or relatives, or even to such institutions as may undertake the bringing up of illegitimate children.

Per Sanborn, J., at p. 109:—

The right to determine to whom the property of a person dying intestate without heirs shall go is of the same nature as the law of descent, in fact it is a part of the law of descent which, I presume, no one doubts pertains to the jurisdiction of the Provincial Legislatures.

The case of *Trusts & Guarantee Co.* v. *The King*, 32 D.L.R. 469, 54 Can. S.C.R. 107, which was much relied on by counsel for the Dominion, has no application to the question under consideration. It was expressly stated by Fitzpatrick, C.J., at page 471:—

Judgment for the respondent on this appeal does not involve any decision as to the right of the Legislature of the Province to change the laws of inheritance. Lands escheat to the Crown for defect of heirs and this has nothing to do with the question who are a person's heirs. But altering the law of inheritance is one thing and appropriating the right of the Dominion on failure of heirs is quite another thing. This is what has been done by the Alberta Statute, ch. 5 of 1916. The statute in terms deals with property of a person dying "intestate and without leaving any next of kin or other person entitled thereto."

To incidentally interfere with the occasion of escheat or *bona vacantia* in the exercise of its exclusive jurisdiction is a very different thing to the appropriation by a Province of property belonging to the Dominion. An Act such as the Devolution of Estates Act cannot be called "colourable legislation" as that term is employed by Mr. Lefroy (Canada's Federal System, page 76). It is not "legislation ostensibly under one or other of the powers conferred by the British North America Act on the enacting body, but in truth and fact, relating to some subject which is not within the jurisdiction of that body."

It is a mere incident of the Act that an "accidental determination" of a grant is prevented or that the Crown is deprived of

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an escheat or *bona vacantia* which is a casual profit, *quod accidit domino et eventu et ex insperato*. *Burgess* v. *Wheate*, 1 Eden 177, 28 E.R. 652.

To give effect to the argument for the Dominion would be practically to hold that the law relating to descent and distribution as it existed on September 1, 1905, must remain fixed and unchangeable forever. To indulge in a slight anachronism, let me put that date back a few hundred years. Then, if effect is to be given to this argument, all the great changes in the law permitting free alienation of land brought about by *Quia Emptores* and later on by the Reformation Statutes could not have been made by a Provincial Legislature. It could not have been made "lawful to every free man to sell at his own pleasure his lands and tenements or part thereof," the legal rights estate in lands could not have been made devisable by will, the right of inheritance could not have been extended to the father or mother, or to any kinsmen of the half blood however near, merely because such changes in the law would have lessened the cessions of escheat.

It may be said that this is all merely an argument *ab inconvenienti*, and should not be "lightly entertained." But in interpreting statutes, that argument has always been accepted as a sound rule of construction.

For the foregoing reasons, I would set aside the judgment appealed from and would declare that all the property of Enos Stone will go to William Stone, subject, of course, to payment of debts, succession duty, costs of administration and all other claims and expenses properly chargeable against the estate.

There will be no costs of appeal but the costs of the administrator, and costs of William Stone and the legitimate children of Sarah Stone on the application below will be paid out of the estate.

Newlands, J.A.

NEWLANDS, J.A.:—The question of royalties can only arise where there are no heirs or next of kin. That is not this case, as here there are heirs and next of kin. The Devolution of Estates Act having made an illegitimate son the heir to his mother, the question therefore for us to decide is, whether that part of the Devolution of Estates Act which makes an illegitimate child his mother's heir and personal representative is *intra vires* of the Province.

That it is a matter of property and civil rights there can be no doubt.

The case of *The Trusts & Guarantee Co.* v. *The King*, 32 D.L.R 469, 54 Can. S.C.R. 107, does not decide this question, as Fitzpatrick, C.J., says in that case, at page 471:—

Judgment for the respondent on this appeal does not involve any decision as to the right of the Legislature of the Province to change the laws of inheritance. Lands escheat to the Crown for defect of heirs and this has nothing to do with the question who are a person's heirs. But altering the law of inheritance is one thing and appropriating the right of the Dominion on failure of heirs is quite another thing.

Both Idington and Anglin, JJ., refer to this question. Idington, J., 32 D.L.R., at page 477, says:—

Again we must never forget that the whole subject of property and civil rights is relegated to the jurisdiction of the Legislature of the Province which can change the whole law of descent and constitute whomsoever or whatsoever it sees fit the heir at law or next of kin entitled to take the estate of an intestate or indeed if it saw fit could revoke the power to make a will and distribute the estates of deceased in such a way as it might determine.

And Anglin, J., at page 484, says:—

While it is no doubt competent to the Legislature of the Province of Alberta, subject to the restrictions of sec. 21 of the Alberta Act, to determine the tenure of land in that Province and to amend the law of descent, it cannot deal with either of these matters so as to affect the rights by that section reserved to the Crown in right of the Dominion, including *inter alia* the right of escheat. In so far as it may purport to do so chapter 5 of the Alberta Statutes of 1915 is *ultra vires*.

Section 21 of the Alberta Act referred to by Anglin, J., at page 485, refers only to lands. It seems therefore to be his opinion that the Province has the right to change the law of descent as to personal property and that that right is unrestricted.

This is also the opinion of the Judges of Quebec in *Att'y-Gen'l of Quebec* v. *Atty'-Gen'l of Canada*, 3 Cart. Cas. 100, 2 Que. L.R. 236. Dorion. C.J., at page 101, says:—(For extracts from judgments of Dorion, C.J., Tessier, J., and Sanborn, J., see *ante* page 685).

I am, therefore, of the opinion that the Legislature had power to make an illegitimate child next of kin to his mother.

It is unnecessary for me to express an opinion on the right of the Legislature to change the laws as to descent of real property, because this law was changed by the Dominion Parliament prior to the establishment of Saskatchewan as a Province and has continued to be the law of this Province ever since.

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Newlands, J.A.
Lamont, J.A.

I have had the privilege of reading the opinion of Haultain, C.J.S., and I entirely agree with him. It is therefore unnecessary for me to go at any further length into the questions involved in this action, and I therefore concur with the conclusions reached by Haultain, C.J.S.

LAMONT, J.A.:—The question involved in this appeal is the disposition to be made of the real and personal property of the late Enos Stone, who died intestate and unmarried.

Enos Stone in his lifetime was an illegitimate son of one Sarah Newton, who died in 1890, leaving her surviving the said Enos Stone, another illegitimate son, William Stone, and a number of legitimate children. The property in question is claimed by the Crown in right of the Dominion, and also by the Crown in right of the Province. It is also claimed by William Stone and by the legitimate children of Sarah Newton. The lands are claimed by the Crown by right of escheat, and the personal property as *bona vacantia*.

The right of the Crown to take land as an escheat can only arise upon failure of heirs. As put in *Att'y-Gen'l of Ontario* v. *Mercer*, 8 App. Cas. 767, at page 772: "When there is no longer any tenant the land returns by reason of tenure to the lord by whom or by whose predecessors in title the tenure was created."

The first question therefore is: Has there been in this case a failure of heirs? At common law a bastard being a *nullius filius* was incapable of inheriting, and upon his death no one could succeed to him as heir-at-law unless he was a legitimate descendant. 2 Hals. 439.

Therefore in case he died intestate and unmarried his property devolved upon the Crown.

Our statute, however, has altered the common law rule. Sections 23 and 24 of the Devolution of Estates Act, R.S.S. 1909, ch. 43, enacts as follows:—

23. Illegitimate children shall inherit from the mother as if they were legitimate and through the mother if dead any real or personal property which she would if living have taken by purchase, gift, demise or descent from any other person.

24. If an intestate being an illegitimate child dies leaving no widow or husband or issue the whole of such intestate's property, real and personal, shall go to his or her mother.

If these two sections were within the jurisdiction of the Provincial Legislature to enact, it seems to me clear that there has been no failure of heirs.

Had the Legislature jurisdiction? By sec. 3 of the Saskatchewan Act 4-5 Ed. VII. 1905 (Dom.), ch. 42, the B.N.A. Acts of 1867 to 1886 are made to apply to this Province except in so far as varied by that Act. By sec. 92 of the B.N.A. Act, 1867, the exclusive jurisdiction to make laws with regard to "property and civil rights within the Province" is given to the Provincial Legislature. The devolution of estates is a matter relating to "property and civil rights," and therefore within the provincial legislative jurisdiction. The exercise of that jurisdiction is subject only to any limitation or restriction placed thereon by the other provisions of the Saskatchewan Act.

It was, however, argued that, although the Provincial Legislature had jurisdiction to make laws relating to devolution of estates, it could not legislate upon the subject so as to affect the rights of the Crown. More amplified, the contention was that, although the Provincial Legislature has exclusive jurisdiction to legislate in respect of the devolution of estates, it is limited in the exercise of its jurisdiction to enactments which do not alter the law of succession so as to take away or postpone the right of the Crown to such casual revenues as otherwise might arise from escheats or *bona vacantia*.

It is well-established law that within the limits prescribed by sec. 92 of the B.N.A. Act, 1867, the powers of a Provincial Legislature are as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed or could bestow. *Hodge* v. *The Queen*, 9 App. Cas. 117; *Re The Initiative and Referendum Act*, 48 D.L.R. 18, [1919] A.C. 935.

The point under discussion came before the Quebec Court of King's Bench (Appeal Side) in *Att'y-Gen'l of Quebec* v. *Att'y-Gen'l of the Dominion*, 3 Cart. Cas. 100, 2 Que. L.R. 236. In that case the opinion was expressed that the Legislature of Quebec had jurisdiction to restrict or extend the degrees of relationship beyond which parties will cease to inherit; that it could enact that in default of legitimate heirs the estate of the deceased should descend to his illegitimate offspring, and thus materially affect or destroy altogether the right to escheats.

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If therefore the provisions of the Saskatchewan Act other than sec. 3 do not place a limitation upon the powers of the Province to legislate in respect of the devolution of estates, it would seem to me that secs. 23 and 24, above set out (*ante* page 688), were well within the power of the Legislature to enact. The only section which it was claimed did restrict the right of the Province to enact such legislation was sec. 21. That section reserves to the Crown in right of the Dominion all Crown Lands, mines and minerals and royalties incident thereto.

In *Trusts & Guarantee Co.* v. *The King*, 32 D.L.R. 469, 54 Can. S.C.R. 107, it was held that royalties in this section included a right to escheated lands, and as this was reserved to the Dominion by the section the Legislature was powerless to enact that they should belong to the Province. But, as Fitzpatrick, C.J., pointed out in that case, that judgment does not involve any decision as to the right of the Legislature of the Province to change the law of inheritance, that altering the laws of inheritance is one thing, and appropriating the right of the Dominion on failure of heirs is quite another thing.

In his judgment in that case Idington, J., 32 D.L.R., at page 477, says (see *ante* page 687).

And Anglin, J., at page 484, said (see *ante* page 687).

This latter passage was relied upon by counsel for the Dominion, but I cannot see how it supports his contention. It points out that the Provincial Legislature has power to determine the tenure of land and amend the law of descent, so long as it does not contravene the rights granted by section 21 to the Dominion. It also holds that legislation which, in effect, says that escheated lands shall not belong to the Dominion does contravene the section. But that is not the question here. In this case we are called upon to determine whether the power which otherwise the Legislature would have to regulate the devolution of estates is restricted by that section so as to prevent any change in the law as to when there shall be a failure of heirs. In my opinion sec. 21 does not so restrict the power of the Legislature. That section, so far as it applies to this case, goes no farther than to say that, once there is a failure of heirs in respect of any land such land shall belong to the Dominion. Until there is a failure of heirs, the reservation as to escheated lands has no application. Personal property is not within the section.

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Lamont, J.A.

The Provincial Legislature has the right to say who shall succeed to property on the death of the owner thereof. The Dominion has the right to succeed to land upon failure of heirs. The simple right to succeed upon failure of heirs does not in my opinion imply any restriction upon the power of the Legislature to say when there shall be a failure of heirs.

I am therefore of opinion that secs. 23 and 24 of the Provincial Act are *intra vires*, and that there has been in this case no failure of heirs. The claims of both the Dominion and the Province must, therefore, be disallowed.

To whom then does the property go? For the reasons given by Haultain, C.J.S., in his judgment, which I have had an opportunity of reading, I have reached the conclusion, not, however, without some hesitation, that it should all go to William Stone.

Elwood, J.A.

ELWOOD, J.A., concurs with Haultain, C.J.S.

Judgment accordingly.

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THE KING AND THE PROVINCIAL TREASURER OF ALBERTA v. THE CANADIAN NORTHERN R. Co. AND THE CANADIAN NATIONAL R. Co.

Alberta Supreme Court, Hyndman, J. August, 1920.

STATUTES (§ II A—95)—ACT TO SUPPLEMENT THE REVENUES OF THE CROWN (ALTA.)—AMENDMENT—INTERPRETATION—"OF THE PROVINCE."

The word "statute" in the Act to Supplement the Revenues of the Crown, in the Province of Alberta, 6 Ed. VII. 1906, ch. 30, sec. 12, means any statute, whether Dominion or Provincial, and the amendment to the said Act (8 Geo. V. 1918, ch. 36), limiting the word to statute "of the Province," is not retrospective nor declaratory, and a railway receiving aid by a guarantee of bonds, debentures, debenture stock or other securities under the provisions of a Dominion statute during the time mentioned in the Provincial Act is not liable to taxation.

Statement.

ACTION to recover from the defendants certain taxes and penalties alleged to be due under the Act to Supplement the Revenues of the Crown, and amendments thereto.

H. H. Parlee, K.C., and *I. B. Howatt*, for plaintiffs.

Wm. Short, K.C., and *N. D. Maclean*, for defendants.

Hyndman, J.

HYNDMAN, J.:—This is an action brought by the King and the Treasurer of the Province of Alberta to recover from the defendant companies certain taxes and double taxes and penalties alleged to be due and owing in respect of 176.23 miles of railway owned and operated by the said company in this Province, imposed for the years 1913 to 1919 inclusive, under the provisions of 6 Ed. VII. 1906, ch. 30 and amendments thereto (being now found

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at page 218 O.C. (Alta.) 1915), being an "Act to Supplement the Revenues of the Crown in the Province of Alberta."

Section 1 of the said Act provides in effect that every person company or corporation owning or operating a line or part of a line of railway within the Province shall pay a tax in respect of the railway or part thereof so operated and not exempt from taxation based upon the actual value of such railway or part thereof so operated within the Province but both the company owning the lines or such part thereof and the company operating or working the said line or part or parts of a line as aforesaid shall be jointly and severally liable for the payment of the amount of such tax to the Provincial Treasurer.

Section 3 provides that until the actual value of such railways or parts thereof has been determined and approved by the Lieutenant-Governor-in-Council or until the Lieutenant-Governor-in-Council otherwise fixes such actual value the same shall for the purposes of the Act be taken to be $20,000 for each mile of such railway or part thereof so operated exclusive of switches and turnouts.

The lines or parts of the lines of railway in question within the Province or partially so are (1) a line from Edmonton to Strathcona, and (2) a line of railway part of which extends from Lloydminster to Edmonton, all in this Province.

The tax imposed and authorised by the Act is 1% of the actual value of such railways or parts thereof so fixed or determined.

Section 9 provides that such taxes shall be payable to the Provincial Treasurer on the first day of September in each year.

By Order-in-Council No. 437, dated August 29, 1908, the Lieutenant-Governor-in-Council pursuant to sec. 3 of the Act fixed the value of the railway lines in question for the purposes of taxation for the years 1906, 1907 and 1908 and all subsequent years until further Order-in-Council at the sum of $11,985.34 per lineal mile of such railway or railways or parts thereof.

It is admitted for the purposes of the trial that if liable at all the defendants did own and operate the lines mentioned for the year 1913 and each subsequent year up to and inclusive of the year 1919; that the line from Lloydminster to Edmonton began its existence in the month of December 1905, and the line from Strathcona to Edmonton began its existence prior to the last mentioned date, and that the mileage is 176.23.

Section 4 of the said Act enacts:—

4. Every person, company or corporation owning or operating a line or part of a line of railway within the Province, shall without any notice or demand to that effect deliver in duplicate to the Provincial Treasurer, on or before July 1, 1906, and on or before the first day of July in each succeeding year, a written statement correctly shewing the number of miles of railway line, or part thereof, whether the same is or is claimed to be exempt from taxation or not, so operated by such person, company or corporation within the Province, and specifying in such statement what portion of the said railway line, or parts thereof, is or is claimed to be exempt from taxation by the Province, describing such line or part or parts thereof so exempt or claimed to be exempt by reference to stations or points within the Province in such a way as to enable the same to be easily identified, and setting out the number of miles of railway line or part or parts thereof so exempt or claimed to be exempt; and the authority under which such exemption is claimed.

Section 5 enacts:—

5. Every person, company or corporation who, or which, and the manager or agent in the Province of any company or corporation as aforesaid who neglects to conform to the provisions of the preceding section shall each be liable to a penalty of $20 per day for each day during which default is made; and the person, company or corporation aforesaid shall also be liable to pay a tax of double the amount for which he or it would have been liable under this Act; and any penalty or such double tax may be recovered with costs in any Court of competent jurisdiction in an action brought in the name of the Provincial Treasurer.

It is admitted that the statements required to be furnished under the provisions of the sections of the Act just quoted have never been rendered nor have any taxes or double taxes ever been paid by the defendants or either of them.

The plaintiff now claims:

Taxes due September 1st, 1918, pursuant to the said Act and amendments thereto on 176.23 miles of railway as fixed by Order-in-Council. Value $11,985.34 per mile at 1%	$21,121.76
Arrears for the year 1913	21,121.76
Arrears for the year 1914	21,121.76
Arrears for the year 1915	21,121.76
Arrears for the year 1916	21,121.76
Arrears for the year 1917	21,121.76
	$126,730.56
Double tax	126,730.56
	$253,461.12
Penalty for the years 1913 to 1918 both inclusive, 2,191 days at $20.00	43,820.00
	$297,281.12

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Taxes for the year 1919, amendment of which was asked for at the trial 21,121.76
Double taxes 21,121.76

Penalty at the rate of $20.00 per day since the first September 1919.

Interest by way of damages at the rate of 8% per annum on the aforesaid sums from the dates on which they respectively fell due.

The principal defences pleaded (excluding the year 1919), as to the lines of railway affected are:

(1) That they are not and never were liable to taxation under the provisions of the said statute; and not being so liable were not bound or required to deliver any written statements as claimed or to pay the said taxes, double taxes or penalties, the said lines having been aided by a guarantee of bonds, debentures, debenture stock or other securities under the provisions of statute or statutes of the Parliament of Canada; and (2) that in any event the said Order-in-Council No. 437 did not affect them because at the time it was passed the said lines had not been in operation for a period of 7 years and that they were therefore not included in it or intended to be affected by it and such Order-in-Council is, in consequence, invalid as against them.

Dealing with the objection first raised it is desirable to quote sec. 12 of the Act, which is in the following words:—

12. In this Act the word "railway" shall mean a line or part of a line of railway within the Province which was constructed at a date 7 years or more previous to September 1, 1905, or a line or part of a line of railway within the Province which shall have completed 7 years or more of existence at any time subsequent to the said September 1, 1905, and in the event of any dispute arising as to whether a line or part of a line of railway is, or was at any particular time, a railway for the purposes of this Act, the same shall be settled by order of the Lieutenant-Governor-in-Council, and notwithstanding anything in the original Act mentioned, the said original Act shall be taken only to have applied to such railways as are in this amendment described. [1908, ch. 20, sec. 17.]

Provided, however, that no tax shall be payable under this Act upon or with respect to any portion of a line of railway aided by a guarantee of bonds, debentures, debenture stock, or other securities *under the provisions of any statute* for a period of 15 years from the date of the commencement of the operation of the portion of the line so aided, and thereafter during the currency of the guarantee as aforesaid the amount of taxes payable hereunder upon or with respect to such portion of any line of railway so aided shall not exceed an amount equal to $30 per mile of the mileage of such portion of such line in the Province:

Provided further that the periods hereinbefore provided for shall not together exceed the full period of 30 years in respect of any line of railway or portion thereof.

(2) The power given in sec. 3 of the original Act to the Lieutenant-Governor-in-Council to fix the actual value of such railways or parts thereof as are within the purview of the said Act for the purpose of fixing and ascertaining the amount of taxes payable for the years 1906 and 1907 by the person, company or corporation owning or operating such line of railway or part of a line of railway, shall be exercisable by Order-in-Council at any time hereafter

notwithstanding the fact that the taxes in respect of such railway or part thereof for the said years have become and are due and payable under the terms of the said Act. [1908, ch. 20, sec. 17.]

(3) The chairman of the Executive Council of Alberta is hereby authorised to enter into a contract or contracts to carry out the intent and meaning of this section. [1909, ch. 5, sec. 10 (2).]

It will be noticed in the last quoted section that the word "railway" as used in the Act shall mean a line or part of a line of railway within the Province which was constructed at a date 7 years or more previous to the first day of September, 1905, or a line or part of a line of railway within the Province which shall have completed seven years or more of its existence at any time subsequent to September 1, 1905, and further, that no tax shall be payable under the Act upon or with respect to any portion of the line of railway *aided by a guarantee of bonds, debentures, debenture stock or other securities* under the provisions of *any statute* for a period of 15 years from the date of the commencement of the operation of the portion of the line so aided and that thereafter during the currency of the guarantee the amount of taxes payable shall not exceed an amount equal to $30 per mile of the mileage of such portion of line within the Province provided the periods mentioned shall not together exceed 30 years in respect of any line of railway.

It is admitted that power was conferred upon the Government of the Dominion of Canada by ch. 7 of 62-63 Vict. 1899 (Can.) and by ch. 7, 3 Ed. VII. 1903 (Can.), and by 7-8 Ed. VII. 1908, ch. 25, to give assistance to the lines in question and it was agreed between counsel that the production of a certified copy of the Order-in-Council granting aid under any of these statutes shall be evidence that such aid was given and might be produced after the hearing if material.

If such aid were given, therefore, the question for determination is whether or not aid by way of guarantee of bonds, etc., by virtue of a *Statute of the Parliament of Canada* was contempleted in the section quoted or refers only to aid granted under a statute or statutes of this Province; in other words, does the word "statute" mean any statute or merely a Provincial Statute?

If the former, then it is obvious that apart from the amendment to the Interpretation Act, 6 Ed. VII. 1906, ch. 3, which I shall presently mention, ch. 30 (1906) (and amendments thereto), does not apply to or affect such lines of railway.

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Except for the amendment to our Interpretation Act, just referred to, there is nothing in the Provincial Statutes defining the word "statute" as a Provincial Statute only, or otherwise, and consequently it is necessary to examine authorities to ascertain what meaning under the circumstances should be given to it.

In *Tennant* v. *Smith*, [1892] A.C. 150, at page 154, Lord Halsbury, L.C., says:—

Cases therefore under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said in *In re Micklethwait* (1855), 11 Exch. 452, at page 456, 156 E.R. 908: "It is a well established rule that the subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words."

In *M'Cowan* v. *Baine* [1891], A.C. 401, Lord Bramwell says, at page 409:—

But it is said that for some reason the primary and natural meaning of the words is to be extended; and that we should hold that there was a collision where there was none. I am at a loss to see why. I think an Act of Parliament, an agreement, or other authoritative document, ought never to be dealt with in this way, unless for a cause amounting to a necessity, or approaching to it. It is to be remembered that the authors of the document could always have put in the necessary words if they had thought fit. If they did not it was either because they thought of the matter and would not, or because they did not think of the matter. In neither case ought the Court to do it. In the first case, it would be to make a provision opposed to the intention of the framers of the document: in the other case, to make a provision not in the contemplation of those framers.

and at page 411:—

Now, my Lords, this seems to me to be a case (too common) in which there is a tendency to depart from the natural primary meaning of words, and add to or take from them—to hold that constructively words mean something different from what they say. It introduces uncertainty. No case is desperate when plain words may be disregarded. I deprecate this in all cases.

Lord Esher, M.R., in *Clerical etc. Ass'ce Society* v. *Carter*, (1889), 22 Q.B.D. 444, at page 448, says:—

In the course of the argument there has been a long discussion of various puzzling matters in relation to the provisions of the Income Tax Acts, but after all we must construe the words of Schedule D. according to the ordinary canon of construction, that is to say, by giving them their ordinary meaning in the English language as applied to such a subject-matter, unless some gross and manifest absurdity would be thereby produced.

I also find in Hardcastle, 1892 ed., at page 94, the following:—

In applying this rule to colonial statutes penned in English it must be modified so as to give effect to any difference between English and colonial usage as to the meaning attached to a word or phrase.

And at page 99, quoting from *Warburton* v. *Loveland* (1828), 1 Hud. & B. 632, at page 648:—

I apprehend it is a rule in the construction of statutes that in the first instance the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention or declared purpose of the statutes, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no further. . . . The mere literal construction of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effectuated.

Grove, J., in *Richards* v. *McBride* (1881), 8 Q.B.D. 119, at page 123, said:—

I even doubt whether if there were words in the Act tending strongly the other way, I could pass from the plain grammatical construction of the phrase in question. The onus of shewing that the words do not mean what they say lies heavily on the party who alleges it. He must, as Parke, B., said in *Becke* v. *Smith*, (1836), 2 M. & W. 191, 150 E.R. 724, advance something which clearly shews that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity.

In 36 Cyc., page 1189, I find the following passage:—

As a general rule, revenue laws, such as laws imposing taxes and licenses, are neither remedial laws, nor laws founded upon any permanent public policy; but, on the contrary, operate to impose burdens upon the public, or to restrict them in the enjoyment of their property and the pursuit of their occupations, and are therefore construed strictly. The provisions of such statutes are not to be extended beyond the clear import of the language used; in order to sustain the tax, it must come clearly within the letter of the statute, and the powers granted to officers charged with its execution must be strictly pursued.

Many other authorities to the same effect are quoted in Hardcastle and Maxwell and it would be useless to extend them all here.

In the light of these rules of construction as laid down in the cases mentioned can it be said that the word "statute" as used in the Act of Legislature of the Province must necessarily mean only a Provincial Statute and exclude a Statute of the Parliament of Canada? It must be remembered that Statutes of the Parliament of the Dominion of Canada are in force here just as Provincial Statutes are and lines of railway have been guaranteed both by Dominion and Provincial Statutes. Neither am I able to find that at the date of the passage of the Act in question aid in the manner indicated had been given to any railway by Provincial Statute which ought to be considered as significant.

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After the best consideration I can give the question I am unable to see any valid reason why the word should be restricted as contended for by the plaintiffs. In so holding I fail to appreciate any inconsistency or manifest absurdity or injustice. On the contrary, it seems quite consistent with an intention to include a Dominion Statute just as much as a Provincial one. Many reasonable arguments may be conjured up why a Dominion Statute was probably intended to be included in the word. In view of the fact that guarantees were extended by the Dominion of Canada to railways within the Province of Alberta, and so far as I am aware the only guarantees in existence at the date of the legislation, it would have been a very proper and easy matter in order to remove all doubt on the question for the Legislature to have added the word "Provincial" so that the meaning would be clear and unambiguous, but this they did not see fit to do.

There being no patent incongruity, absurdity or injustice I am strongly of the opinion that the plain meaning must be placed upon the word "statute" in said sec. 12 of the Act, that is, the word should be taken to include any statute whether Provincial or Dominion which affects in regard to guarantees, &c., &c., the lines sought to be taxed.

By sec. 48, ch. 4 of 8 Geo. V. 1918 (Statute Law Amendment Act), the following was enacted:—

> The Interpretation Act being chapter 3 of the Statutes of 1906 is amended as follows:—
>
> 1. By inserting immediately before clause 11 of section 7 the following new clause: "10*a*." The expression "Province" means the Province of Alberta and the expressions "Act" and "Statute" mean an Act or Statute of the Province.

It is contended that this enactment makes it clear that the word "Statute" means and always did mean Provincial Statute. This submission is met by the argument that the amending enactment is not in terms declaratory or retroactive but is prospective only, especially with regard to vested or accrued rights, and as a matter of fact strengthens rather than weakens the case for the defence inasmuch as not being in terms declaratory, the reasonable inference must be that formerly its meaning is not what it now is, but embraced *any statute* which might apply in the circumstances, otherwise the amendment, not being in terms declaratory, was quite unnecessary if the word "statute" in the

original Act ought to be considered as embracing only Provincial Statutes. In the absence of positive and clear language in the amending Act it would seem to me that it is neither declaratory nor retroactive.

By sub-sec. 44 of sec. 7 of the Interpretation Act, 6 Edw. VII, 1906, ch. 3, it is enacted that the repeal or amendment of any Act or law shall not be deemed to be or involve any declaration whatsoever as to the previous state of the law.

The following are some quotations found in 36 Cyc: At page 1205 I find the following passage:—

It is a rule of statutory construction that all statutes are to be construed as having only a prospective operation, unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used. In every case of doubt, the doubt must be solved against the retrospective effect. This general rule has been applied to a great variety of statutes, including the uniform Negotiable Instruments Law, usury laws, statutes levying taxes, etc.

At page 1209:—

In accordance with the general rule that remedial statutes should be given a liberal construction, they will be freely construed to have a retrospective operation whenever such seems to have been the intention of the Legislature, unless such a construction would impair the validity of contracts, disturb vested rights, or create new obligations.

At page 1210:—

The rule that statutes are not to be construed retrospectively unless such construction was plainly intended by the Legislature applies with peculiar force to those statutes the retroactive operation of which would impair or destroy vested rights.

At page 1212:—

A statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage. This rule has been applied to statutes creating liens, imposing liabilities upon common carriers and upon subscribers to corporate stock, changing the law in regard to interest and usury, authorising the levy of taxes, imposing penalties for non-payment of taxes, etc.

In Hardcastle, 1892 ed., at page 370, I find the following:—

The Act of 1793 in no ways prevents Parliament from making an Act retrospective if the intention to do so is apparent. "No one denies," said Dr. Lushington in *The Ironsides* (1862), 31 L.J. (P.) 131, "the competency of the Legislature to pass retrospective statutes if they think fit, and many times they have done so." Philosophical writers have, it is true, denied that any Legislature ought to have such a power, and it is indisputable that to exercise it under ordinary circumstances must work great injustice. Consequently, the general rule laid down by the Courts is, as Lord O'Hagan said in *Gardner* v. *Lucas* (1878), 3 App. Cas. 582, at page 601, that "unless there

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is some declared intention of the Legislature—clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective, and not retrospective." Bowen, L.J., in *Reid* v. *Reid* (1886), 31 Ch. D. 402, at page 408, thus dealt with it: "The particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well known trite maxim, *omnis nova constitutio futuris formam imponere debet non præteritis*—that is, that, except in special cases, the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought, nevertheless, to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition, that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant." Similarly, in *Reg.* v. *Ipswich Union* (1877), 2 Q.B.D. 269, Cockburn, C.J., said, "It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary it is to be taken as intended to apply to a state of facts coming into existence after the Act."

At page 374:—

"It is a well recognised rule that statutes should be interpreted, if possible, so as to respect vested rights," (*per* Bowen, L.J., in *Hough* v. *Windus* (1884), 12 Q.B.D. 224). "For it is not to be presumed that interference with existing rights is intended by the Legislature, and if a statute be ambiguous the Court should lean to the interpretation which would support existing rights," (*per* Lord Mure in *Macdonald* v. *Finlayson* (1884), 12 Rettie (Sc.) 228 at page 231).

Numerous authorities all pointing in the same direction are to be found in the various text books.

If I am correct then in my view of the meaning which should be attached to the word "statute" as the legislation stood prior to the amendment mentioned and which amendment is neither declaratory nor retrospective then it is clear that the defendants are not and never have been liable for the taxes claimed for the years 1913 to 1918 inclusive.

As to the second objection that Order-in-Council No. 437 is ineffective as against the defendants.

I am of opinion that the said lines not being liable to taxation, the Order-in-Council fixing the value of $11,985.34 did not apply to them at the time as it expressly mentions "railways liable to taxation," which they were not, and consequently the amount claimed by virtue of it for the year 1919 cannot be recovered.

At the trial, however, a motion was made to allow the plaintiffs to amend their pleadings setting up a claim for taxes on the basis

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of $20,000 per mile in case it should be held that the Order-in-Council fixing the value as aforesaid was found to be invalid, and I reserved such motion.

As the amendment was asked for only at the trial, after consideration I am of opinion that it would be more in the interests of justice to refuse the same but without prejudice to plaintiffs' right to bring a new action in respect to the taxes for 1919.

As to the taxes and double taxes claimed therefore (subject to the filing of the Order-in-Council granting the aid), the action will be dismissed with costs.

With regard to the penalties claimed because of failure to furnish statements required by the Act, in accordance with the suggestion made at the trial, I will hear further argument.

Judgment accordingly.

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Ontario Supreme Court, Appellate Division, Magee, J.A., Clute, Riddell, Sutherland and Masten, JJ. April 9, 1920.

MUNICIPAL CORPORATIONS (§ II D—147)—AGREEMENT WITH STREET RAILWAY CO.—AGREEMENT NOT MADE PART OF STATUTE—SUBSEQUENT CHANGE BY AGREEMENT OF PARTIES—VALIDITY.

Where an agreement between a city corporation and a street railway company, and the by-law affecting same, are not made part of a statute but are merely declared "valid and effective in all respects" by the Legislature, no general rights on the public are conferred, and the parties may by mutual consent modify or alter the terms of the first agreement, if the modifications or alterations are such as were clearly contemplated by the first agreement.

[*D. Davies and Sons* v. *Taff Vale R. Co.*, [1895] A.C. 542; *Westgate and Birchington Water Co.* v. *Powell-Cotton* (1915), 85 L.J. (N.S.) (Ch.) 459; *Re City of Toronto and Toronto and York Radial* (1918), 43 D.L.R. 49, at page 59, 42 O.L.R. 545, at 557, 23 Can. Ry. Cas. 218, referred to.]

Statement.

APPEAL from an order of FALCONBRIDGE, C.J.K.B., pronounced upon motion made before him at the London Weekly Court on the 25th October, 1919, quashing by-law No. 5935 of the City of London.

The facts of the case are as follows:—

The London Street Railway Company was incorporated by the Act (1873) 36 Vict. ch. 99 (O.), and sec. 13 of that Act gave power to the council of the city and the company to make agreements for certain purposes. Section 8 provided that the fares should not exceed 6 cents for any distance not more than three miles, etc.; but otherwise the rate was not fixed by statute. In

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an agreement made it was provided that the company's cars should be drawn by horses or mules only. After electricity had become available, an agreement was entered into between the city corporation and the company authorising the company to use electricity as the motive-power for moving the cars, and this agreement and by-law No. 116 giving it effect were declared "valid and effective in all respects" by an Act respecting the London Street Railway Company (1896), 59 Vict. ch. 105, sec. 2 (O.) The agreement and the by-law are set out in schedule A. to the Act, and are interpreted by sec. 2 as having a certain effect therein set out. Section 25 (*d*) of the by-law provides for the fares to be charged by the company, these being less than the maximum mentioned in the Act of 1873, sec. 8. In 1919 the company and the city corporation entered into a new agreement whereby the rates were increased; and the by-law which was quashed was passed for the purpose of bringing the new agreement into operation. The by-law was not submitted to the ratepayers or electors of the City of London.

I. F. Hellmuth, K.C., for appellants.

W. R. Meredith, for respondent.

Clute, J.

CLUTE, J.:—This is an appeal from the order of the Chief Justice of the King's Bench, at the weekly sittings at London, dated the 25th October, 1919, whereby he did order and adjudge "that by-law number 5935 of the Corporation of the City of London be and the same is hereby quashed," and "that the respondents, the Corporation of the City of London, do pay to the applicant his taxed costs of this application."

The grounds upon which this motion was made were:—

"1. The said by-law purports to amend by-law number 916, which was incorporated in an Act of the Legislature, and became a statute of Ontario, 59 Vict. ch. 105, and the said by-law is for that reason beyond the powers of the council of the said corporation."

This is the principal ground, and I will deal with it before referring to the other grounds mentioned.

The statement that by-law number 916 was incorporated in an Act of the Legislature, and became a statute of Ontario, is not correct. The wording of sec. 2 of 59 Vict. ch. 105 is as follows:—

"The agreement between the said company and the Corporation of the City of London and by-law No. 916 therein referred to, which are set out in schedule A. to this Act, are hereby declared to be valid and effective in all respects . . ."

And there is no clause in the statute which had the effect of making the by-law a part of the statute—it simply made it valid and effective in all respects, and the statement that it became a statute of Ontario, and therefore beyond the powers of the Council of the Corporation of the City of London to change, is not true. Section 25 (*d*) of by-law number 916, referred to in the said Act, provides as follows:—

"The company may charge and collect from every person on entering any of their cars, for a continuous journey of any distance on their railway, from any point thereon to any other point on a main or branch line, within the limits of the city of London, as now existing or hereafter extended, a sum not exceeding five cents . . ." with certain exceptions as to children, which have no bearing upon the present case.

It is thus apparent that the original by-law fixed the limit of the charge which the railway company may make. By-law number 5935, which is now in question, was therefore within the limit fixed by by-law number 916. It is, I think, apparent, from this simple statement of the facts, that the said objection is not well taken and does not render the by-law invalid. For anything that appears in by-law number 916 or the statute validating the same, the city corporation and the company had a perfect right to agree to any rate they saw fit, provided the same did not exceed five cents.

The second objection is, that "the said by-law purports to alter or change a franchise which is in force until the year 1925, and is contrary to the provisions of the Municipal Franchises Act, R.S.O. 1914, ch. 197, as the same has never been submitted to and received the assent of the municipal electors of the City of London."

From what has already been said, it is clear, I think, that there is nothing in this objection. The by-law No. 916 that was ratified by the Act of the Legislature is still in force, and the by-law complained of, viz., No. 5935, is not in conflict with it, and there was therefore no necessity for submitting the new by-law to the

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electors. It was quite within the contemplation of the by-law which had their approval. There is nothing, in my opinion, in this objection.

The third objection is, that "the said by-law is contrary to the provisions of by-law No. 5143, which was confirmed and became an Act of the statutes of Ontario (1916), 6 Geo. V. ch. 37 (the Hydro-Electric Railway Act, 1916), and the schedules thereto."

In my opinion, by-law No. 5143 has no application to the present case.

There was a further ground not disposed of by the Chief Justice, but taken on the argument, that the by-law in question was obtained by fraud and from its nature and intendment was illegal and void. There is nothing in this objection. So far as I can see, there is no reason whatever for the suggestion that the by-law was passed for any fraudulent or improper purpose.

The case may be put in a few words thus:—

The original by-law fixed a limit not exceeding 5 cents for fares. The by-law here in question does not exceed that limit; it is not contrary to any other by-law or any Act of the Legislature; it is within the original intendment of by-law No. 916, and, in my opinion, valid.

With great respect, I think the order quashing the by-law should be set aside, and the motion dismissed with costs.

Sutherland, J.

SUTHERLAND, J., agreed with CLUTE, J.

Riddell, J.

RIDDELL, J.:—This is an appeal from the order of the Chief Justice of the King's Bench quashing by-law No. 5935 of the City of London.

The important facts are as follows:—

The London Street Railway Company was incorporated by the Act (1873) 36 Vict. ch. 99 (O.), and sec. 13 of that Act gave power to the council of the city and the company to make agreements relating to the construction of the railway, time and speed of cars, and generally for the safety and convenience of passengers, etc., etc. Section 8 provided that the fares should not exceed 6 cents for any distance not more than three miles, etc.: but otherwise the rate was not fixed by the statute.

Agreements were made that the cars should be drawn by horses or mules only; later, in the advance of motive power

production, electricity became readily available, and it was for many reasons preferred to horses or mules.

An agreement was entered into by the city corporation and the company looking to electrical equipment, and this agreement was declared "valid and effective in all respects" by the Legislature by the Act (1896) 59 Vict. ch. 105, sec. 2 (O.) The agreement and the by-law affecting the same are not made part of the statute, but they are interpreted by sec. 2 as having a certain effect therein set out.

Section 25 (*d*) of the by-law provides for the fares to be charged by the company—these being less than the maximum mentioned in (1873) 36 Vict. ch. 99, sec. 8. In respect of this clause (*d*) and some others, the agreement contemplated the possibility of agreements to be made subsequently: sec. 26 of the by-law.

In 1919 the company and the city corporation entered into a new agreement whereby the rates were increased, and the city passed a by-law, No. 5935, to bring it into operation. The by-law was not submitted to the people; on application by a ratepayer, it was quashed by the Chief Justice of the King's Bench; the city corporation now appeal.

The chief if not the only real objection taken is based upon the hypothesis that the former by-law No. 916 and the agreement are part of the statute, have the force of a statute, and can be altered only by statute.

I am unable to agree with that contention.

No doubt, where there is an express statutory provision, it is (speaking generally) not weakened in its force by the fact that the statute has been promoted by private persons or corporations or that it is the result of a bargain to which statutory validity is desired. We had such a case in *Re City of Toronto and Toronto and York Radial R.W. Co. and County of York*, (1918), 43 D.L.R. 49, 42 O.L.R. 545, 23 Can. Ry. Cas. 218, and the House of Lords considered such a case in *D. Davis & Sons Limited* v. *Taff Vale R.W. Co.*, [1895] A.C. 542.

In the present case, the agreement is not made part of the Act, and, "while legal and binding, it is legal and binding as a contract upon the parties" and "no different from any other contract:" *City of Toronto* v. *Toronto R.W. Co.* (1918), 46 D.L.R. 435 at 442, 44 O.L.R. 308, at pp. 316, 317 (the last two lines of p. 316

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should read "so as to become statutory"); *City of Kingston* v. *Kingston Electric R.W. Co.* (1898), 25 A.R. (Ont.) 462, at pp. 468, 469; *Corbett* v. *South Eastern and Chatham Railway Companies' Managing Committee*, [1906] 2 Ch. 12, at p. 20, and cases cited.

Irrespective of sec. 26, I think the contracting parties are not precluded from changing any clause or term in any way they might lawfully have done if the agreement had not been validated by statute.

Nor do I think that the Municipal Franchises Act, R.S.O. 1914, ch. 197, applies—that forbids the granting of "the right to use or occupy any of the highways . . . or to construct or operate any . . . street railway . . . or to supply . . . gas . . . light, heat or power or steam, unless or until a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted has been assented to by the municipal electors . . ." (sec. 3). Such rights, not the terms and conditions, are the "franchises" covered by the Municipal Franchises Act, sec. 2 (*a*)—the right of using the street, etc., is not intended to be given by this by-law, but only a modification of the terms. The same remarks apply to sec. 4 of the Act.

And, in my view, the agreement validated in 1896 clearly contemplated that new terms might be made, and that the city corporation and the company might make a new agreement, as provided for by sec. 8 of the Act of 1873.

On the facts we cannot say that the by-law is wholly for the advantage of the railway company—and we cannot inquire into its reasonableness: Municipal Act, R.S.O. 1914, ch. 192, sec. 249 (2).

I would allow the appeal with costs throughout.

Masten, J.

MASTEN, J.:—Appeal by the Corporation of the City of London from the order of the Chief Justice of the King's Bench, made on the 25th October, 1919, quashing by-law No. 5935 of the Corporation of the City of London.

The grounds upon which the applicant Joyce applied to quash the by-law in question are set forth in the notice of motion as follows:—

"1. The said by-law purports to amend by-law No. 916, which was incorporated in an Act of the Legislature, and became a statute of Ontario, 59 Vict. ch. 105, and the said by-law is

for that reason beyond the powers of the council of the said corporation.

"2. The said by-law purports to alter or change a franchise which is in force until the year 1925, and is contrary to the provisions of the Municipal Franchises Act, as the same has never been submitted to and received the assent of the municipal electors of the City of London.

"3. The said by-law is contrary to the provisions of by-law No. 5143, which was confirmed and became an Act of the statutes of Ontario (1916), 6 Geo. V. ch. 37, and the schedules thereto.

"4. The by-law provides for payment of costs or damages by the London Street Railway Company."

It is stated by counsel that the learned Chief Justice gave effect to the first, second, and third objections, but did not pass upon the fourth: all these objections are now pressed on the argument before us.

Under the fourth objection, which was supplemented by a notice of motion dated the 17th October, it was argued that the by-law was passed, not in the interests of the inhabitants of the City of London, but in the interest of the street railway company, and the fact that the by-law provides for payment of costs or damages by the London Street Railway Company was urged as cogent, if not conclusive, evidence of want of good faith and of fraudulent action on the part of the municipal council.

The Municipal Act, sec. 249 (2), makes it plain that no by-law shall be quashed on the mere footing of improvidence, but that it is essential that there shall be actual bad faith on the part of the municipal council in order that such a ground may effectively found a motion to quash. Upon the evidence, it appears to me that neither want of good faith nor indeed lack of consideration is shewn by the applicant. At the time when the by-law was passed, a strike was in existence or imminent; the street railway company were alleging that they were unable to grant the demands of the strikers and continue operations, as their resources did not permit such a course, and it was a choice on the part of the municipal council between continuing a condition in which the city would be for an uncertain and indefinite length of time without street railway transportation, or passing the by-law in question. Under these circumstances, it appears to me not only that they

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acted in good faith but with good sense in doing what they did, and that the fourth objection is not tenable.

On the first objection raised by the applicant the real question appears to me to be: Do the statute 59 Vict. ch. 105 and the subsequent Act of 1916, on their true interpretation, deal exclusively with the rights of the parties to the agreements which the statutes validate? Or, did the Legislature, upon the true construction of those Acts, intend to enact a law imposing obligations upon and giving rights to the general public?

The cases of *D. Davis & Sons Limited* v. *Taff Vale R.W. Co.*, [1895] A.C. 542, *Westgate and Birchington Water Co.* v. *Powell-Cotton* (1915), 85 L.J. (N.S.) (Ch.) 459, and *Re City of Toronto and Toronto and York Radial R.W. Co. and County of York*, 42 O.L.R. 545, at p. 557, 43 D.L.R. 49, at p. 59, 23 Can. Ry. Cas. 218, appear to illustrate the proposition that where the agreement is incorporated as a part of the statute itself, and its terms cannot be modified except by an Act of the Legislature, it does become part of the general law of the land. On the other hand, where, as here, the language of the statute merely validates the agreement, its effect appears to me to be confined, upon its true construction, to authorising and validating the agreement as between the parties thereto, and does not confer any general rights on the public. In such a case the parties may by mutual agreement modify or alter the terms of the agreement if the alteration or modification is otherwise within these powers. I am of opinion that it was within the powers of the corporation to amend by agreement by-law No. 916.

With respect to the second ground, namely, that the by-law is in contravention of the Municipal Franchises Act, I am of opinion that the Municipal Franchises Act has no bearing on this case, under the express provisions of the statute itself: R.S.O. 1914, ch. 197, sec. 4, sub-sec. 2.

With respect to the third objection, that the said by-law is contrary to the provisions of by-law No. 5143, I am of opinion that this by-law has no bearing upon the case whatever. It is admitted that no agreement, in the form prescribed by the statute or in any other form, has ever been signed, either by the Hydro-Electric Commission or by the Corporation of the City of London; indeed the corporation have never passed the necessary by-law, though it is said that by the statute it is their duty to do so; no

completed agreement being in existence, it cannot be invoked. Even if such a by-law had been passed, and such an agreement as is called for by the statute had been executed, it would not, in my opinion, give to the present applicant any right to maintain this motion. The only right of action would be in the Hydro-Electric Commission.

The appeal should be allowed and the motion to quash dismissed with costs.

MAGEE, J.A. (dissenting) :—The city corporation appeals from the order of the late Chief Justice of the King's Bench, of the 25th October, 1919, quashing by-law No. 5935, passed on the 10th July, 1919, authorising increased passenger fares to be charged by the London Street Railway Company.

The by-law recited that permission to operate during the remainder of a term of 50 years from the 8th March, 1875, a surface electric railway along certain streets particularly mentioned and subject to conditions and agreements therein, had been granted to the company by a previous by-law, No. 916, passed on the 21st May, 1895, and that clause (*d*) of sec. 25 of such by-law No. 916 provided that the company might charge and collect, except for children under 5 years of age, accompanied, who were to travel free, a passenger fare not exceeding 5 cents, and "shall sell tickets at the price of 25 cents for 7 tickets" for fares for use from the morning start till midnight, "and shall also sell another class of tickets at the price of 25 cents for 9 tickets" for use between 6.30 A.M. and 8 A.M. and between 5 P.M. and 6.30 P.M., and shall also carry children between the ages of 5 and 12 years for a cash fare of 3 cents and shall sell two children's tickets for such children, "at the price of 5 cents" and "shall also carry free of charge" certain police and city employees, and "shall grant transfers without any additional charge . . . from any point on their lines to any other point thereon, within the limits of the city of London, as now existing or hereafter extended, for a continuous journey."

The by-law No. 5935 also recited that, "having been requested by the company so to do, it is deemed expedient to provide for fares, selling tickets, granting of transfers, and otherwise, as hereinafter provided, for the term hereinafter provided and no longer." It then went on to enact that, "instead of charging and

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collecting" the fares provided for by said clause (*d*) of sec. 25 of by-law No. 916, the company may during the term of 8 months from the time the by-law takes effect, and subject in other respects to the terms of the by-law No. 916 and the agreement between the company and the city dated the 6th June, 1895, charge and collect certain fares, and shall issue tickets at certain rates. The wording for these rates appears to be exactly the same as the wording in by-law No. 916, except that, instead of the company being bound to sell 7 ordinary tickets or 9 morning or evening tickets for 25 cents, it "shall sell" 6 of the former or 8 of the latter for that sum. In no other way is the former by-law interfered with. No other reason or consideration for the increase appears. But by the last clause in the new by-law it is not to take effect "unless nor until the company, within one week from its passing, enter into an agreement with their employees, satisfactory to their employees, to grant to their employees such portion of the increase in the receipts of the company caused by the increase of the fares provided for by this by-law as will be satisfactory to their employees."

A previous clause stipulates that the company shall indemnify the council against any loss, damage, costs and expenses by reason of its passing or of any action or proceeding to quash it or have it declared that the council had no power to pass it.

As the by-law does not stipulate what proportion of the increased fares was to go to the company's employees, it is manifest that the benefit operates as a free gift of the increase to the company and its employees at the expense of the public using the cars.

Also it is manifest that, as, under the previous by-law, the city corporation were not to receive any percentage or share or sum proportioned upon the company's receipts, the company were not bound to charge the increased fares, but might issue the same number of tickets for 25 cents as formerly, and, if they did so, would not be doing anything unauthorised; and so the by-law of 1919 does not absolutely require the doing of anything illegal in any way, and its legality has to be considered solely as relative to the previous status.

It is said that there was a threatened strike of the company's employees, who asked an increase of wages which the company professed their inability to grant from their receipts on the existing

rates. The city council may have feared more inconvenience and loss to the public from a strike than would be compensated by a maintenance for the limited term of the lower fares, and should be taken to have acted on their judgment of the best interests of the community. Those here opposing the change also, doubtless, feared that this temporary variation was but the thin edge of a wedge which might easily be driven farther. But what has to be determined is, whether the council itself had authority to give this authority to the company.

The company was incorporated in 1873, by special Act, 36 Vict. ch. 99 (O.), which, in sec. 4, empowered the company to construct and operate a railway along such of the streets in the city and adjoining municipalities as the company might be authorised to pass along, under and subject to any agreement thereafter to be made between the company and the councils of the city and of such municipalities, and under and subject to any by-law of the said corporations respectively, and to carry passengers and freight thereon, by the power of animals or such other power as the said respective corporations might authorise to be used. Section 13 authorised the council of the city and of any of the municipalities, or any of them, and the company, to make any agreement relating, *inter alia*, to the construction of the railway, the paving, grading and repair, of the streets, the location of the railway, and the particular streets along which the same should be laid, the time and speed of running the cars, and other things, and generally for the safety and convenience of the passengers and the non-obstruction or impeding of the ordinary traffic.

By sec. 14, the municipalities were authorised to pass any by-law or by-laws for carrying into effect any such agreements, and containing all necessary clauses for the conduct of all parties concerned, including the company, and for facilitating the running of the company's cars, and for regulating traffic upon the streets.

Section 16 made certain clauses (here immaterial) of the Railway Act of the former Province of Canada part of the Act.

Section 8 gave the directors of the company power to make by-laws for the management of the company, and, *inter alia*, the fares to be received for passengers and freight and the time and speed of running the cars, and in general to do all that may be

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necessary to carry out the objects and exercise the powers incident to the company, subject to the terms and stipulations contained in any agreement between the company and any of the municipalities: provided always, that the fares to be taken by the company shall not exceed 6 cents for each passenger for 3 miles and under, and one cent per mile for distances over 3 miles. Section 5 provided that other ordinary vehicles might use the tracks, not impeding the company's cars, but giving place to them by running off the tracks.

These provisions of secs. 5 and 8 are the only ones which contained enactments restrictive of the company beyond its agreements with the municipalities, and no special mention of fares is made in the reference to the powers of the city council. An amendment in 1889, 52 Vict. ch. 79, of the company's special Act, does not bear on the questions here.

The city council, in March, 1875, July, 1888, December, 1888, and August, 1889, and the councils of the adjoining municipalities of London East (which in 1896 was part of the city) and an adjoining township of Westminster (part of which was added to the city), and the Council of the County of Middlesex passed by-laws conferring certain rights upon the company for 50 years from the 8th March, 1875, subject to conditions in the by-law: see recital in by-law No. 916.

None of these by-laws had professed to grant to the company an exclusive right in the city, and they had not authorised electricity as a motive power. In 1896 it was desired to change from horse traction to electric, and a new agreement was arranged between the city and the company, the terms of which were embodied in by-law No. 916 of the city, passed on the 21st May, 1895, followed by articles of agreement between the city and company, dated the 6th June, 1895, whereby the company accepted the by-law and covenanted to perform and observe the provisions and stipulations therein contained and to perform all things which the by-law provides are to be done by or on behalf of the company, and not to do anything which the by-law provides is not to be done by the company.

By an Ontario statute of 1896, 59 Vict. ch. 105, sec. 2, this agreement and by-law No. 916, both of which are set out in the schedule to the Act, were declared to be valid and effective in

all respects, and it was by the Act declared that under the by-law and agreement the company acquired and are entitled to the exclusive right of constructing, maintaining, and operating, subject to the conditions, stipulations, regulations, obligations, provisions and agreements in the by-law and agreement contained, a surface electric street railway on the streets and portions of streets mentioned in sec. 50 of the by-law. Section 3 of the Act provided that if the company fail or neglect to keep, observe, perform or comply with any of the provisions of the by-law, in which the residents of the municipality, or the corporation, or any other person or corporation are interested, then, in addition to all other remedies by law enforceable against the company, the corporation of the city may bring an action in the High Court of Justice against the company, and all other necessary parties, to compel the observance of and compliance with such provisions of the by-law; and the Court shall have full power and jurisdiction in the premises, and to enforce, by injunction or otherwise, the due observance, performance and fulfilment by the company of all provisions of the by-law in which residents of the municipality or the corporation or any other persons or corporations are interested.

Now, as to the terms of by-law No. 916 itself:—

It gave, in sec. 1, authority to the company to operate along certain streets mentioned in sec. 50, but upon and subject to the conditions and agreements thereinafter mentioned. By sec. 51, this right, so far as the city council had power, was to be an exclusive right; and, by sec. 58, the city agreed to join the company in applying for legislation confirming and declaring valid the by-law and agreement; and, by sec. 61, all previous by-laws, so far as inconsistent, were repealed. Section 43 provided that, in case of any other persons or company proposing to construct a railway or railways on any of the streets, the option of constructing the same on the conditions contained in this by-law, or the conditions of the proposal, as the city corporation might elect, should be offered to this company, and, if not accepted or not proceeded with, the city corporation might grant the privilege to any others, but the city corporation were not to be bound to grant to this company or any one else the right to construct a railway or railways upon any streets not specially named. In sec. 50 over a score of streets are specially named, which, it may be safely assumed, are the chief streets of the city.

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Various powers were given in numerous sections to the council, in some cases to be exercised by by-law, and to the city engineer, but in none of them is there any hint of any power to vary the rates of fare. Those rates, as already mentioned, were prescribed in clause (*d*) of sec. 25, and by clause (*q*) any conductor or employee demanding from any passenger more than the fare "prescribed by this by-law" would be liable to fine in the Police Court (and, by sec. 44, to imprisonment on non-payment); and, by clause (*r*), the company was to keep tickets for sale on the cars and sell to all persons at the rates mentioned in clause (*d*).

Section 26 imposed daily liquidated damages for breach of these provisions, (*d*), (*r*), and others, and in the case of continued breach gave the city corporation the right to put an end to the powers conferred on this company by the by-law or any other by-law or agreement theretofore or thereafter passed or made; but, as several provisions of the by-law itself refer to the passing of by-laws, and as future by-laws or agreements, exclusive or not as to other streets, would as of course be in contemplation of the parties, it cannot for a moment, I think, be considered that this reference to future by-laws or agreements implied power to change this one.

At the time this by-law was passed, there was no power in a municipal council to grant such an exclusive right upon the city streets, and it was necessary to apply to the Legislature for its sanction.

In 1896 the Municipal Act of 1892, 55 Vict. ch. 42, contained, in sec. 286, a provision that no council should have the power to give any person an exclusive right of exercising within the municipality any trade or calling unless authorised or required by statute so to do, and sec. 287 authorised the grant of exclusive privileges in ferries vested in the corporations. In 1893, by 56 Vict. ch. 35, sec. 6, a new section was added, sec. 286*a*., whereby the grant of exclusive rights to telephone companies was authorised, and for the removal of doubts it was declared that previous by-laws granting such exclusive rights to telephone companies were to be as valid as if the municipalities had had power to grant the same. In 1897, on the revision of the statutes, these sections 286, 286*a*., and 287 became secs. 330, 331, and 332 of the Municipal Act, R.S.O. 1897, ch. 223, and sec. 330 then read that, "subject

to the provisions of sections 331 and 332," no council should have the power to grant the exclusive right of exercising any trade or calling.

In 1904, by 4 Edw. VII. ch. 22, sec. 6, another provision was added to the Municipal Act, as sec. 332*a*., authorising the grant of an exclusive right to place waste-paper boxes on the street corners or elsewhere.

On the revision of the statutes in 1914, the section as to ferries (sec. 332 of R.S.O. 1897, ch. 223) was transferred to the Ferries Act, R.S.O. 1914, ch. 127, as sec. 7, and that as to telephones to the Ontario Telephone Act, R.S.O. 1914, ch. 188, as sec. 8, and the other two sections, 331 and 332A, became secs. 254 and 255 of the present Municipal Act, R.S.O. 1914, ch. 192; and sec. 254 now reads: "Subject to section 255, and to section 7 of the Ferries Act and to section 8 of the Ontario Telephone Act, a council shall not confer on any person the exclusive right of exercising, within the municipality, any trade, calling or business." These two latter words "or business" had been inserted on the consolidation of the Municipal Act in 1913, in 3 & 4 Geo. V. ch. 43, sec. 254, and indicate that the Legislature had not then in mind any loosening of restriction without its own special consideration and permission—besides indicating that such enterprises as ferries, telephones, and waste-paper boxes would otherwise have come within its contemplation.

Already reference has been made to sec. 5 of this company's Act of 1873, whereby the Legislature provided that all other ordinary vehicles should be permitted to use and travel in the tracks, and to sec. 15 of the by-law of 1896 allowing the use of the tracks except for street railway purposes.

In April, 1893, Galt, C.J., had held in *Re Robinson and City of St. Thomas*, (1893), 23 O.R. 489, that a grant of an exclusive right to a telephone company was contrary to the anti-monopoly section, then sec. 286 of the Municipal Act of 1892, 55 Vict. ch. 42, a decision which the Legislature appears to have adopted by making telephones one of the express exceptions to the general restriction.

In *St. Hyacinthe Gas Lighting Co.* v. *St. Hyacinthe Hydraulic Power Co.* (1895), 25 Can. S.C.R. 168, it was held that the monopoly of an exclusive right, confirmed by special Act, to supply gas,

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did not give such exclusive right for electric light, which the same company was by the confirming Act authorised to supply with the same privileges, and it was pointed out that special Acts are to be treated as contracts with the Legislature, and are to be construed strictly, and particularly so where exorbitant powers such as a monopoly are conferred.

In *Bell* v. *Town of Westmount* (1899), 15 Que. S.C. 580, Archibald, J., held that a by-law granting an exclusive right to a street-car company, the contract under which had been confirmed by special Act, was not illegal under the general law against monopolies.

In *Peclet* v. *Marchand Township* (1907), 4 East. L.R. 65, the Court of Review in Quebec, reversing the Superior Court, held that a by-law giving exclusive right to operate waterworks was void as creating a monopoly, and providing no proper control over the company's rates and operations, and therefore oppressive, unjust, illegal, and *ultra vires*.

In *British Columbia Electric R.W. Co. Limited* v. *Stewart*, 14 D.L.R. 8, 16 Can. Ry. Cas. 54, [1913] A.C. 816, where the company's special Act gave it the right to use the streets with the consent of the municipal council, it was held that a by-law and agreement giving consent to the company's use, but not exclusive use, of specified streets for a street railway, was not a charter bestowing a right, franchise, or privilege so as to require the assent of the electors, and a clause providing for the company being asked to operate on other streets, in case of another company desiring to do so, was not such a bestowal.

In the recent case of *Town of Cobalt* v. *Temiskaming Telephone Co.* (1919), 47 D.L.R. 301, 59 Can. S.C.R. 62, where the company claimed unsuccessfully to have obtained from the town an irrevocable but not exclusive right, Anglin, J., held that such a grant would be *ultra vires* because it would be an abdication of the power given by statute from time to time to grant an exclusive right to any other company for the permitted term of five years, and Idington, J., considered it invalid as not being exclusive and for such limited term. The other members of the Court held that an irrevocable grant had not in fact been made.

I do not find in the Street Railway Act which was in force in 1896, R.S.O. 1887, ch. 171, amended by 59 Vict. ch. 50, or in

the Electric Railway Act, 1895, 58 Vict. ch. 38, or in the Municipal Act, or in the subsequent amendments to any of these, any authority or requirement to grant an exclusive right.

It may well be granted that if the city council had power to pass the by-law and confer exclusive rights, then the city council should have as much right to vary it as originally to pass it, saving always rights of others acquired thereunder. The Ontario Interpretation Act, R.S.O. 1897, ch. 1, sec. 8 (38), now R.S.O. 1914, ch. 1, sec. 28 (*g*), declared that where power is given to make by-laws it includes power to alter them. But, as the by-law was beyond the council's powers, and could acquire validity only by the sanction of the Legislature, and as that sanction was necessary because the Legislature had in the public interests not seen fit to entrust such wide power to the council, it must, I think, be deemed that in giving that sanction the Legislature took into consideration the benefits accruing to the public from the proposed arrangement. The very same care for the public which induced the Legislature, in granting this company its incorporation in 1873, to say it must not charge over 6 cents for 3 miles or under, would operate in granting its approval to an exclusive or monopolistic franchise at restricted rates of fare. We may leave out of consideration what opposition might have been made to the special legislation, had higher fares been asked. The Legislature itself has approved of monopoly on certain terms, and I do not see how it can be said that it would have done so on any other terms.

It is not necessary to say that the by-law has now the force of legislation. It is sufficient to say that it had no force without legislation, and that, when the legislation is granted, it is granted on the terms put forward to the Legislature. There are in fact three interests to be considered—those of the company, those of the city corporation, and those of the public—or perhaps it would be more correct to say the interests of the public represented by the corporation and those of the public not entrusted to the corporation, but represented by the Legislature. If concurrence of those guarding these three classes of interests was necessary, and if no authority to change the terms of concurrence is given, then equally the concurrence of all is now requisite to this proposed variation.

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It is to be noted that the Legislature did not give to the city corporation power to grant exclusive street rights, which might imply power to vary the terms, nor did it even say that this by-law should be deemed to have been passed under the statutes or sections enabling it to grant rights to railway companies, if that would make it better. It has merely said, "We approve of this particular bargain and by-law, and permit you to make this grant on those terms and declare it valid." But it did more. In sec. 3 of the Act of 1896 it in a way made the city a trustee for the public to enforce the by-law in the interests of the residents as distinguished from the corporation itself. That protective position the city corporation is by this by-law of 1919 deliberately abandoning in regard to what is perhaps the most important part of the whole bargain with the company—the fares which the residents are to be compelled to pay to this company to get the accommodation which all others are excluded from giving them.

The by-law of 1919 being, as I think, invalid for these considerations, I do not deal with the other objections to it.

In my view, the judgment of the learned Chief Justice was right, and the appeal should be dismissed with costs.

Appeal allowed.

MEMORANDUM DECISIONS.

Memorandum of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

SMITH v. BARTLETT.

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Alberta Supreme Court, Hyndman, J. August 13, 1920.

WITNESSES (§ V—65)—*Physician as witness—Also party to action—Allowance payable as witness—Schedule "D" Rules of Court.*]—Application to fix the amount of witness fees to which a physician who is a party to the action and also a necessary witness is entitled.

H. R. Milner, for plaintiff; *C. F. Newell*, for defendant.

HYNDMAN, J.:—In my opinion the proper interpretation of Schedule "D" of Rules of Court is that the allowance to a witness who is a physician as well as one of the parties to the action should be the same as though such physician were not a party.

The important part of the rule in question reads as follows:—

(A.) Where such witness or interpreter is a barrister or solicitor, physician, minister of the gospel, engineer, surveyor or other professional man.

(1) At place of residence	$ 5.00
(2) Elsewhere	10.00
(B.) In other cases	2.00

The object of allowing costs to parties and witnesses is to reimburse or indemnify them for the loss which they sustain by reason of being called away from their usual vocations. In many instances trials take place without the attendance or appearance of parties to the action. Where, however, it is necessary that one of the parties should attend and give evidence—in other words, is a necessary and material witness—it seems to me reasonable that if that particular party happens to be a member of one of the professions mentioned in the rule that he should receive the same remuneration whilst attending the trial that any other professional witness receives. The wording of the rule is clear and unambiguous and according to the rules of construction should be interpreted according to its plain and clear meaning. No distinction is made between a witness who is a party and a witness who is not. If it was intended that a distinction should exist between two such witnesses I think the rules would have provided for it.

The judgment of Buckley, L.J., in *Harbin* v. *Gordon*, [1914] 2 K.B. 577, at page 586, is in point. He says in part:—

ALTA.
S. C.

The plaintiff as a party litigant was not entitled to any allowance (for travelling expenses) but as a witness he was entitled to an allowance like any other witness, and none the less because he was also a party litigant.

In view of this authority and my own opinion as to what ought to be fair and reasonable in circumstances such as here, the plaintiff ought to be allowed to tax his witness fees at the rate of $10 per day for the period during which it was necessary for him to travel to Edmonton, attending the trial and returning to his home. The plaintiff will be entitled to tax a fee of $10 on the application before me. *Judgment accordingly.*

B. C.
S. C.

FINUCANE v. STANDARD BANK OF CANADA.

British Columbia Supreme Court, Morrison, J. August 5, 1920.

CONTRACTS (§ II D—145)—*Agreement to advance money on terms—Bank holding security of borrower—Knowledge of bank of transaction—Money deposited in bank—Assignment of agreement to plaintiff—Refusal of bank to honour cheques of borrower—Rights of parties.*]—Action for the payment of a sum of money and to declare the defendant a trustee for the plaintiff in respect of the said sum and for an accounting.

R. S. Lennie and *J. H. Clark*, for plaintiff; *E. A. Lucas*, for defendant.

MORRISON, J.:—The Rainy River Pulp & Paper Co. at the times material to the issues herein manufactured kraft pulp and had as its bankers the Standard Bank of Canada, Vancouver, the defendants herein, to which they were indebted in large sums and to which it had hypothecated the whole product and output of its commodity. The Rainy River Co. sought and obtained a loan of $50,000 from the Holley-Mason Hardware Co., of Spokane, upon receiving the following letter:—

Vancouver, B.C.
May 13, 1918.

Holley-Mason Hardware Co.,
Spokane, Washington.

Dear Sirs:

In consideration of your advancing us $50,000, we will give you our note, payable on demand, for the amount, with interest at the rate of 7%, and by way of security, we undertake to pay you $10 per ton from the proceeds of each ton of pulp manufactured and sold by us from June 1, 1918, until the amount advanced, with interest, is fully repaid. In any event, the full amount of said advance to be repaid within one (1) year from date.

It is understood that our bankers, the Standard Bank of Canada, to which all our output is hypothecated for advances from time to time, has full knowledge of this arrangement and approves of it, and will waive its security to that extent.

Very truly yours,
RAINY RIVER PULP & PAPER CO.
By Robert Sweeney, President.

Approved:
Standard Bank of Canada,
Vancouver, B.C. J. C. Perkins, Manager.

Pursuant to the terms of this agreement certain sums were paid by the Rainy River Co. by cheques on the defendant bank. On March 10, 1919, the company assigned to the plaintiff this agreement, and in due course upon refusal of the defendant bank to further honour the company's cheques in favour of the assignee pursuant to his interpretation of the said agreement this suit was brought seeking the payment of $8,440 and to declare the defendants a trustee for the plaintiff in respect of the said sum, and an accounting. The point of the case urged upon me at the trial is as to the true intent and meaning of this agreement and of its approval by the bank. The Rainy River Co. was engaged solely in the manufacture of kraft pulp and the defendant bank had hypothecated to them the whole of their products and output, the only asset I take it upon which they could give security. At the date of the agreement the company owed the bank some $100,000. The $50,000 received from the plaintiff's assignor was deposited in the defendant bank and subjected to the usual exigencies of business between the bank and its client. The only way in which security for the $50,000 loan could be provided by the company was with the approval of the bank which now contends in paragraph 3 of the statement of defence supported by Mr. Lucas' very closely worded argument that in approving of the agreement in question they did not approve of the loan of $50,000 by the Holley-Mason Co. to the Rainy River Co., but only of the rate at which the Rainy River Co. proposed to repay the said loan. Assuming the defendants had the power under the Bank Act to associate themselves in this way with a liability of their client, which point is not raised in the pleadings, then, having regard to the relationship existing between the Rainy River Co. and the bank I interpret the approval by the bank as a specific undertaking to see at least that the payment of the

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S. C.

$10 per ton was carried out and they with that object in view consented to honour the company's cheques as issued. Mr. Perkins the manager seemingly did so during his incumbency, and it was not until Mr. Sutherland, the new manager, as a measure it may be of abundant caution, refused to continue doing so, that the bank's view of the transaction was disclosed.

It was entirely a matter for the bank's consideration as to whether the state of the company's account with them and the range and prospect of their business justified an approval of this kind. The step was not obligatory—the Holley-Mason Co. as a business concern were looking for adequate security and the only security available was held by the bank.

As regards at any rate the payment of the $10 per ton, the bank stepped into the shoes of the Rainy River Co. and in my opinion are trustees for such sums as may be found due in an accounting in that respect.

Judgment accordingly.

MAN.
C. A.

McCOLL v. CANADIAN PACIFIC R. Co.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. August 5, 1920.

INJUNCTION (§ I I—75)—*Action for damages under Lord Campbell's Act, and the Railway Act—Notice by defendants of application for adjudication to Workmen's Compensation Board—Interim order restraining Board from adjudicating—Subsequent order enjoining defendants from proceeding—Validity of order.*]—Appeal from an order of Galt, J. (1920), 51 D.L.R. 480, enjoining the defendants from proceeding with an application to the Workmen's Compensation Board under the Workmen's Compensation Act. Reversed.

L. J. Reycraft and *H. A. V. Green*, for appellants; *D. Campbell* and *O. H. Campbell*, for respondent; *John Allen*, K.C., Dep'y Att'y-Gen'l and *W. W. Cottingham*, Ass't Dep'y Att'y-Gen'l, for Manitoba.

The judgment of the Court was delivered by

PERDUE, C.J.M.:—This action is brought by the plaintiff, who is the widow and administratrix of William McColl, deceased, to recover damages resulting from the death of her husband. She

MAN.

C. A.

sues on behalf of herself and her infant daughter under R.S.M. 1913, ch. 36, commonly called "Lord Campbell's Act," and the Railway Act, 9-10 Geo. V. 1919 (Dom.), ch. 68, sec. 385. The deceased was killed in an accident that occurred on the defendants' railway and the plaintiff claims that the accident was caused by the negligence of the defendants and by their breach of statutory obligations. On January 7, 1920, the defendants gave notice to the plaintiff of an application to the Workmen's Compensation Board for adjudication and determination of the question of the plaintiff's right to compensation under the Workmen's Compensation Act: 6 Geo. V. 1916, ch. 125, sec. 13, and amendments thereto. The application was returnable on January 9, 1920. On the day before the application was to be heard the plaintiff applied to and obtained, *ex parte*, from Galt, J., an interim injunction restraining the Workmen's Compensation Board and the members thereof from hearing or adjudicating upon the plaintiff's right to compensation under the Workmen's Compensation Act. On a subsequent application, 51 D.L.R. 480, to which the Attorney-General was a party, Galt, J., made an order enjoining the defendants from proceeding with the application to the Board.

Under sec. 13, subsec. (2), of the Workmen's Compensation Act, any party to an action if brought may apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation, and as to whether the action is one the right to bring which is taken away by the Act and such adjudication and determination shall be final.

The question whether the Workmen's Compensation Board is, or is not, an inferior Court does not arise on the consideration of this appeal. The plaintiff has not applied for prohibition. She has applied for and obtained an injunction against the defendants to this suit restraining them from making an application to the Board under the above section. The question of the plaintiff's right to this injunction can be disposed of briefly upon the ground that it is premature. The Court cannot assume that the Board will grant the order for which the defendants are applying. In any event an order made by the Board cannot merely because it has been made acquire any enhanced authority or validity. There is no threat of irreparable injury or violation of right sufficient to

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C. A.

justify the granting of an injunction. The question whether the Workmen's Compensation Act applies to or in any way controls the operation of sec. 385 of the Railway Act, 1919, can be dealt with when it is properly placed before the Court.

The appeal must be allowed and the order enjoining the defendants set aside. The costs of this appeal will be costs to the defendants in the cause. *Appeal allowed.*

N. B.
S. C.

SULLIVAN v. SCHOOL TRUSTEES.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and White, J. June 2, 1920.

HUSBAND AND WIFE (§ II E—80)—*Purchase of horse by husband—Seizure and sale under execution against husband—Alleged sale to wife—Evidence.*]—Motion by defendant to set aside the judgment at the trial in an action for alleged wrongful seizure of a mare which the plaintiff alleged to be her property or for a new trial. New trial granted.

J. C. Hartley, K.C., and *R. P. Hartley*, for appellant; *M. L. Hayward*, contra.

The judgment of the Court was delivered by

HAZEN, C.J.:—The plaintiff in this action is a married woman, and she brought suit against the defendant herein for the alleged wrongful seizure of a mare which she alleged to be her property, and which the defendant through its agents had seized and sold under an execution issued out of the Court of a Justice of the Peace for the County of Carleton, which execution was issued against the property of the plaintiff's husband, Daniel Sullivan, for school taxes which he owed to the defendant.

The action was tried before Barry, J., sitting without a jury, and on his direction a verdict was entered in favour of the plaintiff for $225 with the costs of the action.

The plaintiff and her husband reside together on a farm in the Parish of Kent. In 1912 her husband, Daniel Sullivan, purchased a mare from William Brannen for the sum of $175 and gave two notes in payment, one for $100 and the other for $75. Having given these notes and received delivery of the mare,

Sullivan took it to his home, and what occurred then and what is relied upon by the plaintiff to prove her ownership of the mare, was stated in the evidence. It appears that when Sullivan brought the mare home his wife expressed a wish to have her as her own property. Her statement of what took place is, "I told him I wanted her and he said I could take her and pay for her myself." Sullivan says, "My wife told me she wanted the mare. I told her if she wanted the mare she could take her and pay for it." This is the only evidence of any sale by Sullivan to his wife, and the claim is that Sullivan sold the mare to his wife, and no claim of a gift of the mare to her by Sullivan was set up.

There is no evidence to shew that Sullivan delivered the mare to his wife or that there was any change in its possession. There is nothing to shew that after the conversation aforesaid it was treated as her separate property or that she exercised any exclusive ownership over it or paid for its keep or that it was in any way treated differently from any of the property on the farm which belonged to Sullivan and was occupied by himself and his wife in the ordinary manner in which married people occupy farms in this country.

It was claimed on behalf of the plaintiff that she subsequently paid for the mare, and the way in which she claims to have paid for it is as follows: When the first note for $100 came due Sullivan borrowed from one Gallagher enough to pay the note in full to Brannen, giving his note therefor, and when this note to Gallagher came due the plaintiff retired it by giving her own note, and in explanation of this in her evidence she says—"When the note came due I gave my note for his and lifted his note. He was sick." When her own note came due she gave a note endorsed by her husband for the same amount, with the interest added, and when this last note came due, her husband paid it. The other note for $75 that was given at the time Sullivan purchased the mare in the first place, was retired by the plaintiff, who made first a payment of $30 on it, afterwards another payment of $50 and a third payment of $3, thus providing for the principal and interest. The plaintiff had no separate property or estate of her own, only what she got from the farm which belonged to her husband in the ordinary way. Her explanation of the manner in which she was able to pay for the mare is that she sold a colt which was the offspring of the mare,

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for $190. There is no evidence to shew who paid for the services of the horse which was the sire of this colt, or if the mare was with foal when Sullivan bought it, but she claims that as she had bought the mare from her husband the colt was her property. The sale of the colt, she alleges, was made by her to Gallagher, a store-keeper from whom the husband had previously borrowed $100 to pay the note to Brannen, and at whose store he appears to have had an account. The price which Gallagher paid for the colt was $190. Of this amount the plaintiff turned in $150 on her husband's account with Gallagher, and claims that by doing this she repaid to her husband the $100 and interest that her husband had paid when he retired the note which he had endorsed. With $30 of the proceeds of the sale she made a payment to Brannen on the $75 note, and the remainder of the $10 she took up in goods at Gallagher's store. The other payments of $50 and $3 on the $75 note were paid with money which she found in the house, which was income from the sale of products off the farm, and which I think it is clear belonged to her husband, unless he had given it to his wife, of which there is no evidence. This then is the manner in which the plaintiff says she paid for the mare which she alleges she bought from her husband when he brought it home after purchasing it in the first instance, and thereby claims it as her property. The plaintiff, as I have said, had no separate estate, and after her marriage received no property or money from anyone except from the proceeds of her husband's farm, and in the usual course, as his wife. This method of payment seems to have been a most extraordinary one. After Mrs. Sullivan and her husband state that the mare had been sold to her on the day he brought it home, on her undertaking to pay for it (to whom was not stated), Sullivan gave his note to Gallagher for $100 in order to pay the Brannen note when it came due and when it fell due again Mrs. Sullivan states that she gave her note for it and lifted his note, because he was sick. According to her own statement after this note became due Sullivan paid it himself, and then she claims to have paid it back to him by the proceeds of the sale of the colt in the way which I have just stated.

The question to my mind turns mainly if not altogether upon whether or not there was an actual sale of the mare by Sullivan to his wife after he brought it home from purchasing it from Brannen. The principles which should govern in cases of this kind,

it seems to me, are correctly laid down in the judgment of Barry, J. There can be no doubt as to the capacity of a married woman at the present time to make a contract with her husband for value without the intervention of a trustee or other third party, and Sullivan would have had the right undoubtedly to sell the mare to his wife as fully and completely as he might to any other person. It is necessary, however, in order to establish a gift or sale between a husband and wife, that more absolute evidence be supplied than in ordinary cases between strangers. The reason for this is obvious, and the authorities go to the extent of stating that such evidence must be beyond suspicion. As Barry, J., says in his judgment, this is the old rule and is founded on good sense and arises naturally out of the relation of husband and wife to each other. (Quoting *Whittaker* v. *Whittaker* (1882), 21 Ch. D. 657.) And it is clear that in such transactions the evidence must be unequivocal and beyond suspicion. While the trial Judge found as a fact that the mare in question was the property of the plaintiff, I, with respect, fail to see how such a conclusion can be sustained, applying to the transaction the principles which are laid down by the Judge himself. The mare was undoubtedly Sullivan's in the first instance, and it seems to me the burden in this case was clearly upon the plaintiff to shew by most undoubted evidence that she purchased it, and this she undoubtedly was in a position to do if she had actually purchased it as alleged. There surely was nothing to prevent her giving some evidence with respect to the delivery of the mare, the way in which it was used afterwards, the sire of the colt, how its feed was paid for, and other details which would have a most important bearing in my mind upon the transtion, and in view of the principles of law applicable to the case of transfers between husband and wife, and the evidence that has been submitted, together with the manner in which the payment is alleged to have been made, I find it impossible to come to the conclusion that the evidence is unequivocal and beyond suspicion, and sufficient to support the wife's claim to the ownership of the mare against her husband's creditors.

In view of the very meagre character of the evidence that was offered, and of the fact that it should be easily possible to supply further facts for the consideration of a trial Court, and for the reasons which I have previously stated, I am of opinion that there should be a new trial. *New trial granted.*

N. S.

S. C.

HUDSON v. HUDSON.

Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ., and Ritchie, E.J. April 5, 1920.

ELECTIONS (§ II D—75)—*Bribery—Agency—Question of fact—Liability of candidate*].

APPEAL from the judgment of the County Court Judge for District No. 6, declining to unseat a municipal councillor.

J. L. Ralston, K.C., for appellant; *W. L. Hall*, K.C., for respondent.

HARRIS, C.J.:—I concur with Drysdale, J.

LONGLEY, J. (dissenting):—An election took place in Country Harbour, Guysboro County. It seems that Harold V. Hudson was elected by a narrow majority of six, which was afterwards reduced to three. The petition was for declaring the election void. The Judge of the County Court found adversely to the petition and the majority of the members of the Supreme Court here hold that the County Court Judge was right. I feel called upon to present my views entirely in opposition. It is clear from the evidence that this man was returned by bribery and corruption. No personal bribery was proved against the petitioner but against Hayne it seems to me that enough was proved to make the respondent responsible as Hayne was his agent. Hayne, I may remark, was thinking of being a candidate himself at this very election and had received pledges from certain men of his own party that he would be selected as the candidate, but when the time came the party decided on another man, named Mason, and left Hayne out; and this afforded Hayne the special opportunity of supporting the opposing candidate, and he went into the election with considerable zeal. It was proved conclusively that he had a talk with the respondent about a month before nomination day, in which he told him "All right, go to it. I will vote for you." It appears that Hayne spent a considerable sum of money of his own, $20.75, for liquor, but the important point is in regard to the agency of Hayne for Hudson. Hudson took Hayne in the carriage with him to go driving to different parts of the ward, and among others he went and saw Aubrey Bennett, and he left the carriage and went in and discussed matters with the said Bennett. On going out, Bennett followed him, and not seeming to be right altogether, Hayne took him apart from Hudson,

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back of the barn, and there discussed the matter, and dropped $4 on the ground and went away and got into the carriage with Hudson. I am inclined to believe that this is unquestionably an act of agency and quite sufficient to overturn the election, and no interpretation which can be put upon the act by the County Court Judge would have any effect upon my mind. Hayne also bribed a number of others but no proof of the same agency was given; but in this case the agency and act are abundantly proved.

I am in favour of overturning the election, with costs.

DRYSDALE, J.:—This appeal is from the judgment of the County Court Judge for District No. 6 declining to unseat a municipal councillor named Hudson, for District No. 7, Guysboro County.

The question is one of agency, a question of fact, and relates to the position of one Hayne and as to whether or not under the circumstances Hayne should be held an agent of the respondent.

Hayne was guilty of bribery and treating. Only on one occasion is he shewn to have been in the latter's company when the respondent was canvassing, and on this occasion it is possible, if not probable, that respondent may have been entirely innocent as to Hayne's conduct. The County Court Judge finds in favour of the respondent on the occasion in question, and considering that agency must be a question of fact under all the circumstances I do not think, under the evidence, we are justified in reversing the County Court Judge in his findings herein. In considering the case I give the petitioner the credit of *Kaulbach* v. *McKean* (1905), 38 N.S.R. 364, having decided that under R.S.N.S., 1900, ch. 72, a councillor's election can be declared void for bribery by an agent without the councillor's actual knowledge or consent. A careful examination of that case, however, does not satisfy me that the case decides the point, or ought to be held as deciding it. The point was really not argued in this case and if we were to reverse the Judge on his findings of fact as to agency I would require a re-argument on this necessary and vital point before deciding that the statute covers a declaration that bribery by agents without actual knowledge renders void a municipal election.

I would dismiss the appeal with costs.

RITCHIE, E.J.:—I agree.

Appeal dismissed.

N. S.

S. C.

THE KING v. McDONALD.

Nova Scotia Supreme Court, Harris, C.J., Longley and Mellish, JJ. May 5, 1920.

TRIAL (§ II A—40)—*Uttering forged check—Evidence—Forgery—Judges charge to jury—Miscarriage of justice—Criminal Code sec. 1019.*]—Appeal from the refusal of Ritchie, E.J., to reserve a case for the opinion of the Court.

J. E. Griffith, for appellant; *A. Cluney*, K.C., Crown Prosecutor, for the Crown.

HARRIS, C.J.:—The prisoner was indicted for uttering a forged cheque and was tried by Ritchie, E.J., with a jury and convicted. Counsel for the accused applied for a reserved case which the Judge refused and he has appealed to this Court.

The application to the Judge was based on two grounds as follows:—

A. That there was no evidence that the cheque in question was forged, and that, therefore, the accused ought to be discharged. B. That the charge to the jury was erroneous and misleading and did mislead the jury to the prejudice of the accused, that is to say, "I tell you as a matter of law and that you must take from me absolutely, that this signature of George E. Sircom which is spelt with a 'b'—I tell you as a matter of law that it is a forgery."

It seems that the charge was of uttering a cheque which purported to be drawn by General Sircom, Paymaster of the Forces. It was signed "George E. Sircomb," and this was followed by his official title. General Sircom's name is George E. Sircom and not Sircomb. He had testified on the trial that the signature was a forgery and there was no contradiction of this fact, but counsel for the accused had argued that because there was a "b" at the end of the signature it could not be a forgery of the signature of General Sircom, notwithstanding the official title was added. Of course this was an untenable argument and the trial Judge used the language he did with regard to that legal question. The report of the trial states that the statement complained of was immediately followed by a statement by the trial Judge that the jury was to find on the facts. As reported, the statement is certainly very ambiguous and involved and I am quite satisfied that something has been left out by the reporter or that he misapprehended what the Judge said; in any event the argument about the letter "b" had taken place in the presence of the jury and they no doubt understood that the Judge was dealing only with this legal question.

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There was no question on the trial that the signature was not that of General Sircom and the defence on this part of the case was based solely on the point as to the letter "b." While the right direction may not have been given it is clear that there was no miscarriage of justice. See sec. 1019 Criminal Code, and *Edward Murray* (1913), 9 Cr. App. Rep. 248, *per* Isaacs, L.C.J., at page 250.

I think the appeal should be dismissed.

LONGLEY, J.:—I agree.

MELLISH, J.:—I agree with Harris, C.J. If I were of opinion that the trial Judge was likely understood by the jury as withdrawing a vital question in the case from their consideration, I should think the conviction would have to be set aside. The accused was entitled, of course, to be tried by a jury. Considering the charge, however, as a whole, not without doubt, I am of opinion that the jury would not come to the conclusion that any facts were withdrawn from their consideration, and would probably take the trial Judge's words as meaning that, as a matter of law, it makes no difference that a forged name is improperly spelled by the forger. The precise language of the particular part of the charge complained of is unfortunate, but the whole charge must be taken together. *Conviction affirmed.*

FILLMORE v. GOVERNMENT RAILWAYS MANAGING BOARD.

Nova Scotia Supreme Court, Harris, C.J. May 25, 1920.

PLEADING (§ I N—113)—*Amendment of—Action under Government Railway Small Claims Act—Jurisdiction of Court.*]—Action against the Intercolonial Railway to recover alleged excessive charges on goods shipped. Dismissed.

G. H. Sterne, for plaintiff; *J. L. Milner*, K.C., for defendant.

HARRIS, C.J.:—This action was commenced in the first instance against C. A. Hayes, General Manager of Government Railways, under the Government Railway Small Claims Act, ch. 26 of 9-10 Edw. VII. 1910 (Can.).

Sections 2 and 3 of that Act provide as follows:—

2. Subject as hereinafter provided any claim against His Majesty arising out of the operation of the Intercolonial Railway, and not exceeding in amount the sum of $200, for damages alleged to be caused by negligence, or made payable by statute, may be sued for and prosecuted by action, suit or other proceeding in any Provincial Court having jurisdiction to the said amount over like claims between subjects.

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(2.) Any such action, suit or other proceeding may be commenced and prosecuted to judgment in the same manner and subject to the same rules of practice and procedure and to the same right of appeal as nearly as may be as in like cases between subjects.

(3.) The said Court shall have the same jurisdiction to order or adjudge the payment of costs either by plaintiff or defendant as in like cases in the said Court between subjects.

3. In any such action, suit or other proceeding His Majesty shall not be cited as defendant, but the process shall be issued against the officers appointed to manage the Intercolonial Railway, who shall be cited by the name and description of the "Government Railways Managing Board," and such process may be served upon any member of the said Board or upon any officer of the Government Railways or other person duly authorised by the said Board to accept service of or to be served with process in such cases.

(2.) The said Government Railways Managing Board shall be entitled, by its said description, to appear and plead and to defend any such action, suit or other proceeding in the same manner and subject to the same rules of practice and procedure as would apply in a like case to any individual cited as a defendant in the Court in which the proceeding is brought.

By ch. 20 of 3-4 Geo. V. 1913 (Can.), sec. 2 of the original Act was amended and the jurisdiction increased to claims of the same nature not exceeding $500.

By ch. 9 of 4-5 Geo. V. 1914 (Can.), sec. 3 of the original Act was repealed and the following substituted as sec. 3:

3. In any such action, suit or other proceeding His Majesty shall not be cited as defendant but the process shall be issued against the General Manager of Government Railways and such process may be served upon him or upon any other person duly authorised by him to accept service of or to be served with process in such cases.

(2) The General Manager of Government Railways shall be entitled by his said description to appear and plead and to defend any such action, suit or other proceeding in the same manner and subject to the same rules of practice and procedure as would apply in a like case to any ordinary individual cited as a defendant in the Court in which the proceeding is brought.

So far as I can discover that is the way the matter stood when the action was brought. On June 17, 1919, the plaintiff took out an order substituting the Government Railways Managing Board as defendant in place of C. A. Hayes, General Manager of Government Railways, and all subsequent proceedings have been carried on against the Government Railways Managing Board. The case came on for trial before me at Amherst in October last and plaintiff asked leave to amend his statement of claim in certain particulars but not as to the party defendant.

The trial was adjourned to take the evidence of A. T. Weldon and to permit the amendment of the pleadings to be made, and

the pleadings were amended, but the Government Railways Managing Board still remains on the record as the sole defendant. The counsel for the defendant has raised the question that the action as thus constituted cannot succeed. My attention has not been called to any change in the Act of 1914, and so far as I can ascertain there is no further legislation affecting the matter. If so, I do not see how the action can succeed without an amendment; which I would be disposed to grant even at this late date, as the railway has been represented by counsel on the trial and could not be prejudiced.

The plaintiff resides at Amherst and has been accustomed to ship hay to the St. John's, Newfoundland, market. In the ordinary course this hay is shipped by the Canadian Government Railways from Amherst to North Sydney and is transported from North Sydney by the steamers of the Reid Newfoundland Railway Co., either direct to St. John's or to Port au Basque and thence by the Reid's Railway to St. John's.

It appears that in the winter season the Reid steamers owing at least in part if not wholly to ice and weather conditions are unable to promptly carry forward all the freight arriving at North Sydney destined for Newfoundland, and at times so much freight accumulates at North Sydney that the railway finds it difficult to care for it in its yard and warehouses, and when this happens the railway notifies its agents throughout Canada not to receive any further freight until further instructed. When in course of time the steamers of the Reid Company have taken forward goods so as to relieve the congestion, the embargo is lifted and the railway again accepts goods destined for Newfoundland.

From January 7, 1916, to March 30, 1916, there was an embargo against goods for Newfoundland—that is to say, the railway authorities during that period refused to receive goods at any of their shipping offices destined for Newfoundland. On March 30, the embargo was lifted and further congestion almost immediately took place at North Sydney and the embargo was restored on April 14 and remained on until May 5.

Between April 4 and 12 plaintiff shipped at Amherst on various dates in all seven cars of hay for St. John's, Newfoundland, *via* North Sydney. They were sent by the Canadian Government Railways by their railway from Amherst to North Sydney, where

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they arrived in due course and were at once manifested and handed over to the Reid Newfoundland Railway Co. to be by that company transported to their destination. It so happened that the harbour of North Sydney had become frozen over or filled with drift ice so that the Reid steamers could not get into the harbour, but Louisburg Harbour was open and the Reid Company took the hay from North Sydney to Louisburg by rail and there loaded it on board their steamers and transported it to its destination. The Reids collected from the consignees at St. John's $111 more freight than would have been payable if the hay had been transported by steamer from North Sydney. None of this money was received by the Canadian Government Railways. The plaintiff brings action against the defendant to recover this $111.

The plaintiff says that before he shipped the hay he called up Weldon, the traffic and freight official of the Canadian Government Railways at Moncton, and he says:—

> He told me he could ship *via* North Sydney, that they had a steamer that the Government was bringing one there to take the hay. He said the Government was hiring a steamer. He said the Reid people were congested with freight and that they had to do something and they were getting a steamer and he told me to ship it *via* North Sydney. Q. What position did Mr. Weldon hold? A. Freight agent I think, I don't know. Q. Did he tell you how to ship? A. The embargo was lifted here on the day I shipped them out. I was advised of that by Mr. Weldon and the freight office here. The embargo on account of the congestion at North Sydney. (And on cross-examination he said): Mr. Weldon was in Moncton and I was in Amherst at my house. The conversation was by telephone. Tell me exactly what Mr. Weldon said. A. That is as near as I can tell you. He told me to ship it *via* North Sydney, that the Government was hiring a steamer to come in and take a load of freight there as it was congested there and the Reids could not handle it. He did not tell me what steamer.

Weldon denied telling the plaintiff that the Government or railway had procured a boat that would sail from North Sydney and take the hay, and he also says the Government or railway had nothing to do with any steamer carrying goods forward except that the Government had chartered a steamer (which it controlled I suppose during the war) to the Reid Company for this business. The steamer was not under the control of the Government but of the Reid Company.

I cannot think Weldon would tell plaintiff anything but the truth about the matter and he no doubt was misunderstood by the

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plaintiff. I accept Weldon's version of the conversation and find accordingly.

When each of the various car loads of hay were shipped the plaintiff presented with each a shipping order in writing whereby he requested the Canadian Government Railways to receive the hay "marked consigned and destined" to Frank McNamara, St. John's, Newfoundland, "Route North Sydney," which the railway "agrees to carry to its usual place of delivery at said destination." It was thereby provided also that as to each carrier over all or any portion of said route to destination that every service to be performed should be subject to all the conditions printed or written contained in or indorsed on the back of each of the shipping orders.

Indorsed on each of said shipping orders was the following condition:

> No carrier is bound to transport said goods by any particular train or vessel, or in time for any particular market or otherwise than as required by law, unless by specific agreement endorsed hereon. Every carrier in case of physical necessity shall have the right to forward said goods by any railway or route between the point of shipment and the point of destination: but if such diversion be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

Plaintiff understood the course of business and knew that at North Sydney the railway would hand over the hay to the Reid Newfoundland Railway Co. to be carried by that company to its destination.

I find that the hay was all delivered by the Canadian Government Railways to the Reid Newfoundland Railway Co. without delay and in the ordinary course, and that it was physically impossible at the time owing to the ice conditions to transport it direct by steamer from North Sydney, and the change of route was not made by the Canadian Government Railways but by the Reid Company. I do not see how the Government Railways can be held responsible under the circumstances for what the Reid Company did with the hay after it passed into their possession. Whether or not the $111 could have been collected by the Reid Company I am not called upon to determine in this action.

The jurisdiction of this Court under the Government Railways Small Claims Act is restricted to claims arising out of the operation of the Intercolonial Railway for damages caused by negligence or

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made payable by statute. I am unable to see any negligence on the part of Weldon or any other official of the Railway which caused any damage to the plaintiff and I do not see how the plaintiff can succeed against the defendants.

I think the action should be dismissed with costs.

Action dismissed.

BANKS v. WEBBER.

Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ., and Ritchie, E.J. April 5, 1920.

EVIDENCE (§ II B—108)—*Negligent operation of motor car—Accident—Damages—Course of employment—Burden of proof—Motor Vehicle Act, 8-9 Geo. V. 1918, ch. 12.*]—Appeal by defendant from the trial judgment in an action claiming damages alleged to be due to the negligent operation of defendant's car. Affirmed.

F. W. Nichols, for appellant; *H. L. Dennison*, K.C., for respondent.

The judgment of the Court was delivered by

RITCHIE, E.J.:—This is an action to recover damages in consequence of the negligent operation of a motor car. The only matter now remaining for consideration is as to whether or not the 5th and 6th findings of the jury should be set aside. The findings in question are as follows:—

5. Has the defendant established that the driver of the car was not operating it in the course of his employment as a servant or agent of the owner? No.

6. When the accident occurred was William Webber, the driver of the motor vehicle operating such vehicle in the course of his employment as a servant or agent of the defendant? Yes.

Apart from the statute to which I will presently refer, I would set aside the findings. Section 50 of the Motor Vehicle Act, 8-9 Geo. V. 1918, ch. 12, provides that a person sustaining damage by reason of the presence of a motor vehicle upon the public highway shall be entitled to recover against

the owner unless he shall establish that such injury, loss or damage was not caused by any negligence or wrongful act of his or of a person operating such motor vehicle, in the course of his employment as a servant or agent of said owner.

In this case the injury was not caused by the negligence or wrongful act of the defendant, the owner, and the question is whether his son was operating the car in the course of his employment as a servant or agent of the defendant.

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The statute throws a heavy burden on the defendant. He is liable "unless he shall establish": that must mean establish to the reasonable satisfaction of the Judge or jury as the case may be. The word "establish" is a strong word. It means, I think, when applied to the quantum of evidence, to settle certainly. The credit to be given to the defendant and his son was for the jury. It was, therefore, I think, within their province to say we do not believe either of these witnesses, and therefore they have not established that the son was not operating the car in the course of his employment as the servant or agent of the father. It is to be noted that this is evidently the view which the trial Judge took of the evidence. He left the question to the jury in the following words:—

> Has the defendant established that the driver of the car was not operating it as the servant or agent of the owner? If you take the same view of the evidence as I would be inclined to take, of the way in which their evidence fails to agree and jangles, you might say, "No, we do not believe that evidence at all, we will throw it out." But on the other hand, if you do believe them, I am afraid you will have to answer that question, "Yes," as Mr. Nichols wishes you to. I think your verdict very largely depends on the view you take of the evidence given by these two—I should say, perhaps, slippery witnesses.

I cannot say that he was wrong; it was really the crucial thing in the case which he was bound to put to the jury, and he had the right to express his own view. Of course, if a jury acts unreasonably in finding that the burden of proof thrown on a defendant has not been sustained their findings are open to review, and with this in mind I have considered the evidence with great care. I am not convinced that I would have made the findings which the jury have made, but on consideration I am unable to say that a jury might not reasonably take the view which the jury has taken in this case. There are some more or less unsatisfactory things in the evidence; it would serve no useful purpose for me to go over them in detail. Then, of course, the jury saw and heard the father and son, and their manner, demeanour and way of giving evidence may have been a legitimate make-weight against believing them. With some doubt I have reached the conclusion that I cannot say that the jury was wrong in finding that the fact in question has not been established.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

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HALIFAX SHEET METAL WORKS v. HISELER.

Nova Scotia Supreme Court, Harris, C.J., Longley, J., and Ritchie, E.J. April 5, 1920.

COSTS (§ I—3b)—*Action for an account—Order giving plaintiff costs of action—Dismissal of counterclaim—One brief and counsel fee allowed on whole.*]—Appeal from the judgment of Drysdale, J. affirming the Taxing Master, who with an order before him giving plaintiff costs of the action and on dismissal of the counterclaim, allowed but one brief and counsel fee on the whole, and on the appropriate County Court scale as the facts in support of the counter claim were the same as those in support of the defence. The Judge, in the judgment appealed from, held that the Master was right.

L. A. Forsyth, for appellant; *S. Jenks, K.C.*, for respondent.

HARRIS, C.J.:—The plaintiffs sued for $115, the balance due on a contract for installing a heating system in defendant's house. The defence was that the work was not properly done and there was a counter claim for $1,332, damages for delay in installing the system and for injury done to the premises of the defendant in doing the work. There was a reply and also a defence to the counter claim and the case was tried before Longley, J., who gave judgment for plaintiffs for the amount claimed and dismissed the counter claim. The order for judgment granted by the Judge provided that the plaintiffs should "be at liberty to enter judgment against the defendant for the said sum of $115, and their costs of the action and counter claim when taxed."

The plaintiff prepared one bill of costs in which he claimed not only a brief and counsel fee in the action, but also on the counter claim. The taxing master allowed only the former and disallowed the latter. Ordinarily the taxing master I suppose in such a case would not allow two briefs and counsel fees, but would make one allowance sufficient to cover both action and counter claim, and I do not see any objection to such a course. It probably is the best course to pursue in most cases, because it is often difficult to separate them and say how much should be allowed with regard to each. This is so particularly where the counter claim and defence arise out of the same matter.

The difficulty in this particular case is that under the tariff of costs and fees the allowance for brief and counsel fee are to be

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taxed in the action on the County Court scale (as the County Court and Supreme Court had concurrent jurisdiction) and these items have to be taxed on the Supreme Court scale with regard to the counter claim. The plaintiffs' contention is that the taxing master in fixing the amount considered only the County Court scale. The plaintiffs, obviously, I think, were entitled to have the brief and counsel fee on the counter claim taxed on the Supreme Court scale, and as this does not appear to have been done I think the matter should go back to the taxing master for re-taxation. In a case such as this where a different scale applies to the action and counter claim (I mean with regard to brief and counsel fee) it is better to fix a separate fee on each.

There is, of course, a clear distinction between a set-off and a counter claim, and it is important on the question of costs. A counter claim is treated for the purpose of taxation as a cross-action, whilst a set-off proper is a defence. Bullen & Leake, page 457, note (e); and if the plaintiff discontinues his action the defendant can still enforce his counter claim. *McGowan* v. *Middleton* (1883), 11 Q.B.D. 464.

On the point as to the right of the plaintiff here to have his costs on the counter claim taxed on the higher scale, the case of *Amon* v. *Bobbett* (1889), 22 Q.B.D. 543, is a direct authority. See also *Finska Angfartygs Aktiebolaget* v. *Brown*, [1891] W.N. 116.

The following cases are referred to on the question as to the plaintiffs' claim: *Shrapnel* v. *Laing* (1888), 20 Q.B.D. 334; *Les Soeurs de la Charite* v. *Forrest* (1911), 20 Man.L.R. 301; *Fox* v. *Central Silkstone Collieries*, [1912] 2 K.B. 597; *Atlas Metal Co.* v. *Miller* [1898] 2 Q.B. 500; *Bauld* v. *Fraser* (1903), 36 N.S.R. 21.

The case must go back to the taxing master in order that he may review his taxation in accordance with the principles referred to.

I express no opinion as to the amounts which should be allowed for brief and counsel fee in this case, except to say that the question obviously is one depending upon the circumstances connected with the action and trial. The taxing master can make all the necessary inquiries as to the time occupied on the trial with the counterclaim and can see by the pleadings how far the issues were common to the action and counter claim, and can take into

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consideration all matters affecting the question as to the proper amounts to be allowed on each, having regard also to the fact that the higher scale applies to the counter claim.

The plaintiff having succeeded should, I think, have the costs here and on the motion at Chambers.

LONGLEY, J.:—In my opinion, in this case, there is no ground for disputing the plaintiff's case that there should be a brief and counsel fee allowed on the counter claim as well as on the original cause of action; but it makes some difference as to what was done on the trial of the cause. In this case the action was for the price of a steam boiler placed in the house of the defendant, and the counter claim was for loss through sickness and otherwise from the failure of the furnace to give heat. The case was thoroughly tried out and judgment given for the balance coming for the furnace, $115. But there was really nothing devoloped, strictly speaking, on the counter claim. It was not seriously urged. There was a very great deal of authority based upon this claim. The consequence is that I would advise the taxing master that he should allow something for the brief and counsel fee, but in this case it necessarily would be a comparatively small amount. The plaintiff is right in applying the principle and it might be that great contestation took place on the counter claim and which went against him, in which case he would be entitled to the large brief and a large counsel fee; but in this case such a condition does not exist.

The judgment, I think, should be for the plaintiff as the brief and counsel fee are allowed, and the question of costs stands until it is ascertained what increase this makes on the question of costs.

RITCHIE, E.J., agrees with Harris, C.J.

Judgment accordingly.

GRUMMETT v. GIBSON.

SASK.

C. A.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

PLEADING (§ I S—146)—*Agreement for sale of land—Allegation of default—Claim for balance not due at date of issue of writ—Order striking out statement of claim—Appeal.*]—Appeal from an order of a Local Master striking out a statement of claim in an action for specific performance of an agreement for sale of land.

J. S. Rankin, for appellant.

NEWLANDS, J.A.:—This is an action for specific performance of an agreement of sale. An instalment of principal fell due on November 1, 1919, and by virtue of the accelleration clause therein plaintiff claimed the whole balance due. She also claimed for $16.50, premium paid for insurance.

Defendants, while denying the plaintiff's claim, pleaded tender and paid into Court the sum of $570, the amount of the instalment, with interest, due November 1, 1919. Plaintiff took this money out of Court, at the same time denying the tender and that it satisfied her claim.

As the $570 was all plaintiff claimed to be due as an instalment under the agreement of sale, her acceptance of the same satisfied that branch of her case; but she cannot proceed for any further amount under the agreement of sale without alleging title and readiness and willingness to convey.

Landes v. *Kusch* (1915), 24 D.L.R. 136, 8 S.L.R. 32.

There being no such allegation in the statement of claim the Local Master was right in allowing plaintiff to amend before she could proceed with the balance of her claim. The appeal should, therefore, be dismissed with costs.

LAMONT, J.A., concurred with Newlands, J.A.

ELWOOD, J.A.:—This is an action for specific performance of an agreement for sale of land. The statement of claim alleges that the purchase price was payable $500 in cash, and three instalments, each of $500 and interest, payable on November 1, 1918, November 1, 1919, and November 1, 1920. There is an allegation that default had been made in the instalment due November 1, 1919, and also default in payment of an insurance premium which it is alleged the defendants are liable to the plaintiff for. *Inter alia*, the plaintiff claims the instalment due

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November 1, 1919, interest thereon, insurance premium and interest thereon, and on December 20, 1919, the date of the issue of the writ, balance of principal, $500.

There is no allegation of any accelleration clause, nor does there seem to me to be any allegation in the statement of claim which entitled the plaintiff to this $500. In the argument before us the $500 was assumed to be due by virtue of some accelleration clause, but, in any event, the balance of the principal due under the agreement is claimed. The defendant paid into Court the sum of $570, pleading tender, and alleging that this is sufficient to pay the amount of the instalment of principal and interest overdue, and denying any liability with respect to the insurance premium. Plaintiff took this money out of Court, denying the tender and that it satisfied her claim.

The defendants thereafter applied to strike out the plaintiff's statement of claim as disclosing no reasonable cause of action. The fiat in the appeal book does not shew very clearly what order was made, but it gives the plaintiff leave to amend, and orders the costs of the motion to be costs to the defendants in any event. The notice of appeal, however, is from an order striking out the statement of claim, so that I think I am justified in assuming that the statement of claim was ordered to be struck out unless amended.

In my opinion the plaintiff could not claim the final instalments under the agreement of sale without alleging title and readiness and willingness to convey.

Landes v. *Kusch*, 24 D.L.R. 136, 8 S.L.R. 32.

There being no such allegation in the statement of claim, the Local Master was correct in making the order which the notice of appeal says he made, and which the appellant complains of. In my opinion, therefore, the appeal should be dismissed with costs. *Appeal dismissed.*

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