Dominion Law Reports

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

ANNOTATED

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VOL. 26

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CASES REPORTED

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TABLE OF ANNOTATIONS

(Alphabetically arranged)

APPEARING IN VOLS. 1 TO 26 INCLUSIVE.

DRUMM v. FOWLER.

Alberta Supreme Court, Scott, J. December 16, 1915.

1. HOMESTEAD (§ III—20)—ABANDONMENT IN FAVOUR OF COMPANY—RIGHT TO RECOVER BACK UPON DISSOLUTION—AGREEMENT FOR RECONVEYANCE—AMENDMENT TO ESTABLISH.

One cannot succeed in an action for the recovery of homestead lands, which he abandoned in favour of a company to enable it to erect a smelting plant, after the latter had ceased to operate and later went into liquidation, in the absence of an agreement for the reconveyance of the land upon such event; if, however, such agreement can be gathered from the subsequent dealings by the parties, the court will direct an amendment of the pleadings for the purpose of establishing it.

Statement

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

W. F. W. Lent, for appellant.

A. L. Smith, for respondents other than J. H. Farmer.

J. W. McDonald, for respondent, J. H. Farmer.

Scott, J.

SCOTT, J.:—In 1900 the defendant company erected a zinc smelter upon lands adjoining a quarter section which the plaintiff had entered for as a homestead under the Dominion Lands Act. For the purpose of carrying off the noxious fumes from the smelter, the company constructed a conduit pipe leading from it to, and up an adjacent hill, and a chimney or stack upon the hill. After they were completed, it was found that the stack and a portion of the conduit pipe were constructed upon the plaintiff's homestead. It was then verbally agreed between the plaintiff and the company's manager that, in order to enable the company to obtain a grant from the Crown for the portion upon which the conduit pipe and stack were erected, the plaintiff should abandon his homestead right thereto. He accordingly abandoned his right to that portion which contained about 8 acres, and the company obtained a grant thereof from the Crown, and became the registered owner. In 1906, the company ceased to operate the smelter, and sometime prior to December 12, 1910, the company went into liquidation, the defendant Fowler, who had for some years been its general manager, being appointed liquidator.

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On May 15, the trustees for the holders of the company's debentures who were mortgagees of the property upon which the smelter was erected, but not of the 8 acres, entered into an agreement with the defendant Farmer to sell the mortgaged property to him, "together with the smelter plant, machinery, houses, goods, chattels and effects, the property of the vendors," and on the same day Fowler, as liquidator, gave Farmer an undertaking in writing to give him the title to the 8 acres in consideration of $1. This agreement and undertaking were afterwards carried out, and Farmer became the registered owner of the smelter property including the 8 acres.

The plaintiff claims that it was a condition of the agreement under which he abandoned his interest in the 8 acres that, in the event of the company ceasing to carry on the business of zinc smelter, and the business incidental thereto, the 8 acres should be re-conveyed to him, and that Fowler, as liquidator, fraudulently conveyed same to Farmer, who has no interest therein, gave no consideration therefor, and now holds same, well knowing that the plaintiff is entitled thereto. He seeks, in this action, a declaration that this conveyance is null and void, as against him, and a decree vesting the property in him.

Notwithstanding the fact that the plaintiff's evidence to the effect that the agreement was subject to that condition was uncontradicted by any other oral testimony, the trial Judge held that the plaintiff had failed to satisfy him that the agreement was subject to that condition and he therefore dismissed the action at the conclusion of the plaintiff's case. He based his judgment mainly upon the ground that subsequent correspondence between the plaintiff and the company's manager, which I will later refer to, was inconsistent with the existence of such a condition.

I think the trial Judge was right in the conclusion he reached. In addition to the fact that the subsequent correspondence between the parties is entirely inconsistent with the existence of such a condition in the agreement, it appears to me to be extremely improbable that, in view of the fact that the company had expended a large sum of money on the erection of the smelter plant, the contingency that it would cease to be operated as

such, within a period extending over many years, would have occurred to the defendant. Also, the effect of the subsequent correspondence was such as to lead to the view that the mind of the plaintiff may have been confused as to the time when the question of the reconveyance of the property to him was first mentioned.

At the time the plaintiff abandoned his homestead right in the 8 acres he was publishing a newspaper in the vicinity of the smelter, in which newspaper the company was carrying an advertisement. The smelter having ceased operations on June 6, 1907, wrote the plaintiff, directing him to discontinue the advertisement, whereupon he, on June 14, wrote the manager as follows:—

Referring to yours of the 6th inst., directing the discontinuance of the advertisement of the Canadian Metal Co., it was received with profound astonishment, and I am constrained to believe, must have been written without a full knowledge of the facts in relation thereto.

You are perfectly well aware that I permitted transfer to you of 7 acres of my land without consideration to me in a direct monetary way. I do not know that you are aware that there was, however, a consideration. If that happens to be the case, permit me to inform you there was a consideration, and that it was that the advertisement of the company would be continued, not for a few months after you obtained what you wanted, but indefinitely. I had Mr. Riendel's verbal promise that it should be so, and I have a letter from your company stating it in writing.

The fact that the advertisement, as it stands, states an untruth, of course has nothing to do with the case, that can be changed at any time and as often as desired.

I do not think and am not yet willing to, that you would be a party to any such unfair and dishonest treatment as to insist on discontinuing the advertisement, under the circumstances, and especially in view of the fact that, without a thought of holding you up as almost anyone else would have done, I voluntarily made it easy for your company to get what it needed and without costs, whereas, had I done, as probably every other man of your acquaintance would have done, that 7 acres of land would cost you several, if not many, times as much as the running of the advertisement would amount to in a number of years.

Trusting you will see the injustice of your order and rescind it.

(Signed) MARK DRUMM.

On June 26, Fowler replied as follows:—

Further replying to your letter of June 14, in the matter of transfer of some of your land to us, we beg to say that we feel that you are unduly annoyed at the present condition resulting from our decision to cancel our advertisement in your paper.

While we appreciate your good offices in transferring the land to us,

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the conditions which we have obtained since our negotiations are radically changed. We do not think that it is particularly necessary to avoid publicity of the fact that we shall probably entirely abandon the Frank plant, and when we do so, so far as we are concerned, we should feel it only right to transfer the land, which we acquired from you, back to you. We feel that you should be satisfied with the manifestation of such intention, and cannot see that you should have any cause of complaint as to our treatment of you.

If it is a fact, as you say, that there was a consideration which was to the effect that our advertisement was to be continued indefinitely, it seems to me that you would have been imposing a very burdensome consideration, and one, which it was very far from our intention to have made a condition of the transfer. Such a consideration would be tantamount to the compulsory operation of our plant, the absurdity of which is too evident to require comment.

As to your statement that you voluntarily made it easy for us to get what we needed, we beg to say that we have always appreciated your action in the matter, but we hope that you will not believe that the present management of this company would have submitted to conditions which made the construction and operations of our plant at Frank so onerous.

And on June 28, plaintiff wrote the manager as follows:—

Referring to your letter of the 26th inst., if, as you say, it is your intention to abandon the smelter at Frank, that puts quite a different phase on the question of the continuance or discontinuance of the adv. of the Canadian Metal Co. in my paper, and if, as you say, you will re-transfer to me the land I made it possible for your company to obtain on easy terms, the cancellation of your advertisement will be quite agreeable to me.

I take it that you have, to all intents and purposes, reached a definite decision with regard to the Frank plant, and I will therefore be very grateful if you will arrange for the transfer of the land back to me as soon as possible for the reason that I am taking title to the rest of my land from the government very shortly, and if I could have the whole closed up at one time it would save me something in expense. I presume you have title from the government, and, if so, you will be able to transfer to me direct. If it is agreeable, you may have the transfer made direct and deduct the $5 per acre from my June account, or I will send you a cheque. If this is done, I shall raise no further question concerning the agreement relative to the advertisement, as I am of the same mind now that I was when I made the transfer, viz., that I have no wish to do anything adverse to the interests of your company.

It may be, though I express no decided opinion upon the question, that the effect of this correspondence is to constitute an agreement on the part of the manager of the company to reconvey the property to the plaintiff in settlement of his claim, that he was entitled to have the advertisement continued for an indefinite period. As such an agreement has not been set up

by the plaintiff, he cannot now avail himself of it, but I think he should be given an opportunity to do so upon reasonable terms.

In case the plaintiff be given leave to amend his statement of claim by setting such an agreement, he should, even if he succeeds upon it, pay the costs of the appeal as it was occasioned by his default in not setting up that agreement in the first instance. The same disposition should, in ordinary cases, be made of the cost of the trial already had, but it may be that the cost of the second trial may be lessened by reason of the evidence given at the first trial, and to that extent, at least, the plaintiff should be allowed the costs of the first trial.

I would dismiss the appeal with costs unless within one month the plaintiff amend his statement of claim by setting up an agreement to reconvey disclosed by the correspondence I have referred to. Upon such amendment being made within the time limited, the defendants shall be at liberty to amend their statement of defence as they may be advised, and should they amend, there will be a new trial and the costs of the first trial shall be in the discretion of the Judge presiding at the new trial. In case the defendants do not amend their statement of defence within 10 days from the amendment of the statement of claim in the manner authorized, or within such further period as a Judge may allow, the plaintiff will be entitled to judgment upon the amended statement of claim with costs of the action including the costs of the trial already had. The defendants to have the costs of the appeal in any event on final taxation.

Appeal dismissed.

De YOUNG v. GILES.

Nova Scotia Supreme Court, Graham, C.J., and Longley, Drysdale and Harris, JJ. December 20, 1915.

1. HIGHWAYS (§ I A—7)—CUL-DE-SAC AS PUBLIC HIGHWAY—DEDICATION. The existence of a public highway is not necessarily confined to a place which is a thoroughfare, and a *cul-de-sac* may properly exist as such and may be established by dedication.
[*Bateman* v. *Bluck*, 18 Q.B. 870, followed.]

2. DEDICATION (§ II—23)—OF HIGHWAY — ACCEPTANCE — WHAT CONSTITUTES.
Open and unobstructed user of a way by the public for a substantial time is evidence from which a jury may infer both dedication and acceptance; and where there has been established, for a number of years, a travelled track with a fence on one side and a gutter on the

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other, passing over the lands of others, over which statute labour is performed under municipal supervision and is otherwise used for municipal purposes, dedication and acceptance of a public highway is thereby established.

[*Reg.* v. *United Kingdom Elec. Tel. Co.*, 3 F. & F. 73, applied.]

Statement

APPEAL from judgment of Ritchie, E.J., dismissing an action of trespass.

V. J. Paton, K.C., for respondent.

Graham, C.J.

GRAHAM, C.J.:—The plaintiff alleges that the defendant has a right of way across his farm by prescription, of the width of about 6 feet for foot passengers and horses and carts and no more. The defendant pleads a public way and also a private way. It appears that the defendant was performing the statute labour upon the road across this farm, and for that purpose was clearing out one of the gutters at the side, and this is the alleged trespass.

One John Giles formerly owned the place the plaintiff now lives on, and his father owned it before him. I suppose he is dead. But John Giles says: "The gutter, so far as I know, was put there about 50 years ago." It would be a strong presumption, I think, when a gutter is found at the side of a road, because a gutter on one side or the other is almost indispensable to a road, that it was within the limits of the road. There is no fence on that side—it is wood land—but there is one on the other. There is another landmark on the other side—the east side of the oak tree called on plan 1, "old oak." Now, the defendant has produced a number of witnesses (the plaintiff, besides his surveyor, has called no witnesses), shewing that the fence on that side of the road ran close to this oak and that the plaintiff has moved the present fence much further in towards the travelled way. The evidence shews that between the gutter on one side and the former fence on the other there was a distance of about between 20 and 30 ft. The defendant, about 19 years before the trial, had purchased from one Magnan. The plaintiff, about 20 years before the trial, had purchased his land. This road runs from the undisputed public highway between Cole harbour and the eastern passage. It passed through the land of Enos Whynott on one side and John Elliott on the other; then through the farm of the plaintiff and next to him

is the defendant's land where it terminates. The plaintiff says, "Yes, he" (the defendant) "has no other way to get to his property." There is no evidence tending to shew that the width of this way should be restricted to 6 ft. 6 ins. wide.

When there has been established for a number of years a travelled track with a fence on one side and a gutter on the other, passing over land of others, I think the land is presumptively a way whether public or private. I shall deal with that question presently: *Reg.* v. *United Kingdom El. Tel. Co.*, 3 F. & F. 73. The gutter and other necessary incidents for the repair and enjoyment of the travelled track between those objects are used with the travelled track, including the gutters on both sides, and are acquired.

There is no reason why the road should be restricted to 6 ft. The extent of the user is the question, and that is for the jury. Even if it existed by express grant and no width was expressed, yet being for carts, loads of hay must have room to pass conveniently. A 6 ft. cart could not, on every passage, take exactly the same track, and travelled tracks are generally much wider than that. Here there are landmarks indicating the width of the fence, and the gutter and the user is established.

Then I am disposed to think that there was a dedication of this way to the public. It was proved that the plaintiff's predecessor in title had given this road for the use of the public. John Giles says:—

> So far as I know about this road, the road formerly went through the field, and my father gave a road there to get the people that live below us out of the field; helped them to cut it out and levelled cradle hills, and gave them a full width of road. I know there was a cart road that two teams could pass anywhere there on the road; father gave a road wide enough for teams to pass anywhere and everywhere.

He says later, it was given as a "public road."

Then the question arises whether the dedication was accepted. There is proof that, for a number of years, the defendant and his predecessor, Magnan, performed the statute labour upon it with the permission of the overseers or municipal authorities. The statute enables this to be done. Henry proves that 37 years before, he being in the employ of Magnan, performed the statute labour upon it. And Enos Whynott says:—

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. Yes, he used to get help for statute labour, and De Young too. De Young does it up to his own gate on the same road.

The plaintiff has admitted in other ways that this was a public road. The telephone people were about to locate poles along it for a telephone on this road, and apparently were only willing to do so if it was a public road. At a public meeting, no doubt in order to secure the telephone, the plaintiff stated that it was a public road as far as Giles' gate. The plaintiff denies that, and attempts to distinguish, admitting that it is a public road as far as his own gate because it serves two, but as to the plaintiff's land there, it serves but one, and he says he called it not a "public road," but a "public right of way."

That brings me to the question whether there can in law be a dedication of a road terminating in a *cul-de-sac*. Whatever the difficulties were in England, the law is, I think, established now, that there can be such a dedication: *Reg.* v. *Burney*, 31 L.T. 828, Blackburn, J., and *Bateman* v. *Black*, 18 Q.B. 870. And there is much more reason for it in a newly settled country like this, for there must always be in back settlements, roads terminating in the woods, and as the people advance, the road is continued.

I think there is no difficulty about invoking the doctrine of estoppel against the proprietors of the plaintiff's farm in this instance. It is estoppel which is the foundation of the dedication of a road to the public.

In my opinion, the appeal should be dismissed.

Drysdale, J.

DRYSDALE, J.:—I think this appeal turns upon whether or not the road into defendant's property is a public highway or not. Long user is established, but it is said that the user is not such as to establish a public highway, and inasmuch as it is a *cul-de-sac*, it is contended there can be no such thing as a public way by dedication. English authorities are cited in support of this proposition. An examination of these authorities convinces me they have no application here. For many many years in this country, by statute, a *cul-de-sac* could be laid out by the county authorities as a public way, and in the light of this I cannot see why a dedication of such a way is not permissible. I think it is. The evidence in this case is strong that the way in

question is, and for long has been, treated as a public way. So much is this the case that I think the acts in question—really acts carrying out what was considered repairs to the public highway—must have been considered rather a shock to the parties performing the work when it was treated as a trespass.

I have no hesitation in holding, under the evidence in this case, that the action was properly dismissed. I put it upon the ground that reasonable inferences from the proved facts establish a highway where the trespasses are said to have occurred, and that the alleged trespasses were nothing more than reasonable acts of repairs.

Harris, J.

HARRIS, J.:—The plaintiff and defendant live on adjoining properties, and the road running past or through their properties ends at the defendant's house. There are a number of other people living on this road. The plaintiff claims that where the road crosses his farm it is not a public highway, and his claim is that the only right of the defendant to use it is as a right of way by prescription, and that it is restricted to a width of about 6 ft.

The defendant contends that it is a public highway, and that its width is from 30 to 33 ft.

The trial Judge decided that it could not be a public highway because it was a pent road or *cul-de-sac*, but he found that the defendant had acquired a good title to the road, which had been in existence for more than 50 years.

The evidence shews that over 50 years ago the father of John Giles who then owned the plaintiff's farm laid out this road from 30 to 33 ft. wide.

The plaintiff bought this farm about 19 years ago, and shortly after he moved the fence on the east side of the road out close to the wheel tracks. Some 8 or 9 years ago he moved it back, but not as far as the old line. It is now some 7 ft. or thereabouts nearer to the centre of the road than was the original fence.

The trespass complained of is that the defendant, in digging out a ditch which had existed for over fifty years on the west side of the road, threw some stones and dirt, not suitable for road-making, across the road on to the east side. The place

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where the stones and dirt were thrown is on the roadway, if the fence erected by the plaintiff eight or nine years ago is to be taken as the boundary of the road, and, of course, it is also on the roadway if the proper boundary is where the original fence was erected.

The plaintiff's contention, however, is, that neither of these fences is to be taken as marking the eastern boundary of the road; that the road is only about six ft. wide and that the place where the stones and dirt were deposited is therefore on his land.

I am of opinion that the road in question is a public highway and that its eastern boundary is not nearer to the centre of the road than the fence erected by the plaintiff eight or nine years ago. It is unnecessary to find whether the true boundary is where the fence now is, or whether it is where the original fence was erected, because the stones and dirt were admittedly deposited nearer to the centre of the road than either of the fences.

With deference, I think the trial Judge was wrong in deciding that a *cul-de-sac* could not be a highway. There was some authority for that proposition, but the law has been settled otherwise since *Bateman* v. *Bluck*, 18 Q.B. 870. In that case Lord Campbell said:—

> In the *Rugby Charity* v. *Merryweather*, 10 R.R. 528, Lord Kenyon laid down that there might be a highway through a place which was not a thoroughfare, and seems to have left it to the jury whether there was such a highway or not.

Coleridge, J., said:—

> But it is objected that there cannot, in law, be a highway through a place which is not a thoroughfare, and that therefore I was not justified in telling the jury that there might be a highway through the court and leave it to them to say upon the evidence whether there was or not. I cannot see any such legal impossibility as has been suggested. It is suggested that the way through such a place as this must be assumed to be for the use of the inhabitants only but surely it is for the jury to say whether there has or has not been a dedication and user.

Erle, J., said:—

> We are to say whether in law there can be a highway through a place which is not a thoroughfare. It seems to be clear from the authorities that there can, and I do not see any reason for holding that there should not. Whether, under the particular circumstances of each case, there is a thoroughfare is a question for the jury.

See, also, 1 Elliott on Roads and Streets, p. 3; 16 Hals. 11; *Young* v. *Cuthbertson*, 1 Macq. H.L. 455.

The question is whether there has been a dedication and user. This is a question of fact. The intention to dedicate a highway may be openly expressed in words or writing, but as a rule it is a matter of inference. No formal act of acceptance by the public is required, but acceptance may be inferred from public user of the way, and the authorities lay it down that open and unobstructed user by the public for a substantial time is the evidence from which a jury may infer both dedication and acceptance.

John Giles says:—

My father gave a road there to get the people that live below us out of the field; helped them to cut it out and levelled cradle hills, and gave them a full width of road; that is where the road is now. Q. Was the gutter made at that time? A. No, but the gutter, so far as my knowledge goes, was put there about 50 years ago. The old fence was away in back. Father must have had 30 feet of a road. The road must have been 30 ft. wide from the old fence of all to the gutter as it is to-day. It was given as a public road.

John Whynott says: "I am 55," and in speaking of the road, he says: "It was opened before I was born. The gutter was there since I can remember."

This witness confirms the other evidence as to the existence of the original fence and its location. The evidence establishes beyond question that for a period of from 30 to 40 years the road remained fenced off on the eastern side, and from the fence to the gutter on the western side it was from 30 to 33 ft. The gutter was walled up. The defendant has been living at this place for at least 19 years, and during all that time he has in almost every year, under the direction of the municipal council, done a portion of his statute labour on this road. He has done a part of his statute labour on this road under five different overseers of roads. Henry Lintaman says he did statute labour on this road 36 or 37 years ago. The plaintiff, in his evidence, calls it a "public right of way," and says, "everybody uses the road."

John Elliott and Maurice Schrumm both testify that at a public meeting of the citizens of Cole Harbour, held for the purpose of getting telephones installed, a question arose about run-

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ning the pole line on this road and the plaintiff said it was a public road to the defendant's gate. It is true that plaintiff denies saying this, and states that he limited the public road to the portion south of his own house; but if I had to determine between plaintiff and the other two witnesses, I would accept the evidence of Elliott and Schrumm. They are apparently disinterested, and Schrumm had a particular reason for remembering it, as the statement was made by the plaintiff at that meeting in answer to a question put by Schrumm.

I have referred to the fact that the plaintiff about 19 years ago moved the fence on the east side of the road out from the position it had occupied for a period of 30 or 40 years to a line nearer the centre of the road. It remained there until 8 or 9 years ago, and the evidence shews that the defendant then complained, and an arrangement was made by which Whynott and Elliott (both of whom lived on this road, but further south than the plaintiff) and the plaintiff all agreed to move their fences back so as to restore the road to something like its original width. The plaintiff in moving his fence did not go back to the original line, but put his fence some five or more feet inside.

It is difficult to understand why this road was made over 30 ft. wide originally unless it was to be a public highway. If, as plaintiff contends, it was only for the use and convenience of one man, no such width was necessary; ten or twelve feet would have been ample.

I think all the evidence points unmistakably to a dedication and acceptance, and I decide accordingly.

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

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CANADIAN FAIRBANKS MORSE v. U.S. FIDELITY & GUARANTY.

British Columbia Supreme Court, Macdonald, J. September 11, 1915.

1. BONDS (§ II A—9)—CONTRACT TO BUILD AND LEASE—BOND FOR PERFORMANCE—SCOPE OF LIABILITY—WORK COMPLETED BY LESSEE.

Where in an agreement by a lessor to erect a building, and to lease same when completed, there is no provision similar to that generally contained in a building contract whereby the owner may, upon default of the contractor, proceed with the completion of the building and charge the amount expended against the contractor, a surety for the performance of such contract, unless it is otherwise expressly agreed, cannot be called upon to assume any further liability than for the amounts of liquidated damages expressly fixed by the contract for any delay of performance thereof, and will, therefore, not be liable for the amounts expended by the lessee for the completion of the building.

2. DAMAGES (§ III A 7—97)—DELAY IN COMPLETING CONTRACT—ERECTION OF BUILDING AND LEASE—LIQUIDATED DAMAGES OR PENALTY.

A provision in a contract fixing a per diem amount of $20 as liquidated damages, in the event of a failure to erect a building and to lease same when completed, is reasonable and cannot be considered a penalty.

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CANADIAN FAIRBANKS MORSE v. U.S. FIDELITY & GUARANTY.

ACTION on bond upon non-performance of building contract.

Joseph Martin, K.C., and *C. W. Craig*, for plaintiff.

S. S. Taylor, K.C., and *J. A. Harvey*, K.C., for defendant.

Macdonald, J.

MACDONALD, J.:—By agreement dated August 31, 1912, John W. Gibb, alleging that he was the owner in fee simple of D.L. 541, adjoining the Connaught Bridge in the City of Vancouver, agreed to erect thereon a building of a certain size and description, and to lease the land and building, when completed, to the plaintiff for a term of years. A copy of the proposed lease, bearing date August 1, 1913, was attached to the agreement. It was executed by both parties and provided for payment of a rental of $22,000 per year for the first 3 years; $24,000 per year for the second period of 3 years; and $26,000 for the last 4 years. It purported to be in pursuance of the Leaseholds Act and had no special provisions except an option to purchase the property for $500,000, and a stipulation that in case the building was not finished, ready for occupancy on August 1, 1913, "the rent of the premises shall abate, and shall not be chargeable until the building is finished and ready for occupation by the company."

The agreement provided that the building when erected should be suitable for the requirements of the above company and in accordance with certain plans and specifications agreed upon by the parties. It then specifically referred to the construction of certain portions of the building and approaches thereto, also as to the installation of the heating and sprinkling system. The plaintiff was to have the warehouse free of charge for 30 days before the building was ready for occupation. The occupation of such space, however, was not to be considered in any way as acceptance of the building. The building was to be erected and ready for occupation by August 1, 1913. In the event of the building not being completed by said date, Gibb was required to

pay to the company (plaintiff) $20 per day for such default until the

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building shall be completed. Strikes, accident, fires or other causes beyond the control of either party shall be considered a plea for extension of time.

It then provided for the execution of the lease already referred to commencing August 1, 1913, such lease "to be in the form and contain the covenants which are set forth in the form of lease hereto attached." It was contended that the lease being executed the bond referred to was only intended to apply to ensure construction of the building. I do not think this position is tenable. The lease was not to become operative until the building was completed, and the previous execution was simply to identify the document as to form, terms, and conditions agreed upon. This conclusion is supported by the fact that this lease was not adhered to nor acted upon, but a new lease granted, under which the plaintiff is occupying the premises. After the execution of the agreement, Gibb took steps for the erection of the building, and on September 12, 1912, for that purpose, entered into a contract with one Walter H. Mueller. It was agreed that the cost of the building, if 5 storeys only, would not exceed $106,000, and that certain payments were to be made from time to time as the work proceeded and the balance to be paid within 30 days after the completion of the work. Shortly after the commencement of the construction of the building plaintiff received information as to Gibb being financially embarrassed, and, as a matter of precaution, applied to the defendant for a bond which, upon payment of the premium of $400, was entered into, bearing date February 28, 1913. Such bond was executed by Gibb as principal and the defendant as surety, in the penal sum of $50,000, and the condition of the obligation refers to the agreement entered into by Gibb for the construction of the warehouse, and is made part of the bond "as fully and to the same extent as if copied at length therein." It provided that the obligation was to be void if Gibb

> should well and truly keep, do and perform each and every, all and singular, the matters and things in said agreement set forth, and specified to be by the said principal (Gibb), kept, done and performed at the time and in the manner in said agreement specified, and shall pay over, make good, and reimburse to the above-named obligee (plaintiff), all loss and damage which said obligee may sustain by reason of failure or default on the part of said principal.

The construction of the work had in the meantime been proceeded with, and on April 28, plaintiff felt confident that the building would be completed by August 1, 1913. On May 8, however, complaint was made to Gibb that the work was progressing so slowly and with such an insufficient force of men as to make it practically certain that it would not be completed and ready for occupancy within the time limit. It was pointed out that this would cause the plaintiff serious damage and that, under the circumstances, it would be forced to notify the bonding company in order to protect its interests. Gibb's financial embarrassment had increased to such an extent that the work was suspended, and according to a letter from Akhurst, the manager of the plaintiff company at Vancouver, to his head office, it was completely shut down prior to June 14. Notwithstanding the statement of Gibb that he was the owner in fee simple of the land, it transpired that he only had an equity and that there was a large amount payable by him before he could acquire complete title. At this date the contractor refused to further proceed with the work except upon receipt of $20,000, being a portion of the money then owing to him. Gibb had apparently arranged a loan for $125,000 with Harvey Haddon, but until he secured the deed to the property and the building was completed the loan could not be effected. He could not obtain any temporary assistance from a bank, and unless some financial arrangements were made the work could not be proceeded with. It would appear that if Gibb had owned the property in fee simple, as alleged, this climax would not have been reached. He could have obtained the usual building loan and carried on construction. No point was, however, made by plaintiff as to this false representation of title, and I assume that it was not considered to affect the rights of the parties. Plaintiff was anxious to leave the inadequate premises it then occupied, and Mueller and other creditors of Gibb's were pressing for payment. I am satisfied that the defendant company was aware of the position of affairs not only through its local agents but also through Smith, a special representative, who came to Vancouver and became acquainted with the situation. Akhurst made various suggestions to his company with the view of overcoming the difficulties, and

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the creditors, during June and July, attempted in many ways to arrive at an arrangement that would secure the completion of the building. It was suggested that the plaintiff should purchase the property, but it declined to accede to this proposition. The unsatisfactory condition of affairs is fully outlined in a letter by Akhurst to Thos. McMillan, the vice-president of his company, dated July 2, 1913. It shewed that the amount required in order to enable Gibb to obtain title was for more than had been previously mentioned, and amounted to double the sum of $106,000. Mueller had only received $12,781 on account of his contract, and had a large amount due him. There was also due to other contractors various large sums of money for material and work in connection with the building. Akhurst, in discussing the situation, and suggesting a course to be pursued, mentioned in his letter, "that we would also have to make the bonding company a party to the agreement, and I propose to insist on them putting up half the amount necessary." He pressed upon his company the desirability of adopting his suggestions as to purchase, and that the gross amount required would only be $40,000 to $45,000, and if the "bonding company come through we would only have to put up half this amount." He referred to the site being an exceptionally good one and the rental extremely low, also that Gibb was spending $15,000 to $20,000 more on the building than was even necessary for him to do. He mentioned that the attitude assumed by the defendant was that of sitting back and waiting, claiming they were not responsible until August 1, and that he expected, from the fact of a special representative being on the ground and becoming aware of the value of the lease, to get a definite proposition from such company within a day or two.

Plaintiff subsequently, at his own cost, proceeded with the work, so that the building was completed ready for occupation on October 15, 1913. Unless it can be shewn that the defendant came to a definite and binding agreement with the plaintiff so as to become liable for the moneys thus expended, I do not think it can be held liable therefor under the bond,

it being the clearest and most evident equity not to carry on any transaction without the privity of the surety, who must necessarily have a con-

cern in every transaction with the principal debtor: Lord Loughborough, L.C., in *Rees* v. *Berrington*, 2 Ves. 541, 543.

The position between plaintiff and Gibb was not similar to that between a building owner and a contractor. The building which Gibb agreed to erect was not to be the property of the plaintiff, but intended only for its use upon payment of the stipulated rent. There was naturally no provision in the agreement between these parties similar to that generally contained in a building contract, whereby the owner could, as in *Wright* v. *Western Canada Accident*, 20 D.L.R. 478, 20 B.C.R. 321, upon default of the contractor, proceed with the completion of the building, and charge the amount expended against the contractor. Gibb agreed with the plaintiff for the lease of premises upon which there was to be erected, ready for occupation by August 1, 1913, a certain specified warehouse. Rent was not to be payable until the building was ready for occupation. Failure of Gibb to satisfactorily carry on construction, or to complete within the time specified, did not entitle the plaintiff to enter on the premises and proceed with the work. It could only claim damages for breach of the agreement. The amount of such damage was fixed at $20 per day. This was considered and decided between the parties as the only "loss and damage" which the plaintiff would sustain "by reason of the failure or default on the part of the principal" (Gibb). In my opinion, this was the only obligation which defendant undertook at the time of the execution of the bond. Fuller, president of the plaintiff company, took this view of the purpose and intent of the bond, as indicated by his letter of July 21, to Akhurst, complaining of the inadequacy of $20 per day for delay in completion of the building, and he then added, "it looks to us as if this were going to be very embarrassing, not getting any substantial damage for the expense and annoyance we are suffering and against which we took our bond." If the principal could only be held liable to the extent mentioned, then the surety could not, without subsequent agreement to that effect, have its liability increased. Plaintiff, through McMillan, as vice-president, summed up the situation on July 18, in a letter of that date to Akhurst, as follows:—

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While the action of the insurance company is not likely to result in strengthening their position with this company, yet they are well within their rights in refusing to take any steps until such time as Gibb may be in actual default. Their position is quite similar to our own—that of "standing pat," with the hope that those who are actually tied up will be compelled to make the advances or concessions as the case may be in order to save themselves from absolute loss.

There were thus two courses open to the plaintiff at this time—either to lie back and do nothing as mentioned by McMillan, or, if it felt so inclined, upon obtaining the consent of Gibb, to enter upon the property and arrange for the completion of the work. This latter course was not contemplated in the agreement, and would be an extension or, at any rate, a change from the liability created by the bond. Plaintiff was fully aware of this position and that it would have to make the "bonding company a party" to any such arrangement. Did defendant ever make the definite proposition already referred to? It is beyond question that there was no agreement executed by the defendant whereby it agreed to reimburse the plaintiff for any portion of its outlay in connection with the building. Plaintiff contends that the correspondence and subsequent course of conduct evidenced an agreement of this nature, which would be binding upon the defendant, or, in the alternative, the completion of the building was for the benefit of Gibb and the defendant, and that it should be repaid moneys thus expended.

Dealing with the first contention, I do not think the evidence adduced proved that the defendant was a party to the completion of the building by the plaintiff. It had no right to object to the plaintiff so acting. The creditors of Gibb were anxious that the building should be placed in a condition so that rents would become payable. It was also necessary to complete in order to obtain the loan from Haddon. Many meetings and consultations took place, and the result was an agreement whereby the plaintiff agreed with Gibb to advance $25,000 towards the completion of the building, such amount to be repaid out of the rent payable during the first and second year of the lease. The letter dated August 1, 1913, containing this agreement, stated that it was without prejudice to plaintiff's rights against the defendant. On the same date the solicitors for the plaintiff

notified the defendant that default had been made by Gibb under his contract for the erection of the warehouse and that the plaintiff would seek payment for such damages as it might sustain by reason of default. It was then arranged that the property should be vested in trustees, and at a meeting held on August 4, 1913, it was "unanimously decided by all those interested to go ahead and complete the building." Documents were prepared by the solicitor for the plaintiff. It was also arranged that the interest of John W. Gibb in the property should be transferred to his father David Gibb. Akhurst was aware of this solution of the difficulty and was at first named as one of the trustees, but, subsequently, on objection from his head office, declined to act. When he reported the result of the efforts on August 5 he certainly was not under the impression that defendant had agreed to advance any portion of the contemplated expense. An extract from his letter of that date reads as follows:—

> If the bonding company would come through and make an advance, no one would suffer any loss, and the bonding company would eventually be reimbursed. If there is anything that you can do to bring about this arrangement, I certainly think it is to our interest to do so.

This is emphasized by a letter dated August 6, 1913, from Smith to Lang, vice-president of the defendant company, in which he says:—

> I quite agree with you that every danger flag is out against our paying out any money on this job.

Whatever opinion the plaintiff may have entertained as to defendant company eventually contributing to the outlay in the first instance or to the subsequent deficiency, I do not think that the defendant ever receded from the position referred to by Smith. The liability under its bond was thus not extended so as make it liable for any portion of the moneys expended by the plaintiff, or for which it had become liable. In so concluding, I should add that I am not discrediting the evidence given by the plaintiff, but do not think it sufficient to create an agreement of the nature required.

As to the contention that the completion of the building by the plaintiff was for the benefit of the defendant, and it consequently should bear the cost. Assuming that there was no

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agreement on the part of the defendant to reimburse the plaintiff for this outlay, then the plaintiff undertook the completion of the work without being compelled to do so, and I do not think the defendant can be saddled with the burden and held liable for the amount. If the agreement with Gibb had contained a stipulation that the plaintiff could, in default of Gibb completing, undertake the work, then the position might be quite different. While it might be argued that the damage estimated at $20 per day might cease to run at an earlier date through the action of the plaintiff, still it had no right to seek recourse from the defendant for the expenditure. It would be a material alteration from the original liability assumed by the defendant, and if, being called upon to consent to such substituted liability, it refused, then it should not be imposed. I think the plaintiff, being well aware that it had no agreement with the defendant to be recouped for the outlay, weighed the advantage or disadvantage of completing the building, and decided, in view of the favourable terms of the lease and location, coupled, perchance, with business friendship towards some of the creditors of Gibb, to adopt the course referred to. In passing, I refer to the option given by Gibb to the plaintiff to purchase the property for $500,000. No reference was made, either during the trial or the argument, to this privilege having any bearing upon the rights of the parties. It would appear simply to have been a nominal figure. This is borne out by the statements of Akhurst and by the correspondence shewing lower figures quoted during the time when the construction of the building was at a standstill. It is also worthy of mention that in the subsequent lease, dated November 6, 1913, given by W. R. Arnold and David Gibb as lessors to the plaintiff, under which it is occupying the property, a new option is given at $350,000, thus finally disposing of the first option.

Defendant contends that, under the circumstances, it is not liable even for the amount of $20 per day from August 1 to October 15, when the plaintiff went into occupation of the premises. A number of decisions were cited, both as to the amount being a penalty and not liquidated damages and also as to the defendant being relieved from liability through the actions of

the plaintiff. I do not think it necessary to discuss these cases as the facts differ from the one under consideration, but, however, I have sought to be guided by the principles to be deduced therefrom. I think that the amount of damage that the plaintiff would suffer from day to day, through lack of facilities in carrying on its business, comparing the old warehouse with the new and otherwise, would be difficult of close adjustment. I consider the parties were entitled to determine the probable amount of damage in advance, and the per diem amount of damage fixed is a reasonable one. Unless through other considerations, the plaintiff has lost its right to recover, it is entitled to damages for 76 days at $20 per day, amounting to $1,520.

Variations of the agreement between plaintiff and Gibb were relied upon to relieve the defendant from liability. It is alleged that a different form of lease was entered into between different parties, and that it contained different provisos from that originally agreed upon. I think these variations are not substantial. In any event they took effect subsequent to the time when the damage began to accrue. They were not prejudicial to the defendant. Other variations were alleged, such as the active, or at any rate passive, support given by plaintiff to the change in the title to the property and substitution of another party as building owner in place of John W. Gibb. The defendant should not now object and endeavour to escape liability through such changes as they were caused by the financial embarrassment of its principal, for whose default it had, for valuable consideration, agreed to become liable. I do not think any of the changes were of such a character "as to affect the surety in any way by substantially or materially altering the risk." They all tended to bring about the main object of all parties, viz., speedy completion of the building and occupation by plaintiff.

Plaintiff, under clause 16 of its agreement with Gibb, had the privilege of viewing the specifications covering the "heating apparatus . . . as well as all piping, belt fittings, vault fronts, and other goods usually sold by the plaintiff company," and they were to be purchased from it by Gibb, provided the prices quoted were reasonable and compared favourably with

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other prices. Gibb ignored this portion of the contract though the plaintiff sought to obtain the benefit of it. It resulted in loss of profit to the plaintiff of $800. This is distinct from the amount of damage agreed upon for non-completion of the building and should also be recoverable from the defendant under the bond.

There will be judgment in favour of plaintiff for $2,320 with costs. *Judgment for plaintiff.*

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WALKER v. BOWEN.

Alberta Supreme Court, Simmons, J. November 19, 1915.

1. PRINCIPAL AND SURETY (§ I B—12)—GUARANTY UPON ASSIGNMENT OF MORTGAGE—DISCHARGE OF SURETY—EXTENSION OF TIME OF PAYMENTS—PERIOD OF DEFAULTS.

The well established principle, that an extension of time given to the principal debtor without the consent of the surety thereby discharges the surety, has no application, when, upon an assignment of a mortgage, the assignor covenants to indemnify the assignee in case of defaults in payments thereon by the mortgagor that shall continue to a certain date, and the extension is given by the assignee for a period terminable prior to the time fixed for the defaults.

[*Prendergast* v. *Devey*, 6 Madd. 124; *Rouse* v. *Bradford Banking Co.*, [1894] 2 Ch. 32, applied.]

Statement

ACTION by assignee of mortgage upon guaranty by assignor of payments thereon.

S. B. Woods, K.C., and *R. D. Tighe*, for plaintiff.

A. D. Harvie, for defendant.

Simmons, J.

SIMMONS, J.:—On October 23, 1912, Robert B. Thompson executed a mortgage upon certain lands in Prince Albert, in the Province of Saskatchewan, as security for an advance made to him by the defendant Herbert Bowen of the sum of $18,853. The mortgagor covenanted to repay the same in instalments as follows: $9,426 on August 2, 1913, and $9,426.95 on August 2, 1914, together with interest at 7 per cent. per annum.

The mortgagor covenanted with the mortgagee, *inter alia*, as follows: That he attorned as tenant to the mortgagee at a yearly rental equal to the annual interest payable thereon; that in case of default by the mortgagor in principal or interest, that the mortgagee might enter, seize and distrain upon said lands as in like case of distress for rent; that in case of default, as aforesaid, the mortgagee might enter into possession of said lands and lease or sell the same or any part thereof; that in case of default as aforesaid the whole principal shall become due and payable in

like manner as if the time mentioned for such payment had come and expired; that the mortgagor may repay the principal sum or any part thereof not less than $5,000 at any time before the due date without notice or bonus, no interest to be charged on any sum so paid after the date of payment thereof.

On October 30, 1912, the defendant Herbert Bowen assigned the said mortgage to the plaintiff for the consideration of $16,968, and in said assignment the defendant covenanted with the plaintiff as follows:—

> And I do further, for myself, my heirs, executors, administrators and assigns, that in case of default by the mortgagor in payment of any sum or sums of money which shall become due or owing under the said mortgage, and that any such default shall continue to November 2, 1914, I will forthwith, on demand, well and truly pay or cause to be paid to the said transferee, his heirs, executors, administrators or assigns, any sum or sums so in default.

On August 25, 1913, the mortgagor paid the interest due on August 2, 1913, and the plaintiff for a valuable consideration granted an extension of time until August 2, 1914, for the payment of the instalment of principal then overdue. The defendant had no knowledge of this agreement and did not assent to it. The defendant claims that the said extension released him from his obligation under the guarantee. In the alternative, the defendant claims that he executed the said guarantee upon the representation of the plaintiff that he should not be called upon to make payment until the plaintiff had exhausted his remedies against the mortgagor. The evidence does not support any such representation, and it is therefore necessary to consider only the effect of the first defence above-mentioned, namely, the extension of time for payment of the first instalment.

It is a well-established principle in equity that when time is given to the principal debtor without the consent of the surety, and that such extension is given by virtue of a positive enforceable contract, the surety is thereby discharged.

The reason underlying the rule is defined by Lord Eldon in *Samuell* v. *Howarth*, 3 Mer. 272, 277, 36 E.R. 107, and is as follows:—

> Because the creditor by so giving time to the principal has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not.

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Examples of the strict application of the rule are found in the leading cases of: *Oakley* v. *Pasheller*, 4 Cl. & F. 207, 209; *Overend, Gurney & Co.* v. *Oriental Financial Co.*, L.R. 7 Ch. App. 142, approved in the House of Lords, L.R. 7 H.L. 348.

If the surety had the right to make payment of the instalment remaining unpaid, which fell due on August 2, 1913, and to sue the principal debtor therefor, the effect of the extension was to deprive him of this right, and he would, at least, be discharged from liability upon this instalment.

The whole question turns upon the meaning of the effective words in the guarantee. The surety did not guarantee the payment of this instalment when it fell due. He was not called upon to make payment of the same until 15 months after August 2, 1913, the date on which it fell due.

It was provided that the default should continue until November 2, 1914, before any liability accrued against the surety. He had the benefit of the extension of time, and I am of the opinion that this involves an implied right of the creditor to give extensions of time to the principal debtor up to November 2, 1914.

The debt that was actually guaranteed was a sum which should be found due and ascertained as of that date.

The same principle was applied by Sir John Leach, V.-C., in *Prendergast* v. *Devey*, 6 Madd. 124, 56 E.R. 1039, where the liability of the surety arose if the principal debtors, *within one month after demand on them*, failed to pay the balance due, and an extension of time was given in the form of a warrant of attorney for the amount, with a stay of execution if the principal debtor should discharge the debt by instalments of $100 per month, and on default, execution to issue for the whole. Sir John Leach, V.-C., expressed his opinion that

> the warrant of attorney certainly gave time, which might have discharged the sureties if they had been affected by it; but that here the sureties' liability not arising until demand, and previous to the demand, default having been actually made by the debtors, so that execution might have instantly issued for the whole debt, the agreement made by the warrant of attorney was at an end and the defendants were no ways injured, as there was nothing to interfere with their immediate recourse to the principal debtors.

In *Rouse* v. *Bradford Banking Co.*, [1894] 2 Ch. Div. 32, 61, the agreement between the debtor and the surety provided that

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the surety should not have the right to call upon his former co-partners (who were the principal debtors) for payment, as long as the principal debtors kept him indemnified against the payment of the debt due the bank. It was held that an extension of time granted to the principal debtors by the bank did not discharge the surety, as the provisions of the agreement between the surety and the principal debtors impliedly authorized his co-partners to make arrangements with the bank for extensions of time for payment. Where the surety contract itself postpones the time for payment by the surety, I would infer that the implication was even stronger. I conclude, therefore, that the surety was not discharged, and judgment will go against the defendant for the claim and costs.

Judgment for plaintiff.

LETARTE v. TURGEON.

QUE.
K. B.

Quebec King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Cross, Carroll and Pelletier, JJ. April 8, 1915.

1. BOUNDARIES (§ II C—16)—BORNAGE—LANDS ADJOINING NON-NAVIGABLE STREAM—DIVISION LINE—MIDDLE OF WATERCOURSE.
Riparian proprietors, whose lands are bounded each on its own side by a river which is neither navigable nor floatable, have their respective rights up to the middle thread of the water.

2. WATERS (§ II A—69)—NON-NAVIGABLE STREAM—OPPOSITE PROPRIETORS—CATTLE GUARDS.
Under the Municipal Code it is the duty of owners, whose lands are divided by a non-navigable and non-floatable watercourse, to maintain, at their respective costs, a fenced enclosure at the centre of the stream sufficient to prevent cattle from straying across the lands, and if any of them fail to construct their part, it may be done at their expense by the others.

Statement

APPEAL from the judgment of Roy, J., Superior Court, dismissing action.

Bédard, Lavergne & Provost, for appellant.

Casgrain & Rivard, for respondent.

The judgment of the Court was delivered by

Pelletier, J.

PELLETIER, J.:—The parties, though residing in two different parishes, are adjoining owners. The appellant is owner of lot No. 1, of the cadastre of l'Ange-Gardien, and has been so by himself and his auteurs for nearly 50 years. His land is bounded on the east, that is on the side of Chateau-Richer, by the river Petit-Pré, called also the river Lottinville. The respondents, by themselves and their auteurs, are owners for more than 50 years

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of lot No. 422 of the cadastre of Chateau-Richer. It is admitted by both parties that the river Petit-Pré is the division line between the two parishes of l'Ange-Gardien and Chateau-Richer. The question in this case is this: is the river Petit-Pré the division line between the two immovables? The plaintiff submits, but the defendants say that their right of property comprises the river over to the west side, and that therefore this river cannot be the division line between them and the plaintiff. If the plaintiff is right, and if this river Petit-Pré is neither navigable nor floatable, he has a right to the division enclosure which he demands. If he is wrong the defendants can refuse the division enclosure and ask for a *bornage* upon the west side of the river. However, the parties appear to admit that there is no ground for a *bornage* if the river constitutes for them a natural boundary in such case. They tell us that the river Petit-Pré is neither navigable nor floatable. This point then is well established. It may first be asked; the river being so, what necessity is there for a division enclosure? This question brings us immediately to the fact which is the first cause of these proceedings. The river Petit-Pré is shallow and narrow, and as the plaintiff tells us:—

> An enclosure is needed at this place, because without it the cattle cannot be put out of doors. When this piece of land is in growing hay, the hay cannot pass over the river but the animals can.

At one time the parties appeared to have believed that this difficulty could be settled by the municipal inspectors. The latter went on the premises, heard the interested parties, and appear to have decided in favour of the plaintiff; there was then commencement of the construction of the enclosure, but the son of the respondent, their son-in-law and another of their family pulled up the stakes and threw them in the water as soon as they were put in place, and therefore it had become necessary to have the question decided by the Courts. The defendants say that they were about themselves to bring an action *en bornage* when they received from the plaintiff service of the action which is now submitted to us.

The title of the plaintiff is not produced. He has perhaps considered it useless in view of the admissions contained in the pleadings on this subject. According to this admission, the title

of the plaintiff makes the river the eastern boundary. The same can be said of the title of the defendant; as they themselves are also bounded by the river. If that was all that was in the title of the defendants, the question would be quickly settled, for two properties which are bounded, each on its own side by a river neither navigable nor floatable, have their respective rights up to the middle of the water, or as it is said up to the middle thread of the water.

This principle is now settled by a fixed and certain jurisprudence. But the title of the defendants or at least the title of their auteurs contains something else. And this something else caused the Judge of first instance to say that there was a strong presumption that the property of the defendants comprised the whole bed of the river.

Here follows a lengthy analysis of the title of the respondent, some of which in bounding his immovable by the river Petit-Pré import the following addition: "With all the rights of the vendor in the said river." By way of interpretation and of reference the Judge concludes that these words do not imply an extension of the right of the owner so as to incorporate into the immovable the bed of the river, but a kind of servitude which the appellant does not contest, for the benefit of the respondent's mills. Appreciating the evidence, he infers from it that the auteurs of the parties have always, concurrently with the title, maintained a division enclosure for one half of one side of the river and for one half of the other side such as the appellant wishes.

To traverse this river, narrow as it may be, and take from the appellant what he has thus enjoyed as well as his auteurs, a presumption appears to me in the circumstances very feeble. Moreover, the presumption in favour of the appellant appears to me very much stronger and more conclusive.

Every one knows that, for a farmer, a water supply accessible for himself and for cattle, is valuable. Without a clear and positive title, one should not shut out a farmer by enclosure from access to the borders of the water which he has always had.

This appears to me inadmissible and constitutes, in my humble opinion, an attempt of encroachment upon a neighbour.

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I am not disposed to place much legal value on the proceedings of the inspectors; but sanctioning the principle recognized by the Municipal Code for properties bordering on the middle thread of the water, I would declare, as the action asks, that the river is the natural boundary between the lands of the parties, and that they should continue to maintain an enclosure as the law directs in such case. I would reverse the judgment *pro tanto*, and would say that if the respondents do not construct their part of the enclosure, the appellant is authorized to do so at their expense. The cost will be against the respondents in the two Courts.

This is the unanimous opinion of the Court.

Judgment reversed.

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GIESE v. BELL & McPHEE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Stuart and Beck, JJ. December 21, 1915.

1. CONTRACTS (§ IV B 3—335)—SUPPLY OF TIES—EXCUSE FOR NON-PERFORMANCE—HINDRANCE BY OTHER PARTY—ORDERS FOR FURTHER QUANTITIES.

It is no defence that a party was unable to complete a contract for the supply of ties by reason of having been required by the other party to the contract to proceed with the manufacture of lumber, not provided for by the agreement, where the contract provided for the delivery, in addition to the stipulated quantity of lumber, any such further quantity as may be ordered.

2. CONTRACTS (§ IV B 2—330)—SUPPLY OF TIES—EXCUSE FOR NON-PERFORMANCE—FAILURE TO PLEAD.

Where the issue is not raised on the pleadings, it cannot be set up that an agreement for the supply of ties was subject to a verbal condition to supply the whole quantity of ties in case there was not sufficient snow during the winter enabling the doing so, and that the stipulated supply was prevented by a lack of snow during a portion of the winter.

3. DAMAGES (§ III A 7—97)—BREACH OF CONTRACT TO SUPPLY TIES—PENALTY—LIQUIDATED DAMAGES.

A provision in a contract, which gives a party thereto the right to retain 10 per cent. of the contract price of the ties supplied, by reason of non-completion of the contract to supply them, is not to be treated in the nature of a penalty, but as security for any damages sustainable by reason of the non-performance of the contract.

Statement

APPEAL by the defendants, and a cross-appeal by the plaintiffs from the judgment of Ives, J., in favour of the plaintiffs for $640 with costs of suit.

C. C. McCaul, for appellants.

C. A. Grant, for respondents.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—On January 17, 1913, one Gottlieb Giese entered

into a contract with the defendants whereby he agreed to cut and manufacture for them a quantity of lumber of certain specified dimensions at $5.25 per thousand. Giese assigned his interest in this contract to the plaintiffs who claimed they cut thereunder 520,380 feet, and that the defendants have paid them for only 500,000 feet, leaving a balance of $106.70 still due them. The trial Judge disallowed this claim, holding that the parties agreed that the cut should be taken to be the latter quantity. The plaintiffs cross-appealed from this finding, but upon the hearing their counsel abandoned the cross-appeal as to that item.

On November 20, 1913, the plaintiffs and the defendants entered into an agreement in writing whereby, after reciting that the defendants had on November 11, 1913, entered into a contract with the C.N.R. Co., respecting the cutting and delivering of ties, which contract was known to the plaintiffs who were desirous of obtaining a sub-contract. They agreed to cut on sections 1, 2, 11 and 12 in township 23, range 15, west of the fifth meridian, and delivered upon the railway right of way 50,000 ties of certain specified dimensions and quality, the whole to be delivered before or during March, 1914. The agreement provided that of the moneys payable by the defendants for ties delivered, 10 per cent. should be retained by them until the contract was completed, and all ties agreed to be delivered should be delivered and accepted by the inspector of the railway company, and that no moneys should be payable by the defendants until the moneys were received by them from the railway company.

By the last-mentioned agreement the plaintiffs also agreed to manufacture for the defendants upon said lands 200,000 feet of merchantable, sound lumber or such further quantity as should be ordered by them from time to time at the rate of $12 per thousand, with an additional 35c. per thousand for such portion thereof as should be sorted and piled by the plaintiffs for loading on cars.

The plaintiffs manufactured only 25,039 ties under this agreement, the amount payable by the defendants therefor being settled by the parties at $6,573.66. They also manufactured

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273,736 feet of lumber, the contract price for which would amount to $3,284.83. They also sorted and piled 200,981 feet of lumber, for which they became entitled to $70.62.

There does not appear to be any dispute between the parties as to the quantity of ties and lumber manufactured by the plaintiffs under this agreement or as to the quantity of lumber sorted and piled by them. The plaintiffs now claim payment of these three sums, amounting in all to $9,868.86, less $8,696.33 admitted by them to have been paid on account, leaving a balance of $1,172.48.

The defendants claim to be entitled to deduct from the contract price of the lumber manufactured by the plaintiffs the sum of $528.48, on the ground that same was not manufactured in accordance with the terms of the contract and was of inferior quality, and that this deduction was agreed upon between the parties. They also claim to be entitled under the agreement to retain $640.70, being substantially ten per cent. of the sum agreed upon as the price of the ties delivered by the plaintiffs. These two sums so nearly approach the amount now claimed by the plaintiff that they may be treated as the only question in dispute between the parties.

In April and May, 1915, the defendant shipped to the Alberta Lumber Co. at Edmonton 547,742 feet of the lumber cut by the plaintiffs under the two agreements referred to. This delivery was made under a contract to sell same to that company. The company refused to accept a portion of the lumber at the price agreed upon, on the ground that it was of inferior quality and improperly manufactured. Defendant McPhee and Dan. Giese, one the plaintiffs, then went down and inspected the lumber in the company's yard and they then returned to defendant's office when the following memorandum was drawn up and signed by the parties:—

May 15, 1914.

In payment of $677.33 will be payment in full for lumber and tie cuts during the year 1913 up to May 15th, 1914. To amount held of ten per cent., amounting to $640.17, on account of non-fulfilment of the contract.

Sgd. BELL & MCPHEE.
" GIESE BROS.
" DAN. GIESE.

The evidence shews that the two sums mentioned in this memorandum represented the amount which remained payable to the plaintiffs after deducting the $528.48 which the defendants claimed to be entitled to, and the evidence also shews that the $677.33 was afterwards paid by the defendants.

The trial Judge has found that the lumber in both contracts was settled for by the defendants. There is abundant evidence, apart from this memorandum, to support the finding, and such being the case this Court should not disturb it.

The plaintiffs allege that their failure to supply the full quantity of 50,000 ties called for by their agreement was due to the following acts of the defendants, viz.: (1) That certain dimensions which were being cut by them pursuant to the agreement would not be accepted by the railway company and were in fact rejected by its inspector and that the defendants thereupon required the plaintiffs to make no more of such ties. (2) That the defendants required the plaintiffs to proceed with the manufacture of lumber and to manufacture lumber not provided by the agreement; and, (3) That the timber upon the specified lands would not produce 50,000 ties of any size.

The evidence in support of these allegations was that of one Campbell, who was employed by the plaintiffs as bookkeeper and sealer. He states that he cruised the lands for the purpose of ascertaining the quantity and quality of the lumber thereon.

It is apparent that, after the plaintiffs ceased manufacturing ties, there remained upon the lands timber sufficient to manufacture a further quantity of at least 15,000 ties, and, in my view, it is not clearly established that there was not thereon sufficient timber to enable the plaintiffs to manufacture the full quantity which they agreed to supply.

The agreement provided that the ties should be of two specified dimensions, but did not specify how many of each dimension should be manufactured. Even if the plaintiffs were directed to cease manufacturing ties a certain dimension specified in the agreement, it is not shewn that they sustained any damage thereby or that by reason of such direction they were unable to furnish the required quantity.

The claim of the plaintiffs that they were unable to complete

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the contract for ties by reason of the defendants having required them to proceed with the manufacture of lumber, and to manufacture lumber not provided for by the agreement is, in my view, untenable. Under the agreement the plaintiffs were bound to manufacture at least 200,000 feet of timber, and such further quantity as the defendants should order. If there was sufficient timber on the lands from which the quantity ordered and supplied, as well as the 50,000 ties, could be manufactured, and the contrary has not been satisfactorily shewn, the plaintiffs were bound to manufacture the quantity ordered in addition to the ties. If any of the lumber ordered was not such as was contemplated by the agreement the plaintiffs were not bound to supply it, and if its manufacture would result in their being unable to cut the required quantity of ties they should have refused to fill any such orders.

Evidence was adduced by the plaintiffs to shew that the agreement of November 20, 1913, was subject to a condition verbally agreed upon at the time the agreement was entered into, that the plaintiffs were not to be bound to supply the whole of the 50,000 ties in case there was not sufficient snow during the winter of 1913 and 1914 to enable them to do so and that the absence of snow during a portion of that winter prevented their supplying any greater quantity than that supplied by them. The trial Judge has found that the reason the plaintiffs did not supply the required quantity was because the snow did not remain long enough for them to do so.

Although no objection was taken by the defendants' counsel to the admission of evidence touching upon this question, I am nevertheless of opinion that as plaintiffs have not, by their pleadings, raised it by way of answer to the defendants' claim that they were entitled to the specified quantity of ties, the plaintiffs are not now entitled to raise it. It does not appear that any notice was given by the plaintiffs of their intention to raise it by way of answer to the defendants' claim, and it may reasonably be presumed that they were not prepared to give evidence upon it at the trial.

There remains the question of the right of the defendants to retain 10 per cent. of the contract price of the ties supplied

by the plaintiffs by reason of the non-completion of their agreement to supply them.

The trial Judge appears to have treated this provision of the agreement as being in the nature of a penalty. He therefore held that the defendants were not entitled to retain the moneys and he gave judgment against them for the amount so retained with costs.

In my view, the proper construction of that provision in the agreement is, that the defendants were entitled to retain the 10 per cent. of the contract price thereof by way of security for any damages they might sustain by reason of the non-performance of the agreement on the part of the plaintiffs to deliver the specified quantity of ties. If they shewed damage to an amount equal to or in excess of the amount retained they would be entitled to retain the whole, but, if they shewed damages only to an amount less than that retained, the plaintiff would be entitled to receive payment of the excess.

The defendants have shewn that by reason of the non-delivery of the specified quantity of ties, they have sustained damages to an amount greatly in excess of the amount retained by them. They have shewn that, under the terms of the contract with the railway company referred to in the agreement of November 20, 1913, the latter has retained from them 10 per cent. of the contract price of the ties cut and the defendants have also shewn that they would have made a profit of about 9c. per tie upon the 25,000 ties which the plaintiffs failed to cut. Counsel for the defendants, however, stated during the hearing of the appeal that they abandoned any claim for damages beyond the amount retained by them.

In addition to the fact that the defendants have shewn damages in excess of the amount retained, there is the further important fact that by the memorandum of May 15, 1914, the plaintiffs expressly agreed that the defendants should be entitled to retain the amount by reason of the non-fulfilment of the contract.

I would allow the defendants' appeal with costs and direct that judgment be entered for the defendants in the Court below with costs. I would dismiss the plaintiffs' cross-appeal with costs.

Appeal allowed.

QUE.

K. B.

QUEBEC AND LAKE ST. JOHN R. CO. v. FORGUES.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Carroll and Pelletier, JJ. November 13, 1915.

1. LIMITATION OF ACTIONS (§ IV C—166)—ACTION UNDER WORKMEN'S COMPENSATION ACT—INTERRUPTION OF PRESCRIPTION — PAYMENT — DIFFERENT STATUTORY INDEMNITIES.

The indemnities provided by the Workmen's Compensation Act (Que.), whether for temporary incapacity or for permanent partial incapacity, are subject to one and the same action, and are governed by the same prescription, and payments by an employer to an injured workman operate as an acknowledgment of debt under the Act, thereby interrupting the prescription, regardless as to which of the indemnities the payments were intended to apply.

Statement

APPEAL from judgment of Dorion, J., Superior Court, in an action under the Workmen's Compensation Act, which is affirmed.

Taschereau & Roy, for appellant.

Galipeault & St. Laurent, for respondent.

Lavergne, J.

LAVERGNE, J.:—The plaintiff, respondent, claims from the appellant an annuity or life rent of $382 under the Workmen's Compensation Act for partial and permanent incapacity caused to him by an accident which happened on July 2, 1913, during the progress of his work in the defendant's employ in the working of its railway. The respondent alleges acknowledgment of this claim by the appellant, and interruption of the prescription. The defendant pleaded prescription, inexcusable and wilful fault of the respondent, and denies the interruption of the prescription.

On July 2, 1913, the respondent, then in the employ of the appellant and working in the operation of railway trains, was the victim of an accident by which he suffered the amputation of the right leg, 4 or 5 inches below the knee, on July 22, 1913.

The appellant paid the expenses of the hospital and of the doctors for the respondent and immediately had knowledge of the permanence of the incapacity of the respondent to work. The appellant also paid to the respondent for 13 months an indemnity or compensation based upon the remuneration which had been given to him for the 12 months preceding the accident.

The evidence establishes that the annual wages of the respondent were $849.73, being the effective remuneration which had been allowed him during the 12 months prior to the acci-

dent. The respondent, by the terms of the above-mentioned Act concerning accidents to workmen, would be entitled to a life annuity of $248.41.

The facts of this case are not really contested. The only question in litigation is that of prescription. The accident happened in the beginning of July, 1913, and the action was brought only on September 21, 1914. The appellant invokes the prescription of a year. In fact the action was brought a little more than a year and two months after the accident.

The respondent answers that there was interruption of the prescription by the acknowledgment by the appellant of the respondent's right. This acknowledgment consists of the twelve payments made by the appellant every month, beginning from the date of the amputation of the respondent's leg. The appellant, believing itself to interpret the law as it exists, paid each month to the respondent, for twelve months, $29.88, for which sums it received receipts in the form printed on the record, receipts which leave no doubt as to the nature of these payments and their object. It appears from these receipts as well as from the evidence that the appellant considered the incapacity of the respondent to be absolute and permanent.

In his action, the respondent mentions the indemnity received as being a temporary indemnity, but he amended his declaration by replacing the words "temporary indemnity" by the words "representing the indemnity," and I am strongly of opinion that if the appellant had recognized the obligation to pay a temporary indemnity for 12 months and up to about a month before the institution of the action, it would have waived the prescription against a demand for permanent indemnity.

The appellant claims that the acknowledgment of temporary indemnity is not the acknowledgment of a permanent indemnity, but in fact it always treated the infirmity resulting from the accident suffered by the respondent as a permanent incapacity and paid it in consequence; and it has itself given to him more than the judgment awards to the respondent for a permanent indemnity under the form of a life annuity and lower than the annuity that the appellant paid before the action.

I believe that there is no reason for prolonging the discus-

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sion of this case, and introducing subtle distinctions. The action brought less than two months after the interruption of the payments of the annuity by the appellant to the respondent is certainly not prescribed, and the payments in question had interrupted the prescription.

As the Judge of first instance says, the appellant had seen the amputation of the respondent's leg and paid the expenses of it. It acknowledged the permanency of the respondent's incapacity. It has, knowing this, paid to the respondent for 13 months an indemnity based, not upon the daily wages received by the respondent at the time of the accident, as should be done in the case of a temporary indemnity, but upon the annual wages calculated from the effective amount allowed to the repondent in the year which preceded the accident, as the annuity granted for permanent incapacity should be calculated.

The aid given by the Workmen's Compensation Act is cumulative, according to the interpretation given by the jurisprudence, and does not appear to have been contested.

The victim should exercise, at the same time, his right of indemnity for temporary incapacity and to indemnity for permanent partial incapacity, and exhaust at once his remedies. There is only one and the same prescription for the single remedy, and the single action of the workman.

The acknowledgment of the right of the respondent by the payment of the indemnity up to July 31, 1914, is then an interruption of the prescription which covers all the remedies of the respondent without distinguishing if it is the case of temporary indemnity or of annuity.

For these reasons I believe the judgment of the Court of first instance to be well founded, and the appeal should be dismissed with costs against the appellant.

Carroll, J.

CARROLL, J.:—The real litigation is based upon defence of prescription. The appellant acknowledges that it paid certain sums for 13 months, but the indemnity paid was only for temporary incapacity, and this payment it says does not constitute interruption of prescription of the life rent due for partial and permanent incapacity or for absolute and permanent incapacity.

The French law of 1898 contains, as to prescription, a text similar to ours. This Act was modified in 1902, and the modification provides that the prescription will only run from the day when the *enquête* is closed by the justice of the peace or from the day of the cessation of the payment of the temporary indemnity.

Under the rule of the Act of 1898, it has been much discussed in France whether or not the payment of temporary indemnity interrupts the prescription as to the life rent. The commentators are equally divided in opinion, but the majority judgment declares that the prescription was not interrupted. The reason given is that the remedy for temporary incapacity and that for permanent incapacity are distinct, and do not come from the same source. Our law as to accidents to workmen is different: it permits the cumulation of the two remedies by one and the same action.

It is to be noted that Sachet, the best commentator of the law in France, tells us that there is interruption of prescription when the head of the industry has declared that he recognized that the accident, of which the workman was a victim, was occasioned in the course of his work, this declaration implying the acknowledgment of the debt in principle. It is useless to object that the employer might have considered that the accident involved only temporary incapacity, and that from that time there was not, on his part, acknowledgment of a debt for life rent.

When the employer is informed of a permanent incapacity and pays without reserve, he admits the debt in principle. The acknowledgment of the debt may consist in an act which implies on the part of the employer the acknowledgment of the obligation to indemnify the workman (2 Sachet, No. 1305).

In this case the acknowledgment, in my opinion, could not be more clearly expressed. It relates to the debt of a life rent. In fact, the accountant of the company, although the brakeman was paid by the hour, has calculated his wages by the year for permanent incapacity and not by the day for temporary incapacity.

Thus having paid for 12 months after being informed of

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the permanent incapacity—for this incapacity was noticed from July 22, 1913, the date of the amputation of the victim's leg—the appellant cannot legally invoke prescription which has been interrupted.

Whether one may consider or look at the payment as a payment for temporary incapacity or as a payment for permanent incapacity, the prescription, for the reasons that I have mentioned, has been interrupted. *Appeal dismissed.*

MAN.
C. A.

REX v. NIMCHONOK.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. November 29, 1915.

1. THEFT (§ I—1)—MAILABLE MATTER—CR. CODE SECS. 399, 400.

Criminal Code sec. 400 originated with the Post Office Act while the preceding sec. 399, originated in the Larceny Act, and in reconciling the language of these two sections which in their ordinary meaning might seem to apply different punishments for the same offence, the words "hereby declared to be an indictable offence" contained in sec. 400, must be limited at least to stolen property as to which the offence has been declared to be theft by some specific reference in the Code apart from the general declaration of sec. 399, if indeed it may not be further limited to such chattels, parcels or other things, the stealing whereof was specially punishable under the Post Office Act.

[Note the language of Code sec. 6 as to the meaning of expressions where the subject-matter is dealt with in another statute, and compare secs. 364, 365 and 366 taken from the Post Office Act.]

Statement

CROWN case reserved by Prendergast, J.

E. R. Levinson, for accused.

John Allen, Deputy Attorney-General, for Crown.

The judgment of the Court was delivered by

Richards, J.A.

RICHARDS, J.A.:—Sections 399 and 400 of the Criminal Code are as follows:—

"399. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who receives or retains in his possession anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained."

"400. Every one is guilty of an indictable offence and liable to five years' imprisonment who receives or retains in his possession, any post letter or post letter bag, or any chattel, money or valuable security, parcel or other thing, the stealing whereof

is *hereby* declared to be an indictable offence, knowing the same to have been stolen."

It will be seen that section 399 is quite wide enough to cover this case and also that section 400 might, if it were not for section 399, be so interpreted as to be wide enough, and it is argued for the defence that we should accept 400 as governing the case, because of the rule that matters reasonably in doubt are to be assumed in the favour of the accused.

The effect, however, of the two sections, as enacted together, is to leave it somewhat doubtful which should apply. Looking at them as they are, without going into their history, it will be noticed that 399 uses broader language than 400. In construing 400 we have, in order to bring the present case within it, to find a description covering the goods here stolen in the words "or other thing, the stealing whereof is *hereby* declared to be an indictable offence."

With a section of this kind, following such a broad one as 399, I should be inclined to construe these words as limited to articles specifically named in clauses of the Code which make the stealing of them an indictable offence. It is only in this way, apparently, that the two sections can be given separate meanings.

The result would be that section 399 would govern in ordinary cases, where the stealing of the particular article in question has not been specifically made theft by some special section of the Act, other than the general one as to theft; but that where the legislature has thought proper, by statute, to specifically name certain things and provide that the stealing of them is an indictable offence, in such cases 399 would not apply to the receiving of such things but 400 would.

There is an ambiguity, at first sight, as to which section should be held to apply, because each, on its face, is capable of being so read as to apply. That being the position, we are, I think, justified in looking back to the history of these sections.

An inquiry into their origin seems to me to strengthen the view stated above.

Before the Criminal Code of 1892, what was apparently the forerunner of 399 was section 82 of the Larceny Act, ch. 164, of the Revised Statutes of Canada, 1886, while the forerunner of

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400 was section 84 of the then Post Office Act, ch. 35 of the last-named Revised Statutes. It read as follows:—

"84. Everyone who receives any post letter or post letter bag or any chattel, money or valuable security, parcel or other thing, the stealing, taking, secreting or embezzling whereof is hereby declared to be felony, knowing the same to have been feloniously stolen, taken, secreted or embezzled is guilty of felony and liable to imprisonment for any term not less than five years."

While those sections were still in separate Acts there could be no doubt that section 82 of the Larceny Act was the only one of them applicable to such a case as the present.

Then, considering the present Code's definition of theft, and considering that the distinction between felony and misdemeanour is now abolished, and omitting consideration of the penalty, which has been changed from not less than five years to not more than five years, it will be seen that the above section 84 has practically been re-enacted, as section 400, in the present Code.

Whoever drafted the Criminal Code, 1892, appears to have overlooked the fact that the word "hereby" in the Post Office Act necessarily confined the offences referred to, to those declared to be such by the Post Office Act, while its use in such a Code as that of 1892 which had a wide scope like that of the present Code, might have a much broader effect.

I think the proper conclusion to draw from the use of section 400, following 399, is that we should confine its effect, at least, to offences which the Code specifically makes such, after describing the article, the theft of which is an indictable offence. Whether it should be further limited to merely the offences which were made crimes of theft by sections of the former Post Office Act, which have been now taken from the Post Office Act and incorporated in the present Code, such as sections 364, 365 and 366, need not be now considered.

I would answer in the affirmative the question asked by the learned trial Judge in his reserved case.

Answer accordingly.

Re TRADERS TRUST AND KORY.

B. C.

S. C.

British Columbia Supreme Court, Morrison, J. November 20, 1915.

1. CORPORATIONS AND COMPANIES (§ IV G 5—130)—PERSONAL LIABILITY OF DIRECTORS—FRAUD—MISAPPLICATION OF INVESTOR'S FUNDS—MISFEASANCE SUMMONS.

Money obtained by a director of a company which was on the verge of insolvency, on the representations that the funds would be invested in first-class securities, but which were in reality used to discharge pressing debts against the corporation, constitutes a fraud which will render all the directors personally liable for the amounts thus obtained, and such liability may be enforced by the liquidator upon a misfeasance summons under sec. 123 of the Winding-up Act, ch. 144, R.S.C. 1906, for the benefit of the defrauded party.

Statement

APPLICATION for misfeasance summons under sec. 123 of the Winding-up Act, ch. 144, R.S.C. 1906.

Sir Charles H. Tupper, K.C., and *Alfred Bull*, Jr., for applicants.

T. E. Wilson, and *Cecil Killam*, for defendants.

Morrison, J.

MORRISON, J.:—The Traders Trust Co. Ltd. was incorporated on May 16, 1912, with its registered office in Vancouver, B.C. The nominal capital of the company was put as $250,000. The objects for which it was incorporated were to carry on the business of trustees, administrators, brokers, financiers, insurance agents, estate agents, etc. On July 24, 1914, it went into voluntary liquidation, and in November following a petition to wind up the company was filed, alleging insolvency and default in payment of its debts, and a liquidator was accordingly appointed as prayed for. During the period material to the issues involved in this application the concern was in a bad state financially. The volume of business being done was very small, very limited in scope, and easy to comprehend and to follow. Insolvency was readily foreseen if, indeed, it in reality did not exist at the time the acts complained of were done, acts tending to prejudice the company, and which in fact did prejudice it, one of which acts created at least a creditor whom it was quite impossible to repay, establishing a fiduciary relation to that creditor, whose interest by their corporate undertaking they were as firmly bound to safeguard as they were to further the interests and objects for which the company was created. In short, the affairs of this company could not, at that time, bear the most superficial investigation by one desiring to resort to it as a medium through which to invest.

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The true position seems to have been this: The payment of dividends was out of the question. They had no money except as they might on the one hand borrow on t[illegible] individual credit —or on the other hand such sums as they could by personal solicitation obtain from unsuspecting, unthinking persons for investment. Such moneys so accumulated, owing to the necessitousness of the corporation, were treated as capital—their only capital available for the requirements which were so pressing. The bailiff was in possession under a distress warrant for rent.

The month of September, 1913, seems to have been a crucial point of time in the unhappy life of the company. On the 10th of that month there was held a meeting of the directors at which it was disclosed that $2,500 was immediately required to protect cheques drawn on the Savings Bank accounts of the company, and also to protect trust funds in their hands, and it was therefore resolved to borrow $2,625 for one month at 60 per cent. per annum. The sum of $2,500 was accordingly borrowed from one W. G. Wasmansdorff, the company giving a promissory note for that amount, and as additional security certain other personal notes of the directors held by the company, likewise a mortgage of property in North Vancouver.

On or about September 30, 1913, was the time as against which it was necessary to register with the Registrar of Joint Stock Companies, according to the terms of the statutory provisions in that behalf, this mortgage bearing interest at 60 per cent. To forestall that embarrassing event, it became necessary to pay off Mr. Wasmansdorff—and there was no money in sight wherewith to do it. Then all hands took, as it were, to the pumps. At least it is certain that some of the directors admittedly joined actively in an ineffectual search for the money. The campaign was brief, and it terminated by C. B. Pitblado, one of the directors, telephoning from Bellingham, Washington, on September 30, that he had secured $2,500 there and was bringing it with him to Vancouver. As to how he secured this money I shall further on relate. He arrived in the afternoon of that day with $2,500 in American currency and instructed Mr. Gibson, the bookkeeper, to credit Miss Bertha Kory of Bellingham with that amount. Pursuant to instructions from Mr.

Pitblado, Mr. Gibson drew up a certificate of deposit in the words following:—

No. 58. CERTIFICATE OF DEPOSIT.

TRADERS TRUST COMPANY LIMITED.

Head Office, Vancouver, B.C.

This is to certify that Miss Bertha Kory, of the City of Bellingham in the State of Washington, U.S.A., has deposited with the Traders Trust Co. Ltd., the sum of $2,500.

The company reserves to itself the privilege of requiring 30 days' notice of the withdrawal of this deposit. It is understood that the above amount is to remain on deposit until such time as a suitable mortgage can be obtained.

The company agrees to allow interest on this deposit at 12 per cent. per annum computed quarterly, the interest so accrued to be added to the face value of this certificate of deposit.

Dated this 30th day of September, A.D. 1913.

Traders Trust Company Limited. THOMAS DUKE, *Vice-president.*

Incorporated 1912. H. S. GIBSON, *Asst. Secy.*

Not good unless countersigned by C. B. PITBLADO.

On the counterfoil of this certificate was the following indorsement:—

It is understood that the above amount is to remain on deposit until such time as a suitable mortgage can be obtained.

The said sum was never deposited in the bank of the company, notwithstanding it was the duty of the directors under the memo. and articles of the company to keep moneys received under trust or on deposit earmarked and intact, but on the contrary, it was at once paid over to the solicitors of Mr. Wasmansdorff, discharging the note referred to. Together with this amount was paid to the same solicitors a cheque for $125, drawn on the Traders Trust Co. Ltd., in payment of the interest on the said note.

On October 2, following, Mr. Gibson was instructed to forward this certificate to Miss Kory in Bellingham, together with a letter in the words following:—

October 2nd, 1913.

Dear Madam,—We enclose herewith a certificate of deposit in your name for $2,500, which is to be retained on deposit here until such time as we can obtain for you a suitable mortgage.

We will doubtless be sending you within the next few days particulars of some mortgage offer for your approval.

The same day there was held a meeting of the directors when the transaction above was explained to them, whereupon the action of the management, so called, in paying off the Wasmans-

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dorff note was, on motion of Mr. Elliott, seconded by Mr. Graham, confirmed. At this meeting were present Messrs. Duke, Newton, Elliott, Pitblado, Lewington and Graham. The expenses of Mr. Pitblado to Bellingham were itemized, presented to the company and paid. The manner in which Mr. Pitblado obtained the money in question from Miss Kory appeared in her evidence, which is not contradicted—Mr. Pitblado not having deemed it necessary or advisable to appear, and he has entirely ignored the present proceedings. Mr. Pitblado went to Bellingham on or about September 29, together with a Mr. J. B. Helliwell, who is in no way a party to these proceedings—Mr. Helliwell had known Miss Kory. How Mr. Pitblado and Mr. Helliwell came together in this matter does not appear. Mr. Helliwell introduced Mr. Pitblado to Miss Kory. He told her that Mr. Helliwell had informed him that she possessed the sum of $2,500 for which she was seeking investment and he straightway solicited her patronage, assuring her he could invest it for her in a first-class mortgage, bearing interest at 12 per cent. per annum, through the Traders Trust Co. of Vancouver. He told her that though the company might not be able to get the money out at once they would be able to do so within a very short time, and that in the meantime and until such mortgage was secured, the company would pay her interest at the said rate. She questioned him as to the status and stability of his company, and he at once disarmed all apprehension and inspired instant confidence by solemnly assuring her that the company was a very sound one and that indeed, "its liabilities were guaranteed by the Bank of England." Relying on this representation she went to the Bellingham National Bank on September 30, and therefrom she withdrew $2,500 in currency and handed it over to him. He then gave her the following receipt written on the back of a draft requisition form of the bank:—

Bellingham, Sept. 30, 1913.

Received from Miss Bertha Kory the sum of twenty-five hundred dollars to be deposited with the Traders Trust Co. Ltd. This deposit is at the rate of 12 per cent. per annum, but it is only to remain on deposit until a suitable mortgage is secured for her.

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Mr. Pitblado then departed on the noon train passing through Bellingham for Vancouver, and in her own words she

"has not since seen either Mr. Pitblado or her money." It is in an effort to get back her money she is now invoking sec. 123 of ch. 144, R.S.C., by means of what, in lawyer's parlance, is known as a misfeasance summons, in which she charges that all the directors are guilty of misfeasance and breach of trust in relation to the company in respect of the facts above stated as well as in respect of certain other transactions whereby the funds of the company were wrongfully paid out to certain of the directors for their benefit at different times, shortly before the winding-up proceedings. The first of these items is the sum of $1,058, which it is charged was paid wrongfully out of the funds of the company on July 22, 1914, to Mr. C. G. MacLean, a director, or on his behalf, to one Mark Hill, when, as it is alleged, Mr. MacLean was indebted to the company in a substantial sum and the company insolvent. Notices calling a meeting of the shareholders for July 22, for the purpose of passing a resolution to go into liquidation had been sent out on July 13 by the directors. It is also charged that, under these circumstances, to have discounted out of the funds of the company the promissory note of this director for $1,500 without security was wrong and negligent, and that the company and Miss Kory have suffered loss, and also that the directors wrongfully hypothecated certain assets of the company on or about April, 1914, to secure the personal note of Mr. MacLean, a director. It is also charged that $128 of the company's funds were paid to Messrs. Daykin, Findlay & Burnett, solicitors of the company, on July 22, 1914, which sum was due to one E. A. Sisk. It is alleged that this payment was made by the directors, and that they did wrong in so doing, to reimburse the said solicitors for an advance made by them on an exchange of cheques for $150 with Mr. Sisk, whose cheque was returned by the bank, there not being sufficient funds to meet it. Whatever view might be taken of those late transactions, if separated from a consideration of the sum obtained from Miss Kory, which matter forms the gravamen of the present application—it is of the first importance to shew the internal position of the company and the methods and devices, worthy of a better cause, which had to be resorted to, or at least were resorted to by some of the direc-

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tors, and as it is charged with knowledge of all of them, in respect of what, after all, should be considered very small sums to an incorporated company soliciting trust funds. Mr. MacLean was not present at the hearing of the summons, and I must make the best I can of his affidavit and his examination on discovery. Mr. Daykin very emphatically disclaimed any intention of wrongdoing. The other directors who appeared also took the position that, either they were ignorant of the true situation or did not comprehend the meaning of what they did know was being done. Some of them seek to free themselves from blame because, at a certain juncture, their functions were thought to have been delegated to what was called an "executive committee." But the only trace there is of that committee is somewhat nebulous. Whatever may be the powers of delegation ordinarily and under normal circumstances, I am certain there cannot be a power to delegate the task of circumventing a confiding investor. Where a power to delegate exists it must be exercised specifically, knowingly and *bonâ fide*, after the directors have determined upon a particular *bonâ fide* course of action. It is pointedly put to me whether the directors did not leave matters in Mr. Pitblado's hands, for him either alone or through some expedient, such as an executive committee, to get the necessary funds by "hook or by crook." And that at a time when those transactions were of sufficient solemnity and importance as to require the serious, considered and particular attention of all the directors. If that be the position, then one must look for some adequate excusatory answer.

The company was desperately endeavouring to keep itself alive and from what motive? Surely one was to keep up an appearance of prosperity, which would induce the public to patronize them as a safe and secure medium for receiving, holding and investing trust funds. If that be true of these directors, then they are guilty of fraud towards any person who is induced by that semblance of prosperity to deal with the company: *Evans* v. *Coventry*, L.J., 25 Ch. 489.

Lord Romilly, M.R., in the case of *Land Credit Co. of Ireland* v. *Lord Fermoy*, L.R. 8 Eq. 7 at 11, in dealing with the

facts of that case said what seems to me to be apposite to the facts of this case:—

What is their excuse? The excuse of all is about the same. They say they did not know for what the payment was made. To some it was explained before the meeting, to others after the meeting, but they treated it as a matter of routine, and relied upon the executive committee from which the cheques so drawn proceeded. Two or three of the defendants who only understood it after the meeting was over said they disapproved of it much, and that if they had understood it they should not have sanctioned the payment, but that it was then too late, and indeed, that one of the cheques had been already paid, although that fact does not appear to have been known to them at the time. It appears to me that all these defences are equally futile.

And then he proceeds:—

If a director could justify himself for sanctioning an improper payment by asserting ignorance of the purposes for which the money was meant to be applied no director would ever be liable for the most flagrant abuse of the trust funds confided to his care, as he would always take care to be uninformed of the purpose for which the money was required.

Directors are liable for the misprisions of their co-directors where they are under the duty of finding out and knowing and preventing such misprisions and where, under the evidence, they are to be regarded as having assented to such misprisions: Vol. 10 Cyc., p. 825.

If they do not exercise that care in the circumstances which a due regard to the rights of others require, they are liable: 27 Cyc. 805.

Where directors personally and knowingly derive a benefit from the fraud of a sub-agent they may be held liable on the ground that he thereby becomes in a sense their agent: *Weir* v. *Bell*, 3 Ex.D. 238.

It is an equitable rule which has always been guarded and enforced with the utmost jealousy that no fiduciary agent shall, under pain of consequences thoroughly well known, intentionally place himself in a position in which his interest may conflict with his duty. The rule is not a mere arbitrary or technical rule, but it is based upon high grounds of morality, and the Courts of equity have always held any departure from it to be a very serious wrongdoing: Rigby, L.J., in *Lagunas Nitrate Co.* v. *Lagunas Syndicate*,, [1899] 2 Ch.D. 392.

Directors' private interests must yield to their official duty whenever those interests are conflicting. They cannot take to themselves advantages not common to all the shareholders: *Re Camerons, etc., R. Co., Ex parte Bennett*, 18 Beav. 339.

When dealing with the funds or moneys of the company they must be under an honest or reasonable belief in a state of facts

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which would justify the payments in question: *In re Kingston Cotton Mills Co.*, [1896] 1 Ch. p. 345. I quite agree with the contention of the respondents' counsel that:—

> The amount of care is difficult to define; but it is plain that directors are not liable for all mistakes they may make, although if they had taken more care they might have avoided them.

National Bank of Wales Ltd., Cory's Case, [1899] 2 Ch.D. 672; *Overend Gurney & Co.* v. *Gibb*, L.R. 5 H.L. 480; *Lagunas Nitrate Co.* v. *Lagunas Synd.*, [1899] 2 Ch.D. 392; *Re Brazilian Rubber Co.*, [1911] 1 Ch. 425. I also agree with them where they contend that "business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them as well as by those below them until there is reason to distrust them. Care and prudence do not involve distrust, but for a director acting honestly himself to be held legally liable for negligence in trust in the officers under him, not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden upon honest business men." But it is not to be lost sight of that cases such as this are always cases of degree. In *Leeds Estates Building & Investment Co.* v. *Shepherd*, 36 Ch. D. 787, the directors trusted their manager and were held liable:—

> They did not take the trouble to see that what he did was even apparently what he ought to have done. They delegated their functions to him.

> The true rule, disregarding casuistic distinctions as to degrees of care and diligence, holds directors liable for being ignorant of what they might have discovered by the exercise of that good, business diligence which the law imposes on them: 10 Cyc. 832.

The rule is as it ought to be, that he who has put his trust in the wrongdoer and held him out to the world as a person to be dealt with shall bear the burden of his acts: *St. Aubyn* v. *Smart*, L.R. 5 Eq. 183; *Swift* v. *Jewsbury & Goddard*, L.R. 9 Q.B. 560. The authorities are numerous in support of those principles to which I have referred, dealing with the degree of diligence and care to be observed by directors. But in this matter now before me the liability alleged rests upon a higher ground, viz.: it rests upon the ground of an affirmative breach of trust: *Bargate* v. *Shortridge*, 5 H.L. Cas. 297.

Counsel for the respondents relied largely upon the cases of *Dovey* v. *Cory*, [1901] A.C. 477, and *Préfontaine* v. *Grenier*,

[1907] A.C. 101. But the facts upon which those cases turned are essentially different from those of the present case, and should be readily distinguished. There is no doubt that Pitblado perpetrated a pitiably mean fraud on Miss Kory. Nothing has been said on his behalf, doubtless nothing could have been said on his behalf except, perhaps, that when he relieved her of her cash he was acting for the benefit of his fellow directors and only for himself *qua* director. Perhaps it may be in his favour that, once having secured this money, he did not remain as he then was out of the jurisdiction of the Courts. Had he done that and retained the money, I could readily agree with much of the able arguments submitted by counsel for the respondents. But he returned, and without losing a moment's time he proceeded to misapply the money, surely with the knowledge of the directors securing the signature of the vice-president, Mr. Duke, to the certificate of deposit—which he first read and presumably understood. Mr. Duke is a man of business experience and acumen, and I have no doubt but his name on the directorate was of alluring assistance to the company. For him it was urged that what he did was merely a matter of routine, to which he gave nothing more than mechanical thought—meaning thereby that he simply signed what was put before him. But the critical time and the turn of affairs in his company must have been present to his mind. All the disquieting circumstances were fully known to him. He must have known that Pitblado went to raise the money and the purpose for which that money was needed. If that were not so, then as a reasonable, prudent, careful man of ordinary business understanding, he should have become suspicious and hesitated. If he trusted, under all the circumstances, of which he should not have been ignorant, then he must bear the consequences. If he signed merely as a matter of form and in complete ignorance of the circumstances surrounding it he must be put in the same position as if he had made himself master of all the circumstances—*Joint Stock Dis. Co.* v. *Brown*, L.R. 8 Eq. 381.

As regards Mr. Daykin, his counsel, Mr. White, submitted that the payment to Wasmansdorff was simply a renewal of the old loan which took the form it did in order that the com-

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pany might benefit by an evasion of the Companies Act, and make it possible for Wasmansdorff to extend the time for the payment of the moneys due him, without registering his security—and thus prevent the company being wound up. I cannot follow this reasoning if it is meant as an excuse or answer to the claim herein. At most, this alleged renewal, if it can be so designated in a business sense, was merely an expedient to postpone the inevitable. Then, as to the Mark Hill loan, the position is difficult to understand on any hypothesis other than that the bookkeeping of the company was utilized for the purpose of raising a loan of $1,000 from the company for MacLean, a co-director, through Hill, who is a brother-in-law of Mr. Daykin, and who was secured by assets of the company, the company not being consulted in the matter. The net result, regardless of the details, and as to how they may be viewed, was that one director, with the aid of another, secured a personal, exclusive benefit at the expense of the company, its shareholders and creditors, with nothing to shew for it but the unsecured promissory note of the beneficiary. And that on the eve of the liquidation of the company—Mr. MacLean was president and managing director and with Mr. Pitblado, might be characterized as a dominating factor in the affairs of the company. It seems to me a matter of comment that he should be absent at such a critical juncture as September, 1913. He admittedly realized the scope of his duties and kept in touch with all that was going on. He was made aware of what happened in his absence. As to Mr. Graham, were it not that he derived a personal benefit by the retirement of his note, which Wasmansdorff held, I should have some hesitation in going so far as to hold him wholly liable, notwithstanding that he was present at the meeting of October 2, and was made aware, if he paid any attention, as to what was going on. He, too, cannot have been ignorant of the dire straits into which the company had come. I put Mr. Thomson in the same category, and reluctantly, Wasmansdorff held his note also, which was paid off by the Kory money. As to Mr. Lewington, I should like to see my way clear to relieve him, but I cannot escape from the facts which shew that he stood by and did not, until too late, evince that interest on behalf of Miss Kory and

the affairs of the company, which, if manifested earlier, by exercising his proper functions as a director, might have effected a protection to them and relieved himself of liability. "It was his duty as a director not to have remained quiescent or acquiescent, which is much the same thing, in what his brother directors did:" *Joint Stock D. Co.* v. *Brown, supra.* All the directors were participators in the non-investment of Miss Kory's money: *Re British Guardians Life Assce. Co.*, 14 Ch.D. 335.

I find that all the directors cited are liable for repayment of the sum of $2,500, and interest, and that it should be paid to the liquidator for repayment to Miss Kory. That MacLean and Daykin are also liable for the other amounts, $1,000 and $150 respectively, with interest, which sums should be paid to the liquidator to form part of the assets of the company.

As to the costs of the directors whose names have been struck from the summons, I decline to comply with their counsel's request that they be paid by the applicant.

Application granted.

ATTY.-GEN'L FOR CANADA v. RITCHIE CONTRACTING AND SUPPLY CO. AND ATT'Y.-GEN'L FOR BRITISH COLUMBIA.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. November 2, 1915.

1. CONSTITUTIONAL LAW (§ I G—140)—DOMINION OR PROVINCIAL DOMAIN—PUBLIC HARBOURS—WHAT ARE.

English Bay, lying outside the entrance to the harbour of Vancouver, B.C., is not a "public harbour" within the meaning of that term used in the third schedule of the British North America Act, 1867, and, therefore, not "the property of Canada" under sec. 108, so as to entitle the Dominion government to restrain parties from removing gravel from a bank running out from the coast into the bay, necessary for the protection of ships anchoring therein, as a harbour of refuge from storms.

[*Fisheries Case*, [1898] A.C. 700, considered; 17 D.L.R. 778, 20 B.C.R. 333, affirmed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, 20 B.C.R. 333, affirming the judgment of Macdonald, J., in the Supreme Court of British Columbia, 17 D.L.R. 778, by which the action was dismissed with costs.

Newcombe, K.C., Deputy Minister of Justice, for the appellants.

L. G. McPhillips, K.C., and *J. A. Ritchie*, for the respondents.

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SIR CHARLES FITZPATRICK, C.J.:—The substantial claim in this case is for a declaration that English Bay forms part of the Harbour of Vancouver, and, as such, is the property of the Dominion of Canada under the terms of the B.N.A. Act, 1867. Section 108 of this statute provides that

the public works and property of each province enumerated in the third schedule to this Act shall be the property of Canada.

I do not think it is necessary for the decision of the present case to refer to the other public works and property enumerated in this third schedule, although for certain purposes, it might be desirable to make a comparison with the nature of the other public works and property so enumerated and passing to the Dominion of Canada.

The constitution of this country was established by the B.N.A. Act, 1867 (Haldane, in *Australia Case*). It is, comparatively speaking, a short statute, and it is obvious that many matters with which it deals could only be provided for in general terms. It is the business of the Courts, when occasion arises, to say what interpretation is to be put on any of its provisions, so far as these govern the particular case. It is not the business of the Court to expand or supplement the legislation.

The Judicial Committee of the Privy Council accordingly, in the *Fisheries Case*, [1898] A.C. 700, declined to give any general definition of what constituted a "public harbour" within the meaning of the above provisions of the B.N.A. Act. At pp. 711-712 of the judgment it was said:—

Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question what falls within the description "public harbour." They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent at all events, upon the circumstances of each particular harbour, what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green*, 6 Can. S.C.R. 707, that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion.

Their Lordships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily

forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it.

A large body of evidence has been taken, and, at the argument before this Court, a wealth of research was offered us in the form of dictionary definitions, descriptions of the principal harbours of the world, and other interesting information.

Into any of these considerations it is unnecessary for me to enter, holding, as I must do, that English Bay is in no sense of the word a harbour; it is, in my opinion, wanting in every distinctive mark that would render it possible to describe it as such. It is, indeed, admitted that, except as a possible harbour in the future, it can now only be considered as an outer harbour or part of the harbour of Vancouver.

It matters nothing, I think, that some one, in the year 1855, may have described this then scarcely explored part of the coast as suitable for a harbour, or that the Dominion government should have proclaimed it as being a harbour or part of a harbour. What we have to do is to decide whether at the present time it is a harbour within the meaning of the B.N.A. Act, so that the property in it is vested in the Dominion government. As I have said, I cannot find anything present, either of usage, works or requirements which would render it possible to describe this open bay as fulfilling any of the conditions essential to bring it within any definition or description of a harbour.

I do not desire to express any opinion on the questions which have been discussed during the hearing as to whether a harbour must necessarily have been such at the date of the Union, or whether it is sufficient that it was then a potential harbour; or whether, though the property remained in the province at the Union, it could, by subsequent events be divested and become the property of the Dominion. None of these questions, in my opinion, need to be answered for the decision of the present case.

There is one point calling for consideration. The statement of claim was by leave amended to include the claim put forward in par. 11, to the effect that whether English Bay be or be not

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a "public harbour," the defendants had no right to interfere with the bed of the foreshore thereof, the same being navigable waters of the sea.

This point, though pleaded was not relied on at the hearing in the Courts below, and does not appear to have been referred to in the argument; no attempt to deal with it is made in the appellant's factum. The practice of raising a substantial claim for the first time at the hearing of an appeal before this Court is most objectionable and should be discouraged in every possible way. The inconvenience of such a course and its unfairness to the opposite side are obvious. This view has been strongly upheld by the Judicial Committee of the Privy Council in the recent case of *City of Vancouver* v. *Vancouver Lumber Co.*, [1911] A.C. 711 at 720.

This claim is, of course, advanced under sec. 91 of the B.N.A. Act 1867, which gives to the Parliament of Canada exclusive legislative authority over (amongst other matters therein enumerated) "10. Navigation and Shipping." It is to be observed that it is simply legislative authority over the subject which is given to parliament, and we have not been referred to any legislation by parliament under which the claim in question could be supported; it follows, of course, that no contravention can be alleged of any legislative provisions made by parliament.

As presented by counsel in argument at the bar of this Court, the claim is an abstract one, since there are no facts established on which it can be based. It is not shewn that there is any navigation to be interfered with or that, if there were, it would be interfered with by any action of the respondents. The contrary would indeed appear to be the case. Neither is it shewn that the removal of sand as taken by the defendant company could cause any injury to the coast; the contrary would again appear to be the case. The practice of the removal of such natural products of the shore as sand, shells and seaweed spoken of in Coulson & Forbes, in the extract quoted in the appellant's factum, is a common one, and as therein stated the right belongs to the Crown or its grantees; if, however, the shore is the property of the Crown in right of the province, this does not assist the claim of the Dominion

Government. Even if English Bay were a harbour, the foreshore might be the property of the province, and it has not been shewn that it is the property of the Dominion. The province might have the right to take sand from the foreshore even if English Bay were a harbour, and, *a fortiori*, if it were merely a part of the coast of the province.

The appeal should be dismissed with costs.

DAVIES, J.:—The substantial questions to be determined on this appeal are, first, whether English Bay or harbour lying outside the entrance to the harbour of Vancouver was a "public harbour" within the meaning of the term as used in the third schedule of the B.N.A. Act, 1867, and became, under sec. 108 of that Act, "the property of Canada"—and, secondly, whether, if it was not such a "public harbour" the Dominion Government had the right to restrain parties from removing gravel from a bar or bank running out from the coast into the bay and alleged to be necessary for the protection of shipping resorting to and anchoring in that bay as a harbour of refuge from storms.

As to the first question whether English Bay was, at the time British Columbia entered into the Union with Canada, in 1871, a "public harbour" within the meaning of the B.N.A. Act, I feel I need not say more than that I fully concur with the Courts below and with my colleagues in answering that question in the negative.

Mr. Newcombe, however, contended that even if English Bay was not, in 1871, when British Columbia became part of Canada, a public harbour, it was at least a potential one, and has since then become a public harbour by reason of the use made of it by shipping and for shipping and harbour purposes, and by the proclamation of 1912 proclaiming it as a port and defining its limits.

I am quite unable to accede to this contention. I do not think the 108th section, enacting that

> the public works and property of each province enumerated in the 3rd schedule to this Act shall be the property of Canada

was ever intended to cover more or can fairly be construed as covering more than public works and property existing at the time the Union took place. That section passed the property in

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these enumerated works from the provinces to Canada. It was a then present transfer of existing public works and property and had no relation to potential works or possibilities, such as harbours, which, in the future, settlement by population and expenditure of money might create.

If, subsequently to Confederation, from any cause potential harbours became *de facto* harbours, and it became necessary for the Dominion to acquire the rights or property on their foreshores, either vested in the Crown in right of the province or in private individuals, there were obvious methods by which the Dominion could acquire such property or rights.

Then, as to the right claimed on the part of the Dominion, if English Bay was a harbour of refuge for shipping only, and not a "public harbour" within the meaning of the Act, to restrain any one from removing gravel from a bar or bank forming, as contended, one of the protecting arms of the alleged harbour of refuge for shipping and so destroying or impairing the protection its presence gave to the harbour, I have only to say that the amendment to the statement of claim, par. 11, did not claim that there had been any such removal of the sand or gravel from the bar in question as was destructive or prejudicial to the harbour or bay as a harbour or port of refuge. Nor did the evidence shew or prove that to be the case.

If, under its legislative power over navigation and shipping, the Dominion had created and defined any special place as a port or harbour of refuge, it might well be that it would be entitled to prevent its destruction as such by the removal of one of its protecting arms by exercising its power of expropriation and awarding compensation to the owner of the foreshore, whoever he might be. The trial Judge has found that the bay does not, except under the special circumstances and to the limited extent he mentions, afford for ships a haven of safety, and I do not think that the evidence shews a removal of gravel or sand from the bar which can be said prejudicially to affect that bay as a harbour of refuge.

The claim advanced was an absolute one challenging the right of the Attorney-General of British Columbia

to authorize the removal of any part of the said bed or foreshore or interference therewith.

It does not claim that the removal of the sand or gravel complained of prejudicially affected that bay as a harbour of refuge, but simply puts forward the claim on the ground

that the waters of English Bay, being navigable waters, it was the duty of the Crown in so far as it was represented locally to maintain the bed and foreshores of the said waters in their natural states.

It seems to me that, as made, the claim was based upon the contention that English Bay was a public harbour within the B.N.A. Act, and that its foreshore as such had passed to the Dominion.

I have already dealt with this part of the case, but giving the very widest construction to the claim as made and assuming that it was intended as an assertion of a right to protect to the fullest necessary extent a harbour of refuge created by the proclamation of 1912, I fail to find evidence to support the contention that the removal of the sand or gravel proved did prejudicially affect or destroy such harbour, or might be reasonably feared to have that effect.

The complainant has failed in proving the facts essential to the maintenance of his case, and I would, therefore, dismiss the appeal.

IDINGTON, J.:—The claim of appellants that English Bay now in question was a public harbour or part thereof within the meaning of the B.N.A. Act, I think must rest upon the meaning to be given the term "public harbour" as used in said Act and the relevant facts demonstrating the conditions and use made of such bay, in 1871, when British Columbia became one of the provinces of Canada. Idington, J.

If we have regard either to the language used by the late Lord Herschell in *A.-G. for Canada* v. *The A.-G. for Ontario, etc.*, [1898] A.C. 700 at 711 and 712, when dealing with the term "public harbour" as used in said Act, or I submit, to the plain ordinary meaning of the words, it seems quite clear that, at said date, there had not been any such use made of any part of said bay as to constitute it or any part of it a public harbour or part thereof.

It has been argued, however, that the said bay, together with the protecting conformation of the adjoining and adjacent land fitted it by nature for use as a harbour, and hence, as part of

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the Crown domain, was in fact a public harbour at the time in question. The language I use is mine, but, as I understand the argument put forward, it represents fairly the substance thereof without expanding its details. It seems to me almost such "an exhaustive definition of the term applicable to all cases" as their Lordships declined to attempt.

Indeed, the argument seems in direct conflict with what their Lordships had in mind, else I suspect the few additional words needed to cover, what the hand of man in the service of the Crown may have done to aid nature, and thus have completed all that was needed to frame the desired exhaustive definition, would surely have been supplied.

Nay more, the framers of the legislation by which British Columbia became part of Canada, could, at that stage of things (in British Columbia's development) so easily, instead of using the round-about language they did, have framed a suitable definition that would have made plain all now contended for if they really intended as is argued.

For these and other considerations, needless to dwell upon, it seems to me the argument is not well founded, and that using the old method of resorting to the facts, as their Lordships suggested in the case just referred to, destroys appellants' case.

And as to what has been called the other branch of the case so far as designed to protect a harbour, that must also fail for want of a "public harbour" to be protected.

Then neither does the proclamation nor the Act of 1913, constituting the Harbour Commission, which have been, tentatively as it were, put forward, seem when clearly examined to found any claim such as made.

The Dominion Parliament may have the power by legislation to lay a foundation for such a claim. Why, indeed, the easy path of legislation has not been chosen instead of the thorny and difficult one of litigation, seems inexplicable.

The proclamation deals only with the constitution of a port and the Act of 1913, by sec. 11 thereof, only gives the commission such property as the Dominion, at the enactment, may have had within the limits defined therein.

Moreover, if the marking on ex. 3 of where the sand in ques-

tion was taken be correct, that taking was outside said limits. And I suspect the Act was passed later than the alleged commission of the trespass.

It would seem as if the property in the foreshore was vested in the province; possibly subject to legislation of the Dominion in virtue of its powers over navigation and shipping. In the absence of such legislation it is not worth while forming a definite opinion as to the powers each may have relative thereto. And even if there is, upon which I express no opinion, an inherent power in the Dominion to take, against any one impeding navigation, proceedings to restrain the same, the facts in evidence do not seem to fit or lay a foundation therefor. And if the province has the right to the soil and minerals therein, what of the sand?

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The principal question must be decided by the application of those provisions of the B.N.A. Act, which effected a distribution between the provinces and the Dominion of the property of the Crown within the territorial limits of the several provinces. As Lord Watson observed in the *Precious Metals Case, A.-G. for B.C.* v. *A.-G. of Canada*, 14 App. Cas. 295, at 301.

> The title to the public lands of British Columbia has all along been and still is vested in the Crown; but the right to administer and to dispose of these lands to settlers together with all royal and territorial revenues arising therefrom, had been transferred to the province, before its admission into the Federal Union.

And I think it is not unimportant to keep in view the difference between the provisions of the B.N.A. Act, dealing with public proprietary rights and those of sec. 91, conferring general legislative jurisdiction. It is true, as has been frequently pointed out, that when public property is spoken of in the Act as being "the property of" or "belonging to" the Dominion or a province these expressions import that the right to its beneficial use or the proceeds of it is within the exclusive disposition of the Dominion or of the provincial legislature as the case may be, the property itself remaining in the "Sovereign as the Supreme Head of the State" (see [1892] A.C. p. 443); and it may be an admissible form of expression to say that the ques-

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tion whether a given item of public property is vested in the Dominion or in the province is strictly a question of legislative control over its administration as property. Nevertheless this legislative control over Crown property as property whether transferred to the Dominion legislature or reserved to the provincial legislatures is treated in the B.N.A. Act as ownership, and their Lordships of the Privy Council have more than once held that the provisions of the Act dealing with this subject of ownership in relation to public property must be construed and applied independently of the provisions dealing with general legislative jurisdiction.

In *St. Catherine's Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 46 at 59, it was said:—

> Their Lordships are, however, unable to assent to the argument for the Dominion founded on sec. 92 (24). There can be no *a priori* probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved for their use has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

In *A.-G. of the Dominion* v. *A.-G. of Ontario*, [1898] A.C. 700 at 709 and 710:—

> It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion parliament rights were transferred to it. The Dominion of Canada was called into existence by the B.N.A. Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada.

And, at p. 713:—

> If, however, the legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by sec. 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the B.N.A. Act, been left to the provinces and not vested in it.

The question, therefore, whether Spanish Bank has passed to the Dominion is a question which must be determined by reference to the provisions of the Act relating to the distribution of the public assets, and as it is not disputed that the property in question was vested in the province at the time of Confederation, the point to be determined is whether or not it has by one of the "express enactments" of the B.N.A. Act been transferred to the Dominion. The Dominion contends that it has been so transferred, by force of sec. 108, as part of a "public harbour" within the meaning of item two of the third schedule.

The Dominion contention is twofold. (1) That English Bay was a public harbour within the meaning of item two at the time of the admission of British Columbia into the Canadian Union and Spanish Bank was part of that harbour. If these propositions be established, the property indisputably passed to the Dominion. (2) That English Bay, being at the time mentioned, an arm of the sea having the physical qualities necessary to fit it for use as a public harbour and having since become in fact a public harbour of which Spanish Bank is a part, the public harbour with Spanish Bank as one of its constituent parts has consequently passed to the Dominion.

First, then, was Spanish Bank part of a public harbour at the time of the admission of British Columbia into the Canadian Federation within the meaning of the second item of the third schedule?

Lord Herschell, speaking for the Judicial Committee in the *Fisheries Case*, [1898] A.C. 700 at 711, says, it would be extremely inconvenient that a determination should be sought of the abstract question: "What falls within the description of a public harbour?" And he adds that it would be likely to prove misleading and dangerous to attempt an exhaustive definition of the term applicable to all cases.

Nevertheless, it must be difficult to apply one's self intelligently to the question of fact whether a particular locality does or does not fall within item 2 of the third schedule without first having arrived at some conclusions as to the attributes connoted by the phrase "public harbour." In *Reg.* v. *Hannam*, 2 Times L.R. 235, Lord Esher said:—

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A harbour in its ordinary sense was a place to shelter ships from the violence of the sea, and where ships are brought for commercial purposes to load and unload goods.

And he added, "the quays were a necessary part of the harbour." During the argument on the *Fisheries Case*, [1898] A.C. 700, the opinion was expressed more than once by Lord Herschell and Lord Watson, and it does not appear to have been disputed on behalf of the Dominion, that to constitute a "public harbour" within the meaning of item two, it would not be sufficient to have simply an arm of the sea affording shelter to ships in certain states of the wind and that the phrase employed connotes, in addition something in the nature of public user for loading or discharging ships. The observations made repeatedly by their Lordships during the argument are, of course, not authoritative, but I think one is justified in appealing to them as evidence of the meaning of the phrase "public harbour" according to the common understanding. See stenographer's note of the argument at pp. 198, 199 and 201. In *A.-G.* v. *C.P.R. Co.*, [1906] A.C. 204, it was assumed that it was necessary to shew user for commercial purposes as distinguished from purposes of navigation merely. Generally speaking, I think such user must be shewn in the absence of some evidence of recognition by competent public authority of the locality in controversy as a harbour in the commercial sense: *The King* v. *Bradburn*, 14 Ex. C.R. 419, at 429 and 430. As to the extent of the commercial user necessary to bring a given locality within the description "public harbour" a variety of circumstances may no doubt affect the determination of that question.

In British Columbia there was passed, in 1867, and in force at the time of Confederation an ordinance known as the "Harbour Ordinance," an ordinance respecting harbour and tonnage dues and to regulate the licenses on the vessels engaged in the coasting and inland navigation trade, which provided for the proclamation of "ports, inland places and waters" as "harbours," the effect of the proclamation being to bring the proclaimed locality under the Act for the purpose of applying the regulations and prohibitions enacted by it. There is no evidence

in this case and, as I pointed out, in giving judgment at the trial in *A.-G. for B.C.* v. *C.P.R. Co.*, 11 B.C.R. 289, there was in that case no evidence of any proclamation having been issued under that ordinance or under the ordinances passed some years before in which the legislation had its origin. Had it been shewn that such proclamations had issued with respect to other localities, while the locality in controversy had never been proclaimed, that would have been of considerable weight in favour of the province; while, on the other hand, the fact that the locality had been proclaimed would establish a case in favour of the Dominion which it might be difficult if not impossible for the province to repel. Again, the expenditure of public money or the absence of such expenditure may be a circumstance of some importance. None of these elements is present in this case. The evidence shews that the physical character of English Bay is such as to make it capable of being used as a harbour. It is capable of being used, that is to say, in its natural state, not merely as a shelter for ships, but as a harbour for commercial purposes; but the evidence as to the state of affairs at the date of the Union does not really carry us beyond this. There is no evidence that it was then in use or had ever been in use as a harbour in the commercial sense, and the probabilities are against it; and there is no evidence that there ever had been any public money spent upon it or any other recognition of it as a harbour by any competent public authority. My conclusion is, on this question of fact, that the decision must be against the Dominion.

Even on the assumption that the Dominion had sufficiently shewn English Bay to have been a public harbour at the date mentioned, there would still remain the question whether Spanish Bank was a part of that harbour; there is, as I have said, no evidence of user, but I am not sure that, given a public harbour, their Lordships' observations in the *Fisheries Case*, [1898] A.C. 700, as to the evidence of user by landing goods or anchoring ships can properly be read as intended to lay down a single exclusive test for determining whether the foreshore or solum is or is not part of it. To me, at all events, it is not quite obvious that a ledge or sandspit, the property of the Crown, affording protection necessary for the maintenance of a public har-

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bour, that is to say, protection necessary to enable it to be used for that purpose, can in no circumstance be regarded as part of the harbour within the meaning of item two unless it is shewn to have been used for discharging or mooring ships. That Spanish Bank, however, is such a necessary protection is not satisfactorily proved.

The second question remains. If the question of public harbour or no public harbour, for the purpose of applying sec. 108, had to be decided by reference to the circumstances existing at the time the controversy arises and not by reference to the state of circumstances existing at the date of Confederation, I should have no difficulty in holding that English Bay is now a "public harbour."

The additional question—whether or not Spanish Bank is a part of that harbour is one which would probably have to be answered in the negative by reason of the absence of satisfactory evidence either of user or that it serves the office of protection.

I think, moreover, that the Dominion fails in its main contention on this branch of the argument. The language of secs. 108 and 109, and of the 3rd schedule when read with sec. 117, seems to me to shew that subjects of the third schedule were intended to be transferred to the Dominion as subjects which, when the Act came into force, were the property of the province and at that time answered the descriptions found in the schedule. In other words, as the transfer was to be operative upon the passing of the Act, the subjects transferred were necessarily subjects ascertainable at the time by the application of those descriptions to the existing facts. The other construction would lead to results little short of absurdity.

The 3rd schedule is in the following words:—

Provincial public works and property to be the property of Canada. 1. Canals, with lands and water power connected therewith. 2. Public harbours. 3. Lighthouses and piers, and Sable Island. 4. Steamboats, dredges and public vessels. 5. Rivers and lake improvements. 6. Railways and railway stocks, mortgages, and other debts due by railway companies. 7. Military roads. 8. Custom houses, post offices, and all other public buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments. 9. Property transferred by the Imperial Government, and known as Ordinance Property. 10. Armouries, drill sheds, military clothing, and munitions of war, and land set apart for general public purposes.

It could hardly have been within the contemplation of the Act that the roadbed of a provincial government railway, for example, constructed after Confederation should pass to the Dominion as soon as it should be a completed railway or that a ship acquired for provincial government purposes should forthwith become the property of the Dominion. One can hardly distinguish between such subjects (which, if existing at the date of the Act, would, of course, fall within the third schedule) and a pier or an artificial harbour constructed as a provincial government work.

A reference to the language of the judgments in which the effect of secs. 108, 109 and 117 has been discussed seems to indicate that it has generally been assumed that the subjects which passed under section 108 were subjects ascertainable at the time of the transfer. In the *Vancouver Street Ends Case* (*A.-G.* v. *C.P.R. Co.*), [1906] A.C. 204, 11 B.C.R. 289, it was assumed in all the Courts that the question of public harbour or no public harbour and whether the foreshore was one of the constituents of the harbour must be decided by reference to the facts existing in 1871.

In the litigation that is generally known as the *Fisheries Case*, [1898] A.C. 700, the first question submitted by the Dominion and the provinces in relation to the beds of public waters and public harbours was in this form in part:—

> Did the beds of the lakes, rivers, public harbours . . . situate within the territorial limits of the several provinces not granted before Confederation become under the B.N.A. Act the property of the Dominion? (See [1898] A.C. at 701.)

The formal answer given by their Lordships to the first question is as follows:—

> 1. In answer to the first and fourth questions, that under the B.N.A. Act, 1867, the improvements only in lakes and rivers within the provinces *became* the property of the Dominion of Canada; that under the same Act, whatever is properly comprised in the term "public harbour" *became* the property of the Dominion of Canada; and the answer to the question, what is properly so comprised, must depend, to *some extent*, upon the circumstances of each particular harbour.

All this points to a transfer operative at the passing of the Act; and on the argument it was assumed that the date of Confederation was the decisive date. See report of the argument

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at p. 202. As to the point of view from which the subject was considered in the Supreme Court of Canada, see judgment of Strong, C.J., 26 Can. S.C.R. 444, at 515. The question submitted in that case were framed after a good deal of consideration and with the object of setting at rest as far as possible such points as that now raised by the Dominion. I think there is sufficient evidence in the arguments and in the judgments to shew that there was a general consensus of view that the position now taken by the Dominion was not sustainable.

It was also contended on behalf of the Dominion in this Court that the acts complained of, removing sand from the bank in question, constituted, in some way, an infringement of the *jus publicum* of which the Attorney-General for the Dominion is the proper public authority to make complaint. I have no doubt that the Attorney-General of the Dominion has a *status*, acting for the Crown on behalf of the public, to invoke the aid of the Courts to restrain, in a proper case, any substantial infringement of the public right of navigation or of the rights incidental thereto. But counsel for the Attorney-General of Canada at the trial took an attitude which precludes the appellant from raising at this stage any contention that what is now complained of was in fact an interference with any of those rights; and that ground of relief cannot be considered in this Court.

It seems necessary to add a word upon the suggestion that the Dominion Parliament may, in the exercise of its legislative powers, under sec. 91, against the will of a province, acquire the title to provincial Crown lands for the purpose of constituting a harbour. To say the least, that, I think, is gravely questionable, it would be going far beyond anything decided or any opinion expressed in the *A.-G.* v. *C.P.R. Co.*, [1906] A.C. 204, 11 B.C.R. 289, where the Courts had to deal with an Act passed in exercise not only of its authority derived from sec. 91, but also of powers arising from the Terms of Union under which British Columbia entered Confederation and with a case, moreover, in which the assent of the province was abundantly proved; it would not be easy to reconcile such a proposition with Lord Herschell's language quoted above from the

judgment in the *Fisheries Case*, [1898] A.C. 700, or with sec. 117 of the B.N.A. Act. I do not, however, enter upon a discussion of the subject. Reference may be had to Clement's Canadian Constitution, at pp. 388 and 389, the *Burrard Power Co.* v. *The King*, 43 Can. S.C.R. 27, at 52, and the *Indian Treaty Case; Province of Ontario* v. *Dominion of Canada*, 42 Can. S.C.R 1, at 127.

ANGLIN, J.:—I cannot believe that it was intended that every indentation of the uninhabited sea and lake coasts of Canada which had a natural conformation that rendered it susceptible of use as a harbour, should pass under section 108 of the "British North America Act" from provincial to Dominion control. In my opinion "public harbours" in the third schedule means harbours in use as such, and not mere potential harbours.

The purpose and operation of section 108 was to effect an immediate transfer of property from the provinces to the Dominion.

I strongly incline to the view that it does not apply to harbours which have only come into use as such after the Union. There are other means by which the Dominion can acquire jurisdiction over such harbours and title to the property in the land under and adjacent to them requisite for their proper control and administration, whether that title is vested in the Crown in right of the province (*A.-G. for B.C.* v. *C.P.R. Co.*, [1906] A.C. 204), or in private individuals.

But it is not necessary to determine this question because I heard nothing in the course of the argument of this appeal, and have found nothing in the record which would warrant interference with the findings of the provincial Courts that neither at the date of the entry of the Province of British Columbia into Confederation (1871), nor at the time when this action was begun, was English Bay in fact a "public harbour" within the meaning of that term as used in the schedule 3 to the B.N.A. Act.

Neither the proclamation nor the statute of 1913, relied on by Mr. Newcombe, in my opinion, effected a transfer of the property in question from provincial to Dominion control. The proclamation deals with a port, not with a "public harbour,"

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and is apparently based on an assumption that English Bay formed part of the harbour of Vancouver. The statute provides powers of expropriation which, so far as the evidence shews, have not yet been exercised.

The record contains neither allegation nor evidence that the removal of sand by the respondent company had affected, or was likely to affect, prejudicially any interest over which legislative jurisdiction is vested in the Dominion under the heading, "Navigation and Shipping."

I would dismiss the appeal.

Brodeur, J.

BRODEUR, J.:—This is an appeal from the Courts of British Columbia which dismissed the action of the appellant.

By the B.N.A. Act, sec. 108, and the 3rd schedule, the public harbours of each province have become the property of Canada.

By the order-in-council, passed by the Imperial Government in 1871, British Columbia was admitted into the Dominion of Canada, and it was stipulated that the provisions of the B.N.A. Act should be applicable to British Columbia.

Vancouver harbour was, on December 3, 1912, proclaimed as such by the Governor in Council under the provisions of the Canadian Shipping Act, and according to that proclamation English Bay was declared to be a part of the harbour.

In the year following, a statute was passed by the Federal Parliament vesting the administration of the harbour in the Vancouver Harbour Commissioners, one of the appellants in the present case.

We have to examine, at first, whether this English Bay was a public harbour in 1871. As it has been decided in the *Fisheries Case*, [1898] A.C. 700, the question as to whether a piece of property is a harbour or not is a question of fact which has to be determined according to the circumstances of each case.

The Courts below unanimously found that English Bay was not, in 1871, a public harbour and nothing has been brought before us which could convince me that this finding was erroneous.

It is even very much to be doubted whether this part of Burrard Inlet which is called English Bay was ever considered

before the proclamation of 1912, as part of the harbour of Vancouver, or was ever considered a harbour by itself. We find by a chart of Burrard Inlet, issued in 1891 by order of the Canadian Government, that Vancouver harbour did not include the part of Burrard Inlet where English Bay is situate; and that chart then proves conclusively that even the Dominion authorities, before 1891, did not consider English Bay as a part of the harbour of Vancouver.

By the proclamation of 1912, and by the statute passed in the following year, the Dominion authorities, of course, assume control over all Burrard Inlet, including English Bay. But that proclamation did not give them the ownership of the bed of the bay. It remained vested in the provincial authorities and the Dominion Government could not assume any right of ownership with regard to that bed without taking the necessary expropriation proceedings. It was a very easy thing to do, but it was not done, and until this is done the provincial authorities may assume to be the owners of the bed of English Bay.

The action of the appellant was properly dismissed, and I see no reason why we should interfere with the judgment of the Courts below.

The appeal is dismissed with costs. *Appeal dismissed.*

[Leave to appeal to the Privy Council was granted December 20, 1915.]

Annotation—Constitutional law—Property clauses of British North America Act—Construction of. Annotation

Constitutional interest attaches to this case because it, apparently for the first time, suggests a question which will some day, no doubt, have to be decided, and which may be expressed in this form: Is the British North America Act to be construed as always speaking, or did it speak once for all on July 1, 1867, when it was brought into force? This question may take two forms; it may relate to the transfer of property from the provinces to the Dominion, or it may relate to the distribution of legislative power. In the principal case, so far as it is touched on, it took the former shape. Mr. Newcombe, on behalf of the Dominion Government, contended that sec. 108 and schedule 3, whereby it is enacted that "Public Harbours" belonging to the different provinces shall be the property of Canada, should be construed as passing to the Dominion, not only those harbours which were public harbours at the time of the Union, but also those which afterwards became public harbours. In *Attv.-Gen. of B.C.* v. *Canadian Pacific R. Co.*, 11 B.C.R. 289, at 296, Hunter, C.J., had so held. He there says: "The public works forming part of the public harbour, as well as the bed of the harbour, are, and always have been, vested in the

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Crown, and it was no doubt considered advisable, if not actually necessary, to transfer the jurisdiction, executive and legislative, over public harbours to the Dominion, as ancillary to the proper exercise of its powers relating to shipping and navigation. The jurisdiction, in my opinion, is latent, and attaches to any inlet or harbour as soon as it becomes a public harbour, and is not confined to such public harbours as existed at the time of the Union."

In the principal case it was perhaps not really necessary to decide the point, because Fitzpatrick, C.J., and Anglin, J., distinctly, and Idington, J., and Brodeur, J., apparently, hold that English Bay, the *locus* in question, was not a harbour in 1871, when British Columbia came into the Union, and is not a harbour now. Duff, J., however, holds that, though not a harbour in 1871, it is a harbour now. But whether actually necessary to decide the point or not, Davies, and Duff, JJ., hold decidedly, and Anglin, J., strongly inclines to the view, that sec. 108, schedule 3, does not apply to harbours which have only come into use as such after the Union.

If "Public Harbours" were the only provincial property which sec. 108 referred to, more might be said for the opposite contention. For, as the Privy Council pointed out in the *St. Catherines Milling & Lumber Co. Case* (1888), 14 App. Cas. at p. 56, in construing such enactments in the B.N.A. Act, it must always be kept in view that, where public land, with its incidents, is described as the "property of," or as "belonging to" the Dominion or a province, these expressions merely import that the right to its beneficial user, or to its proceeds, has been appropriated to the Dominion, or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown. See also the *Fisheries Case*, [1898] A.C. 700 at 709-711. It might then have been contended, not unreasonably, if "public harbours" stood alone, that, inasmuch as "navigation and shipping" had been placed under the exclusive jurisdiction of the Dominion parliament, the proper construction of sec. 108 was that whenever a place became a public harbour, even after Confederation, it should automatically cease to be under provincial administration, and pass under Dominion administration. But Duff, J., seems to give the *coup de grâce* to such a contention when he points out that sec. 108, besides "public harbours," includes "railways," "piers" and "public vessels," and says: "It could hardly have been within the contemplation of the Act that the roadbed of a provincial government railway, for example, constructed after Confederation, should pass to the Dominion as soon as it should be a completed railway, or that a ship acquired for provincial government purposes should forthwith become the property of the Dominion. One can hardly distinguish between such subjects (which, if existing at the date of the Act, would, of course, fall within the third schedule), and a pier, or an artificial harbour constructed as a provincial government work."

But let no one suppose that this convicts the B.N.A. Act of a *casus omissus*. For just as in *Atty.-Gen. of B.C.* v. *Can. Pac. R. Co.*, [1906]

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A.C. 204 (*cf. Booth* v. *McIntyre* (1880), 31 C.P. at p. 193), the Privy Council decided that for the purposes of a Dominion railway company, the Dominion Parliament has power to dispose of provincial Crown lands, and, therefore, of a provincial foreshore to a harbour, so there can be no doubt that, under its exclusive jurisdiction over "navigation and shipping," the Dominion parliament could expropriate a provincial harbour. And so, in the principal case, *per* Davies, and Duff, JJ.

Some day, as already stated, the question whether the B.N.A. Act is to be construed as always speaking may arise, not in reference to its section transferring provincial property to the Dominion, but in reference to its clauses defining areas of legislative power. Such a question has already arisen in the Australian Commonwealth, where "trademarks" is one of the subjects with respect to which the Federal parliament is expressly given power to make laws. Such a power is conceded, though not expressly granted in our Federation Act, to the Dominion parliament, no doubt as incidental to, or included in, its exclusive jurisdiction over "the regulation of trade and commerce." In *Atty.-Gen. for New South Wales* v. *Brewery Employees Union of N.S.W.* (1908), 6 C.L.R. 469 (*cf.* Keith's Responsible Government in the Dominions, vol. II., p. 840), the validity of part VII. of the Commonwealth Trademarks Act, 1905, came up for consideration. That section of the Act provided for the registration of workers' trademarks. These marks or labels were marks affixed to goods to shew that they were manufactured by the workers or associations of workers by whom they were registered, and the Act penalized the use of marks in the case of goods not produced by the workers or associations. The aim of the enactment was, of course, to extend the influence of trade unions by allowing the immediate identification of goods as produced under union conditions, and several brewery companies of New South Wales questioned its validity. The Court decided against the validity of the part of the Act attacked, because they held that the power of the Commonwealth to legislate as to trademarks did not extend to permit the creation of what was not a trademark at all in the sense of that word as understood in 1900, the date of the enactment of the Constitution. O'Connor, J., pointed out, 6 C.L.R. 469 at 540, that a workers' trademark was deficient in both of the essential characteristics of a trademark as ordinarily understood, a trade or business connection between the proprietor of the trademark and the goods in question, and distinctiveness in the sense of being used to distinguish the particular goods to which it is applied from other goods of a like character belonging to other people. Even so we may surmise, in view of the liberal construction given to those clauses in our Federation Act which confer spheres of legislative power, that the decision would be different under our Constitution, if the subject of trademarks was expressly placed within the legislative powers of the Dominion parliament.

There can be no doubt that the phrases by which subjects of legislative power are conferred must acquire a more extended connotation as the inventions of science and developments of the national life extend the

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Annotation *(continued)*—Constitutional law—Property clauses of British North America Act—Construction of.

significance of such phrases beyond what they comprehended when the Constitution was originally framed. Thus, in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (1877), 96 U.S. 1, the power of the Congress of the United States to regulate commerce with foreign nations, and among the several states, and with the Indian tribes was held not confined to the instrumentalities of commerce as they were known and used when the constitution was adopted. As the Court says: "It keeps pace with the progress of the country and adapts itself to the new developments of times and circumstances. It extended from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successfully brought into use to meet the demands of increasing population and wealth."

In annotating the principal case, we must not overlook the contribution which Duff, J., makes to the knotty point of what constitutes a "public harbour" within sec. 108 of the Federation Act. After quoting some words of Lord Esher, in *Regina* v. *Hannam*, 2 Times L.R. 235, and referring to some observations of Lords Herschell and Watson, reported as occurring on the argument before the Privy Council in the *Fisheries Case*, [1898] A.C. 700, he says: "In *Atty.-Gen.* v. *Can. Pac. R. Co.*, [1906] A.C. 204, it was assumed that it was necessary to shew user for commercial purposes as distinguished from purposes of navigation merely. Generally speaking, I think such user must be shewn, in the absence of some evidence of recognition by competent public authority of the locality in controversy as a harbour in a commercial sense. *The King* v. *Bradburn*, 14 Can. Ex. 419. As to the extent of the commercial user necessary to bring a given locality within the description 'public harbour' a variety of circumstances may, no doubt, affect the determination of that decision."

A. H. F. LEFROY.

QUE.

K. B.

WARNER-QUINLAN ASPHALT CO. v. CITY OF MONTREAL.

Quebec King's Bench, Sir Horace Archambeault, C.J., and Lavergne, J.
October 14, 1915.

1. INJUNCTION (§ II—134)—SUSPENSION OF INTERLOCUTORY INJUNCTION PENDING APPEAL—DISCRETION AS TO—WRONGFUL AWARD OF MUNICIPAL CONTRACT.

Though the court is given absolute discretion under art. 969 C.P.Q. to temporarily suspend an interlocutory injunction pending an appeal, no such relief will be granted where it has the effect of completely destroying the object of an interlocutory injunction against a municipality to prevent the execution of a contract which has been wrongfully awarded, through favouritism, as against the rights of a lowest bidder.

Statement

PETITION for temporarily suspending an interlocutory injunction granted by a Judge of the Superior Court on August 31, 1915.

Smith & Markey, for petitioner.

J. H. Dillon, for appellant.

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WARNER-QUINLAN ASPHALT CO. v. CITY OF MONTREAL.
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SIR HORACE ARCHAMBEAULT, C.J.:—The Warner-Quinlan Asphalt Co. obtained an interlocutory injunction against the City of Montreal to stay the execution of a contract awarded by the Board of Control to the Aztec Asphalt Co.

The Judge who granted this injunction based his judgment upon the illegality arising from the fact that this contract had been given to the Aztec Co., through favouritism and wrongfully, although the Warner-Quinlan Co. should have obtained it as being the lowest tenderer.

The Warner-Quinlan Co. at the same time brought an action against the city to have annulled the resolution of the Board of Control awarding the contract to the Aztec Co., and to have declared permanent the interlocutory judgment which had been granted.

This action of the appellant was afterwards dismissed on the merits, and the interlocutory judgment was, in consequence, quashed and annulled. The judgment declares that the commissioners are not obliged to award the contract to the lowest tenderer, that the Warner-Quinlan had no legal right to receive the contract; and that it suffers no wrong from the fact that the contract was not given to it, while the annulment of the contract would cause the Aztec Co. considerable damage.

The Warner-Quinlan Co. at once inscribed an appeal from the judgment given, and this appeal is pending.

Art. 969 C.P.Q. declares that the interlocutory injunction remains in force, notwithstanding the final judgment which annuls it, when the judgment is thus immediately taken to appeal; but it adds that the Court of Appeal, when application is made to it during the session, or two Judges of that Court, when the application is made outside of the sittings, can suspend the interlocutory injunction temporarily.

The Aztec Co., relying upon this last provision of art. 969, asks us to suspend until judgment on appeal the interlocutory injunction which was granted in this cause, and which is yet in force, notwithstanding the judgment which quashed it. It alleged that the delay which the appeal would necessarily involve would cause to it, as well as to the City of Montreal, irreparable damages; that the contract could only be put in exe-

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cution during the fine season, and that it will be necessary to execute it in the spring if the suspension demanded is not granted. It adds that it has brought from the United States 14 wagon reservoirs for asphalt liquid, that there are 10 of them not used, and it suffers on this head a damage of $40 a day.

The application made to us, as may be seen, is to permit the execution of the contract, that is to say, the laying of the asphalt, notwithstanding the injunction which forbids this execution of the contract pending the action.

I do not see that we can grant this application. To do so would render absolutely inefficacious the interlocutory judgment which the law declares to be still in force. The petitioner should have asked leave to appeal from the judgment which granted this injunction if it wished to destroy the effect of it.

When the legislature gave to the two Judges the right to suspend an interlocutory judgment during the hearing on appeal, it gave them an absolute discretion in this respect. The fact that art. 969 declares that this suspension should be temporary, proves that it should not be granted if it has the effect of completely destroying the object of the injunction, that is to say, as in the present case, to permit the execution of the contract, which the injunction has precisely the object of preventing. To grant the application to the petitioner would virtually be to reverse the judgment which granted the interlocutory injunction. The Court alone has this right, and we would be abusing the discretion which is given to us by suspending the injunction.

I should add that though the petition of the *mis-en-cause* sets up the interest of the city to obtain the suspension applied for, the city has not deemed it proper to join with the company in this demand. It has not even filed an appearance before us. The reason for that is perhaps that a demand of intervention in the cause in the Superior Court, on the part of one Rodrigue Langlois, alleges certain facts which are not of a nature to put the Aztec Co. in a position very favourable towards the members of the Board of Control and of the City Council.

As to the damages which the petitioner claims to suffer from the delay in the execution of the works, it will be indemnified.

if the Courts are in its favour, because the Warner-Quinlan Co. gave security for this purpose when it obtained the issue of the interlocutory injunction.

On the other hand, the inconvenience which would result from the execution of the contract would be irreparable, if the contract were annulled either on account of its illegality or on account of fraudulent manœuvres.

We are, therefore, of opinion that the petition submitted should not be granted. *Petition dismissed.*

REX v. LICENSE COMMISSIONERS OF POINT GREY. EX PARTE GRAUER AND ROBINSON.

British Columbia Supreme Court, Macdonald, J. July 7, 1915.

1. INTOXICATING LIQUORS (§ II B—40)—LICENSES — DISCRETION AS TO GRANTING—REVIEW BY COURT.

Under sec. 50 of the Municipal Act (B.C.), 1915, the Board of License Commissioners has the absolute discretion to grant the renewal of licenses, and where no bad faith is shewn the court will not interfere with the Board's discretion in refusing to grant a renewal of hotel licenses, even where such refusal would result in a total denial of liquor licenses in the municipality.

ACTION to make absolute rules for mandamus to compel the renewal of hotel licenses. Statement

W. B. A. Ritchie, K.C., for Grauer Bros.

F. J. McDougal, for Robinson.

R. L. Reid, K.C., for License Commissioners.

MACDONALD, J.:—In these cases Grauer Bros., as licensees of the Grand Central Hotel at Eburne, in the municipality of Point Grey, and F. J. Robinson, as licensee of the Eburne Hotel at the same place, seek to make absolute rules for mandamus, directed to the board of license commissioners for the municipality of Point Grey, commanding them to renew the licenses for such hotels. The board, at its statutory meeting on June 9, 1915, had unanimously declined to renew the licenses. The license inspector, at such meeting, reported in writing that from periodical inspections he had always found the hotels conducted properly; and that the licensees were of good character and in all respects appeared fit persons to hold licenses. According to the minutes of the meeting, the inspector, in reply to a question of the reeve, as chairman of the board, in reference to the hotels, said that the "guests were very few, and for Macdonald, J.

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days no guests at all—mostly bar trade." The minutes do not shew any reasons for the action of the Board in declining to renew.

By-law No. 15 (1911) of the municipality relating to liquor licenses was repealed by by-law No. 8 (1915), passed on June 1, 1915. The latter by-law was authorized under sec. 50 of the Municipal Act, Amending Act (ch. 46), 1915, which repealed sec. 323 of the Municipal Act. By such sec. 50, the council of every municipality is empowered to pass by-laws "not contrary to or inconsistent with this or any Act"—*inter alia*,

(*a*) for regulating the manner and prescribing the conditions in and under which the board of license commissioners may grant or refuse the renewal of licenses.

Sub-sec. 2 of sec. 50 provides that nothing in such sec. 50 contained,

shall be deemed to cancel, or prevent the renewal of, any liquor license granted and issued prior to the passing of this Act.

By-law No. 8 outlined the requirements and procedure necessary in order to obtain the renewal of a license, and sec. 25 of the by-law provided that, "the board may, at its discretion, grant or refuse the renewal of licenses." Sec. 26 then stated that, if the applicant for renewal of a liquor license had made proper application and the board were satisfied that such applicant had complied with all the provisions of the by-law and with all statutory requirements, it "*may*, upon payment of the required license fee, grant the renewal of license applied for." It was contended that "may" in this section should be construed as "shall" so as to make the grant of renewal compulsory and not permissive on the part of the board. I do not think the cases cited support this contention. It would completely destroy the effect of the previous sec. 25, conferring discretion upon the Board, and would be directly opposed to sec. 299 of the Municipal Act relating to the powers of the board, as follows:—

The board of license commissioners . . . subject to the provisions of this Act, or the provisions of any by-law passed by the council in accordance with a power conferred upon the council by this Act, may, in their discretion, grant or refuse a license, or transfer of a license, or a renewal of license, or cancel a license absolutely.

Counsel for the board did not satisfy me as to the object

and effect of the proviso above referred to in said sub-sec. 2 of said sec. 50, but I do not think it destroys the discretionary power sought to be conferred by by-law No. 8, nor affects the statutory discretion vested in the board by sec. 299. The board of Point Grey were not controlled by a by-law similar to the one referred to in *Prudhomme* v. *License Commissioners*, 16 B.C.R. 487, at 490, as follows:—

> No application for renewal *shall be refused* by the board, unless it be proved that the licensee has been guilty of an infraction of the provisions of this by-law, or unless the number of licenses are reduced, in which case the licenses shall be reduced in order of the last issued.

It was then contended that if a "discretion" with respect to the renewal of licenses rested with the board, it had not been properly exercised. The board is a judicial body and is required to grant or refuse licenses in open Court, and an attempt was made to shew that the question of renewal of these licenses had been prejudged by the board before its sitting. The evidence does not in the slightest way support such a conclusion. Did the board then exercise this discretion within the rules applied to a licensing board by Lord Halsbury in *Sharpe* v. *Wakefield*, [1891] A.C. 173, at 179:—

> An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rookes Case*, 5 Rep. 100, according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself.

All the members of the Board, though not required to do so, deemed it advisable to file affidavits setting forth the reasons why the licenses were not renewed. For example, the reeve, in the *Grauer case*, stated:—

> That a renewal of the said license was refused by the said board for the reason that the hotel in question was not doing a legitimate hotel business, and that its guests were very few; that its liquor trade was almost entirely bar trade, which facts were reported to the board by the license inspector; also the licensee admitted that he was losing money on the hotel, and even on the bar itself, and as the municipal council had recently passed a much stricter liquor by-law, the board thought that it would only be encouraging breaches of the by-law to renew the license under the financial conditions in which the licensee admitted that he was.

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and the licensed premises being situate in a residential district, it was not deemed to be in the public interest of the municipality, or of the locality in question, to have any licensed hotel premises there.

He then adds that the board heard the licensee at some length and deemed it advisable to exercise a statutory discretion and refuse to renew the license. Accepting such reasons as the ones which actuated the board in arriving at its decision, have I any right to interfere with the discretion exercised under these circumstances? In *Sharpe* v. *Wakefield*, *supra*, it was contended that the right to refuse renewal of license did not depend upon the same discretion as might be exercised in refusing a license in the first instance: Lord Bramwell said:—

It is said that this power or right (of refusal) in the magistrates does not exist where a license has been granted, and the question is whether it should be renewed. I am not sure that this contention might not be met by this: The magistrates have a discretion to refuse; they are not bound to state their reason, and, therefore, their decision cannot be questioned, but I think it better to say that, in my judgment, if they had to state their reasons it would be a good one in point of law that they refused to renew on the ground of the remoteness from police supervision, and the character and interests of the locality and neighbourhood in which the said inn is situate. Of course the findings of the facts by the sessions is conclusive.

In *Rex* v. *London County Council*, [1915] 2 K.B. 466, 31 T.L.R. 249, the Court of Appeal refused to interfere with the discretion exercised by the county council as a license authority in refusing to grant the renewal of music and cinematograph licenses to a company on the ground that the majority of the shareholders were alien enemies. The reasons were discussed by the Court, but the Court did not interfere with the discretion exercised, even although there was no evidence to shew that such alien enemies as shareholders had so far done anything that would militate against the public interests. Lord Reading in that case points out that:—

It must be borne in mind that this Court, in determining whether or not mandamus should issue, is not exercising appellate jurisdiction. We are not entitled to decide according to the view we should have taken in the first instance had the matter come before us. . . . The council, in these matters, are the guardians of the public interest and welfare.

In *Prudhomme* v. *License Commissioners*, *supra*, Macdonald, C.J.A., after referring to terms of the by-law omitting the power of the board, and considering the effect of a new by-law

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omitting the part already quoted, "so as to make it discretionary with the Board to renew the license," concludes as follows:—

At the time the wrong (refusal to renew) was done, no exercise of discretion was required, but simply the doing of a ministerial act.

Martin, J.A., in a dissenting judgment, says:—

Unless bad faith on the part of the license commissioners can be established, the order appealed from cannot clearly, in my opinion, be supported, and as no satisfactory evidence of such bad faith has been adduced, the appeal should be allowed.

It was pointed out that failure to renew these licenses would result in there being no liquor licenses in force in the municipality of Point Grey. Assuming that such result would ensue, I do not think it should affect the matter. If discretion is vested in the board, then it should not, without legislation to that effect, be debarred from properly exercising such discretion with respect to these particular licenses. If these two hotels are exempt from the action of the board on the ground of discretion, it would mean that the holders thereof would have a vested interest. They could not be deprived of their licenses so long as they lived up to the letter of the Municipal Act and by-laws properly passed thereunder. A refusal to renew, for example, could not be supported on the ground that such course was in the public interest. I do not think the position thus assumed by licensees is tenable. It is not in accord with the trend of legislation regulating the sale of intoxicating liquors, and is contrary to the intention of the legislature: Licenses are not intended to be renewed as a matter of course. Each year the holder of a license obtains a new license to carry on his business.

It is a "renewal," *i.e.*, a new license, as we think of a new lease being a renewal, though parties and terms may be wholly different.

See Lord Bramwell, in *Sharpe* v. *Wakefield, supra.*

Bad faith has not been shewn on the part of the board. All of its members were cross-examined on their affidavits. In my view of the evidence, it was not shewn that the discretion of the board had not been exercised "in a manner fair, candid, and unprejudiced." The legislature has appointed a body to deal with the granting and renewing of licenses. Two of such board owe their position through a vote of the ratepayers, and are

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responsible to them for their conduct in this and other matters. The reluctance of the Court to grant mandamus where the proper exercise of discretion is in question, is referred to by Lord Coleridge, C.J., in *Rex* v. *Evans*, 63 L.T. 570, at 571.

I do not think that any legal right has been affected which, to the "end that justice may be done," required the interference of the Court. In my opinion, both rules should be discharged with costs. *Rules discharged.*

CAN.

Ex. C.

The KING v. CANADIAN PACIFIC LUMBER CO.

Exchequer Court of Canada, Hon. Mr. Justice Audette. April 12, 1915.

1. DAMAGES (§ III L 2—251)—EXPROPRIATION OF WATER LOTS—ABANDONMENT—RIPARIAN RIGHTS—DISPOSSESSION OF USE OF WATER-MILL. The value of a water-lot, expropriated for the purpose of a public work, must be assessed in view of such riparian rights as are actually enjoyed by the owner at the time of the taking; and where property, used in connection with a saw mill, is taken by the Crown and subsequently abandoned under sec. 23 of the Expropriation Act, the owner is entitled to be compensated for what the property would have been worth to him if used for that business during the time he was ousted from its possession by the Crown.

Statement

ACTION for the price of land expropriated at Vancouver, B.C., by the Dominion Government, for Harbour improvements.

W. B. A. Ritchie, K.C., and *R. Maitland*, for the plaintiff.

Douglas Armour, K.C., for the defendants.

Audette, J.

AUDETTE, J.:—This is an information exhibited by the A.-G. of Canada, whereby it appears, *inter alia*, that certain land and a water-lot, belonging to the defendant company, were taken and expropriated, under the provisions of the Expropriation Act, for the purposes of a public work of Canada, namely, the construction of wharves, piers, docks and works for improving and developing the harbour of Vancouver, Burrard Inlet, B.C., by depositing, on February 27, 1913, a plan and description of such land and water lot, in the office of the registrar of deeds for the county or registration division of Vancouver, B.C.

This case first came on for trial before Cassels, J., in November, 1913, upon the original information filed on September 6, 1913, when the Crown was expropriating both a strip of land 44 ft. wide, together with the water lot extending in front of the same. Cassels, J., in his reasons for judgment, filed in the case of *The King* v. *Investment Co. of Canada*, speaking of

the present case said that the evidence had been made common to the three cases therein mentioned,

and that he had been notified that the Crown would likely give an undertaking or possibly abandon the proceedings relating to the strip of 44 feet, together with this water lot in front of the same. Adding that in this case uncontradicted evidence was adduced to shew that if the 44 feet were expropriated by the Crown, the whole of the property held in connection with the strip would practically be destroyed for mill purposes—as this was practically the only land available for the piling of lumber—lately, notice of abandonment has been registered pursuant to the statute, abandoning the 44 ft. strip so far as it is composed of land, and about the southerly half of the water lot extending in front of the 44 ft. strip. The practical result of this abandonment is to render the trial abortive.

On February 17, 1914, the Minister of the Public Works Department, acting under the authority and power conferred upon him by sec. 23 of the Expropriation Act, abandoned 450 ft. by 44 ft. in width of lot 14 in question herein. That is abandoning the whole of the land from Stewart street for 290 ft. on the west side and 310 on the east side, by 44 ft. in width, up to the original highwater mark—together with 160 ft. on the west side and 140 ft. on the east, by 44 ft. in width, of the water lot—leaving 30,140 sq. ft., the balance of the water lot retained by the Crown as shewn on plan exhibit 21.

The defendant company's claim is: 1. For the value of this piece of the water lot first mentioned. 2. Alleged loss of profits caused by the closing of the mill during the period of 8½ months, from July 15, 1913, to March 31, 1914, at $53,516.71 per annum, equal to $37,907.66. 3. Standing charges borne by the Vancouver mill during the above-mentioned period, being a direct loss in addition to the above loss of profits, viz.: Insurance, $6,942.50, taxes, $2,875.17, depreciation on buildings and plant (on $203,918.98 for 8½ months at 5 per cent. per annum), $7,222.13; watchman's wages, $785, head office expenses estimated for 8½ months at $5,000 per annm. $3,541.67—$21,367.27.

4. Loss sustained in the realization of lumber piled on lot expropriated due to the enforced sale, estimated at $3 per M. ft. (For inventory of lumber piled on lot expropriated): 1,721,282 ft. at $3 per M. ft., $5,163.84; cost of pile bottoms, $850.13—$6,013.97.

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EX. C.

THE KING v. C. P. LUMBER CO.

Audette, J.

In view of the abortive trial during November, 1913, resulting from the above-mentioned abandonment, at the opening of the present trial, during February, 1915, I ordered out of the present case all the evidence already adduced in the three cases, both documentary and *viva voce*, and which had been made common to the present case; subject, however, to the leave by either party of applying to the Court to put in any part of such evidence. No such application was made, and we therefore now face the present issues upon the evidence adduced solely at the trial during February, 1915.

The defendant company, which is the result of a merger or amalgamation of several companies, own large saw-mills in British Columbia, and had been in operation for 23 months at the date of the expropriation. It is perhaps idle to go into the numerous details of their amalgamation, sufficient will it be to mention that, after the consummation of the amalgamation, they decided to borrow £400,000—of which £350,000 were underwritten in England at 93 and brokerage, netting in round figures $1,413,000, 25 year bonds at 6 per cent., payable half-yearly. The balance of £50,000 are held by the bank in Canada as security on loans.

The proceeds of the bonds were used to purchase the other companies. The sum of $1,000,000 was for the payment of the liabilities of each company—putting them in the amalgamation free from other incumbrances. The balance was placed over to the different other companies and they started business with $15,000 to $20,000.

In 1913, the company borrowed from the directors over $100,000 to meet the liabilities on the bonds, and in 1914 the two February and August payments were defaulted.

On November 18, 1914, under an order of the Supreme Court of British Columbia, C.N.D. Robertson, a party hereto, was appointed liquidator. He is also the receiver who is presently operating the Vancouver mill in question, which is the only mill of the company which is presently operated.

I have had the advantage at the time of the trial of viewing the premises in question, accompanied by counsel as well for

the plaintiff as for the defendant. The mill, which is a large one, was then in full operation.

VALUE OF WATER LOT.

This water lot was sold to one John Hendry on the 16th May, 1905, under a Crown grant from the Dominion Government for the sum of $500, subject to the following clause:—

Provided that nothing in these presents shall be held to absolve the grantee, his heirs and assigns, or any of them, from fulfilling in that respect the requirements of the Act, ch. 92 of the R.S.C. (1886), and it is an express condition of this grant that no "work" within the meaning of the said Act shall be undertaken or constructed on the said lands by the grantee, his heirs or assigns or any of them, or shall be suffered or allowed by them or any of them, to be constructed thereon until, as regards such works, the provision of the said Act shall have been fully complied with. (See also 49 Vict. ch. 35; R.S.C. (1906) ch. 115; and 9-10 Edw. VII. ch. 44.)

The whole lot 14—land and water lot—was subsequently sold to Mr. Meredith on September 17, 1907, for $22,000 and on the following day he sold it to the Anglo-American Lumber Co. for $25,000. And then it was sold to the defendant company on August 17, 1911, for $150,000—but it cannot be overlooked that the last sale was made at the time of the amalgamation of the several companies, as already mentioned, and one only knows too well what it means when promoters are handling properties under such circumstances. It should also be qualified by the fact that the asset of each company was not put in at the full value of their appraisal.

In tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which, *primâ facie*, is in the public: *A.-G. for B.C.* v. *A.-G. of Can.*, 15 D.L.R. 308, [1914] A.C. 153, 168. The subjects of the Crown are entitled as of right to navigate on tidal waters. The legal character of this right is not easy to define. It is properly a right enjoyed so far as high seas are concerned, by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if indeed it did not in fact take rise in them. The right into which the practice has crystallized resembles, in some respects, the right to navigate the seas, or

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the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding the subjects exercising this right as from immemorial antiquity, the Crown, as *parens patriæ*, no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts, 15 D.L.R. at 315.

It would, therefore, appear that the Crown, as trustee for the public, is the guardian of such right held by the public to use navigable and tidal rivers as a public highway, and it thus rests with the Crown to protect its subjects against any right which might arise by adverse possession, in violation of such *jus publicum*. The defendant's grant is subject to the *jus publicum*, or public right of the King and people, to the right of passing and repassing both over the water and the *solum* of the river: *Mayor of Colchester* v. *Brooke*, 7 Q.B. 339; Ency. Laws of England, vol. 12, p. 566, and *The King* v. *Tweedie*, 22 D.L.R. 498, 15 Can. Ex. 177, 183.

While the grantee of this water lot owns the bed of this water lot, he is not entitled to place erections or stretch booms thereon without the approval required by the statute, and its value must be ascertained by reference to that approval, which is not obtainable as of right.

Following the decisions in the cases cited: *The King* v. *Wilson*, 22 D.L.R. 585, 15 Can. Ex. 283, 288; *Cunard* v. *The King*, 43 Can. S.C.R. 88, 99; *The King* v. *Brown*, 13 Can. Ex. 354, *The King* v. *Bradburn*, 14 Can. Ex. 432-437; *Lynch* v. *City of Glasgow* (1903), 5 C. of Sess. Cas. 1174; *The King* v. *Gillespie*, 12 Can. Ex. 406, and the *Central Pacific R. Co. of California* v. *Pearson*, 35 Cal. 237, it must be held that the right to that approval provided by the statute is too remote and speculative to form a legal element for compensation. And, indeed, it is too obvious that the Crown, requiring these lands for the purposes of a public work, would not grant such leave, and the property must therefore be assessed without that right.

Several witnesses have expressed their opinion upon the

value of this water lot, with and without the right to erect wharves and stretch booms. Some have valued it as real estate land—but that valuation is not applicable in the present case. Witness Bateman, a witness heard by the defendant, said that without the right to erect wharf and stretch boom the lot is not worth much. Witness Heap was negotiating for the purchase of some additional water lot and was offering 10 cents a square foot. He declined to purchase at 25 cents—the price fixed in 1914 by the Vancouver Harbour Commission, saying it was too high a price.

This water lot must be assessed at its market value, at the date of the expropriation, without the right to erect wharves and stretch booms, but with such rights as are defined in *Lyon* v. *Fishmongers*, 1 App. Cas. 662, that is to say, with such rights as are enjoyed by a riparian owner, *ex jure naturæ*, which are quite distinct from those held in common with the rest of the public. Besides the use of the water for domestic purposes—which, in a case of salt water is, however, obviously less valuable, the riparian owner has over and above the rights enjoyed by the public the right of access to and from the river.

Taking as a basis for the market value of this water lot the price now asked by the Harbour Commission, I hereby fix the value of the same at $7,535—to which should be added 10 per cent. for compulsory taking, making in all the sum of $8,288.50.

CLAIM RESULTING FROM ABANDONMENT.

The defendants claim that, as a result of the expropriation of their piling ground on lot 14, and which was subsequently abandoned and returned to them, they were compelled to close down their mill and thereby suffered very heavy damages.

The expropriation of the piling ground, which was made at the same time as the water lot, took place on February 27, 1913. On June, 20, 1913 (ex. C.), the defendants were asked by the Crown for the possession of lot 14 not later than two months from that date. On July 29, 1913 (ex. D.) the defendants are requested to vacate, without contest, the lands in question. At a meeting of the defendant company on July 4, 1913, it is decided to close down the mill and stop operations

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on July 7, 1913, and they do so and remain closed until April 1, 1914. On July 17, 1913, Mr. Meredith, the managing director, writes to the Minister of Public Works asking that either the whole of the Hastings Shingle Co. be expropriated, leaving the defendant's property intact or that the whole of the defendant's property be taken leaving the other intact, because, if the expropriation is pursued as projected, these two companies will have to shut down, and alleging, further, that the notice to vacate the lot expropriated within 60 days from the 20th June, 1913, had compelled them to close down their mill—as it would be impossible to clear off this lot and keep the mill in operation.

In November, 1913, the defendant company had still about 500,000 feet of lumber on lot 14, and the balance was only removed at the end of December, 1913.

Mr. Meredith tells us that this mill is usually closed down every year for taking stock and overhauling, for a couple of weeks or a month, and the secretary-treasurer mentions about the same period.

There is an unaccountable error of fact which has slipped in and has been worked upon almost all through the trial, and that is the statement made by Mr. Meredith, that after the Crown had taken the water lot 14, the company remained with 275 ft. by 400 ft. of water lot for booming purposes opposite their property. That statement is not borne out by the title which only shews 95 ft. frontage. A material difference indeed as between 95 and 275 ft. A great many questions put to witnesses have been answered on this basis and assumption of 275 by 400—instead of 95 by 765 on one side and 690 ft. on the other side. The difference in the statement is so large that it becomes impossible to reconcile it.

Now, the state of the market in the lumber business in 1913, at Vancouver, had not been very good. Witness Hardy tells us that business began to slack off in the latter part of 1913, and witness Meredith states that business had not been very good. Witness Lewis says that the condition of the lumber business in 1913 was not good, and there was a drop in the fall of 1913. Three or four large mills went down and were

placed in the hands of receivers. Witness Alexander, who belongs to the Association of Lumber Mills Co., which issue prices that are from time to time varied by discount sheets, says that trade held fairly well up to July, 1913, and after that it began to decline. Things then went to pieces and we could not recommend any prices and did not issue any. The trade picked up again in the spring of 1914; but when the war started it went to pieces again. Witness Chew says that by the end of June, 1913, prices began to drop. There was no stable or fixed price after that, and we made the best we could. Then witness Heap, who is in the same business as the defendants, speaks in the same strain, and says it had got to a price where nobody could live, and we had to close down.

The fixed charges the defendant company had to face in 1913 were as follows, as shewn by the evidence of witnesses Meredith and Hardy, viz.: Interest on bonds, $103,000; sinking fund, $35,000; licenses, taxes, etc., $25,000; insurance, $11,000; interest on loan from bank in 1913, $275,000 at 6 per cent., $16,500—$190,500.

Then witness Crehan, a chartered accountant, contended from the figures and explanations given in his evidence that the company was running its business at a loss in June, 1913—just before they decided to close down.

It is perhaps well to mention that the defendant company was also using the waterfront, opposite their mill, for stretching logs, on sufferance by the Crown—because, under the statute as above set forth, they had no such right to interfere with navigation without leave from the Crown. In the early days when trade was being built up at Vancouver no objection was ever made by the Crown—but that did not give them any legal right to such use. The silence of the Crown is only referable to its grace and bounty, and does not constitute an acknowledgment of such a right. And this tolerance, resulting from the benevolence of the Crown, may be very reasonably expected to be put an end to since the passing of the statute creating a commission for the harbour of Vancouver.

If the defendant's business is affected by the curtailment of booming space by the Crown exercising its right, what of the

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whole business of the company if the Crown were exercising its right with respect to all the water lots?

Now, in the result, it would appear from the evidence that the lumber business and the company's business was in a very undesirable financial state at the time they closed down. That their going into liquidation and in the hands of a receiver were, under the circumstances, its ultimate fate and a matter of time.

It would, therefore, appear to me that the closing in July was perhaps the combined result of the state of the trade and of the expropriation, and would let in for a part certain compensation. The defendants did not wish to be expropriated, they protested, and made suggestions to avoid it. The Crown finally returned the piling ground, in face of the large claim for damages, and the company re-opens its mill in 1914, when, as witness Gibbons says, the market was a little better and we closed down because it was bad. They had, at the time of re-opening, a very large contract with the firm constructing the government piers in question.

In their claim as set forth in ex. No. 16, and in their statement of defence, the defendants claim loss of profits during 8½ months—from 15th July, 1913, to 31st March, 1914. By their particulars it would appear that they operated that mill for about ten months in the year; that they vacated the piling ground on December 30, 1913; that they claim, by such particulars, 6½ months from about 3 months after the closing down of the mill; but qualified by the statement that they operated during about ten months, that would reduce it to 4½ months.

While the defendants should be confined to the particulars delivered: Chitty's Archbold, pp. 387, 388, they perhaps should not be held to it, under the circumstances, in absolute strictness; but it should be taken into account as a help in arriving at a conclusion respecting the period in question.

If we are to reckon the number of months from about three after the closing of the mills, we should start to reckon up from October 7 or 15, and down to February 17, 1914, and that would give us about 4 months and a few days. Then, if something

should be deducted because of the usual closing up for stock-taking and over-hauling around Christmas, that would still go to reduce the number of months. However, one cannot expect that they could re-open on the very day they were served with the abandonment—a reasonable time should be given them for re-organization.

Therefore about 4½ months should be allowed, but to make it more liberal, I will allow five months.

By ex. M, the defendants claim that for the 23 months therein mentioned, their Vancouver Mills earned per 12 months $53,516.71, giving about $4,459.72 per month. However, in face of the lumber business which had gone to pieces at that time, it is not reasonable to expect that the mill would have maintained its earning power at that figure, especially when we have in evidence that prices were no longer fixed or stable, and that mill after mill was running into liquidation and in the hands of receivers. I will therefore take one-third off the sum of $4,459.72, and fix the monthly profits which might have been earned at the sum of $2,973.14—making, in all, for 5 months, the sum of $14,865. To this amount should be added the standing charges borne by the company while it was earning the above-mentioned figures. The amount representing these standing charges, which, according to plaintiff's witness, the chartered accountant, should also be classified as damages—because they were taken care of by the defendant company while they earned the above-mentioned profits. The claim for 8½ months is made up at $21,367.27, therefore, for 5 months, they are hereby fixed at the sum of $12,568.98.

There is the further claim of $6,013.97 alleged loss sustained on the lumber piled on lot 15, due to enforced sale, estimated at $3.00 per M. ft. I find that the defendant company has failed to establish that claim. Indeed the lumber in question, which was partly sold in the middle west, was, under the evidence, sold at about the prevailing prices at the time and at the prices fixed by their contract of September 16, 1913, for the following year 1914: (ex. 27). I find this claim is not meritorious, and it is disallowed.

Now, is the defendant company entitled to recover the above-

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mentioned damages? It may be said that loss of profit, *per se*, is not recoverable, because it is a personal claim: (*The King* v. *Richard*, 14 Can. Ex. 365, 372), but it may well be that sub-sec. 4 of sec. 23 of the Expropriation Act (ch. 143, R.S.C.) contemplates a class of cases not governed by the general principles of expropriation, but standing by themselves under that particular enactment. Its language is as follows:—

> The fact of such abandonment or revesting shall be taken into account in connection with *all the other circumstances of the case*, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

If we have to take into account all the circumstances of the case, the damages resulting from such abandonment and revesting would seem to be part of the consideration in estimating and assessing the compensation for the land taken, and would let in such class of damages.

However, the defendants are clearly entitled to receive compensation based upon the value of the piling ground to them, whatever that might be during the time it remained vested in the Crown. This piling ground has a special value to them in connection with the running of their mill. The suitability of the piling ground, for the purpose of the mill business, affected the value of the land to them, and the prospective profits which it was shewn would attend the use of that land in their business, furnish material for estimating what was the real value of the land to them. The prospective profits are only entitled to be taken into consideration in so far as they might fairly be said to increase the value of the land to them. Probably the most practical form in which the matter can be put is, that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to retain it. Now, in this present paragraph, I have mostly paraphrased the able judgment of Lord Justice Moulton upon this subject in the case of *Pastoral Finance Association Ltd.* v. *The Minister*, [1914] A.C. 1083, 1085. In this latter case it will be noticed that the profits that might be realized from the land in question, and which went to give it a special value to the owner, were also unearned profits; but really represented the

potential capability of the piece of land to the owner as in the present case. See also *Paradis* v. *The Queen*, 1 Can. Ex. 191.

Therefore, the value of this piling ground to the defendant company—between the time of the expropriation and the abandonment—must be measured by the value it had to them in connection with the running of their mill, which had a revenue-producing power, as established by the evidence, and they are entitled to receive as well the value of the water lot as the value of the piling ground to them for the time it remained vested in the Crown.

Now, witnesses Bateman, McClay, Vassar and Albernethy have testified that the government works will appreciate and increase in value the defendant's property as a whole. And great stress has been made upon the new facilities for shipping, as resulting from this public work. Under sec. 50 of the Exchequer Court Act (ch. 140, R.S.C.), such advantage should be taken into account and consideration by way of set-off. While I agree with their evidence I will not earmark any figure by way of set-off, but I will leave this advantage as part of the compensation to make it more liberal and fair, under the circumstances of the case.

The Crown having abstained from tendering any amount by the pleadings as amended, costs will go in favour of the defendants.

There will be judgment as follows, viz.: 1. The lands expropriated herein and described in the amended information are declared vested in the Crown from February 27, 1913. 2. The compensation is hereby fixed as follows, viz.: At the sum of $8,288.50 for the water lot—together with the further sum of $14,865 and $12,568.98, as above mentioned, making the total sum of $35,722.48—with interest on the sum of $8,288.50 from February 27, 1913, to May 14, 1913, when the Crown paid the defendant $58,500. The whole in satisfaction for the land taken and for all damages resulting from the expropriation and the abandonment, upon giving to the Crown a good and sufficient title free from all encumbrances whatsoever. 3. The defendants are entitled to all costs herein, inclusive of all costs incidental to the two trials.

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4. The Crown having paid the defendant company the sum of $58,500 on May 14, 1913, on account of the present expropriation, the said sum of $35,722.48, with interest as above mentioned and costs, will be deducted from the said sum of $58,500; and I do order and adjudge that the plaintiff recover from the defendants the difference between the said sum of $35,722.48, interest and costs, and the said sum of $58,500.

Judgment accordingly.

B. C.

S. C.

Re MARITIME TRUST CO. LTD. AND BURNS & CO.

British Columbia Supreme Court, Macdonald, J. October 4, 1915.

1. CORPORATIONS AND COMPANIES (§ VI C—330) — VALIDITY OF INSTRUMENTS HELD BY OUTSIDERS—JURISDICTION OF COURT TO DETERMINE SUMMARILY.

The court has no jurisdiction, either under sec. 109 of the Winding-up Act (ch. 144, R.S.C.), or r. 46 of the B.C. Winding-up Rules, to determine, upon a summary application in chambers, the validity of instruments held by outside parties who are not connected with the company.

[*Cardiff Coal etc. Co.* v. *Norton*, 2 Ch. App. 405, distinguished; *Re Imperial Bank*, 1 Ch. App. 339, referred to; *Re Ilkley Hotel Co.*, [1893] 1 Q.B. 248, applied.]

Statement

APPLICATION by a liquidator for an order for surrender of securities and for an accounting.

W. C. Brown, for plaintiff.

C. W. Craig, for defendant.

Macdonald, J.

MACDONALD, J.:—The liquidator of this company, by application in Chambers, seeks to obtain an order directing Burns & Co. of New York to deliver over to the liquidator certain documents, by which mortgages or charges were created by the company, on the ground that such documents are void as against the liquidator. An order is also sought to be obtained directing such parties to render an account of moneys received under such documents, and for payment over of the same to the liquidator. While it is admitted that no winding-up rules are in force which explicitly warrant this application, still, it is submitted, that the Court has jurisdiction to deal with the matter. The question is, whether the procedure adopted is proper, or whether the liquidator should bring an action to ascertain his rights. The latter course would involve delay, and the speedier mode is the one pursued by the liquidator. This involves the question of jurisdiction, and the rights of Burns & Co. should

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not be dealt with in a summary manner in Chambers unless the power to do so is clearly conferred. It is contended that rule 46 of the B.C. Winding-up Rules, coupled with sec. 109 of the Winding-up Act, supply the necessary power—r. 46 simply requires that

> every application to the Court shall be by summons at Chambers or motion in Chambers,

and sec. 109 of the Winding-up Act (ch. 144, R.S.C.), declares:—

> The powers conferred by this Act upon the Court may, subject to the appeal in this Act provided for, be exercised by a single Judge thereof; and such powers may be exercised in Chambers either during term or in vacation.

I do not think either the rule or section afford any support to the application. They point out the procedure and the way in which the power may be exercised, but the question of jurisdiction has first to be determined. No case has been cited to me in which the point was raised, and it was, upon consideration, decided that the power existed to determine in a Chamber application as to the validity of instruments held by parties not connected with the company: *Cardiff Coal and Coke Co.* v. *Norton Law Reports*, 2 Ch. App. 405, referred to by the liquidator, does not assist as there the assets sought to be recovered were in the hands of a shareholder of the company. In Palmer Company Precedents, 11th ed., part 2, p. 28, reference is made to the limits of the jurisdiction possessed by the Court. It is pointed out that, under sec. 215, the Court has jurisdiction over "outsiders" in specified cases, "but the jurisdiction is limited to such cases." Cases are cited in support of this proposition. An agreement between the company and an outsider cannot be impeached in the winding-up, an action must be brought: *Vide Imperial Bank of China*, 1 Ch. App. 339. I think Burns & Co. are "outsiders." Cave, J., in *Re Ilkley Hotel Co.*, [1893] 1 Q.B. 248, on appeal, set aside an order declaring a certain transfer from the company to a third party void. He considered the question of jurisdiction, and decided that there was no authority to grant such order, affecting the rights of the appellant, who was a stranger to the company. He dealt fully with the result that would follow should it be decided such a power existed under the Act:—

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The Act does not give the Court any power to decide such a question as the County Court Judge has decided in the present case. The functions of the Court are administrative; and there is no ground for collecting from the language of the Acts an implied power to decide such a question as this.

I think the language of Cave, J., applies to the present application. In my opinion, there is no jurisdiction to grant the order sought to be obtained. The application is dismissed with costs.

Application dismissed.

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Ex. C.

The KING v. KENT.

Exchequer Court of Canada, Cassels, J. October 6, 1915.

1. JUDGMENT (§ III A—203)—THE LIEN—PRIORITIES—REGISTRATION SUBSEQUENT TO UNREGISTERED ASSIGNMENT FOR CREDITORS—KNOWLEDGE.

The registration of a judgment by an assignee thereof after the death of the judgment debtor and subsequent to an unregistered assignment for creditors by the latter, of which the judgment creditor and the assignee of the judgment had knowledge, does not, by virtue of secs. 15 and 16 of the Registry Act, R.S.N.S. 1900, ch. 137, create a charge upon the land of the deceased debtor which has passed to the assignee for creditors under the deed of assignment, and against which, therefore, no execution can issue thereon.

[*Miller* v. *Duggan*, 21 Can. S.C.R. 33, considered.]

Statement

STATED case to determine rights of assignee of judgment registered after an unregistered assignment for creditors, and subsequent to the death of the judgment debtor.

H. Mellish, K.C., for defendant P. G. Archibald.

Burchell, K.C., for defendant estate of Hugh MacKenzie.

The Crown took no part in the argument.

Cassels, J.

CASSELS, J.:—A question of considerable importance, affecting the rights of persons not before the Court, as well as the rights of the defendants, P. G. Archibald and the executors of the late Hugh MacKenzie, was argued before me at the trial of this expropriation case, at Halifax.

A statement of facts was agreed to by counsel, and is on file. It is as follows:—

1. That Thomas Stewart, the predecessor in title of the defendants, Franklin Kent and Ada Kent, gave to one Samuel Archibald, a lease of certain clay and minerals covering the lands described in the information, said lease being dated April 28, 1896, and registered in the office of the registrar of deeds in and for the county of Halifax, which lease is still in force.

2. That by indenture in writing, dated April 30, 1898, a copy of which is hereto annexed, the said Samuel Archibald, together with James Parker

Archibald and Thomas Archibald, made an assignment for the benefit of creditors, to Hugh MacKenzie, and that there were not sufficient assets in said estate to satisfy the creditors in full. The said indenture has never been registered in the registry of deeds in Halifax. The defendants Lyda R. MacKenzie and Kenneth F. MacKenzie are the executors of the last will and testament of the said Hugh MacKenzie now deceased.

3. That on May 2, 1898, Charles M. Dawson recovered judgment against the said Samuel Archibald and James Parker Archibald and Thomas Archibald, doing business under the name, style and firm of Samuel Archibald & Sons. That a certificate of said judgment was recorded in the office of the registrar of deeds in Halifax, on April 10, 1913.

4. That said judgment, by indenture of assignment, dated March 27, 1913, was assigned to the defendant Peter G. Archibald for valuable consideration.

5. That no execution was issued on said judgment until the month of April, 1914, when pursuant to an order of the Court obtained on an *ex parte* application, made on behalf of the defendant herein, Peter G. Archibald, an order for leave to issue execution was made by the Supreme Court of Nova Scotia, copy of which is hereto annexed. That also annexed hereto are copies of the affidavits of Charles M. Dawson and Peter G. Archibald used on said application. That pursuant to said order an execution was issued and a sale made by the sheriff of the county of Halifax to the defendant Peter G. Archibald, a copy of the deed being hereto annexed. That, previous to the said sale, notices of objection were served on the sheriff by Maclean, Paton, Burchell & Ralston and Harris, Henry Rogers & Harris, copies of which are annexed hereto.

6. That said Charles M. Dawson knew of the said assignment for the benefit of creditors made by Samuel Archibald *et al.* to Hugh MacKenzie at the time it was made on April 30, 1898, and that Peter G. Archibald, at the time he took the assignment of the judgment from Dawson, also knew that said Samuel Archibald had failed and made an assignment for the benefit of creditors, but did not know that there was any said assignment on record in the registry of deeds in Truro or elsewhere, and did not know that the assignment affected the lands in question.

7. That said Samuel Archibald died on or about July 3, 1903.

Chapter 84, of the R.S.N.S., 5th series (1884), intituled, Of the Registry of Deeds and Incumbrances Affecting Lands, is in part, as follows:—

18. Deeds or mortgages of lands duly executed but not registered shall be void against any subsequent purchaser, or mortgagee for valuable consideration, who shall first register his deed or mortgage of such lands.

21. A judgment, duly recovered and docketed, shall bind the lands of the party against whom the judgment shall have passed, from and after the registry thereof in the county or district wherein the lands are situate, as effectually as a mortgage, whether such lands shall have been acquired before or after the registering of such judgment; and deeds or mortgages of such lands, duly executed but not registered, shall be void against the judgment creditor who shall first register his judgment.

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The construction of this statute, as affecting the rights of a judgment creditor, registered without notice, of a prior unregistered deed, was fully considered by the Courts of Nova Scotia and the Supreme Court of Canada in the case of *Miller* v. *Duggan*, 21 Can. S.C.R. 33. The majority of the Supreme Court, affirming the majority of the N.S. Court, upheld the right of the judgment creditor whose judgment was registered to priority over an unregistered deed executed by the debtor prior to the judgment, but not registered.

Strong, J., dissented, and in a very exhaustive and able judgment, gave his reasons for arriving at the conclusion that the statute conferred no priority. Ritchie, C.J., with whom Fournier and Taschereau, JJ., concurred, arrived at a different opinion.

At p. 36 of the report, the reasons for the conclusion arrived at by the majority of the Court are reported as follows:—

The statute has declared the deed void against the judgment creditor. Does not the voiding of the deed, as against the judgment creditor, leave the property in the judgment debtor as if the deed had never been made? The difference between the English and Irish statutes and the statute of Nova Scotia is most material, as the former *do not declare the deed* void as the latter does. I cannot conceive how the Court could have held differently from what they did in *Grindley* v. *Blakie*, 19 N.S.R. 27, which decision they have followed in this case, unless they read out of the statute the 22nd sec. of ch. 79 R.S., 4th series, under which the question in that case arose.

It seems to me to be reducing the registry statute to an absurdity to say the legislature could have intended that a mortgage, duly executed but not recorded, should be void as against a judgment creditor whose judgment is duly recorded, and that a mere parol agreement not recorded to give a mortgage should have priority over the duly recorded judgment, thereby giving greater effect to a mere parol unrecorded promise to give a mortgage than to the unrecorded mortgage itself: such a result the legislature could, in my opinion, never have contemplated.

Under these circumstances, I think the judgment of the Supreme Court of Nova Scotia quite right, and this appeal should be dismissed.

Subsequently, probably in view of the dissenting judgment, the statute law was amended.

Chapter 137 of R.S.N.S. 1900, Of the Registry of Deeds, enacts as follows:—

2. In this chapter unless the context otherwise requires: (*a*) the expression "instrument" means every conveyance or other document by which the title to land is changed or in any wise affected, and also a writ

of attachment, a certificate of judgment, a lease for a term exceeding three years, and a vesting order; but does not include a grant from the Crown, a will, or a report of commissioners appointed to make partition.

15. Every instrument shall, as against any person claiming for valuable consideration and without notice, under any subsequent instrument affecting the title to the same land, be ineffective unless such instrument is registered in the manner provided by this chapter before the registering of such subsequent instrument.

16. A judgment, a certificate of which is registered in the manner by this chapter provided in the registry of any district, shall, from the date of such registry, bind and be a charge upon any land within the district of any person against whom such judgment was recovered, whether such land was acquired before or after the registering of such certificate, as effectually and to the same extent as a registered mortgage upon such land of the same amount as the amount of such judgment.

It will be noticed that the concluding words of sec. 21, "and deeds or mortgages of such lands, duly executed but not registered, shall be void against the judgment creditor who shall first register his judgment," are omitted from the corresponding clause (said sec. 16) in the statute of 1900.

Mr. Burchell contends that the later statute was enacted in order to amend the law and make it accord with the views expressed by Strong, J., in *Miller* v. *Duggan*, *supra*. This seems to be the opinion of the present Chief Justice of Nova Scotia, as expressed in the case of *Sissiboo Pulp Co.* v. *Carrier Lane Co.*, 40 N.S.R. 546.

But the earlier statute of 1884, sec. 21, provides that "from and after the registry thereof in the county or district wherein the lands are situate," the judgment duly recovered and docketed, shall bind the lands as effectually as a mortgage.

Sec. 18 of the R.S.N.S. 1884, provides that the prior deed or mortgage shall be void as against any subsequent purchaser or mortgagee for valuable consideration, who shall first register his deed or mortgage of such lands.

While sec. 21 of this statute provides that the judgment shall bind the lands as effectually as a mortgage, it does not make applicable the provision of sec. 18 which declares that the prior unregistered deed is void as against a mortgagee for valuable consideration who shall first register.

This sec. 18, while conferring the right on a prior mortgagee for valuable consideration, implies, according to the authori-

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ties, that such mortgagee should not have actual notice of the prior unregistered deed. It could not reasonably be contended that a judgment creditor can be designated as a purchaser for valuable consideration without notice. To make it clear that sec. 18 did not intend to include a registered judgment creditor, the latter part of sec. 21,

> and deeds or mortgages of such lands, duly executed but not registered, shall be void against the judgment creditor who shall first register his judgment,

provides for the priority intended to be given to a judgment creditor first registering.

After the best consideration I can give to the question under consideration, I am of opinion that the contention of Mr. Burchell is correct, and that if *Miller* v. *Duggan, supra*, were to be decided under the statute of 1900, a decision would be arrived at in accordance with the law as expounded by Strong, J.

An important difference, however, exists between the facts of the case of *Miller* v. *Duggan*, and of the present case. In *Miller* v. *Duggan*, the registered judgment creditor was a creditor who had obtained the judgment. In the present case the claimant is the assignee of the judgment.

Judgment was recovered by one Charles M. Dawson on May 2, 1898. The judgment was assigned to the defendant Peter G. Archibald, on March 27, 1913, for valuable consideration, and a certificate of the said judgment recorded in the office of the registry of deeds in Halifax on April 10, 1913.

It may well be that the legislature of Nova Scotia considered that to give the original judgment creditor, who could not be classed as a purchaser for valuable consideration without notice, a priority was too violent a departure from the law as it existed in England, and therefore amended the law. Nevertheless, they still practically retain the same provision in favour of an assignee of the judgment for valuable consideration without notice.

It will be noticed that sec. 15 provides that every instrument shall, as against any person claiming for valuable consideration and without notice, be ineffective as against the subsequent instrument.

Sec. 15, having regard to the interpretation in sec. 2 of the

word instrument, would read that, "every instrument" (in this case the conveyance from Samuel Archibald to Mackenzie of April 30, 1898), "shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument," etc.—the subsequent instrument here referred to would, under the interpretation of the statute, include a certificate of judgment.

The assignment of the judgment was prior to the registration of the certificate of judgment, and it is open to question whether, when the judgment was assigned, it could be called an instrument affecting the title to the same land. It is the registration of the certificate of judgment which makes it a charge on the land. However this may be, in my view, Peter G. Archibald for other reasons cannot claim any priority by virtue of the provisions of this statute.

The statute in Nova Scotia gives the benefit to the purchaser for value without notice. Under the Ontario registration statutes, the words used are "actual notice." I think, however, under the authorities, that no distinction can be made between the two statutes on this account.

Two questions may be said to be established by authority: 1. That, under the registry laws, actual notice is requisite. 2. That constructive notice is insufficient. See *Rose* v. *Peterkin*, 13 Can. S.C.R. 677, 694; *N.B. Railway Co.* v. *Kelly*, 26 Can. S.C.R. 341; *Ross* v. *Hunter*, 7 Can. S.C.R. 289, *per* Ritchie, C.J., and Strong, J., at p. 321. This latter case is decided with reference to the N.S. statute.

Burns v. *Young*, 40 N.S.R. 199, a decision of Meagher, J., as to constructive notice being insufficient.

The defendant Peter G. Archibald is the assignee of a judgment against Samuel Archibald whose lands are sought to be affected by this judgment. The judgment was obtained on May 2, 1898, and remained unsatisfied, and is still unsatisfied at the date of the trial.

By the admission of facts it is stated that Peter G. Archibald, at the time he took the assignment of the judgment from Dawson, also knew that said Samuel Archibald had failed, and made an assignment for the benefit of creditors. He would

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know that this assignment would pass all the property of Samuel Archibald. In any event he had actual notice of the assignment. It is stated that he did not know that the assignment affected the lands in question. The point is, however, that he had actual notice of the deed.

I have considered a great many authorities bearing upon the question of constructive as against actual notice. The nearest to the one in question I can find is *Coolidge* v. *Nelson*, 31 O.R. 646, 655, a decision of the Divisional Court. In that case the Chancellor of Ontario points out that the claimant to priority knew of the previous agreement, but he did not know that it affected the lands. Stress is laid upon the fact as found by the Chancellor, that he was told it did not affect the lands.

In the case of the *N.B. Railway Co.* v. *Kelly*, 26 Can. S.C.R. 341, it is expressly pointed out by Strong, J., that possession is not actual notice, and the Judge proceeds to state that the evidence does not shew that he had actual notice of the deed.

In *Roe* v. *Braden*, 24 Gr. 589, Spragge, C., points out that there was no notice of any instrument, etc.

Here is a creditor who had actual notice that his debtor was insolvent, and with actual notice that the debtor had executed an assignment of his property for the benefit of creditors seeking to protect himself on the alleged ground that he did not know the assignment passed his debtor's property. I think it will be pressing the doctrine of constructive notice as against actual notice too far to allow such a defence in favour of the creditor.

Another feature of this case seems to me to place an insuperable barrier in the way of Peter G. Archibald sustaining the position claimed for by him. It has been held that, under the registry laws, the registered judgment creditor could only claim such interest as his debtor had in the lands (assuming the unregistered conveyance to be void as against him). For instance, if Samuel Archibald, the debtor, had no interest in the lands but was a bare grantee "in the absence of statutory provision governing the point."

See *Entwisle* v. *Lenz*, 14 B.C.R. 51; *Oxley* v. *Culton*, 32 N.S.R. 256; *Sissiboo* v. *Carrier Lane Co.*, 40 N.S.R. 546.

Now sec. 16 of ch. 137, R.S.N.S. 1900, provides that the judgment shall, from the date of such registry, bind and be a charge.

There is a material difference between a conveyance or a mortgage executed by the grantor, which takes effect as between grantor and grantee from the date of execution, whether registered or not, and a judgment which operates as a charge from the date of registration.

In the present case Samuel Archibald died on July 3, 1903. The certificate of judgment was recorded on April 10, 1913. At the date of registration, Samuel Archibald had no lands or interest in lands. It is sought to place the judgment creditor in the same position as a valid grantee by deed executed by Samuel Archibald during his lifetime. I do not think he is entitled to this position. It seems an extraordinary state of affairs that a judgment should be capable of registration after the debtor's death. If the deed from MacKenzie was void, Samuel Archibald's estate would have passed to his heirs, next of kin or personal representatives, and at the date of the registry of the judgment Samuel Archibald had no interest in the lands.

Chapter 170 of the R.S.N.S. 1900, intituled, Of the Sale of Land under Execution, sec. 3, provides as follows:—

> The land of every judgment debtor may be sold under execution after the judgment has been registered for one year in the registry of deeds for the registration district in which the land is situated.

It is only when a judgment debtor dies *after* the judgment is registered against the land, that the judgment creditor may apply for leave to issue execution.

The purchaser at the sheriff's sale was the execution creditor, and no question arises as between an outside purchaser who may have relied upon the order of the Court. Besides, the deed under the sheriff's sale has not been recorded. See the latter part of the judgment in *Jellett* v. *Wilkie*, 26 Can. S.C.R. 282.

For the reasons I have set out, I am of opinion that the defendant, Peter G. Archibald, obtained no higher right against the property of Samuel Archibald by virtue of the registration of his judgment. He is, of course, entitled to any rights he may have as a judgment creditor to rank on the assets or to obtain any other relief he may be entitled to.

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The defendant, Peter G. Archibald, must pay the costs of the executors of MacKenzie of this issue.

The parties, no doubt, can agree on the terms of the formal judgment to be issued—if not, application can be made in Chambers. *Judgment against assignee.*

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INTERNATIONAL HARVESTER CO. v. SMITH.

Saskatchewan Supreme Court, Haultain, C.J., and Lamont, Elwood and McKay, JJ. January 8, 1916.

1. PLEADING (§ IX—111)—AMENDMENT OF DEFENCE ALLEGING FRAUD—WHEN ALLOWED—FAILURE TO SET OUT REPUDIATION.

Where in an action on lien notes the statement of defence incompletely sets up fraud owing to the failure of alleging repudiation of the contract on account of the fraud, the court, by virtue of sec. 30(7) of the Judicature Act and r. 253, should, for the complete settlement of controversies and avoiding their multiplicity, allow an amendment of the defence to enable the introduction of evidence in support thereof. [*Kurtz* v. *Spence*, 36 Ch. D. 770; *Tildesley* v. *Harper*, 10 Ch. D. 393, applied.]

2. BILLS AND NOTES (§ IV C—100)—ORDERS FOR MONEY DUE FOR THRESHING—FAILURE TO GIVE NOTICE OF DISHONOUR—LOSS OF THRESHER'S LIEN—DISCHARGE.

Orders for the payment of money due for threshing, given in connection with an assignment of a thresher's lien as part of the purchase price for a threshing engine, are inland bills of exchange within the meaning of sec. 17 of the Bills of Exchange Act, though such orders contained a statement of the transaction; and where no notice of their dishonour is given to the drawer and the holder fails to seize the grain under the lien thereby occasioning the loss of the drawer's security, the latter will thereby be discharged from liability and entitled to have the amount represented by them credited on the purchase price.

Statement

APPEAL from a judgment for plaintiff in an action on lien notes.

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

H. Y. MacDonald, K.C., and *F. L. Basledo*, for respondent.

The judgment of the Court was delivered by

McKay, J.

McKAY, J.:—This is an action brought on a number of lien notes given by appellant to respondent; some for small implements and others for a 30-60 Mogul engine. The defence admits the lien notes given for the small implements, but pleads payment before action brought. There are a number of defences to those given for the Mogul engine, which I will refer to later.

The action was tried before a Judge and jury, and during the progress of the trial, counsel for the appellant proposed to adduce evidence to shew that the lien notes for the Mogul engine, and the order or agreement to purchase the same, had been ob-

tained by fraud from the appellant by the respondent's agent, that is, that the appellant had been induced to sign and deliver the said lien notes and order by the fraud of the respondent's agent.

The trial Judge refused this evidence on the ground that the pleadings did not warrant the admission of such evidence, because the paragraphs of the defence alleging the fraud which induced the signing and delivery of the lien notes and order were inconclusive, and did not plead a complete defence in that they did not allege repudiation of the contract owing to said fraud. After some discussion, counsel then applied to amend so as to allege that, as soon as the appellant discovered the fraud alleged in para. 8, he refused to accept the engine and repudiated the contract and agreements in writing and refused to pay the moneys therein stipulated for. Counsel also asked for other amendments, but the trial Judge, on objection of plaintiff's counsel, refused to allow the proposed amendments. The hearing of evidence, in so far as the lien notes for the Mogul engine, then stopped and the trial continued with regard to the lien notes for the small implements. At the conclusion of the hearing of evidence on the latter, counsel for both parties then agreed that the trial Judge should decide the matters in dispute on the lien notes for the small implements without the intervention of the jury. Thereupon the trial Judge dismissed the jury, and gave judgment for respondent on the whole claim for amount claimed, less $388.85.

From this judgment the appellant appeals on the ground, among others, that the trial Judge was wrong in excluding the evidence above referred to and in refusing the proposed amendments. I will deal only with the proposed amendments as to fraud, as my remarks on this to a great extent apply to the other proposed amendments.

Paragraphs 8 and 9 of the defence referring to fraud are as follows:—

8. In the alternative, the defendant says that on or about August 30, 1913, he informed one McEwan, sales agent of the plaintiff, that he was open to purchase an engine that would pull eight 14-inch plows 6 inches deep breaking and walk along with it as an engine should, and stand up to it and that would pull a 40-64 Gaar Scott separator with four men

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pitching into it, and pull it as an engine should, and the said McEwan as agent of and on behalf of the plaintiff fraudulently represented and warranted that a certain 30-60 Mogul engine sold by the plaintiff would do the said work, and fraudulently represented to the defendant that a certain form of order and contract was only a lot of blue print containing nothing prejudicial to or at variance with his said representations, with intent to induce the defendant to execute the said order and contract and to make the agreements in writing set up in para. 8 of the statement of claim, the said McEwan well knowing that the said representations were false and the defendant was induced thereby to execute the said order and contract and to make the said agreement in writing and deliver the same to the plaintiff to the damage of the defendant.

9. The defendant did not read the contract or the agreement in writing at the time he was required to execute the same, relying wholly on the warranty and representations of the said McEwan and no copy thereof was left with him nor has he since been furnished with a copy and he does not know the contents thereof.

It is quite true that these paragraphs are complete without the allegation of repudiation. But it seems to me, when one reads the whole defence the matters in controversy between the parties are quite clearly made and stated. The very question of repudiation is raised in para. 12 dealing with the warranties, and I think the pleading shews that the pleader intended to raise the defence of fraud in obtaining the lien notes and agreement, but did not plead correctly. If pleaded correctly and proved, in my opinion it would be a complete defence, unless shewn that the appellant affirmed after knowledge of the fraud or was unable to make restitution.

Sec. 30, sub-sec. 7, of the Judicature Act (ch. 52, R.S.S.), directs that the Supreme Court

shall grant either absolutely or on such reasonable terms and conditions as to it shall seem just all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter so that as far as possible all matters so in controversy between the said parties respectively may be completely and finally determined and all multiplicity of legal proceedings concerning any such matters avoided.

Our Court r. 253 reads as follows:—

The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his statement of claim or pleadings, in such manner and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

This is the same as the English rule.

And in *Kurtz* v. *Spence*, 36 Ch. Div. 770, allowing an amendment which was applied for under this rule, Cotton, L.J., stated as follows, after quoting the rule:—

> When by an amendment the real substantial question can be raised between the parties, ought we to refuse to allow the amendment, having regard to the rule, and to the direction in the Judicature Act, that as far as possible in any proceeding all questions between the parties shall be decided so as to prevent multiplicity of actions?

I may add this was an appeal from Kekewich, J., who refused the amendment.

In the case at bar if the proposed amendments were disallowed it would still leave the respondent open to an action for deceit, and I think all matters in controversy between these parties in connection with this transaction should be disposed of in this action.

In *Tildesley* v. *Harper*, 10 Ch. D. 393, which was an appeal from Fry, J., who refused an application to amend at the trial, Bramwell, L.J., in his judgment allowing the amendment stated:

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

In the same case Thesiger, L.J., is reported as saying:—

> The object of these rules is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial.

And Brett, M.R., in *Clarapede* v. *Commercial Union Assocn.*, 32 W.R. 261 at 263, used the following language when allowing amendments:—

> However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated with costs.

On the foregoing authorities I am of the opinion that the proposed amendments should have been allowed.

The plaintiff's counsel contended that this amendment even if allowed would be false and useless, as the evidence shewed that the appellant had accepted the engine, and had used it and enjoyed benefits from its use. I have carefully gone over the evidence, and all I find is that an engine was delivered to appellant by respondent and that it was still at appellant's place, but there is nothing clearly shewing he accepted it. The question of

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acceptance is a question of fact to be submitted to the jury and this was one of the matters on which defendant's counsel wished to tender evidence. Then, with regard to its use and the benefits derived therefrom, I do not think this would be conclusive of acceptance, as it might have been a "trying out" of the engine, as was referred to in *Alabastine Co.* v. *Canada Producer*, 17 D.L.R. 813, 30 O.L.R. 394.

With regard to the cross appeal objecting to the allowance by the trial Judge of the item of $388.85 as of November 15, 1913, I think the trial Judge was right in allowing this.

It appears that the appellant, in the fall of the year 1913, did some threshing for Caswell & Davis Co., Ltd., for which this company owed him $463.60, and for which the appellant had a thresher's lien on this company's grain under the Thresher's Lien Act. At the request of the respondents' agent, the appellant assigned this account and his thresher's lien to the respondent and gave it 2 orders on the company for payment of this money.

The respondent collected from the company only $74.75 in May, 1914, after action brought, and failed to collect the balance, and failed to seize the grain under the lien to cover the balance, and the security under the thresher's lien was lost.

The trial Judge held that the orders were inland bills of exchange, and as the respondent had given time to the company without notice to the appellant and lost the security, the appellant was released from the unpaid balance amounting to $388.85, and held he was entitled to credit for this amount.

Section 17 of the Bills of Exchange Act (ch. 119, R.S.C.), is as follows:—

17. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specific person, or to bearer.

2. An instrument which does not comply with the requisites aforesaid, or which orders any act to be done in addition to the payment of money, is not, except as hereinafter provided, a bill of exchange.

3. An order to pay out of a particular fund is not unconditional within the meaning of this section: Provided that an unqualified order to pay, coupled with—

(*a*) an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount; or.

(*b*) a statement of the transaction which gives rise to the bill;

is unconditional.

Although these orders are not in the usual form of an inland bill of exchange, it seems to me they have all the essential requirements of the same and clearly come within the above definition. They are unconditional orders in writing, signed by the appellant—the person giving them—requiring the persons to whom they are addressed to pay, in one case without stating any time, and the other a fixed future time, in each case, a sum certain in money to the respondent.

The fact that these orders have a statement of the transaction which gives rise to the orders, does not make them unconditional, as specifically provided for by the foregoing sub-sec. 3(*b*). And with regard to the order which does not state the time for payment, by virtue of sec. 23(*b*) of the Bills of Exchange Act, it would be payable on demand.

The orders were accepted on November 8, 1913. The demand order was, therefore, payable on November 11, 1913, and the other on November 18, 1913, and the trial Judge found that respondents had given time to the acceptors without notifying the appellant. There is abundant evidence to support this finding and I do not think it should be disturbed. There is no evidence to shew that respondent gave notice of dishonour to the drawer, the appellant.

The bills then, not being paid at maturity, and no notice of dishonour being given to the drawer, and time having been given to the acceptors which resulted in the loss of the security, the surety, the drawer, is released, and in my opinion is entitled to receive credit for these bills or orders as of their due date, upon the lien notes given for the small implements.

The trial Judge allowed the appellant the costs of this issue, and I think this should not be disturbed, but there will still be a small balance of about $25.75 due the respondent on these lien notes for small implements, after allowing appellant credit for the said bills of exchange.

The result will be that the judgment will be set aside and

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there will be a new trial on the lien notes given for the engine, and judgment will not be entered for the balance due on the lien notes given for the small implements or for the appellant's costs of above issue until judgment is given in the new trial; and if the respondent be successful the appellant's costs of above issue will be set off against respondent's judgment *pro tanto*.

The appellant will have leave to amend his pleadings as he may be advised within 30 days from date, otherwise this respondent will be entitled to judgment.

As I come to the conclusion that the trial Judge should have allowed the amendments and there is nothing on the record to shew that respondent would have been taken by surprise and unprepared to continue the trial had the amendment been allowed, the costs of the trial, save the costs of the issue above referred to, will be costs in the cause.

The appellant will have the costs of the appeal.

Elwood, J.

ELWOOD, J., concurred in the judgment of the Court except as to costs of former trial. *Appeal allowed.*

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THE TRUSTS & GUARANTEE CO. v. RUNDLE.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. November 2, 1915.

1. APPEAL (§ I A—1)—FROM JUDGMENTS ORIGINATING IN SURROGATE COURT. Under sec. 37(*d*) of the Supreme Court Act, R.S.C., 1906, ch. 139, an appeal to the Supreme Court of Canada from a judgment of the Appellate Division of the Supreme Court of Ontario, in a case originating in a Surrogate Court, is maintainable.

[*Standard Trusts Co.* v. *Treasurer of Manitoba*, 23 D.L.R. 811, 51 Can. S.C.R. 428, referred to; *Re Rundle*, 32 O.L.R. 312, affirmed.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 32 O.L.R. 312, *sub nom. Re Rundle*, varying an order of a Surrogate Judge on the passing of accounts.

The only substantial question decided on this appeal was one of jurisdiction, namely, whether or not the Surrogate Court of Ontario is within the terms of sec. 37(*d*) of the Supreme Court Act, which provides for an appeal "from any judgment in appeal in a case or proceeding instituted in any Court of Probate." The same question was raised but not decided in the case of *In re Muir Estate*, 23 D.L.R. 811, 51 Can. S.C.R. 428.

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THE REGISTRAR:—This is an appeal from the judgment of

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the Supreme Court of Ontario, in an action instituted in the Surrogate Court of the County of York. The appellant, pursuant to the Supreme Court Act, applies to have a bond as security for his appeal allowed. No objection is taken to the form of the bond, but the sole question is whether or not the Supreme Court has jurisdiction to hear the appeal. The appellant relies upon sec. 37, sub-sec. (*d*) of the Supreme Court Act, which provides as follows:—

37. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest Court of final resort now or hereafter established in any province of Canada, whether such Court is a Court of Appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a superior Court, in the following cases. . . .

(*d*) From any judgment on appeal in a case or proceeding instituted in any Court of Probate in any province of Canada other than the Province of Quebec, unless the matter in controversy does not exceed five hundred dollars.

I am called upon first to determine whether the words "Court of Probate" used in this section include the Surrogate Court of the County of York. This provision of the Supreme Court Act is a consolidation of an amendment made by 52 Vict., ch. 37. The legislation probably was passed to meet the objections raised by the Supreme Court in the case of *Beamish* v. *Kaulbach*, 3 Can. S.C.R. 704, where it was held that the Court of Probate of Nova Scotia was not a superior Court and, therefore, an appeal taken from such Court to the Supreme Court of Nova Scotia was not the subject of a further appeal to the Supreme Court of Canada. At that time the Supreme Court Act only gave an appeal in cases originating in a superior Court.

The Ontario Surrogate Court Act, R.S.O. 1914, ch. 62, provides by sec. 21 as follows:—

21. Subject to the provisions herein contained, every such Court shall also have the same powers and the grants and orders of such Court shall have the same effect throughout Ontario, as the former Court of Probate for Upper Canada, and its grants and orders respectively had in relation to the personal estate of deceased persons and to causes testamentary within its jurisdiction; and all duties which, by statute or otherwise, were imposed on or exercised by such Court of Probate or the Judge thereof in respect of probates, administrations and matters and causes testamentary, and the appointment of guardians and otherwise, shall be performed by the Surrogate Courts and the Judges thereof, within their respective jurisdictions.

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The origin of the Upper Canada Court of Probate is to be found in an Act passed 33 Geo. III., ch. 8 (1793), which constituted a

Court of Probate with full power and authority to issue process and hold cognizance of all matters relating to the granting of probates and committing letters of administration and to grant probates of wills and commit letters of administration of the goods of persons dying intestate having personal estates, rights and credits within this province, to be called and known by the name of the Court of Probate of the Province of Upper Canada.

The Governor, Lieutenant-Governor, or person administering the government, presided over the said Court and he was given power to appoint an official principal of the Court together with a registrar and necessary officers. By the second section of the same Act, for the convenience of the inhabitants of the province, the Governor, etc., was authorized to appoint a Surrogate Court in each district for the purpose of granting probates and letters of administration presided over by a Surrogate Judge. By sec. 16 an appeal lay from the Surrogate Court to the Judge of the Court of Probate.

In 1858 by 22 Vict., ch. 93, the Probate Court was abolished and the jurisdiction in relation to the granting and revocation of probates and wills and letters of administration was vested in the Surrogate Courts of the province and this has continued the law down to the present time.

At the time *Beamish* v. *Kaulbach*, 3 Can. S.C.R. 704, was decided the Court of Probate in the Province of Nova Scotia was substantially identical with the Surrogate Court in the Province of Ontario (R.S.N.S., ch. 395). There was a Judge and a Registrar of Probate in each county and the jurisdiction of these Judges covered all matters relating to the probate of wills and administration of intestate estates. I am, therefore, of the opinion that the words "Court of Probate" used in the Supreme Court Act, are not to be limited to Courts bearing the name of Probate Courts, but apply to Surrogate Courts in other provinces, having similar jurisdiction.

The 2nd point I have to determine is whether this is "an action, suit, cause, matter or other judicial proceeding" or a "case or proceeding" within the meaning of sec. 37 of the Supreme Court Act. Mr. Raney contends that it does not fall

within that expression; that what the Judge has done, has been simply to make an audit of the administrators' accounts and that his action was in no sense judicial. I cannot accede to his argument. The Century Dictionary defines "judicial" as follows:—

> Pertaining to the administration of justice, proper to a Court of law; consisting of or resulting from legal inquiry or judgment as judicial power or proceedings.

Webster defines "judicial" as "practiced or employed in the administration of justice as judicial proceeding."

See also the judgment of this Court in *Turgeon* v. *St. Charles*, 15 D.L.R. 298, 48 Can. S.C.R. 473.

The facts of this case as disclosed by the judgment of the Court of Appeal, reported in 32 O.L.R. 312, would appear to be that a dispute arose between the plaintiff and the trust company with regard to an item of $1,100 advanced by the trust company to the infant Rundle out of the corpus of his estate. When the boy became of age, he executed a release to the company for what they had undoubtedly done without warrant or authority, and the administrators' accounts were duly audited and passed by the Surrogate Court of the County of York. An action was taken in the High Court to set aside this release and I understand a consent judgment was made by Latchford, J., as follows:—

> 1. This Court doth declare that the order made by Edward Morgan, Esquire, acting Judge of the Surrogate Court of the County of York, on December 22, 1909, on the auditing and passing of the accounts of the defendants, as administrators of the estate of Lily Rundle, and as guardian of the said Clarence Arthur Rundle, is not binding upon the plaintiffs and that the plaintiffs are entitled to have the said accounts re-taken and re-audited in the said Surrogate Court.
>
> 2. And this Court doth order that the costs in this action be paid as the Judge of the Surrogate Court of the County of York shall determine on the re-taking and re-auditing of the said accounts.

Proceedings were thereupon taken *de novo* by the administrators to pass their accounts before Winchester, Judge of the Surrogate Court of the County of York. The proceedings are regulated by the Surrogate rules and the petition and affidavits supporting the same and all the subsequent proceedings were carried on under the style of cause "in the Surrogate Court of the County of York." The Judge of that Court, after reciting the proceedings before him, made an order on May 29, 1914,

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which is the subject of this appeal, in which he made a finding as to the receipts and expenditures of the administrators and directed that the costs which had been referred to him in the judgment of Latchford, J., should be paid out of the estate as well as the costs of the administrators in connection with the auditing and passing of accounts.

The Surrogate Act, R.S.O., 1914, ch. 62, sec. 34, provides by sub-sec. 1 as follows:—

> Any person who deems himself aggrieved by an order, determination or judgment of a Surrogate Court, in any matter or cause, may appeal therefrom to a Divisional Court.

Sub-sec. 5 provides that:—

> An appeal shall also lie from any order, decision or determination of the Judge of a Surrogate Court on the taking of accounts in like manner as from the report of a Master under a reference directed by the Supreme Court, and the practice and procedure, upon and in relation to the appeal, shall be the same as upon an appeal from such a report.

I would interpret these provisions for appeal to be that sub-section 1 has reference to an appeal from the final order, determination or judgment of the Court, while sub-sec. 5 is an interlocutory appeal which may be taken during the course of the audit before the Judge. Mr. Raney contends that the order made by the Surrogate Judge was an order made under sub-sec. 5 and that sub-sec. 1 has reference only to contestations between plaintiff and defendant in such cases as a proceeding in proof of a will in solemn form or where a will is attacked on the ground of undue influence or want of capacity. I do not think this distinction is sound and I hold that the order in this instance made by the Surrogate Judge is an order within the provisions of sub-sec. 1 of sec. 34 of the Surrogate Act and is a judgment in a "judicial proceeding" and "is a case or proceeding instituted in a Court of Probate" within the meaning of sec. 37 of the Supreme Court Act.

It is to be noted that the appeal under sub-sec. 5 would be to a Judge of the Supreme Court of Ontario, whereas the appeal under sub-sec. 1 is to the full Court and that in the present case Mr. Raney's clients (so far as the papers and proceedings before me disclose) treated the judgment in question as one under sub-sec. 1 because the appeal was taken direct to the Court of Ap-

peal, which has by the new Judicature Act been substituted for the Divisional Court, instead of being taken to a single Judge.

This point being determined in favour of the appellants no further question remains as to the amount involved as admittedly it is over $500. The security is, therefore, allowed with costs.

(Sgd.) E. R. CAMERON.

Rowell, K.C., for appellant.

Hales, for respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—An important question of jurisdiction is raised on this appeal, which I think should be determined, although I am of opinion that the appeal should be dismissed on the merits.

The Supreme Court Act, sec. 37(*d*), provides for an appeal to this Court

from any judgment on appeal in a case or proceeding instituted in any Court of Probate in any province of Canada other than the Province of Quebec unless the matter in controversy does not exceed $500.

It is true that this legislation originated by reason of a decision of this Court in *Beamish* v. *Kaulbach*, 3 Can. S.C.R. 704, where it was held that the Court of Probate in Nova Scotia was not a superior Court, but the language of the amending statute shews that it was not intended to apply solely to the Maritime Provinces where alone the term "Court of Probate" is used for Courts having jurisdiction over estates of deceased persons, the language of the statute being "any Court of Probate in *any* province of Canada."

In the Province of Ontario prior to 1858, the Court having jurisdiction over the estates of deceased persons was called *eo nomine* "the Court of Probate," but after that date its name was changed to the Surrogate Court, and to-day the R.S.O., by ch. 62, sec. 21, in conferring jurisdiction upon the Surrogate Court provide that such Court shall have the same powers as the former Court of Probate for Upper Canada.

I am, therefore, of opinion that the Surrogate Court in Ontario is included in the expression "Court of Probate" in the Supreme Court Act.

Davies, J.

DAVIES, J.:—The judgment of Mulock, C.J., speaking for the Second Appellate Division of the Supreme Court of Ontario in

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this case is quite satisfactory to me and I agree in the disposition of the appeal made by that Court. I am more glad to find myself in accord with the judgment appealed from because of the ever increasing appointments of trust companies as trustees and executors of the wills of deceased persons and administrators of their estates and the great necessity which exists for impressing upon these companies that while there may be pecuniary advantages arising out of such appointments, there are also necessary liabilities calling for the exercise of reasonable prudence, skill and attention on their part.

On the argument of the appeal a very important question was raised as to our jurisdiction to hear appeals in actions originating in the Surrogate Court of Ontario.

The same point was raised before the registrar of this Court who, after hearing argument on the point by counsel, affirmed our jurisdiction. I have read his reasons for judgment and agree with them.

The jurisdiction of this Court is to be found in sec. 37, sub-sec. (*d*), of the Supreme Court Act, which provides for an appeal to this Court

from any judgment on appeal in a case or proceeding instituted in any Court of Probate in any province of Canada other than the Province of Quebec unless the matter in controversy does not exceed $500.

This sub-sec. (*d*) was no doubt enacted in consequence of the judgment of this Court in *Beamish* v. *Kaulbach*, 3 Can. S.C.R. 704, which held that the Probate Court of Nova Scotia was not a Superior Court and, therefore, an appeal did not lie here from a judgment of the Supreme Court of Nova Scotia in a matter or controversy originating in the Probate Court.

In the Province of Ontario there is no Court called the Probate Court. The Court which formerly existed there under that name was abolished in 1858 and its jurisdiction with respect to the granting and revocation of probates of wills and letters of administration, etc., was vested in the Surrogate Courts of the province. That jurisdiction still continues and is to be found in the R.S.O., 1914, ch. 62, secs. 19, 20, and 21.

The latter section expressly provides that every such Surrogate Court shall have the same powers, etc., and its grants and orders the same effect as the former Court of Probate for Upper

Canada had in relation to the personal estate of deceased persons and to causes testamentary within its jurisdiction, and that all duties which by statute or otherwise were exercised by such Court of Probate or the Judge thereof in respect of probates, administration and matters and causes testamentary and the appointment of guardians and otherwise should be performed by the Surrogate Courts.

These latter Courts were substantially the same Courts as the Probate Courts, though under another name, and if the legislature has somewhat added to their jurisdiction, such addition cannot, in my opinion, affect the right of appeal under the Supreme Court Act.

I think the section of the Supreme Court Act quoted above applies to these Surrogate Courts of Ontario (so called) and are not to be limited to those Courts in some of the provinces such as Nova Scotia exercising the same jurisdiction and called "Probate Courts."

It is a mere question of name only, not of substance. The Courts are the same Courts: their jurisdiction covers the same subject matters. The only difference lies in the name given to the Courts, and in Ontario it is expressly enacted that their powers and duties shall embrace all those of the old probate Courts. I would dismiss the appeal with costs.

Idington, J.

IDINGTON, J.:—This appeal is from the judgment of the Appellate Division of the Supreme Court of Ontario reversing an order of the Judge of the Surrogate Court of the County of York made as a result of his passing the accounts of the appellant and as an administrator and guardian appointed by the said Court.

The first question to be considered is our jurisdiction to hear such an appeal. Any we have must rest on sec. 37, sub-sec. (*d*), as follows:—

(*d*) From any judgment on appeal in a case or proceeding instituted in any Court of Probate in any province of Canada other than the Province of Quebec unless the matter in controversy does not exceed five hundred dollars

first enacted in 1887 by 50-51 Vict., ch. 16, and probably as result of the decision of this Court in the case of *Beamish* v. *Kaulbach*, 3 Can. S.C.R. 704, where it was held no appeal would lie to

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this Court from a Court of Probate of Nova Scotia, inasmuch as it was not a Superior Court within the meaning of the Supreme and Exchequer Court Act. The issue in that case was the validity of a will.

The meaning of this enactment came in question in the recent case of *In re Muir Estate*, 23 D.L.R. 811, 51 Can. S.C.R. 428. In that case the parties were evidently on their way to the Judicial Committee of the Privy Council and only calling here as at a half-way house, neither side cared to have the question raised, for they desired and got the opinion of this Court on the main issues raised in appeal without any very express decision being reached by the Court on the question of jurisdiction.

I, however, then examined that question in its bearing upon that case and set forth my views to which I may be permitted to refer without repeating them at length here.

This case is, however, essentially different from what was involved therein. That went to the question of the jurisdiction of the Surrogate Court in Manitoba granting probate before or until the succession duties were provided for.

This, however, is of an entirely different character. The issues raised herein have nothing to do with the grant of administration. It is assumed that grant was rightfully made and is no way in question.

In Ontario the Judges of the Surrogate Courts have, as results partly of the development of practice and partly of statutes passed since the above quoted amendment to the Supreme Court Act, obtained very extensive powers over the administration of estates concurrently with what still exists in the Supreme Court and formerly existed almost entirely in the Court of Chancery, and later, after the passing of the Judicature Act, in the High Court of Justice in virtue of its equity jurisdiction.

The outline of the story of how that has come about is somewhat thus:—

Administrators were always required to give a bond with sureties for the due administration of the estates entrusted to them and to exhibit an inventory of the estate and make, or cause to be made, a true and just account of the administration when required.

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Any one aggrieved by misconduct in any such regard might apply to the Surrogate Judge to obtain an assignment of the bond in order to bring an action upon it.

Incidentally thereto the Judge might have to examine the accounts of the administrator to ascertain if there was reason to believe there had been such a breach of the condition of the bond as entitled the applicant to its assignment. There was no final adjudication upon the rights of the parties arising out of the accounting in such a proceeding. All it involved might be whether a *primâ facie* case had been made out. Or possibly the rights had been determined by the Court of Chancery in the course of an administration suit and the establishment therein of what constituted a breach of the condition of the bond which the sureties were then called upon to make good.

Ever since 1859 the Surrogate Judges had power to make allowances to the administrator, executor or trustee in the way of compensation for his services upon his passing his accounts.

These provisions tended to the development of a practice of passing accounts, but, if my memory serves me correctly, there was nothing final therein in the way of determining the rights or liabilities of the administrator till comparatively recent legislation, of which 10 Edw. VII., ch. 31, sec. 71, is now, in R.S.O., 1914, ch. 62, sec. 71, the outcome.

I may, in passing, point out that the administration of estates, originally part of the exclusive jurisdiction of the Court of Chancery, and later after law and equity Courts were consolidated by the Judicature Acts, of the High Court, has in practice, without depriving the higher Courts of jurisdiction, largely passed by virtue of a few minor, but growing, powers, aided by numerous statutes, into the Surrogate Courts of Ontario.

These statutory provisions promoted a less expensive mode of administration than had prevailed in the Court of Chancery or the High Court of Justice.

I doubt if the legislature of the province ever desired that in aiding such development as a means of the economical administration of justice, in that regard, it desired an appeal to exist to this Court as part of the system.

Of course it matters little what they desired if the legal result

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of a correct interpretation of the above quoted amendment brings that about.

I may suggest, however, that I hardly think Parliament would have intended to bring about any such undesired and undesirable result.

The local legislatures can remove many subjects of litigation from the jurisdiction of this Court by providing, through inferior Courts, for the judicial determination of matters which formerly were and still are subject matters to be dealt with in superior Courts.

Important litigation finds its way to the superior Courts in any case where the parties so desire. Now are we, by a side wind as it were, to gather in appeals originating in the inferior Courts as well as those originating in the superior Courts?

This appeal is a very good illustration of the probable result of such a development.

I cannot think it ever was the intention of Parliament to bring about such a result. I think all that was intended by the amendment in question was to give an appeal in cases that belonged, properly speaking, to the Courts of Probate as such.

The validity of a will must always be an important question and trials of issues which involved that in cases, where as in Ontario the amount of the estate in controversy must exceed $1,000, probably was all the amendment extended to.

If, for example, the Judges of the County Courts, who are generally Judges of surrogate in their respective counties, were called only Judges of Surrogate and their jurisdiction as Judges of County Courts by process of consolidation were transferred to them as Judges of surrogate, would that enable appeals in all cases now within County Court jurisdiction to be brought here?

The case of *Daly* v. *Brown*, 39 Can. S.C.R. 122, was referred to in the argument herein and if the point had been raised therein and decided I should feel bound to follow it. No such question, however, was raised. A question was raised of the jurisdiction of the provincial Court, but none as to the competence of this Court.

For my own part I confess I was, until the question was raised in *In re Muir Estate*, 23 D.L.R. 811, 51 Can. S.C.R. 428,

under a vague impression that the amendment was intended only to apply where, as in the Maritime Provinces, the Courts were designated "Probate Courts." The fact that the amendment stood so long without any litigant, in a province where the Courts of Probate are called "Surrogate Courts," attempting to come here by virtue of it, seemed to lend *primâ facie* a colour to this idle notion. My examination of the question in that case convinced me for reasons I therein assigned that such a construction was untenable.

To say the least the jurisdiction in such cases as this must be exceedingly doubtful; and it has ever been the rule of this Court where the jurisdiction was doubtful not to exercise it.

I conclude, therefore, for the foregoing reasons this appeal should be dismissed, but without costs as the point was not taken by appellant and hence not argued as it might otherwise have been.

Duff, J.

DUFF, J.:—I think the Appellate Division has drawn the line a little more narrowly than I should have done. The Ontario Courts, however, appear to have found from experience that the practice of requiring guardians to obtain antecedent sanction with regard to extraordinary expenditures must be strictly insisted upon for the protection of the property of infants on pain as a rule of the guardian establishing to a demonstration and entirely satisfying the conscience of the Court as to the propriety of the payments not so sanctioned; and although this practice cannot be strictly said to be enjoined by law, yet if followed with reasonable regard to special circumstances, it is not necessarily out of harmony with the law and this Court ought not to interefere with a judgment pronounced in the spirit of this settled practice unless it appears that some injustice has been done. I concur in dismissing the appeal.

As to jurisdiction I think "Court of Probate" in sec. 37(*d*) denotes any Court exercising a general probate jurisdiction.

It does not follow that every judgment or order of such a Court is appealable; but the judgment now before us is, I think, well within the purview of the sub-section.

Anglin, J.

ANGLIN, J.:—For the reasons which I stated in *Standard Trusts Co.* v. *Treasurer of Manitoba*, 23 D.L.R. 811, 51 Can.

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S.C.R. 428, during the argument of this appeal I doubted our jurisdiction to entertain it. I cannot yet believe that Parliament intended by the amendment now embodied in clause (*d*) of sec. 37 of the Supreme Court Act to confer a right of appeal from the provincial Appellate Court to this Court in cases originating in the Surrogate Courts of Ontario whenever the matter in controversy amounts to or exceeds $500. Cases originating in other inferior Courts in that province cannot be brought here whatever the amount involved; and where the right of appeal in proceedings originating in the Supreme Court of the province is dependent upon the amount in controversy it must exceed $1,000. To allow costly appeals to this Court in mere matters of summary accounting in the Ontario Surrogate Courts is destructive of the purpose for which this jurisdiction was given to those Courts. It seems to me deplorable that the allowance or disallowance of an item of $500 by a Surrogate Judge auditing the accounts of an executor, administrator or guardian may be made the subject of an appeal to this Court. Yet, upon mature consideration, I am unable to say that an Ontario Surrogate Court is not a "Court of Probate," or to find any sufficient ground for denying a right of appeal which clause (*d*) of sec. 37 purports in explicit terms to give.

Upon the merits, except in regard to two items, I think the appeal cannot succeed. It would be most unfortunate were anything that we might do to encourage a departure from the wholesome practice which requires guardians of infants to obtain the prior sanction of the Court to any encroachment on the capital of the estates of their wards, or a relaxation of the tacit rule prescribing that when such prior sanction has not been obtained guardians seeking to have expenditure made out of capital allowed must establish by the clearest and most convincing proof that an order sanctioning it would have been made had it been applied for in advance. The appellants failed to satisfy the Judges of the Appellate Division that they would have obtained such an order in regard to a large part of their expenditures in the present case, and in the disallowance by that Court of all the items in question except two I have not been convinced that there has been any error.

One of the two excepted items is a sum of $100 deducted from the commission of $500 allowed by the Surrogate Court Judge to the appellants, who were administrators of the estate of Lilly Rundle and guardians of the estate of her son, as he says in recompense for their services "in dealing with the estate and handing the balance over to the plaintiffs." The deduction was made by the Appellate Division on the assumption that of the $500 commission allowed $100 was for the services of Mr. Warren as guardian of the person of the infant. With respect, I find nothing whatever in the record to warrant that assumption and I think it should not have been made.

Anglin, J.

The other item is the allowance by the Judge of the Surrogate Court to the appellants of the costs of an action brought by Clarence A. Rundle against them to set aside a release which they had obtained from him. The appellants acceded to this claim and judgment was pronounced by consent setting aside the release, and, presumably, to avoid the necessity of any consideration of the merits of the action in the High Court Division, referring the question of the costs of it to the Judge of the Surrogate Court to whom the taking of the accounts was remitted. In dealing with these costs of proceedings in another Court I think the Surrogate Court Judge acted as *persona designata* and that his disposition of them, however erroneous it may be deemed, was not subject to appeal. Both these items should be allowed to the appellants. Subject to this modification I think the appeal fails and should be dismissed. But in view of the result there should be no costs to either party.

BRODEUR, J.:—I am of opinion that the judgment *a quo* should be confirmed. It has been found, it is true, that the minor, Clarence A. Rundle, deceived the company appellant; but it was also the duty of the company, as guardian of his property, to look after his proper maintenance according to his position in life.

Brodeur, J.

If the expenditure for the maintenance had not exceeded the income of the infant's property, no serious blame perhaps could be made to the guardian. But the expenditure exceeded largely the income; it was not made according to the position in life which the minor occupied before his mother's death and it de-

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veloped in the young boy very bad habits which have perhaps affected his future. Besides, that money was expended without the guidance and the authorization of the Court.

Appeal dismissed.

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New Brunswick Supreme Court, McLeod, C.J., and White and Grimmer, JJ.

1. TRIAL (§ I B—7)—SEPARATE TRIAL OF TWO COUNTS IN INDICTMENT — CR. CODE SEC. 857.

Where evidence is tendered in support of one count of an indictment which while admissible thereon is not admissible in proof of another count of the same indictment, the defendant's remedy is to apply under Cr. Code sec. 857 to have each count tried separately if he fears that, notwithstanding the direction which would properly be given by the judge to the jury to disregard such evidence in considering the second count, the jury would unconsciously be influenced thereby to the prejudice of the accused.

2. CRIMINAL LAW (§ I F—25)—CONDONATION BY PARTY AGGRIEVED NO DEFENCE TO INDICTMENT PREFERRED BY CROWN.

A private party cannot by condoning or forgiving a personal injury done to himself in the commission of crime, thereby condone or pardon the offence against the King so as to enable the wrongdoer to defend on that ground an indictment preferred against him by the Crown.

3. ADULTERY (§ I—5)—AS A CRIME—NEW BRUNSWICK UNREPEALED LAW OF 1854—INDICTMENT.

Adultery is an indictable offence in the Province of New Brunswick under the pre-confederation statute of that province, R.S.N.B. 1854, ch. 145, sec. 3, which has not yet (1915) been repealed by the Dominion Parliament.

4. CRIMINAL LAW (§ II A—30)—PROCEDURE APPLICABLE UNDER PRE-CONFEDERATION PROVINCIAL STATUTE—ADULTERY INDICTABLE IN NEW BRUNSWICK.

The repeal in 1886 by the Dominion Parliament of parts of certain pre-confederation statutes of New Brunswick, which regulated procedure in prosecutions for adultery under R.S.N.B., 1854, ch. 145, leaves that offence punishable in New Brunswick under the procedure applicable to indictable offences generally under the Criminal Code of Canada. [*R. v. Buchanan* (1846), 8 Q.B. 883, referred to.]

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CROWN case reserved. The defendant was tried before Landry, C.J., of the King's Bench Division and a jury, at the Queen's Circuit, in October, 1914, on an indictment containing two counts charging him with adultery. The first count charged an offence on September 16, 1913, and the second an offence on March 14, 1914.

No application was made on the trial to have the counts tried separately. The defendant was found guilty on both counts. Before the defendant pleaded to the indictment his counsel moved to quash it, and on questions then raised and on further questions raised during the course of the trial, the Chief Justice

Statement

reserved a case for the opinion of the Court of Appeal, submitting the following questions:—

(1) Was the offence charged an indictable offence under the Criminal Code?

(2) Should the offence have been tried summarily under chapter 123 of the Consolidated Statutes of New Brunswick, 1903?

(3) Does the indictment disclose an indictable offence under the Criminal Law of Canada?

(4) Was there a legal commitment upon which a bill of indictment could be preferred?

(5) Can a conviction be sustained on a bill of indictment not preferred by the Attorney-General, nor by his direction nor with the written consent of the presiding Judge?

(6) Is the evidence of marriage sufficient, there being no evidence that the person performing the ceremony had been duly licensed?

(7) Was the evidence sufficient to raise an absolute legal presumption of adultery under either count of the indictment?

(8) Under the facts proved should the question whether the complainant condoned the offence have been submitted to the jury?

(9) Was not the evidence of what occurred on March 14 and 15, improperly received and submitted to the jury?

W. B. Wallace, K.C., moved to quash the indictment.

Hon. J. B. M. Baxter, Attorney-General, for the Crown.

The judgment of the Court was delivered by

White, J.

WHITE, J.:—In the case reserved, one of the grounds stated as an objection to the conviction is that there is not sufficient evidence of marriage, there being no evidence that the Reverend Mr. Patterson was duly licensed. As this ground was not pressed or argued before us, I take it to have been abandoned, and, therefore, will not discuss it.

A second ground is that evidence of what occurred on March 14 or 15 should not have been admitted or left to the jury. The evidence referred to was adduced in support of the adultery charge in the second count of the indictment, and I think was properly received for that purpose. Admitting for the moment

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(but without so deciding) that this evidence was not such as could properly have been received in proof of the charge laid in the first count, that fact would not render bad its admission in support of the second count. It not infrequently happens that evidence is properly received in support of one count in an indictment, which would be inadmissible to prove the charge in another count of the same indictment, and it is easily conceivable that in some such cases the jury, notwithstanding a proper charge to them to disregard such evidence in considering a count to which it is not applicable, might, nevertheless, be unconsciously influenced thereby in their finding upon such count. But where the prisoner feels that he is liable to be thus prejudiced in his defence he may apply to have each count tried separately. This was not done in the present case. Moreover, I find it difficult to believe that the prisoner can have been prejudiced in his defence to the first count by the evidence admitted in proof of the second count, because the evidence given in support of the first count is such that no jury could well have failed to convict upon it had it stood alone. As to the evidence in support of the second count, I may say that while it is, I think, sufficient to warrant a conviction upon that charge, it is not so abundantly convincing as is the evidence upon the first count; and for that reason and having regard to all the circumstances of the case, I venture to suggest to the learned Chief Justice of the King's Bench Division, who tried the case, for his consideration, whether the ends of justice will not be sufficiently served by imposing sentence under the first count only.

A third objection is that under the facts the complainant condoned any offence, and this should have been submitted to the jury. If this objection is intended to be construed as covering a contention, that on the assumption of adultery being a criminal offence, the complainant could, by condoning the offence deprive it of its criminal character, I can only say that in my judgment such a contention is not even arguable. A crime is an offence against the state, and not merely a wrong done to an individual. Hence, no private party can, by condoning or forgiving a personal injury done to himself in the commission of crime, thereby condone or pardon the offence against the King—that is

to say, against the state—which is an essential element of all crime.

The remaining six grounds set forth in the reserved case form one contention, namely, that adultery committed in this province is not a crime punishable by indictment. The indictment is admittedly laid under ch. 145, sec. 3, of the Revised Statutes of New Brunswick (1854), which reads: "Whoever shall commit adultery shall be guilty of a misdemeanour, and shall pay a fine not exceeding one hundred pounds, or be imprisoned for a term not exceeding two years." This section was in force at the time the British North America Act was enacted and the Dominion of Canada was created. It has never since been expressly repealed. The learned counsel for the prisoner contends, however, that this section is in effect repealed by sec. 91 of the British North America Act, because that section gives Parliament exclusive power to deal with the criminal law, including procedure in criminal matters; or, failing that ground, then because Parliament has, by the Revised Statutes of Canada (1886), p. 2259, repealed secs. 18, 20 and 22 of ch. 156 of the Revised Statutes of New Brunswick, and also sec. 3 of ch. 158 of the same Revised Statutes, these being sections of the old provincial law which regulated procedure in prosecution for adultery. It is argued that inasmuch as this procedure, originally provided by the provincial law, is repealed, either there remains no procedure under which the crime of adultery can be prosecuted, or, if there be such procedure, it is the procedure alone which is provided by ch. 123 of the Consolidated Statutes of New Brunswick (1903), sec. 2 of which reads as follows: "This chapter shall only apply for the purpose of recovering any fine, or enforcing any order, penalty or imprisonment imposed by virtue of any Act of the Legislature of this province, or by virtue of any by-law, ordinance or regulation lawfully made under the authority of any Act of the Legislature of this province.

Now, it is quite clear that under the law of New Brunswick, adultery was, at the date of confederation, a crime punishable on indictment. By sec. 129 of the British North America Act, it is enacted: "Except as otherwise provided by this Act, all

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laws in force in Canada, Nova Scotia or New Brunswick, at the Union, and all Courts of civil and criminal jurisdiction, and all legal commission, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the union had not been made; subject, nevertheless, except with respect to such as are enacted by, or exist, under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective province, according to the authority of the Parliament, or of that Legislature, under this Act."

By virtue of this section I have quoted, adultery committed in New Brunswick must still continue to be a crime there, unless or until the Provincial Act which originally created the offence is repealed. Although in 1869 the Dominion Parliament, by ch. 36, repealed many of the laws of the several provinces of Canada dealing with criminal offences and, by subsequent legislation, has repealed or amended other provincial laws governing crime and criminal procedure, sec. 3 of ch. 145 of the Revised Statutes of New Brunswick, has, as I have stated, been left unrepealed.

It is, moreover, quite clear that no provincial legislation passed subsequent to confederation could amend or affect the procedure in a trial for adultery, because, by the terms of the British North America Act, all criminal law, including procedure, is within the exclusive legislative authority of Parliament. Hence, neither ch. 123 of the Consolidated Statutes, 1903, nor the sections of the New Brunswick law embodied and re-enacted in that consolidation, could alter the procedure in trials for adultery.

For the reasons I have stated, adultery in this province continued after confederation to be a crime. Until the procedure provided by the Provincial Act was repealed that procedure continued in force. When, in 1886, Parliament repealed this old provincial procedure, it did not then or thereby repeal the provincial enactment which made adultery a crime. The effect of abolishing the former procedure was and is simply to render

adultery in this province punishable under the procedure provided by the criminal law of Canada applicable to indictable offences generally; that is to say, to all indictable offences for which special procedure is not otherwise provided.

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Being a crime, adultery must be tried by indictment, in the admitted absence of any procedure provided by Dominion law for its trial in any other mode: see *The Queen* v. *Buchanan* (1846), 8 Q.B. 883. In other words, when Parliament left the law creating the crime of adultery unrepealed, while abolishing the old procedure under which adultery was formerly tried, it must, I think, be taken to have intended, not to abolish the crime itself, but merely to substitute for such old procedure the procedure applicable in Canada to the trial of crimes in general. I think the conviction should be affirmed. *Conviction affirmed.*

DUPUIS v. BLOUIN.

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Quebec Sessions of the Peace, Langelier, J.S.P.

1. SUNDAY (§ III A—10)—SUNDAY OBSERVANCE—SALE OF FRUITS AND CIGARS BY RETAIL—AUTHORIZATION BY PROVINCIAL LAW—EXCEPTION FROM FEDERAL LAW.

Section 4466, R.S. Que. 1909, preserves, subject to the restrictions therein mentioned, all such liberties as are recognized by the customs of the Province of Quebec as to Sunday trading, and on a prosecution in that province under the Lord's Day Act, R.S.C. 1906, ch. 153, for selling by retail fruits and tobacco on a Sunday at a place where there is no municipal by-law prohibiting such sales, it may be shewn by parol evidence in defence of the charge that such sales, of which there is no express prohibition in either federal or provincial Acts, are customary in the Province of Quebec and therefore lawful under the exception contained in the Federal Act of matters provided "in any provincial Act or law;" (R.S.C. 1906, ch. 153, sec. 5).

[*Kennedy* v. *Couillard*, 17 Can. Cr. Cas. 239, referred to.]

PROSECUTION of defendant in summary proceedings under the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 13, for selling fruits and cigarettes at defendant's store on a Sunday in alleged contravention of sec. 5 of the Act.

J. Gosselin, K.C., for the complainant.

Hon. L. A. Taschereau, K.C., for defendant.

LANGELIER, J.:—It has been established by the witness Yvonne Blouin, a sister of the defendant, that on the 6th June last, a Sunday, she had sold fruits and cigarettes; she had added that she had been instructed by the defendant not to sell anything beside fruits and cigarettes.

Langelier, J.

Witness Havier Blouin, the father of the defendant swore that it was the usage everywhere in the province to sell fruits and

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tobacco on Sunday. R.S.C. 1906, ch. 153, sec. 5, and sec. 4466 of the R.S. Que. referred to.

It has been contended by the prosecution that the laws respecting the observance of Sunday in the Province of Quebec had been declared unconstitutional by our Supreme Court. In support of that contention the case of *Ouimet* v. *Bazin*, 3 D.L.R. 593, 20 Can. Cr. Cas. 458, 46 Can. S.C.R. 502, was cited. That judgment applies only to moving pictures and does not affect in any way our laws respecting Sunday observance. It has been decided in Ontario that a victualler is allowed to sell on Sunday all kinds of victuals. *R.* v. *Albertie*, 3 Can. Cr. Cas. 356.

The Supreme Court of N.B., sitting full bench, has decided that the sale of cigars on Sunday may be prohibited by an Act of the Legislature or by a municipal by-law; that it is a mere police by-law, the violation of which does not constitute a criminal offence exclusively within the jurisdiction of the Parliament of Canada. *Re Greene*, 4 Can. Cr. Cas. 182.

Our own Court of Appeal in the Province of Quebec has also decided that a by-law of the city of Montreal authorizing the sale on Sunday of fruits and cigars does not fall under the criminal law of Canada. *Kennedy* v. *Couillard*, 17 Can. Cr Cas. 239.

What is to be concluded from those decisions?

They establish (1) that a municipality has authority to pass a by-law prohibiting the sale on Sunday of fruits and cigars; (2) that a victualler has the right to supply on Sunday things necessary to life; (3) that in the absence of a by-law in the Province of Quebec, the sale of fruits and cigarettes is not forbidden.

In our province we remain, in respect of Sunday observance, under the authority of the Revised Statutes of Quebec; now sec. 4466 allows all such liberties as are recognized by the customs of this province.

It has been proved by Havier Blouin, and he was not contradicted, that it was the general custom in the province to sell fruits and tobacco on Sunday. No evidence was offered to the effect that there was in the parish a by-law prohibiting it.

The offence against the defendant does not come under the federal statute on account of the exceptions therein mentioned in favour of provincial laws.

The complaint is dismissed with costs. *Case dismissed.*

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Exchequer Court of Canada, Cassels, J. January 26, 1916.

1. ESCHEAT (§ I—1)—PROVINCIAL RIGHTS—DOMINION LANDS—INTESTACY—FAILURE OF HEIRS AND NEXT OF KIN—BONA VACANTIA.

R., a resident of and domiciled in the Province of Alberta, was, at the time of his death, the registered owner of a certain parcel of land in said province, under a patent issued to him by the Department of the Interior of Canada on July 25, 1911. He died on November 18, 1912, leaving no heirs or next of kin. Letters of administration to his property, both real and personal, were granted to the defendant as public administrator under the law of the province, and a certificate of title to the land in question was granted to defendant under the Land Titles Act of Alberta. The land was thereafter sold by the defendant, and the provincial government claimed the proceeds of the sale, except in so far as they were amenable to debts and administration expenses, as belonging to it under the provisions of the Alberta Statute, 5 Geo. V., ch. 5, sec. 1. Upon an information being exhibited by the Attorney-General of Canada to have it determined that such proceeds belong to the Crown in right of Canada,

Held, 1. That the right of escheat to the lands in question, or if the principle of escheat did not apply and the lands were to be treated as *bona vacantia*, then the right to them as such belonged to the Crown in right of the Dominion as *jura regalia*.

2. That, in so far as the rights of the Dominion Crown to escheated lands or *bona vacantia* in the province are concerned, the provisions of the Alberta Statute, 5 Geo. V., ch. 5, sec. 1, purporting to vest the property of intestates dying without next of kin or other persons entitled thereto in the Crown in right of the province, are to be regarded as *ultra vires*.

[*Atty.-Gen'l. of Ontario* v. *Mercer* (1883), 8 App. Cas. 767; *Church* v. *Blake*, 2 Q.L.R. 236; *The King* v. *Barrard Power Co.*, 12 Can. Ex. 295; *Dyke* v. *Walford*, 5 Moo. P.C. 434, referred to.]

Statement

An information exhibited by the Attorney-General of Canada, seeking a declaration of escheat to the Crown in right of the Dominion of Canada, of certain lands situate within the Province of Alberta.

The facts of the case are stated in the reasons for judgment.

W. D. Hogg, K.C., for the plaintiff.

Frank Ford, K.C., for the defendants.

Cassels, J.

CASSELS, J.:—The information in this case was exhibited on behalf of His Majesty by the Atty-Gen'l of the Dominion of Canada. The case was argued before me on an admission of the facts. Mr. Hogg, K.C., appeared for the plaintiff; Mr. Ford, K.C., of the Alberta Bar, for the defendant. The statement of facts agreed upon is as follows:—

1. Prior to his death, Yard Rafstadt was a resident of and domiciled in the Province of Alberta.

2. During his lifetime and at the time of his death the said Yard Rafstadt was the registered owner of the S.E. quarter of lot 30, tp. 44, r. 17, west of the 4th M. in the Province of Alberta, he having obtained a certificate of title therefor under the Land Titles Act of Alberta, the

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patent for the said lands having been issued to the said Yard Rafstadt by the Department of Interior of Canada on July 25, 1911.

3. The said Yard Rafstadt died on or about November 18, 1912, leaving no heirs or next of kin.

4. A grant of letters of administration to the property of the said Yard Rafstadt was made by the proper Court in that behalf, in the Province of Alberta, to the defendant as public administrator, under the statutes in force in the said province, and the said property was taken possession of and administered by the defendant as such public administrator under the laws of Alberta, the defendant having obtained a certificate of title to the said lands in its name, under the said Land Titles Act of Alberta.

5. The said grant of letters of administration has never been revoked.

6. The property of the said Yard Rafstadt consisted of the said land above described and a small amount of personal property, which latter is not in question in this action.

7. The said land above described was sold and disposed of by the defendant company as public administrator as aforesaid, and the sum of $1,405 was realized therefor. The defendant, as public administrator, paid the debts of the deceased, and also the costs and charges incurred in the administration of the estate, and there remains a balance of $563.25 in the hands of the defendant company as such public administrator.

8. In view of the fact that the said land has been sold, and it is not the desire of either party to disturb the title of the purchasers, the parties to the action are content to treat in the alternative the said balance of proceeds remaining in the hands of the defendant as public administrator to the extent that it represents the lands, as the subject-matter of the action, and that the judgment to be delivered in the suit may dispose of and award the said balance to one or the other of the parties in the action.

At the opening of the case, I made the suggestion that the Atty.-Gen'l of the Province of Alberta should be notified, as a question might arise as to the validity of a statute of the Province of Alberta. Mr. Ford stated that he had authority to represent the Atty.-Gen'l of Alberta, and appeared for him as well as for the defendants.

Although the amount in question is small, the point raised is one of very considerable importance. The contention of the Crown, represented by the Attorney-General for the Dominion, is that Yard Rafstadt, having died intestate without heirs, the lands in question escheated to the Crown in right of the Dominion of Canada, and thereupon became and is now under the provisions of the Dominion statute 4-5 Edw. VII. ch. 3, sec. 21, the property of His Majesty the King in such right.

The defendant on the other hand denies the contention of the plaintiff, and alleges that the said Yard Rafstadt was at the time of his death a resident of and domiciled in the Province of Alberta; and was during his lifetime and at the time of his death, which occurred on November 18, 1912, the owner of the lands in question.

The defendant admits that the said Yard Rafstadt died intestate, leaving no heirs or next-of-kin, but says that a grant of administration to the property referred to in the statement of claim was made by the proper Court in that behalf to the defendant, as public administrator under the statutes in force in the Province of Alberta, and that the said property was taken possession of and administered by the defendant as such public administrator under the laws of Alberta. The defendant further alleges and contends that, if the land in question did escheat, it escheated to His Majesty in the right of the Province of Alberta. In the alternative, the defendant alleges that the property referred to in the statement of claim, immediately on the death of the said Yard Rafstadt, vested in His Majesty in his right of the Province of Alberta, under ch. 5, of the Statutes of Alberta, 1915, being an Act respecting the property of intestates dying without next-of-kin.

The lands which now comprise the Province of Alberta were formerly the property of the Hudson's Bay Co. The Royal Charter incorporating the Hudson's Bay Co. was signed on May 2, in the 20th year of the reign of Charles II. It will be found in full in the work published by Mr. Archer Martin (now Martin, J.), in 1898, intituled, "The Hudson's Bay Company's Land Tenures," at p. 163. It was a very extensive grant by the Crown and contains the following:—

> To have, hold, possess and enjoy the said territory, limits, and places, and all and singular other the premises hereby granted as aforesaid, with their, and every of their rights, members, jurisdiction, *prerogatives, royalties* and appurtenances whatsoever, to them the said Governor and company, and their successors forever, to be holden of us, our heirs and successors, as of our Manor of East Greenwich in our County of Kent, in free and common Socage, and not in Capite or by Knight's service.

Sec. 146 of the B.N.A. Act, 1867, provided for the admission of other colonies than those originally constituting the Union. After expressly providing for the admission of Newfoundland,

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Prince Edward Island, and British Columbia, it is further provided:—

And on addresses from the Houses of the Parliament of Canada to admit Rupert's Land and the North Western Territory, or either of them, into the Union *on such terms and conditions* in each case as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of this Act.

By the Rupert's Land Act, 1868 (31-32 Viet. U.K. ch. 105), to be found in the R.S.C. (1906), vol. 4, 3125, the Hudson's Bay Co. were authorized to surrender all or any of the lands, territories, rights, etc., granted or purported to be granted, by the Letters Patent to the Governor & Company of Adventurers of England, trading into Hudson's Bay, and known as the Hudson's Bay Co., unto Her Majesty Queen Victoria, and Her Majesty was authorized to accept the surrender upon the conditions to be set forth in an Order-in-Council. It was further enacted that Her Majesty by an Order-in-Council on addresses from the Houses of Parliament of Canada might declare that the lands so surrendered should be admitted into and become part of the Dominion of Canada, and that thereupon it should be lawful for the Parliament of Canada to make all such laws as might be necessary for the peace, order and good government of Her Majesty's subjects and others therein.

The lands of the Hudson's Bay Co. were duly surrendered to Her Majesty the Queen on November 19, 1869, and Her Majesty, by an instrument under her sign manual and signet, bearing date at Windsor, June 22, 1870, duly accepted the surrender of the said lands.

The Queen's Order-in-Council (R.S.C. 1906, vol. 4, p. 3143) was passed on June 23, 1870, under which the lands of the Hudson's Bay Co. so surrendered, as aforesaid, and accepted by Her Majesty were admitted into and became part of the Dominion of Canada, with full power and authority to the Dominion Parliament to legislate for the future welfare and good government of the territory in which said lands were situated.

Subsequently, by sec. 2 of the B.N.A. Act, 1871 (34-35 Viet. (U.K.) ch. 28), intituled An Act respecting the establishment of Provinces in the Dominion of Canada, it was provided as follows:—

The Parliament of Canada may, from time to time, establish new provinces in any territories forming, for the time being, part of the Dominion of Canada, but not included in any province thereof, and may at the time of such establishment, make provision for the constitution and administration of any such province and for the passing of laws for the peace, order and good government of such province, and for its representation in the said parliament.

By sec. 3 of 51 Vict. ch. 20, as amended by 57-58 Vict. ch. 28, sec. 3 the Dominion Parliament enacted as follows:—

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

—and when the statute establishing the Province of Alberta was enacted, this statute still remained in force.*

It becomes necessary to consider carefully the provisions of the Alberta Act, 4-5 Edw. VII. ch. 3. It created the Province of Alberta. No public lands were given or granted to the Province—they still remained the property of the Dominion; and, in consequence thereof, sec. 20 was enacted, which provides as follows:—

Inasmuch as the said province will not have the public land as source of revenue, there shall be paid by Canada to the province, by half-yearly payments in advance, an annual sum based upon the population of the province as from time to time ascertained by the quinquennial census thereof, as follows:—

The population of the said province being assumed to be at present 250,000, the sum payable until such population reaches 400,000, shall be $370,000;

Thereafter, until such population reaches 800,000, the sum payable shall be $562,500;

Thereafter, until such population reaches 1,200,000, the sum payable shall be $750,000.

And thereafter, the sum payable shall be $1,125,000.

As an additional allowance in lieu of public lands, there shall be paid by Canada to the province annually, by half-yearly payments in advance, for 5 years from the time this Act comes into force, to provide for the construction of necessary public buildings, the sum of $93,750.

Sec. 21 of the Alberta Act, 4-5 Edw. VII. ch. 3, provided as follows:—

All Crown lands, mines and minerals and *royalties* incident thereto,

*REPORTER'S NOTE.—See also 63-64 Vict. ch. 21. The section is now sec. 5 of R.S.C. 1906, ch. 110. But so far as the Provinces of Saskatchewan and Alberta are concerned, the Dominion Parliament, by 4-5 Edw. VII. ch. 18, authorized the Governor in Council to repeal the above enactment. Orders for this purpose were passed on July 23, 1906, while both the Acts constituting the provinces mentioned came into force on September 1, 1905.

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and the interest of the Crown in the waters within the province under the North West Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the North West Territories.

This section would not vest in the Crown, represented by the Government in question, the royalties incident to the Crown lands unless such royalties, including the rights to lands escheated or to *bona vacantia* were vested in the Crown, represented by the Government of the Dominion.

It is a clause relating to the administration of the particular lands and royalties, etc., and would not have the effect of vesting such property in the Crown represented by the Dominion unless such rights were otherwise so vested. It is a provision enacted on the assumption that the Alberta Act did not divest the Crown, as represented by the Dominion, of any royalties or *jura regalia* theretofore the property of the Dominion. It may be contended, however, that as far as Alberta is concerned, the province accepted its incorporation as such with this stipulation in favour of the Dominion; and that it cannot now be heard to contend to the contrary.

Sec. 1 of ch. 5—5 Geo. V. of the Legislature of Alberta, assented to on April 17, 1915, is as follows:—

When any person dies intestate, owning any real or personal property and without leaving any next-of-kin or other person entitled thereto by the law of Alberta, such property shall, immediately on his death, vest in His Majesty in his right of Alberta, and the Attorney-General may cause possession thereof to be taken in the name of His Majesty in his said right; or if possession is withheld, may cause an action to be brought in the Supreme Court of Alberta for the recovery thereof.

(2) The proceedings in the action may be in all respects similar to those in other actions in the said Court.

If in point of fact the right to lands escheated or to *bona vacantia* (which at the time of the passing of the Alberta Act were part of the revenues and properties of the Dominion) did not pass as property of the province, then I think it obvious that such legislation as affecting the property of the Crown represented by the Dominion of Canada, would be *ultra vires* of the legislature of the province as purporting to vest in His Majesty

in his right of Alberta, property or revenues of the Crown as represented by the Dominion.*

After the best consideration I can give to the case, I am of opinion that 51 Viet. ch. 20, sec. 3, as amended by 57-58 Viet. ch. 28, sec. 3 (Dom.) above recited at length, does not, as contended for by Mr. Ford, take away this right of escheat, whether belonging to the Crown as represented by the Dominion, or by the Province, as if the lands were not real estate but personal estate possessed by the owner at the time of his death, intestate and without next-of-kin.

Furthermore, if the argument be well founded, the proceeds of the lands in question would be *bona vacantia*, and consequently *jura regalia*, and would belong to the Crown, represented by the Dominion or the Province as the case may be, as in the case of escheat.

In vol. 3 of Cartwright's Cases on the B.N.A. Act, p. 1, will be found reported in full the decisions of the Privy Council, the Supreme Court of Canada, p. 16, the Court of Appeal of Ontario, p. 85, and of Proudfoot, V.-C., p. 94, in the *Mercer* case; also the reasons for judgment in the Court of the Province of Queen's Bench, Quebec, in *Atty.-Gen'l of Quebec* v. *Atty.-Gen'l of the Dominion* (*Church* v. *Blake*), p. 100.

These judgments and the arguments of counsel deal at great length with the history of the law relating to escheats. In many of the reasons for judgment, the question raised in the *Mercer* case is treated as depending upon the true construction of the B.N.A. Act.

In his reasons for judgment, Selborne, L.C., is quoted as stating that,

> in its primary and natural sense, "royalties" is merely the English translation or equivalent of "*regalitates*," "*jura regalia*," "*jura regia*," etc.; and he adds:—
>
> The subject was discussed with much fullness of learning in *Dyke* v. *Walford*, 5 Moore P.C. 434, where a Crown grant of *jura regalia* belonging to the County Palatine of Lancaster, was held to pass the right to *bona vacantia*. That it is a *jus* (said Mr. Ellis in his able argument) is indisputable; it must also be *regale*; for the Crown holds it generally

*See remarks of Patterson, J., in his reasons for judgment in *Atty.-Gen.* v. *Mercer*, 3 Cart. Cas. 90. Also *The King* v. *Burrard Power Co.*, 12 Can. Ex. 295; 43 Can. S.C.R. 27; [1911] A.C. 87.

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through England by Royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the Sovereign. It stands on the same footing as the right to escheats, etc., etc. With this statement of the law, their Lordships agree, and they consider it have been in substance affirmed by the judgment of Her Majesty in Coun... in that case.

The first point to consider is to whom the rights of escheat or *bona vacantia* belonged prior to the creation of the province of Alberta. They must have belonged (I am employing the word as used in the B.N.A. Act) to the Crown of Great Britain and Ireland or to the Crown, represented by the Dominion. I think, having regard to the judgment in the *Mercer* case (*supra*), that they belonged to the Crown represented by the Dominion.

I have previously referred to the grant to the Hudson's Bay Co. If at and previous to the creation of the Province of Alberta, the rights belonged to the Crown, represented by the Dominion, how did such right pass to the Crown, represented by the Province of Alberta? I have set out in a previous part of these reasons, the statute creating Alberta as a province. No lands were conveyed to them. The lands remained the property of the Crown, represented by the Dominion, and to be administered for the benefit of the Dominion; Alberta obtained a money subsidy.

In the *Mercer* case, (*supra*), where it was decided that the right of escheat belonged to the Crown, represented by the Province of Ontario, the question turned upon the construction of a section of the British North America Act, 1867.

Section 109 of that statute provides that:—

All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

Selborne, L.C., referring to sec. 102 of the Act, 3 Cart. Cas., p. 9, is reported as stating:—

If there had been nothing in the Act leading to a contrary conclusion, their Lordships might have found it difficult to hold that the word "revenues" in this section did not include territorial as well as other revenues; or that a title in the Dominion to the revenues arising from public lands did not carry with it a right of disposal and appropriation over the

lands themselves. Unless, therefore, the casual revenue arising from lands escheated to the Crown after the Union "*is excepted and reserved*" to the Provincial Legislatures within the meaning of this section, it would seem to follow that it belongs to the consolidated revenue fund of the Dominion.

The "royalties" referred to in sec. 109, according to this judgment, covered escheats as "*jura regalia*," and therefore belonged to the Province of Ontario.

In the present case, I am of opinion that the right to the escheat in the lands in question, to the *bona vacantia*, never passed to the Province of Alberta, but belong to the Crown represented by the Dominion as *jura regalia*. The patent to the lands in question was a grant from the Dominion.

There will be judgment declaring that the plaintiff is entitled to be paid the surplus in the hands of the defendant, the amount thereof being agreed upon.

This being the first case in which the question has arisen, the parties having agreed upon the facts, I think each party should bear its own costs. *Judgment accordingly.*

Annotation—Escheat—Bona vacantia—Jura regalia—Provincial and Dominion rights. Annotation

ESCHEAT—This word is derived from the French (O.F. *escheoite*, fr. *escheoir*, M.F. *échoir*) and signifies the falling back or reversion of lands to the lord of the fee, upon the failure of heirs capable of inheriting under the original grant. "Escheat is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter, by either natural or civil means; if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony, thereby every inheritable quality was blotted out and abolished:" Chitty's Prerog., ch. xi., p. 226; 1 W. Bla. 123; Wright's Ten. 115. At the present day, in England as well as in Canada, escheat only arises in the case of failure of heirs (*propter defectum sanguinis*). By the Felony Act, 33-34 Vict. (U.K.) ch. 23, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se*, shall cause any forfeiture or escheat. (And see Can. Crim. Code, sec. 1033). Escheat was one of the five marks of feudal tenure; but it was a feature also of tenure by socage. The Statute 12 Charles II. ch. 24, had the effect of changing all the then existing tenures (except frankalmoign and copyhold) into free and common socage. By that statute, "the rents and services (among which fealty is occasionally due) are preserved to the lord. Of him, therefore, the lands are still holden, and to him they may escheat:" (Chitty's Prerog., p. 227). According to the true principles of escheat *propter defectum sanguinis*, the land can be claimed by the next lord of the fee; and in the case of copyholds, where the manorial rolls shew the title, the land escheated passes to the next lord, *i.e.*, the lord of the manor. In the case of socage estates, however,

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Annotation

Annotation (*continued*)—**Escheat—Bona vacantia—Jura regalia—Provincial and Dominion rights.**

it may be laid down as a general rule that the escheat, where it takes effect, operates for the benefit of the Crown, because, since the passing of the statute *Quia Emptores*, few, if any, new estates in fee simple have been created, and it is next to impossible to trace the title of a mesne lord. (*Cf.* 1 Steph. Com., 16th ed., p. 335).

By the provisions of sec. 11 of R.S.C. (1886), ch. 50, it was enacted that the laws of England relating to civil and criminal matters, as the same existed on July 15, 1870, should be in force in the North-West Territories in so far as the same had not been repealed or altered by the Parliament of the United Kingdom or of Canada, or by any Territorial Ordinance. By the Alberta Act, 4-5 Edw. VII, ch. 3, sec. 16, all laws and all orders and regulations made thereunder, so far as the same were not inconsistent with the provisions of such Act, existing in the territory established as the Province of Alberta, immediately before the coming into force of the Act, should continue in force until changed by competent legislative authority. So that the English law of escheats as it stood at the date above-mentioned was in force in the province at the time of the decision of *The King* v. *Trusts and Guarantee Company Ltd.*, above reported.

The profits and proceeds of sales of land escheated to the Crown are part of the casual territorial revenues of the Crown: (*Atty.-Gen'l. of Ontario* v. *Mercer*, 8 App. Cas. 767 at 773). These revenues were taken out of the possession of the Crown by the Civil Lists Acts, passed by the Parliament of the United Kingdom in the reigns of William IV. and Victoria, and came under the control of Parliament. By 15-16 Vict. (U.K.) ch. 39 (1852), any control which the Parliament of the United Kingdom may have acquired over the casual territorial revenues of the Crown in the colonies was surrendered in favour of the legislatures of the colonies.

The Provinces of Alberta and Saskatchewan were carved out of the territory formerly in the possession of the Hudson's Bay Co. By the provisions of the Rupert's Land Act (1868), the company were authorized to surrender the lands to Her Majesty Queen Victoria. After such surrender was duly made, an Order of Her Majesty in Council was passed on June 23, 1870, whereby the lands were declared to form part of the Dominion of Canada, and the Dominion Parliament was given authority to legislate for the future welfare and good government of the territory within which such lands were situated. Provision had previously been made by sec. 2 of the B.N.A. Act, 1871, for the establishment by the Parliament of Canada of new provinces in any territories forming, for the time being, part of the Dominion of Canada, but not included in any of the provinces. The two provinces above mentioned were created by statutes of the Dominion, passed in the year 1905, and becoming effective on September 1 of that year. By these Acts, the Crown lands within the boundaries of each of the provinces were not given to the provinces, but were retained by the Dominion. See the Alberta Act, sec. 21; the Saskatchewan Act, sec. 21. By reason of this outstanding fact, the case of *The Attorney-General of Ontario* v. *Mercer* (*supra*) is distinguishable from that above reported.

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Annotation

Annotation *(continued)*—Escheat—Bona vacantia—Jura regalia — Provincial and Dominion rights.

It is important to note further, that while the provisions of the Land Titles Act, 1894, were in force at the time of the coming into force of the Acts constituting the Provinces of Alberta and Saskatchewan, by the 4-5 Edw. VII. ch. 18, the Governor in Council was given power to repeal such Act so far as it concerned the two new provinces after they had passed for themselves laws regulating the registration of land titles. Such repeal was actually effected by Orders-in-Council passed on July 23, 1906. Earlier in the same year the provinces mentioned had passed statutes respecting the registration of land titles. By sec. 1, of 5 Geo. V. ch. 5, the legislature of Alberta provided that the real and personal property of intestates dying without leaving any next-of-kin or other person entitled thereto by the law of Alberta, should vest in His Majesty in right of Alberta.

Bona Vacantia. Under this title in the old common law were comprised certain articles, such as royal fish, shipwrecks, treasure-trove, waifs and estrays, which vested in the Crown as part of the Sovereign's revenue. The term is also now applied to the case of goods, or personal property, the owner of which dies intestate, leaving no next-of-kin, when the title to such property becomes vested in the Crown upon proper proceedings being taken therefor. The like happens in the case of personal property held by trustees for beneficiaries, all of whom have died out during the existence of the trust. (See 2 Steph. Com., 16th ed., p. 644; *Middleton* v. *Spicer*, 1 Bro. C.C. 201; *Burgess* v. *Wheate*, 1 Eden, 177; *Dyke* v. *Walford*, 5 Moo. P.C. at p. 498; *Re Gosman*, 15 Ch.D. 67; *Cunnack* v. *Edwards*, [1896] 2 Ch. 679.)

Jura Regalia. In its generic sense this term is used to denote all the royal rights appertaining to the Sovereign. In that sense, too, it is synonymous with the old use of the word "royalties," as distinguished from the modern use of that word which limits it to payments, in the nature of rent, made to the landowners by the lessees of mines in return for the privilege of working them. (See New Engl. Dict. by Murray, vol. viii., *sub voce* "Royalty," 5 and 6; *Kissick* v. *Bolton*, 134 Iowa, 650.) "A Crown grant of *jura regalia*, belonging to the County Palatine of Lancaster was held to pass the right to *bona vacantia*." *"Per* Lord Selborne, L.C., in *Atty.-Gen'l of Ontario* v. *Mercer*, 8 App. Cas. at p. 778. In sec. 5 of 21-22 Vict. (U.K.) ch. 45, "An Act for Separating the Palatine jurisdiction of the County Palatine of Durham from the Bishopric of Durham; and to make further provision with respect to the *jura regalia* of the said County," some further light is thrown on the meaning of the term in question by the following language used by Parliament: "All forfeitures of lands or goods for treason or otherwise; and all mines of gold and silver, treasure-trove, escheats, fines and amerciaments, and all *jura regalia* of what nature or kind soever." (See also *Atty.-Gen'l. of B.C.* v. *Atty.-Gen'l. of Canada* (1889), 14 A.C. 295.)

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LIVINGSTON v. LIVINGSTON.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Parker of Waddington, and Lord Sumner. January 27, 1916.

1. PARTNERSHIP (§ VI—28)—DISSOLUTION—COMPENSATION TO PARTNER CONTINUING BUSINESS.

A surviving partner who has carried on the business for the benefit of the partnership, pending proceedings being taken for its winding up by the court, is not a trustee within the meaning of the Act, and therefore not entitled to the benefit of sec. 40, ch. 129, R.S.O. 1897, but if his claim is not based exclusively on this section and he asks generally to be allowed out of the partnership assets such sum as the court may deem fair and reasonable as compensation for his services, he should be allowed to apply to the court for such compensation as it, in its discretion, may see fit to grant.

[*Knox* v. *Gye*, L.R. 5 H.L. 656, applied; *Livingstone* v. *Livingstone*, 20 D.L.R. 960, 32 O.L.R. 440, varied.]

Statement

APPEAL from a judgment of the Supreme Court of Ontario, in an action to wind up a partnership business, 20 D.L.R. 960.

The judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER:—The death of John Livingston, of Listowel, Ontario, on May 21, 1896, brought to an end a partnership with his younger brother James, which had lasted for some 40 years. It was a remarkable example of mutual confidence and affection. The brothers came to Canada as quite young men, and agreed that for their earnings they would have a common purse and in all their enterprises a common venture. They never had any articles of partnership; they never had, even by parol, any more definite terms or arrangements. So whole-heartedly was this plan carried out that they built their houses and bought their furniture with funds taken by each at will from the common stock; they drew upon it, as they required, for their household expenses, and they never, to the last day of John Livingston's life, struck a balance or arranged for a division between themselves. Their concerns were many, but their principal business was in flax and flax seed, and in this, under the firm name of J. and J. Livingston, they prospered greatly. The leading spirit in everything was James. He was the younger, the abler, and the better educated of the two. John managed the firm's mill at Listowel, where he lived, and there his active part in the business ended.

For a time John Livingston's representatives and his surviving brother attempted to wind up the affairs of the partnership amicably, but the attempt eventually broke down. An

action was begun in 1901 and it has gone on ever since, but the end is not yet. So far the ground has been cleared that only four matters are now in dispute, namely: (1) a business carried on at Yale, Michigan, U.S.A.; (2) a business carried on in the name of Wuerth, Haist and Co., at Crediton, Ontario; (3) the sale of the mills at Baden, Ontario, and (4) the claim of James Livingston for remuneration for his trouble in carrying on the business of J. and J. Livingston *de bene esse* after his brother's death. As to the first and third, the representatives of the estate of John Livingston are appellants; as to the second and fourth, there is a cross-appeal by James Livingston.

The sequence of the proceedings is as follows. The action was brought for the purpose of having an account of the partnership taken under the direction of the Court and a decree, formally declaring that the partnership was dissolved by the death of John Livingston and directing certain accounts and enquiries, was made by Meredith, J., on March 27, 1902. Evidence was then taken before the Local Master at Berlin, who made a report in 1904; but in 1906 an order was made, and confirmed on appeal in 1907, setting aside all proceedings before the Local Master at Berlin and transferring the whole reference to the County Judge of the County of Waterloo as Official Referee. Further accounts were brought in, and then, in 1909, the reference was transferred to the Official Referee at Toronto. By consent, portions of the evidence taken before the Local Master at Berlin were treated as having been taken before the Official Referee at Toronto, and further evidence was called before him. It is of some importance to observe that the witnesses, Edward Liersch, John R. Livingston, and Phillip Urbach (as the name is spelt when the evidence is taken), were examined only before the Local Master at Berlin, and that the Official Referee at Toronto had their evidence before him only as it appeared upon the shorthand note. The report of the Official Referee at Toronto was made on December 7, 1910. He decided against the defendant, James Livingston, on the Yale business, the business of Wuerth, Haist and Co., and the sale of the Baden Mills, and upon the question of remuneration he decided in his favour. Both parties appealed, and on April 16, 1912, Middle-

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ton, J., gave judgment in favour of James Livingston as to the Yale business, the business of Wuerth, Haist and Co., and the Baden Mills, and against him upon his claim for remuneration. Again both parties appealed, and on December 7, 1914, the Appellate Division of the Supreme Court of Ontario gave judgment affirming the decision of Middleton, J., except as to the business of Wuerth, Haist and Co. (See 20 D.L.R. 960). From this judgment the representatives of the estate of John Livingston bring the present appeal as to the business carried on at Yale and as to the sale of the Baden Mills, and James Livingston brings a cross-appeal as to the business carried on by Wuerth, Haist and Co., and as to his claim for remuneration.

No question of law is now raised except upon the last head; the other three matters involve only disputes upon questions of fact. The business at Yale, Michigan, carried on in the name of James Livingston and Co., and the business of Wuerth, Haist and Co. were both of the same character as that of J. and J. Livingston. In the first, James Livingston had a one-third share; in the latter his share was two-sevenths. It is not necessary to examine these businesses in detail. Their Lordships are satisfied upon the evidence, as was the Appellate Division of the Supreme Court of Ontario, that in each case the business was such that the respondent is under an obligation to account for his share in it, as for an asset of the firm of J. and J. Livingston, unless he can shew that his deceased partner consented to his participating therein for his own account alone. Such an answer is only made in the case of the business at Yale.

The respondent does not contend that he made any arrangement at all with his brother about the Yale business. His evidence is, that the matter was never mentioned between them: but he says that his brother knew all the mills in the flax trade and could not have been ignorant of this business at Yale, and contends that, as he never claimed to share in it, he must be taken to have assented to James Livingston's participating in it on his own account. Obviously this contention involves proof that John Livingston knew not merely that there was a flax business at Yale, but that his brother James was sharing in it. As to this, it is true that the style of the firm carrying on the busi-

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ness at Yale was James Livingston and Co., but there is no direct evidence that John Livingston knew of that style. On the only occasion when it is shewn to have been brought to his attention as a going concern it is called Brockway Centre, which was the name of the place in Michigan where it was carried on before it was changed to Yale, nor was it until the last year of John Livingston's life that the firm carrying on this business was referred to in the books of J. and J. Livingston as James Livingston and Co., although J and J. Livingston were in continuous relations with it. Again, it is true that statements of the assets of J. and J. Livingston were submitted to John Livingston on two or three occasions, and that, although they did not bring in any interest in James Livingston and Co., of Yale, he made no complaint; but here, again, this is only significant, if, firstly, he was aware that his brother James had a share in that business, which is in doubt, and, secondly, if he was competent to appreciate the effect of these statements, which, in view of his admittedly inferior education, is by no means clear.

The respondent's argument tries to clinch the inference from this alleged tacit acquiescence of John Livingston by the evidence of James McColl, who was the respondent's son-in-law and his partner in the business at Yale. McColl was accepted by the Official Referee at Toronto as a credible person. He testified, giving his evidence in 1910, that 22 years before, namely, before the business of James Livingston and Co. was started in 1887, he, in the presence of the third intended partner, Peter Livingston, told John Livingston that "James and Peter and I was going over there," that is to Brockway Centre, Michigan, and "asked if he would like to join us," and that "he says No! I don't want nothing to do with it, Peter." This evidence was elicited in a friendly cross-examination and, for whatever reason, was not touched in re-examination by the appellant's counsel, who had called McColl for other purposes.

Their Lordships are unable to attach the same importance to this evidence as was given to it by the Appellate Division of the Supreme Court of Ontario. Peter Livingston was not called to confirm it, nor was his absence accounted for. The respondent, James Livingston, who had been called before McColl was

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examined and was recalled afterwards, had evidently never heard of the conversation. On his own shewing he had been giving to his own firm at Yale support from the firm of J. and J. Livingston, which he directed, to an extent which was quite improper, if he regarded his share in the Yale firm as his own and not as a partnership asset of J. and J. Livingston. When the conversation is scrutinized, it is by no means clear that it amounts to more than this, that John Livingston, taught by earlier painful experience, refused to have anything to do with any business in which others were concerned beside his brother. It does not even purport in any clear manner to give assent to his partner's entering on his own account into another business which was within the scope of the objects of the partnership firm of J. and J. Livingston. When the purpose of the evidence is to prove something in the nature of an admission against his own interest on the part of a dead man, in relation to a matter that is not otherwise shewn to have been brought to his notice, it is clearly imprudent to place reliance on the evidence of a single witness, especially when it depends on his sole recollection after an interval of so many years of a conversation of this kind, to which in itself little importance seems to have attached at the time. Their Lordships think that on this part of the case the appellants must succeed.

Finding themselves in accord with the conclusion of the Appellate Division of the Supreme Court of Ontario as to the Baden Mills question, though not necessarily with all the reasons on which that conclusion was based, their Lordships think it needless to examine this matter in great detail, though, having had the advantage of searching and vigorous criticism by counsel on both sides, they have passed the evidence somewhat closely in review. In order to succeed, the appellants must shew that the agreement for the sale of the Baden Mills by J. and J. Livingston in liquidation to Philip Urbach (or Erbach, as the name is there also spelt), Peter Livingston, John Livingston, William Henry Urbach, and Edward Liersch was in truth an agreement for its sale to them as nominees of and for the respondent James Livingston. These persons, Phillip Urbach, John Livingston, and Edward Liersch, who alone were examined, were called on

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behalf of the appellants and did not shew themselves hostile witnesses. Being examined on the only issue originally raised, namely, that the sale was at an undervalue, on which issue the appellants failed, and no issue as to a colourable purchase having then been raised, formally at least, they all stated that they were purchasing solely on their own behalf. The appellants' argument is that, nevertheless, they ought to be treated as untruthful witnesses, in view of the surrounding circumstances. The burden thus assumed by the appellants is heavy. On examining these circumstances, their Lordships think that they are matters of surmise and perhaps of suspicion, but that they do not amount to satisfactory proof. No doubt the respondent had strong reasons for wishing the Baden Mills to fall into friendly hands, but they were bought for a very full price. It is doubtful if any sale could have been effected at all, unless persons such as Mr. Urbach and his associates had come forward, and their connection with the respondent was such as to make his support of them in their enterprise not unnatural, apart from his own interest in securing that a sale should take place, and that a sale to friendly buyers. Mr. Urbach and his associates turned their bargain over to a company called the Livingston Linseed Oil Co., in which they held all the shares. The respondent, no doubt, gave great financial support to this company, and in some respects assumed a proprietary air. Eventually he acquired the great bulk of the shares. If the appellants had proved that the holders of these shares, being original purchasers of the mills, transferred them to the respondent for nothing, they would have gone far to prove their case, but of the three, who were called, two swore that they were paid considerable sums for the transfer, and the third swore that he confidently expected that he would be paid too. The only explanation vouchsafed for this by the appellants was that one of the shareholders, Liersch, must have had some hold over the respondent, and that what he received was the price of his silence. No such suggestion was made to him, nor had he the opportunity of denying it, and, in their Lordships' opinion, such a suggestion should not now be made. So far, accordingly, the appeal must fail.

The respondent's alleged right to remuneration is rested on

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the Trustee Act, R.S.O. (1897), ch. 129, sec. 40, which speaks of "any trustee under a deed, settlement, or will . . . or any other trustee, howsoever the trust is created," and it is contended that when the respondent managed the partnership business after his brother's death he did so as a trustee within this section, and is therefore entitled to the benefit given by it. The short answer is that, as is well settled, in so acting he was not a trustee at all (see *Knox* v. *Gye*, L.R. 5 H.L. 656 at 675). His obligations may have been similar to and not less onerous than the obligations of a trustee. Persons in such a position have sometimes been spoken of loosely as being trustees, but, in any correct sense of the term, a trustee he was not, and therefore the section had no application to his case. There is nothing in the language of the Trustee Acts to justify the contention that they were intended to apply to persons who ought not to be described as trustees at all. Since, however, his claim, in the first instance, was not rested exclusively on this section, but asked generally "to be allowed out of the partnership assets such sum as the Court may deem to be fair and reasonable as compensation for his services," and since also, after the Official Referee at Toronto decided in his favour on the ground of the Trustee Act, the respondent does not appear to have elected to rely on that Act exclusively, their Lordships think that he should be allowed to apply to the Court for such compensation, if any, as in its discretion it may see fit to grant to him, as a surviving partner who has carried on the business for the benefit of the partnership pending proceedings being taken for its winding-up by the Court.

Their Lordships will humbly advise His Majesty that the appeal should be allowed so far as the Yale business is concerned, and that the respondent must account therefor, and that the case should be remitted in order that accounts may be taken (in addition to the account of the Wuerth, Haist and Co. matter) on the footing that the respondent's one-third share in James Livingston and Co., of Yale, Michigan, U.S.A., was an asset of the late firm of J. and J. Livingston, but that otherwise the appeal should be dismissed, and further, that the cross-appeal should be dismissed, with liberty to the respondent to

apply to the Court for the allowance out of the partnership assets of such compensation, if any, as in its discretion it may see fit to grant to him for his services in carrying on the business of the late firm of J. and J. Livingston from the death of John Livingston, and lastly, that each party should bear their and his own costs of the appeal and of the cross-appeal.

Judgment varied.

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Re LAND TITLES ACT. Re SUN LIFE ASSURANCE AND WIDMER.

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Alberta Supreme Court, Harvey, C.J. January 7, 1916.

1. MORTGAGE (§ VI G 1—100)—FORECLOSURE—SALE — STATUTORY REQUISITES.

Where a mortgagee gives notice under sec. 62*a* (see amendment 1915), the Land Titles Act (Alta.) for directions for sale of the mortgaged land, the registrar has a right to require the production of (*a*) an affidavit of default and continued default, (*b*) an affidavit of value of the property, (*c*) a statement of amount due under the mortgage with an estimate of cost of sale, proceedings, taxes, etc., (*d*) reserve bid form and envelope, (*e*) instructions to auctioneer; in order that he may satisfy himself: (1) that the mortgagee is entitled to offer the land for sale, (2) (*b*), (*c*) and (*d*), for the purpose of enabling him to settle a reserved bid, subject to which the property may be offered for sale, having regard to its actual value and the amount of the mortgagee's claim, and (3) for the purpose of being sure that the sale will be conducted in accordance with the conditions.

REFERENCE by the Registrar of Land Titles. Statement

F. J. Ap'John, for the mortgagee.

A. T. Mode, for the registrar.

HARVEY, C.J.:—The Sun Life Assurance Co. is the mortgagee of certain lands, and having given a notice under sec. 62 (*a*) of the Land Titles Act has applied to the registrar for directions for a sale of the land. The registrar has required the production of:—(*a*) an affidavit of default and continued default; (*b*) an affidavit of value of the property; (*c*) a statement of amount due under the mortgage with an estimate of cost of sale proceedings, taxes, etc.; (*d*) reserve bid form and envelope; (*e*) instructions to auctioneer. Harvey, C.J.

The mortgagee objects to furnish this material contending that the registrar has no right to call for it, and the reference is for the purpose of determining whether the registrar is within his rights.

It is apparent that the material required is for three purposes: (1) (*a*) to satisfy the registrar that the mortgagee is

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entitled to offer the lands for sale; (2) (*b*), (*c*) and (*d*), for the purpose of enabling the registrar to settle a reserved bid, subject to which the property may be offered for sale, having regard to its actual value; (*b*), and the amount of the mortgagee's claim; (*c*), and (3), for the purpose of being sure that the sale will be conducted in accordance with the conditions.

It is to be observed that the mortgagee's right to sell the property is not by reason of any power of sale given by the mortgagor in the contract of mortgage.

Under the old system this is almost the invariable method of sale by a mortgagee. The mortgage is a deed which transfers the legal estate to the mortgagee and contains in it a power of sale under which, on default, the mortgagee may sell and realize his claim, and having sold in the manner authorized a conveyance from him to the purchaser vests the estate, legal and equitable, in the purchaser.

Under our Torrens system such a method of passing the title can have no place. The title can be transferred from one person to another only by the act of the registrar and an assurance fund is provided to which recourse may be had in case the registrar makes a mistake and deprives some one improperly of his land. It is apparent, then, that while a purchaser or any person subsequently dealing with the land under the old system must satisfy himself and take the chance of the power of sale having been properly exercised, under the new system he may place implicit reliance on the act of the registrar which insures his title.

It is, therefore, equally apparent that the registrar is not an automaton, but, on the contrary, has important functions to perform, a mistake in which may render the assurance fund liable.

When the Torrens system was first introduced into the North-West Territories, which included the area of this province in 1886, at a period when the title to nearly all the land was still in the Crown, comparatively slight interference was made with the rights of a mortgagee as formerly exercised under the old system. (49 Vict. ch. 26, secs. 77, 78 and 79). The power of sale was given by the statute instead of by the mort-

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gage, but it was in much the same terms as usually given by the mortgage, and it was authorized to be exercised without supervision.

It is probably true that the registrar, before registering a transfer from a mortgagee to a purchaser, had both a right and duty to see that the mortgagee had the right to make the sale, but the method and the conditions of the sale were left practically entirely in the hands of the mortgagee.

When the Land Titles Act, 1894 (ch. 28) was passed, a new principle was applied. The power of sale was still given, but it was not permitted to be exercised without supervision. The registrars of Land Titles were still the persons who had been registrars of deeds under the old system before 1886, and the power of supervision was not given to them but reposed in a Judge. It was only subject to the direction of a Judge that a sale could be made, and the sale could only be made subject to the conditions he imposed, and the transfer from the mortgagee could only be registered when the sale had been confirmed by a Judge.

As the proceedings were thus in fact before a Judge, it probably being considered that they might as well be so in name also, in 1898 another change was made, and the power of sale given by the statute was wiped out entirely, and the mortgagee was required to resort to the Court to obtain a sale.

Though there was no statutory provision that a mortgagee under the statutory mortgage of the Act should have the same rights as a mortgagee under the old mortgage deed, yet the Courts applied, in a general way, the proceedings under the old mortgage, and that practice continued until last year when the present provisions, contained in sec. 62, were first enacted.

In 1908, the Judges of the Court formulated certain rules of practice for mortgage actions. It was pointed out, that as the mortgage is only a security, the mortgagee's right was in the first instance a right of sale, and not as under the old mortgage, a right of foreclosure, which term, though scarcely appropriate, has continued to be applied to our mortgage proceedings.

It was also provided that the reserved bid would be fixed at about two-thirds the value of the property, subject to the right

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of the mortgagee to have it fixed at sufficient to cover his claim and costs.

The standing conditions were settled, one of them being: "The sale is subject to a reserved bidding which has been fixed by a Judge."

Provision was made for directions to the auctioneer to contain, amongst other things, an instruction that the reserved bidding was not to be divulged until all bidding had ceased, and if upon its being then opened it was found that it was more than the highest bid, the property was then to be offered at the reserved bid as an upset price.

It is apparent that the registrar's requirements are in no way in excess of his needs if he has the right and duty to safeguard a sale as the Court does.

In essentials the provisions of the Act are now back to what they were under the Act of 1894 before its alteration. The fact that the person designated in that Act as supervisor was a Judge instead of the registrar is unimportant. His powers and duties were conferred upon him by the Act, and did not exist by virtue of his being a Judge of the Court.

It is argued on behalf of the mortgagee that sub-sec. (6) gives the mortgagee an absolute right to sell, but this is scarcely correct. His right to sell is limited, both in its existence and in its manner of exercise. There is no right to sell unless there is default as specified in the Act. The registrar, perhaps, need not be concerned with the question of whether the right exists until an application is made to him to register a transfer or an application for foreclosure after an abortive sale. Then it would clearly be his duty to satisfy himself that the necessary default had existed to justify the mortgagee's proceedings, for only so could the mortgagee have the right to transfer lands registered in the name of another. If he is willing to take the evidence to satisfy himself on this point at an earlier stage which may save the mortgagee from the expensive proceedings in the event of his being unable to prove the fact, it is all in the mortgagee's interest, and I fail to see why he should object. Moreover, strictly, the registrar may say: "I am only called on to settle conditions of sale if there is a right to a sale which can

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only exist in case of default." I think he has a right then to decline to settle the conditions until it is shewn that the sale is one authorized by the Act.

We then come to the question of conditions. The Act says (6), the sale shall be in such manner as the registrar may direct,

and either altogether, or in lots, by public auction or private contract, or by such modes of sale and subject to such terms and conditions as to expenses or otherwise, as the registrar may think fit.

The expression is somewhat confused, but I think the intention is, that every sale shall be subject to such conditions as the registrar imposes, and on this application no objection is taken to this interpretation. I do not know why the word "expenses" should have been employed, but I do not see how it can limit the general meaning of the word "conditions." It was probably intended to widen the meaning of "conditions," by indicating that it might include the subject of expenses. Then "public auction" and "private contract" would be "modes of sale," I think, clearly, even though we would have expected to see the word "other" used before "modes of sale."

I see, however, no ground for limiting the registrar's duties to anything less, as respects conditions, than what has always been understood as conditions of sale. As I have pointed out, in this province, these have been settled for several years in respect to all property sold under mortgage, and I can see no reason why that should not be what is intended. It is not open to argument before me that the settled conditions of the Court are not reasonable for general application. One of these conditions is that the property is to be sold subject to a reserved bid, which is to be fixed by the person settling the conditions.

There is, moreover, an Imperial Act, 30-31 Vict. ch. 48, which has some bearing on this point. Having been passed before July 1, 1870, it is in force here, and by sec. 5 it is provided,

that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved.

It is clear, therefore, that in settling the conditions the registrar must see that there is a statement whether the sale is sub-

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ject to a reserved bid, and if he decides that it is to be so subject, as our Act clearly gives him the right to do, he can only effectively exercise that right if he can himself fix the amount of the reserve bid, for it would be of no substantial value to say that it must be sold subject to a reserved bid and not be able to interfere with the mortgagee's ability to fix the reserved bid at whatever he sees fit.

The Australian Acts furnish no assistance on this question because, in all of them, the mortgagee is given power to sell on such terms as he may think fit.

The Manitoba and Saskatchewan Acts contain terms somewhat similar to ours, but I have not found any case in which this particular point has arisen. Thom, however, in his work (Can. Torrens System), at p. 329, says:—

> The fixing of this reserve bid does not appear to be a matter for the registrar. The mortgagee is entitled to realize his debt out of the property, and is not required to fix the reserve bid by reference to the value of the property. The registrar's duty is to see that the sale is conducted fairly and openly under reasonable conditions, and, having done that, the mortgagee may sell below his claim and costs if he wishes to. If he thereby directly or indirectly gains an advantage, the sale may be set aside; while, on the other hand, if he sets the reserve bid above his claim and costs, and the bids run above his claim and costs, but not to the amount of the reserve bid, the mortgagee thereby deprives himself of the opportunity of making an application for foreclosure, based on such abortive sale. It is doubtful whether the costs of a sale abortive for such reason would, as between the mortgagor and mortgagee, be chargeable to the mortgage account, although, as a general rule, the mortgagee is entitled to the costs of sale proceedings taken reasonably which prove abortive.

The only authorities quoted are for the last sentence, and, if they support it, they would support the mortgagee's claim for costs of the hypothetical abortive sale if the course adopted by the mortgagee were a reasonable one. If it should happen that a $50,000 property was put up for sale to realize a mortgage security for $5,000, could it be said that it would be unreasonable to fix a reserve bid much higher than the amount of the mortgagee's claim? I hardly think so. On the other hand, could it be said that a reasonably prudent man dealing with his own property would do otherwise? Again I think not. That objection, therefore, appears to me scarcely justified. The statement that the sale may be set aside also appears to me scarcely warranted. Whether the registrar leaves the fixing

of the reserve bid to the mortgagee or not, if the latter does only what he is legally justified in doing, surely the consequences must be valid and binding, and that consideration, to my mind, furnishes an argument in favour of the view that the registrar should fix the reserve bid. If the registrar has no control over the reserve bid, then he must issue a certificate on a transfer from the mortgagee, however great a sacrifice there may have been. Indeed, the registrar would have no means of knowing or right of ascertaining, since it would be no concern of his, whether there had been a sacrifice or not.

The difficulty about a subsequent foreclosure is no difficulty in practice. If the bids are more than the amount of the mortgagee's claim, then he ought not to have foreclosure, and if there has been no sale by reason of the reserve bid not being reached, anyone having experience in such matters knows that, by subsequent private negotiation, almost invariably a sale can be made for a price equal to, if not greater than, the amount bid, and such a sale is quite within the terms of the section.

The mortgagee's rights under a power of sale given by the mortgagor in the mortgage have been exercised for centuries, and the extent of these rights has been well settled by the Courts. It is perfectly clear that the legislature, when, by sec. 62(*a*), it conferred on the mortgagee a power of sale did not confer such power without restriction, but it did confer a right which could be exercised only subject to the restrictions imposed. These restrictions are clearly not imposed in favour of the mortgagee, but for the protection of the mortgagor. Sec. 61 says that a mortgage shall have effect as a security. In the procedure adopted by the Courts the mortgagor's interests have always been protected as far as could be done consistently with the mortgagee's rights to realize his security. Under the general principles of the Act when a certificate has been issued to an honest purchaser the mortgagor has lost all right in respect of his land. It is, therefore, especially important that no certificate should issue without all proper regard being had to safeguard his rights, and I have no doubt the rights and duties assigned to the registrar are for that purpose. The registrar is not a Judge to determine the rights as between

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the mortgagee and the mortgagor. If any question of that sort should arise, which is not dealt with by the terms of the Act, no power is given to the registrar to deal with it, and resort will necessarily require to be had to the Courts, which can, under sub-sec. (18) (and probably could without), stay the proceedings under the Act pending the determination of such rights. The registrar is merely an administrative officer whose duty it is to see that the rights conferred by the statute are exercised, and though in administering the Act he may exercise a judicial discretion in certain respects, so must almost any administrative officer. Even in proceedings in the Courts, as in the old Court of Chancery, in probably 95 per cent. of the cases there is no question requiring the consideration of a Judge, and the machinery required for giving effect to the mortgagee's rights is worked by officers under the established rules without resort to a Judge.

For the various reasons I have mentioned I am clearly of the opinion that it is the right and duty of the registrar to fix the reserve bid in settling the conditions of sale.

The matter of giving proper instructions to the auctioneer is entirely subsidiary, and I do not understand that any serious objection is taken to that, if the registrar is held to have the right to fix the reserve bid. It is a reasonable, safe, and wise precaution which ought to be taken in the interests of all parties.

Judgment accordingly.

N. S.
S. C.

BURT v. DOMINION IRON AND STEEL CO.

Nova Scotia Supreme Court, Graham, C.J., Russell, Longley, and Drysdale, JJ., and Ritchie, E.J. January 11, 1916.

1. APPEAL (§ XI—720)—LEAVE TO APPEAL TO PRIVY COUNCIL—FINALITY OF JUDGMENT—DAMAGES AWARDED BUT NOT ASSESSED.

Where a plaintiff claims damages for more than the £500 necessary to allow an appeal under sec. 2 of the Imperial order in council of July, 1911, and has been awarded such damages to be assessed by the County Court Judge, which judgment has been sustained by the Supreme Court of the Province, such judgment is final, although the damages have not actually been assessed, and leave to appeal to the Privy Council will be granted the defendant upon application.

[*Re A Debtor*, [1912] 3 K.B. 242, applied; *Dunn* v. *Eaton*, 9 D.L.R. 303, 47 Can. S.C.R. 205; *Union Bank of Halifax* v. *Dickie*, 41 Can. S.C.R. 13; *Allan* v. *Pratt*, 13 App. Cas. 780, distinguished; see 25 D.L.R. 252.]

Statement

MOTION for leave to appeal to the Privy Council from a

judgment of the Court of Appeal in an action for damages, 25 D.L.R. 252.

H. Mellish, K.C., in support of application.

J. J. Power, K.C., *contra*.

The judgment of the Court was delivered by

GRAHAM, C.J.:—The defendant has, under the Imperial Order-in-Council of July, 1911, applied under sec. 2 for leave to appeal to the Judicial Committee of the Privy Council from the judgment of this Court, dismissing an appeal from the trial Judge giving the plaintiff damages. The application is opposed on the ground that the judgment of this Court is not a final judgment and is not up to the amount of £500 under (*a*) of that section, and also that it cannot be granted under (*b*) by which the Court has discretion to grant leave under special circumstances.

The action was an action for damages for lowering the grade of a street in the city of Sydney and otherwise destroying the access to the plaintiff's premises in the city of Sydney. The plaintiff claims in the action the sum of $7,000 damages. The order for judgment at the trial was that the plaintiff was to recover his damages to be assessed by the County Court Judge for the district, a Master of this Court, "and that the plaintiff have leave to enter judgment for the amount of said damages so assessed, together with costs of the action and said assessment to be taxed."

There was no further consideration reserved, and no provision for confirmation of the report by the Court. And, under the practice, the judgment would be entered by the officer automatically on the amount assessed.

I think it was clearly a final judgment disposing of the rights of the parties in the action. Nothing was left to be dealt with judicially by this Court. In *Re A Debtor*, [1912] 3 K.B. 242, and cases cited. And the time for appealing either to the Supreme Court of Canada or to the Privy Council then began to run. The filing of the report of the Judge would give no fresh starting time for an appeal from that decision. The cases cited from the Supreme Court of Canada, namely, *Dunn* v. *Eaton*, 9 D.L.R. 303, 47 Can. S.C.R. 205, and *Union Bank of*

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Halifax v. *Dickie*, 41 Can. S.C.R. 13, do not apply, and were decided upon another provision, differently worded, and now (1913) properly amended.

Then, as to the amount of damages involved, it is contended that the case does not come up to the appealable amount required by that section. And *Allan* v. *Pratt*, 13 App. Cas. 780, was cited. The claim in that case was for $5,000 damages, but a judgment had been recovered for $1,100 only. The amount therefore involved was restricted to a less amount than the limit in the provision, and it was held in effect that the measure of value for determining a defendant's right of appeal, is the amount which the plaintiff has recovered, and against which the appeal could be brought. Upon that appeal, by no possibility, could the defendant have judgment against him for more. Of course, I suppose, the plaintiff might also appeal. The judgment proceeds:—

> The injury to the defendant, if he is wrongly adjudged to pay damages, is measured by the amount of damages which he is adjudged to pay. That is not in the least enhanced to him by the fact that some greater sum had been claimed on the other side.

In this case the damages claimed have not been restricted by the recovery of a fixed amount, and the plaintiff himself having claimed an amount exceeding £500 sterling, cannot well say now that he is not entitled to that amount. The defendant remains open to the danger of having judgment against him for the amount of this claim. I think there is involved under (*a*) a claim for upwards of £500 sterling, at least as against this plaintiff.

But supposing that is not the test, there ought, I think, and it is in our discretion, to be given leave under (*b*). There are four other cases by other plaintiffs, four other landowners, against the same defendants depending on this case which this Court disposed of in the same way, and it is convenient to consolidate them. Of the opinions delivered in the case, some at least depend on the consensus of opinion of three Judges of the Supreme Court of Canada in a case in which this same plaintiff first proceeded against the city of Sydney for these same damages. And in the ordinary course the defendant ought not to be expected to go there in this case.

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Then a decision of the Privy Council of *Parkdale Corp.* v. *West*, 12 App. Cas. 602, is much relied on in the opinions in this Court. But it is contended it can be distinguished; that there is a difference in the legislation involved in the two cases. Such a distinction can be best made in the Privy Council if tenable. I think there is good reason for saying that this case ought to be submitted to His Majesty in Council for a decision at least under the "otherwise" provision of clause (*b*). I think it would be a disaster if the defendants are precluded from getting to the Court of Appeal.

This application was made to this Court on January 8, 1916, and within time. I think leave should be granted in all of the four cases, but that they should be consolidated under sec. 15 of the Imperial Order in Council. Proceedings of plaintiff will be suspended during the appeal. *Leave granted.*

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Ontario Supreme Court, Falconbridge, C.J.K.B., and Riddell, Latchford and Kelly, JJ. November 30, 1915.

1. EXECUTION (§ I—9)—DISTRIBUTION UNDER CREDITOR'S RELIEF ACT—RIGHTS UNDER EXECUTION SUBSEQUENT TO ASSIGNMENT FOR CREDITORS.

The fund realized at a sheriff's sale under execution and an entry thereof made by the sheriff in the form required by sub-sec. 1 of sec. 6 of the Creditor's Relief Act, R.S.O. 1914, ch. 81, prior to the making by the debtor of a general assignment for the benefit of creditors, is distributable ratably among all execution creditors and those who placed their executions after the making of the assignment but within the period fixed by sub-sec. 2 of sec. 6 of the Act.

[*Breithaupt* v. *Marr*, 20 A.R. (Ont.) 689; *Roach* v. *McLachlan*, 19 A.R. (Ont.) 496, distinguished.]

Statement

APPEAL from an order made by a County Court Judge under sec. 33 of the Creditor's Relief Act, R.S.O. 1914, ch. 81.

George S. Gibbons, for appellants.

G. A. Urquhart, for the first execution creditor.

H. V. Hattin, for the second execution creditor.

The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—An appeal from the judgment of Dromgole, Co. C.J., argued with great ability and candour on all sides.

The facts are simple. On the 14th November, 1914, the Tooke Brothers Company Limited placed a writ of execution in the hands of the sheriff against Harrison; on the 13th January, 1915, the Metal Shingle and Siding Company Limited placed another; on the 16th February, 1915, the sheriff sold and realised a con-

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siderable sum, upon that day making his entry, form 1, under R.S.O. 1914, ch. 81, sec. 6; on the 17th February, 1915, Harrison made an assignment for the benefit of creditors; on the 2nd March, 1915, the McClary Manufacturing Company Limited placed another execution in the sheriff's hands, and there were others within the time limited by sec. 6* (if that section applies).

The learned County Court Judge held that the assignment cut out the creditors filing their executions thereafter; and these creditors appeal.

It is said that the County Court Judge proceeded on the authority of *Roach* v. *McLachlan* and *Breithaupt* v. *Marr;* these are decisions of the Court of Appeal, and we are bound by them; but it is necessary to examine with care what they do decide and their *ratio decidendi*.

Breithaupt v. *Marr*, 20 A.R. 689, is decided expressly on the authority of *Roach* v. *McLachlan*, 19 A.R. 496; and it will be well to examine the facts of the leading case and the principle upon which it proceeds. An execution at the suit of Roach & Miller was placed in the hands of the sheriff against the goods of McLachlan; then the execution debtor made a mortgage of his goods to Robinson; the sheriff seized, and Robinson (and another) claimed the goods—the claims were abandoned so far as that the priority of Roach's execution was admitted, and the sheriff sold; certain creditors of the execution debtor sued, obtained judgment, and placed writs of execution in the sheriff's hands within the time limited by the Act; the County Court Judge held that they were entitled to share in the proceeds of the sale, and Roach & Miller appealed. The Court of Appeal proceeded upon the ground that the goods sold were not the goods of the debtor but of the chattel mortgagee. "When the sheriff sold under the first execution he was selling the goods, not of the debtor, but of the mortgagee:" p. 502, *per* Maclennan, J.A.: *cf. per* Osler, J.A., at p. 501.

*6.—(1) Where a sheriff levies money under an execution against the property of a debtor, or receives money in respect of a debt which has been attached or sold under the provisions of sec. 16 of the Absconding Debtors Act, he shall forthwith make an entry, form 1, in a book to be kept in his office open to public inspection without charge.

(2) The money shall thereafter be distributed ratably among all execution creditors and other creditors whose executions or certificates given under this Act were in the sheriff's hands at the time of the levy or receipt of the money, or who deliver their executions or certificates to the sheriff within one month from the entry. . . .

So in *Breithaupt* v. *Marr*, 20 A.R. 689, the plaintiffs had judgment against Marr and execution placed in the sheriff's hands on the 18th July, 1893; the goods were seized the same day; on the 20th July, Beardmore & Co. and Park & Co. placed writs in the sheriff's hands; on the 26th July, Marr made an assignment for the benefit of creditors; and, after this, several creditors placed writs in the sheriff's hands; then the sheriff sold the goods; and the Court of Appeal held that the Creditors Relief Act did not apply—but the reason given was that "it is the assignee's property and not the debtor's that the sheriff sells:" *per* Osler, J.A., at p. 693: see *per* Maclennan, J.A., at p. 694. Mr. Justice Maclennan, at p. 694, says: "If the money were realised and the entry made in the sheriff's books before the assignment, it is possible that the fund might be divisible among all creditors coming in within the limited time." *Turner* v. *Murray* (1893), 20 A.R. 690 (n.), is to the same effect.

Here the money is in the hands of the sheriff; the assignee has no property in it nor any right except after the sheriff has paid all claims duly made upon it; and the cases cited do not apply.

I cannot see why the provisions of the Act are not applicable; and would adopt the language of Mr. Justice Maclennan already cited, but deciding that to be law which he says is possible.

The appeal should be allowed with costs here and below.

Appeal allowed.

COUILLARD v. BEAUHARNOIS.

Quebec Court of King's Bench, Archambeault, C.J., and Trenholme, Lavergne, Cross and Carroll, JJ. June 15, 1915.

1. MASTER AND SERVANT (§ II A 4—66*b*)—STRINGING WIRES CHARGED WITH ELECTRICITY—DUTY OF PROTECTION—RUBBER GLOVES.

Permitting an inexperienced employee to work at stringing wires charged with electricity, without furnishing him with rubber gloves as a protection against the dangers of such work, will render the electric company liable for the death of the employee, caused by electrocution, during the course of the work.

Statement

APPEAL from judgment of Charbonneau, J., dismissing action, which is reversed.

On May 15, the son of the plaintiff was killed by an electric shock while working for the defendant company on the top of an electric pole. The plaintiff alleges that he is poor, the father of a large family, and that his son was the only one of his children who helped him. This accident, says the plaintiff, hap-

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pened by the fault of the company. The victim was a young man of 20 years of age with little experience as an electrician. His foreman had sent him into a dangerous place to work in the vicinity of electric wires charged at a high tension without instructions and without furnishing him with rubber gloves, in spite of his repeated demand to be protected against electric shocks. He claims $5,000 damages.

The defendant pleaded in substance that the plaintiff is a well-to-do farmer; that his son Laurent had no need of protecting gloves at the place where he was working; that he freely exposed himself; and that the accident was due to his own imprudence and gross negligence.

The Superior Court, in the district of Beauharnois, dismissed the action, giving, as a reason, that there was no necessity for the deceased to go to the top of the pole upon the cross pieces which carry the wires at high tension where he was electrocuted.

Maurice Rousseau, K.C., for appellant.

J. G. Laurendeau, K.C., for respondent.

The judgment of the Court, reversing judgment of Charbonneau, J., was delivered by

Lavergne, J.

LAVERGNE, J.:—The reasons for the judgment appealed against appear not to take into consideration the essential allegations of the appellant's declaration, especially that the accident is imputable to the respondent company because it refused to furnish the protective gloves to its employee whom it had caused to work in a dangerous place knowing that Couillard was almost entirely without experience.

A former action had been instituted by the appellant against the respondent under the Workmen's Compensation Act, but it was dismissed, the Judge deciding that the appellant was not in the position required to sue under that Act, his son not having been his sole support, and the judgment expressly reserved to the appellant his recourse under the common law.

To avoid costs the parties have agreed that the evidence given in the former action should be used in the present case. The Judge who decided the present case should have read the evidence taken in the other as he did not himself hear the wit-

nesses. (Lavergne, J., examines here the oral testimony as to the orders given to the plaintiff's son by the foreman.)

The foreman of these workmen is a man named Ferdinand Bourbonnais; all the instructions that Bourbonnais gave to his workmen, without especially addressing any of them, were to place the supports below the cross pieces; he added that there was danger as the line was charged; that is all that the foreman said to them on the morning of the accident. Daoust only related the part of the instruction which follows; that there was some danger as the wires were charged; he did not hear him say that the wires should have been placed at one place more than at another. (Discusses the evidence of Mr. Millette.)

There was then no question that the wires should not have been attached to the cross pieces. Bourbonnais gave no directions about putting on rubber gloves. He did not say, further, which of his workmen was charged with the duty of doing this work. Millette was a man of 15 years' experience, and he was not directed to watch Couillard nor to furnish him with gloves. Does it not appear that these instructions were very insufficient and very vague? To enable the respondent company to relieve itself from liability for this accident, it seems that the instructions given should have been more precise, that the necessary measures should have been taken to see that these instructions were carried out to the letter, since Bourbonnais did not go up there himself; it seems as well that this work should have been especially entrusted to Millette an old employee rather than to be done by Couillard who had only some months of experience in this kind of work. It should also have been foreseen and provided for, that Couillard should have been obliged to wear rubber gloves to work so near the charged wires, but there was no mention of this.

It is evident, according to the first deposition of Bourbonnais, that the latter believed there was no danger in working without the protection of gloves; that he never thought of specially putting his men on guard against the risks to be run. He says:—

I myself did the work every day without gloves and I do not consider it important even at the place where Couillard was put; I do not consider

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that dangerous. He can put his hands without gloves at half an inch from the charged wires.

That quite explains why he did not give more formal instructions to his employees on the morning of the accident.

I conclude from this that no prudent measure was taken by the respondent or its representative to prevent this accident. Couillard died instantly. No one can explain exactly how the accident had happened unless it was that his hands touched the charged wire. Couillard was in the execution of his duties performing work for the respondent. He may have been imprudent, he may have made a mistake in the execution of this work; in his discretion he believed it necessary to fix the support in the eye of the bolt at the bottom of the cross pieces, and he effectively attached there the wire, part of which was found rolled up upon the ground after the accident. It is evident that in passing from the cross piece to the pole, in order to descend, is what led to his death.

Millette tells us that one of his legs was between the 2 cross pieces above, when he was found dead. That plainly shews that he had made a false step and had touched the wires in endeavouring to save himself. (Discusses the evidence as to the necessity of placing the wire in the eye of the bolt found at the point "A," which evidence seems contradictory.)

The Court of first instance lays down the principle that the company cannot always have a foreman to watch every employee. That is possible, but what is certain, is that the employer should see that his orders are precise and that they are carried out. These dangerous operations should be confided to persons of experience, and, at all events, there should have been a direction to Couillard to put on the protecting gloves. Thus it follows that the respondent was really careless, and its omission makes it responsible for the consequences of the accident.

It is well established that Couillard had, on several occasions, demanded rubber gloves from the foreman, but was always refused under some pretext. Adams himself tells us that the men were forbidden to work upon the charged wires without rubber gloves. The appellant's expert, Lacasse Rousseau, tells us also that the first precaution to be taken when one

works in the vicinity of charged wires is to put on rubber gloves.

If Couillard had had rubber gloves it is perfectly certain that he would have been protected against the electric shock and would not have died. The respondent, for this reason alone, is responsible for the consequences of the accident which happened. It was its duty to protect its employee by means of rubber gloves. He not only did not do so but he refused to furnish them.

When Couillard went up the pole, Millette knew that he would be working in the immediate vicinity of the charged wires, and he should have passed his rubber gloves since he had them with him. Millette adds, indeed, that he would have lent his gloves to Couillard when he had need of them but he was obliged to admit soon after that he had never lent them. He says in answer to the Judge that the gloves had been given to him for his own use.

The respondent claims that if Couillard had remained at the point "F" to do his work, he would have run no danger; but the appellant's expert, Lacasse Rousseau, tells us that even at this place Couillard should have had the protection of gloves.

The doctrine is that the employer cannot be relieved from his responsibility if he is himself in fault. Even if the workman has been careless, the employer is always bound to take, for the protection of his workmen and employees, the most minute precautions to protect them against their own carelessness. Too often the heads content themselves with giving their orders to carry protective appliances without being careful to see that the orders were executed; to act thus is not fulfilling their whole duty; the essential thing is that the order should be carried out and the means of defence observed; it is especially in the case of young workmen that the responsibility of the employer becomes greater.

I may say that the authorities cited by the appellant on this subject are absolutely *ad rem*. There exist in this country, in the United States and in England, numerous decisions establishing this doctrine; and all the cases cited by the appellant as precedents are also *ad rem*, and I cannot do otherwise than

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come to the conclusion that there is error in the judgment below and that the respondent should bear the responsibility for this accident. The least that can be said is that there was contributory negligence, and to reach that conclusion it is necessary to treat the respondent with much indulgence, for I am satisfied that it is entirely responsible for the consequences of the accident. It remains now to determine the amount of the damages.

The appellant is a farmer in fair circumstances, but he has a large family, of which 7 children are still under his care; moreover he is obliged to pay an annual sum to his mother and to an invalid brother; for these latter obligations his land is mortgaged. The appellant is already old and has poor health. The only one of his children who could assist him was Laurent Couillard, the victim, and in fact Laurent Couillard for a couple of years had begun to assist his father in a tangible manner, either in working for him on the farm or in sending him a part of the money that he earned otherwise. As text writers have said, the appellant had reason to expect aid and pecuniary advantage from his son if that son had lived; he had reason to believe that his son would continue to assist him.

I believe that it would be right to determine the damages suffered, as a consequence of the facts which I have set out, at the sum of $2,000 for the appellant, but, taking into consideration the contributory negligence of Laurent Couillard, which I do not consider to be well established, I believe that ample justice would be rendered to the respondent by condemning him to pay to the appellant the sum of $1,000 only.

Judgment reversed.

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McGILLIVRAY v. KIMBER.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 5, 1915.

1. SHIPPING (§ III—10)—DISMISSAL OR SUSPENSION OF PILOTS—WHEN WARRANTED.

A pilot, duly qualified and licensed as such under the Pilotage Act, sec. 28, ch. 80, R.S.C. 1886, now forming part of the Shipping Act, ch. 113, R.S.C. 1906, sec. 448, so long as he conforms to the regulations and has not been duly condemned for any of the offences for which the pilotage authorities may try him, and suspend or dismiss him, is quite independent of the pilotage authority, and entitled to follow his calling as provided by sec. 38 of the Pilotage Act, now sec.

459 of the Shipping Act and the pilotage authority has no arbitrary authority to interfere with the tenure of his office or rights as a licensee.

[*McGillivray* v. *Kimber*, 23 D.L.R. 189, 48 N.S.R. 280, reversed.]

2. SHIPPING (§ III—10)—LIABILITY FOR ILLEGAL DISMISSAL OF PILOT.

A pilotage authority, in dismissing a pilot for neglect and incapacity by resolution alone, without any complaint, notice, or investigation, has not complied with the statutory requirements and has not exercised any judicial functions and is liable for damages in an action by such pilot.

[*The Marshalsea Case*, 10 Co. Rep. 68*b*; *Clark* v. *Woods*, 2 Ex. 395; *Jones* v. *Gurdon*, 2 Q.B. 600; *Foster* v. *Dodd*, L.R. 3 Q.B. 67; *Ashby* v. *White*, 1 Smith's L.C. (12th ed.), 266, referred to; *McGillivray* v. *Kimber*, 23 D.L.R. 189, 48 N.S.R. 280, reversed.]

Statement

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment at the trial in favour of the plaintiff, 23 D.L.R. 189.

Mellish, K.C., and *Finlay Macdonald*, K.C., for appellant.

Rogers, K.C., for respondents.

Fitzpatrick, C.J. Davies, J.

SIR CHARLES FITZPATRICK, C.J., and DAVIES, J., dissented.

Idington, J.

IDINGTON, J.:—This is an action by appellant who was duly qualified as a pilot and licensed as such in 1888, under the Pilotage Act, ch. 80, R.S.C. 1886, now, so far as amended and in force, forming part of the Canada Shipping Act, R.S.C. 1906, against respondents, who were appointed May 13, 1912, the pilotage authority for the Port of Sydney.

The respondents constituted an entirely new Board, Mr. Kimber, their secretary, testifies as follows:—

Q. You know the plaintiff here, John B. McGillivray? A. I do. Q. Were you present at the meeting where it was decided to dispense with his services? A. Yes. Q. When was that? A. June 13th, 1912. Q. Who were present at that meeting? A. Vincent Mullins. Q. He was chairman? A. He was elected chairman. There were present Commissioners Vooght, Desmond, Barrington and myself. Q. Was that the first meeting you had? A. Yes, the first meeting. Q. It was at that meeting you undertook to dispense with the services of the plaintiff? A. He was dropped from the list of pilots. Q. Was that the meeting he was dismissed from the service? A. Yes. Q. Is there a resolution there? A. Yes, "Moved by Com. Barrington, seconded by Com. Vooght, that the following pilots should be dismissed from the service. Carried." John B. McGillivray is the first name. Q. Is that all there is to it? A. Yes. Q. And that resolution was carried? A. Yes. Q. And Mr. McGillivray was dismissed? A. He was.

This resolution so read from the minute book is further evidenced by what I presume was intended for a certified copy filed as an exhibit. And apparently from that, after the motion was declared carried, there was added a note as follows: "P.S.

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Neglect and incompetency were the reasons for the above dismissal."

When this was done or how it came to be entered, we have no evidence of. And the book is not in the record. Appellant says he was notified to quit, that his services were no longer required and that he quit accordingly after seeing Mr. Kimber and Mr. Mullins, and being unable to get any information from either of them why he was dismissed. There was no pretence of any accusation and inquiry in respect thereof, or of hearing the appellant, or calling upon him to answer for anything.

It seems later to have dawned upon some of these men that their proceedings were illegal. In August of the next year, in the absence of some of the more relentless members of the Board, the appellant was reinstated and acted as a pilot for some two or three months. The matter was again taken up pending such service, at a meeting on October 8, 1913, when the following resolution was passed:—

Whereas after a meeting of the Board of Pilot Commissioners for the Port of Sydney, held on August 4, 1913, two only of the Commissioners being present, a resolution was irregularly introduced and adopted by the said two Commissioners, and entry made of the same on the minutes of the doings of this Board, reappointing John B. McGillivray, George Spencer and Peter Rigby as Pilots for the Port of Sydney, although at a prior meeting of the Board, the said persons, having previously been pilots, had their commissions cancelled by an unanimous vote,

Be it therefore resolved that this Board declares itself in no way bound by the resolution irregularly introduced and purporting to have been adopted after said meting of August 4, and that it does not, and will not recognize the said John B. McGillivray, George Spencer and Peter Rigby as pilots acting under the authority of this Board.

Be it further resolved that the secretary be instructed to forthwith notify the said parties that the Board does not, and will not recognize them as pilots having any authority whatsoever from this Board. Carried.

The secretary accordingly notified the appellant that he would not be recognized as a pilot.

Later, on October 18, 1913, the secretary wrote the following letters:—

D. A. McInnis, Esq., Sydney, N.S., October 18th, 1913.
Member of Pilots' Finance Committee.

Dear Sir,—On the 7th inst. I notified John B. McGillivray and Peter Rigby, under instructions given me by a meeting of the Board of Commissioners, held the previous day at North Sydney, that the Pilotage Authority

did not and would not recognize them as pilots having any authority whatever from the Board.

I understand that both these men have reported for duty since receiving this notice, and I, therefore, give your Committee formal notice that neither of these men are clothed with any license or authority from the Board to act as pilots of this port.

Yours truly,

F. C. KIMBER, *Secretary.*

It is upon these acts, done or brought about by the respondents, that appellant founds this action.

The trial Judge maintained the action and assessed the damages at $1,800. The Appellate Court of Nova Scotia reversed this judgment on the ground that the respondents in so acting were discharging a quasi-judicial duty and hence not liable to any action for damages therefor, unless shewn to have been moved by malice.

It is necessary in order to understand and correctly appreciate the relations between the Board and the appellant to ascertain what his legal position was and the degree of authority they had over him.

The Pilotage Act provided that before a man can act or be licensed as a pilot he must have served an apprenticeship. And then the Board had power to licence him. Having done so he must register his licence with the collector of customs.

Sec. 28 of that Act under which appellant obtained his licence, after serving apprenticeship, is as follows:—

Every pilot who had received a license from a duly constituted authority in that behalf, before the commencement of this Act, may retain the same under and subject to the provisions of this Act, and shall, for the purposes of this Act, be a pilot licensed by the pilotage authority of the district to which his license extends.

This section in substantially the same terms, and doubtless intended to be a continuation in force of said section, appears in sec. 448 of the Canada Shipping Act, above referred to.

It seems quite clear from said section and the other sections bearing upon the question, that so long as a licensed pilot conformed to the regulations and had not been duly condemned for any of the offences for which the Board might try him, and suspend or dismiss him, he was (until sixty-five years of age) quite independent of the Board and entitled to follow his chosen calling and earn his livelihood thereby and as provided in sec.

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38 of the Pilotage Act, now sec. 459 of the Shipping Act secure the provisions he would be entitled, upon retirement, to claim thereunder for himself, his widow or child.

There is no claim set up or pretended that he failed to conform to the regulations such as requiring payment of the annual licence fee and getting a renewal so called of the licence.

The Board had no arbitrary authority to interfere with that tenure of appellant's office or rights as a licensee. It is quite clear that they imagined they had such arbitrary authority and acted accordingly. They never dreamed of anything else. They never for a moment supposed they had a judicial duty to discharge. Indeed, it never occurred to them to imagine such a thing in pleading their defence herein or presenting their case at the trial.

It seems some one suggested a possibility of such a defence in the Appellate Court, but I can find no leave given or asked to amend the statement of defence. I am unable to see how, under the law and facts, they can claim such a defence as matter of course. Their defence on the pleadings was one of absolute authority and nothing else but what fell within the scope thereof.

I cannot say that a state of pleading, such as before us, with a glimpse into some of the vicious, and hence in law, malicious, motives which impelled the mover of the resolution, can be properly remodeled at this stage in such a way as to import therein the defence of acting in quasi-judicial capacity, and exclude the consideration of malice as being unproven.

Even if Graham, J.'s holding that, where a quasi-judicial act is involved, malice must be pleaded and proved, be correct, it surely devolved on defendants to set up the claim of quasi-judicial authority instead of the absolute authority set up by the statement of defence. In that case it might have been incumbent on the appellant to have replied malice and proven it.

The mover of the resolution so far as he is concerned puts himself out of Court in assigning, as follows, his reasons for acting:—

Q. Why was John McGillivray dismissed? A. Well, I can give you my own reasons. I had two. One was political and I considered him a dis

grace to the service. Q. What was the political reason? A. I got it in the neck myself once and I thought I would return the compliment when I got the chance. Q. You had been dismissed when the Liberals were in office and you thought you would return the compliment to him? A. That was one reason and one was just as strong as the other.

Although Mr. Kimber disclaims personal knowledge of appellant's politics he indicates some of the Board seemed incidentally moved by considerations relative thereto. The surprising thing is, that on the issues presented, we should find accidentally disclosed so much evidence of those indirect motives of action which constitute malice. If the issue had been raised on the pleadings we may, from this sample so disclosed, well imagine there may have been much more which the trial of such an issue might have brought forth.

Indeed, it is hard to understand how, unless moved by improper motives, any one in such a position, looking at this part of the statute (of which a copy was to be given every pilot, and of which every commissioner presumably knew something) could have conceived it his right or duty to dismiss a man unheard.

I cannot find it incumbent upon us to impute to the respondents a quasi-judicial character which they never supposed they had, or were required to have and have not pleaded. The appeal should be allowed for these reasons alone.

But, in deference to the judgment appealed from and the chief argument presented here, let us examine the claim that what was done was of a quasi-judicial nature. To appreciate it correctly, there is nothing in the statute, which gave the Board any power or authority it had, supporting the defence of absolute authority as pleaded. It is admitted, in argument, that the Board is not a corporation. It is, however, given power to frame by-laws subject to the provisions of the Act. That power is now contained in sec. 433, which, in its first or operative clause is as follows:—

433. Subject to the provisions of this part, or of any Act for the time being in force in its pilotage district, every pilotage authority shall, within its district, have power, from time to time, by by-law confirmed by the Governor-in-Council, to, . . .

This is followed by sub-sections numbered from (*a*) to (*n*), defining such enumerated subjects as therein appear, over which

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the Board is given merely the initiative faculty of framing by-laws to be adopted by the Governor-in-Council, but nothing therein gives the Board any absolute or indeed any control.

I fail to see how anything done or supposed to be done under that section can, by any chance, be supposed to be a quasi-judicial exercise of power.

In sub-sec. (*j*), which is as follows:—

(*j*) Provide for the compulsory retirement of licensed pilots who have not attained the age of sixty-five years, proved on oath before the pilotage authority to be incapacitated by mental or bodily infirmity or by habits of drunkenness.

they are thus given power to frame by-laws in respect of the incapacities and offences which are most prominently put forward by defendants as palliating their conduct relative to appellant. This sec. 433 and its sub-sections for the most part are identical with and taken from sec. 15 of the Pilotage Act, which again was consolidated from the Act of 1873.

Under that Act there were in 1906 re-enacted and amended prior by-laws which contain all that is in evidence before us relative to the powers and duties of respondents under said section of the Act. So far as they had any judicial or quasi-judicial powers such must rest in said statutes and the by-laws so far as enacted within same.

These furnish no ground for the assertion of any judicial or quasi-judicial powers such as would in the remotest degree warrant the procedure adopted in the passing of the resolution quoted above or in the steps taken either in accord therewith or legitimately consequent thereupon.

I conclude, therefore, that all these steps so taken were without any colour of jurisdiction for such acts. As the resolution in its terms fails to assign any cause for its passage, that should end such contention as set up. If heed is to be paid to the postscript in way of assigning any cause "neglect and incompetency" are the only ones assigned for consideration. The said by-laws contain the following:—

By-law No. 9.—Any pilot or apprentice incapacitated by mental or bodily infirmity, or by habits of drunkenness, shall forfeit his license, and not be at liberty to serve in the capacity of a licensed pilot, and any pilot or apprentice guilty of drunkenness and incapacity while on duty shall be suspended for three months.

It is not pretended in argument or apparent in evidence that there was any neglect save in occurrences at least 2 years old, and those were at the time dealt with by the then Board.

In regard to the charge of drunkenness that seems answered in the same manner. But habitual drunkenness, though not assigned in the postscript to the resolution, is alleged in some of the evidence. But how is that in law or in fact in any way so connected with the resolution and other acts of respondents complained of herein as to furnish ground for saying that the respondents were so acting in relation thereto as to maintain the pretence of quasi-judicial action?

That as a ground of compulsory retirement is specifically provided for by the statute in sec. 433, sub-sec. (*j*) as hereinbefore quoted and in No. 9 by-law also quoted, which must be read therewith. Sec. 433, with sub-sec. (*j*) only enables the enactment of a by-law adapted to cases proved on oath before the pilotage authority.

The by-law No. 9 so enacted and apparently intended to be within said power of enactment cannot in law be extended beyond the powers given to enact it. It might be treated as null by reason of being in excess of the power given. But I think the more reasonable interpretation of it is to presume it is intended to operate within the statute and to be resorted to conditionally upon proof, as required by the statute, under oath of the offence or incapacity from the causes assigned or habitual drunkenness.

So interpreted I fail to see how the respondents were given any semblance of jurisdiction to deal with such matters unless upon the production of proof upon oath, or in the trying of some of the specific cases for which the Act provides, and, upon a finding thereby, prescribes dismissal or forfeiture of licence.

In every way one may look at the matter, the respondents were acting entirely without jurisdiction and so acting must be held liable.

In *The Marshalsea Case*, 10 Co. Rep. 68*b*, at 76*a*, the case of one so acting is clearly distinguished from that where the person acting might have had jurisdiction over the subject-matter or person, but erred in the mode of proceeding. From that

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down to the present date the distinction has been observed. Many statutes have been enacted to protect magistrates who have acted in good faith, yet that protection has often failed.

The case of *Clark* v. *Woods*, 2 Ex. 395, is an illustration. But perhaps as curious as any is the case of *Jones* v. *Gurdon*, 2 Q.B. 600, where, though there existed evidently good faith, yet from failure to comply with the conditions giving a right to act, the magistrate was held liable and the protecting Act held not to cover his case. *Foster* v. *Dodd*, L.R. 3 Q.B. 67, is of another type. Needless to multiply authorities of this kind extending in principle to every kind of inferior and domestic jurisdiction.

The error (beyond the apprehension of the pleading and issue raised) into which I respectfully submit the Court below fell, in relying upon the cases cited there, was in not observing the distinction I have just pointed out.

There is another line of cases from *Ashby* v. *White*, fully set out in 1 Smith's L.C. (12th ed.), 266 (where note is made of the many cases illustrative of what is involved in the question therein decided), down to the present time, shewing that where the officer is seized of the business to be done, indeed, has it forced upon him to decide and manifestly has a discretion or judgment to be exercised, he is, if acting without malice, free though mistaken.

These respondents never were seized of any business to be done in the doing of which they were discharging any duty relative to the appellant's tenure of his licence.

It occurs to me also that even if the resolution could by any stretch of the imagination be called a judgment of any kind, it was as such invalid for want of jurisdiction, and all the acts which the respondents persisted in later, in way of executing their purpose, were mere ministerial acts, which had no valid judgment or order to justify acting thereupon, and hence rendered them liable to an action for damages.

They, by these mere ministerial acts without a valid order to support them deprived appellant of the share he otherwise would have got in the funds distributed as well as of direct earnings.

Again it was suggested in argument as well as in the judgment appealed from that a mandamus was the only remedy. The doubt I expressed in the argument if such a remedy could be successfully sought as against those serving the Crown in the capacity the respondents were appointed for, has, as result of a very casual examination, increased, but I express no opinion in regard thereto.

The right to bring this action if, as I hold, the respondents acted without any jurisdiction, seems clear even if the remedy by way of mandamus was also open to appellant.

The many cases cited and others which, though not cited, I have looked at, seem to me to make it abundantly clear that we must have regard, in considering such cases, to the particular terms of the respective statutes in force bearing upon any such like question; and above all to the general purview of the statute in question, and the general principles of law such as I have adverted to.

So, looking at the matter in question, I have, for the reasons I have given, no doubt of the appellant's right of action herein. Indeed, there seems to have been such an entire absence of regard for and observation of the principles of natural justice that I am not surprised at the failure to find any exact precedent to guide us.

I was, on the argument, impressed with the possibility of the damages being excessive, and still am not free from doubt. But the details bearing thereon seemed to counsel to be irrelevant. The action was framed in error and all seemed agreed on the rectification that was made in that regard. Hence I assume the changes that took place, as I now find in the second year of the new Board, are not to be considered of any consequence. That change, however, might have made an arguable difference of view as to the amount of the damages. Appellant seems to have been restored to the list and probably this detail is of no consequence.

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

DUFF, J.:—The appellant after a service of twenty-five years as a pilot in Sydney Harbour, was summarily retired by the re-

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spondents, the Sydney Pilotage Authority, constituted under the Shipping Act, ch. 113, R.S.C. sec. 429. The appellant contends that the proceedings of the respondents, by which they professed to retire him from the list of pilots licensed to serve as such in Sydney Harbour, was wrongful and inoperative in point of legal effect, but that the respondents, by these proceedings, in fact effectually prevented him serving as and earning the remuneration of a licensed pilot. The respondents in their defence alleged (in par. 6) that they "have absolute control" of pilots in Sydney Harbour "and the granting of licences to pilots in said waters with authority to appoint and dismiss such pilots;" and (by par. 8) that the appellant "was not wrongfully dismissed in the month of April, 1912, but that his services . . . were dispensed with at a regular meeting of the said pilotage authority for good and sufficient reasons, and *no license was granted to said plaintiff to act as pilot for the season of* 1912 *and* 1913, *and said plaintiff was not entitled to receive a license from said Board.*

The trial Judge held that the respondents' attempt to justify the exclusion of the appellant from the list of pilots failed, because any power they possessed to suspend or withdraw the appellant's licence could only be valid if exercised after proper inquiry which had admittedly not taken place. The full Court reversed this judgment on the ground that the act of the respondents was the act of a body exercising judicial functions for which they were not accountable without proof of "malice."

I think this ground of decision cannot be sustained, but before discussing it, it is desirable to consider a little more fully what the appellant's claim really is and the ground upon which it rests.

In June, 1912, the appellant was a pilot licensed under the Shipping Act. The practice (the validity of which will demand a word of discussion) of this particular Pilotage Authority seems to have been to issue licenses for a term limited according to the tenor of the licences to one year; and it was stated by the appellant and not disputed that this annual term expired in August of each year. On June 13, at a meeting of the Pilotage Authority a resolution was passed which is entered in the minutes in these terms:—

Moved by Com. Barrington, seconded by Com. Vought, that the following pilots be dismissed from the service. Carried.

And the appellant's is the first among the names which follow. The appellant says he was then "notified to quit" and that he acted on the notice.

The first point to consider in the case which the appellant advances is, that this action of the Pilotage Authority, assuming it to have been in law inoperative, had nevertheless the intended effect of preventing him exercising his calling as a licensed pilot.

This point being of considerable importance I have examined the evidence closely in its bearings upon it and I think the appellant's contention is fairly made out.

That such was the intention has never been disputed and in the pleadings and at the trial the respondents contended that this act was legally effective for the purpose intended; the defendant alleges and Graham, J., expressly holds, speaking for the majority of the full Court, that on the passing of this resolution the appellant "ceased to be a licensed pilot." The Shipping Act contains provisions making it an offence for a "licensed pilot suspended or deprived of his license or compelled to retire," to fail to produce or deliver up his licence (sec. 534, see also sec. 451); for any person not a "licensed pilot" to pilot a ship (sec. 535); or for a licensed pilot to "act as a pilot whilst suspended" (sec. 550(*d*)). There is no evidence that the superintendent of pilots was communicated with; but the appellant no doubt assumed, and rightly assumed, that the respondents would take the steps necessary to give effect to this resolution. Having regard to the consequences which resistance (other than by legal proceedings simply) might entail if it should prove that the respondents were acting within their authority, the appellant acted wisely in not resorting to primitive methods of asserting his rights; and as to legal proceedings—at this stage it is enough to say that a legal contest with officials backed by the resources of the Government is not to be lightly undertaken by people in the appellant's position.

These considerations, together with the conduct of the respondents in October and November, 1913, to which I need not refer in detail, justify, I think, a finding that the respondents did in fact (as they intended to do) by this purported dis-

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missal prevent the appellant from exercising his calling as a licensed pilot at least during the unexpired portion of the pending term.

The statement of defence seems to proceed upon the theory that for the purpose of measuring legal responsibility, the consequences of this dismissal came to an end with the expiry of the term, and that I shall discuss; but for the present it is sufficient to repeat that the dismissal was an act which, being not only calculated, but intended to prevent the appellant continuing the exercise of his calling had in fact this intended effect; and the respondents are consequently answerable in damages unless there was in law justification or excuse for what they did. *Per* Bowen, L.J., *Mogul S.S. Co.* v. *McGregor*, 23 Q.B.D. 598.

The justification pleaded and relied upon at the trial is stated in the two paragraphs of the statement of defence quoted above. It should be observed that in these paragraphs there is no suggestion that the respondents have exercised a judicial discretion and no such suggestion was made during the course of the trial.

The powers of the Pilotage Authority to deprive a licensed pilot of an unexpired licence rest upon the provisions of secs. 433, 550, 551, 552 and 553 of the Shipping Act.

It is not suggested that any of these sections other than 433 has any relevancy here. Sec. 433 provides:—

433. Subject to the provisions of this part, or of any Act for the time being in force in its pilotage district, every pilotage authority shall, within its district, have power, from time to time, by by-law confirmed by the Governor-in-Council, to,—

(*d*) License pilots and, except in the pilotage district of Quebec, apprentices, and, except in the pilotage districts of Quebec, Montreal, Halifax and St. John, grant certificates to masters and mates to act as pilot, as hereinafter provided:—

(*e*) Fix the terms and conditions of granting licenses to pilots and, except in the pilotage district of Quebec, apprentices, and, except in the pilotage districts of Quebec, Montreal, Halifax and St. John, the terms and conditions of granting such pilotage certificates, as are in this part mentioned, to masters and mates, and the fees payable for such licenses and certificates, and to regulate the number of pilots;

(*f*) Make regulations for the government of the pilots, and the masters and mates, if any, holding certificates from such pilotage authority, and for ensuring their good conduct and constant attendance to and effectual

performance of their duty on board and on shore, and for the government of apprentices, and elsewhere than in the pilotage districts of Quebec, regulating the number of apprentices;

(*g*) Make rules for punishing any breach of such regulations by the withdrawal or suspension of the licence or certificate of the person guilty of such breach;

(*h*) Fix and alter the mode of remunerating the pilots licensed by such authority, and the amount and description of such remuneration, and the person or authority to whom the same shall be paid, subject to the limitation respecting the pilotage district of Quebec in the next following section contained;

(*j*) Provide for the compulsory retirement of licensed pilots who have not attained the age of sixty-five years, proved on oath before the pilotage authority to be incapacitated by mental or bodily infirmity or by habits of drunkenness.

The by-laws passed under the authority of this section are before us and the only one we need consider is by-law No. 9 in these words:—

By-law No. 9.—Any pilot or apprentice incapacitated by mental or bodily infirmity, or by habits of drunkenness, shall forfeit his licence, and not be at liberty to serve in the capacity of a licensed pilot, and any pilot or apprentice guilty of drunkenness and incapacity while on duty shall be suspended for three months.

That is the only regulation touching the suspension or forfeiture of a pilot's certificate or the compulsory retiring of pilots which has been brought to our attention. It professes to make provision for the cases specifically dealt with in sub-sec. (*j*) and it can, I think, only go into effect subject to the condition laid down in that sub-section. The more general powers conferred by the earlier sub-sections cannot legitimately be brought into operation in order to declare that the "forfeiture" attached as a consequence by sub-sec. (*j*) to incapacity arising from the causes therein mentioned and proved as therein provided for, shall arise as a consequence of incapacity, in fact whether the same is or is not evidenced as required by that sub-section; and it cannot be contended that an *ultra vires* by-law becomes valid in consequence of publication by force of sec. 437. It follows that if by-law 9 is a valid by-law, the "forfeiture" takes place only when incapacity has been "proved on oath before the Pilotage Authority."

433(*j*) obviously imports inquiry of a judicial nature and notice and full opportunity to be heard as essential conditions

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of any valid decision or executive action upon the evidence adduced. It cannot successfully be invoked in support of the claim of absolute authority set up in the statement of defence. The justification relied on at the trial, therefore, fails.

In the Court of Appeal the judgment of the trial Judge was reversed on the ground that as the Pilotage Authority in the acts complained of was exercising a judicial capacity, the appellant could only succeed by alleging and proving malice in fact. For two reasons that seems inadmissible.

First, it rests, I think, upon some misconception of the character and ground of the appellant's claim which are that the respondents are answerable in damages for intentionally preventing him pursuing his calling of a licensed pilot without lawful justification or excuse. The respondents not denying but admitting that they had done acts which were intended to have and had the effect of preventing the appellant acting as a licensed pilot, set up, as I have said, as justification for these acts, an absolute power conferred upon them as pilotage authority to "dismiss licensed pilots." It was not alleged that the power was a judicial power or that in doing the acts complained of they in fact exercised judicial functions; and the defendant's case at the trial failed, I repeat, simply because they were unable to shew the existence of any such absolute authority as that upon which they alleged they had acted. I do not think it was open to the respondents in the Court of Appeal to change face and take up the position that in what they did they were exercising judicial functions for which they were answerable only on proof of express malice. That is a position which ought to have been taken in the pleadings or at least at the trial when the appellant, if so minded, could have raised the question whether the respondents had acted otherwise than in good faith in the interests of the public service. The evidence now in the record is not calculated to convince one that the prosecution of a claim, founded upon such a charge, would have been a hopeless enterprise.

Secondly, assuming the respondents are entitled to rest upon the position in which they succeeded in the full Court, I think

the defence fails on the merits in both law and fact on the evidence as it now stands.

I have already said enough to shew that, as the facts present themselves to my mind, it is sufficiently established that there was in fact no exercise of judicial function or of authority resting upon a judicial decision under sec. 433(*j*).

As to the law, assuming there had been an intention to exercise authority under by-law 9 since there was no hearing, no evidence on oath, no judicial determination, it follows that no "forfeiture," to use the language of the by-law, took place, and consequently there is nothing amounting to a justification of the so called dismissal; which is, therefore, an actionable wrong under the principle of the *Mogul Steamship Co.'s Case*, 23 Q.B.D. 598. Moreover, the rule is sufficiently established that persons in the position of the respondents exercising quasi-judicial powers are only protected from civil liability if they observe the statutory rules conditioning their powers as well as the rules of natural justice. *Wood* v. *Woad*, L.R. 9 Ex. 190; *Riopelle* v. *City of Montreal*, 44 Can. S.C.R. 579, and see the judgment of Buckley, L.J., in *Ex parte Arlidge*, [1914] 1 K.B. 160, and the judgment of Lord Macnaghten in *Herron* v. *Rathmines, etc., Commissioners*, [1892] A.C. 498, at 523.

I have not, of course, overlooked the argument of Mr. Rogers, founded upon authorities relating to the responsibility of the judicial officers strictly so called, Judges of the inferior Courts and magistrates. Generally, no doubt, in the absence of bad faith, such judicial officers are not responsible for harm caused by acts otherwise wrongful when such acts are judicial acts done in the course of some judicial proceeding in which the officer has jurisdiction as regards the persons affected, and the matter before him is some matter with which he has authority judicially to deal. No authority has been cited, however, for the extension of this principle to protect administrative officers such as the respondents from the consequences of injurious acts for which authority is wanting owing to the omission of the essential statutory prerequisites. Even as regards the acts of judicial officers strictly so called in respect of matters in which there is jurisdiction over the person affected as well as over the subject-

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matter where the jurisdiction is purely statutory, the statutory conditions must be observed at the peril of the officer, assuming, at all events, that he is under no mistake as to the facts. Thus, a magistrate being empowered by a statute to issue a warrant on complaint in writing before him on oath, the issue of a warrant in the absence of evidence on oath is an act for the consequences of which he is civilly responsible. *Morgan* v. *Hughes*, 2 T.R. 225; see also *Jones* v. *Gurdon*, 2 Q.B. 600.

There remains the question of damages. A preliminary point arises touching the appellant's tenure of office. The practice of the Sydney Pilotage Authority (we have no information as to the origin of it) has been apparently, as I have said, to issue licences expressed to be for a term of one year. I can find no authority in the statute for imposing this limitation. In the by-laws produced there is nothing touching the point and, having regard to the express provisions of sec. 454, I think that sec. 433(*e*) relating to "the terms and conditions of granting licences" does not authorize the imposition of any limit upon the duration of the term for which the license is to be in force. The relevant statutory provisions appear to be secs. 445, 448, 452, and 454. (It may be observed in passing, that the judgment of the trial Judge seems to involve a finding that the appellant was not within the operation of sec. 462. An application before the delivery of judgment in this appeal for leave to adduce further evidence on this point was rejected on the ground that no adequate reason was shewn for the admission of further evidence at that stage.)

Sec. 454 authorizes pilotage authorities to limit the period for which any licence shall be in force to a period of not less than 2 years. But our attention has not been called to any authority for limiting the period to 1 year. I am inclined to think that the words inserted in the licence granted to the appellant professing to provide that the licence shall only be in force for one year must be treated as inoperative. But, at all events, if it must be assumed that the Pilotage Authority intended to grant a valid licence, and if the proper assumption is, that the intention was to grant a licence only for the minimum period permitted by the law, then, on that assumption, each of the

licences must be treated as a licence valid for a period of 2 years.

On these assumptions the appellant's licence held by him in June, 1912, did not expire until August, 1913, and the position taken by the respondents in their statement of defence and sustained by the full Court that the appellant ceased in law to be a licensed pilot after June, 1912, necessarily fails.

Assuming that the proper course is to treat the appellant's licence as a licence limited as to duration under sec. 454, and that the discretion to renew, conferred upon the Pilotage Authority by sub-sec. (*b*) of that section, is an absolute and not a judicial discretion; it would still, I think, be wrong to deal with the question of damages on the footing of the consequences of the proceedings in 1912, having ceased to operate with the expiry of the license in August, 1913. The proceedings in evidence in August, October and November of 1913, shew that the majority of the Board insisted at that time on treating the appellant as compulsorily retired from the service and disqualified from holding a licence. This loss of status and the prejudice thereby occasioned him in his character of applicant for a licence in August, 1913, is one of the consequences natural and intended of the respondents' conduct in respect of which the appellant is entitled to reparation.

On this footing the appellant would not be entitled to recover compensation *nominatim* for the loss of prospective earnings in the season of 1913-14. But without deciding whether or not the appellant's position was that of a licensee with a licence limited as to time under sec. 454, I still think the damages found by the trial Judge are not excessive. Apart altogether from the right to reparation just mentioned, this is emphatically not a case for measuring damages with nicety.

There was some suggestion, although I do not think it was seriously pressed, that substantial damages ought not to be awarded on the ground that the evidence shews the appellant's habits to have been so notorious that, if there had been an investigation conducted as the law required, the respondents must have reached the conclusion judicially that the appellant was incapacitated as an inebriate. But the findings of the trial

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Judge dispose of this contention effectually. Not only does the finding as to damages tacitly involve a rejection of any such contention, but the Judge explicitly holds that the appellant had successfully repelled the attack upon his character. The statements of some of the respondents must be evaluated in light of the fact that they were seeking some refuge from legal responsibility and of the strong suspicion, not to say probability, that the respondents as a whole whatever may have been their beliefs as to the appellant's conduct, were not free in the impeached proceedings from the influence of other motives than a desire to elevate the character of the pilotage service. In this aspect of the case it is eminently one in which the view of the trial Judge ought to guide a Court of Appeal.

Two further points are suggested.

First, that the acts by which the respondents professed to "dismiss" the appellant from the service being legally void, no damages can be recovered. Secondly, that the appellant should have had recourse to mandamus and can only recover such damages as could not have been prevented by resorting to that remedy. As to the first of these points. This is not a case like *Wood* v. *Woad*, L.R. 9 Ex. 190, where a member of a partnership complained of an illegal decision of a domestic tribunal professing to exclude him from the benefits of the partnership. This decision having been invalid in law and no special damage having been proved, it was held that as damage was the gist of the plaintiff's action he must fail. It is unnecessary to repeat what I have said above in order to dispose of this point.

As to the second: I have already said sufficient to indicate my view that the respondents cannot complain that the appellant did not take legal proceedings to compel them specifically to execute their duties or rather to refrain from wronging him in order to reduce the damages to which he might eventually prove to be entitled.

The appeal should be allowed and the judgment of the trial Judge restored.

Anglin, J.

ANGLIN, J.:—I assume, as was contended on their behalf, that when acting within the ambit of the jurisdiction conferred upon them, the defendants are entitled to the immunities of a

quasi-judicial body. But, after a careful consideration of the duties and powers of the Pilotage Authority, their relations to pilots, the relevant provisions of the Canada Shipping Act, and all the circumstances of the present case, I have reached the conclusion that in directing the cancellation of the plaintiff's licence, the defendants neither acted, nor professed to act in the discharge of a quasi-judicial function, but exercised an assumed absolute and arbitrary power to dismiss the plaintiff or to cancel his licence, without complaint, notice or investigation. Having regard to sections 433(*j*), 514, 550(*e*), 552 and 553 of the Canada Shipping Act (R.S.C. ch. 113), I think it is clear that the Pilotage Authority did not possess any such absolute power. The relationship of master and servant does not exist between the Board and the pilot. The Board has a statutory control over the licensing of pilots within the territory for which it is constituted. Its jurisdiction to cancel a pilot's licence is also statutory and arises only after it has been satisfied either by a quasi-judicial investigation, held after fair notice has been given the pilot and he has had a reasonable opportunity to make his defence (and in cases not within secs. 552-3 it would seem that the Board must take testimony upon oath), or by the production of a conviction thereof made by a competent tribunal, that the commission of an offence subjecting the pilot to cancellation of his license has been established. The plaintiff had a clear and definite interest in the earnings of the body of pilots to which he belonged. His sharing in those earnings depended upon the continuance of his licence. The principles which govern the action of such a body as the Pilotage Authority in dealing with charges which, if established, may entail forfeiture of licence, are those which the Courts have applied in such cases as *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal*, [1906] A.C. 535, at 539; *Fisher* v. *Keane*, 11 Ch.D. 353; *Labouchère* v. *Earl of Wharncliffe*, 13 Ch.D. 346; *Béland* v. *L'Union St. Thomas*, 19 O.R. 747.

There is some evidence which indicates that the defendants' action in cancelling the plaintiff's licence was induced by motives other than zeal for the public welfare, and a finding

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of malice on their part would not entirely lack support. It is, however, unnecessary to deal with this aspect of the case.

In ordering the cancellation of the plaintiff's licence the defendants, in my opinion, proceeded without jurisdiction. They committed an unwarranted and illegal act which subjected them to liability to the plaintiff for such damages as he sustained as a natural and direct consequence thereof.

The trial Judge assessed these damages at $1,800. The plaintiff's loss was, no doubt, substantial; but, with respect, I incline to think the evidence does not warrant so large a verdict. The plaintiff was bound to minimize his loss by seeking other employment. This he does not appear to have made any great effort to obtain. His conduct was by no means above reproach and it may be that the cancellation of his licence was not undeserved. Had the Board proceeded judicially and in accord with the requirements of natural justice, its action could not have been reviewed. It is certainly difficult, however, to determine with any degree of accuracy what amount of compensation should be awarded. My learned colleagues, with whom I agree in allowing this appeal, think the plaintiff entitled to the full amount of the damages awarded by the trial Judge. It may be that, as wrongdoers, the defendants are not in a position to ask that the amount of the damages, to which the plaintiff is entitled, should be closely scrutinized. Their course of action was undoubtedly high-handed. On the whole, while not entirely satisfied with the amount allowed, I am not prepared to dissent on the quantum of damages. *Appeal allowed.*

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DONOVAN v. EXCELSIOR LIFE INS. CO.

New Brunswick Supreme Court, McLeod, C.J., and Grimmer, and Barry, JJ. November 26, 1915.

1. INSURANCE (§ III A—48)—WHEN POLICY GOES INTO EFFECT—DELIVERY—WITHHOLDING DURING ILLNESS.

Returning a policy by the insurance company to its agent to be delivered to the assured, the application whereof having been approved and the premium thereon paid, but the policy being withheld by the agent because of the illness of the assured, does not constitute a delivery of the policy as to render it effective within the meaning of a clause, "that the policy shall not take effect until the same has been delivered, the first premium paid thereon, and the official receipt surrendered by the company during the lifetime and continued good health of the assured."

[*Roberts* v. *Security Co.*, [1897] 1 Q.B. 111, distinguished.]

2. INSURANCE (§ III E 2—125)—MISREPRESENTATIONS—OTHER INSURANCE —PREVIOUS APPLICATION—MATERIALITY.

Statements made by an insured that no proposal to insure her life has ever been declined and that she held no other assurances on her life, whereas, in point of fact, she had been refused a policy in a certain amount because she was a markswoman, but that instead, an industrial policy for a small amount had been informally issued to her without a medical examination, are not misrepresentations materially affecting the risk.

[*Donovan* v. *Excelsior Life Ins. Co.*, 22 D.L.R. 307, 43 N.B.R. 325, affirmed.]

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APPEAL from judgment of White, J., 22 D.L.R. 307, which is affirmed. Statement

Daniel Mullin, K.C., supported the appeal.

Fred R. Taylor, K.C., *contra*.

GRIMMER, J.:—The action was brought to enforce specific performance of a contract of insurance alleged to have been entered into by the defendant with the plaintiff's mother, and to compel the defendant to issue a policy of life insurance as of March 5, 1912, on the life of the plaintiff's mother, payable in the event of death to the plaintiff. Grimmer, J.

By amendment at the trial, the suit resolved itself into an action to recover $1,000 upon a contract of insurance which it is claimed was entered into by the defendant, whereby the company insured the life of the plaintiff's mother in that sum, and agreed to pay such insurance to the plaintiff in the event of the death of the insured within the twenty-year period covered by such contract.

The defendant, by amendment made at the trial, set up the defence that the insured had made material misrepresentations in her application, in two particulars, namely:—

1. In answering "No" to the printed Q. 16: Has any proposal to insure your life been declined, withdrawn or postponed —give full particulars? 2. In answering "No" to the Q. 14: Have you any other assurances on your life, if so where and for what amount—give full particulars?

The evidence relied upon to support the first ground of alleged misrepresentation is that the insured, prior to her application to the defendant for insurance, had verbally asked one Pressly, then agent for the Prudential Insurance Company, for an amount of insurance of $200. Mr. Pressly's reply was, that his company would not accept a proposal for insur-

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ance to that amount from an applicant who was a markswoman. The Prudential Company did, however, insure the plaintiff's mother by a policy spoken of as an industrial policy, for a small amount in the vicinity of $60, the premium being payable weekly. This insurance was paid upon the death of the plaintiff's mother, without question. No formal written application or application other than I have stated was made to the Prudential for insurance, and no medical examination was ever made in connection with the application to the Prudential. The trial Judge held that these facts were not sufficient to sustain the defence that there was a material misrepresentation in answering Q. 16, and that what took place did not constitute either a proposal to insure or a declining of the same, within the meaning of the question. As to the second ground of alleged misrepresentation, he held it not to be material, inasmuch as the amount of the insurance was so trifling; and in these views I concur.

The learned Judge in setting forth the facts stated that as possibly having some bearing in this connection, the plaintiff testified that Mr. King, in taking her mother's application, put the question and filled in the answers in the printed application form which her mother signed, but that he never asked any question as to whether or not the applicant was insured in any other company or had applied for such insurance. Mr. King's testimony was that he felt quite sure he did ask these questions, but that as the occurrence took place nearly 3 years previously he could not undertake to swear from memory that he had read all of the application to the applicant, although he believed he had, as it was his custom to do so. The insured signed the application, and therefore, under the authorities—see *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516—must be taken to have had knowledge of its contents, unless the fact that she was a markswoman, and that the witness to her mark was the defendant's agent, can be held to destroy the basis of such assumption, and no such contention as that was made. If it were important to make a finding upon the point, the Judge further says:—

I would find that Mr. King was mistaken in his belief that he read to the insured the two questions quoted. He admits that Mr. Pressly, who

was his son-in-law, had informed him of Mrs. Donovan's request for insurance in the Prudential, and of the reason why she could not, being a marks-woman, get such insurance, and says further that it was at Mr. Pressly's suggestion and upon the understanding that Pressly was to receive a commission if the insurance was effected, that he canvassed the plaintiff's mother. I find there was no fraudulent misrepresentation by or on the part of the plaintiff's mother.

The plaintiff contended that when the application was marked "approved" and was signed by the defendant's manager and medical director, a contract to insure resulted, by which the defendant is bound, and in support of this contention relied upon *Roberts* v. *Security Co.*, [1897] 1 Q.B. 111. The decision in this case was seriously questioned by the Judicial Committee of the Privy Council in *Equitable Fire Insurance* v. *Ching Wo Hong*, [1907] A.C. 96, where, referring to the claim that the question involved was already decided by *Roberts* v. *Security Co.*, the Committee say:—

The learned counsel for the appellant company cited and relied on a decision of the Court of Appeal in England, in *Roberts* v. *Security Co.* It is enough for their Lordships to say that the words in the instrument in that case were different from those which their Lordships have to construe, and they are relieved from saying whether they would otherwise have been prepared to follow it.

The learned Judge, finding there were essential differences between the facts in *Roberts* v. *Security Co.*, and the present case, inasmuch as in the *Roberts* case there was no condition in the policy which was required to be performed in order to give the policy effect as a binding contract, declined to follow or be bound by the decision therein, in which he was undoubtedly right. In this case the policy was, among others, issued upon the following conditions named therein:—

1. When policy in force?

This policy shall not take effect until the same has been delivered, the first premium paid thereon and the official receipt surrendered by the company during the lifetime and continued good health of the assured.

10. The contract, the policy, the endorsements thereon and the papers attached bearing the company's seal shall constitute the entire contract between the parties hereto, and all statements made by the assured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall be used in defence of a claim under the policy unless it is contained in the application, a copy of which is hereto attached. No provision or condition of this contract can be waived or modified except by an endorsement thereon signed by the president, a vice-president, the general manager or secretary.

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The Judge found there was no intention on the part of the company, under these conditions, that the preparation and mailing of the policy, and the marking of approval of the application therefor, should constitute a contract binding on them without the performance of all their requirements, and that there was no such delivery of the policy or surrender of the official receipts as is contemplated and required by the policy as a condition precedent to its taking effect, and that therefore there never was any contract of assurance executed and in force between the parties. In this finding I entirely concur, after an examination of the evidence and the authorities cited on the argument.

The appeal will be dismissed with costs.

Barry, J.

BARRY, J.:—In its essentials, a contract of life insurance made by deed does not differ from any other specialty contract, and its formation, and the time from which it is to take effect, is to be governed by the same rules. Before there can be a complete contract of insurance, there must be a concurrence of intention between the parties. What Mrs. Donovan, the applicant for insurance, wanted and what the defendant company intended to give her, subject to certain precedent conditions before the policy became effective, was what is known as an endowment policy of insurance for $1,000 upon her own life, payable to herself in case she should live 20 years, or if she died before the expiration of that term, to her daughter, the plaintiff.

Although Mr. King, the agent of the company, says that he received the first premium of $83.90 on March 5, 1912, and that it was on that date that he gave her the receipt, which is in evidence, for the money, the application is dated March 11. The application was received at the head office of the company in Toronto on March 18, and on that day the company wrote Mr. Ferris the letter of instructions which is in evidence. The first policy was mailed from the head office to the St. John office on March 21, and was received by Mr. Ferris on the 25th of that month. On the next day, he went to the home of Mrs. Donovan, did not see her, but saw the plaintiff, and pointed out to the latter the error in her mother's age as disclosed by the examining physician's report and the consequent shortage in the

amount of the premium which had been paid. But it is not suggested that the mistake in the age would have avoided the policy. On the contrary, had Mrs. Donovan and her daughter then chosen to have accepted the policy, it would have been a perfectly good policy notwithstanding the error in the assured's age, not good for the $1,000 face value, it is true, but good for an amount which at the applicant's true age $83.90 would buy in that company under the plan of insurance which Mrs. Donovan had chosen.

There is a difference between the evidence of the plaintiff and that of Mr. Ferris as to what the amount of the lessened insurance would be, the plaintiff insisting that the agent told her that the policy would be good for but $800, while Mr. Ferris, though he says he may have mentioned that sum by way of illustration, says that he could not have told her absolutely that the policy would be good for only $800, because, according to his interpretation of the rules, it would in fact be good for $950. The latter estimate would probably be the correct one because the premium was short 5 per cent. of the amount which would be requisite for a full insurance of $1,000, and the payment of the smaller sum would only result in a corresponding reduction in the face of the policy, that is 5 per cent. or $50. But, in my opinion, this discrepancy in the evidence of the parties really counts for little, because neither Mrs. Donovan nor her daughter, who was actively participating in the negotiations being carried on in respect of the proposed insurance, and who must therefore, I think, be regarded as her mother's agent for the purpose, cared to accept the policy under its decreased value, but were anxious to obtain insurance for the full amount applied for. And both of them were willing to pay, and the daughter did pay $4.15, the amount necessary to bring the premium up to $88.05, which was the premium required by the company to be paid by the applicant for a policy of $1,000.

Now, it seems to me that, up to this point there was not in any view a completed contract between the parties expressed by the written instrument which had been issued. While there probably may be said to have been a complete concurrence of intention between the parties in regard to the contract which

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was to be entered into between them, the first policy sent down did not correctly express that intention. By it, Mrs. Donovan was not getting what she wanted, *i.e.*, an insurance for $1,000; the company was giving her an insurance for only $950. There were two errors, honest ones no doubt, on the face of the policy; the proposed assured's age was stated on the face of the policy to be 64 years, whereas her true age was 65 years; the annual premium was stated to be $83.90, when it should have been $88.05. And both the agent of the company and the acting agent of the applicant for insurance concurred in sending the contract which had been sent down for delivery, back to the company, for the avowed purpose of having a corrected contract made, one which would fully set out the intention of the parties and exhibit on the face of it the true age of the applicant and the correct amount of the annual premium which she would be required to pay in order to maintain in force a policy for $1,000 for 20 years.

It is now claimed by the plaintiff that all the conditions precedent to the delivery of the policy were performed, and that notwithstanding the fact that the first policy, the one of which I have been speaking, never passed into the hands of the assured or her mother, there was nevertheless a complete and effective delivery. In a case which has been much depended upon by the appellant, two important principles of law, not new by any means, have been re-affirmed. Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party, nothing to shew that he did not intend it to operate immediately, it is a valid and effectual deed, and the delivery to the party who is to take by it, or to any person for his use, is not essential: *Doe d. Garnons* v. *Knight*, 5 B. & C. 671; *Xenos* v. *Wickham*, L.R. 2 E. & I. App. 296. The efficacy of a deed depends upon its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived or until

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some condition has been performed; and it is not until the time has arrived or the condition has been performed that the delivery becomes absolute and the maker of the deed is absolutely bound by it.

On March 26, Mr. Ferris sent the policy back to the head office of the company for correction; and on April 2, the company mailed to Mr. Ferris, not the old contract, not the same instrument corrected, but an entirely new instrument similar to the first one in every respect, except that the second instrument correctly exhibited upon its face the applicant's true age as well as the correct amount of the annual premium. No letter accompanied the second policy, but after Mr. Ferris received it at St. John, which he did on April 4, he did not go near her or her daughter, or make any effort to deliver the policy, for the very good reason that in the meantime he had heard that Mrs. Donovan was very ill. Unless the applicant had continued in good health, it would have been contrary to his instructions to have done so.

By a term of the application which Mrs. Donovan had signed she had agreed that any policy which might be issued should not be in force until the same was delivered "during her lifetime and continued good health." And according to the manual furnished by the company to all its agents, a copy of which is in evidence, agents are instructed that,

> policies to be binding on the company can only be delivered during the lifetime and continued good health of the applicant, and after the payment of the first premium.

In the Court below several grounds were urged as reasons why the plaintiff should not be entitled to recover. In the first place it was urged that in the application for insurance there were material misrepresentations sufficient to avoid the policy which was subsequently issued. The trial Judge has found, and I think, under the evidence, quite properly found, against this contention. Then it was urged that on March 26, when Mr. Ferris called and received the balance unpaid of the premium, there had, since the taking of her application, occurred such an unfavourable change in the health of the applicant as to warrant the agent in declining to deliver the policy. This, too, the learned Judge has found against the defendants. He has found

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as a fact that on March 26, Mrs. Donovan was in good health. Were I called upon to decide this question of fact for myself, or did the determination of this appeal wholly depend upon the health of Mrs. Donovan on March 26, or whether from the date of the application her health had so deteriorated as to have warranted the agent in declining to deliver the policy, I must confess that I should have hesitated before arriving at the same conclusion as the Judge. I should have hesitated in so finding because the plaintiff herself says her mother was sick for 3 weeks; on re-examination by her own counsel she narrows the duration of her mother's illness down to 2 weeks; and since her mother's death occurred on April 7, one can scarcely see how, even giving her evidence the most favourable construction, and taking the shorter period deposed to by her as the duration of her mother's last illness, she can be said to have been in good health on March 26. Since, however, I base the conclusion at which I have arrived on other and entirely different grounds, it is unnecessary further to pursue the subject.

Because, in the action as it now stands, it is upon the first and not upon the second policy that the plaintiff relies, the learned trial Judge has made no finding in regard to the health of Mrs. Donovan at the time when the second policy came down, that is, on April 4.

In the letter of March 18, from the general manager of the company to the provincial manager at St. John, in which the latter was advised that the company had accepted the application, he was instructed to ascertain from Dr. Pratt before delivering the policy "that he (the doctor) had sent in his confidential report, and that it is satisfactory." But the question whether, in pursuance of these instructions, the provincial manager did or did not take any steps to ascertain from Dr. Pratt that he had sent in a confidential report, must remain an open one because the provincial manager was not able to state with certainty whether he had or not, and the learned Judge has made no finding upon the matter.

As already indicated, my mind rather inclines to the view that the first policy did not represent a concluded and completed contract, expressive of their true intentions, between the par-

ties. But if I am wrong in this, if the first policy was the contract of the parties, executed by and duly issued under the seal of the company, then the important and perhaps the only real and vital remaining question is, was there a completed and effective delivery of the policy sufficient to entitle the plaintiff to maintain this action, notwithstanding the fact that the policy never came into her or the assured's possession? When, on March 11, Mrs. Donovan signed her formal written application for the insurance, she agreed to accept the policy, when issued, on the terms mentioned in the application, and on such terms as should be contained in the printed policy in use by the company applicable to the application. Also, she agreed that any policy which should be issued upon her application should not be in force until the same was delivered.

The policy subsequently issued by the company contained, *inter alia*, this condition: This policy shall not take effect until the same has been delivered, the first premium thereon paid, and the official receipt surrendered by the company, during the lifetime and continued good health of the assured. By another condition of the policy, a condition by which the assured was bound, no provision or condition of the contract could be waived or modified except by an indorsement thereon signed by either one of the four named general officers of the company. By the former of these 2 conditions until the surrender of the official receipt the policy was to be non-effective. This was a condition by which Mrs. Donovan had agreed to be bound at the time she signed the application. It was the expressed intention of both parties therefore, that until the official receipt was surrendered, the policy should not be binding on the company.

It may perhaps be pertinent to inquire into the necessity for the surrender of an official receipt, or why, indeed, when the contract itself, the policy duly executed and issued was passed over into the possession of the assured, there should be any necessity for an official receipt at all. It appears from the evidence of the provincial manager of the company that the policy itself is not considered a receipt for the first premium, and that oftentimes the possession of the policy is passed over without the first premium having actually been paid. There

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may be very good reasons, therefore, why the issuance of such an instrument as an official receipt is necessary. But whether or no there be reasons for requiring an official receipt, and if there be any reasons, whether these reasons be good or bad, is not the question. There is the term of the contract, which is one of the conditions precedent to the complete and effective delivery of the policy.

It will be observed that the expression employed in the condition is not that the official receipt shall be "delivered," but that it shall be "surrendered." The former expression has a clear and well-defined meaning in legal nomenclature; and while, as already pointed out, there may be a good delivery by a covenanter without the actual passing over of the deed to the covenantee, I can scarcely see how, taking the word in its literal meaning—and I have not been able to discover that, as used in the context, the word has a legal meaning different from its literal—there could be a surrender of an official receipt without a yielding or a giving up or a resigning of the possession of it. Even had the company actually delivered the policy, executed with all the necessary legal formalities, into the hands of the assured herself, by turning to the conditions endorsed on the back of it, which are made an integral part of the instrument, she could have seen that without something else, without the official receipt, the policy was non-effective. The receipt given for the first year's premium is not the official receipt contemplated by the condition; that has been found as a fact, and is not, I think, disputed. No official receipt was surrendered by the company to either Mrs. Donovan or her daughter, the plaintiff. There was therefore no effective delivery of the policy; and for that reason I think the verdict or judgment below was right, and that this appeal should be dismissed.

McLeod, C.J. McLEOD, C.J., agreed. *Appeal dismissed.*

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Nova Scotia Supreme Court, Graham, C.J., and Longley, and Drysdale, JJ., Ritchie, E.J., and Harris, J. January 11, 1916.

1. BILLS AND NOTES (§ III B 1—63)—LIABILITY OF INDORSER—ACCOMMODATION INDORSEMENT BY AGENT OF MARRIED WOMAN—POWER OF ATTORNEY.

The business of a married woman conducted for her by her husband and son under a general power of attorney is not of itself sufficient to charge her with liability on an accommodation indorsement executed

in her name outside of the scope of the business, in the absence of proof that such indorsement was expressly authorized by the terms of the power of attorney or otherwise.

2. BILLS AND NOTES (§ III B 1—60)—PROCURATION SIGNATURES—INDORSEMENT BY AGENT—LIMITED AUTHORITY.

An endorsement on a note, "Jennie Green, H. Green, Atty.," is sufficient, under sec. 51 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, to charge with notice that the agent has but a limited authority and that the principal is only bound if the agent was acting within the actual limits of his authority.

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APPEAL from judgment of a County Court Judge in an action against the maker and the indorser of promissory notes. Statement

H. Mellish, K.C., for respondent.

GRAHAM, C.J.:—This is an action on a 3 months' note for $164.33 against Isaac Green as maker and Jennie Green as indorser. The indorsement that appears on the note is, "Jennie Green, H. Green, Atty." Isaac Green was her son, and Harris Green her husband, having become insolvent, the business was carried on ostensibly by her as a married woman, but no doubt really by her husband. Graham, C.J.

Before the note was given, this letter was sent to the plaintiff, really in the interest of Isaac Green who was needing assistance in his business.

The arrangements Mr. I. Green made with you are satisfactory, send the notes and I will indorse them. J. GREEN.

Time was given by the plaintiff clearly on the strength of this letter. Now J. Green is the defendant Jennie Green, but she cannot read or write, and she now disputes the indorsement on the ground that H. Green, her husband, who made the indorsement, had not authority, and she disputes the letter because her son Arthur who signed her name had not authority. Of course, if the letter could be traced to her directly or indirectly, and the plaintiff acted upon it to his prejudice that ought to dispose of the case.

The County Court Judge says:—

It is possibly true that she gave no authority directly to indorse these particular notes, but I have no doubt she was consulted in the same manner as *she is in the other paper accepted or indorsed in her name.* I would judge that she is like most married women carrying on business, a mere figure head under which the old business of the bankrupt husband is carried on. If she was not consulted she was treated badly by her attorneys, her husband and son.

There is a letter to the plaintiff written by her son Arthur

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and signed Jennie Green in which she is made to say that she is satisfied with the arrangement made with Isaac Green and that the notes when sent would be duly indorsed. This hardly bears out the evidence of Isaac that it was the father who was to indorse the notes. I have no doubt that the notes were signed by Harris Green in the ordinary course of business as attorney for Jennie Green and that she is bound thereby.

But it appears that Jennie Green was thereby becoming liable as a surety for Isaac, and although Arthur was probably her agent, held out as such to transact everything in connection with his own business, it is not clear that his apparent authority extended to signing letters for her outside of the business of the concern. Also, that the signature of the indorsement is within the terms of the alleged power of attorney to Harris and Arthur Green. Under sec. 51 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, that kind of signature is notice that the agent has but a limited authority, and the principal is only bound if the agent was acting within the actual limits of his authority. Strangely enough the power of attorney was not put in evidence, but only secondary evidence unobjected to was used. Ordinarily that would be good enough. Probably the power of attorney which was addressed to a bank is not to be considered at all, and that the husband, Harris, was indorsing and using her name under his authority outside of it.

The County Court Judge apparently had not the difficulties of the agency in respect to the letter, and the indorsement called to his attention. There ought to be a new trial. This will afford an opportunity for the tribunal to have placed before it the power of attorney which may relate only to Jennie Green's own business. Also the letter (or copy) of August 4, 1912, to which the letter in evidence was a reply. It will also afford an opportunity of shewing if it can be done that Harris Green was an agent outside of the mere terms of the power of attorney. Also that what Arthur Green had done in affixing his mother's signature to this letter was within the scope of his authority by other transactions. A person who does not write at all must, in carrying on business or in getting along in the world, generally have someone to write or sign letters. He was held out by be-

ing an employee and in her office, and it would not require much evidence to shew from other transactions that he was not using her signature only in the business of that concern. He was not called as a witness.

There will be a new trial, the costs of appeal to abide the result.

Graham, C.J.

RITCHIE, E.J., concurred.

Ritchie, E.J.

LONGLEY, J.:—I am not very clear in this case how the judgment should go, but I believe that the Judge below gave due consideration to all the facts, and I am not disposed therefore to find fault with his judgment. The defendant Jennie Green is a person without any education at all; she can neither read nor write, and all her correspondence is placed in the hands of her husband and her son. Edward Green probably understood his business when he wrote the letter which appears in the evidence, and distinctly agreed to sign the notes, and asked the plaintiff to forward them to him. It would have been better in the main to have Edward's evidence as to his right and authority, but I accept the Judge's view in the matter. However, though I have a strong opinion on the case, I do not care to take the responsibility of dissenting from the decision of the majority of my associates.

Longley, J.

DRYSDALE, J.:—I agree that a new trial be had herein. The question of defendant Jennie Green's liability depends upon a question of fact to which attention does not seem to have been directed at the trial. The indorsement relied upon was made by the husband of defendant Jennie Green, and, whether such an act came within the scope of his authority in acting for his wife is a question of fact that must be found, and upon some satisfactory evidence. I cannot find satisfactory proof on this point and I agree that justice requires that a new trial be had.

Drysdale, J.

HARRIS, J.:—The sole question is as to the authority of Harris Green to indorse, in the name of the defendant Jennie Green, the second promissory note sued on.

Harris, J.

Jennie Green had a store and her husband and her son Arthur looked after the business for her, and they had a general power of attorney from her to do business in her name with the Royal Bank of Canada. The note in question was not indorsed

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in connection with the business but was signed in Jennie Green's name by Harris Green as accommodation for Lewis Green, a son who carried on a separate business.

The power of attorney deposited with the bank was not produced, but the manager of the bank gave evidence which was not objected to, that it was a general power of attorney authorizing both Harris and Arthur Green to do business with the bank.

It was objected that evidence as to the contents of the power of attorney should not have been received and should not now be considered by this Court. If it had been objected to on the trial the bank manager would, without doubt, have been allowed to step across the street and get the original document. It was, no doubt, because of this that the evidence was not objected to. I think the secondary evidence should not now be rejected, but in the view I take of the case, this question is of no importance as the power of attorney only authorized the father and son to do business with the Royal Bank.

It obviously would not authorize either of the attorneys to sign accommodation notes for a third party. If there was authority to make the indorsement in question it must be found outside the power of attorney.

The defendant says that her husband and her son were looking after her business, *i.e.*, the store which she was carrying on, and she was asked:—

Q. Did you do the ordering of goods in your store, and she replied: "I don't do nothing, the old man and the boy do all the business for me."

She denies ever having been told that her husband had indorsed a note for Isaac Green or for anybody else, and this question was put to her.

Q. I suppose if Isaac had wanted a little help from you to stave off his creditors you would have been willing to do it? A. Well, he did not ask me. I did not know anything about it. He spoke to his own father, that is all.

She denied specifically that she ever authorized her husband to indorse for Isaac.

From this evidence it is, I think, clear that Jennie Green had given her husband and her son Arthur full power and authority to carry on her store and all business connected there-

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with, but I cannot find any authority to act for her beyond this business and matter arising out of or incidental to it.

The law as I understand it is that persons having general authority such as existed in this case in connection with a particular business are held to have implied authority to do whatever is incidental to the ordinary conduct of the business in question or whatever is within the scope of that class of acts, but they have no implied authority to do anything outside the ordinary scope of that business.

There was a letter produced on the trial which it was contended was binding on the defendant Jennie Green and made her liable on the indorsement.

This letter was written by the son Arthur. Just before the date of this letter Isaac had been to Montreal and had seen the plaintiff about his account. The only evidence as to the arrangement made by Isaac with the plaintiff was that of Isaac himself, and he says that notes were to be indorsed by his father and not by his mother. If so, it is difficult to see why plaintiff should write the mother but it is perhaps a fair inference in the absence of explanation that a letter was written by the plaintiff addressed to Jennie Green.

She swears she never knew anything about the letter written in her name. Apparently she was not asked whether she received the letter from the plaintiff dated August 14. The suggestion on the argument was that Arthur had received this letter addressed to his mother and answered it, and that he must have had authority to open all her mail and answer all communications addressed to her and therefore that Jennie Green is bound by this letter, and therefore that she is bound by the subsequent indorsement of the accommodation note. The defendant could not read or write, and, considering her condition in life, she probably had little or no correspondence, apart from that arising out of the store business. If this letter had been written by her son in connection with any matter arising out of the store business it, undoubtedly, would have been binding on her. Can it be assumed in the absence of any evidence that Arthur had ever before received or written a letter for his mother about any matter outside of or unconnected with the

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business that he had authority to write this letter to the plaintiff in her name, agreeing to indorse notes for the accommodation of Isaac? I am unable to find any evidence upon which I can make such a finding, and I say it with some regret because I must confess that I have a strong suspicion that circumstances really existed which, if they had been proved, would have shewn authority to her son to write the letter and to the father to indorse the note, but the case cannot be decided on suspicion alone.

The plaintiff's counsel was evidently taken by surprise on the trial. His client, who lives in Montreal, and is a merchant there, was not present, and I think there should be a new trial and that the costs of the appeal should abide the event.

Appeal allowed.

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HAUG & NELLERMOE v. MURDOCH.

Saskatchewan Supreme Court, Sir Frederick W. G. Haultain, C.J., Newlands, Brown and McKay, JJ. January 8, 1916.

1. SALE (§ I A—1)—ILLEGALITY OF SALE IN CONTRAVENTION OF STEAM BOILERS ACT.

Where a traction engine is not constructed in accordance with the Steam Boilers Act (R.S.S. 1911, ch. 22, sec. 19), but the affidavit of the proper officer of the company states that it has been constructed in accordance with the plans required, and owing to the nature of the defect, it is not discovered by the inspector of steam boilers, and the reduction in pressure required by regulation 1 of the Department of Public Works has consequently not been made, and, therefore, neither the statute nor the regulations having been complied with, the sale of such engine is wholly illegal and cannot be enforced.

[*Haug Bros.* v. *Murdock*, 25 D.L.R. 666, reversed; *Cope* v. *Rowlands*, 2 M. & W. 149, applied; *Whiteman* v. *Sadler*, [1910] A.C. 514; *Re Robinson, Grant* v. *Hobbs*, [1912] 1 Ch. 717; *Foster* v. *Taylor*, 5 B. & Ad. 887; *Beasley* v. *Bignold*, 5 B. & Ald. 335, referred to.]

2. SALE (§ III C—70)—ILLEGALITY OF SALE IN VIOLATION OF STATUTE—RESCISSION—RIGHTS OF PARTIES.

It is ordinarily the duty of the seller to know of the defects in the engine he sells, and where the legislature has imposed a duty on him and prohibits any sale not in accordance with the statute, making the seller liable to a penalty, but does not in express terms prohibit the purchase nor make the purchaser liable to any penalty, even though he buy with knowledge that the specifications have not been statutorily complied with, the legislation must be deemed to have been passed primarily for the protection of the purchaser, who is entitled to have the purchase price returned; the seller being entitled to possession of the engine.

[*Kearley* v. *Thomson* (1890) 24 Q.B.D. 742; *Moses* v. *Macferlan*, 2 Burr. 1005; *Lodge* v. *Nat. Union Inv. Co.*, [1907] 1 Ch. 300, applied; 25 D.L.R. 666, reversed.]

Statement

APPEAL from a judgment of a trial Judge in an action for

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the balance due on a traction engine [*Haug & Nellermoe* v. *Murdoch*, 25 D.L.R. 666, reversed].

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

H. Y. MacDonald, K.C., for respondent.

HAULTAIN, C.J., and MCKAY, J., concurred with BROWN, J.

NEWLANDS, J.:—This is an action for the balance due on a traction engine. It is alleged by the defendant as a defence that the boiler of said engine was not built in accordance with the regulations of the Department of Public Works, and that by virtue of the Steam Boilers Act the contract is an illegal one and cannot be enforced.

The trial Judge held that the boiler was not built in accordance with regulation No. 101, but that the only penalty was a reduction of the horse power as provided by regulation No. 1 of said regulations.

The Steam Boilers Act, ch. 22, R.S.S. sec. 19 (3), provides:—

Every new boiler sold or exchanged for use within Saskatchewan from and after the first day of January, 1911, shall be constructed in accordance with specifications set forth in the regulations issued by the department.

Regulation No. 101 is as follows:—

Tubes must fit the holes in tube sheets as nearly as possible before expanding, the end nearest fire being a driving fit when applied. The ends must be prepared for this, and the holes in sheets be truly round, with edges slightly rounded and true to size.

The hole in sheet where tube is entered is to be only large enough to allow free entry of tube.

Tubes must be expanded by roller expanders.

The ends of tubes must not extend more than three-sixteenths to one-quarter inch beyond sheet, according to the thickness of tube, and then be beaded against the tube sheet without cracking, to ensure which the ends of tubes must be annealed. The hand-welding of tubes is prohibited.

And regulation No. 1 is as follows:—

All boilers that do not comply in every particular with these regulations will be penalized by the inspectors by a suitable reduction in pressure allowed. In order to cause the minimum inconvenience to present owners, boilers installed and in operation in the province before January 1, 1911, will be treated as liberally as possible, their working pressure being calculated from the formulæ in the following rules with such additions as the inspector may deem safe and in accordance with the provisions of the Steam Boilers Act.

By virtue of sec. 16 of the General Act these regulations must be complied with before the boiler could be sold, the sale in this case having taken place after January 1, 1911.

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As I have said, the trial Judge held that the boiler was not constructed according to regulation No. 101, but that by regulation No. 1, the penalty was a reduction in the pressure allowed and that, therefore, the sale of the boiler was not forbidden by the Act, and the contract was not, therefore, illegal.

I am of opinion that neither regulation No. 1 nor No. 101 were complied with. It was found that the boiler did not comply with No. 101, and, therefore, there should have been a similar reduction of the pressure allowed under No. 1. There is no evidence that this was done; in fact the evidence shews that the first inspection of the boiler did not shew the defect. That plans and specifications had been filed with the department that complied with the regulation, and an affidavit had been made by the proper officer of the company that the engine and boiler had been built according to the plans, which was not the fact. The defect was one that could not be found out without taking the boiler to pieces, which was probably the reason why the inspector did not find it out and reduce the pressure as provided by regulation No. 1.

Neither regulation was, therefore, complied with, and the sale is, therefore, illegal, because the boiler does not comply with the regulations, and should not, therefore, have been sold: *Spears* v. *Walker*, 11 Can. S.C.R. 113.

The fact that the defendant kept the engine and boiler after finding out the defect does not make the contract legal, because where the prohibition is absolute as in this case, it cannot be waived by the party in whose favour it is made: Leake on Contracts, Can. ed., p. 517; *Bisgood* v. *Henderson's Transvaal Estates*, [1908] 1 Ch. 743.

The plaintiffs cannot come in now and ask that the pressure on the boiler be reduced on account of the defect in the tubes because that would reduce the horse power of the boiler and defendant is entitled under his contract to a 30 h.p. boiler: *Wallis* v. *Pratt*, [1911] A.C. 394.

The appeal should, therefore, be allowed with costs.

As to the counterclaim, the defendant is in the same position as the plaintiff. He is a party to an illegal contract and made the payments after he knew the boiler was not built ac-

cording to the regulations of the department. The counterclaim should also be dismissed with costs.

BROWN, J. (after stating the facts):—The question that arises on this appeal is as to whether or not the joint effect of the statute and the regulations is to prohibit the sale of this engine, and to make such sale illegal.

Sec. 19 of the Act, as I understand it, in effect states that, after January 1, 1911, no new boiler (this term "boiler" would cover the engine in question) shall be sold or exchanged for use in the province unless at the time of such sale it is constructed in accordance with the specifications set forth in the regulations. In view of this section, it seems clear that if the engine did not comply with the specifications set forth in the regulations, the plaintiff cannot succeed. In *Cope* v. *Rowlands*, 2 M. & W. 149, Parke, B., at 157, is reported as follows:—

> It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only because such a penalty implies a prohibition. Lord Holt, *Bartlett* v. *Vinor*, Carthew, 252. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is whether the statute means to prohibit the contract?

The following authorities are to the same effect: *Whiteman* v. *Sadler*, [1910] A.C. 514; *Re Robinson, Grant* v. *Hobbs*, [1912] 1 Ch. 717; *Foster* v. *Taylor*, 5 B. & Ad. 887; *Bensley* v. *Bignold*, 5 B. & Ald. 335; Leake on Contracts, Can. ed., 516.

The question now arises, did the engine comply with the specifications as contained in the regulations? It is clear, and the trial Judge has so found, that the engine did not comply with the specifications set out in reg. 101, and, it may be added, that the departure in this respect was not of a trivial, but, on the contrary, it was of a serious, character.

It is contended on behalf of the plaintiffs that the regulations must be read as a whole, and that the effect of regulations 1 and 101, taken together, is not to absolutely require engines to be constructed in accordance with the specifications in

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No. 101, but only that they must be so constructed if it is desired to avoid being penalized, as provided in regulation 1. I am unable to accept that view. Regulations 1 and 2 are, in my opinion, in no way intended to modify the explicit provisions of reg. 101, but are simply for the guidance of the inspectors who are appointed under the Act. It seems to me that regulation 101, though called a regulation, must be regarded as containing the "specifications set forth in the regulations" as provided for in sec. 19 of the Act, as distinguished from mere regulations such as are set out in Nos. 1 and 2. Sec. 19 of the Act deals only with *new* boilers *sold or exchanged for use in Saskatchewan after January* 1, 1911. This section in no way touches old boilers sold before or after January 1, 1911, nor old boilers brought into the province either before or after January 1, 1911, nor new boilers sold for use in other provinces but brought into this province by the purchaser after sale and before use. Regulations 1 and 2 would apply to all such cases, and it may even have been contemplated in framing these regulations that new boilers would be sold contrary to the provisions of sec. 19 of the Act, and in such case it is provided what an inspector's duties are. That, however, would not, in my opinion, modify the specifications as contained in reg. 101, nor in any way permit the sale of an engine that was not constructed in compliance therewith in view of the positive provision of the statute. If effect were to be given to the plaintiffs' contention, it would mean that, notwithstanding the Act of the legislature, which was clearly intended to prohibit the sale of certain engines, any kind of an engine could be sold after January 1, 1911, at the risk only of the purchaser being penalized by the inspector in the use of it. In this view, the prohibition portion of the section as to sale and exchange would mean nothing. I am of the opinion, therefore, that the plaintiffs having sold an engine, the sale of which was prohibited by statute, the sale was illegal, and the plaintiffs cannot recover.

Having thus disposed of the plaintiffs' claim, we now come to consider the defendant's counterclaim. The defendant seeks recovery of the amount paid the plaintiffs on the engine, and cancellation of the notes that still remain unpaid. The only

evidence of the amount paid, that I find, is what the plaintiffs admit in their statement of claim. Par. 5 of the claim states: "The note for $1,200, due November 1st, 1911, has been paid in full." In the absence of evidence to the contrary, I take this to mean that this note was paid at maturity. It was dated June 21, 1911, and bore interest at 7 per cent. per annum until maturity. The amount that would be due, therefore, on the note on November 1, 1911, is $1,230. There were also the following sums paid: December 5, 1912, $300; March 27, 1913, $492; December 18, 1913, $20; making a total of $2,042. It will be noted that the 1911 note was paid before the defendant discovered the defects in the engine, and the balance of the payments were paid afterwards. In my view of the case, however, this distinction is not material. The general rule governing the right to recover money paid under legal contracts is set out by Fry, L.J., in *Kearley* v. *Thomson*, [1890] 24 Q.B.D. 742, at 745, as follows:—

> As a general rule, where the plaintiff cannot get at the money which he seeks to recover without shewing the illegal contract, he cannot succeed. In such a case the usual rule is *potior est conditio possidentis*. There is another general rule which may be thus stated, that where there is a voluntary payment of money it cannot be recovered back. It follows in the present case that the plaintiff who paid the £40 cannot recover it back without shewing the contract upon which it was paid, and when he shews that he shews an illegal contract. The general rule applicable to such a case is laid down in the very elaborate judgment in *Collins* v. *Blantern*, 1 Sm. L.C., 7th ed., 369, where the Lord Chief Justice says: "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again; you shall not have a right of action when you come into a Court of justice in this unclean manner, to recover it back." To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of those is the case of oppressor and oppressed, in which case usually the oppresed party may recover the money back from the oppressor. In that class of cases the *delictum* is not par, and therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithtanding that both have been parties to the illegal contract.

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See also 7 Hals. 409.

In my opinion, the defendant comes within two of the exceptions referred to in *Kearley* v. *Thomson*. In the first place he is not *in pari delicto* with the plaintiffs, and in the second place he is one of a class of persons that the legislature has sought to protect by the legislation in question. It is clear that the defendant had no knowledge of the defect in the engine until the summer of 1912. It does not appear that the plaintiffs did not know of this defect at the time of sale; and, in any event, it was their business to know, as they were the vendors, and it is upon vendors that the legislature has placed a duty. Moreover, as the legislature prohibits the sale and makes the vendor liable to a penalty, and as it does not, except indirectly, prohibit the purchase, and does not make the purchaser liable to any penalty even though he buy with knowledge that the specifications have not been complied with, it seems clear that the legislation was passed primarily for the protection of purchasers. In this view the defendant would be entitled to recover.

But the defendant has for several years had possession and use of the engine and still has possession of same, and this, it seems, is a factor that should be considered by the Court in granting him the relief which he seeks. Lord Mansfield, in the case of *Moses* v. *Macferlan*, 2 Burr. 1005, 1012, 97 E.R. 680, says:—

> This kind of equitable action, to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake: or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances

of the case, is obliged by the ties of natural justice and equity to refund the money.

In *Lodge* v. *Nat. Union Inv. Co.*, [1907] 1 Ch. 300, the defendants, being money-lenders, had loaned a large sum of money to the plaintiff and had taken as security for the repayment certain assignments, bills of exchange, and other securities. The defendants had not registered under the Money-lenders' Act, nor had they obtained an exemption from the Board of Trade, and in consequence, the transaction was void for illegality, and the defendants could not, by action, recover the amount of their advance. The plaintiff brought action for the return of his securities. Parker, J., who tried the case, in giving judgment says, at p. 306:—

The defendants are now admitted to have been money-lenders within the meaning of the Money-lenders Act, 1900. At the date of the transactions I have referred to they had not registered themselves under that Act, nor had they obtained any order from the Board of Trade exempting them from such registration. It follows that, on the authority of *Victorian Daylesford Syndicate* v. *Dott*, [1905] 2 Ch. 624, and *Bonnard* v. *Dott*, [1906] 1 Ch. 740, the loan transactions above referred to are void for illegality. The usual rule is, that in the case of a transaction void for illegality, neither party can take any proceedings against the other party for the restoration of any property or for the repayment of any money which has been transferred or paid in the course of the illegal transaction. To this rule, however, there are exceptions, one of them being in favour of the persons for whose protection the illegality of the contract has been created, and in the authorities I have mentioned it has been held that in the case of loan transactions, void under the Act of 1900, the borrower is within that exception. The illegality of the transaction, therefore, does not preclude the plaintiff from maintaining this action. The defendants, however, maintain that, this being an appeal to the equitable jurisdiction of the Court, the plaintiff can be put upon terms and not allowed to assert any equity unless he himself is prepared to do equity by repaying the £1,075 less the £150 paid for the privilege of renewing the bills, and certain sums which they are willing to allow him to deduct, which I need not refer to in detail. In support of this contention the defendants referred to the decisions of the Court relating to transactions void under the old usury laws. On reference to the statutes dealing with usury, it will be found that usurious contracts were made illegal and a penalty imposed in much the same way as is done with regard to loan transactions prohibited by the Money-Lenders' Act, 1900. I refer in particular to the statutes, 12 Car. 2 ch. 13, and 12 Anne, stat. 2, ch. 16. I think, therefore, I shall be justified in treating the decisions under those statutes against usury as authorities for what I ought to do in the analogous cases which arise under the Act of 1900. It seems reasonably clear that, at any rate in equity, if not also at law, a person taking advantage

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of the exception arising from the fact that he belonged to the class for whose protection the statutes were passed, could not assert any right unless he was himself prepared to do what the Court considered fair to the defendant.

After reviewing the authorities, the Judge ordered the return of the securities, but imposed a condition upon the plaintiff that he return the money which he borrowed.

In the case at bar, the evidence shews, and the trial Judge has so found, that the engine was of no practical value to the defendant during any or all of the time that he has had possession of same. The defendant also states that the engine, as it now stands, is of no value to him whatever. It may, however, be of considerable value to the plaintiffs, and I am of opinion, in view of the authorities that I have referred to, that upon the plaintiffs paying the amount which I hold the defendant is entitled to, and his costs, the defendant should deliver up possession of the engine to the plaintiffs.

In the result, the judgment appealed from, should, in my opinion, be set aside, the plaintiffs' action in the Court below should be dismissed with costs, and the defendant should have judgment on his counterclaim for $2,042 and costs of the counterclaim; the notes sued on, which are on file in Court should be cancelled, and the defendant should have his costs of this appeal. In the event of the plaintiffs paying, or the defendant recovering from the plaintiffs the said sum of $2,042 and his costs as aforesaid, the plaintiffs should have possession of the engine.

Appeal allowed

ONT.

S. C.

REX v. UPTON.

Ontario Supreme Court, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. October 12, 1915.

1. CRIMINAL LAW (§ I E—20)—ARSON—CHARGE AGAINST TWO PERSONS JOINTLY—INSUFFICIENCY OF EVIDENCE TO IMPLICATE BOTH OR DISTINGUISH BETWEEN THEM.

A conviction of two persons jointly charged with arson will be set aside where the evidence warrants a finding that the act was committed either by one or the other of them but does not enable the court to determine which one committed the offence nor justify a finding implicating them both.

Statement

CASE reserved by the Judge of the County Court of Brant, by whom the two prisoners were convicted of arson.

I. F. Hellmuth, K.C., and *W. A. Hollinrake*, K.C., for the accused.

J. R. Cartwright, K.C., for the Crown.

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REX v. UPTON.

Meredith, C.J.O.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the argument proceeded on the footing that the case was amended so as to raise the question whether there was evidence to support the conviction.

The Court was of opinion that there was evidence which, while not conclusive, warranted a finding that the elder prisoner's house was set on fire either by him or by the other prisoner, his son, but that there was no evidence to warrant a conviction of both of them; and that, there not being (as the Court thought there was not) any evidence to enable it to be determined by which of the prisoners the offence was committed, the conviction must be quashed. *Conviction quashed.*

GRAND TRUNK PACIFIC R. CO. v. OPPERTHAUSER & SONS.

ALTA.

S. C.

Alberta Supreme Court, Scott, Stuart, and Hyndman, JJ. January 26, 1916.

1. CARRIERS (§ III A—373)—POWERS OF AGENTS—PAYMENT TO AGENT'S WIFE—EFFECT.

Payment of freight charges to the wife of the local agent before his dismissal by the railway company, who was permitted frequently to act about the office in the agent's capacity, constitutes payment to the company, notwithstanding a notice on the bill that all cheques should be made payable to the railway company.

Statement

APPEAL from a judgment for plaintiff in an action for freight charges, which is reversed.

J. E. Wallbridge, K.C., for defendants, appellants.

N. D. Maclean, for plaintiffs, respondents.

The judgment of the Court allowing the appeal was delivered by

Stuart, J.

STUART, J.:—The defendants carried on business as hardware merchants at Stoney Plain. In June, 1912, a carload of freight was shipped from Winnipeg over the plaintiffs' railway line to Stoney Plain, and to the defendants as consignees. At that place, one L. V. Green was the local agent of the railway company. On June 14, one of the defendants went and saw Green, and was informed that the car had arrived. The defendant then told Green that he wanted the goods badly and asked whether he would allow them to start unloading the car and to send the expense bill up and he would pay it. To this Green

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consented, and the unloading of the car began. Green had to remain in supervision of this work. Green's wife took the expense bill up to the defendants' office and the defendants then signed a receipt for the goods and gave Mrs. Green a cheque for $365.79 upon the Canadian Bank of Commerce, payable to "Mr. Green, or order." The amount of the freight was $361.42. The extra small amount of $4.37 was for freight on another shipment of goods. After the whole of the contents of the car had been delivered he went to the station and saw Mr. and Mrs. Green together and made some complaint about a certain shortage in the shipment and this was noted on the shipping bill. No mention was then made by Green that the freight had not been paid. Green returned the smaller sum of $4.37 to the plaintiff company but never returned the larger sum of $361.42. The cheque was endorsed, not by Green, but by "Mrs. L. V. Green," and was paid by the bank upon that endorsement to someone, it is not shewn to whom. The documents, expense bills, etc., which Green had possession of were destroyed. That same day Green was dismissed by the plaintiffs and disappeared. The plaintiffs sued the defendants for the $361.42 and obtained judgment for the amount and costs. The defendants appeal.

In my opinion, the appeal should be allowed. Really the only question is, whether Green received the money, either actually in his hands or in such a way as constitutes a receipt by the company in the defendants' favour.

It is true that the expense bill contained a notice that all cheques should be made payable to the railway company, but there was nothing which forced the defendants to give a cheque at all. They were at perfect liberty to pay cash to Green. The question is: Did they not in effect do so?

The defendant, George Opperthauser, swore that Mrs. Green frequently came and collected freight from them, that they had never been allowed to receive goods from the company without first paying the freight; that on one occasion he paid freight charges in the company's office to Mrs. Green when Green was sitting in the office on a chair. It is quite apparent that Mrs. Green was acting as a clerk in Green's office. I can see no difference between what happened here and the position which would

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have existed if the defendants had gone as they had done before to the office and paid the cash to Mrs. Green in the presence of Green, and with his apparent approval and consent. Surely, in such a case, the railway could not repudiate the receipt of the money if Mrs. Green had seen fit not to hand it to her husband but put it in her pocket. And practically that was what occurred. True, Mrs. Green stepped up to the defendants with the documents and received the cheque there, but it was, in my opinion, just the same as if they had gone to Green's office and handed the cheque to Mrs. Green in Green's presence. Green must have known that the cheque had been received because he sent Mrs. Green for it and also he never said a word about the freight not having been paid although he saw the defendants shortly after all the goods had been delivered, and in Mrs. Green's presence. Then there is the additional fact that he did remit the $4.37 which was included in the same cheque.

I think therefore that Green received the money either into his own hands or into the hands of a clerk whom he had in his office, and who he knew had received the money at the very moment it was received.

Payment to Green was payment to the company because his dismissal had not yet taken effect, or at any rate had not reached the defendants' knowledge.

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

Appeal allowed.

CAN.

S.C.

Re HEINZE.
FLEITMANN v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. May 4, 1915.

1. TAXES (§ III B 1—112)—RAILWAY SUBSIDY LANDS—INTEREST OF OWNER UNDER AGREEMENT VALIDATED BY STATUTE.

An agreement declaring one entitled to a moiety of railway subsidy lands for which no formal conveyance is executed, but the recitals as to the moiety being later adopted in a validating Act confirming a repurchase of the lands by the Crown subject thereto, sufficiently vests an interest in the lands which is liable to assessment and taxation under sec. 47 of the Taxation Act, R.S.B.C. 1911, ch. 222.

[*Angus* v. *Heinze*, 42 Can. S.C.R. 416, referred to; *Re Heinze*, 20 B.C.R. 99 affirmed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, 20 B.C.R. 99, affirming the judgment of a special

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RE HEINZE.

Court of Revision, by which the assessment of the appellant's interest in certain lands was confirmed.

Wallace Nesbitt, K.C., and *Wallace*, K.C., for the appellant.

E. Lafleur, K.C., for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed for the reasons given in the notes of Idington, J.

Davies, J.

DAVIES, J., concurred with Duff, J.

Idington, J.

IDINGTON, J.:—This is an appeal resting upon sec. 41 of the Supreme Court Act, relative to the assessment for taxation of a certain interest which the original appellant was alleged to have had, in 1913, in certain lands in British Columbia.

The original appellant, now dead, and represented by present appellant, owned the entire stock of the Columbia and Western R. Co., which had earned a large land subsidy under 59 Viet. ch. 8, of the Statutes of British Columbia, and also owned a number of other properties. He, in February, 1898, entered into an agreement with Messrs. Angus and Shaughnessy to sell them these other properties and said stock of said company for the price or consideration of $800,000, and their agreement that the moiety of said land subsidy should be conveyed to him, Heinze, when and how he should direct and the other moiety should be the property of the said company.

The agreement provided by many details for securing the payment of the liabilities of the company and the charges against the said other properties.

The agreement was so framed that the other properties and stock should be acquired free from liability and without being in any way complicated by the provisions dealing with the land subsidy and division thereof. That land subsidy was free from taxes in the hands of the company for 10 years, which did not expire till October, 1911, and the original appellant, for that very obvious reason, did not desire to have them sooner transferred to him than he desired.

For some reason or other Angus and Shaughnessy, who it is alleged (and the sequel shews) represented the C.P.R. Co., did not desire to keep the matter open so long. And they attempted to bring about a partition, by a partition suit, and therein,

amongst other things, to terminate their trusts. The Court of Appeal for British Columbia held that neither form of relief could thus be granted under the said agreement against the will of the said Heinze.

This Court, on appeal thereto, in 1909 (*Angus* v. *Heinze*), 42 Can. S.C.R. 416, maintained that position.

Because of what, I respectfully submit, was either an unfortunate expression of the reasons given by the only Judge in this Court assigning reasons for the dismissal of the said appeal, or misapprehension of these by the Courts below, it was, when the time came that these lands, or any interest therein, might properly be taxed, alleged that this Court had declared that said original appellant had no equitable interest in the moiety of the undivided land subsidy.

The Courts below apparently accepted that interpretation put upon said judgment and assumed that he had none but such as depended upon the legislative enactment I am about to refer to.

Said Angus and Shaughnessy having failed in said partition suit, the said railway company and the C.P.R. Co., which Angus and Shaughnessy seem to have represented, and the B.C. Southern R. Co., on January 31, 1912, entered into an agreement with respondent, whereby, amongst other things, the unsold part of said lands earned as subsidy by the Columbia and Western R. Co., which had been granted to said company, should be, pursuant to a statutory option relative thereto, reconveyed to the respondent for the price or sum of 40 cents an acre to be computed on the basis of one-half of the total area so reconveyed, but subject, nevertheless, to the right of said Heinze in the other moiety of said lands.

The Crown, by virtue of said agreement, and an Act of the Legislature of British Columbia confirming same, acquired said lands, subject to the interest of said Heinze therein, under the said agreement first mentioned.

It is the said interest of said Heinze in said lands which has been assessed by virtue of an Act passed by said legislature and known as Taxation Act Amendment Act, 1913, and from that assessment this appeal has been taken.

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The judgment of the Court of Appeal for British Columbia on appeal to it from the Court of Revision, maintained the assessment. The section providing for that assessment is as follows:—

(2) Where the title of any land has become vested in His Majesty in right of the province, subject to any estate or interest therein of any person, or where the title to any lands is vested in His Majesty, and it appears that any person had, prior to the vesting of such title in His Majesty, acquired or had such a right, whether legal or equitable, to an interest in such lands as would be enforceable against a private individual if such title were vested in a private individual, and such person has such right though he may not have actually acquired such interest, it shall be lawful for the assessor to assess the interest of such person or the right of such person to an interest in such lands by estimating the value of the whole of said lands at their cash value per acre, and the proportion thereof representing the value of the interest or of the right to an interest of such person shall be set down by the assessor upon his roll.

This seems to have been designed to meet the very case of Heinze's interest in the lands in question. There never could have been a doubt of Heinze having acquired or rather retained an equitable interest in the said lands under the first mentioned agreement, but for the possibly arguable question of the capacity of the company to become bound in such way as sought to be accomplished thereby.

I should, however, feel inclined to hold that the absolute owner of a company might, where no other claims of any kind existed in or against the company, and no one in existence to be injured by or to complain of such a mode of dealing, stipulate with his vendees for the reservation to himself of part of the lands of the company and that a Court of equity could and would so long as no third party had acquired any right against the company hold the vendees had thereby become his trustees and enforce the agreement accordingly.

It is the constant habit of Courts of equity in looking at the ordinary transactions and relations of vendors and vendees to treat the vendee as the equitable owner and the vendor or other possessor of the legal estate as trustee for him.

The owner of such an equity can so long as he discharges his own obligations depend upon the Courts of equity protecting him without his being driven to an action for damages as his only remedy.

But to put that beyond peradventure, it is admitted, as part of this case, that in April, 1906, the said company and the said Angus and Shaughnessy signed a notice to Heinze expressly acknowledging that said lands had been then granted by the Crown to said company and recognizing the right and interest therein of said Heinze under the said agreement of 1898, and that he was entitled to a moiety of said lands as provided therein and proposing a partition of said land so as to give him his said moiety.

His reply thereto, also made part of the admissions in the case, shews that his only objection to acceding thereto was the possibility of his being taxable therefor in case of a division; whereas the company could not be so taxable.

I am, therefore, unable to understand how it ever could have been supposed that Heinze had no equitable interest in said lands. Such an interest I conceive may become the subject of taxation and of direct taxation of land within the province. I can understand how, by reason of there having been no joint interest, either legal or equitable, and no clear right in Angus and Shaughnessy or any one else to insist on the termination of the relationship created by the agreement till, within the terms thereof, he, Heinze, had expressed how and when it should terminate and its determination might have been to his detriment any such right could not be asserted by way of a partition suit.

The denial of that relief by way of partition was all that was involved in the decision relied upon save the minor question of the trustee passing his accounts.

I may reiterate once more that a decision of any Court relative to what is before it for judicial determination is what binds as authority and not the possibly irrelevant reasons assigned for coming to such decision.

In justice to myself I may be permitted to add that the report of the case does not correctly represent me. The records shew I filed no opinion or concurrence and only one other Judge than he writing appears of record to have concurred therein, in the usual mode when intending to agree in the reasons as well as result.

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The result is, I am sure, a misapprehension for which I may not be blameless in failing to file a memorandum expressing how I desired to treat the opinion in question.

I have no doubt of the legislative power to declare, as I think the confirming Act does, Heinze entitled or to declare him assessable in the manner the later Act sets forth.

His non-residence might prevent steps being taken to collect the rates abroad, but that cannot affect the undoubted right of the legislature to limit his rights in claiming from the Crown the recognition by grant or otherwise of his interest, and charging it with the amount of the taxes as provided by the statute. I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I have come to the conclusion that the appellant's rights originating in the agreement of the 11th of February, 1891, are now assessable as constituting an interest in land under the B.C. Statute, 1913, ch. 71, sec. 2.

By ch. 8 of the statutes of B.C. for 1896, the Lieutenant-Governor-in-Council was empowered to aid the construction of the Columbia and Western Railway by a land grant. Sec. 8 of that chapter exempted this land grant from taxation until the expiration of 10 years from the date of the acquisition of it by the company or until alienated by lease, agreement for sale or otherwise by the company.

The Columbia and Western Railway was divided into 6 sections. Sections 1, 3 and 4 were constructed, but there was no construction on sections 2, 5 and 6. In respect of sections 1 and 3 the company earned 1,603,312 acres, of which 794,440 acres were granted on or about April 17, 1908. To these lands the exemption applies.

The residue of the subsidy earned, namely, 808,872 acres, could not be granted under the Act of 1896 as the lands were not designated and surveyed within 7 years from the passing of the Act, as required by sec. 5.

This state of affairs led to the passing of ch. 9 of the statutes of 1906, whereby the Lieutenant-Governor-in-Council was empowered to grant and did grant to the company this residue of 808,872 acres. By sec. 3 of that statute the exemption of these lands from taxation expired on October 3, 1911.

In February, 1898, F. August Heinze, owned or controlled

the capital stock of the Columbia and Western Railway Company. Messrs. Angus and Shaughnessy, acting in the interests of the C.P.R. Co., acquired this property from Heinze under an agreement executed in that month.

It was part of the arrangement between the parties that the benefit of an undivided half of the land subsidy earned at the date of the transfer should be secured to Heinze. The stipulations for securing this are a little complicated, and in some respects, perhaps, not easy to comprehend; but, while Heinze no doubt had in view the condition imposed by the subsidy Act, that the exemption from taxation should cease upon alienation in any manner of the subsidy lands by the company, still the agreement provided clearly enough that either the company or Heinze should be entitled to a partition of any portion of the subsidy lands affected by the agreement as soon as such portion should be granted to the company by the Crown. The Columbia and Western R. Co. was not a party to the agreement. In *Angus* v. *Heinze*, 42 Can. S.C.R. 416, an action by Messrs. Angus and Shaughnessy for a partition was dismissed, this Court taking the view that, under the agreement of February, 1898, alone, Heinze had acquired neither a legal nor an equitable interest in the lands in question.

It would, I think, not be open to doubt that Heinze's rights under the agreement constituted an interest in the lands if it had appeared that they had been vested in Messrs. Angus and Shaughnessy for the purpose of enabling them to carry out the agreement. We are not informed whether this was done, and it may be assumed that, when the agreement of 1912 was executed, Heinze was not in possession of any "interest" within the meaning of the statute of 1913.

The agreement of 1912, was made a schedule to ch. 37 of the statutes of that year; and to ascertain the effect of them they must be read together. I reproduce the statute in full and the material parts of the agreement:—

STATUTES OF BRITISH COLUMBIA, 1912.

Chapter 37.

An Act Respecting the Repurchase by the Crown of Certain Railway Subsidy Lands.

(27th February, 1912.)

Whereas by the Railway Subsidy Lands Re-purchase Act, being ch.

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198 of the Revised Statutes of British Columbia, 1911, the Lieutenant-Governor-in-Council was empowered to enter into conditional agreements to acquire for the province, by re-purchase, exchange, or otherwise, any lands theretofore or thereafter granted by the Crown in the right of British Columbia in aid of the construction of railways:

And whereas, pursuant to the provisions of the said statute, a conditional agreement has been entered into between His Majesty's Government and the Canadian Pacific, British Columbia Southern, and the Columbia and Western Railway Companies for the re-purchase by the Crown of certain unsold portions of the lands granted in aid of the construction of the British Columbia Southern and the Columbia and Western Railways:

And whereas it is expedient to ratify the said agreement pursuant to the provisions of the said Railway Subsidy Lands Re-purchase Act:

Therefore, His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. The agreement, a copy of which forms the schedule to this Act, made between His Majesty the King, represented by the Honourable the Premier of British Columbia and the Canadian Pacific Railway Company, the British Columbia Southern Railway Company and the Columbia and Western Railway Company is hereby ratified and confirmed and declared to be legally binding, according to the tenor thereof, upon the parties thereto; and the said parties to the said agreement are hereby authorized and empowered to do whatever is necessary to give full effect to the said agreement, the provisions of which are to be taken as if they had been expressly enacted hereby and formed an integral part of this Act.

SCHEDULE.

. . . . .

And whereas, by agreement bearing date the 11th day of February, 1898, and made between F. August Heinze of the one part, and Richard B. Angus and Thomas G. Shaughnessy of the other part, the said Heinze became entitled to an undivided one-half interest in certain portions of the said Crown grants to the Columbia and Western Railway Company, containing approximately 615,600 acres, and detailed in the document hereunto annexed, marked "Schedule B" hereto, and signed by the parties hereto.

. . . . .

2. The Columbia and Western Railway Company agrees to sell and convey to the Crown in right of the Province of British Columbia, and the Crown in right of the Province of British Columbia agrees to purchase, all those portions of the lands of which the Columbia and Western Railway Company has obtained Crown grants or of which it is entitled to Crown grants, as set out in the recitals hereto, and which the said company has not sold or contracted to sell at the date of this agreement, reserving, however, to the said company all timber upon the lands covered by timber permits in force at the date of this agreement and during the existence of each respective timber permit, particulars of which are shewn in the statement hereto attached, marked "Schedule C" hereto, and signed by the parties hereto, but so that, with the expiration of each respective timber permit, the timber remaining upon the land in such permit

comprised shall revert to the Crown in right of the Province of British Columbia; and subject to the estate and interest held by F. August Heinze under the agreement bearing date the 11th day of February, 1898, hereinbefore mentioned, in portions of the said lands containing approximately 615,600 acres, the details whereof are shewn in Schedule B hereto. The lands to be conveyed under this paragraph being estimated to contain approximately 1,514,832.66 acres.

. . . . .

4. The Crown in right of the Province of British Columbia agrees to pay to the said Columbia and Western Railway Company compensation at the rate of forty cents per acre for all the lands to be sold and conveyed by the said company to the Crown, pursuant to paragraph 2 hereof, excepting from the computation of the amount payable under this paragraph one-half of the total area in which the said F. August Heinze is entitled to an undivided one-half interest, as detailed in Schedule B hereto, under the terms of the agreement hereinbefore mentioned; the said compensation to be payable on the execution and delivery of conveyances of the said lands, subject to the interest of the said F. August Heinze therein, and otherwise free from encumbrances.

. . . . .

6. The Crown in right of the Province of British Columbia agrees to accept the conveyance of the lands mentioned in paragraph 2 hereof, subject to the estate and interest of the said F. August Heinze, his heirs and assigns, therein; and so that the estate and interest of the said F. August Heinze, his heirs and assigns, in the said lands and his right to a conveyance or partition thereof shall not be impaired by the execution and delivery of this agreement, and the Crown will not refuse or neglect to grant, convey or partition the interest of the said Heinze in the said lands upon proof of right, title and interest.

If Heinze had been a party to this agreement of 1912 it would hardly be susceptible of dispute that his rights in relation to the lands in question under the agreement of February, 1898, had become binding on the Crown or that they constituted an "interest" in those lands in the sense of the Act of 1913. It is argued and this argument raises the substantial point for decision that the declarations touching Heinze's rights and the stipulations contained in the clauses quoted above must be read as contractual stipulations in an agreement, *inter partes*, and intended to have no other effect; and that it is only as contractual stipulations that the statute recognizes and sanctions them. It follows, of course, if this be accepted, unless it could be argued that the C.P.R. Co. or the Columbia and Western R. Co. were trustees for Heinze in entering into the contract (of which there is no evidence), that these provisions having legal

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effect only as contractual stipulations, *inter partes*, confer no rights upon Heinze who was not a party to them.

Read literally the words,

the provisions of which (of the agreement) are to be taken as if they had been expressly enacted hereby and formed an integral part of this Act

would seem to give the force of statutory declarations to the recitals,

the said Heinze became entitled to an undivided one-half interest in certain portions of the said Crown grants;

and to import a declaration that portions of the lands conveyed to the Crown were "subject to" an estate or interest

held by F. August Heinze under the agreement bearing date the 11th February, 1898,

as well as a further declaration that the title passed to the Crown

subject to the estate and interest of the said F. August Heinze, his heirs and assigns therein.

And the words quoted from the statute, literally read and applied to par. 6 of the schedule, involve a declaration that Heinze had at the time of the passing of the statute an interest in the lands in question. It is urged, however, that, treating the agreement as an integral part of the statute and as "expressly enacted" thereby, it still must be read as an agreement and the various provisions of it interpreted and given effect to as the provisions of an agreement.

The argument has considerable force. But this construction does, I think, deprive the words of the Act of some part of their literal effect, and when the statute is read, as it must be read, in light of the documents and the other facts mentioned in the statute and the agreement themselves, I think it is a construction which cannot be accepted.

We must assume that the parties to the agreement had in view the protection of the interests, on the one hand of Heinze and on the other of Messrs. Angus and Shaughnessy. These last mentioned gentlemen had entered into covenants with Heinze by which they were personally bound, but concerning the fulfilment of which there could, of course, be no doubt so long as the lands remained under control of the C.P.R. Co. These lands were now to be transferred to the Provincial Gov-

ernment. An effectual way of protecting at one and the same time the interests of these gentlemen as well as the interests of Heinze was to provide that the title acquired by the Crown should be charged with the obligations that had been entered into by Messrs. Angus and Shaughnessy.

I think the passages quoted above from the agreement of 1912 do sufficiently declare that the title of the Crown is burdened with these obligations and that par. 6 is intended to be a specific declaration that the Crown assumes that burden. The purpose of the parties being to protect the interests mentioned, it would be a singular thing if they had set about doing it by means of contractual declarations and stipulations, of which neither Heinze, on the one hand, nor Messrs. Angus and Shaughnessy on the other, not being parties to the contract, could avail themselves. I think the proper inference is that the statute is intended to take effect according to the literal meaning of the words used.

ANGLIN, J.:—I concur in the judgment of Duff, J. Anglin, J.

Appeal dismissed with costs.

ERICKSON v. TRADERS BUILDING ASSOCIATION.

Manitoba King's Bench, Curran, J. January 7, 1916.

1. LANDLORD AND TENANT (§ III C 2—65)—SCOPE OF LANDLORD'S LIABILITY TO TENANT—DEFECTIVE OR DANGEROUS PREMISES.

A lessee of certain rooms only, but not of the halls, staircases, and approaches of the building leading thereto, the possession and control of which remains in the lessor, is entitled to reasonably safe access to the rooms, but the obligation of the lessor is only that the means of access shall not contain a trap or concealed danger, and where the tenant saw the condition of the doors and approaches when he accepted the lease he is bound by their condition.

[*Miller* v. *Hancock*, [1893] 2 Q.B. 177, followed; *Cavalier* v. *Pope*, [1906] A.C. 428, *Robbins* v. *Jones*, 15 C.B.N.S. 221, *Lucy* v. *Bawden*, [1914] 2 K.B. 318, *Huggett* v. *Miers*, [1908] 2 K.B. 278, referred to.]

ACTION for damages for injuries caused by defective condition of entrance to building. Statement

W. H. Trueman and *T. W. Robinson*, for plaintiff.

C. P. Wilson, K.C., and *J. A. Machray*, K.C., for defendant.

CURRAN, J.:—This case was tried before me with a jury in December last. The plaintiff is an employee of certain tenants of the defendant company, who own the Grain Exchange Building on Lombard St. in the City of Winnipeg, and had leased offices Curran, J.

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therein to the plaintiff's employers. As such employee the plaintiff had a right to use the entrance and hallways of such building to reach and leave her employers' offices where she was employed. The possession and control of the entrances and hallways remained in the defendants, subject to the tenants' right of user thereof, which might perhaps be termed an easement. This right certainly extended by implication to the employees of the various tenants.

On the morning of February 24 last the plaintiff on her way to work attempted to enter the defendants' building by the Lombard St. entrance, which she was in the habit of using. This entrance was placed in a recess or alcove of the building which itself was, I understand, constructed flush with the street line. The doorway was fitted with two sets of double doors opening outwards. Only one set, however, was in use on the morning in question, the doors of which were fitted with an automatic spring or device to close the door after being opened and to prevent its slamming. The flooring of the footway approaching this door was level with the sidewalk and consisted of, first and next to the pavement, or sidewalk, a granite slab 3 ft. wide; then marble mosaic pavement from this slab into the recess and thence through the doorway into and joining the pavement of the hall. This pavement is a hard, smooth substance. The door in use on the morning in question is designated as No. 167, the other set as No. 165 being closed and fastened. In attempting to pull open the left-hand door of No. 167 of the defendants' building, the plaintiff slipped and fell on the pavement, breaking her leg.

At the close of the plaintiff's case the defendants' counsel moved for a nonsuit. I took time to consider the argument and cases cited, and thereupon delivered the following judgment.

The House of Lords in *Cavalier* v. *Pope*, [1906] A.C. 428, at 430, affirmed the law as laid down by the Court of Common Pleas in *Robbins* v. *Jones*, 15 C.B.N.S. 221, that

> a landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening in consequence during the term:

for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any.

The English Court of Appeal in *Miller* v. *Hancock*, [1893] 2

Q.B. 177, decided that where the owner of the building let the different floors separately as chambers or offices, the staircase by which access to them was obtained remaining in the possession or control of the owner, there was, by necessary implication, an agreement by the owner with his tenants to keep the staircase in repair, and inasmuch as the owner must have known and contemplated that it would be used by persons having business with them, there was a duty on his part towards such persons to keep it in a reasonably safe condition, and that an action was maintainable against the owner by the plaintiff, who had, in the course of business, called on the tenants of one of the floors and fallen while coming down the staircase through the worn and defective condition of one of the stairs and sustained personal injuries.

It was argued in that case, for the defendant that as between the tenants and the defendant it was for the tenants to do the repairs which might be necessary to afford safe access to their premises; that a stranger resorting to the premises can be in no better position than the tenant as regards the landlord; that the landlord knows nothing about the state of the stairs; he does not invite persons who have business with the tenants to use the stairs; that it is the tenant who invites them, and who knows the condition of the stairs; that there might have been a good cause of action against the tenant, but there was none against the defendant owner. This is, in fact, as I understand it, the exact argument put forward by the defendants' counsel in this case.

A perusal of the judgment as well as the head-note of the case indicates, to my mind, clearly, that the Court disagreed with this argument and refused to give effect to it.

In *Lucy* v. *Bawden*, [1914] 2 K.B. 318, Atkin, J., considered and distinguished *Miller* v. *Hancock*, *supra*, and followed *Huggett* v. *Miers*, [1908] 2 K.B. 278, holding that the only obligation upon the defendant in reference to the approach to the house was to avoid exposing the plaintiff to any unexpected danger without giving her warning; that as the danger was patent to every one, and the plaintiff in fact knew of it, she had voluntarily taken upon herself to bear the risk; and, therefore, that she had established no cause of action.

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In this case, which was one of letting separate floors of a house to separate tenants, there being a common entrance to the house at the front on ground floor level which was approached by a flight of 6 or 7 steps, protected only on either side by a coping about 8 inches high, with an area on each side of the steps, the defendant, who was the owner of the building, retaining possession and control of the steps, the plaintiff, who was the wife of one of the tenants, slipped on the steps and fell into the area, sustaining personal injuries. The jury found that the defect in the steps in consequence of which the accident occurred consisted not in any disrepair of the steps themselves, but in the absence of a railing. The Judge said, at p. 326:—

The case might have had a different result had not the jury negatived the existence of a defect in the repair of the steps.

At p. 321, the Judge also said:—

I think the case of *Miller* v. *Hancock*, [1893] 2 Q.B. 177, is an authority binding me to hold that if the landlord remains in possession and control of a common staircase under the circumstances of this case he is under some obligation to persons lawfully using the same.

And again at p. 322:—

But, nevertheless, I consider that the circumstances do raise an implied duty on the part of the landlord towards persons using the steps. The important question is, what is the extent of such duty? I do not see how the duty can be larger than the duty of an occupier of premises to those whom he invites to enter his premises for purposes of lawful business. This obligation was expressed in *Indermaur* v. *Dames*, *per* Willes, J., L.R. 1 C.P. at p. 288: "And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know."

And at p. 324, the same Judge, commenting on the decision in *Miller* v. *Hancock*, *supra*, says:—

The evidence in that case, however, was clearly consistent with the defect being in the nature of a trap, and the reference in Bowen, L.J.'s, judgment to *Smith* v. *London and St. Katherine Docks Co.*, L.R. 3 C.P. 326, makes it to my mind very improbable that he intended to state any proposition of law different to what is stated in that case as mentioned above.

And at p. 325:—

On principle it is difficult to see how an obligation could be imposed upon a landlord larger than the obligation to avoid traps. It is plain that he is, in the absence of express or implied agreement, not liable at all for the consequence of letting a house in a state of even dangerous dis-

repair. If he lets a loft approached by a ladder, a cellar approached by steep steps, or invites access to his premises over a plank, there seems no reason why the person accepting an invitation to use the ladder, the steps, or the plank, should, if injured by no hidden danger, be at liberty to complain that the access was not of a different and safer character. I can see no difference between the use of an unlighted staircase—*Huggett* v. *Miers*, [1908] 2 K.B. 278—and the use of an unfenced staircase.

The finding of the jury that the defect was due to the negligence of the defendant must be taken to assume that the duty of the landlord was to provide a reasonably safe access, and not merely to avoid having an access in the nature of a trap. If the duty were the larger one I think there is evidence to support the jury's finding. In my opinion, however, the duty being what I have stated, there was no evidence of negligence on the landlord's part.

The case of *Dobson* v. *Horsley*, [1915] 1 K.B. 634, is the latest case cited to me by the defendants' counsel. It was also a decision of the English Court of Appeal. In this case *Miller* v. *Hancock, supra*, is again considered and distinguished. Buckley, L.J., at p. 638, says:—

The proposition, however, that, for injury resulting from the defective condition of demised dilapidated premises the lessor or the landlord is not liable, is not the proposition relevant to the present case. For the steps in question were not part of the demised premises. The question is, what is the liability of the man who demised the rooms in the house when he invited the tenants of the rooms to use these steps as a means of access to the rooms, the landlord retaining control over the steps? It is said that that control involved an obligation upon the landlord to see that the steps were kept in such a condition that persons using them were not injured. Upon that point reliance was very properly and strongly placed upon a decision of this Court in *Miller* v. *Hancock*, which is, of course, binding upon us.

At p. 639, Buckley, L.J., quoting the language of Lord Esher, M.R., in *Miller* v. *Hancock*, says:—

It seems to me there is an implied obligation on the part of the landlord to the tenants to that effect, i.e., to the effect that the staircase shall afford a reasonably safe means of entrance and exit to the tenants—that there was a contractual obligation arising from the implied terms flowing from the contract of demise. What was the implied obligation? It was to maintain a proper staircase, of which the stairs should be each and all proper stairs. One was not a proper stair, and the man fell because it was an improper stair. Therefore, because it was an improper stair, the plaintiff recovered because there was a breach of the implied obligation upon the lessor to provide a proper staircase. The fact that there was a defective stair was a fact which the persons using the staircase were not bound to anticipate. The contrary was the case. By allowing a stair to be defective the lessor was exposing them to a trap. He was leading them to think there was something there which was not there. The plaintiff was trapped

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by something which he was not bound to anticipate, and he suffered injury. That was the basis of the decision in *Miller* v. *Hancock*, [1893] 2 Q.B. 177.

And at p. 640:—

What seems to flow from these cases as a matter of principle is this: that the lessor, the defendant, is liable in any case in which, by way of implied grant, he enters into an implied obligation to provide something and fails to provide it. But where that is not the case and where the lessor simply offers to the tenant the right to use a particular sort of approach and the tenant accepts it, the tenant must accept the approach such as it is—say a plank with no handrail across a stream or steps protected only by a coping eight inches high. The tenant using it is not trapped in any way; he knows perfectly well that there is no handrail or railing, and he accepts the risk of using the access in the form in which it is provided.

This statement of the law is clear, and, applied to the case at bar, how does it affect the plaintiff's position and her right to succeed? Her employers were lessees of certain rooms only from the defendants. They were not lessees of the halls and staircase and approaches of the building. The possession and control of all these remained in the defendants. So far the case seems parallel with *Miller* v. *Hancock*, *supra*, and I think the implied obligation which in that case was held to rest upon the defendant to provide a reasonably safe access to the building exists here and rests upon the defendants; but I also think that the law as defined in the various cases referred to cuts down that obligation to this extent, that such means of access should not be in the nature of a trap or contain any concealed danger. The tenant saw what sort of doors, doorway, approaches and footing were provided when he accepted his lease, and is bound by their conditions.

Was there then, at the time of the plaintiff's accident, any trap or hidden danger in the approaches to the building to which the plaintiff or any one lawfully using these approaches would be exposed, and the existence of which the plaintiff was not bound to anticipate, and so guard against? Was the defendant leading the plaintiff to believe there was something there which was not there, which influenced her conduct and resulted in her injury? Was the plaintiff trapped by something which she was not bound to anticipate, and so suffered injury? I think these are questions of fact which should be submitted to the jury. I, therefore, deny the motion for nonsuit.

The defendant thereupon adduced its evidence and, after addresses of counsel and my summing up, I left the following questions to the jury:—

1. Was the plaintiff injured through any defect in the means of entrance to its building on Lombard St. provided by the defendants for the use of persons lawfully using such building? A. Yes. 2. If so, (*a*) In what did such defect consist? A. Door was heavy and unwieldy, with stiff spring. The right-hand door was fastened and closed, forcing one entering building to use the left or awkward door. There was ice on the floor outside the doors. (*b*) Was it due to any negligence on the part of the defendants? A. Yes. If so, in what did such negligence consist? A. In not having door working more easily, in having right-hand door, No. 2, fastened, closed; in allowing the ice to remain there uncovered. 3. If such defect existed, was it known to the plaintiff prior to the accident, and was it also known to the defendants? A. The plaintiff knew doors were heavy and unwieldy, and that the right-hand door was fastened, closed, but did not know of the ice. The defendant knew right-hand door was closed, but it has not been shewn they knew the door was not working easily or that there was ice on the floor. 4. If such defect existed and it was unknown to the plaintiff prior to the accident, was it one which the plaintiff ought reasonably to have anticipated and could, by the exercise of reasonable and ordinary care, have guarded against? A. These defects, excepting the ice, were known to the plaintiff and she exercised reasonable and ordinary care. 5. Was the plaintiff guilty of contributory negligence? A. No. 6. If so, in what did this contributory negligence consist? No answer. 7. Whose negligence really caused the accident? A. The negligence of defendant company, the Traders Building Association Ltd. 8. At what sum do you assess the plaintiff's damages? A. $5,482.

On these questions and the answers thereto the plaintiff's counsel moved for entry of judgment for the plaintiff for the amount of damages assessed. The defendant contended that there should be an entry of judgment for the defendants. I reserved the question as to what judgment ought to be entered, desiring to hear further argument, and this being agreed to by

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counsel for both parties, the argument in question was adjourned to a later date and by appointment taken up and fully argued by both parties. Upon the conclusion of these arguments judgment was reserved.

I see no reason for altering the opinions as to the law expressed in my judgment on the motion for nonsuit. As the findings of fact by the jury on the question of negligence and of what it consisted do not bring the negligence found within the definitions of that negligence towards tenants and their employees for which a proprietor or landlord of a building can be held liable, I have no option but to refuse the motion to enter a verdict for the plaintiff, and must enter a verdict for the defendant with costs.

I do not think this is a case where the statutory limit as to costs should be withdrawn, and I, therefore, refuse the defendant's application in that behalf.

Judgment for defendant.

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ROBERTSON v. CITY OF MONTREAL.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. October 12, 1915.

1. MUNICIPAL CORPORATIONS (§ II C 3—70)—GRANTING FRANCHISE TO OPERATE AUTOBUS LINE—INTEREST OF RATEPAYER ATTACKING GRANT.

Where a municipal corporation, presuming to act under a by-law and a special statute and the general powers conferred by the city charter, passed a resolution authorizing the municipality to grant to a stock company the exclusive privilege of operating an autobus line on certain streets of the city, a ratepayer, who is also a shareholder in a tramway company which held similar privileges, has no interest entitling him to bring an action against the city unless he has suffered special injury beyond that which is public in its nature and affects all the inhabitants alike.

[*Dundee Harbour Trustees* v. *Nicol*, [1915] A.C. 550, specially referred to; *Robertson* v. *City of Montreal*, 23 Que. K.B. 338, affirmed.]

Statement

APPEAL from the judgment of the Court of King's Bench, affirming the judgment of Demers, J., dismissing the plaintiff's action with costs, 23 Que. K.B. 338.

Lafleur, K.C., and *R. Taschereau*, K.C., for the appellant.

Atwater, K.C., *Bisaillon*, K.C., and *J. A. Archambault*, K.C., for the respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—In my opinion, the appellant is not qualified to bring suit. A ratepayer who has not suffered any special injury, but only such as is public in its

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nature and affects all the inhabitants alike, has no interest entitling him to bring action against the city. It is against public policy that he should be permitted to do so.

It is undoubtedly the law in England that such a suit can only be brought with the permission and in the name of the Attorney-General representing the Sovereign, the *parens patriæ*. Apart from any presumption to which this fact may give rise in favour of the principle, the grounds on which it is based seem clear. Rule in France, Garsonnet, vol. I., No. 376.

It would be difficult for public business to be carried on at all if every individual in a city with a population of half a million persons could sit in judgment on all the actions of the civic authorities and any crank were at liberty to drag them at any time before the Courts. The city would never be free from litigation with its attendant expense, when, as would probably be often the case, the complainants were men of straw.

But there is more than this. That which is for the general benefit of all the ratepayers may cause an injury to the private interests of any particular ratepayer which would far outweigh any advantage which he might gain simply as one of the body of ratepayers. This injury may or may not be actionable. If, for instance, his property is taken for the common purposes he will have a right of action, but if it is merely in his capacity as a rival trader that he suffers loss, this may well give rise to no cause of action.

The appellant is the private secretary of the Montreal Tramways Co., and, as found by the trial Judge, is only the "*prête-nom*" of a rival company. He originally claimed qualification as holder of a few shares in the company transferred to him for the purpose of the action. This clearly gave him no title to sue, and in the course of the proceedings, he abandoned the claim. His claim as a ratepayer is not *bonâ fide* as such. The contract is not against the interest of the ratepayers generally, but in their favour and the appellant is using his interest as a ratepayer, not for the benefit of the whole body of ratepayers, but in the interests of his private business. This claim as a ratepayer is an attempt to do indirectly what he cannot do directly.

Nevertheless, it is necessary to consider carefully what is

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the law, since if it permits the bringing of such actions, the Courts have to give effect to it whatever inconvenience may result from such a course.

Art. 77 of the Code of Civil Procedure provides that "no person can bring an action at law unless he has an interest therein." This is merely a formal statement of a rule that is elementary in every system of law. The difficulty that may arise is in determining what is an interest in the particular case.

In a Scotch case, recently before the House of Lords (*Dundee Harbour Trustees* v. *Nicol*, [1915] A.C. 550), Lord Dunedin, in his judgment, said:—

> By the law of Scotland a litigant must always qualify title and interest. . . . I am not aware that any one of authority has risked a definition of what constitutes title to sue. I am not disposed to do so.

There is, I think, similarity as to this between the Quebec and the Scotch law and I do not myself propose to attempt any definition of what constitutes an interest within the meaning of art. 77, C.P.Q.

It seems clear that there must be some limitation placed upon the word. Farmers in the west of Canada whose produce is all sent to be shipped from the Port of Montreal must certainly have an interest of a kind in the affairs of the city. Indeed, every Canadian might be said to have an interest in the good government of the commercial metropolis of the country.

When the interest which the individual has is no greater or other than that of the rest of the public he has not, in my opinion, an interest in the action within the meaning of art. 77, C.P.Q.

But no one is on this account without remedy. An individual can always inform the Attorney-General who can, and, in a proper case, must, take action thereon (art. 978, C.P.Q.). If the Attorney-General does not consider the case a proper one for him to intervene in he can permit the complainant to use his name and the action is then brought in the name of the Attorney-General on the relation of the individual informant. There is in this practice the advantage that the Attorney-General can impose such terms for security for costs being given as in the circumstances of the case he may deem proper.

Then it must not be forgotten that sec. 304 of the charter of the City of Montreal (62 Vict. ch. 58) provides a special remedy in favour of any individual ratepayer. In the manner provided in this section

tout contribuable peut, par requête libellée, en son nom, présentée à la cour supérieure, demander l'annulation d'un règlement pour le motif d'illégalité.

This provision does not necessarily imply either that there would be otherwise no remedy or that any previous right of action is superseded. There might, however, be some presumption that the latter alternative was the intention of the legislature. It is common where the intention is otherwise for the legislature to state explicitly that the remedy it provides is to be in addition to, and not in lieu of, any existing remedies. I do not doubt, however, that but for this provision, individual ratepayers would have had no right to take action such as this section expressly confers upon them.

When we come to examine the jurisprudence on the subject, I think it is doubtful whether the Courts have given any decisions that conflict with the principle under consideration.

I do not wish to enter at tedious length into a discussion of any that may be supposed to do so; most of them, at any rate, can, I think, be distinguished. There is, however, one class to which the majority probably belong to which I must call attention. There are cases in which property is involved, on which the Courts, fastening a trust, have held that fiduciary relations existed between the parties. It is on this ground that a corporation in the capacity of a trustee is allowed to be sued by an individual inhabitant as one of the *cestuis que trust*.

In the United States this right and the doctrine on which it is based are distinctly recognized. Thus, in Dillon, on Municipal Corporations (5th ed.), vol. IV., p. 2763, sec. 1579, it is said that in the United States the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations under such circumstances is established; the origin of the equitable doctrine is explained in the following sections. In the much quoted judgment of the United States Supreme Court in the case of *Crampton* v. *Zabriskie*, 101 U.S.R. 601, at 609, it was said:—

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Of the right of resident taxpayers to invoke the interposition of a Court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question.

It will be observed that in the United States the proceeding is one in equity. Whether the Courts in this country would, in like cases, assume to exercise a similar equitable jurisdiction need not be too closely inquired into. The present case offers no occasion for the raising of any trust or the jurisdiction flowing therefrom.

To this class of cases belongs the case to which I have already referred, of the *Dundee Harbour Trustees* v. *Nicol*, [1915] A.C. 550, though the principle on which it depends may not be so expressly recognized. In that case the appellants had been constituted by statute a body of trustees to be elected in part by the shipowners and harbour ratepayers of Dundee, and the Act vested in them certain property and rights. They made a use of part of their property for purposes not authorized by the Act and which involved the risk of its loss. It was held that they could be restrained from so doing, and that the respondents, who were shipowners and harbour ratepayers, had a good title to maintain the proceedings. The Lord Chancellor said:—

Reading the sections together, I think that the effect of the statute is to establish a trust comprising a fund made up of rates, ferry dues and other sources of income as well as of sums authorized to be borrowed. . . . It appears to me that the respondents have an interest as beneficiaries in the fund so constituted and in the undertaking. . . . I see no reason in point of principle to doubt that this beneficial interest in the trust funds and undertaking, which are vested in the appellants as a corporation with limited powers, is sufficient to enable the respondents individually to claim to restrain dealings which are *ultra vires* with the trust funds and undertaking.

And, after referring to the usual and proper practice in England to invoke in such a case the assistance of the Attorney-General, he said that he thought it probable that even in England a harbour ratepayer in such a case

whose interest in the undertaking and funds is apparent, ought to be treated as within the analogy of the principle, which enables a single shareholder to sue in his own name to restrain an *ultra vires* action.

Lord Dunedin, who delivered the principal judgment on the point, insists on the argument that the respondents being per-

sons for whose benefit the harbour is kept up have a title to prevent an *ultra vires* act of the appellants which directly affects the property under their care.

So that it was really as trustees of the property to which the respondents had contributed, and in which they were beneficially interested that the appellants were sued, and it was to prevent the loss of that property through their improper acts.

There can be no analogy between such a case and that of a ratepayer suing to prevent acts which neither involve any property in which the ratepayers are interested as *cestuis que trust*, nor impose any taxation or burdens upon them, but, on the contrary, are for their common advantage.

If I have dealt more fully with this case than its concern with the present case calls for, it is because it is the most recent case on the subject and has the authority of the final Court of Appeal for the United Kingdom. It illustrates well, moreover, the character of the class of cases in which a single individual can sue as one amongst a number of beneficiaries a corporation in whom property is vested in trust for all such beneficiaries.

As regards cases in the Canadian Courts, particularly those of the Province of Quebec, I do not desire to say more than that I think the foregoing remarks apply with force to them. Perhaps, however, it must be admitted that there is difficulty in reconciling all the decisions in the Quebec Courts.

Under these circumstances, I think the matter must be treated as one that, in view of its importance, has not yet been sufficiently discussed and, at any rate, not conclusively decided. I think on all grounds it is open to this Court to give a clear and final decision upon this point.

Since for the above reasons I consider that the appellant was not qualified to bring suit, I express no opinion upon the merits of the questions raised in the suit. The appeal is dismissed with costs.

Idington, J. (dissenting)

IDINGTON, J., dissented.

Duff, J.

DUFF, J.:—On June 10, 1912, the council of the City of Montreal passed a by-law containing the following provisions:—

Sec. 2. Les autobus destinés à transporter des "passagers" seront exclus de toutes les rues, avenues et autres voies publiques qui ne sont pas mentionnés dans la cédule ci-annexée.

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Sec. 16. Aucune personne ou compagnie ne devra faire circuler des autobus ou établir, maintenir ou exploiter des lignes d'autobus dans la Cité de Montréal, dans les rues mentionnées dans le présent règlement, sans avoir préalablement obtenu un permis à cet effet de la cité.

On August 22 of the same year, the mayor, on behalf of the municipality made a contract with the Canadian Autobus Co. Ltd., in pursuance of a resolution passed by the council on the 14th of the same month, by which (*inter alia*) the Autobus Co. was given the right to run autobusses for the transportation of passengers for hire on certain parts of the public highways mentioned in these two sections. The contract contains the following provisions:—

La Cité de Montréal s'engage durant une période de dix années à compter de la mise en exploitation des lignes désignées dans les articles 1, 26, et 27, du présent contrat, à n'accorder aucun autre permis pour l'établissement, le maintien et l'exploitation de lignes d'autobus sur ces dites lignes,

the effect of this contract, if valid, being that for the period of 10 years following "la mise en exploitation" the Autobus Co. acquires the right to run its vehicles as above mentioned, while the municipality disables itself from granting permits under the by-law of August 10 to possible competitors for any of the same routes. On the same assumption it is also probable that the council is disabled from abrogating the regulation contained in sec. 16 of the by-law. It is not necessary, however, in the view I take, to consider that point.

The validity of the contract is attacked upon three grounds: (1) That the City of Montreal has no authority to grant an exclusive right to run autobusses in the city streets. (2) That, assuming such a power to be vested in the municipality it is a power which can only be exercised under the authority of a by-law, and admittedly no by-law was passed authorizing the contract of August 24. (3) That the contract provides for a transfer to the municipality of shares in the Autobus Co., and the taking shares in such a company is *ultra vires* of the municipality.

The first ground raises, among others, the important question of how far the council can, by contract, bind its successors in respect of regulating the use of the city streets: *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623; *Staffordshire and*

Worcestershire Canal Proprietors v. *Birmingham Canal*, L.R. 1 H.L. 254, but I think the appellant has no title to impeach the resolution of the council or the contract upon either the first or the second of these grounds. I shall state my reasons for this as briefly as possible, but a summary reference is unavoidable to the powers and authorities with which the municipal corporation of the City of Montreal is invested by its present charter—of the year 1899 (62 Vict. ch. 58). By sec. 4 it is provided (*inter alia*) that the inhabitants and ratepayers of the City of Montreal and their successors shall continue to be a municipal corporation under the name of the City of Montreal,

and as such shall have . . . *all the powers of legislation*, control, and administration commonly possessed by municipal corporations, and, in addition thereto, all the powers specially granted to the said city by law and by the provisions of this Act.

The description of these "powers of legislation" and "control," in so far as they are material for the present purpose is found in secs. 299 and 300 of the charter and in an enactment, passed in 2 Geo. V., and specially referred to in the contract by sec. 12, sub-sec. 137, ch. 56, of the statutes of that year. Sec. 299 of the charter which is the general provision on the subject of "powers of legislation" had better be quoted substantially in full, and is as follows:—

299. It shall be lawful for the city council to enact, repeal or amend, and enforce by-laws for the peace, order, good government and general welfare of the City of Montreal, and for all matters and things whatsoever that concern and affect, or that may hereafter concern and affect the City of Montreal as a city and body politic and corporate, provided always that such by-laws be not repugnant to the laws of this province or of Canada, nor contrary to any special provisions of this charter.

And for greater certainty, but not so as to restrict the scope of the foregoing provision or of any power otherwise conferred by this charter, nor to exceed the provisos herein above mentioned, it is hereby declared that the authority and jurisdiction of the said city council extends, and shall hereafter extend to all matters coming within and affecting or affected by the classes of subjects next hereinafter mentioned, that is to say:—

3. *Streets, lanes, and highways, and the right of passage above, across, along or beneath the same;* 6. *Licenses for trading and peddling;* 8. *Health and sanitation;* 12. *Nuisances;* 14. *Decency and good morals;* 17. *The granting of franchises and privileges to persons or companies.*

The provisions of sec. 300 are more specific; sub-secs. 1, 29, and 74 have some bearing upon the question before us. They are as follows:—

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300. And the city council, for the purposes and objects included in the foregoing article, but without limitation of its powers and authority thereunder, as well as for the purposes and objects detailed in the present article, shall have authority:—

1. To regulate the use of and prevent and remove encroachments into, upon or over streets, alleys, avenues, public grounds and public places, municipal streams and waters, and to prevent injury thereto and prohibit the improper use thereof;

29. To license and regulate hackmen, draymen, expressmen, porters, and all other persons or corporations, including street railway companies, engaged in carrying passengers, baggage or freight in the city, and to regulate their charges therefor, and to prescribe standing places or stations within the streets or near railway stations, where the same may remain while waiting for business, and to prohibit the same from standing or waiting at any other places than the places so prescribed;

74. To regulate and control, in a manner not contrary to any specific provisions on the subject contained in this charter, the exercise, by any person or corporation, of any public franchise or privilege in any of the streets or public places in the city, whether such franchise or privilege has been granted by the city or by the Legislature.

The statute of 2 Geo. V. is in these terms:—

137. To permit, under such conditions and restrictions as the city may impose, the circulation of autobusses and the establishment, maintenance and operation of autobus lines in the City of Montreal; to prescribe on which streets they may circulate and be established and from what streets they may be excluded; subject to the provisions of arts. 1388 to 1435 of the Revised Statutes, 1909, governing motor vehicles, respecting speed limits, the registration of vehicles and the licenses of owners and chauffeurs.

It is evident that in passing the by-law of June 10, and the resolution of August 14, the council was attempting to exercise one or more of the "powers of legislation" and "control" described in these enactments. The soil of highways within the municipality is declared, it is true, by another enactment to be vested in the municipality (Municipal Code, art. 752); but as highways they are dedicated to a public use, and the municipality holds its title subject to the public right. The municipal council in professing to regulate the exercise of the public right (as in prohibiting the running of autobusses for hire without license) is not acting as proprietor in the administration of the private property of the corporation. In Mr. Dicey's phrase, it acts herein as a "subordinate law-making body" in a matter which concerns not only the ratepayers or the inhabitants, but all persons who, as the subjects of His Majesty, are *primâ facie* entitled to use the highways. And the "law-making" function

it thus exercises may be assumed to have been committed to it in the interests of the whole public understood in that sense.

I have been unable to convince myself that, apart from special enactment, the relation between the municipality and a ratepayer or an inhabitant as such, imports in itself the possession by each of them of an "interest" within the meaning of art. 77, Code of C.P., entitling each of them as an individual to call the council of the municipality to account in a Court of law for excess or abuse of authority in the exercise or professed exercise of functions of this description.

Although the phrase has perhaps countenance from the highest judicial authority (see *Bowes* v. *City of Toronto*, 11 Moore P.C. 463, at 524), it is only in a broad sense that a municipal council exercising such powers can be said to act as "trustee" for the inhabitants or for the ratepayers as individuals. Between them as individuals, and the council, there is no fiduciary relation in the legal sense; but it is urged that since the inhabitants and ratepayers are constituted the Corporation of the City of Montreal by sec. 4 of the charter, the law confers upon each of them a status to maintain such an action as this as a member of the corporation and the analogy of the shareholder in a joint stock company and his right to attack *ultra vires* acts of the corporation is invoked. I think that is straining the analogy. The governing body of a municipal corporation exercising law-making powers affecting the rights of all His Majesty's subjects presents a very different hypothesis from a corporation administering private property only. For excess of power in the first case (which is a wrong against the corporation or against the public as a whole) the appropriate remedy seems to be by way of some proceeding at the instance either of the corporation itself or of an authority representing the public. The law of Quebec provides the machinery. Art. 978, C.P.Q.

What I have said has, of course, no necessary bearing upon any right a ratepayer might be supposed to have to impeach proceedings of the council to impose a tax or rate exigible from such ratepayer.

The decisions relied upon give little help to the appellant. The ratio of *Dundee Trustees* v. *Nicol*, [1915] A.C. 550, is stated

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in this passage of the judgment of Lord Dunedin, at 568 and 569:—

I now turn to the circumstances of this case. As I said at the outset, I do not think any general pronouncement can be made as to when there is title and when there is not. But when I find that the *respondents in the capacity of harbour ratepayers are members of the constituency erected by the Act of Parliament to elect the trustees*, and *as such, are also persons for whose benefit the harbour is kept up*, I cannot doubt that they have a title to prevent an *ultra vires* act of the appellants, *which ultra vires act directly affects the property under their care*. It is not only that loss of that property through improper acting may have the effect of imposing heavier rates on the respondents in the future, but, in the words of Lord Johnston in the *Stirling County Council Case* (1912), Sess. Cas. 1281, at p. 1293, as they have contributed to the funds which bought the property, "they have an interest in the administration of a . . . fund to which they have contributed," and a title flowing from that position and interest.

This passage, of course has no application to the present case. The Lord Chancellor, at p. 558, suggests an analogy between the ratepayers whose rights were being considered and that of a shareholder in a joint stock company under the English law. His Lordship's language makes it plain that he has in mind a case where the right which is being asserted is in the nature of a "beneficial interest in trust funds;" and I think I am not misreading his Lordship's judgment in interpreting it as giving no countenance to the proposition that the analogy of the shareholder in a joint stock company extends to a case in which the act complained of is not an act dealing with or directly affecting corporate property, but an act done in professed exercise of law-making powers exercisable in the interests of the public as a whole. In *Bowes* v. *City of Toronto*, 11 Moore P.C. 463, the action in the form in which it ultimately succeeded, was an action by the municipality and the complaint was that certain city officials had made a profit out of business transacted for the municipality, and for this they were compelled to account. *MacIlreith* v. *Hart*, 39 Can. S.C.R. 657, was a case of *ultra vires* payments to members of the council. I concurred in the judgment of Davies, J., but I must admit I have always had my doubts about the decision.

There is, moreover, the observation of Lord Watson in *Dechène* v. *City of Montreal*, [1894] A.C. 640, which, as I read

it, affords an argument of considerable weight in favour of the respondents. In that case the appellant sought to attack the annual appropriation as illegal. The charter of Montreal as it then stood (37 Vict. ch. 51, amended by 42 & 43 Vict. ch. 53), gave a right to any municipal elector in his own name to impugn by-laws, resolutions and appropriations on the ground of illegality within a delay of three months. At pp. 642 and 643, Lord Watson explicitly says for the Judicial Committee that in his view a municipal elector, as such, would have no title to attack the resolution even if incompetent except under the authority of this provision. The provisions of the charter then in force in relation to the qualification of voters seem to shew that all classes of persons qualified to vote would fall within the category of "ratepayers" as that term is used in the charter of 1899. It would not be easy to reconcile the positions (1) that a voter (necessarily a ratepayer) has no status to attack even an incompetent resolution or by-law authorizing an appropriation except by special enactment; and (2) that a ratepayer as such has such a status even where the resolution or by-law does not directly affect the municipal property or impose a tax or rate.

It should be noted that this observation by Lord Watson was made in 1894, and that the present charter which is a revision and consolidation of the statutes relating to the City of Montreal was passed 5 years later. A comparison of the enactment under review by the Privy Council in 1894 in *Dechêne's Case*, [1894] A.C. 640, with sec. 304, which was substituted for it in the present charter, would hardly support a suggestion that the law as stated by Lord Watson had been intentionally changed. There is, therefore, some ground for saying that, having regard to the course of legislation and the discussion in the judgment referred to, sec. 304 ought not to be read as a regulation or a limitation of an existing right, but as conferring a new right which would not otherwise have existed, even as regards incompetent resolutions dealing directly with corporate property.

As to the second ground, namely, that the council proceeded by resolution and not by by-law. If a by-law was strictly re-

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quired, the objection, assuming as it does, the power to act by by-law, must, I think, be rejected on the additional ground that as the council may be assumed to have been ready to pass a by-law had they been advised that a by-law was necessary, and as the corporation itself as represented by the council stands by the resolution and the contract entered into pursuant to it, the nature of the procedure followed by the council is not a matter in which the Courts ought to interfere at the suit of an individual ratepayer. The resolution on this same assumption is not *ultra vires* in the sense of the rule which enables an individual shareholder to attack the *ultra vires* acts of a joint stock company. If the analogy of the shareholder is to be appealed to I can see no good reason why the principle of *Foss* v. *Harbottle*, 2 Hare, 461, should not be put into effect.

I have had more difficulty with the third ground of objection, but I have come to the conclusion that, assuming the transaction otherwise competent, sec. 4, read together with these words of sec. 299, namely:—

> It shall be lawful to enact by-laws for all matters and things whatsoever that concern and affect or that may hereafter concern and affect the City of Montreal as a body politic and corporate

and with the statute of 2 Geo. V., are sufficient to invest the municipality with authority to take shares in such a company as that in question here which are fully paid up and in respect of which the municipality can incur no liability on account of the conduct of the company's affairs. If it be said there is no by-law then that objection has just been answered. I reserve my opinion on the question whether, assuming the taking of such shares to be *ultra vires*, the transaction would, on that ground, be open to attack at the instance of a ratepayer after the expiration of the delay prescribed by sec. 304.

Anglin, J. (dissenting)

ANGLIN, J., dissented.

Brodeur, J.

BRODEUR, J.:—Two questions present themselves in this case: the first one is whether the plaintiff has an interest sufficient to permit him to bring the present suit; and by the second the validity of certain municipal by-laws and of a certain contract are questioned.

The conclusion to which I have come on the first question,

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i.e., as to the right of action of the plaintiff, exempts me from discussing the second point.

The plaintiff wants to have annulled by a direct action: (1) A by-law of the City of Montreal authorizing the traffic by autobusses; (2) The resolution determining the conditions under which the respondent company could establish itself in Montreal; (3) The contract between the city and that company in execution of that by-law and of that resolution.

The City of Montreal is governed by a special Act passed in 1899 (62 Vict. ch. 58). By virtue of that Act (art. 304) municipal by-laws can be attacked by a ratepayer by way of petition, which must be presented in the Superior Court within 3 months from their coming into force. It is nowhere declared that the resolutions of the municipal council or the contracts executed by the corporation can be attacked by a ratepayer.

In the present case, the plaintiff could have proceeded by the expeditive way of the motion to quash, but he has chosen to have recourse to the direct action so as to contest at the same time the resolution and the contract. I am of opinion that he has not proved that he had an interest sufficient to allow of his success in his suit. He does not prove that he is personally affected by the by-law, the resolution or the contract in question. He had first alleged that he was a shareholder in a company competing with the one which got the privilege to circulate its autobusses; but at the hearing before us he abandoned this point.

His interest is the interest of any ratepayer in the municipality. This question of interest has been the subject of a great many decisions.

We have first the decisions of the Privy Council in the cases of *Brown* v. *Gugy*, 2 Moore P.C. (N.S.) 341, at 363, and of *Bell* v. *Cité de Québec*, 7 Q.L.R. 103, to the effect that the right of a riparian owner to sue because of the obstructions placed in a river cannot be exercised except when he suffers special damages.

It is true that no municipal affair was in question; but the distinction is drawn just the same between personal interest and general interest.

In 1879, in a case of *Bourdon* v. *Benard*, 15 L.C. Jur. 60,

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the Court of Appeal declared that the right to compel the removal of obstructions and encroachments on roads exclusively belongs to the municipalities and that private citizens have not that right of action unless real and special damages result to them therefrom.

In 1892, 1893 and 1894, the same principle was applied by the Honourable Mr. Justice Doherty, now Minister of Justice, in the cases of *Sénécal* v. *Edison Electric Co.*, 2 Que. S.C. 299, and of *Bélair* v. *Maisonneuve*, 1 Que. S.C. 181, and by the Honourable Acting Chief Justice Archibald, in the case of *Bird* v. *Merchants Telephone Co.*, 5 Que. S.C. 445.

In 1907, the Court of Review, composed of Tellier, Lafontaine and Hutchison, JJ., confirmed the judgment of Mathieu, J., who in the case of *Emard* v. *Village du Boulevard St. Paul*, 33 Que. S.C. 155, had decided that the action to avoid a resolution of the municipal council cannot be taken 30 days after the coming into force of such resolution, except by a ratepayer having a direct and special interest to do so.

In 1909, in the case of *Allard* v. *Ville de Saint-Pierre*, 36 Que. S.C. 408, four honourable Justices of the Superior Court were equally divided on that question, the majority of the Court of Review holding that any ratepayer can take a direct action for the quashing of an *ultra vires* by-law, notwithstanding the special recourse by way of motion provided for in the Act.

In the case of *Aubertin* v. *La Ville de Maisonneuve*, decided in 1905, 7 Que. P.R. 305, the Judges were again equally divided on the question as to whether the direct action could be taken by a ratepayer who had no special interest.

At last, in the present case, Lavergne, J., who delivered the judgment of the Court, said in his notes that:—

> Robertson could not have his action maintained without proving a personal and special prejudice. The grounds for a declaration of nullity or illegality which he might perhaps invoke as petitioner cannot be put forward by him in an ordinary suit where he makes himself the plaintiff.

The jurisprudence of the provincial Courts of late years is therefore uncertain enough.

The decisions of the Privy Council, which I mentioned above, and of the Court of Appeal in the case of *Bourdon* v. *Benard*, 15 L.C. Jur. 60, clearly prove that the rights of action of a

private citizen exist by law only if he is personally and directly interested.

That is the principle adopted in France and I find in Dalloz, Répertoire Pratique, the following: Vo. action:—

No. 39. It is a fundamental principle that an action can be exercised by anybody only in so far as he has an interest. . . . The absence of interest precludes the maintenance of the action.

Vo. Commune,

No. 505. For a long time the Conseil d'Etat has decided, in general terms, that a ratepayer, in the absence of any direct and personal interest, is not qualified to ask the prefect to pronounce a decision null.

Dalloz, 1887-3-72; Dalloz, 1889-3-68; Dalloz, 1892, 5-128; Dalloz 1902-3-33.

But the most recent judgments have decided that a ratepayer in a commune is interested as such in having it declared that a resolution is null by which the council has inscribed an expense on the budget of the commune.

I understand the reason of those recent decisions referred to by Dalloz. The ratepayer has a personal interest in the budget of a municipality not being illegally increased because he will then be called upon to pay a larger amount of taxes.

At No. 506, Dalloz, Vo. Commune, adds that:—

A ratepayer is not allowed to ask that the resolutions relating to the erecting of a statue and to the naming of a street be declared null when he does not prove any personal interest or when the attacked resolutions do not affect the municipal finances.

The right of a ratepayer to ask for the annulment of municipal by-laws is outside of the ordinary bounds of common law.

Tribunals can be resorted to, as a general principle, only for the conservation of our personal rights. But in the case of a motion to quash municipal by-laws, the ratepayer exercises a popular action, and if he succeeds they will be quashed and annulled not only for him but for all the other ratepayers. One does not then plead only for himself but also for others. It is for the common good that this right of action be exercised only in accordance with the rules prescribed by the law which created it.

It will perhaps be said that those restrictions might have an effect to deprive the Courts from the control given them by art. 50 of the Code of Procedure over municipal councils.

This objection could not be admitted, for if a municipal corporation were to adopt a resolution or execute a contract

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entirely *ultra vires*, the ratepayer could then have recourse to the Attorney-General under art. 978 C.C.P. for a remedy.

For all those reasons I have come to the conclusion that the plaintiff had no right, under the circumstances, to a direct action. His appeal must be dismissed with costs.

Appeal dismissed.

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Re TORONTO AND YORK RADIAL R. CO. AND CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Meredith and Hodgins, JJ.A., and Kelly, J. December 9, 1915.

1. STREET RAILWAYS (§ I—3)—LOCATION AND PLANS—APPROVAL.

Clause 5 of the agreement between the Metropolitan Street Railway Co. and the municipal council of the County of York, in schedule A of 56 Vict. ch. 94 (Ont.), setting out that the location of the line of the railway in the said street or highway shall not be made until the plans shewing the positions of the rails and other works have been submitted to and approved by the warden, county Commissioners and engineer, and clause 3 of the agreement in schedule A of 60 Vict. ch. 92, setting out that before the work is commenced upon any section of such extension, the plans setting forth the proposed location of the company's tracks shall be approved by the committee, form the very basis of all the work to be afterwards undertaken and the production of the plans so approved cannot be dispensed with by the Ontario Railway and Municipal Board.

[*Toronto and York Radial R. Co.* v. *City of Toronto*, 15 D.L.R. 270, *City of Toronto* v. *Metropolitan R. Co.* (1900), 31 O.R. 367, applied.]

Statement

APPEAL by the Corporation of the City of Toronto from an order of the Ontario Railway and Municipal Board.

G. R. Geary, K.C., and *Irving S. Fairty*, for the appellant corporation.

I. F. Hellmuth, K.C., and *C. A. Moss*, for the railway company, the respondent.

Garrow, J.A.

GARROW, J.A.:—This is an appeal by the Corporation of the City of Toronto from an order of the Ontario Railway and Municipal Board allowing an application made by the railway company for the approval of certain plans of tracks by way of a deviation from its existing line along Yonge street in the city of Toronto, to a proposed station on land adjoining that street.

The city corporation resists the application on two grounds: (1) that the railway company has no franchise in respect of the street and adjoining land proposed to be used; and (2) that, in any event, the consent of the municipal council of the city is necessary.

By the statute of Ontario 40 Vict. ch. 84 (1877), the Met-

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ropolitan Street Railway Company of Toronto was incorporated and (sec. 8) authorised to construct, maintain, complete, and operate a double or single track iron railway, with the necessary side-tracks and turn-outs, for the passage of cars, carriages, and other vehicles, upon and along such streets and highways and railway tracks or lines within the jurisdiction of the Corporation of the City of Toronto, and of any of the adjoining municipalities as the company might be authorised to pass along, under and subject to any agreement thereafter to be made between the municipal councils and the railway company, as to construction, maintenance, and repairs of roadway and renewal thereof, and grade, style of rail, and all other matters and things relating to roadway and works, and under and subject to any by-laws of the municipalities or any of them, and to take, transport, and carry passengers, and, outside the limits of the city of Toronto, freight, and to use and to construct and maintain all necessary works, buildings, appliances, and conveniences connected therewith.

By sec. 2, the several clauses of the Railway Act, C.S.C. ch. 66, and the amendments thereto, with respect to, among other things, "powers," "plans," "surveys," "lands and their valuation," were by reference incorporated, but as to the matters above enumerated only as regards the portion of the railway outside the limits of the city of Toronto.

Pursuant to the statute, by an agreement dated the 25th June, 1884, made between the railway company and the Corporation of the County of York, validated by 56 Viet. ch. 94, the company was authorised to place and maintain its railway upon and along Yonge street, on its westerly side, between the macadam or gravel and the ditch, from the northerly limit of the city of Toronto to the town-hall at Eglington (subsequently extended northerly to Lake Simcoe), which covered and included that portion of Yonge street now in question. But, by clause 5 of the agreement, it was provided that "the location of the line of railway in the said street or highway shall not be made until the plans thereof shewing the positions of the rails and other works on said street shall have been submitted to and approved of by the warden, county commissioners, and en-

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gineer." And under and in accordance with that agreement the tracks were laid upon Yonge street, and the railway, which was then authorised to use horse power only, was for a considerable period operated.

By the statute 56 Viet. ch. 94, an extension northerly of the railway and the use of electricity for power were authorised. In pursuance of that statute, a further agreement, dated the 6th April, 1894, was entered into between the railway company and the county, which was validated by 60 Viet. ch. 92, in the schedule to which the agreement is set out. And it is under the provisions of that agreement that the learned Chairman of the Board, as expressed in his judgment, reached the conclusion that the company is authorised to make the deviation now proposed.

The only clauses directly bearing upon the subject seem to be 7 (3) and 11. 7 (3): "Construct, put in and maintain such culverts, switches and turn-outs as may from time to time be found to be necessary for the operating of the company's line of railway on Yonge street, or leading to any of the cross-streets leading into or from Yonge street, or for the purpose of leading to any track allowances or rights of way on lands adjacent to Yonge street, where the company's line deflects from Yonge street, or to the company's power-houses and car-sheds. . . . " 11: "The company may deflect its line from Yonge street and operate the same across and along private properties after expropriating the necessary rights of way under the provisions of the statutes in that behalf."

Clause 3 should also be looked at. It provides for the approval by the county corporation, before work upon the extension hereby authorised is commenced, of plans shewing the proposed location of the tracks; which is not in principle unlike the provisions of clause 5 of the first agreement before set out.

There were other agreements between the parties, most, if not all of them, referred to and validated by the statutes to which I have referred, but their provisions have apparently no direct bearing upon the question now before us.

The northerly boundary of the city was extended northwards in the year 1888, and again still further north in the

year 1908, the latter extension including the present *locus in quo*.

By sec. 6 of 60 Viet. ch. 92, the rights of the company existing at the date of any northerly extension of such boundary were declared to be unaffected by such extension; which, as I understand it, means that such rights, whatever they were, were neither to be abridged nor enlarged by such extension. If the right claimed existed against the county, it continued to exist, and could be asserted against the city in the territory so annexed. But, if the consent of the county, while the territory was in the county, was necessary to give effect to the right claimed, a like consent by the city would afterwards be necessary and must be shewn.

The learned Chairman did not point out what particular clause of the agreement he relied upon, but it must have been one or the other of those which I have quoted. If it was clause 11, I incline to think that its proper construction does not and was not intended to authorise a partial removal of the tracks from Yonge street. And, if it was clause 3, the express enumerations and descriptions omitting "station" or "depot" seem to be against the contention of the company. I would prefer, however, not to pronounce a final opinion upon these questions of construction, because it seems to me that the application fails upon another ground, alike applicable whether the power asserted is to be regarded as specific or general, or even necessarily to be implied, to which I have so far seen no answer; and that is, that, as far as appears, no plan of the proposed deviation and extension was ever submitted to or approved by the municipal officials of either the county or the city.

Such a plan, so approved, is expressly made by the terms of the agreement which I have quoted the very basis of all the work to be afterwards undertaken upon the highway. And its production and approval cannot, in my opinion, be dispensed with by the Board. It is not the case of a violated agreement under sec. 260 (1) of the Ontario Railway Act, R.S.O. 1914, ch. 185; while, under sec. 105, sub-sec. 8, the Board is powerless to alter or affect the number or *location* of the tracks agreed on.

The case is really within the principle applied in the recent

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case between the same parties in the Privy Council on appeal from the old Court of Appeal, *Toronto and York Radial R.W. Co.* v. *City of Toronto* (1913), 15 D.L.R. 270; and by Falconbridge, J., in *City of Toronto* v. *Metropolitan R.W. Co.* (1900), 31 O.R. 367. In both cases the real question was, as it is here, primarily one of locality.

In the view I have expressed, it is not, I think, necessary to pronounce any opinion upon the situation presented by the transfer of that portion of the highway in question by the county corporation to the Corporation of the Township of York, nor the effect to be given under the circumstances to the confirmation contained in sec. 15 of 60 Viet. ch. 92.

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

Maclaren, J.A.

MACLAREN, J.A.:—I agree in the result.

Magee, J.A.

MAGEE, J.A.:—I agree.

Hodgins, J.A.

HODGINS, J.A.:—The former application of the respondent, which was granted by the Ontario Railway and Municipal Board, and whose order was set aside by this Court, *Re City of Toronto and Toronto and York Radial R.W. Co.* (1913), 12 D.L.R. 331, affirmed by the Judicial Committee, *Toronto and York Radial R.W. Co.* v. *City of Toronto* (1913), 15 D.L.R. 270, was for permission to deviate from the present tracks of the respondent on Yonge street to its private right of way, necessitating the crossing of the sidewalk on the west side of Yonge street, and to connect with tracks upon a lot on the south-west corner of Yonge street and Farnham avenue. These tracks led across several streets, and ended at proposed terminals some distance to the south. The respondent was held to have no right to deviate in the way proposed, because (1) it was not in conformity with the obligation created by the agreements of the 25th June, 1884, and 20th January, 1886, and (2) because the proposed line was neither a deviation nor a deflection within the meaning of the statutes quoted in the argument before the Privy Council relative to the powers of railway companies in general, or the railway company in particular, but was a new line which the company was desirous of constructing and operating without having any franchise or statutory authority so to do.

That decision was based upon the rights of the Corporation of the City of Toronto in regard to that portion of the respondent's line south of the north limit of the city of Toronto, as fixed by the proclamation of the 24th September, 1887, which became effective on the 1st January, 1888.

With regard to the section of the line which lay to the north of that limit, their Lordships in the Privy Council made the following remarks (15 D.L.R. 270, at 273): "Their Lordships do not feel called upon to decide whether, as against the Municipality of the County of York, the appellants acquired the right to make the line in its new position, or whether its so doing would be consistent with their duties, or within their powers in other respects, because they are of opinion that nothing done under the powers of this agreement can in any way affect the rights of the respondents with regard to the portion of Yonge street owned by them and situated within their own jurisdiction."

It will be observed that the request of the respondent, which has now been granted by the Ontario Railway and Municipal Board, as evidenced by the approval of the plans, differs from the former application in that, although the deviation into and on the property at the south-west corner of Yonge street and Farnham avenue is exactly the same in its actual location, it is limited to a deviation into the respondent's property for specific purposes, and does not purport to be a new line such as was then objected to. It stops short of crossing any street south of Farnham avenue.

The application before Falconbridge, J., in *City of Toronto* v. *Metropolitan R.W. Co.*, 31 O.R. 367, on being examined in connection with the plan then used, discloses the fact that what the appellants were then endeavouring to do was to cross from their line into a lot owned by the Canadian Pacific Railway Company, and that the permission they sought was only to run a curve from their rails across the sidewalk to reach that lot where the tracks of the Canadian Pacific Railway Company were already laid.

Thus the three applications involve exactly the same sort of physical connection, i.e., the two last a short curve or deflection

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across the west sidewalk from a track lying on the west side of Yonge street into property lying to the west of the street line, and the earlier one a curve from the track to property on the east side of Yonge street.

The appellant asserts, therefore, that this application is essentially the same as the two previous ones, and that the remarks of their Lordships in the later case are descriptive of it, notwithstanding its altered form. Those remarks are as follows (15 D.L.R. at 273): "The object and effect of the proposed plan is plain. The company desired by it to take the line off Yonge street without obtaining the consent of the municipality, and it was not concealed from their Lordships in the argument that it would in future be contended that, thereafter, they would not be using the franchise or privilege obtained by the agreements of 1884 and 1886, or be affected by the fact that such franchise and privilege would terminate in June, 1915."

This is supported by the suggestion made on the hearing that, if this order is upheld, the respondent, having secured the right to cross into its private property, will contend that it becomes a deviation sanctioned by the general powers applicable to railway companies, and that either the respondent or some other railway company will, as a natural consequence, be in a position to secure the right to cross the streets to the south, and, by effecting a junction with the tracks connected with this crossing, accomplish in that way what was refused before, and make connection with other railways. The agreement between the appellant and respondent in 1903—a copy of which has been supplied since the argument—whereby the respondent secured the right to cross the sidewalk into lands of the Canadian Pacific Railway Company, contained the following stipulation: "The company covenants with the city that it will not join or unite its tracks or permit a junction or union to be made during the currency of this agreement with the tracks, branch line or switches of the said Canadian Pacific Railway Company, or of the Toronto Railway Company, or of any other railway company within the limits of the city of Toronto."

This covenant is not provided for in the order appealed from.

The importance of the appellant's objection is thus appar-

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ent, and the right claimed cannot be called trifling. Since 1888, the city of Toronto has again, in 1908, enlarged its borders, taking in part of the county of York, known as Deer Park, which territory lay just to the north of the city limits of 1888. Hence the portion of Yonge street and the respondent's tracks thereon lying to the north of the limit of 1888, have been, since the 15th December, 1908, and now are, within the corporate limits of Toronto, and that highway has become, for some distance to the north of the important point here, a city street. The County of York, by by-law No. 712, passed on the 6th February, 1896, and confirmed by order in council dated the 23rd September, 1896, pursuant to the Consolidated Municipal Act, 1892, sec. 566, sub-sec. 7, parted with its title to the highway itself, which thus became the property of and owned as a public highway by the Township of York. It is not shewn that the Township of York has consented to what is here proposed.

The application of the respondent to the Ontario Railway and Municipal Board, on which the order appealed from was made, is, in its amended form, expressed as follows:—

"1. The applicant is a railway company operating, among other lines, the line known as the Metropolitan Division from the old north city limit in the city of Toronto to Jackson's Point and intermediate stations.

"2. The applicant, pursuant to its powers in that behalf, has acquired property and private right of way as shewn on the plan filed for the purposes of its terminal, freight-sheds and car-sheds.

"3. The applicant submits plans shewing proposed switches or deviations into the said property or right of way to be used by the company for the purpose of providing the necessary switches and turn-outs to the company's property required by the company in its operation and for the accommodation of its passengers, freight and cars, and desires approval thereof."

What the Board have sanctioned is a plan which shews nothing but two buildings, not designated in any way; one connected by a track to the rails on Yonge street and one unconnected and standing by itself, also two tracks, likewise unconnected with anything, but ending near the south-west corner of the lot on

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the corner of Farnham avenue and Yonge street. The plan does not suggest that either of the buildings could be used as car-sheds.

The order made by the Board is as follows: "The application for the approval of the plans having been amended to shew the purpose for which such switches or deviations are required by the applicant, namely, for the purpose of providing the necessary switches and turn-outs to the company's property required by the company in its operation and for the accommodation of its passengers, freight and cars: This Board doth order that the said plans as amended be and the same are hereby approved."

The reasons of the Board speak of what is being approved as "a terminal including tracks and buildings for the accommodation of its passengers and freight," and refer to the sections of the old Railway Act, which, it is said, are incorporated by reference into the company's Act of incorporation, and to the provisions of the agreement of the 6th April, 1894, as giving authority in that behalf. "Terminal" is a word not found in any Act or agreement dealing with the respondent, and is a word of elastic meaning, as is the expression "buildings for the accommodation of its passengers and freight." What "terminals" may include can be seen by considering the provisions of an Act, 6 Edw. VII. ch. 170 (D.), incorporating the Toronto Terminals Railway Company, and by reference to the case of *Pennsylvania R.R. Co.* v. *Marshall* (1911), 147 N.Y. App. Div. 806.

This Court has, I suppose, little to do in this case with the character or sufficiency of the evidence before the Board; but, in reading it over to understand what caused the Board to use the language employed in its order, it seems that there is not much in it to indicate what these words actually mean, and what the respondent really intends to do. It is necessary, therefore, to determine whether, taking the words as they stand, the order is justified.

It must be borne in mind, in dealing with this appeal, that the rights of the respondent upon and in relation to Yonge streets are primarily governed by the principle laid down in

the case already referred to in the Privy Council, and emphasised in the cases of *Toronto Electric Light Co.* v. *City of Toronto* (1915), 21 D.L.R. 859, and *Weir* v. *Hamilton Street R.W. Co.* (1914), 22 D.L.R. 155, reversed in the Supreme Court of Canada, *Hamilton Street R.W. Co.* v. *Weir* (1915), 25 D.L.R. 346. This principle is, that the respondent possesses the right to maintain and operate the street railway on Yonge street solely under and subject to any agreement made between the respondent and the municipalities affected, and to any by-laws made in pursuance thereof, and that it is bound, in respect to such privilege and franchise, by all the terms and conditions thereof. The "location" and its removal and change are things specially mentioned in the Act of incorporation as the subject of such an agreement.

By that Act, 40 Viet. ch. 84, sec. 17, the respondent's powers are to remain in abeyance until the agreements provided for in the Act shall have been entered into; and it follows that their exercise is to be measured by what is contained therein. Those agreements are to deal, *inter alia*, with the location of the railway and the particular streets along which the same will be laid, together with many details.

The rights and privileges defined under the agreement of the 25th June, 1884, expired on the 15th June, 1915, according to its terms, but for some reason the respondent still maintains that that agreement has some vitality. It recites the powers of the company very fully, and recognises in so many words that the occupation of the streets is dependent on the consent of the municipality and upon such conditions as might be agreed upon. It enabled the respondent to construct its track on the west side only of Yonge street, but the location was not to be made until plans shewing the position of the rails and other works on Yonge street were approved by the warden, county commissioners, and engineer, and it gave the respondent the exclusive right in and upon that portion of Yonge street. The switches and turn-outs—which is the expression that replaces "side-tracks and turn-outs"—permitted by the Act of incorporation, were not to exceed 100 feet in length, nor to be more than 4 in number, and the respondent was bound to extend the

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macadam 16 feet beyond the outer rail—a provision manifestly inapplicable to crossing the sidewalk on the west side.

It was held by the Privy Council that it was solely under this agreement and that of the 20th January, 1886 (relating to an extension northward from the northern terminus under the 1884 agreement), that the right arose to maintain and operate the street railway along the portion of Yonge street referred to in that case, which includes the section from which the proposed crossing tracks extend. The statement in the reasons of the Ontario Railway and Municipal Board that the construction of the tracks where the proposed deflection leaves them was done under the agreements referred to in those reasons, is inaccurate, if it is intended to include that of 1894. The track at the point in question had been laid down and operated prior to the agreement of the 28th June, 1889 (see that agreement).

I find nothing in those agreements to authorise the change proposed, and I think that the practical effect of the judgment in the Privy Council is to prevent the deviation sought in this case, so far as the appellant is concerned. The only reservation of opinion by their Lordships is that already quoted, viz., whether, under a subsequent agreement of 1894, and as against the County of York, the respondent had acquired the right to construct the deviation, or whether its doing so would be consistent with its duties or within its powers in other respects.

Here the City of Toronto has become the owner of Yonge street, and the street is now within its jurisdiction, although not so when the 1894 agreement was made. It must be remembered that the right of the respondent upon the streets is dependent upon authority derived from the council which has jurisdiction over the street in question, and not upon ownership as a necessary element; and this is the effect of sec. 8 of the Act of incorporation and of all subsequent provisions; so that, unless a right to do the specific thing now asked can be found in subsequent legislation which takes it out of the earlier restriction, the authority to permit it must reside in the council having jurisdiction over the street, i.e., in this case, that of the City of Toronto. But, as it was argued that powers were afterwards

granted by agreement and legislation, it is necessary to consider them.

The agreement of the 28th June, 1889, and the 17th December, 1889, only emphasise the limited rights possessed by the respondent as to switches and turn-outs. The Act of 1897, 60 Vict. ch. 92, by sec. 4, permits the carrying along and the operating of the railway upon such streets and highways "as have been or may be authorised by the respective corporations having jurisdiction over the same, and . . . under and subject to any agreements between the company and the councils of any of the said corporations."

This indicates that jurisdiction is again the test. Section 6 deals with the sale of electric power, etc., and its proviso is, I think, limited to what is conferred by the section. But, if not, it merely preserves the respondent's rights such as they are, and these, by sec. 4, are what I have quoted. There is no limitation of jurisdiction in the proviso, and these rights cannot include it. At the date of the passing of this Act, i.e., the 13th April, 1897, the ownership of the part of Yonge street now in question had passed to the Township of York, under the by-law passed on the 6th February, 1896, and the order in council of the 23rd September, 1896, already referred to, and it had also come within the jurisdiction of that municipality. When the agreement of 1894 was made, this was not the case. But it appears by a subsequent agreement of the 7th February, 1896, that the respondent had failed to complete its railway to Richmond Hill before the 1st October, 1895. The result of that may be important as to the powers of the county council. By the earlier agreement of 1894 (clauses 34 and 40), that failure annulled the agreement, and set up the older agreements as those binding both on the county and the railway company.

Before the second agreement was made, which purported to extend the time for completion until November, 1896, the county had passed a by-law transferring the portion of Yonge street within the township of York to that municipality; and, so far as it could, the County of York had divested itself of jurisdiction over it. It is true that this by-law was passed only one day earlier than the date of the 1896 agreement, but by the

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fourth paragraph of that agreement it is stated that the extension agreement should not be operative until a deposit of $1,000 or a bond in lieu thereof was made by the railway company with the county treasurer. This bond was actually deposited on the 25th October, 1896, according to information supplied by the respondent since the hearing. The by-law of the county was not effective until the Lieutenant-Governor in Council had assented to it (1892, 55 Viet. ch. 42, sec. 566, sub-sec. 7); but it is doubtful whether the county could effectively deal with that portion of the road in question so as to burden it with a franchise or privilege pending confirmation, to the disadvantage of the minor municipality. However, whether the forfeiture was actually claimed or not, it existed, and the older agreements were, in terms, revived. A formal contract to avoid the effect of the clauses of the 1894 agreement was required; and, before that had been made, the jurisdiction had been actually transferred, by virtue of the statute, on the 23rd September, 1896, the date of the order in council.

It appears to me that, in these circumstances, and in view of the terms of secs. 4 and 15 of the Act of 1897 (60 Viet. ch. 92), under which latter section the agreements were only then confirmed, and not as of their respective dates, the County of York had no power to authorise any additional tracks, switches, or turn-outs upon Yonge street, or any deflection across the sidewalk within the limits of the township of York.

But, if it had that power, the words of clauses 7 and 11 of the agreement confirmed by 60 Viet. ch. 92, which are relied on by the Ontario Railway and Municipal Board, do not seem to me to authorise what is proposed. Sub-clause 1 of clause 7 of the agreement is apparently only intended to deal with the added extensions provided for by the Act and the agreements, because, as to the portion now in question, the expression "may be occupied" is not appropriate to a line then in operation, but is correct as to the extension.

Further, a similar provision is found in the agreement of the 28th June, 1889, clauses 1 and 2, which applied to the line then built, thus rendering the words in clause 7, sub-clause 1, unnecessary except as to the extension. Sub-clause 3 of clause

7 of the 1894 agreement gives the right to construct, etc., such switches and turn-outs as may from time to time be found to be necessary for the operating of the company's line of railway on Yonge street.

"Switches and turn-outs" do not include what is here proposed. The word "turn-out" has been considered by the Judicial Committee in a case between the appellant and the Toronto Railway Company (unreported, 2nd August, 1901), as meaning, in the agreement in which it was used, "a side-track on which a train can be shifted in order to let another train on the main track pass it." "Turn-out" was defined in *Bridgewater Borough* v. *Beaver Valley Traction Co.* (1906), 214 Pa. St. 343 (Supreme Court), as being a short line of track having connection by means of switches with the main track. In Tennessee, the Circuit Court of Appeals, in *City of Memphis* v. *St. Louis and S.F.R. Co.* (1910), 183 Fed. Repr. 529, expressed the opinion that the phrases "turn-outs" and "switches" related to tracks adjacent to and used in connection with another line of track, and not to one which branched off entirely from the existing line. These definitions are aided by the use of the words "side-tracks and turn-outs" in sec. 8 of the Act of incorporation.

Nor does the order appealed from authorise any switches and turn-outs (even if these terms covered the deviation across the sidewalk on Yonge street) which lead to any cross-street, nor for the purpose of leading to any track allowances or rights of way on lands adjacent to Yonge street where the company's line deflects from Yonge street; for these expressions include only such deviations as are necessary along the company's line where it leaves the highway and returns to it again as part of its right of way, and not to such a deviation as is proposed here, which is not for the purpose of leading to any "cross-street, track allowance, or right of way."

The further provisions of sub-clause 3 of clause 7 are limited to deflection to the company's power-houses and car-sheds, which are not in terms or in fact covered by the order in appeal. It is not seriously contended that the respondent intends to connect with car-sheds. Clause 11 gives the right to operate the

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line across and along private properties only after a right of way has been expropriated, and this relates to such deflections as I have mentioned.

But, however these sub-clauses and clause 11 of the agreement are viewed, they must, if effective in the way contended, include such a deviation as was declared improper by the judgment of the Privy Council in 1913 (15 D.L.R. 270). Besides, both sub-clause 3 and clause 11 speak of tracks leading to track allowances or rights of way, and operation across and along private property after the rights of way have been expropriated: expressions entirely contrary to what is now proposed, i.e., merely deflecting the line to connect immediately with terminals and for the accommodation of its passengers, freight and cars.

The carriage of freight was urged as a reason why this deflection was necessary. It may be observed that by its Act of incorporation the right to carry freight is limited to the line outside the limits of the city of Toronto, and the provisions of 56 Vict. ch. 94, sec. 6, must be treated as subordinate to that provision.

As I understand the judgment of Falconbridge, C.J.K.B.—then Falconbridge, J.—in 31 O.R. 367, he held that the provision in the Act of incorporation as to the clauses of the Railway Act relative to "powers," "plans and surveys," and "lands and their valuation," applied to the respondent only so far as regards the portion of the railway outside the limits of the city of Toronto, and to the condition of affairs as it existed when the respondent sought to exercise those powers. In that view the Privy Council must have agreed in 1913, because the portion of Yonge street in question there was outside the limits as they existed in 1877, and, if applicable, the powers in the Railway Act would have justified what was then refused. I accept it as the correct view of the statute (see also *Collier* v. *Worth* (1876), 1 Ex. D. 464), and in consequence have not been able to regard the C.S.C. ch. 66 as in any way applicable here.

It seems strange that, when providing for the carriage of passengers and freight, the necessity now urged was not sufficiently obvious to require express provision for handling it on

property adjacent to Yonge street and connecting that property with the rails thereon. It may be observed that in the statute enabling the respondent to acquire parks (56 Viet. ch. 94, sec. 8) no provision exists for running the tracks into these pleasure-grounds. There is no real reason why passengers should not board and alight from the cars on the streets, as they do elsewhere in the city of Toronto, where many more passengers are daily carried, and find accommodation in a station across the sidewalk, if the respondent really desires to accommodate them.

Upon the whole, there is ground for the opinion that these omissions were designedly made, especially in view of the fact that, where connections were required with power-houses and car-sheds, they were set out in express words in the Act or in the agreements. There is no trace of any willingness anywhere to grant the right to deflect except for very limited and specific purposes. The necessity for extreme caution with regard to the franchise claimed by this company before the Privy Council may have been foreseen and thus provided for.

No doubt, modern experience indicates that increased efficiency and decreased cost can be attained by the expenditure of money in facilitating the operations of a railway. But these considerations are not sufficient in themselves to warrant an extension of the words used in the statute or agreements beyond their plain meaning. Nor are they really applicable in a case where a railway was originally planned with horses as a motive power and with the idea that the highway was the cheapest and most convenient right of way, both for running and for operating all its functions. With a franchise expiring in 21 years, any large amount of money to be spent on terminals and for the comfort of passengers can hardly have been expected, and the language used was, no doubt, appropriate to the existing conditions. If, in 1894, where a 35-year franchise was being granted, there had been a change in the point of view, it might have been expected that what is now pressed for would have been provided for if an intention to do so existed.

There is not in what took place before the Ontario Railway and Municipal Board any comparison instituted between the

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way in which the passengers who come and go over the respondent's railway are handled by the Toronto Railway Company upon Yonge street, some few blocks below, nor how far freight could be dealt with at the car-sheds a couple of streets above. It is doubtful whether this Court has much to do with that as an element of fact; but, speaking for myself, I would have preferred it, if the question of inconvenience had been more clearly dealt with before the Board.

I have gone over the subsequent and present legislation cited upon the argument, and I am unable to come to the conclusion that anything that appears therein enabled the Board to deal with the subject unaffected by the terms of the agreements already recited or that the various sections relied on operate to give larger rights than the Act of incorporation did, i.e., subject to and upon the terms of the agreements. Indeed, sec. 229 of the present Ontario Railway Act recognises this in terms.

My conclusions may be summarised thus:—

1. The Act of 1877, 40 Viet. ch. 84, does not incorporate the sections of the C.S.C. ch. 66, relied on by the Board, so as to enable the powers therein given to be now exercised except outside the (present) limits of the city of Toronto.

2. That those limits are the limits existing when any application is made which has to rely, for the right to exercise the desired powers, on the sections referred to.

3. That the rights of the respondent are to be put in force only under and subject to the agreements which it from time to time makes with the municipalities concerned, and that the agreements define the rights with which the respondent is clothed, in the absence of express legislation.

4. That the municipalities concerned are those which have jurisdiction over the streets and highways in question when an agreement is actually made.

5. That the County of York had, on the date when the 1894 agreement became effective, i.e., on the 25th October, 1896, lost jurisdiction over that portion of Yonge street in question, and that the Township of York then possessed it.

6. That the Township of York is not shewn to have given any permission or agreement while it had such jurisdiction.

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7. That that portion of Yonge street passed to the City of Toronto in 1908 unaffected by the provisions of the 1894 agreement.

8. That that agreement, even if it bound the City of Toronto, does not comprehend such a deflection as is allowed here, under any of its terms nor under any that ought to be implied.

9. That the Board had no power or authority, either under any agreement already made, or under any statute, to make the order appealed from, giving the right to connect with terminals or with tracks and buildings on the lot in question for the accommodation of passengers and freight.

I think the appeal should be allowed with costs, and the order vacated.

Since the hearing of this appeal, the Court has had the advantage of a further argument on the effect of the documents recently produced. It has not in any way altered my view. Nothing that was then presented convinces me that the County of York had not, before the second agreement of 1896 became effective, and before the validating statute, lost its jurisdiction over that part of Yonge street annexed in 1908. The statute declares the agreements to be binding on the parties thereto, and does not purport to affect the rights of the Township of York.

Kelly, J.

KELLY, J.:—By 40 Viet. ch. 84, the Metropolitan Railway Company of Toronto was incorporated with power to construct, maintain, complete, and operate a double or single track iron railway, with the necessary side-tracks and turn-outs upon and along such streets and highways and railway tracks or lines within the jurisdiction of the Corporation of the City of Toronto, and of any of the adjoining municipalities, as the company might be authorised to pass along, under and subject to any agreement thereafter to be made between the city and these municipalities or railway company and the said company, as to construction, maintenance, and repair of roadway, etc., and under and subject to any by-laws of the corporations of the said city and municipalities respectively, or any of them, made in pursuance thereof.

This Act also authorised the councils of the city and of the

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said municipalities, or any of them, and the company, to enter into agreements relating to the construction of the railway, and for several purposes, including the location of the railway, and the particular streets along which the same should be laid; and it provided that the powers contained in it (the Act) should remain in abeyance until such agreements should be entered into (sec. 17).

The name of the company has more than once been changed by statute, and the respondent, so far as is material to the present inquiry, may be considered the successor of the company so incorporated.

On the 25th June, 1884, an agreement was entered into between the Municipal Council of the County of York and the railway company permitting the company, on terms therein set out, to construct and operate a street rail track or tramway, with the necessary culverts, switches, and turn-outs (such switches and turn-outs being limited to four in number) in, upon, and along that portion of Yonge street lying between the northern limit of the city of Toronto and the town-hall at Eglington, in the township of York, that part of Yonge street being then owned by the county. Clause 5 of the agreement is: "The location of the line of railway in the said street or highway shall not be made until the plans thereof shewing the positions of the rails and other works on said street shall have been submitted to and approved of by the warden, county commissioners, and engineer."

By clause 16, the privileges and franchises granted were made to extend for 21 years from the 25th June, 1884; and by an agreement of the 28th January, 1886, these privileges and franchises were further extended so as to run for 31 years from the 25th June, 1884. Both of these agreements, and others as well, were, by 56 Vict. (1893) ch. 94, confirmed and declared binding on the parties to them. All these agreements are set out in full in schedule A. to that Act.

The company's application to the Ontario Railway and Municipal Board, from whose order the present appeal is taken, was for approval of its plans for "switches or deviations from

Yonge street into the company's property south of Farnham avenue" on the west side of Yonge street.

In 1888 the city's limits were extended northerly to a line a short distance to the south of Farnham avenue, and in 1908 the limits were still further extended northerly, this latter extension taking in the land into which the respondent now seeks to construct "switches or deviations."

In 1896, the county parted with its title to the part of Yonge street now under consideration, and the city, when its limits were extended in 1908, acquired it.

Clause 5 (quoted above) in my opinion imposes an obstacle to the right of the company to succeed on the application. Keeping in mind that the powers and rights of the company, a creature of statute, to build upon or over and to use the highways, are not inherent, but are only such as are conferred by statute or by agreements authorised by statute, the fulfilment of the conditions imposed upon it is an essential to locating its line of railway in or upon the street or highway. Unless, therefore, there can be found other agreements, acts or happenings, expressly or in effect relieving the company from the obligation so imposed upon it, of submitting plans and obtaining the approval referred to, it is still bound thereby. I have searched without result in subsequent legislation and agreements for an expression of authority to the company to proceed unless in compliance with these conditions. These imperative requirements are still in force.

The respondent relies on these later agreements, particularly that of the 6th April, 1894, for authority for the course it has taken. These agreements dealt largely with extension of the railway still further to the north, that of the 6th April, 1894, between the county and the company, in clause 7 (3) providing for the construction, putting in, and maintenance of "such culverts, switches, and turn-outs as may from time to time be found to be necessary for the operating of the company's line of railway on Yonge street, or leading to any of the cross-streets leading into or from Yonge street, or for the purpose of leading to any track allowance or rights of way on lands adjacent to Yonge street, where the company's line deflects from Yonge

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street, or to the company's power-houses and car-sheds;" and clause 11 being: "The company may deflect its line from Yonge street and operate the same across and along private properties after expropriating the necessary rights of way under the provisions of the statutes in that behalf."

There is no express repeal of or interference with the terms of clause 5 above cited; but in the legislation of 1897 (60 Vict. ch. 92), by which the agreement of the 6th April, 1894, and another agreement between the same parties of the 7th February, 1896, were validated, there is an indication of intention not to disturb the rights of the company in the territory now in question, where (by sec. 6) it is provided that, in the event of the city extending its limits so as to include any portion of the right of way, such extension of the limits shall not affect the rights of the company at the date of such extension or its property then situate within such extended limits, and that the powers conferred by that Act on the company shall remain as if the said limits had not been extended.

I entertain grave doubts of the company having acquired the right to "deflect" its line from Yonge street in the manner and for the purposes now intended; as to that, however, I do not desire to be taken as expressing an opinion intended to be binding. But, assuming such right to exist, I am clearly of opinion that it cannot be exercised unless by compliance with the conditions imposed by clause 5 of the agreement of the 25th June, 1884; a course which it has not followed, there being nothing in the material before us to shew that plans were so submitted or approval obtained.

The appeal should be allowed with costs.

Appeal allowed.

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U.S. FIDELITY & GUARANTEE CO. v. PHARAND.

Quebec King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. June 19, 1915.

1. JUDICIAL SALE (§ III A—27)—SHERIFF'S SALE—FAILURE OF TITLE — RIGHTS OF PURCHASER—RECOURSE AGAINST ATTACHING CREDITOR. A purchaser at a sheriff's sale, who is unable to obtain possession of lots he purchased on account of an erroneous survey of the land, has no recourse for the purchase price against one who prosecuted the execution in subrogation to the rights of an attaching creditor

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Statement

APPEAL from judgment of Chauvin, J., Superior Court, in favour of plaintiff.

George C. Wright, for appellant.

Devlin & Ste. Marie, for respondent.

The respondent purchased 9 lots in the subdivision of an immovable at a sale made by the sheriff of the district of Ottawa for the sum of $900. The sale had been made in a case of *McCarthy* v. *City of Hull*, 12 D.L.R. 502, in proceedings by the appellant who had caused himself to be subrogated to J. W. Ste. Marie, attorney in this cause, for his costs. The lots were not delivered to the purchaser because it was discovered subsequently that, on account of an erroneous survey, the subdivision lots sold were found to be identical with numbers of subdivision of public streets or in possession of other owners. The respondent then brought an action against the appellant to be reimbursed his $900, alleging that the lots had not been delivered to him because they did not exist.

The appellant pleaded in fact and in law that the lots had been seized from the apparent owners of these immovables, and that their rights had been transferred to the plaintiff, and that it was for him to take the necessary proceedings to be placed in possession. The defendant denied that there was any privity between it and the appellant, and that it was not obliged to reimburse him.

The Superior Court maintained the action upon the principle that to constitute a contract of sale it is necessary that there should be something to form the object of it. Now, as the lots sold had no existence there had been no sale. It condemned the appellant to reimburse the $900 paid by the respondent.

This judgment was reversed on the following grounds:—

"Seeing that on September 30, 1913, the plaintiff-respondent bought, at judicial sale from the sheriff of the district of Ottawa, certain lands described in his declaration in this cause and forming parts of block number 135 in ward number 3 on the official plan and book of reference for the city of Hull, for the price of $900 which he paid to said sheriff;

"Seeing that by his demand in this cause, the said plaintiff-respondent complains that he has been unable to enter into

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possession of the said lands so purchased by him, alleging that if the same exist at all, they are in possession of third persons, and prays that the defendant-appellant, as being the creditor prosecuting the execution in virtue of which the said lands purport to have been seized and sold, as aforesaid, be adjudged to deliver possession of the said lands to the plaintiff-respondent or in default of so doing to repay the said sum of $900 to him;

"Considering that it is not proved that the defendant-appellant was vendor of the said lots, but merely that being in the rights of M. Ste. Marie, judgment creditor for costs of James E. McCarthy, it was the prosecuting creditor at whose instance the said lands purport to have been seized and sold under execution duly issued for recovery of the said costs, that the defendant-appellant is not shewn to have been at fault in having procured to be seized lands not ostensibly belonging to the said judgment debtor McCarthy, and that it is not proved that any part of said sum of $900 was paid to the defendant-appellant;

"Considering that the obligation and responsibility alleged against the defendant-appellant as a creditor prosecuting execution do not exist;

"Considering, moreover, that it is not proved that lands of the description of those which purport to have been sold as aforesaid do not exist; all that can be said to have been proved in that respect being that, in consequence of an overlapping of surveys, the greater portion of the lands purchased by the defendant-respondent as aforesaid are also represented by different numbering or description as being lands held by other owners or laid out as streets, and it has not yet been determined which should prevail;

"Considering that the plaintiff-respondent does not offer to cede to the defendant-appellant his rights under the said sheriff's sale;

"Considering that it is not proved that the plaintiff-respondent applied for an order commanding the sheriff to put him in possession of said lands;

"Considering, therefore, that there is error in the judgment appealed from, whereby the said action was maintained;

"Doth maintain the appeal, doth reverse and set aside the

judgment appealed from, to wit, the judgment pronounced by the Superior Court in the district of Ottawa, on March 1, 1915, and, now giving the judgment which the said Superior Court ought to have pronounced, doth dismiss the plaintiff-respondent's action with costs as well in the Superior Court as of the appeal in this Court, except the costs of the defendant's inscription in law in the Superior Court which remain adjudged against the defendant; saving to the plaintiff such recourse as may be available to him by law in respect of the said sheriff's sale and of the price thereof, in the circumstances."

Judgment reversed.

SHAJOO RAM v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. March 15, 1915.

1. OATHS (§ I A—2)—FORM OF SWEARING A HINDOO—SWEARING THROUGH AN INTERPRETER.

Where a Hindoo witness in a criminal case is sworn through an interpreter by solemnly promising with uplifted hand to tell the truth, the whole truth, and nothing but the truth, and he assents to such ceremony as the appropriate and usual one in swearing men of his nationality and class with intent that his evidence should be received and acted upon as evidence given under oath, and thereupon answers affirmatively an interrogation whether the "oath" he had taken was binding upon his conscience, he must be taken to have invoked his deity by such ceremony even though it does not appear that express words of invocation were uttered in connection with his solemn promise to tell the truth, and such witness is properly convicted of perjury if his testimony proves false.

[*R.* v. *Shajoo Ram*, 19 D.L.R. 313, 23 Can. Cr. Cas. 334, affirmed; *R.* v. *Loi Ping*, 8 Can. Cr. Cas. 467, 11 B.C.R. 102, and *Carry* v. *The King*, 15 D.L.R. 347, 22 Can. Cr. Cas. 191, 48 Can. S.C.R. 532 referred to.]

Statement

APPEAL by defendant from the judgment of the Supreme Court of British Columbia, *R.* v. *Shajoo Ram*, 19 D.L.R. 313, 23 Can. Cr. Cas. 334.

The judgment appealed from had affirmed the appellant's conviction for perjury (Irving, J.A., dissenting).

W. L. Scott, for the accused.

J. A. Ritchie, for the Crown.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This appeal should be dismissed.

Idington, J.

IDINGTON, J.:—I think this appeal should be dismissed. Sufficient reasons are assigned therefor and appear in the judgments of the Court below and it seems needless to repeat them here.

Duff, J.

DUFF, J.:—I think there was evidence, meagre it is true, but still sufficient, to support a finding by the jury that the accused,

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presenting himself as a witness in a Court of justice, and giving the answers he did give, on his examination, on the *voire dire*, in effect declared that the ceremony which was accepted as the taking of an oath was in fact binding on his conscience as an oath. It is probable that the jury in reaching their conclusion assumed, as I think they were entitled to assume, that the witness understood that he was going through that which was the ordinary form of oath administered to persons of his race and class in the Court of British Columbia, and of course generally accepted as a form of oath binding on their consciences.

On the questions of law I am in entire agreement with the view expressed by Mr. Justice Martin, in which Mr. Justice McPhillips concurred, which view is concisely stated in the judgment of the Chief Justice in the case of *Rex* v. *Lai Ping*, 8 Can. Cr. Cas. 467, 11 B.C.R. 102, in a passage which is quoted in the judgment of Mr. Justice Martin, and is in the following words:—

"It seems to me that when a man without objection takes the oath in the form ordinarily administered to persons of his race or belief, as the case may be, he is then under a legal obligation to speak the truth, and cannot be heard to say that he was not sworn. If we were to decide otherwise we would deprive the evidence given in a Court of justice of the most powerful and necessary sanction which it is possible to give it, namely, the risk of a prosecution for perjury."

In British Columbia, indeed, the facts being as above mentioned, the question would seem to be beyond controversy by reason of the declaratory enactment of 1 & 2 Vict. (Imp.), ch. 105, as follows:—

"An Act to remove doubts as to the validity of certain oaths.

"Be it declared and enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that in all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any Court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may

declare to be binding; and every such person in case of wilful false swearing may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

Eighteen years before that statute was passed, Abbott, C.J., in *The Queen's Case*, 2 Brod. & Bing. 284, used these words:—

"I conceive that, if a witness says he considers the oath as binding upon his conscience, he does, in effect affirm, that, in taking the oath, he has called his God to witness . . . and having done that, that it is perfectly unnecessary and irrelevant to ask any further questions."

There seems to be no substance in the objection that the oath was administered by the interpreter and not by the magistrate. The interpreter was merely the mouthpiece of the judicial officer. I think the appeal fails.

Anglin, J.

ANGLIN, J.:—The appellant was admittedly capable of taking an oath. He was not a person authorized to make affirmation under sec. 14 of the Canada Evidence Act. To sustain his conviction for perjury under sec. 170 of the Criminal Code it is therefore necessary to shew that he told what was known to him to be false as part of his evidence upon oath in a judicial proceeding.

With Mr. Justice Galliher I regret that greater care was not taken in the Police Court proceedings, when the appellant was called as a witness, to make it certain that he fully understood that he was about to give evidence under the sanction of an invocation of the Deity (his Deity) as witness to his truthfulness. In whatever form it may be administered, that is in English law the essence of an oath. *Omychund* v. *Barker*, 1 Atk. 21 at 48; *Attorney-General* v. *Bradlaugh*, 14 Q.B.D. 668 at 708; *Curry* v. *The King*, 15 D.L.R. 347, 22 Can. Cr. Cas. 191, 48 Can. S.C.R. 532 at 534 and 535.

The evidence on the defendant's trial for perjury fairly establishes that, before giving his testimony at the Police Court, he solemnly promised with uplifted hand to tell the truth, the whole truth, and nothing but the truth. That he said "I swear," though probable is uncertain. But he answered "yes" to the question "Is the oath you have taken binding on you?" or, it may have been, "binding on your conscience," or some equivalent term. *The Queen's Case*, 2 B. & B. 284 at 285.

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It also appears that it is the custom of the people to whom the defendant belongs to swear by putting up the hand; and he himself was so sworn when giving evidence on his own behalf on his trial for perjury. Taking all these circumstances into account it would seem to be a not unreasonable inference that the defendant knew he was taking what was intended to be an oath, that his purpose was to have the Court believe that he was swearing to tell the truth and by uplifting his hand to invoke the Deity as witness. On the whole, though not entirely satisfied that the appellant did actually call upon the Deity to witness his truthfulness, neither am I satisfied that he did not. I entertain no doubt, however, that he gave his testimony with full knowledge that it would, and with deliberate intent that it should, be received and acted upon as evidence given under oath.

I am, for these reasons, not prepared to dissent from the judgment affirming this conviction.

Brodeur, J.

BRODEUR, J.:—The appellant claims that he has not been duly sworn and that he could not then be convicted of perjury. He is a Hindoo, and the evidence shews that when he was sworn the interpreter did his best to convey to the mind of the witness what he was bound to do as such.

He volunteered to take the oath by the uplifting of the hand. As the Chief Justice said in *Curry* v. *King*, 15 D.L.R. 347, 22 Can. Cr. Cas. 191, 48 Can. S.C.R. 532:—

"Having taken the oath in that form without objection it is an admission that the witness regarded it as binding on his conscience."

I cannot see how the appellant may claim to-day that he has not been duly sworn. He was examined in this case before the Criminal Court and there took the oath in the same way.

I am of opinion that if a witness allows himself to be sworn in any form without objecting to it, he is liable to be indicted for perjury, if his testimony prove false. Best on Evidence, 10th ed., p. 151. It would be a pity if perjurers could escape on technicalities such as the one which is raised in this case. The appeal should be dismissed.

Appeal dismissed.

REX v. STUDDARD.

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Ontario Supreme Court, Lennox, J. October 7, 1915.

1. HOMICIDE (§ II—18)—DRUNKENNESS REDUCING CRIME TO MANSLAUGHTER.

Homicide is reduced from murder to manslaughter where the accused, at the time he committed the act, was so under the influence of liquor that his reason was dethroned and he did not know what he was doing or know that he was liable to cause grievous bodily harm.

[Compare *R.* v. *Jessamine*, 1 D.L.R. 285, 19 Can. Cr. Cas. 214, 3 O.W.N. 753, and *R.* v. *Wilson*, 21 Can. Cr. Cas. 418, 46 N.S.R. 59.]

Statement

TRIAL on a charge of murder.

Lennox, J.

LENNOX, J., in his charge to the jury, said that three defences were set up, and that upon matters of fact the jury must act upon their own final judgment in the matter. Questions of fact were entirely for them, but as to matters of law they must take the ruling of the Judge.

As to the first line of defence, that the death was not caused by the prisoner, he thought the evidence was conclusive that the prisoner caused the death of Mrs. Job, but it was still a matter for the jury to determine.

As to the question of insanity, after referring to the evidence of experts and others, his Lordship stated that, in his opinion, there could not be said to be any evidence of insanity in the legal sense, and defined what insanity means as a matter of law. He was, therefore, of the opinion that the defence upon both of these lines had failed.

As to the defence of drunkenness, however, his Lordship charged the jury that the matter stood in an entirely different light. If the accused at the time he committed the act was so under the influence of liquor that his reason was dethroned, that he did not know what he was doing, was dangerous, and did not know that he was liable to cause grievous bodily harm, then he was guilty of manslaughter only, and not murder, and if the jury were in doubt as to whether they should find a verdict of murder or manslaughter it was their duty to give the prisoner the benefit of the doubt and bring in a verdict of manslaughter.

N.B.—The jury found the prisoner guilty of manslaughter, with a strong recommendation for mercy, and he was sentenced to eight years' imprisonment..

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McTAVISH v. McLEOD.

British Columbia Supreme Court, Macdonald, J. January 20, 1916.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—ON JUDGMENT ON SETTLEMENT OF ACTION—EXCHANGE OF LANDS.

Where an action coming on for trial is settled by the parties, and the terms of settlement are incorporated in a formal judgment providing for an exchange of properties which the plaintiff has failed to comply with, the defendants' remedy is in an action for specific performance and not by an order directing an assessment of damages.

Statement

APPLICATION for an order directing an assessment of damages.

Hamilton Read, for plaintiff.

J. J. Gibson, for defendant.

Macdonald, J.

MACDONALD, J.:—Upon these actions coming on for trial, the parties settled the same. The terms of settlement were incorporated in a formal judgment, providing, *inter alia*, for an exchange of certain properties. Plaintiff failed to comply with the provisions for exchange, and defendant now seeks, on account of such default, to obtain an order directing an assessment of any damages he may have suffered thereby. It is not the enforcement of the judgment which is now sought, but the allowance of damages for nonfulfilment of the terms of the judgment. I think this course cannot be pursued. In my opinion, it should be the subject of independent proceedings. In arriving at this conclusion I have considered a number of authorities, but cannot find any decision which goes the length sought by the defendant. Notwithstanding the inclination of the Court to avoid multiplicity of legal proceedings, still I do not, in the absence of authority, feel disposed, by directing damages to be assessed, to thus deprive the plaintiff of any defence he may have against such a claim for damages. It will be necessary for the defendant to bring an action for specific performance, claiming an alternative remedy.

As the defendant has failed in this application there will be costs to the plaintiff in any event.

Application dismissed.

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Judicial Committee of the Privy Council, the Lord Chancellor, Viscount Haldane, Lord Parker of Waddington and Lord Sumner. February 24, 1916.

1. CORPORATIONS AND COMPANIES (§ I A—1)—TERRITORIAL POWERS—RIGHT TO CARRY ON BUSINESS OUTSIDE OF PROVINCE.

A company incorporated by provincial letters patent has the capacity to acquire and exercise powers and rights outside the territorial boundaries of the province where it is incorporated; hence, an Ontario mining corporation is not precluded from carrying on mining business in the Yukon Territory and receiving licenses or certificates in respect thereto from the executive officers of that territory.

[21 D.L.R. 123, 50 Can. S.C.R. 534, reversed.]

2. CORPORATIONS AND COMPANIES (§ IV D—60)—DOCTRINE OF ULTRA VIRES —GROUNDS FOR FORFEITURE OF CHARTER—DISTINCTION.

In the case of a company created by charter, the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter, and such company has the capacity of a natural person to acquire powers and rights; if by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is, therefore, not *ultra vires*, although such a violation may well give grounds for proceedings by way of *scire facias* for the forfeiture of the charter.

[*Ashbury Carriage Co.* v. *Riche*, L.R. 7 H.L. 653, distinguished.]

3. CONSTITUTIONAL LAW (§ I G—140)—PROVINCIAL POWERS—INCORPORATION OF COMPANIES—"PROVINCIAL OBJECTS."

Sec. 92 (11) of the British North America Act, conferring upon provinces the exclusive power to legislate in respect of "the incorporation of companies with *provincial objects*," is wide enough to enable the legislature of the province to keep alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person, with an ambit of vitality wider than that of the geographical limits of the province, except that rights outside of the province would have to be derived from authorities outside of the province.

4. CONSTITUTIONAL LAW (§ I G—140)—INCORPORATION OF COMPANIES—"PROVINCIAL OBJECTS"—SCOPE OF LIMITATION.

The limitations of the legislative powers of a province expressed in sec. 92 of the British North America Act, 1867, and in particular the limitation of the power of legislation to such as relates to the "incorporation of companies with *provincial objects*" (sub-sec. 11 of sec. 92), confine the *character* of the actual powers and rights which the provincial government can bestow, either by legislation or through the executive, to powers and rights exercisable within the province.

5. CONSTITUTIONAL LAW (§ I D 1—82)—DISTRIBUTION OF POWERS—EXECUTIVE—PREROGATIVE OF LIEUTENANT-GOVERNOR—INCORPORATION OF COMPANIES.

The distribution of powers under the British North America Act, between the Dominion and provinces, extends not only to legislative but executive authority; hence, the effect of secs. 12, 64 and 65 of the Act is, that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, the exercise of the prerogative is delegated to the Governor-General and through his instrumentality to the Lieutenant-Governors, and the powers to grant letters patent for the incorporation of companies, which the Governor-General or Lieutenant-Governor possessed before the Union or Confederation, must be taken to have passed to the Lieutenant-Governor of the province, the continuity of which is made by implication to depend on the appropriate legislature not interfering.

[*Liquidator of Maritime Bank* v. *Receiver-Genl., N.B.*, [1892] A.C. 437, applied.]

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APPEAL from the judgment of the Supreme Court of Canada, 21 D.L.R. 123, 50 Can. S.C.R. 534, which is reversed.

The judgment of the Board was delivered by

VISCOUNT HALDANE:—This is an appeal from a judgment of the Supreme Court of Canada (21 D.L.R. 123, 50 Can. S.C.R. 534) in a petition of right which gave rise to questions of constitutional importance as to the position of joint-stock companies, incorporated within the provinces, but seeking to carry on their business beyond the provincial boundaries.

The appellants were incorporated in Ontario by letters patent, dated December 23, 1904, and issued under the authority of the Ontario Companies Act and by virtue of any other authority or power then existing, in the name of the Sovereign and under the Great Seal of the province, by its Lieutenant-Governor. The letters patent recite that this Act authorises the Lieutenant-Governor-in-Council by letters patent under the Great Seal to create and constitute bodies corporate and politic for any of the purposes or objects to which the legislative authority of the province extends. They go on to incorporate the company to carry on the business of mining and exploration in all their branches, and to acquire real and personal property, including mining claims, with incidental powers. There are no words which limit the area of operation or prohibit the company from carrying out its objects beyond the provincial boundaries.

In the years 1899 and 1900 the Crown, through the Minister of the Interior of the Dominion, had granted to predecessors in title of the appellants leases of certain tracts of land, in what is now the Yukon district, for the purposes of hydraulic mining. Two of these leases contained exclusions of so much of the tracts as had been taken up and entered for placer mining claims. In the year 1900 the Crown entered into agreements with these predecessors in title to the effect that, if any of the placer mining claims within the tracts should be forfeited or surrendered, the Crown would include them in the tracts by supplementary leases. The original leases having subsequently been assigned to the appellants, and certain of the placer mining claims having reverted, the Crown purported, in 1907, to demise to the appellants these claims, and to agree to demise to them such other of the claims as might thereafter revert, for the same terms of years as those for which the original leases were granted.

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In 1906 the Minister of the Interior of the Dominion had purported to issue to the appellants a free miner's certificate. This certificate was issued in conformity with certain regulations under an Order-in-Council made under the provisions of the Dominion Lands Act, which gives the right to a free miner's certificate to persons of over 18 and to joint-stock companies, the latter being defined to include any company incorporated "for mining purposes under a Canadian charter or licensed by the Government of Canada."

When the Yukon district was, by the statute passed by the Dominion Parliament in 1899, made a separate territory, power to make ordinances was conferred on the commissioner of the territory. Under this power the Foreign Companies Ordinance was passed, under which any company, incorporated otherwise than by or under the authority of an ordinance of the territory or an Act of the Parliament of Canada, was required to obtain a license under the ordinance to carry on its business in the Yukon territory. Such a license, when issued, was made sufficient evidence in the Courts of the territory of the due licensing of the company. In September, 1905, the appellants obtained such a license.

In 1908 the appellants presented a petition of right in the Exchequer Court of Canada, alleging that, in breach of the agreement entered into by the Crown, placer mining claims which had reverted to the Crown and should have been leased to the appellants had been wrongfully withheld from the appellants, and that, by reasons of this and of other breaches of the agreement, the appellants had suffered heavy damage, for which they as suppliants prayed compensation. The respondent delivered an answer to the petition of right, the first two paragraphs of such answer being as follows:—

1. The respondent denies that the suppliant has now or ever has had the power, either under letters patent, license, free miner's certificate, or otherwise, to carry on the business of mining in the district of the Yukon, or to acquire any mines, mining claims, or mining locations therein, or any estate or interest by way of lease or otherwise in any such mines, mining claims, or locations.

2. Should a free miner's certificate have been issued to the suppliant, the respondent claims that the same is and always has been invalid and of no force or effect, that there was no power to issue a free miner's certificate to the suppliant, a company incorporated under provincial letters patent, and that there was no power vested in the suppliant to accept such certificate.

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Cassels, J., the Judge of the Exchequer Court, ordered the questions of law raised by these paragraphs of the answer to be disposed of, and, pending this, stayed all other proceedings. He subsequently heard arguments upon the questions thus raised. As the result he decided that he ought to follow what he conceived to be the opinions given by the majority of the Judges of the Supreme Court of Canada in a general reference which had been made to them in regard to companies, opinions which are now before this Board for consideration in the appeal which was argued immediately after the present one. He thought that the majority in the Supreme Court had decided that a provincial company was confined in the exercise of its functions to the province where it was incorporated. He, therefore, dismissed the petition of right, but without costs, on the ground taken in the first of the above-quoted paragraphs of the answer. On the narrower ground taken in the second paragraph he did not enter.

There was an appeal to the Supreme Court, and the learned Judges were divided in their views. The Chief Justice, Davies, J., and Duff, J., were of opinion that it was *ultra vires* of the appellants to exercise powers or to acquire rights outside the boundaries of the province of Ontario. Idington, J., and Anglin, J., were of a different opinion. They held that, while a provincial company could exercise its powers as of right only within the province where it was incorporated, it was elsewhere in Canada like a foreign company, and had capacity to accept rights and powers conferred on it by comity by another Government.

The majority in the Supreme Court were, therefore, adverse to the appellants on the first question raised—that as to general capacity. On the question raised by the second paragraph of the answer, Duff, J., expressed an opinion in favour of the appellants. On the question, which was one of construction, and arose only if he was wrong in his answer to the wider question, he thought that the condition of acquiring, under the Dominion Regulations approved by the Order-in-Council already referred to, the right to a mining location to be worked by hydraulic process, was the obtaining a free miner's certificate under the Dominion regulations governing placer mining. Under these regulations a joint-stock company might receive such a certificate,

if it came within the definition of being "incorporated for mining purposes under a Canadian charter, or licensed by the Government of Canada." Differing from the Chief Justice, who had been adverse to the appellants on this point also, Duff, J., was of opinion that the expression, "Canadian charter," meant, not a charter granted under Dominion authority, but one emanating from any lawful authority in Canada. Otherwise, as he pointed out, a company incorporated by Yukon authority, or by the council of the North-West Territories before Yukon became a separate territory, would be excluded, along with companies incorporated by the Province of Canada before confederation.

Their Lordships have come to the same conclusion on this point as Duff, J. They think that the appellants, if they possessed legal capacity to receive such a Dominion certificate, had it validly bestowed on them, and that, if so, they subsequently obtained a good title to the mining locations, and also to the Yukon license to carry on business which was granted to them. This subordinate question ought, therefore, to be answered in favour of the appellants.

Their Lordships accordingly turn to the larger question raised by the first of the two paragraphs, a question which is of far-reaching importance. It is whether a company incorporated by provincial letters patent, issued in conformity with legislation under sec. 92 of the B.N.A. Act, can have capacity to acquire and exercise powers and rights outside the territorial boundaries of the province. In the absence of such capacity the certificates, licenses, and leases already referred to were wholly inoperative, for, if the company had no legal existence or capacity for purposes outside the boundaries of the province conferred on it by the Government of Ontario, by whose grant exclusively it came into being, it is not apparent how any other Government could bestow on it rights and powers which enlarged that existence and capacity. The answer to this question must depend on the construction to be placed on sec. 92 of the B.N.A. Act and on the Ontario Companies Act.

Sec. 92 confers exclusive power upon the provincial legislature to make laws in relation to the incorporation of companies with provincial objects. The interpretation of this provision which has been adopted by the majority of the Judges in the Supreme

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Court is that the introduction of the words, "with provincial objects," imposes a territorial limit on legislation conferring the power of incorporation so completely that by or under provincial legislation no company can be incorporated with an existence in law that extends beyond the boundaries of the province. Neither directly by the language of a special Act, nor indirectly by bestowal through executive power, do they think that capacity can be given to operate outside the province, or to accept from an outside authority the power of so operating. For the company, it is said, is a pure creature of statute, existing only for objects prescribed by the legislature within the area of its authority, and is, therefore, restricted, so far as legal capacity is concerned, on the principle laid down in *Ashbury Carriage Co.* v. *Riche*, L.R. 7, H.L. 653.

Their Lordships, however, take the view that this principle amounts to no more than that the words employed to which a corporation owes its legal existence must have their natural meaning, whatever that may be. The words of the British Companies Act were construed as importing that a company, incorporated by the Statutory Memorandum of Association which the Act prescribes, could have no legal existence beyond such as was required for the particular objects of incorporation to which that memorandum limited it. A similar rule has been laid down as regards companies created by special Act. The doctrine means simply that it is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation. This was held by the House of Lords to be the error into which Blackburn, J., and the Judges who agreed with him had fallen when they decided, in *Riche* v. *Ashbury Carriage Company*, L.R. 9 Ex. 224, in the Court below, that the analogy of the status and powers of a corporation created by charter, as expounded in the *Sutton's Hospital Case*, 10 Co. Rep. 23*a*, should, in the first instance, be looked to. For to look to that analogy is to assume that the legislature has had a common law corporation in view, whereas the wording may not warrant the inference

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that it has done more than concern itself with its own creature. Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. In the absence of such language they are excluded, and, if the corporation attempts to act as though they were not, it is doing what is *ultra vires* and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used. For the statute may be so framed that executive power to incorporate by charter, independently of the statute itself, which some authority, such as a Lieutenant-Governor, possessed before it came into operation, has been left intact. Or the statute may be in such a form that a new power to incorporate by charter has been created, directed to be exercised with a view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal personality which the charter creates to existence for the purpose of these objects and within territorial limits. The language may be such as to shew an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn, J., will be the true one.

Applying the principle so understood to the interpretation of sec. 92 and of the Ontario Companies Act passed by virtue of it, the conclusion which results is different from that reached by the Court below. For the words of sec. 92 are, in their Lordships' opinion, wide enough to enable the legislature of the province to keep the power alive, if there existed in the executive at the time of confederation a power to incorporate companies with provincial objects, but with an ambit of vitality wider than that of the geographical limits of the province. Such provincial objects would be, of course, the only objects in respect of which the province could confer actual rights. Rights outside the province would have to be derived from authorities outside the province. It is, therefore, important to ascertain what were the powers in this regard of a Lieutenant-Governor before the B.N.A. Act passed, and, in the second place, what the Ontario Companies Act has really done.

The Act which was passed by the Imperial Parliament in

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1840, in consequence of the Report on the State of Affairs in Canada made by Lord Durham, united the provinces of Upper and Lower Canada under a Governor-General, who had power to appoint deputies to whom he could delegate his authority. This Act established a single legislature for the new United Province of Canada, and, shortly after it had passed, responsible government was there set up. In 1867 the B.N.A. Act modified the constitution so established. This Act contained a preamble stating that the provinces of Canada, Nova Scotia," and New Brunswick had expressed their desire to be federally united into one Dominion under the Crown, with a constitution similar in principle to that of the United Kingdom. In the case of the *Att'y-Gen'l for Australia* v. *Colonial Sugar Refining Co.*, [1914] A.C. 237, this Board had occasion to comment on the contrast between the principles which underlie the distribution of powers in the constitutions of Canada and Australia respectively. They drew attention to the fact that the expression "federal" in the preamble of the B.N.A. Act had been used in a somewhat loose fashion, and that the principle actually adopted was not that of federation in the strict sense, but one under which the constitutions of the provinces had been surrendered to the Imperial Parliament for the purpose of being re-fashioned. The result had been to establish wholly new Dominion and Provincial Governments, with defined powers and duties, both derived from the statute which was their legal source, the residual powers and duties being taken away from the old provinces and given to the Dominion. It is to be observed that the B.N.A. Act has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority. The executive government and authority over Canada are primarily vested in the Sovereign. But the statute proceeds to enact, by sec. 12, that all powers, authorities, and functions which by any Imperial statute or by any statute of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of these provinces shall,

> as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exercisable by the Governor-General.

Sec. 65, on the other hand, provides that all such powers, authorities, and functions shall

as far as the same are capable of being exercised after the Union in relation to the government of Ontario and Quebec respectively, be vested in and exercised by the Lieutenant-Governor of Ontario and Quebec respectively.

By sec. 64 the constitution of the executive authority in Nova Scotia and New Brunswick was to continue as it existed at the Union until altered under the authority of the Act.

The effect of these sections of the B.N.A. Act is that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the Governor-General and through his instrumentality to the Lieutenant-Governors the exercise of the prerogative on terms defined in their commissions. The distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers. In relation, for example, to the incorporation of companies in Ontario with provincial objects, the powers of incorporation which the Governor-General or Lieutenant-Governor possessed before the Union must be taken to have passed to the Lieutenant-Governor of Ontario, so far as concerns companies with this class of objects. Under both sec. 12 and sec. 65 the continuance of the powers thus delegated is made by implication to depend on the appropriate legislature not interfering.

There can be no doubt that prior to 1867 the Governor-General was for many purposes entrusted with the exercise of the prerogative power of the Sovereign to incorporate companies throughout Canada, and such prerogative power to that extent became after confederation, and so far as provincial objects required its exercise, vested in the Lieutenant-Governors, to whom provincial Great Seals were assigned as evidence of their authority. Whatever obscurity may at one time have prevailed as to the position of a Lieutenant-Governor appointed on behalf of the Crown by the Governor-General has been dispelled by the decision of this Board in *Maritime Bank of Canada* v. *Receiver-General of N.B.*, [1892] A.C. 437. It was there laid down that the Act of the Governor-General and his Council, in making the appointment, is within the meaning of the statute, the Act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty, for all purposes of provincial government, as the Governor-General himself is for all purposes of Dominion government.

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The form of the commission by which the Governor-General appoints a Lieutenant-Governor to be Lieutenant-Governor of Ontario bears this out. For it runs in the name of the Sovereign, and is

> to do and execute all things that shall belong to your said command and the trust we have reposed in you, according to the several provisions and directions granted or appointed you by virtue of the Act of the United Kingdom of Great Britain and Ireland passed in the thirtieth year of the reign of Her late Majesty Queen Victoria, called and known as the British North America Act, 1867, and of all other statutes in that behalf and of this our present Commission, according to such instructions as are herewith given to you or which may from time to time be given to you in respect of the said province of Ontario, under the sign manual of our Governor-General of our said Dominion of Canada, or by order of our Privy Council of Canada, and according to such laws as are or shall be in force in the said province of Ontario.

Their Lordships have now to consider the question whether legislation before or after confederation has been of such a character that any power of incorporation by charter from the Crown which formerly existed has been abrogated or interfered with to such an extent that companies so created no longer possess that capacity which the charter would otherwise have attached to them.

Prior to confederation, the granting of letters patent under the Great Seal of the province of Canada for the incorporation of companies for manufacturing, mining and certain other purposes was sanctioned and regulated by the Canadian statute of 1864. This statute authorized the Governor-in-Council to grant a charter of incorporation to persons who should petition for incorporation for the purposes of the enumerated kinds of business. Applicants for such a charter were to give notice in the "Canada Gazette" of, among other things, the object or purpose for which incorporation was sought. By sec. 4 every company so incorporated under that Great Seal for any of the purposes mentioned in this Act was to be a body corporate capable of exercising all the functions of an incorporated company as if incorporated by a special Act of Parliament. Their Lordships construe this provision as an enabling one, and not as intended to restrict the existence of the company to what can be found in the words of the Act as distinguished from the letters patent granted in accordance with its provisions. It appears to them that the doctrine of *Ashbury Carriage Company* v. *Riche, supra,*

does not apply where, as here, the company purports to derive its existence from the act of the Sovereign, and not merely from the words of the regulating statute. No doubt the grant of a charter could not have been validly made in contravention of the provisions of the Act. But, if validly granted, it appears to their Lordships that the charter conferred on the company a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings. There is nothing in the language used which, for instance, would preclude such a company from having an office or branch in England or elsewhere outside Canada.

The Dominion Companies Act (ch. 79, R.S.C., 1906) is, so far as Part I. is concerned, framed on the same principle, although the machinery set up is somewhat different. Part II. stands on another footing. This part deals only with companies directly incorporated by special Act of the Parliament of Canada, and to these it is obvious that other considerations may apply. But the companies to which Part I. applies are, like those under the old statute, to be incorporated by letters patent, the only material difference being that the Act enables these to be granted by the Secretary of State under his own seal of office. When granted by sec. 5 they constitute the shareholders a body corporate and politic for any of the purposes or objects, with certain exceptions, to which the legislative authority of the Parliament of Canada extends. The Sovereign, through the medium of the Governor-General, in this way delegates the power of incorporation, subject to restrictions on its exercise, to the Secretary of State, and it is by the exercise of the executive power of the Sovereign that the company is brought into existence.

The Ontario Companies Act, which governs the present case, is ch. 191 of the Revised Statutes of the province, 1897. The principle is similar, save that the letters patent are to be granted directly by the Lieutenant-Governor of the province under the Great Seal of Ontario. Excepting in this respect, the provisions of sec. 9, which corresponds to sec. 5 of the Dominion Act, are substantially the same as those of the latter section, so that, subject to the express restrictions in the statute, it is by the grant under the Great Seal and not by the words of the statute, which merely restrict the cases in which such a grant can be made, that the vitality of the corporation is to be measured.

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It will be observed that sec. 107 enables an extra-provincial company desiring to carry on business within the province of Ontario to do so if authorized by license from the Lieutenant-Governor, a provision which bears out the view indicated.

It was obviously beyond the powers of the Ontario Legislature to repeal the provisions of the Act of 1864, excepting in so far as the B.N.A. Act has enabled it to do this in matters relating to the province. If the legislature of Ontario had not interfered, the general character of an Ontario company constituted by grant remains similar to that of a Canadian company before confederation.

The whole matter may be put thus: The limitations of the legislative powers of a province expressed in sec. 92, and, in particular, the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial Government can bestow, either by legislation or through the executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra provincial powers and rights is quite another. In the case of a company created by charter, the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is, therefore, not *ultra vires*, although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies. Where, under legislation resembling that of the British Companies Act by a province of Canada in the exercise of powers which sec. 92 confers, a provincial company has been incorporated by means of a memorandum of association analogous to that prescribed by the British Companies Act, the principle laid down by the House of Lords in *Ashbury Carriage Company* v. *Riche, supra*, of course, applies. The capacity of such a com-

pany may be limited to capacity within the province, either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries, or because the statute under which incorporation took place did not authorize, and, therefore, excluded, incorporation for such a purpose. Assuming, however, that provincial legislation has purported to authorize a memorandum of association permitting operations outside the province if power for the purpose is obtained *ab extra*, and that such a memorandum has been registered, the only question is whether the legislation was competent to the province under sec. 92. If the words of this section are to receive the interpretation placed on them by the majority in the Supreme Court, the question will be answered in the negative. But their Lordships are of opinion that this interpretation was too narrow. The words, "legislation in relation to the incorporation of companies with provincial objects," do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create by and by virtue of a statute a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of power and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted. It follows, as the Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, that the appellant company could accept powers and rights conferred on it by outside authorities.

The conclusions at which their Lordships have thus arrived are sufficient to enable them to dispose of this appeal; for, according to these conclusions, the appellant company had a status

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which enabled it to accept from the Dominion authorities the right of free mining, and to hold the leases in question and take the benefit of the agreements relating to the locations in the Yukon district, as well as of the license from the Yukon authorities.

A yet larger view of the devolution and distribution of executive power in Canada was suggested in some of the arguments addressed to their Lordships from the Bar, and they are aware that this view has been contended for on former occasions in the Dominion. It has been urged in several cases which have occurred that the Governor-General and the Lieutenant-Governors of the provinces, excepting so far as the Royal prerogatives have been reserved expressly or by necessary implication, have the right to exercise them, as though by implication completely handed over and distributed in such a fashion as to cover the whole of the fields to which the self-government of Canada extends. The Governor and the Lieutenant-Governors would thus be more nearly Viceroys than representatives of the Sovereign under the restrictions explained in *Musgrave* v. *Pulido*, 5 App. Cas. 102, where it was laid down that, in the case of a Crown Colony, the commission of the Governor must in each case be the measure of his executive authority, a principle which, in such a case as that of a self-governing Dominion like Canada, might find its analogy in the terms not only of the commission, but of the status creating the constitution.

The argument for the larger view concedes that it is the general rule in the construction of statutes that the Crown is not affected unless there be words to that effect, inasmuch as the law made by the Crown with the assent of the Lords and Commons is enacted *prima facie* for the subject, and not for the Sovereign. But this principle of construction, it is said, cannot apply to an Act the expressed object of which is to grant a constitution with full legislative and executive powers. In the case of such an Act there is, therefore, no presumption that the general provisions it contains were not intended to include any matter of prerogative which, in the absence of the rule of construction above stated, would fall within the general words employed. For a constitution, granted to a dominion for regulating its own affairs in legislation and government generally, cannot be created

without dealing with the prerogative, and the B.N.A. Act, from beginning to end, deals with matters of prerogative, for the most part without expressly naming the Sovereign.

If this argument were well-founded, it would afford a short cut to the solution of the question which has arisen in this appeal. For, under the distribution of the prerogative which it assumes, it would be difficult to see how a Lieutenant-Governor, placed in the position of a Viceroy as regards matters pertaining to the government of his province, could be excluded from the prerogative power of incorporating by charter, unless that power had been expressly taken away by legislation.

But their Lordships abstain from discussing at length the question so raised. They will only say that when, if ever, it comes to be argued, points of difficulty will have to be considered. There is no provision in the B.N.A. Act corresponding even to sec. 61 of the Australian Commonwealth Act, which, subject to the declaration of the discretionary right of delegation by the Sovereign in ch. 1, sec. 2, provides that the executive power, though declared to be in the Sovereign, is yet to be exercisable by the Governor-General. Moreover, in the Canadian Act there are various significant sections, such as sec. 9, which declares the executive government and authority over Canada to continue and be vested in the Sovereign; sec. 14, which declares the power of the Sovereign to authorize the Governor-General to appoint deputies; sec. 15, which, differing from sec. 68 of the Commonwealth Act, says that the command-in-chief of the naval and military forces in Canada is to be deemed to continue and be vested in the Sovereign; and sec. 16, which says that, until the Sovereign otherwise directs, the seat of the Government in Canada shall be Ottawa. These and other provisions of the B.N.A. Act appear to preserve prerogative rights of the Crown which would pass if the scheme were that contended for, and to negative the theory that the Governor-General is made a Viceroy in the full sense, and they point to the different conclusion that, for the measure of his powers, the words of his commission and of the statute itself must be looked to. In the case of *Maritime Bank of Canada* v. *Receiver-General of N.B.*, already referred to, it was said by this Board that the provisions of the Act "nowhere profess to curtail in any respect the rights

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and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces." Properly understood, and subject to such express provisions of the Act as transfer what would otherwise remain prerogative powers, their Lordships are disposed to agree with this interpretation. It is quite consistent with it to hold that executive power is in many situations which arise under the statutory constitution of Canada conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative. It follows that to this extent the Crown is bound and the prerogative affected. But such a conclusion is a very different one from the far-reaching principle contended for in the argument in question.

For the reasons which they have assigned earlier in this judgment, their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the trial of the petition of right should be proceeded with. As these are proceedings arising out of a petition of right, with reference to which, under the Petition of Right Act of Canada, there is discretion to award costs as against the Crown, the respondent will pay the appellants' costs here and in the Courts below. There will be no order as to the costs of the interveners. *Appeal allowed.*

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ATT'Y-GEN'L FOR CANADA v. ATT'Y-GEN'L OF ALBERTA AND ATT'Y-GEN'L OF BRITISH COLUMBIA.

(The Insurance Case.)

Judicial Committee of the Privy Council, the Lord Chancellor, Viscount Haldane, Lord Parker of Waddington, and Lord Sumner. February 24, 1916.

1. CONSTITUTIONAL LAW (§ II A 3—197)—FEDERAL REGULATION OF INSURANCE BUSINESS—INTERFERENCE WITH CIVIL RIGHTS—PROVINCIAL COMPANIES.

Secs. 4 and 70 of the Insurance Act (Can.), 1910, 9 & 10 Edw. VII. ch. 32, prohibiting under penalty any person or corporation from engaging in insurance business unless it be done by or on behalf of a company of underwriters holding a license from the Minister, deprive private individuals of their liberty to carry on the business of insurance and is an interference with the civil rights of individuals and corporations, as well as an encroachment upon the legislative powers of provinces to confer such rights upon corporations beyond the provincial limits, and, therefore, *ultra vires* of the Dominion Parliament.

[*Bonanza Case*, 26 D.L.R. 273, followed; *Re Insurance Act*, 15 D.L.R. 251, 48 Can. S.C.R. 260, affirmed.]

2. CONSTITUTIONAL LAW (§ II E 1—440)—LAWS FOR PEACE, ORDER AND GOOD GOVERNMENT—SCOPE OF DOMINION POWERS.

The general authority to make laws for the peace, order and good government of Canada, which the initial part of sec. 91 of the British North America Act confers, does not, unless the subject-matter of legis-

lation falls within some of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in sec. 92 of the Act.

[*Russell* v. *The Queen*, 7 App. Cas. 829, followed; *Hodge* v. *The Queen*, 9 App. Cas. 117; *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, referred to.]

3. CONSTITUTIONAL LAW (§ II A 2—194z)—DOMINION POWERS—REGULATION OF TRADE AND COMMERCE—FOREIGN COMPANIES.

The Dominion Parliament, in virtue of the power to regulate trade and commerce under sec. 91 (2) of the British North America Act, has jurisdiction to require a foreign company to take out a license from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province.

Statement

APPEAL from the judgment of the Supreme Court of Canada, 15 D.L.R. 251, 48 Can. S.C.R. 260.

Viscount Haldane.

VISCOUNT HALDANE:—This is an appeal from a judgment of the Supreme Court of Canada (15 D.L.R. 251, 48 Can. S.C.R. 260), answering certain questions put to the Judges by a reference from the Government of the Dominion. The questions so referred were as follows:—1. Are secs. 4 and 70 of the Insurance Act (ch. 32), 1910, or any and what part or parts of the said questions, *ultra vires*, of the Parliament of Canada? 2. Does sec. 4 of the Insurance Act, 1910, operate to prohibit an insurance company incorporated by a foreign State from carrying on the business of insurance within Canada, if such company does not hold a license from the Minister under the said Act, and if such carrying on of the business is confined to a single province?

Sec. 4 is in these terms:—

In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister.

The Minister is defined in the Act to mean the Minister of Finance of the Dominion.

Section 70 is an ancillary section, which imposes a penalty on every person who contravenes or attempts to contravene the provisions of the above and other sections. Section 3 provides that the provisions of the Act shall not apply to any contract of marine insurance effected in Canada by any company authorized to carry on such business within Canada, nor to any company incorporated by an Act of the late Province of Canada, or by an Act of the legislature of any province now forming part of

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Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province. Section 3 also provides that any such company as is last described may, by leave of the Governor-in-Council, avail itself of the provisions of this Act on complying with the provisions thereof, and that, if it so avails itself, these provisions shall then apply to it, and such company shall thereafter have the power of transacting its business of insurance throughout Canada. Section 12 enacts that no license shall be granted to any individual underwriter or underwriters to carry on any kind of insurance business, excepting in the case of associations of individuals formed upon the plan known as Lloyd's, under which each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy. The Act contains other restrictive and regulative provisions.

It will be observed that sec. 4 deprives private individuals of their liberty to carry on the business of insurance, even when that business is confined within the limits of a province. It will also be observed that, even a provincial company, operating within the limits of the province where it has been incorporated, cannot, notwithstanding that it may obtain permission from the authorities of another province, operate within that other province without the license of the Dominion Minister. In other words, the capacity in interfering with which, according to the judgment just delivered by their Lordships in the case of the *Bonanza Company, ante*, such a company possesses to take advantage of powers and rights proffered to it by authorities outside the provincial limits. Such an interference with its status appears to their Lordships to interfere with its civil rights within the province of incorporation, as well as with the power of the legislature of every other province to confer civil rights upon it. Private individuals are likewise deprived of civil rights within their provinces.

It must be taken to be now settled that the general authority to make laws for the peace, order and good government of Canada, which the initial part of sec. 91 of the B.N.A. Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion

Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in sec. 92. There is only one case, outside the heads enumerated in sec. 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under sec. 92. *Russell* v. *The Queen*, 7 App. Cas. 829, is an instance of such a case. There the Court considered that the particular subject-matter in question lay outside the provincial powers. What has been said in subsequent cases before this Board makes it clear that it was on this ground alone, and not on the ground that the Canada Temperance Act was considered to be authorized as legislation for the regulation of trade and commerce, that the Judicial Committee thought that it should be held that there was constitutional authority for Dominion legislation which imposed conditions of a prohibitory character on the liquor traffic throughout the Dominion. No doubt the Canada Temperance Act contemplated, in certain events, the use of different licensing Boards and regulations in different districts, and to this extent legislated in relation to local institutions. But the Judicial Committee appear to have thought that this purpose was subordinate to a still wider and legitimate purpose of establishing a uniform system of legislation for prohibiting the liquor traffic throughout Canada, excepting under restrictive conditions. The case must, therefore, be regarded as illustrating the principle, which is now well established, but none the less ought to be applied only with great caution, that subjects which, in one aspect and for one purpose, fall within the jurisdiction of the provincial legislatures, may in another aspect and for another purpose fall within Dominion legislative jurisdiction. There was a good deal in the Ontario Liquor License Act, and the powers of regulation which it entrusted to local authorities in the province, which seems to cover part of the field of legislation recognized as belonging to the Dominion in *Russell* v. *The Queen*, 7 App. Cas. 829. But in *Hodge* v. *The Queen*, 9 App. Cas. 117, the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board, though without giving reasons, that

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the Dominion licensing statute, known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout Canada, was beyond the powers conferred on the Dominion Parliament by sec. 91. Their Lordships think that, as the result of these decisions, it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces. Section 4 of the statute under consideration cannot, in their opinion, be justified under this head. Nor do they think that it can be justified for any such reasons as appear to have prevailed in *Russell* v. *The Queen*, *supra*. No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada, which are to-day freely transacted under provincial authority. Where the B.N.A. Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words, which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well-founded. Where a company is incorporated to carry on the business of insurance throughout Canada, and desires to possess rights and powers to that effect operative apart from further authority, the Dominion Government can incorporate it with such rights and powers, to the full extent explained by the decision in the case of the *John Deere Plow Co.*, 18 D.L.R. 353, [1915] A.C. 330. But if such a company seeks only provincial rights and powers, and is content to trust for the extension of these in other provinces to the governments of these provinces, it can at least derive capacity to accept such rights and powers in other provinces from the province of its incorporation, as has been explained in the case of the *Bonanza Co.*, *ante*.

Their Lordships are, therefore, of opinion that the majority in the Supreme Court were right in answering the first of the two questions referred to them in the affirmative.

The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a license from the Dominion Minister, even in a case where

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the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in sec. 91, which refer to the regulation of trade and commerce and to aliens. This question also is, therefore, answered in the affirmative.

Their Lordships will, therefore, humbly advise His Majesty that the questions referred to should be answered as now indicated. Following the usual practice, there will be no order as to costs.

ATT'Y-GEN'L OF ONTARIO v. ATT'Y-GEN'L FOR CANADA.

(The COMPANIES CASE.)

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Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Parker of Waddington and Lord Sumner. February 24, 1916.

1. CONSTITUTIONAL LAW (§ II A 3—195)—CORPORATIONS AND COMPANIES—"PROVINCIAL OBJECTS"—TERRITORIAL POWERS — REGULATION AND LICENSING—POWERS OF DOMINION AND PROVINCES.

[*Bonanza* case, 26 D.L.R. 273; *Re Insurance Act*, 26 D.L.R. 288; *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, followed; *Re Companies*, 15 D.L.R. 332, 48 Can. S.C.R. 331, affirmed.]

Statement

APPEAL from the judgment of the Supreme Court of Canada, 15 D.L.R. 332, 48 Can. S.C.R. 331.

The judgment of the Board was delivered by

Viscount Haldane.

VISCOUNT HALDANE:—Of the questions before the Board in this appeal some have already been disposed of by the judgments already delivered in the cases of the *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330; the *Bonanza Company*, and the *Insurance Act* reference. In the first of these cases, in which the judgments in the Supreme Court of Canada in the present reference were brought to their notice, their Lordships indicated that the task of answering the questions on the interpretation of the B.N.A. Act imposed on the Judges in the Court below was one which it was, in their own opinion, impossible satisfactorily to accomplish. They gave reasons for thinking that the abstract and general character of the questions put, rendered it unsafe in the interests of justice to future suitors to attempt to answer them completely. Their Lordships

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are desirous of rendering all the assistance they can to the Governments of the Dominion and the provinces in the work, which is often difficult, of securing adequate assistance in the interpretation of the Constitution of Canada and the consequent framing of legislation. But, for reasons several times assigned in earlier judgments of the Judicial Committee, they feel the paramount importance of abstaining as far as possible from deciding questions such as those now stated until they come up in actual litigation about concrete disputes rather than on references of abstract propositions.

However, it so happens that on the present occasion most of the questions raised have been disposed of in the judgments in the three cases already referred to, and their Lordships will shortly indicate how far they consider this to have been done.

Questions 1 and 2 are answered as sufficiently as is expedient in the judgment given in the *Bonanza* case, *ante*.

Questions 3 and 4 are sufficiently disposed of by the judgments in the *Bonanza* case and the *Insurance Act* reference, *ante*.

As to question 5, their Lordships think it unnecessary to add to what they have said at length in the judgment in the *Bonanza* case.

As to questions 6 and 7, their Lordships have endeavoured in the case of the *John Deere Plow Co.*, 18 D.L.R. 353, [1915] A.C. 330, to give as much assistance as is practicable in answering these questions. The questions are, however, in some of their developments of a highly abstract character, and the Board is of the opinion that it is not prudent to go further than was done in the judgment in that case.

Their Lordships will humbly advise His Majesty that the answers to the questions brought before them on this appeal should be to the effect above indicated. There will be no order Board. *Judgment accordingly.*

Annotation

Annotation—Corporations—Constitutional law—Jurisdiction of Dominion and provinces to incorporate companies—Capacities and rights of companies so incorporated—Insurance companies—Validity of Canada Insurance Act—Foreign insurance companies—Extra-provincial license and registration—Effect of letters patent—Royal prerogative—Doc-

trine of ultra vires—"Company law"—Taxation—Discrimination—Right to sue. IMP.

Annotation

BY F. W. WEGENAST, ESQ.

The decisions in the three cases reported above, viz., *Bonanza Creek Gold Mining Company, Limited*, v. *The King*, *The "Insurance Reference"* and *The "Companies Reference,"* mark the culmination of a constitutional contest, extending over more than a generation, between the provinces and the Dominion, over the incorporation and control of companies. The three cases had been set down together, and the inter-dependence of the judgments is accounted for by the fact that there was considerable overlapping in the argument. The *Companies Reference* itself was not in fact argued as such, except that, after the argument of the *Insurance Reference* and the *Bonanza Creek* case, a few minutes' discussion took place on the fourth item of the *Companies Reference*, with only negative results however, as their Lordships gave no decision on the item. The group of cases is not complete without the judgment in the case of *John Deere Plow Company Limited* v. *Wharton* [1915], A.C. 330, 18 D.L.R. 353, in which their Lordships referred to and dealt with questions 6 and 7 of the *Companies Reference*.

The group of judgments embody what is undoubtedly the most important and far-reaching exposition hitherto given as to the relative jurisdictions of the Dominion and the provinces over the incorporation and control of corporations and also as to the subject of trade and commerce. It is inevitable that such a decision should give rise to further important questions, and one of the effects of these judgments is to open certain grave questions which had been regarded as settled.

At the passing of the British North America Act in 1867 there was in force in both of the Canadas a general Companies Act, originally passed in 1864. There were also in force in each of the two provinces, more particularly in Upper Canada, various statutes for the incorporation of certain classes of companies for what might be considered "local" objects, such as the building of roads and bridges, the holding of agricultural exhibitions and the like. The subject of company law was then in its infancy and considerable versatility of conception and draftsmanship had been displayed in devising methods of incorporation considered suitable to the corporate object. The formation of mutual insurance companies, for instance, was provided for under the head of municipal institutions and by legislation in *pari materia* with the Municipal Act.

The general Act applicable to the two provinces provided a uniform method of incorporating what might be called "commercial" companies. The preamble recited that it was "expedient to authorize the incorporation by letters patent of companies for manufacturing, mining and other purposes, and to provide that certain general clauses of this Act shall apply to all companies so incorporated"; and the Act set forth a long list of "purposes" for which letters patent could be granted.

There is little reason to doubt that the antithesis between the general Act for the incorporation of companies of the broader "commercial" type, on the one hand, and the Acts for the incorporation of "local" companies, on the other, was present in the minds of the framers of the British North America Act when "incorporation of companies with provincial objects" was made one of the items of provincial jurisdiction.

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Annotation *(continued)*—Corporations—Constitutional law—Jurisdiction of Dominion and provinces to incorporate companies—Capacities and rights of companies so incorporated—Insurance companies—Validity of Canada Insurance Act—Foreign insurance companies—Extra-provincial license and registration—Effect of letters patent—Royal prerogative—Doctrine of ultra vires—"Company law"—Taxation—Discrimination—Right to sue.

With the coming into force of the British North America Act the question at once arose whether and to what extent the authority to incorporate companies under the Act of 1864 devolved upon the Lieutenant-Governors of the provinces, and with it the question whether and to what extent companies previously incorporated under that Act became subject to the jurisdiction of the provincial legislatures.

Section 65 of the British North America Act had provided for the perpetuation in the Lieutenant-Governors of the newly created provinces of all the powers which had been "before or at the union vested in or exercisable by the respective Governors or Lieutenant-Governors of those provinces . . . as far as the same are capable of being exercised after the union in relation to the Government of Ontario and Quebec respectively." The question was obviously whether the power to incorporate companies under the Act of 1864 was "capable of being exercised" by the Lieutenant-Governor, and, upon the assumption that the executive jurisdiction of a province was coterminous with its legislative jurisdiction, the question was whether and to what extent the incorporating power under the Act of 1864, and the regulatory provisions of the Act, were referable to the head "incorporation of companies with provincial objects."

In the provinces of Nova Scotia and New Brunswick, and in the provinces of British Columbia and Prince Edward Island, when these came into the union, the question in its historical phase was whether and to what extent the local Companies Acts were displaced by the operation of the British North America Act. It would seem reasonable to assume that these Acts remained in effect and operation for the purpose of incorporating companies "with provincial objects," and were displaced only in the sense that they were no longer available for the incorporation of companies with non-provincial or ultra-provincial objects.

There is an interesting letter among the private papers of the late Sir John A. Macdonald, which, as it does not appear to have been published elsewhere, is quoted here:—

[Private.] OTTAWA, Oct. 22nd, 1867.

My dear Sandfield:

There are several applications for letters patent for the incorporation of mining and manufacturing companies, under the General Act of 27 & 28 Vict. chap. 23. Cartier and I have discussed the matter, and have come to the conclusion that the power to grant such letters patent is vested in the local and not in the general Government.

We have no doubt that it does not exist in the general Government, and that, if it does not belong to the local, the power does not exist at all, until there is legislation on the matter. Cartier agrees with me that the power rests with you, but a doubt may be raised, and indeed has been raised, whether you will require some legislation.

The 11th sub-section of the 92nd clause of the Union Act vests in

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Annotation

Annotation *(continued)*—Corporations—Constitutional law—Jurisdiction of Dominion and provinces to incorporate companies—Capacities and rights of companies so incorporated—Insurance companies—Validity of Canada Insurance Act — Foreign insurance companies — Extra-provincial license and registration—Effect of letters patent—Royal prerogative—Doctrine of ultra vires—"Company law"—Taxation—Discrimination—Right to sue.

the provincial legislature the power of incorporating companies with provincial objects. Now, the word "provincial" evidently applies to the four provinces established by the Union Act, and not to the three old provinces. By our Act 27 & 28 Vict. ch. 23, a patent of incorporation gives a corporate existence to any company receiving a charter under it, through the whole of the two Canadas; but, since the Union charter given by the local Government under the Act cannot extend beyond its bounds, hence the doubt which I have mentioned.

I don't think there is much in it, but Cartier thinks it of sufficient importance, as the point has been raised, to warrant our calling your attention to it. In fact, he says that, the question having been mooted, he would not think it prudent himself to accept a charter without previous legislation.

I understand that since the 1st July and during the hurry of the elections, when we were all away from headquarters, that some charters have been issued by the general Government. I would suggest for your consideration the propriety of your passing an Act, at your first session, confirming all such charters, and carrying through a General Incorporation Act in the spirit of the old Canadian statute to which I have referred.

Yours faithfully,

(Sgd.) JOHN A. MACDONALD.

The Hon. John Sandfield Macdonald,

Etc., etc., etc.

P.S.—I have written to Chaveau on this subject.

There is another letter to Hon. P.J.O. Chaveau, of the Quebec Government of the same date and in almost identical terms. This letter bore immediate fruit, for in 1868 the Quebec legislature passed an Act, 31 Vict. ch. 25, which embodied almost verbatim the Act of 1864, though, so far as the province was concerned, it was passed as a new piece of legislation, and did not purport to be in perpetuation of the pre-confederation Act.

In Ontario, in direct opposition to the view expressed by Sir John A. Macdonald, charters began to be issued purporting to be in exercise of the power conferred by the Act of 1864. The first charter was dated the 13th February, 1868, and was issued to the "Cornwall Manufacturing Company." It was in the form of letters patent from the Crown, and recited that, "Whereas under and by an Act of Our Parliament of the province of Canada passed in the session thereof held in the twenty-seventh and twenty-eighth years of our reign, and intituled 'An Act to authorize the granting of charters of incorporation to manufacturing, mining and other companies,' our Governor-General in Council may grant by letters patent under the great seal of our said province a charter of incorporation . . . for any of the purposes therein mentioned; and whereas under the provisions of an Act of the Imperial Parliament, intituled 'An Act for the Union of Canada, Nova Scotia

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and New Brunswick and the government thereof, and for purposes connected therewith,' our Lieutenant-Governor of the Province of Ontario in Council may in like manner cause to be issued the said letters patent."

During the following five years some one hundred and twenty charters in all were issued by the Ontario department, all purporting to be operative under the Act of 1864. The question of the validity of these charters does not appear to have been raised in any reported case. It might have been raised in *Re Massey Manufacturing Company* (1886), 13 A.R. 446, if either of the parties had thought it to his interest; for that company was one of those mentioned above, and the question was whether a mandamus would lie against the Provincial Secretary to compel the publication, in the "Ontario Gazette," of a notice necessary in connection with a by-law to increase the capital stock of the company.

In 1872 the legislature of Ontario went so far as to pass an Act (35 Vict. ch. 40) purporting to amend the Act of 1864, an attempt which must, in the light of the subsequent decision in *Dobie* v. *Temporalities Board* (1882), 7 App. Cas. 136, be considered to have been *ultra vires*—unless, indeed, the original Act might be considered to have been split up between the federal and the provincial Governments.

Finally in 1874 the provincial authorities in Ontario acquiesced in the view of the Dominion, and an Act, 37 Vict. ch. 35, was passed providing for the incorporation of companies "for any of the purposes to which the authority of the legislature of Ontario extends." The bulk of the provisions of the Act were, as in the case of Quebec, copied from the pre-confederation Act, but did not purport to be in perpetuation of it. This Act was the original of the present Ontario Companies Act.

The Ontario Act was copied by Manitoba in 1875, by Nova Scotia in 1883, by New Brunswick in 1885, by Prince Edward Island in 1888, and in 1886 an ordinance was adopted for the North-West Territories based upon the Manitoba Act as it then stood. Every province of Canada, therefore, except British Columbia, has had at some stage a system of incorporation by letters patent. The latter province had from the beginning adhered closely to the practice in England of incorporating companies by registration of a memorandum and articles of association. Registration systems corresponding more or less closely to the Imperial Act have since been adopted—in Nova Scotia in 1900, in the North-West Territories in 1901, and in Prince Edward Island in 1915. There are, therefore, now only four provinces—Ontario, Quebec, New Brunswick and Manitoba—where incorporation is by letters patent.

It should be observed that in some of the Acts there has been a modification of the original method of letters patent issued by the Governor-in-Council. The charters under the Act of 1864 were issued in the form of royal letters patent from the Crown. This practice was changed later so that the letters were issued by the Lieutenant-Governor under his own seal of office. In Quebec, by an amendment of 1875, it was provided that "it

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shall not be necessary that an order in council be passed for granting any charter under the authority of the above-mentioned Act, but the Lieutenant-Governor may grant any charter upon a favourable report from the Attorney-General or the Solicitor-General of this province," and in later revisions of Act the power was simply vested in the "Lieutenant-Governor." In the revision of the Dominion Companies Act in 1902 the Secretary of State was substituted for the Governor-in-Council. In 1907 the words "in Council" were dropped out of the section in the Ontario Act, and three years later a further amendment was made providing that the Provincial Secretary might, "under the seal of his office, have, use, exercise and enjoy any power, right or authority conferred by this Act on the Lieutenant-Governor in Council."

The uncertainty with respect to the devolution of the Act of 1864 and the executive powers under it was only one phase of the question of the relative jurisdictions of the Dominion and the provinces to incorporate companies. From the very beginning the Dominion authorities held strictly to the view that a provincial company would be confined in its operation to the territorial limits of the incorporating province. This view was adhered to by successive Ministers of Justice. In 1877, for instance, "An act to incorporate the Alexandra Company," purporting to authorize the company to carry on business n the Province of British Columbia "or elsewhere" was recommended for disallowance by Mr. Z. A. Lash, then Deputy Minister of Justice, because "the company is not only incorporated for the purpose of carrying on the business in British Columbia, but the words 'or elsewhere' are added, which would apparently enable them to carry on business over the whole Dominion, and also in other countries."

So late as 1897 Sir Oliver Mowat, then the Minister of Justice, expressed the view that "the Dominion has power to incorporate a company for the whole Dominion though the objects of the company are provincial, a provincial legislature having no power to authorize a company to do business outside of the province, as regards each province." (Hodgins, Provincial Legislation, 1896-98, p. 63).

Special Acts purporting to grant to companies extra-provincial powers were regularly disallowed (See *e.g.* Hodgins, Prov. Leg. 80, 1052, etc.). There are some instances of letters patent or certificates of incorporation under general companies Acts of the provinces in which there was an assertion of extra-provincial power but none of the Acts themselves under which the letters patent or certificates were issued expressly sanctioned such an assertion. Until 1897 the Ontario Act required the application of a company to state "the place or places within the Province of Ontario where its operations are to be carried on, with special mention if there are two or more places of some one of them as the chief place of business" (R.S.O. 1887, ch. 157, s. 5), and until 1887 the departmental practice was to recite in the letters patent the fact that the company's objects were to be carried out within the province as justifying the issue of the letters patent. In the revision of 1897 the reference to operations within the province was dropped from the statute and the de-

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partmental form of letters patent became non-committal upon the question of extra-territorial powers.

In 1899 joint action of the legislature (62 Vict. [2] ch. 11, s. 21), and the department permitted the incorporation of the "Sao Paulo Railway, Light and Power Company Limited,' for the purpose *inter alia*. "Elsewhere than in our Dominion of Canada to obtain legislative, governmental, municipal or other authority, concessions, or power and there to survey, lay out, construct, complete, maintain and operate . . . . railways . . . . also telegraph and telephone lines." . . . . This appears to be the first positive assertion in Ontario of provincial power to incorporate a company to carry on business outside the province and being expressed inthe terms of letters patent instead of a special Act, the incorporation could not be disallowed by the Dominion.

Whether occasioned by the incident of the Sao Paulo incorporation or not, the theory began to be advanced that the words "provincial objects" in section 92 of the B.N.A. Act referred, not to the territory within which a company was to operate but to the nature of the business which it was to conduct; that is to say, the business must be outside the classes assigned by section 91 to Dominion jurisdiction, such as banking, navigation, etc. The opposing theory as shown by the opinion of Sir Oliver Mowat, quoted above, was that the limitation was a double one relating both to subject matter and to territory.

In the meantime a number of decisions and expressions of the judicial committee had appeared to recognize implicitly the theory of a territorial limitation. In *Citizens* v. *Parsons* (1881), 7 App. Cas., 96, 117, th's passage occurs:—

"The learned Judge assumes that the power of the Dominion Parliament to incorporate companies to carry on business in the Dominion is derived from one of the enumerated classes of subjects, viz., 'the regulation of trade and commerce,' and then argues that if the authority to incorporate companies is given by the clause the exclusive power of regulating them must also be given to it, so that the denial of one power involves the denial of the other. But in the first place it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislature being 'the incorporation of companies with provincial objects' follows that the incorporaton of companies for object other than provincial fall within the general powers of the parliament of Canada. But it by no means follows that because *the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion* that it alone has the right to regulate its contracts in each of the provinces."

The decision and the reasoning in *Dobie* v. *Temporalities Board* (1882), 7 App. Cas. 136, also appear to rest solidly on the assumption that the limitation is territorial. The question there was as to the power of the legislature of Quebec to repeal or amend a pre-confederation Canadian statute creating a

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corporation with rights and interests both in Upper Canada and Lower Canada. After pointing out that any such repeal or amendment in Quebec would necessarily affect the corporation's interests in Ontario, Lord Watson said, "If the board incorporated by the Act of 1858 could be held to be a 'company' within the meaning of class 11, its objects are certainly not 'provincial.'"

In *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1883), 9 App. Cas. 157, the question was as to the Dominion incorporating power and it was thought necessary to base the jurisdiction of the Dominion to incorporate the appellant corporation upon the want of jurisdiction in the province to incorporate it. It had been claimed by the province that the corporation in question "could not lawfully be incorporated except by the authority of the legislature of the province." Dealing with this plea Sir Montague Smith says: "It is asserted in the petition, and was argued in the Court below and at the bar that inasmuch as the association had confined its operation to the province of Quebec, and its business had been of a local and private nature, it follows that its objects were local and provincial and consequently that its incorporation belonged exclusively to the provincial legislature. But surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its statutes or capacity as a corporation; if the Act incorporating the Association was originally within the legislative powers of the Dominion Parliament. The company was incorporated with powers to carry on its business, consisting of various kinds, throughout the Dominion. *The Parliament of Canada could alone constitute a corporation with these powers;* and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the act of incorporation, nor warrant the judgment payed for, viz., that the company be declared to be illegally constituted."

The first case in which the question of the extra-provincial capacity of a provincial company became a real issue appears to have been *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*, [1903] A.C. 59. The action arose upon a policy covering property in Toronto, issued by a company incorporated under legislation of the province of Quebec. The argument that the policy was ultra vires appears not to have been seriously pressed in the Privy Council, so that the decision in favor of the validity of the policy could not be considered conclusive.

It seems somewhat remarkable, by the way, that in none of the cases upon the insurance phase of the constitutional issue has any particular emphasis been placed upon the special character of insurance as distinguished from trade in commodities nor upon the distinction between an insurance contract, which is essentially a contract *in personam*, and a contract for the sale of goods, which involves at least potentially a transaction *in rem*. In the case of *C.P.R.* v. *Ottawa Fire Ins. Co.* (1906), 39 Can. S.C.R. 405, for instance it would appear to have been quite arguable that a contract entered into at Ottawa between the plaintiff and the defendant, to indemnify the former

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against loss occurring in the State of Maine, should be considered as a transaction taking place at Ottawa and not in the State of Maine.

The point was indeed mentioned in the opinions of some of the judges, but in the questions which were propounded by the Court as the basis of the re-argument upon the constitutional issue it appears to have been assumed in the first place that the transaction first took place in the State of Maine and in the second place that it constituted or evidenced conclusively a carrying on of business in that State. The questions proposed were:—

1st. Is every charter issued by virtue of provincial legislation to be read subject to a constitutional limitation that it is prohibited to the company to carry on business beyond the limits of the province within which it is incorporated?

2nd. Can an insurance company incorporated by letters patent issued under the authority of a provincial Act carry on extra-provincial or universal insurance business, to make contracts and insure property outside of the province or make contracts within to insure property situated beyond?

3rd. Has a province power to prohibit or impose conditions and restrictions upon extra-provincial insurance companies which transact business within its limits?

4th. Has Parliament authority to authorize the Governor in Council to permit a company locally incorporated to transact business throughout the Dominion or in foreign countries?

To these questions answers were given which are effectively summed up in the head-note as follows:—

Held, per Idington, Maclennan and Duff, JJ., Fitzpatrick, C.J., and Davies, J., contra:—That a company incorporated under the authority of a provincial legislature to carry on the business of fire insurance is not inherently incapable of entering outside the boundaries of its province of origin into a valid contract of insurance relating to property also outside of those limits.

Per Fitzpatrick, C.J., and Davies, J.:—Sub.-sec. 11 of sec. 92, B.N.A. Act 1867, empowering a legislature to incorporate "companies for provincial objects," not only creates a limitation as to the objects of a company so incorporated, but confines its operations within the geographical area of the province creating it. And the possession by the company of a license from the Dominion Government under 51 Vict. ch. 28 (R.S. 1906, ch. 34, sec. 4), authorizing it to do business throughout Canada is of no avail for the purpose.

Naturally there was speculation as to the possible results of an appeal to the Privy Council. The case was not appealed; but the uncertainty of the whole situation prompted the Dominion authorities to suggest to the provinces that a stated case should be brought before the Supreme Court to determine the most important points in issue. This suggestion did not meet with the favor of the provinces. A conference of representatives of the provinces and the Dominion was held at Ottawa on the 29th March, 1910, at which the provinces proposed that the Dominion should join them in an ap-

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plication to the Imperial Parliament for an amendment to the British North America Act which would assure to them the powers they had claimed to exercise. This the Dominion authorities declined to do, and the provinces on their part refused to facilitate any reference to the Supreme Court.

In the meantime the situation had been further complicated by the adoption in one province after another of a type of legislation whose practical effect afforded a more serious issue than the question of the powers of a provincial company. If the question of the relative jurisdictions of the Dominion and the provinces over company incorporation had remained purely a question of law a simple solution would have been in every case of doubt to take out a Dominion charter. Under the decision in *The Colonial Building* case it had been held that the fact that a Dominion company chose to confine the exercise of its powers to one province and to local and provincial objects, did not affect its status as a corporation or operate to render its original incorporation illegal as *ultra vires* of the Parliament of Canada.

But the obvious solution by way of a Dominion charter was inimical to the provinces from a fiscal standpoint, the departmental fees for incorporation of companies constituting a substantial item of revenue in some of the provinces. There is little question that the reflex operation of the licensing Acts in impeding companies from taking out Dominion charters was regarded as one of their chief objects. For intending incorporators were faced with this situation, that if they took out a Dominion charter it was necessary to procure a further authorization from the companies department of the province and to pay fees approximately equal to those which they would have paid in the first place for a provincial charter; and to a company proposing to carry on business in more than one province the practical effect of taking out a Dominion charter appeared to be merely the payment of an extra incorporation fee.

The original licensing Acts were directed at foreign companies, that is to say, companies incorporated in jurisdictions outside of Canada; and it is not improbable that the original Acts were prompted by a notion of regulating, and perhaps taxing, companies incorporated in the American States who had extended their operations into Canada.

The first attempt at this class of legislation was an Act of the province of Manitoba in 1875 "to require certain foreign corporations, associations and co-partnerships to enregister within this province." The comment in the report of the Minister of Justice upon this Act was "the undersigned quite recognizes the right of legislation for Manitoba in respect of any companies with provincial objects which may be incorporated by the legislature, but it is possible that companies may be incorporated by the parliament of Canada or under the Joint-Stock Companies' Act of Canada, and the undersigned is of the opinion that the application of the present Act to any such companies would be in restriction of the rights granted to them by Canada." (Hodgins, Prov. Leg. 787).

Three years later, in reporting upon another Manitoba statute to license loan companies, Mr. Z. A. Lash, then Deputy Minister of Justice, said: "The

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right of a provincial legislature to provide for the granting of a license by the province, to a company incorporated by the Parliament of Canada, and which by its Act of incorporation could be given the right to do business in the various provinces, is at least doubtful. (Hodgins, Prov. Leg. 818).

Similar expressions of dissent were from time to time given by the Dominion authorities with reference to several other statutes of a similar nature, but in some cases the statutes were allowed to come into operation subject to their being declared *ultra vires* by the Courts, thus the British Columbia statute of 1897 was not disallowed, though again the Department of Justice expressed the view that the part requiring registration of companies before carrying on business in the province was *ultra vires* in so far as it purported to apply to Dominion companies. (Hodgins, Prov. Leg. 1896-98, p. 81)

A rather remarkable incident in connection with the Ontario Act is worth noting. There had been a long course of correspondence between the Department of Justice and the Ontario Government (See Hodgins, Prov. Leg. 1898-1900 pp. 11-48; *ib.* 1901-1903, pp. 22-23), culminating in an undertaking by the Hon. J. A. Gibson, then Attorney-General, to make satisfactory amendments to the Ontario Act. Pending the following session of the legislature however, a change of government took place, and the new government, declining to be bound by the undertaking given by the former government, omitted to make amendments. The time for disallowance had been allowed to pass, and as a result of this political accident the Act was left to go into force and it was left for the Courts to determine its validity.

The Ontario Act furnished the model for all the Acts at present in force. It was followed by New Brunswick and by the North-West Territories in 1903, by Manitoba and Quebec in 1909, by British Columbia in 1910, by Nova Scotia in 1912 and by Prince Edward Island in 1913. Subject to certain exceptions the effect of these Statutes may be generally said to be:—

(*a*) To render illegal the carrying out of the company's corporate objects unless and until such objects have received provincial sanction through the officials in charge of the administration of companies locally incorporated.

(*b*) To place unlicensed or unregistered companies and their agents under substantial penalties for attempting to carry on business in the province.

(*c*) To deny to unlicensed or unregistered companies corporate capacity and status in the courts.

(*d*) To prohibit unlicensed or unregistered companies from holding real or personal property, or affirmatively to permit companies to hold such property from and after becoming licensed or registered.

(*e*) To impose upon companies as a condition of obtaining a license or registration the payment of fees similar to the incorporation fees paid by companies incorporated or registered under provincial legislation, and based generally upon the authorized capital of the company.

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Until 1915 the Act of Quebec was the only one which excepted Dominion companies from its scope. In that year, following the decision in the *John Deere* case, a similar exception was made in the Act of Alberta.

As to their operation in respect to Dominion companies, the Extra-Provincial Licensing Acts had come under consideration in several cases in the Provincial Courts. In *Rex* v. *Massey-Harris* (1905), 9 Can. Cr. Cas. 25, 6 Terr. L. R. 126, a test prosecution was brought to determine the validity of the Foreign Companies Ordinance of the North-West Territories as regards companies incorporated by the Dominion. The Supreme Court of the North-West Territories held the Act valid as a measure of provincial taxation, though it was seriously questioned whether the territorial assembly had not gone beyond its power in demanding of the defendant company compliance with certain requirements precedent to the obtaining of a license.

In *Heney* v. *Birmingham* (1909), 39 N.B.R. 336, the question was also raised, although the case was afterwards decided upon another point. The report of the case quotes counsel before the full court arguing as follows:—

> "The plaintiff company being incorporated under the Dominion Act has power to carry on business throughout the Dominion of Canada. The provincial legislature therefore cannot prohibit them from carrying on business in the province or subject them to penalties for doing so. In so far as this License Act prohibits the plaintiff from doing business it is *ultra vires*. There is a distinct provision in the British North America Act giving authority to the local legislature to impose shop, saloon, tavern, auctioneer and other licenses, but that would not include a tax such as this upon a Dominion Company."

In *Waterous Engine Works Company* v. *Okanagan Lumber Company* (1908), 14 B.C.R. 238, the question of the validity of the British Columbia Act was also considered, and the Act was upheld on the ground that, while the capacity to carry on business had been conferred upon the company by the Dominion, the business must be carried on in conformity with provincial laws, one of which required the taking out of a license.

Thus matters stood when the proposal of the reference to the Supreme Court was under discussion.

Failing to obtain the co-operation of the province in the effort to secure a decision upon the disputed questions, a stated case was finally drafted by the Dominion Department of Justice, and under an order-in-council, dated 9th May, 1910, was submitted to the Supreme Court of Canada.

There was also included in the stated case a question as to the power of the Dominion to enlarge the powers of provincial companies, the theory of the Dominion department being apparently that provincial companies might secure their extra-provincial capacities and rights by supplementary legislation of the Dominion rather than by enabling legislation of other provinces.

One phase of this question arose under the Dominion Insurance Act, which provided for an extension, by means of a federal license, of the powers

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of a provincial insurance company. The original of the present Insurance Act, as passed by the Parliament of the Dominion in 1868, had provided (31 Vict. ch.48, sec. 25) that "the provisions of the Act as to deposit and issue of license shall not apply to any insurance company incorporated by any Act of the legislature of the late province of Canada or incorporated or to be incorporated under any Act of Quebec, Nova Scotia or New Brunswick so long as it shall not carry on business in the Dominion beyond the limits of that province by the legislature or government of which it was incorporated, but it shall be lawful for any such company to avail itself of the provisions of the Act." This provision was maintained in effect through the various revisions of the Act down to the present time, and, with the provisions requiring the licensing of foreign companies, was the basis of the whole Act and the activities of the Dominion insurance department in administering it.

Another serious question had been raised under the Insurance Act by the decision, in November, 1909, by a Montreal police magistrate, Mr. Seth P. Leet, holding that the provisions prohibiting and penalizing foreign insurance companies carrying on business in Canada without a license were *ultra vires* of the Parliament of Canada. The two questions upon the Insurance Act were made the subject of the separate case known as the *Insurance Reference*.

When the *Companies Reference* first came on for hearing in October, 1910, the provinces took objection to the jurisdiction of the Supreme Court to hear it. This preliminary question of jurisdiction was argued first, and, on judgment being given against the provinces, an appeal was taken to the Privy Council, which affirmed the decision of the Supreme Court. Subsequently upon the accession of the Borden Government strong efforts were made by the provinces to have the References withdrawn. These objections were, after some delay, overruled, and the References were finally argued in February, 1913.

The question of the validity of the extra-provincial licensing Acts had also in the meantime arisen in a concrete case in British Columbia, *John Deere Plow Company, Ltd.*, v. *Agnew*, 8 D.L.R. 65, 10 D.L.R. 576, in the lower Courts, and the validity of the provincial legislation was upheld, following the case of *Waterous* v. *Okanagan*. In the appeal to the Supreme Court of Canada the case went off on the question of the interpretation of the expression of "carrying on business," and the constitutional question was not decided. This case was argued in the Supreme Court, however, at the same time as the general *Companies Reference*, and the opinions of the Judges in the Supreme Court dealt with the British Columbia Act in the light of the *Agnew* case, and Mr. Justice Duff gave a lengthy supplementary judgment largely occupied in support of the validity of the provincial statute in question in the *Agnew* case.

It is not necessary to discuss the result of the opinions of the Supreme

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Court given in answer to the questions in the *Companies Reference*. Generally speaking, it may be said that on the question of the extra-provincial capacity of provincial companies a majority of four to two Judges held in favour of the provinces. On the question of the validity of the licensing Acts the Court was evenly divided.

Pending the appeal of the references to the Privy Council, another case had arisen in British Columbia upon the licensing provisions. In the consolidated appeals of *John Deere Plow Company* v. *Wharton* and *John Deere Plow Company* v. *Duck*, [1915] A.C. 330, 18 D.L.R. 353, the question of the validity of provincial licensing legislation was brought squarely before the Judicial Committee on an appeal *per saltum* from judgments of Mr. Justice Gregory of the Supreme Court of British Columbia (12 D.L.R. 422, 554).

The appellant in both cases was a company incorporated by letters patent issued by the Secretary of State of Canada under the authority of the Companies Act of Canada, and empowered *inter alia* to carry on the business of dealers in agricultural implements. The company had in fact been carrying on such a business, but was not licensed or registered as required under Part VI. of the Companies Act of British Columbia.

The first case was an action by a shareholder of the company to restrain it from carrying on business in British Columbia, on the ground that the company was not registered or licensed. The second case was an action brought by the company against the defendant for the price of certain goods which the defendant had ordered but afterwards refused to accept and pay for. It was held, following the decision in *Waterous* v. *Okanagan* and *John Deere Plow Company* v. *Agnew*, that the company was precluded from carrying on business in the province, and from maintaining any action in the Courts, because it had not complied with the provisions of the Act.

The judgment of the Judicial Committee, given by Viscount Haldane, then Lord Chancellor, dealt with the decisions in the Court below and also with the opinions of the Judges of the Supreme Court of Canada on the *Companies Reference*. It was held that "these provisions of the Companies Act of British Columbia, which are relied on in the present case as compelling the present company to obtain a provincial license of the kind of about which the controversy has arisen or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes.

In the course of the argument in the *John Deere* case, the Privy Council had occasion to consider the opinions of the Supreme Court in the *Companies Reference*, and the judgment was planned to obviate the necessity for dealing with the matter again on a possible appeal of the *Companies Reference*. Thus the ground was laid for the very brief reference to questions 6 and 7 in the judgment of the reference.

While the *John Deere* case did not involve the question of the extra-provincial powers of provincial companies, a passage in the judgment was

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the basis of a change of attitude on the part of at least one of the Judges of the Supreme Court when that body came to deal with the *Bonanza Creek* case. It had been said in the *John Deere* case that "the power of the provincial legislature to make laws in relation to matters coming within the class of subjects forming No. 11 of sec. 92, the incorporation of companies with provincial objects, cannot extend to a company such as the appellant company, the objects of which are not provincial."

This dictum, which was undoubtedly in accordance with the former dicta of the Privy Council above quoted, was the ground of a reversal of the opinion of Mr. Justice Duff, who held in the *Bonanza Creek* case that the company was not capable of carrying on business outside the province of its incorporation.

It is difficult to estimate the precise result of the cases on any one of the questions of constitutional law directly or indirectly involved. The specific points decided in the four judgments appeared to be:—

1. A company incorporated and authorized under a Dominion legislation to carry on insurance or trade throughout Canada has not merely the capacity but the right to carry on such business without further authority from any provincial legislature, and provincial legislation requiring a license of such a company by way of determining or regulating its corporate status is *ultra vires*.
2. It is possible by letters patent under provincial legislation to incorporate a company with the capacity, as distinguished from the right, to receive from jurisdictions outside the province corporate rights and privileges.
3. The Dominion Insurance Act in its present form is *ultra vires* of the Parliament of Canada in so far as it purports to require a license of an insurance company incorporated by legislation of a province before such company can receive from another province the right to do an insurance business in such other province.

The first point is the result of the *John Deere Plow Co.* case, as reaffirmed by expressions in the *Insurance Reference* and the *Bonanza Creek* case. No distinction is drawn between the business of insurance and that of dealing in agricultural implements. The statement is that "where a company is incorporated to carry on the business of insurance throughout Canada, and desires to possess rights and powers to that effect, operative apart from further authority, the Dominion Government can incorporate it with such rights and powers to the full extent explained by the decision in the case of the *John Deere Plow Co.*"

In the judgment in the *John Deere Plow Co.* case, Viscount Haldane, after suggesting avenues of legislation which were open to a provincial legislature as regards Dominion companies, said: "But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers

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Annotation

Annotation *(continued)*—Corporations—Constitutional law—Jurisdiction of Dominion and provinces to incorporate companies—Capacities and rights of companies so incorporated—Insurance companies—Validity of Canada Insurance Act—Foreign insurance companies—Extra-provincial license and registration—Effect of letters patent—Royal prerogative—Doctrine of ultra vires—"Company law"—Taxation—Discrimination—Right to sue.

conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under sec. 92 of the provincial legislature." In the light of this expression and of the distinction between capacity and right established in the *Bonanza Creek* case the Extra-Provincial Licensing and Registration Acts of Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Manitoba and Saskatchewan must be judged to be invalid along with the British Columbia Act if and in so far as they deal with corporate status, capacity and rights. The Acts of Quebec and Alberta as already stated expressly except Dominion Companies.

No. 2 appears to be the broadest statement that is at present safely possible of the result of the *Bonanza Creek* case. There is indeed a suggestion that extra-provincial capacity might be conferred by provincial legislation acting through the medium of a registration system such as that under the Imperial Act. None of the provincial registration Acts at present in existence however, appear to be in apt form to confer such capacity. And there is some difficulty in conceiving a form of registration Act which would confer extra-provincial capacity, the obvious difficulty being that the moment a provincial legislature undertook to deal with capacity beyond the province the subject would be no longer local to the province.

A clear distinction is drawn between what a company is capable of doing and what it has the right to do, and it is said in effect that where a chartered company is in terms forbidden to do a certain thing the prohibition is a subtraction merely from the right of the company and not from its capacity.

As regards No. 3, it must be observed that there is considerable difficulty in resolving the opinion of their Lordships into a definite statement. The subject appears to be dealt with from the standpoint of company incorporation rather than the regulation of the business of insurance. Doubtless the distinction in the Insurance Act itself between companies carrying on business in two or more provinces and those carrying on business only in one province afforded an invitation for a discussion on this basis. To the question, "Are sections 4 and 70 of the Insurance Act, 1910, or any and what part or parts of the said sections *ultra vires* of the Parliament of Canada?" their Lordships merely answer in the affirmative, with no indication of the method, if any, by which the Dominion could undertake the regulation of insurance.

The 2nd question of the *Insurance Reference* as to whether a foreign company is prohibited by the Insurance Act from carrying on insurance business in Canada is also answered in the affirmative. Their Lordships' comment, however, is that "in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction." It seems impossible to reconcile the use of the conditional expression with a positive answer in the affirmative. It seems probable that what their Lordships had in mind was Dominion legislation of the nature of the

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Annotation

Annotation *(continued)*—Corporations—Constitutional law—Jurisdiction of Dominion and provinces to incorporate companies—Capacities and rights of companies so incorporated—Insurance companies—Validity of Canada Insurance Act—Foreign insurance companies—Extra-provincial Doctrine of ultra vires—"Company law"—Taxation—Discrimination—license and registration—Effect of letters patent—Royal prerogative—Right to sue.

present provincial licensing and registration Acts. That is to say, the Dominion could regulate the status of foreign insurance companies by legislation directed at their status instead of being directed at the business of insurance as such.

If it is difficult to state exactly the points decided, it is still more difficult to estimate the effect of the obiter expressions and their results. But, however difficult the task, it will be necessary for companies in some fashion to gather up what is left of the law of the companies as hitherto understood and to anticipate the probable application of the decisions and dicta to cases on company law in the future. It may, therefore, be not altogether fruitless to sumbit some tenative propositions which appear to have been established and to indicate some further questions which have been raised by the decisions:—

4. The doctrine of *ultra vires* is not applicable to companies incorporated by letters patent issued by the executive branch of the Government.

This doctrine, which has been implicitly and uniformly recognized by the Courts as applicable to all statutory corporations in Canada, is apparently wiped out as regards companies incorporated under letters patent under such Acts as those of the Dominion and the provinces of Ontario, Quebec, New Brunswick and Manitoba. It seems clear, on the other hand, that the reasoning of the *Bonanza Creek* case would not apply to companies incorporated under the registration Acts in force in the rest of the provinces, and that, therefore, companies incorporated under the present Acts of these provinces are not vested with extra-provincial capacity.

5. The Secretary of State for Canada and the Provincial Secretary of Ontario, in issuing letters patent, act in a discretionary and not in a ministerial capacity.

This point had been raised on several occasions when it was sought to hold the Government responsible for the incorporation of companies for purposes which for one cause or another were considered objectionable. The attitude of the department has usually been that its functions were automatic, and that intending incorporators for any lawful purpose were entitled to the issue of letters patent as a matter of right. The test is whether a mandamus would lie to compel the exercise of the incorporating power. The language of Viscount Haldane, in the *Bonanza Creek* case, though quite obiter, would seem to afford strong support to the theory that the functions in question are discretionary and that a mandamus would not lie. One result would be to overrule *Re Massey Manufacturing Co.* (1886), 13 A.R. Ont. 446.

6. Legislation to control or regulate by license any particular trade or business not enumerated in sec. 91 of the B.N.A. Act is *ultra vires* of the Dominion Parliament.

There is evidence in the judgment in the *Insurance Reference* of a deliberate purpose to complete the isolation of the case of *Russell* v. *The Queen*

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Annotation

Annotation *(continued)*—Corporations—Constitutional law—Jurisdiction of Dominion and provinces to incorporate companies—Capacities and rights of companies so incorporated—Insurance companies—Validity of Canada Insurance Act—Foreign insurance companies—Extra-provincial license and registration—Effect of letters patent—Royal prerogative—Doctrine of ultra vires—"Company law"—Taxation—Discrimination—Right to sue.

(1882), 7 App. Cas. 829, and finally to dispose of the expression of Lord Watson, in the *Local Prohibition* case [1896] A.C. 348, that "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 Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion."

7. A foreign insurance company, and inferentially a foreign trading company, may be required to take out a license before carrying on business even within the limits of a single province.

Such legislation, their Lordships say, would be supported either by the item, "trade and commerce," or by the item, "naturalization and aliens." What is difficult to see is why the business of a company, as between a foreign country and one of the provinces, should be controllable under "trade and commerce" and the business of a company as between two provinces should not be so controllable. Indeed, it cannot be said to be decided that it would not be possible for the Dominion to control the inter-provincial business of a provincial company doing business in more than one province—that is to say, using the illustration of the well-known T. Eaton Company, this company, which is incorporated under an Ontario charter, might in its local business at Toronto and at Winnipeg respectively be free from interference by license or otherwise through Dominion legislation, but might as to any business which could be described as "inter-provincial" or "foreign," as, for instance, its mail-order business or its business of importation, be subject to regulation by the Dominion.

8. The *genus* of "licenses" under item 9 of sec. 92 does not include a license on corporate status or capacity.

In the *Brewers and Maltsters* case, [1897] A.C. 829, it had been said that their Lordships were "unable to see what is the *genus* which would include 'shop, saloon, tavern' and 'auctioneer' licenses and which would exclude brewers' and distillers' licenses." This expression had been regarded as tantamount to holding that *genus*, if there were one, would be broad enough to include any kind of licence. It would appear as if the *genus* might now be taken to include "insurance," but not "corporate capacity."

9. Provincial legislation dealing with the corporate status of a Dominion trading company cannot be justified as an exercise over "property and civil rights."

In their application to companies of other provinces and of other countries most of the features of the licensing Acts might have been considered justifiable as an exercise of the provincial jurisdiction over "property and civil rights." The effort in the *John Deere Plow Co.* argument was, indeed, to justify them as against Dominion companies on the same ground, and the chief weight of the argument was upon this point. Their Lordships, however, declined to regard the British Columbia legislation in question in that case as referable to the "property and civil rights in

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Annotation

Annotation *(continued)*—Corporations—Constitutional law—Jurisdiction of Dominion and provinces to incorporate companies—Capacities and rights of companies so incorporated—Insurance companies—Validity of Canada Insurance Act—Foreign insurance companies—Extra-provincial license and registration—Effect of letters patent—Royal prerogative—Doctrine of ultra vires—"Company law"—Taxation—Discrimination—Right to sue.

the province," and held that the real purpose was to regulate corporate status.

No question has so far been raised as to the validity of the provincial Acts in relation to companies other than those operating under Dominion charters, but, unless the Acts may be considered as operating in one way upon Dominion companies and in another way upon companies of other provinces and foreign jurisdictions, it would seem that they must be regarded in this respect also as dealing with corporate status, and to be intended to lay down the terms and conditions upon which foreign corporations are to be recognized; in other words, to establish rules of comity as between the enacting province and other provinces and jurisdictions. If this is a correct view of the nature and character of the provincial Acts, the question is still open to be raised whether the provincial legislatures are the proper body to lay down rules for the recognition of foreign corporations or for inter-provincial recognition of provincial corporations. There is a suggestion in the judgment in the *John Deere Plow Co.* case that the legislation might be regarded as dealing with naturalization. As to provincial companies, the licensing legislation derives some support from the judgment in the *Insurance Reference*, though the question might still be raised whether the same rule would apply to trading corporations.

10. Dominion companies are not subject to provincial "company" legislation.

There is a branch of law, not perhaps very clearly defined, which is recognizable as "company law" or law relating to the constitution, organization and operation of companies, the relations of shareholders and directors *inter se* and with the company. The logical result of the judgment in the *John Deere* case appears to be to determine, what might indeed be regarded as elementary, that the "company law" of Dominion companies is a matter for Dominion legislation. Referring to the argument of counsel for the respondent that, even if the capacity of the company were a matter for Dominion legislation, the exercise of the capacity was a matter for provincial regulation, the judgment says their Lordships "are unable to place the limited construction upon the word 'incorporation' occurring in that section (92) which was contended for by the respondents and by the learned counsel who argued the case for the province." "Incorporation," therefore, means more than merely the act of incorporating, and it is a matter to be determined by future developments of case law what are the boundaries of the jurisdiction implied in the term "incorporation"; whether, for instance, the term includes such branches of company law as prospectuses and directors' liability.

11. Provincial legislation, which, under the guise of taxation or any other subject of provincial jurisdiction, placed Dominion companies under any discrimination or substantial disadvantage as compared with other companies would be *ultra vires* of a province.

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Annotation

Annotation *(continued)*—**Corporations—Constitutional law—Jurisdiction of Dominion and provinces to incorporate companies—Capacities and rights of companies so incorporated—Insurance companies—Validity of Canada Insurance Act—Foreign insurance companies—Extra-provincial license and registration—Effect of letters patent—Royal prerogative—Doctrine of ultra vires—"Company law"—Taxation—Discrimination—Right to sue.**

This would seem to follow from the reasoning in the *John Deere* case and from the distinction drawn in the *Bonanza Creek* case between capacity and right. Corporate rights necessarily involve a comparison with natural persons and with other corporations. Any disability as compared with other corporations would be a negation of right. In the judgment in the *John Deere* case the enumeration of the avenues of legislative enactment open to the provinces as regards Dominion companies is guarded by such expressions as "laws of *general* application" and "a license to trade which affects a Dominion company *in common with other companies*," and "laws applying to companies *without distinction*." It would obviously be futile to credit a Dominion company with "rights" if these rights were subject to be nullified by legislation colourable with an intent to place the company at a substantial disadvantage as compared with other companies. If discrimination were not bad *per se*, it might still be bad as indicating for the legislation an ulterior intention, and thus bringing into play the principle in *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580.

In this connection it may be questioned whether the notion of taxing companies upon the basis of their authorized capital, regardless of the amount paid up or the amount invested or employed in the province, is consistent with equality of treatment or with taxation "within the province."

It is open to observation, also, though not germane to the group of cases under discussion, that the term "taxation" must in itself be subject to some limitation. In its ordinary acceptation it imports an imposition by constituted authority of a pecuniary assessment enforceable by right of action or ultimately by levy and seizure. It is elementary to draw a distinction between taxation and confiscation. It seems questionable, also, to say the least, whether it would be open to a province, under the head of "taxation," to add to the sanctions ordinarily invoked to compel payment, a penalty of outlawry or a deprivation of the ordinary use of the Courts. Yet this is what the extra-provincial licensing Acts have in terms purported to do in the case of corporations.

It appears fair to assume that, as to Dominion companies, at all events, that:

12. Provincial legislation purporting to deny to, or withhold from, Dominion companies the right of maintaining actions in the Courts is *ultra vires*.

It appears consonant with the reasoning in the group of cases to assume that a province could not, in aid of a scheme of taxation, bring pressure to bear upon a Dominion company by way of a denial of what is perhaps the most vital of all corporate rights, the power to "sue and be sued, plead and be impleaded."

MAN.

K. B.

CANADIAN CREDIT MEN'S ASSOCIATION v. STUYVESANT INSURANCE CO.

Manitoba King's Bench, Macdonald, J. January 6, 1916.

1. INSURANCE (§ III E 1—80)—MISREPRESENTATIONS AS TO OWNERSHIP—MATERIALITY.

Notwithstanding the condition in an insurance policy that "any fraud or false statement in a statutory declaration shall vitiate the claim," a representation or statutory declaration by the assured that he was the owner of the property, whereas, in fact, the property was purchased with the funds of the assured's brother but intended for the assured, does not materially affect the risk as vitiating the policy on that account.

Statement

ACTION by assignees of an insurance policy.

A. E. Hoskin, K.C., and *H. P. Grundy*, for plaintiff.

E. N. Williams, and *P. C. Locke*, for defendant.

Macdonald, J.

MACDONALD, J.:—The plaintiffs are the assignees of all moneys payable by the defendants under a policy of insurance bearing date November 3, 1913, whereby the defendants insured one J. Winshtock for the term of 12 months from November 20, 1913, against all loss or damage by fire to an amount not exceeding $1,200 to the following described property: The one and a half storey patent roofed building owned and occupied by the assured as a livery stable, situate and being on Main St. in the village of Kreusberg in the Province of Manitoba.

On or about May 24, 1914, the said building was totally destroyed by fire, and the plaintiffs as such assignees claim payment of the said sum of $1,200, with interest thereon to judgment.

The defendants, as a defence to the action, claim that the policy issued upon the representation of the said Winshtock and upon the express condition which was a condition precedent to any liability upon the said policy that the said Winshtock was the owner of the property thereby insured, and they allege that he was not the owner of the property insured and had no insurable interest therein.

They further claim that after the occurrence of the said fire the said Winshtock submitted to the defendant company a statutory declaration as to the loss alleged, and that the said declaration contained a false statement, to wit: a statement to the effect that the said Winshtock was the owner of the property

in question and falsely stated the interest of the said Winshtock therein and they plead condition No. 15, endorsed upon the said policy, and allege that by reason thereof the claim thereunder (if any) was vitiated and the plaintiff debarred from recovery thereunder.

Condition 15 reads as follows:—

Any fraud or false statement in a statutory declaration in relation to any of the above particulars shall vitiate the claim.

Max Winshtock, a brother of Joseph Winshtock, lived at the village of Kreusberg and purchased the lot upon which the building covered by the policy of insurance was erected. He says he bought for his brother Joseph, and that the receipt on account of the purchase money was given in Joseph's name. After buying the lot he built the stable. He says:—

I built for Joseph; he gave me the money and I paid for the building, which cost over $1,800.

The evidence with respect to the payments on the lot and for the construction of this stable is unreliable and impossible to reconcile with truth and reason. Joseph says that he remitted to his brother Max from Yorkton about $1,200. He went to Yorkton late in 1911. The stable was finished early in 1912. He brought no money with him to Yorkton and the $1,200 he remitted represented his wage earnings which he says were $25 a week. In less than a year then he claims to have remitted his brother out of his wage earnings of $25 a week $1,200. He furthermore claims to have left with his brother-in-law the sum of $800 and asked him to give to Max when he started the stable. Max says that he got $400 or $500 from Joseph from Yorkton and that he got $800 from his brother-in-law.

Max is corroborated with respect to the purchase of the lot for Joseph by his brother Michael, who worked for Liebman, the vendor of the lot at the time. He says that Max made the deal for Joseph and took a receipt for Joseph.

It is possible that Max purchased the lot for Joseph and put up the stable for him with some secret understanding between them unconnected with the risk.

Louis Leipsic, the insurance agent through whom the insurance was placed, knew Max when he made the application for

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Macdonald, J.

the insurance, and he knew the policy was to issue to Joseph. It does not, it seems to me, matter in whose name the policy issued; it did not affect the risk.

After the stable was erected, Liebman, the vendor of the lot, sued Joseph and Max Winshtock, claiming for use and occupation of the plaintiff's stable, being the stable the subject of the insurance claim herein. The defendant Max Winshtock entered a dispute note to this action, in which he claims that, "There were no dealings between the plaintiff and the defendant Joseph Winshtock, who is not indebted to the plaintiff in any amount." In this dispute note he further claims that he never leased the property, the use and occupation of which is sued for. On the contrary, he alleges that he purchased the said land (being the lot upon which the stable was erected) from the plaintiff for $125, which amount he is ready to pay upon delivery of title. He now claims, however, that the purchase was not for himself.

Title to the lot has, since the bringing of this action, been secured. This title never was in reality in dispute, and it is evident that title could be made through Liebman, the vendor.

That the lot was purchased from Liebman is scarcely to be doubted. Liebman lived in the village and must have seen the stable under construction. It is unreasonable to think that Winshtock would have put up a stable costing $1,800 without having arranged the purchase of the lot, and it seems to me that it made little difference, so far as the risk was concerned, which of the Winshtocks owned the property. Max was willing that it should be Joseph's, notwithstanding that at least some of his own money and labour went into its construction, and so far as this action is concerned, I do not think the defendant company has any reason to complain, and, in my opinion, the plaintiff is entitled to judgment.

There will be judgment for the plaintiff for $1,200 with interest from January 5, 1915, together with costs.

Judgment for plaintiff.

POWELL v. CROW'S NEST PASS COAL CO.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. March 7, 1916.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—"SERIOUS NEGLECT" AS BARRING RECOVERY—FAILURE TO TREAT CAUSING AGGRAVATION.

The meaning of the words "serious neglect" in sub-sec. 2 (c) of sec. 6 of the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, in their ordinary and non-statutory sense, import more than ordinary negligence; and while that section has no application to the conduct of the injured subsequent to the accident, a failure to continue treatment of an eye after the injury, which consequently results in its permanent loss, constitutes serious neglect which will preclude the right to claim further compensation in respect of that injury.

[*Humber Towing Co.* v. *Barclay* (1911), 5 B.W.C. Cas. 142, followed; 23 D.L.R. 57, affirmed.]

Statement

APPEAL from the judgment of Macdonald, J., 23 D.L.R. 57, on questions of law submitted to him by an arbitrator acting under the provisions of the Workmen's Compensation Act, which is affirmed.

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

E. C. Mayers, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The question before us turns on the conduct of the injured man and his medical attendant in relation to the treatment of the injury. The injured eye after being treated with good results for 2 or 3 days, was neglected for the following 6 days, and the sight thereof was in consequence, as found by the arbitrator, permanently lost.

The arbitrator found that the man was guilty of "serious neglect" within the meaning of those words as used in sec. 6, sub-sec. (2) (c) of said Act.

In my opinion, that section has no application to the conduct of the man subsequent to the accident. But while this is so, it does not follow that the serious neglect, or negligence of the injured man subsequent to the accident, and apart from the statute, may not deprive him of compensation when, but for such neglect, he would have recovered. I think this case is covered by authority. I cannot distinguish it in principle from *Humber Towing Co.* v. *Barclay* (1911), 5 B.W.C. Cases, 142. The question there was—"whether or not the man's present condition is due to the original accident or to the negligence of the bone-setter," and it is clear from the report that if the arbi-

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trator had found that it was due to the negligence of the bone-setter, the injured man could not have succeeded.

In the case at bar the arbitrator found that the man's present condition is due to the want of treatment of the eye for the said period of 6 days, and that he was guilty of serious neglect in failing to attend the doctor during that period. Now, if the negligence of a bone-setter in setting a broken arm will deprive the injured workman of compensation subsequent to the period when, but for such negligent treatment, the arm would have become as good as ever, it must *a fortiori* follow that the negligence of the man himself may do so.

While the arbitrator was in error in thinking that said sec. 6 was applicable to the case, I think that error was harmless. It was not error in the finding of fact but in the manner of applying the finding, and as it would be equally fatal to the workman's claim whether the finding was applied with reference to the act or without reference to it, the legal result has not been affected by the error. The meaning of the words "serious neglect" in their ordinary or non-statutory sense import more than ordinary negligence, as the equally indefinite words "gross negligence" do. In the *Barclay* case, *supra*, Cozens Hardy, L.J., in his opinion in one place speaks of gross negligence, while in the portion quoted above he speaks of negligence simply. I do not think he intended to draw a legal distinction between the two. In any case I think a finding that the workman's present condition was brought about by his own serious neglect, or even by his neglect simply, would be sufficient to deprive him of further compensation.

I think there was evidence upon which the arbitrator could make his finding. The appeal should, therefore, be dismissed.

Irving, J.A.

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

As to the sufficiency of the doctor's evidence, I have entertained considerable doubt. The onus was on the company to prove that the chain of causation was broken, and the doctor's evidence on that point is not satisfactory; but as the Judge who heard him accepted his vague, as it appears to me to be, statement in one sense, I think I must accept his view of the matter.

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The other point presents no difficulties. The section relied on does not touch the matter we are dealing with.

MARTIN, J.A.:—This appeal should, I think, be dismissed because there is evidence on which the arbitrator could base his finding of fact which is sufficient to sustain his award.

GALLIHER, J.A.:—I agree with Macdonald, J., that question (a) should be answered in the negative.

Galliher, J.A.

I also agree that question (b) should be answered in the affirmative. There is evidence upon which the arbitrator might reasonably find that the employers had discharged the onus cast upon them of proving that the accident was not the cause of the eye being in its present condition, but that the neglect of either the applicant or the doctor, it matters not which, was such cause.

As to (c) I think the arbitrator probably uses the word "serious" in view of his finding that sub-sec. (c) of sec. 2 of the Act applies (with which I disagree).

It seems to me that once there is a finding of neglect by the arbitrator on the part of either the applicant or the doctor, and the onus cast upon the employers of shewing that but for such neglect the accident would not have brought about the present condition, has been discharged, the employers are relieved from responsibility and I agree that there is evidence upon which he could so find here.

McPHILLIPS, J.A., dissented. *Appeal dismissed.*

McPhillips, J.A. (dissenting)

DRAPER v. JACKSON.

MAN.

C. A.

Manitoba Court of Appeal, Richards, Perdue, Cameron and Haggart, JJ.A. February 21, 1916.

1. SALE (§ IV—90)—BULK SALES—SETTING ASIDE—STATUTORY PERIOD.

A sale declared void as not having complied with the provisions of the Bulk Sales Act is void only as against the claimant who has brought action within the 60 days prescribed by the Act, and is binding as against those who have not attacked it within that time, and they will not be allowed to come in subsequently and share ratably with the one who, by his diligence, has succeeded in having the sale set aside.

[*Davis* v. *Bryan*, 6 B. & C. 651; *Re London Celluloid Co.*, 39 Ch.D. 190; *Hughes* v. *Palmer*, 19 C.B.N.S. 393, referred to.]

2. EXECUTION (§ II—15)—STATUTORY REQUIREMENTS AS TO SHARING IN PROCEEDS.

To enable claimants to share in money realized by the bailiff of the County Court under an execution they must observe the requirements of sec. 207 of the County Courts Act.

MAN.

C. A.

DRAPER v. JACKSON.

3. EXECUTION (§ II—15)—MONEY OF ASSIGNEE—DISTRIBUTION — INTERPLEADER.

Where money has been paid by an assignee to the bailiff under a bond given for payment of the plaintiff's claim in the event of interpleader proceedings being decided against him, and which has not been realized under a writ of execution, it cannot be reached by an execution creditor, and the bailiff should not advertise it for distribution under secs. 204, 205 of the County Courts Act.

[*Davies Brewing Co.* v. *Smith*, 10 P.R. (Ont.) 627; *Roach* v. *McLachlan*, 19 A.R. 496 (Ont.), followed.]

Statement

APPEAL from a judgment of Cumberland, J., in an interpleader action.

H. J. Symington, for appellant.

S. H. Forrest, for respondent.

Richards, J.A.

RICHARDS, J.A.:—Jackson and Neelands, doing business as the Western Salvage Co., and being traders within the meaning of the Bulk Sales Act, sold their stock in trade, in bulk, to the Smith Trading Co. without complying with that Act.

Draper recovered a judgment in the County Court of Souris against the Salvage Co. The Smith Co. had, in the meantime, assigned to C. H. Newton for the benefit of their creditors. Draper placed an execution in the bailiff's hands. The facts before us do not shew whether or not the bailiff made a seizure of any of the goods. The assignee, however, disputed the plaintiff's claim, and an interpleader issue was had, the assignee giving a bond for payment of the claim.

It is not so stated, but I assume that this bond was only to pay the claim if the assignee failed in the interpleader. It is not stated whether the bond was to the bailiff or to the plaintiff. The plaintiff succeeded in the issue, it being held that the sale from the Salvage Co. to the Smith Co. was void, so far as the claim of the plaintiff was concerned, his proceedings having been taken within the time limited by the Bulk Sales Act, and the provisions of that Act not having been observed in the making of the sale. The assignee thereupon paid to the bailiff $455.70, the amount of the plaintiff's claim and costs.

The bailiff then advertised the receipt of the money, purporting to act under sec. 205 of the County Courts Act, and within the 3 months provided by that section, Robinson, Little & Co. Ltd. filed notice of claim under an execution in their favour against the Salvage Co. for $4,870.41.

Robinson, Little & Co., after receiving notice of the sale to the Smith Co. allowed the 60 days provided by sec. 9 of the Bulk Sales Act to expire without taking action under that Act. They nevertheless now claim to be entitled to share *pro rata* with the plaintiff in the moneys paid by the assignee to the bailiff as above stated. In an interpleader issue to try their rights to so share, the learned trial Judge held them not entitled. From that decision they now appeal.

If Robinson, Little & Co. should succeed in this action the position will be this—that after neglecting to enforce their claim under the Bulk Sales Act, they can nevertheless take advantage of the plaintiff's greater diligence and deprive him of over 90 per cent. of that which he has gained thereby—and that despite the fact that they were not in a position themselves to make the money under their execution, if plaintiff had never sued, and despite the fact that the plaintiff's execution in no way lessened what, if anything, was available for their execution.

Sec. 204 of the County Courts Act requires the proceedings by that, and secs. 205, 206 and 207 to be taken,

when a bailiff realizes any moneys under a writ of execution, etc.

The wording of the section was slightly altered in 1915, and it does not seem certain whether this bailiff got the money before or after that change came into force. But the change is not material here. We may assume that but for the execution the assignee would not have given the bond or paid the money.

The principle on which secs. 204, etc., were enacted, was that one creditor should not be enabled to get a greater share than others of the proceeds of the debtor's estate. Here there was, in fact, no estate of the debtor to realize upon. The Bulk Sales Act gave a remedy against goods which were not the debtor's property, and it was because of the plaintiff's right to realize out of those goods that the assignee gave the bond.

The money paid was the assignee's money. It was not the proceeds of the goods. The goods remained in the assignee's hands and could have been made available for Robinson, Little & Co.'s claim—if at all—as fully as if the plaintiff had never recovered his judgment.

It is true that our Act does not, on its face, limit the pro-

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visions in question to moneys realized from the debtor's goods as the Ontario Act does; and for that reason some of the Ontario decisions may not apply here.

I am of opinion, however, that the sections now in question should be held to be limited to moneys realized out of the debtor's estate. To construe them otherwise would cause injustice in some cases. Suppose A. to be indebted to a number of creditors, including B. For some reason C. is liable to B. in respect of A.'s debt to him, but is not liable to any of A.'s other creditors. Let us further suppose that B. sues A., gets a judgment and issues execution. There is no property of A. to be levied on. C. comes forward and pays off the execution, knowing that otherwise B. may sue him for the debt.

If Robinson, Little & Co.'s claim here is correct, then in the case above supposed, A.'s other judgment creditors could share *pro rata* in the moneys paid by C. Then, either B. would lose all but his *pro rata* share or C. would have to pay over again to B. the debt, less what the latter got by tht *pro rata* distribution, and the other creditors of A. would be paid moneys that they never could have got at but for C.'s contract of liability to B. to which they were strangers.

It is unfortunate that the learned trial Judge has not given us the reasons for his holding. I think, however, that such holding is correct. There are a number of other points in the case—such as the question whether Robinson, Little & Co. brought themselves within sec. 207 of the Act. As to such I express no opinion.

I would dismiss the appeal with costs.

Perdue, J.A.

PERDUE, J.A. (after stating the facts:)—The defendants were traders within the meaning of the County Courts Act and Bulk Sales Act.

The amount of the plaintiff's judgment was $455.70.

By the admitted facts the plaintiff, Draper, succeeded against the assignee for the benefit of the creditors of the Smith Trading Co., on the ground that the sale by the Western Salvage Co. to the Smith Trading Co. was void in so far as the claim of the plaintiff was concerned, because the provisions of the Bulk Sales Act (R.S.M. 1913, ch. 23, as amended by 4 Geo.

V. ch. 13), had not been observed, and the plaintiff had taken proceedings under the Act within the time limited for so doing (sec. 9). The Act prescribes what shall be done by purchasers of stocks of goods in bulk in order that creditors of the vendor may be protected. Sec. 2 makes sales in which the provisions mentioned in the section have not been complied with, "fraudulent and void against the creditors of the vendor." A breach of sec. 3 renders the sale "fraudulent and absolutely void as against creditors of the vendor." There is no penalty provided by the Act. The expression "absolutely void" is not, I think, any stronger than "void." If a thing is void it is of no effect, and there cannot be degrees in nullity. When an instrument is void as against persons who may or may not take advantage of it, it is voidable only: see *Davis* v. *Bryan*, 6 B. & C. 651, 655, cited in *Re London Celluloid Co.*, 39 Ch.D. 190; *Hughes* v. *Palmer*, 19 C.B. (N.S.) 393; Maxwell on Stat. 5th ed., 343-345. The provision contained in section 9 of the amended Act that no action shall be brought to set aside a bulk sale after 60 days from the making of the sale or from the date when the attacking creditor first received notice of it, shews that the expressions "void" and "absolutely void," as used in the Act, mean only voidable. The lapse of time cures the defects resulting from non-observance of the statute. The sale is therefore void only as against the creditors who attack it within the time prescribed by the statute.

The claimants did not recover judgment against the Salvage Co. until more than a year had elapsed since the sale to the Smith Trading Co. The claimants never attacked the sale. They waited until Draper, a small creditor, had brought his suit to a successful conclusion and had the sale declared void as against him, then they came in with a large execution issued upon a judgment obtained in the Court of King's Bench, and sought to appropriate over 90 per cent. of the fruits of his litigation. In attempting to accomplish this, they rely upon the provisions contained in secs. 203-207 of the County Courts Act, relating to the ratable distribution of money realized under execution.

To enable the claimants to share in money realized by the

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bailiff of the County Court under an execution, they must observe the requirements of sec. 207 of the County Courts Act. This section, as amended by 5 Geo. V. ch. 12, provides that a person having an unsatisfied judgment in any other Court against the same execution debtor at any time before the distribution of the moneys, "may procure a memorandum thereof under the seal of the Court, and file the same with the bailiff who has realized the money as aforesaid." The section then provides:—

Thereupon such person shall be entitled to share ratably in the distribution as if he were an execution creditor.

Upon looking at the papers filed in the County Court, we find that this is what was done: On July 9, 1915, the sheriff of the Western Judicial District notified the bailiff that he, the sheriff, filed a claim for $4,870.31. On July 12, the sheriff wrote to the bailiff enclosing a copy of the writ of *fieri facias*. This copy, apparently made in the sheriff's office, has had the seal of the County Court impressed upon it. No memorandum of the judgment under the seal of the Court of King's Bench, in accordance with the requirements of sec. 207, appears to have been filed with the bailiff. The statement of facts makes no mention of such a memorandum. On the contrary, the claimants base their right on the fact, as they put it, that they "filed notice of claim under a King's Bench execution against the Western Salvage Co. for $4,830.02 and $40.39 costs." This is not a compliance with sec. 207. Unless they have observed the provisions of the section, the claimants are not entitled to share in the moneys in the hands of the bailiff.

But, apart from this objection and dealing with the matter as if the provisions of sec. 207 had been observed, there is another point upon which, in my view, the claimants must fail. The money in the bailiff's hands was not realized under a writ of execution. This money was paid by Newton, the assignee of the Smith Trading Co., under a bond he had given for payment of the plaintiff's claim in the event of the interpleader proceedings being decided against him, Newton. The goods seized evidently were released to Newton. When the claimants obtained their judgment the bailiff had no money in his hands realized from the seizure and sale of the Western Salvage Co.'s goods.

He had only the money paid by Newton in satisfaction of his liability on his bond, to secure the plaintiff in the first interpleader.

In *Davies Brewing Co.* v. *Smith*, 10 P.R. (Ont.) 627, payment of a first execution was made by a chattel mortgagee of the goods, whose mortgage was subsequent to the execution. A second execution creditor whose execution was subsequent to the chattel mortgage claimed to share in the money under the Creditors' Relief Act, 43 Vict. ch. 10 (O.) It was held by the Master in Chambers that the money paid to the sheriff having been specially appropriated by the chattel mortgagee to the payment of the first execution, and the money not having formed any part of the debtor's estate, the Act did not apply. On appeal to Rose, J., this decision was affirmed, and in *Roach* v. *McLachlan*, 19 A.R. (Ont.) 496, it received the approval of the Ontario Court of Appeal.

The money in question in this case could not have been reached by the claimants. It never belonged to the Western Salvage Co. The claimants were not in a position to enforce their execution against the goods which had been sold by that company to the Smith Trading Co., and which afterwards passed to Newton. The sale was void only as against the plaintiff Draper, who had taken proceedings under the Bulk Sales Act. The sale was binding as against the claimants who had not attacked it within the time prescribed. The bailiff, when he received the money on the bond, should have paid it to the plaintiff, whose money it was, and should not have advertised it for distribution under secs. 204-205 of the County Courts Act. The appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—When Osler, J., says, in *Roach* v. *McLachlan*, 19 A.R. (Ont.) 496, at 501, that when goods subject to a chattel mortgage and to an execution prior thereto are sold under an execution they are sold not as the property of the debtor but as the property of the mortgagee, I confess, with all due respect, that I am unable to follow his line of reasoning. The remarks of Mr. Justice Wetmore in *Howard* v. *High River*, 4 T.L.R. 109 at 118, seem to me pointed and unanswerable. However, there is a marked distinction between the wording of

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the Ontario statute and the Territorial Ordinance, and the sections of the County Courts Act applicable in this case.

On the facts as stated, it seems to me that when the assignee paid the moneys in question to the bailiff, pursuant to the terms of his bond, after the decision in the first interpleader, the bailiff received them as having been realized on the execution in his hands against the Western Salvage Company.

It appears, however, that the claimants have not complied with the provisions of sec. 207 of the County Courts Act. There was filed no memorandum of their judgment under the seal of the Court of King's Bench, in which it was recovered. The copy of the writ of execution, the memorandum by the sheriff of the Western Judicial District, and the letter from him, forwarded to the Clerk of the County Court, do not, any or all of them, constitute a memorandum of the claimants' judgment such as sec. 207 specifically requires.

In view of this fact I must concur in the conclusion arrived at by the other members of this Court. Had there been a memorandum of the judgment filed in accordance with the statute, I would have been inclined to favour the appeal.

Appeal dismissed.

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Alberta Supreme Court, Harvey, C.J. January 6, 1916.

1. FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTIONS BETWEEN HUSBAND AND WIFE—BURDEN OF PROOF SHEWING GOOD FAITH—CORROBORATION.

On an application under r. 462, calling on the judgment debtor and his wife to shew cause why the property should not be sold to realize the amount to be levied under an execution, the burden of proof is on the defendants to shew that a transfer from the husband to the wife is not made to delay, hinder, or defraud creditors, and the Judge should not consider that burden satisfied unless the evidence of the parties themselves is corroborated by some other evidence.

[*Green, Swift & Co.* v. *Lawrence*, 7 D.L.R. 589; *Koop* v. *Smith*, 25 D.L.R. 355, followed.]

2. FRAUDULENT CONVEYANCES (§ II—5)—CONSIDERATION—PRE-EXISTING DEBT—PRESSURE.

A pre-existing debt is not in general so good a consideration for a conveyance or mortgage by the debtor to the creditor as money actually paid at the time, although it may be a valuable consideration, if it be given under pressure or pursuant to an agreement between the parties.

3. FRAUDULENT CONVEYANCES (§ II—8)—VOLUNTARY SETTLEMENT.

To uphold a voluntary settlement the settler must, at the time of making it, have property enough left out of the settlement to meet all his existing debts and liabilities.

[*Jackson* v. *Bowley*, Car. & M. 97, followed.]

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4. FRAUDULENT CONVEYANCES (§ II—8)—VOLUNTARY SETTLEMENT—WHEN DEEMED FRAUDULENT.

If, after deducting the property which is the subject of a voluntary settlement, sufficient available assets are not left for the payment of the settler's debts, the law infers that the intent is to defraud creditors. [*Freeman* v. *Pope*, L.R. 5 Ch. 538, followed.]

Statement

APPLICATION under r. 462, calling on judgment debtor to shew cause why certain lands should not be sold to realize under an execution, and for an order.

E. J. Knisely, for plaintiff.

I. B. Howatt, for defendant.

Harvey, C.J.

HARVEY, C.J.:—In July, 1913, the plaintiff brought action against the defendant, claiming in respect of certain dealings between them in 1911. There was a trial and a reference upon which a report was made on March 10, 1915, which was confirmed on April 16, 1915, and judgment entered thereon on the same date for $1,117.39. Execution was issued thereon, and on June 30, 1915, the defendant was examined for discovery in aid of execution, the sheriff having been unable to realize on the execution.

On the examination it appeared that he had transferred some property to his wife since the debt due to the plaintiff was incurred, and an order was obtained for her examination under r. 636, and she was thereafter examined. This is an application under r. 462 against the judgment debtor and his wife, calling upon them to shew cause why the property should not be sold to realize the amount to be levied under the execution.

It appeared on the examination of the wife that some other lands had been transferred to her by her husband at the same time, and that they had subsequently been exchanged for certain other lands which she now holds, and it was agreed that the application should apply to both transactions, and it was admitted that if the transaction was fraudulent the land now held as the subject of the exchange would be liable to the execution.

The plaintiff seeks to make out his case from the evidence given by the husband and wife on their examinations. Objection was taken to the use of their examinations for this purpose, but it was subsequently withdrawn.

Defendant's counsel contends that the burden is on the plaintiff to make out that the transaction was fraudulent. It is to be noted, however, that the form of the rule indicates that the burden

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is on the defendants, for they are to shew cause. This suggests that the plaintiff, having shown the transfer to have been made while his debt existed, it will be presumed, in the words of the rule, to be "void as being made to delay, hinder, or defraud creditors or a creditor," until they shew that it is not so. It is, perhaps, not very important to determine that question, however, because I have all the evidence before me, and in *Green, Swift & Co.* v. *Lawrence*, 7 D.L.R. 589, and in the very recent case of *Koop* v. *Smith*, 25 D.L.R. 355, the Supreme Court of Canada pointed out that in a transaction between near relatives under suspicious circumstances, in an action to set it aside, not merely is the burden on the defendants, but the Judge should not consider that burden satisfied unless the evidence of the parties themselves is corroborated by some other evidence.

Duff, J., who declined to consider this a rule of law, either in this province or in British Columbia, yet says in the last case, at p. 359:

> I think the true rule is that suspicious circumstances, coupled with relationship, make a case of *res ipsa loquitur*, which the tribunal of fact may and will generally treat as a sufficient *prima facie* case.

It would have been of great value to have had the *viva voce* evidence of the defendants instead of merely the transcript of that evidence, because the manner of giving evidence in such a case as this is of very great assistance. As it is, however, I can only rely on the information that is given me by the written record.

It appears that the transfer of the house in which the defendants lived was executed on December 15, 1913. The affidavit of value made by the wife on that day shews that the land was worth $8,000 and the improvements on it $2,800. On or about the same day the husband transferred his interest in the other lands, and gave his wife also a bill of sale of all his chattels, the different conveyances comprising all of his property. The transfer of the house and lot was produced from the Land Titles Office. Though it is dated and the affidavit of execution sworn on December 15, 1913, it was not registered until March 15, 1915. The consideration is specified as $1 and other considerations. Mrs. Porter's affidavit of value states that the consideration mentioned is the true consideration, but there is an affidavit of value made by Mr. Porter on the same day, but re-sworn before another commissioner on March 15, the year 1913 not being changed, though

no doubt it was 1915. This affidavit has a clause added after the statement of consideration—no doubt at the re-swearing, for the purpose of registration—as follows:

> Being an existing indebtedness by the transferor to the transferee, such existing indebtedness exceeding the purchase price paid by the transferor, and dating back to the year 1910.

The improvements are specified as a residence, $2,500, and a barn, $300.

The making over of all his property to his wife while the suit was pending, the holding of this transfer for a year and a half without registration, and its registration after the report was made and before it was confirmed, are such suspicious circumstances as in my opinion call upon the defendants to shew the *bona fides* of the transaction.

The explanation given by the debtor is that he did not think he owed the plaintiff anything and did not believe the latter could recover a judgment against him, that he had received some money from his wife—about $1,200, and that

> my object was to secure her in the moneys I got from her, and as I was running on the lakes up there and liable to get drowned or crippled in an accident, and she had the little children to bring up, she wanted to have something to bring them up on, and I thought it my duty to secure her in case of accident so that she would not have to go through the Courts.

This is in answer to his own counsel on the examination, who then put the following question: "You mean take out probate administration?" to which he naturally answered, "Yes." Subsequent to the making of the above explanation, on his examination for discovery, the debtor made an affidavit in which the following paragraph appears:

> The consideration for the said sale was partly the money due by me to my wife, partly to avoid the necessity of administering my estate in case I met death, as I had several small children, and partly as a gift to her.

In the same affidavit he gives particulars of the sums he received from his wife, which total $1,228, of which $550 was subsequent to the date of the transfer and $407 subsequent to the examination for discovery. By a later affidavit he gives what he says are accurate figures of the amounts received, which shew $543 principal and $55 interest prior to the date of the transfer and $401 principal and $30 interest subsequent, making a total of about $1,030. The moneys received were not paid him by his wife, but were received as payments to which she was entitled as a member of a syndicate of which he and his son were also members,

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which had some interests in lands in British Columbia. The age of his son does not appear, but he refers to him as "my boy," and from his statement that he had small children it seems probable that the son was a child. The wife, also, in her affidavit, states that she has a family of small children. In his last affidavit he says:

> My said wife did not transact any of her own business; I did it all for her. I had a power of attorney from her to receive the moneys due her under this agreement.

He apparently, therefore, received all the moneys representing the interests of all of them, though what became of the moneys representing the interest of his son does not appear. There is independent evidence that the wife's name appeared in the syndicate, and that she became nominally entitled to the moneys mentioned, and to this extent there is corroboration of the testimony of the defendants, but there is no corroborative evidence that she did not in fact receive these moneys, or that they were used by the husband in his own interest. Further, there is no evidence of any description that the wife ever advanced any money of her own to acquire any interest in the syndicate, and it may well be that she was only interested nominally. As far as appears, the husband may only have used her name and that of his son for his own interest. He says he received all of her moneys and used them in his business to pay his personal debts.

From Mrs. Porter's examination I feel quite satisfied that she knew nothing about the details of the syndicate at all, and I find it hard to conclude from the evidence that when the payments were made to which she was nominally entitled there was any agreement or understanding that the husband should ever be liable to pay her or refund the amounts to her. In her examination she states with emphasis, and repeats, that the only consideration of the transfer to her by her husband of all his property was that, being in a dangerous occupation, he wished to protect her and the children. Finally, to make quite sure, the plaintiff's counsel asks:

> You understand what I mean when I say "consideration," do you, Mrs. Porter? I mean, is that the only reason or recompense he had for transferring the property to you?

To which she answers, "Sure." She also says that she knew of the plaintiff's action shortly after it was begun. It is true that when her own counsel had an opportunity, after some effort he succeeded in persuading her to suggest that a part of the considera-

tion was her husband's indebtedness. I quote a portion of the written record:

Mr. Howatt: You said to Mr. Knisely that the only reason that your husband transferred the property mentioned in that bill of sale and the house on Syndicate avenue was because he was going on very dangerous work and wanted to protect you and your children? A. That was the reason.

Q. Was there any other reason? A. No, sir.

Q. Now, just think, he was going on a very dangerous occupation?

Mr. Knisely: I object to Mr. Howatt leading the witness.

Q. (continued): You go back over the last six or seven years and think whether or not you gave your husband anything?

Mr. Knisely made further objection to the question and to any answer, but she answered:

A. Owing me money.

There are some further questions and answers, but this is the nearest she came to saying that the indebtedness was part of the consideration.

It is apparent that such questions and answers would not have been permissible if the examination had been before me, and it is equally apparent that little value should be attached to evidence so obtained.

It is true that in an affidavit which she had sworn a few days before she did say that the consideration was partly the advance of money, but in view of her statements on the examination to which I have referred, and of the fact that a perusal of the whole examination fails to produce the conviction that she was trying to be candid and truthful, I find myself far from convinced that at the time the transfer was executed it was intended by the parties that it should be even in part upon the consideration of an existing debt, if, indeed, there was any such valid debt, as to which I have already expressed some doubt. I have dealt at some length with this subject, and have reached the conclusion that there is no consideration of an existing debt to support the transaction, though it appears by no means clear that even if such a debt had formed a part of the consideration it would have validated the transfer.

In *Mathews* v. *Feaver*, 1 Cox 278, Sir L. Kenyon, M.R., said:

This is a transaction between the father and the son, and natural love and affection is mentioned as part of the consideration; upon which, as against creditors I cannot rest at all. It is true it is a consideration which, though not valuable, is yet called meritorious, and which in many instances the Court will maintain; but not against creditors.

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May's Fraudulent Conveyancing, 3rd ed., p. 199, says:

> A pre-existing debt may be a valuable consideration, under the statutes of Elizabeth, for a conveyance or mortgage to the creditor by the debtor; or at least, if it be given under pressure by the creditor, or pursuant to an agreement between the parties . . . But a pre-existing debt is not, in general, so good a consideration as money actually paid at the time.

It is urged by defendant's counsel that there is no evidence of insolvency, but in *Jackson* v. *Bowley*, Car. & M. 97, cited by May at p. 30, Erskine, J., said:

> The question is, what is meant by insolvency? If by the act of assignment the party makes himself insolvent, that is, if the property left after the conveyance is not sufficient to pay his debts, that is insolvency, sufficient for the purposes of the plaintiff in this action.

May adds:

> This is the sense in which the term insolvency is now applied. To uphold a voluntary settlement the settler must, at the time of making it, have property enough left out of the settlement to meet all his existing debts and liabilities.

Having come to the conclusion that the transfer was a voluntary one, it is unnecessary to consider the question of intent, because it will be presumed that the intention was to defraud the creditors, who must of necessity be defrauded, as would be the case here in respect of the plaintiff by the debtor's disposing of all his property.

In *Freeman* v. *Pope*, L.R. 5 Ch. 538, Gifford, L.J., at 545, says:

> If, after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settler's debts, then the law infers intent, and it would be the duty of a Judge in leaving the case to a jury to tell the jury that they must presume that that was the intent.

This being the state of the law, it is quite apparent that the statement by the defendants that they did not intend such a result, even if they were believed, is immaterial. As it is thus established that the conveyance is void as being in fraud of creditors, the plaintiff is entitled to the relief provided by the rule, viz., an order that the lands in question comprising the two parcels are subject to his execution and may be sold to realize the amount to be levied thereunder.

As I have already indicated, the one property is the home of the defendants, and if not transferred would probably have been exempt up to a certain amount. *Roberts* v. *Hartley*, 14 Man. L.R.

284, raises a doubt as to whether that exemption has not been lost by the fraudulent transfer. At present, however, this question does not arise, and may never do so.

The plaintiff will have the costs of these proceedings.

Order granted.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. November 2, 1915.

1. VENDOR AND PURCHASER (§ I E—25)—SALE OF SUBDIVISION LANDS CONTRARY TO STATUTE—RIGHTS OF PARTIES—RESCISSION.

The provisions of sub-sec. 7 of sec. 124 of the Land Titles Act (Alta. St. 1911-12, ch. 4, sec. 15(25), amending sec. 124, St. 1906, ch. 24, as amended by sec. 12 of ch. 2, St. 1910, sess. 2), prohibiting the sale of land according to any townsite or subdivision plan until after the same has been duly registered, are directed against the vendor for protection of the purchaser, and though the effect of the statute is to render void any sale made in contravention of it, the purchaser cannot be deemed in *pari delicto* with the vendor, and is therefore not deprived of the remedy of rescission to recover back moneys paid in virtue of the agreement of sale.

[*Lapointe* v. *Messier*, 17 D.L.R. 347, 49 Can. S.C.R. 271, applied; 24 D.L.R. 881, affirming 20 D.L.R. 858, 8 A.L.R. 16, affirmed.]

2. APPEAL (§ VII A—291)—CHANGE OF LAW PENDING APPEAL—PROVINCIAL STATUTE.

Appeals to the Supreme Court of Canada are not of the nature of rehearings; and a provincial statute (sec. 25 of Alta. St. 1915, ch. 2, amending sec. 124 of the Land Titles Act, St. 1906, ch. 24), which changes the law affecting cases while appeals therefrom are pending in the Supreme Court of Canada, has no binding effect upon the latter Court in the disposition of such appeals.

[*Quilter* v. *Mapleson*, 9 Q.B.D. 672, distinguished.]

Statement

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 24 D.L.R. 881, affirming the judgment of Walsh, J., at the trial, 20 D.L.R. 858, 8 A.L.R. 16, by which the plaintiff's action was maintained with costs.

A. H. Clarke, K.C., for the appellants.

M. B. Peacock, for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—This is an appeal from the Supreme Court of Alberta. The action was brought for return of moneys paid on account of a contract for the purchase of lands and for a declaration that the contract was rescinded. The judgment at the trial was in favour of the plaintiff. This judgment was affirmed by the full Court, and I can see no reason to interfere with the conclusion reached below.

The appeal is dismissed with costs.

Idington, J.

IDINGTON, J.:—This is an action to rescind an agreement for the sale of lots in a subdivision, and the appeal must turn upon

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the meaning to be given to the section of an Alberta Act, which reads as follows:

> No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until after the same has been duly registered in the Land Titles Office for the registration district in which the land shewn on said plan is situate; providing that this section shall not apply to any plan now in existence and approved by the Minister.

This was in force at the time when the agreement in question was entered into. It seems, therefore, to be the very thing which the Act prohibits, for, admittedly, there was no plan registered when it was entered into. The respondent was ignorant of that fact, and brought this action for rescission the next day after his discovery thereof.

The purpose of the Act may primarily have been the convenience of those having to deal with registrations, but the Court of Appeal suggests another purpose had in view by the legislature was to protect intending purchasers from possible fraud by manipulation of unregistered plans. I think we must feel bound to give due weight to that view, resting upon knowledge of local conditions which we may not as clearly apprehend as the local Courts. It is by accepting that view that the respondent is entitled to succeed herein. He comes, thus, within a class of whom each person is entitled, when acting in ignorance of an illegality tainting a contract he has entered upon, to recover from the other party to the contract, notwithstanding the illegality.

Had he known the fact when entering into the contract, or possibly when acting under the contract in a way to ratify it, he could hardly claim to recover.

The Act was amended after judgment was given herein by the Court of Appeal, and the amendment, it is urged, does away with his right therein.

Whatever might be said in the case of such an amendment as appears, enacted before the hearing in appeal, cannot, I think, help the appellant now. That judgment was right when given. We can only give the judgment which the Court below appealed from should have given. To go further would be to exceed our jurisdiction. I think, therefore, the appeal must be dismissed with costs.

Duff, J.

DUFF, J.:—I have no difficulty in reaching the conclusion that, apart from the enactments discussed below, the respondent is

entitled to rescind the agreement in question on the ground of misrepresentation, on the principle of *Redgrave* v. *Hurd*, 20 Ch.D. 1; and this, of course, would entail the consequence that he is entitled to recover back the moneys paid under the agreement.

It is necessary, however, to notice the points upon which the argument chiefly proceeded (touching certain legislation), and which are dealt with in the judgments of the other members of the Court. I entertain no doubt that sub-sec. 7 of sec. 124 of the Land Titles Act, which is in the following words:

> No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until after the same has been duly registered in the Land Titles Office of the registration district in which the land shewn on said plan is situate; providing that this section shall not apply to any plan now in existence and approved by the Minister,

does prohibit any agreement for the sale of "lots"—"according to any townsite or subdivision plan until after the same has been duly registered"; and that consequently, any such agreement, made in the circumstances mentioned, though *de facto* complete, is by reason of this enactment legally inoperative.

It does not, however, necessarily follow, where moneys have been paid under such a transaction in professed and intended performance of the obligations supposed to be thereby created, that such moneys can be recovered back by the party paying them on discovering that the transaction was illegal. The law of England as touching the right to recover back moneys paid or property delivered under an unlawful agreement, or the right to set such an agreement aside, was fully discussed in the case of *Lapointe* v. *Messier*, 17 D.L.R. 347, 49 Can. S.C.R. 271, and, for convenience, I quote from my own judgment. (For judgment see 17 D.L.R. at 358, 359 and 360.)

In the present case it may be suggested that the respondent brings himself within either one of two of the exceptions mentioned. First (and, as I have intimated, this is sufficient for disposing of the appeal), that the agreement was made under such circumstances that if otherwise lawful it would have been voidable at the option of the respondent. Secondly, that the enactment was intended to afford protection to a particular class of persons of whom the respondent is one. It is open to doubt, I think, whether the respondent does in truth bring himself within this last-mentioned exception. I am disposed to think the better view to be that this

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enactment is intended to serve the general public interest in the security and certainty of title, which is one of the main objects of the Land Titles Act.

Assuming, however, as some of my learned brothers think, that the respondent has a status to set aside the agreement on the ground of illegality alone, then it become necessary to consider the contention of Mr. Clarke that the rights of the parties are governed by sub-secs. 8(*a*) and 8(*b*) of sec. 124, which sub-sections were enacted on April 17, 1915, after the judgment of the Appellate Division of Alberta now appealed from was delivered (5 Geo. V., ch. 2, sec. 25). If we are governed by these amendments in the decision of this appeal, then the respondent must fail in so far as his case rests upon the illegality of the agreement of sale.

There can be no doubt, I think, that if these amendments had been enacted before the hearing of the appeal by the Appellate Division of Alberta, that Court would have been governed by them in the disposition of the appeal: *Quilter* v. *Mapleson*, 9 Q.B.D. 672. The question we have to consider is another question. The Legislature of Alberta has no authority to prescribe rules governing this Court in the disposition of appeals from Alberta; and the enactments invoked by Mr. Clarke, which do not profess to declare the state of the law at the time the action was brought, or at the time the judgment of the Appellate Division was given, can only affect the rights of the parties on this appeal to the extent to which the statutes and rules by which this Court is governed permit them so to operate.

In my judgment, the appeal to this Court is an appeal strictly so called, not an appeal by way of re-hearing. The Supreme Court Act (sec. 51) expressly declares that this Court should give the judgment which ought to have been given by the Court below, and there are no words corresponding to those of Order 58, r. 2, of the Judicature Rules, which enable the Court of Appeal to "make any further or other order as the case may require." Speaking generally, subject to some special provisions of the Act which have no present application, and to some exceptions established for the purpose of preventing the abuse of the right of appeal, it is the duty of this Court to give the judgment which the Court below ought to have given according to the state of the law on which it was the duty of that Court to base its judgment.

ANGLIN, J.:—The contract under which the payments that the plaintiff claims to recover back were made was, in my opinion, unquestionably in contravention of sub-sec. 7 of sec. 124 of the Land Titles Act of Alberta (2 Geo. V., ch. 4, sec. 15, sub-sec. 25). I cannot assent to Mr. Clarke's contention that what this statute forbids is not the making of an agreement for the sale of lots on an unregistered plan, but the conveyance or transfer of lots sold under such an agreement. It is the sale under an agreement (or otherwise) which is prohibited, and that is effectuated by the agreement itself, which vests in the purchaser the equitable title to the lots agreed to be sold. The agreement was, therefore, illegal and void.

The amending statute of 1915, although made applicable to pending litigation, is not declaratory of the law as it stood at the time of the contract in question or at any subsequent period anterior to its enactment. It became law only after the judgment of the Appellate Division in this case had been delivered. This Court is bound by statute to render the judgment which the Court appealed from should have given—of course upon the law as it was when that Court delivered judgment. The appeal to this Court is upon a case stated, and it is not a re-hearing such as would render applicable the principle of the decision in *Quilter* v. *Mapleson*, 9 Q.B.D. 672. It is impossible to say that the provincial Appellate Court should have given effect to an amendment of the statute law which was not in force when it rendered judgment. Nor can an amendment not declaratory in its nature, such as was that dealt with in *Corp. of Quebec* v. *Dunbar*, 17 L.C.R. 6, cited by Mr. Clarke, enable us to say that the law was at the date of the judgment appealed from what the subsequent amendment has made it. I express no opinion as to how far such a declaratory amendment enacted by a provincial Legislature after a right of appeal to this Court had arisen would be binding on us.

Ordinarily, a party to an illegal contract cannot recover back moneys paid under it. But to this rule the law admits of an exception in favour of a plaintiff whom it does not regard as *in pari delicto* with the defendant. In the present case it is the sale, not the purchase, of land according to an unregistered plan which is forbidden. The penalty provided by sub-sec. 8 of sec. 124 of the Land Titles Act (4 Geo. V. (2nd sess.), ch. 2, sec. 9, sub-sec. 4) is,

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as I read it, imposed on the vendor. He is the "offender" who sells. The seller may be presumed to know whether the plan according to which he is selling is or is not registered. There is no ground for a presumption of like knowledge on the part of the purchaser. Moreover, there is reason to believe that the statute was passed for the protection of purchasers. These are circumstances which, upon the authorities, suffice to relieve the present plaintiff, as a party not *in pari delicto*, from the operation of the rule which would, otherwise, disentitle him to sue for the recovery back of money paid under an illegal agreement.

It is unnecessary to consider the other grounds on which the respondent claimed to be entitled to rescission.

The appeal, in my opinion, fails, and must be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—This is an action in rescission of an agreement for sale based upon three grounds: (1) Illegality of the contract; (2) defendant's inability to make title; (3) misrepresentation of the vendors.

The illegality of the contract is invoked by the purchaser, who claims that it was made in contravention of a statute passed in 1912 (sub-sec. 7 of sec. 124, Land Titles Act), declaring that

no lots shall be sold under agreement for sale, or otherwise, according to any townsite or subdivision plan until after the same has been duly registered in the Land Titles Office.

The lots of land in question in this case were shewn on a subdivision plan that was not registered as required by that statute.

The trial Judge and the Appellate Division of the Supreme Court came to the conclusion that the agreement for sale should be rescinded in view of that prohibitory law. I concur in the reasons given by the trial Judge, Walsh, J.

But, since the judgment of the Court of Appeal was rendered, on March 12, 1915, the Legislature of Alberta has amended the Land Titles Act, on April 17, 1915 (5 Geo. V. ch. 2, sec. 25), and has enacted sub-secs. 8(*a*) and 8(*b*) of sec. 124, which provide as follows:

8(*a*). No party to any sale or agreement for sale shall be entitled in any civil action or proceeding to rely upon or plead the provisions of sub-sec. 7 of this section, if the plan of subdivision by reference to which such sale or agreement for sale was made was registered when such action or proceeding was commenced, or if, pursuant to the arrangement between the parties, it was the duty of the party who seeks to rely upon or plead the provisions of such sub-

section to himself register such plan of subdivision or cause the same to be registered.

8(*b*). The costs of pending proceedings to which sub-sec. 8(*a*) applies shall be disposed of as if the said sub-section had not been passed.

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The question which is raised as a result of that new legislation is whether we should give effect to it or not in this case.

By the Supreme Court Act, sec. 51, this Court may dismiss an appeal or give the judgment which the Court whose decision is appealed against should have given.

At the time the Court below was considering this case the statute now invoked had not been passed. It could not be then acted upon by that Court. Our duty is to render the judgment which the Court below should have rendered. The Legislature of Alberta could not pass any legislation that could interfere with the powers vested in and restrictions imposed on this Court by the Federal Parliament. If it was a declaratory law that had been passed by the provincial legislature, of course we would be bound by it.

I am of opinion that the judgment of the Supreme Court of Alberta should be confirmed with costs. *Appeal dismissed.*

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Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. January 8, 1916.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—RISK INCIDENTAL TO EMPLOYMENT—ALIGHTING WHILE TRAIN MOVING.

A workman engaged in taking wires up and down telegraph poles, and for that purpose travelling in a worktrain with a crew from place to place, is not justified in alighting from one car and attempting to get on another while the train is in motion, and between stations; and such conduct is not a "risk arising out of and incidental to the nature of the employment" within the meaning of sec. 6 of the Workmen's Compensation Act, Sask. St. 1910-11, ch. 9, so as to render the employer liable for injuries to the employee resulting therefrom, the employer's liability in such case being limited to the ordinary risks of travel.

[*Plumb* v. *Cobden Flour Mills Co. Ltd.*, [1914] A.C. 62; *Barnes* v. *Nunnery Colliery Co.*, [1912] A.C. 44, followed; *Herbert* v. *Fox*, 84 L.J.K.B. 670; *Jibb* v. *Chadwick*, 84 L.J.K.B. 1241; *Parker* v. *Black Rock*, 84 L.J.K.B. 1373; *Price* v. *Tredegar*, 30 T.L.R. 583, referred to.]

Statement

APPEAL from a judgment in favour of defendant in an action for injuries to an employee, which is affirmed.

P. M. Anderson, for appellant.

J. A. Allan, K.C., for respondent.

Lamont, J. (dissenting)

LAMONT, J., dissented.

Brown, J.

BROWN, J.:—In so far as the evidence is concerned in this

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case, I simply wish to emphasize what was said by the witness Nicholson in relating an interview which he had with the plaintiff some time after the accident. His statement is as follows:—

I asked him how the accident had happened and he told me he was in the front sleeping car visiting with some of the boys and after the train had started he decided he would go back to his own car, and he said he jumped off the first car and attempted to get on the second car, and he said he knew when he did it he couldn't make it—he realized the train was going too fast—and he said if anyone had told him five minutes before the accident occurred he would have told them he would not have been so foolish as to do such a thing.

The trial Judge accepted this evidence of Nicholson, and this Court would not be justified in doing otherwise. Can it be said that the accident arose out of the employment? One of the tests frequently applied when answering this question is: Was the risk one reasonably incidental to the employment?

In *Plumb* v. *Cobden Flour Mills Co.*, [1914] A.C. 62, Lord Dunedin, in giving the unanimous judgment of the House of Lords, is reported to have said, at p. 68:—

A risk is not incidental to the employment, when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself.

In the English Workmen's Compensation Act there is a provision that:—

If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed. (Stats. 6, Edw. VII., p. 326).

and Lord Dunedin, in the case aforesaid, goes on to say, p. 69:—

I cannot see that the serious and wilful misconduct section really introduces any difficulty. Reverting to the words of the Act, you have first to shew that the accident arises out of the employment. Then, in the older Act came the rider that even when that was so the workman still could not recover if the accident was due to the serious and wilful misconduct of the workman himself—a rider limited in the later Act to cases where the injury did not result in death or serious and permanent disablement. But the very fact that it is a rider postulates that the accident is of the class which arises out of the employment. A man may commit such a piece of serious and wilful misconduct as will make what he has done not within the sphere of his employment. But if death ensues and his dependants fail to get compensation, it will not be because he was guilty of serious and wilful misconduct, but because the thing done, irrespective of misconduct, was a thing outside the scope of his employment.

In using the language just quoted, Lord Dunedin was apply-

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ing the House of Lords' decision in the case of *Barnes* v. *Nunnery Colliery Co.*, [1912] A.C. 44; and in that case the proviso of the English Act was operative, as the injury was of a fatal character.

The *Plumb* case, therefore, decides, as I undertsand it, that the misconduct of the workman may be of such a character as to bring what he has done outside the sphere or scope of his employment, and to make it impossible to say that the risk is one reasonably incidental to the employment.

By sec. 6 of our provincial Act, the employer is made liable to pay compensation, whether or not:—

(c) the workman contributed to or was the sole cause of the injury or death by reason of his own negligence or misconduct: (1910-11, ch. 9).

This simply means—as I take it—that negligence or misconduct on the part of a workman in the doing of anything within the scope of his employment, shall not constitute a bar to his claim.

Each case must, of necessity, be decided on its own facts, and, in the light of the *Plumb* case, I am of opinion that, notwithstanding sec. 6 aforesaid of our Act, the trial Judge decided the case at bar correctly, and that the plaintiff, in acting as he did, was guilty of misconduct of such a character as to make it impossible for him to say that the risk of accident arising therefrom was reasonably incidental to his employment. The appeal should, therefore, be dismissed with costs.

McKAY, J., concurred with BROWN, J.

McKay, J.

ELWOOD, J.:—The plaintiff in this case was engaged by the defendant to take wires up and down the telegraph poles of the defendant, and in the course of such employment it was necessary that the plaintiff should be taken from place to place to perform his work, and the defendant did convey him from place to place by means of its railway trains. On the occasion of the accident the defendant was conveying the plaintiff from one to another of such places. The plaintiff and some of his fellow-employees were in two box cars which were converted into boarding cars for the use of the employees. The entrance to the cars was from doors on either side of the car. There was no means of communication between the cars. The plaintiff, with some others, was assigned to one car, and some of his fellow-

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employees were assigned to another car, both in the same train. During the course of the journey, the train, which was also acting as a way-freight, stopped at a point for some 35 minutes. When it so stopped the plaintiff alighted from the train for a purpose which I apprehend gave him the right to alight, and got on the train before it started, but did not get on his own car. Some question arose as to whether he went into that car by invitation or not, but I think that is quite immaterial for the decision of this case. After the train started and had proceeded for between an eighth and a quarter of a mile, the plaintiff attempted to go from the car in which he was to his own car, and in doing so alighted from the train while it was in motion, and, while it was also in motion, attempted to board his own car, and in doing so was injured. The question arises whether or not, under the Saskatchewan Workmen's Compensation Act, the accident which he received arose out of and in the course of his employment.

In *Barnes* v. *Nunnery Colliery Co.*, [1912] A.C. 44, the facts were as follows: A boy employed at a colliery, noticing that an endless rope having a number of empty tubs attached to it was about to start for a level where his work was, jumped into the front tub with three other boys, in order to ride to his work instead of walking, as he ought to have done, and in the course of the journey his head came in contact with the roof of the mine and he was killed. It was a common practice for the boys to ride to their work in the tubs, but it was expressly forbidden and the prohibition was enforced as far as possible. It was held that there was no evidence to justify the finding that the accident arose out of the employment, and it was also found that the death was caused by an added peril, to which the deceased, by his conduct, exposed himself, and not by any peril involved by his contract of service. Lord Atkinson, at p. 49, of the above report, says, as follows:—

> In these cases under the Workmen's Compensation Act, a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employee does the work he is employed to do may well be held, in most cases, rightly

to be a risk incidental to his employment. Not so in the other case. For example, if a master employs a servant to carry his (the master's) letters on foot across the fields on a beaten path or on foot by road to a neighbouring post-office, and the servant, having got the letters, went to the stables, mounted his master's horse and proceeded to ride across country to the post-office, was thrown and killed, or went to his master's garage, took out his motor car and proceeded to drive by road to the post-office, came into collision with something and was killed, it could not be held, I think, according to reason or law, that the injury to the servant arose out of his employment, though in one sense he was about to do ultimately the thing he was employed to do, namely, to bring his master's letters to the post. In such a case the servant puts himself into a place he was not employed to be in, and had no right to be in—the back of his master's horse, or the seat of his master's motor car. He was doing a thing he was not employed to do and had no right to attempt to do. . . . These were altogether outside the scope of his employment. He exposed himself to a risk he was not employed to expose himself to . . . It was not, therefore, reasonably incidental to his employment. That is the crucial test.

In *Herbert* v. *Fox*, 84 L.J.K.B. 670, a workman was employed as a shunter, and it was part of his duty to walk in front of any train with which he was working while it moved about the employer's works. On January 17, 1914, he worked with an engine until 12.30 p.m. when it was time to stop work. The engine had to return to its shed, three-quarters of a mile away and started to go there pushing four waggons in front of it. According to the workman's own story he jumped upon a front buffer of the leading waggon and then slipped, fell across the rails, and was run over. There was a notice in the locomotive shed that the look-out man must be in front of the waggons on pain of instant dismissal, and the workman admitted that he had no business to get on to a buffer and that anyone seen riding on a buffer by the manager would be dismissed. It was held that the accident did not arise "out of" the employment, but was due to an added risk to which the workman's conduct had exposed him and which was put outside the sphere of his employment by genuine prohibition.

In *Jibb* v. *Chadwick*, 84 L.J.K.B., 1241, a workman was employed to work for his employers in Sheffield and was given a railway season ticket between that place and Rotherham, where he and his employers lived. He was expected to return to Rotherham and report at the office at 6 p.m. each day. Arriv-

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ing one day late at the station at Sheffield for the last train which would reach Rotherham before 6 p.m., he attempted to enter it while it was in motion, but fell, and suffered injuries from which he died. It was held that, by attempting to enter the train while in motion, the workman exposed himself to an additional risk by doing an unauthorized and illegal act which was not in any way incidental to his employment. It would appear that by the statute in England to attempt to board a train in motion is forbidden. Swinfen-Eady, L.J., at p. 1243, quotes the Lord Justice Clerk in *Wemyss Coal Co.* v. *Symon*, as follows:—

> On railways it is a punishable offence to enter or leave a train while in motion. It is, of course, often done, with the result that from time to time accidents do occur . . . I cannot, therefore, see how it can be held that the doing of an act, forbidden, and known to be forbidden, can be held to make a master liable for an accident to his message boy on the footing that the accident arose out of his employment. It is not in any way like an accident, such as making a false step upon a stair.

Then continuing, the Lord Justice says:—

> The peril involved in the deceased's contract of service was to travel by the train in the ordinary way, and he was not doing anything incidental to the proper performance of his duty when the accident happened. He exposed himself to an added risk or peril which was not incidental to his employment.

In *Parker* v. "*Black Rock*," 84 L.J.K.B. 1373, at 1375, Earl Loreburn is reported as follows:—

> Did this injury arise out of this man's employment as a seaman on board this ship? Did his employment involve as one of the things belonging to the employment that he should come ashore to get food and then return the same evening?

In *Price* v. *Tredegar*, 30 T.L.R. 583, the applicant, who was in the employment of the appellant, a colliery company, was going home by a train which was run by a railway company under a contract with the appellant to carry workmen free, to and from their employment; and in order to shorten his way home he attempted to jump off the moving train before it reached the place where it ordinarily stopped for the workmen to alight. The result was he was injured. It was held that, as the applicant had attempted to get out at a place other than the proper place, the accident did not arise out of his employment. The Master of the Rolls at the above page says:—

His Lordship thought it was no part of the workman's employment to get out between the platforms.

I am quite aware that in the foregoing cases the person injured was prohibited from doing the very act which caused his injury; but in *Plumb* v. *Cobden Flour Mills*, [1914] A.C. 62, at 67, Lord Dunedin, in referring to *Barnes* v. *Nunnery Colliery Co.*, says:—

Lord Moulton put it thus: "The boy was only guilty of disobedience. Was this out of the scope of his employment or only a piece of misconduct in his employment?" Though Lord Moulton arrived at a different result on the facts from that of a majority of the Court of Appeal and that of this House, yet no fault is to be found with the question as put, and in this House, Lord Loreburn (L.C.), said the same thing in other words: "Nor can you deny him compensation on the ground only that he was injured through breaking rules; but if the thing he does imprudently or disobediently is different in kind from any thing he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." The Lord Chancellor there put the test cumulatively, because that fitted the facts of the case in which boys in a mine rode in tubs, a thing they were not employed to do and which they had been expressly told not to do, but I imagine the proposition is equally true if he had expressed it disjunctively and used the word "or" instead of "also."

In cases in which there is no prohibition to deal with, the sphere must be determined upon a general view of the nature of the employment and its duties. If the workman was doing those duties he was within, if not, he was without.

And p. 68:—

The Master of the Rolls in the case of *Craske* v. *Wiggin*, [1909] 2 K.B. 635, is quoted as follows: "It is not enough for the applicant to say, 'the accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go farther and must say, 'the accident arose because of something I was doing in the course of my employment or because I was exposed, by the nature of my employment to some peculiar danger.'" As regards the second branch, a risk is not incidental to the employment when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself.

And at p. 68, I also find the following:—

As I have already said, however, the question of within or without the sphere is not the only convenient test. There are others which are more directly useful to certain classes of circumstances. One of these has been frequently phrased interrogatively. Was the risk one reasonably incidental to the employment?

Applying the above test to the case at bar—was the risk which the plaintiff ran, in leaving a car in motion and attempt-

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ing to board another car in motion, reasonably incidental to his employment? The engagement of the company was to convey him from one place to another, and the risks which the plaintiff ran during such a journey were the ordinary risks of travel. Is the getting on and off a train while in motion, and particularly between stations, an ordinary risk of travel? I apprehend not, and if I am correct in that conclusion, then it seems to me it was a risk which was never contemplated when the engagement of the plaintiff took place, and, therefore, following the above cases, was not reasonably incidental to the employment or a risk for which the defendant is responsible. In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed.

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LAVERE v. SMITH'S FALLS PUBLIC HOSPITAL.

Ontario Supreme Court, Falconbridge, C.J.K.B., and Riddell, Latchford and Kelly, JJ. December 10, 1915.

1. HOSPITALS (§ I—4)—LIABILITY FOR INJURIES TO PATIENT BECAUSE NEGLIGENCE OF NURSE—RESPONDEAT SUPERIOR.

The "trust fund doctrine," under which the funds of a public hospital were deemed exempt from liability for damages, has no longer any application, and on the principle of *respondeat superior* such hospital is liable for the negligence of a nurse who in the course of her duty had inflicted burns on a patient after an operation not under the orders of the surgeons or physicians.

[*Mersey Docks Trustees* v. *Gibbs*, L.R. 1 H.L. 93; *Hall* v. *Lees*, [1904] 2 K.B. 602; *Hillyer* v. *St. Bartholomew's Hospital*, [1909] 2 K.B. 820; *Glavin* v. *Rhode Island Hospital*, 12 R.I. 411, 34 Am. Rep. 675, followed; 24 D.L.R. 866, 34 O.L.R. 216, reversed.]

Statement

APPEAL by the plaintiff from the judgment of BRITTON, J., 24 D.L.R. 866, 34 O.L.R. 216.

J. A. Hutcheson, K.C., for the appellant.

G. H. Watson, K.C., for the defendants, respondents.

Riddell, J.

RIDDELL, J.:—The Smith's Falls Public Hospital is an incorporated body, conducting a public hospital in the town of Smith's Falls; there are no shareholders or capital stock, and the institution is conducted not for private profit but simply as a public charity and for the benefit of the community—a most admirable and commendable object.

The plaintiff, Mrs. Lavere, suffering from *prolapsus uteri*, was advised by her physician, Dr. Gray, to go into the hospital and be operated upon. She accordingly went to the hospital of

the defendants and selected her room, agreeing to pay $9 a week, "to include her board and attendance and nursing."

She was operated on (successfully) under an anæsthetic by Dr. Gray, Dr. Ferguson assisting; and then she was taken to her own selected room and put to bed, still unconscious. On recovering consciousness, she felt a severe pain in her right foot; and, on the surgeon being sent for, he discovered a serious burn on her right heel about the size of a fifty cent piece; a blister had formed—Dr. Redditch thinks the burn must have been at least a quarter of an inch in depth. The plaintiff was treated properly, and she left the hospital at the end of seven weeks with the burn about healed; but she still has a scar at the *locus*, of about an inch by an inch and a half. This is not only painful but also disabling; there does not seem to be much hope of improvement unless an operation be performed, and the result of such an operation is doubtful.

She brought an action against the hospital, which was tried before Mr. Justice Britton at Brockville on the 26th May, 1915; the learned Judge decided in favour of the defendants (24 D.L.R. 866), and the plaintiff now appeals.

There can be no possible doubt that the burn was caused by an over-heated brick being placed against the foot of the anæsthetised and unconscious plaintiff; that this was done by the nurse in charge; and that such an act was improper. There can be no doubt of the liability of the nurse civilly in tort, unless she can justify herself by a command of some one she was bound to obey; but the nurse is not sued here. The sole question is, whether the hospital is liable for this act of its nurse.

The matron was the head of the nursing staff; a trained nurse herself, she was the superintendent of the nurses. She selected the nurses, hired and discharged them, subject to the approval of the Board.

The nurses, in addition to board, etc., received a "honorarium" in money ("honorarium," which really means a gift on assuming an office, is now often used as equivalent to "salary" by those who do not like to think they receive wages). The particular nurse to wait on the plaintiff she had nothing to do with selecting; the matron appointed her to that particular

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work, and she never became the servant or employee of the plaintiff, but continued the servant and employee of the hospital. She was sent by the hospital to perform for the hospital its contract to supply the plaintiff with nursing.

In the absence of authority and of special circumstances, it would be plain that the hospital is liable for her act. The cases will be examined after dealing with the circumstance most relied upon by the defendants.

It is contended that the nurse was under the orders of the operating surgeon, that she carried out his orders, and consequently the hospital could not be made liable. But this connotes a state of affairs which does not exist in the present case.

If the nurse obeyed the express order of the surgeon, she was not guilty of negligence at all. That is the duty of a nurse. Of course she must take some pains to see that she quite understands the doctor's meaning, and she must not act on what she should know to be a slip of the tongue. To put it in other words, the order she obeys must be a real order, not such as is apparently an order but so expressed that it cannot be supposed to set out the doctor's real meaning.

A nurse holds herself out to the world as being possessed of competent skill, and undertakes to use reasonable care. If the command of the surgeon is plainly a slip, she should call his attention pointedly to the order. When his attention has been called to the order, and he shews that the order made was that intended, she may obey; "he is the doctor," and it is not negligence for a nurse to act on the belief that he is the more competent.

In *Armstrong* v. *Bruce* (1904), 4 O.W.R. 327, the nurse contended that the surgeon had ordered her to fill the "Kelly pad" (upon which the unconscious patient was to lie) with boiling water. She did fill it with boiling instead of hot water, with the result which was to be expected. The patient sued the surgeon for damages; the defendant and other surgeons swore that the nurse had been told to fill the pad with hot water (not boiling water), and the trial Judge believed them. My learned brother said (p. 329): "I have no manner of doubt that if the doctor had said to any experienced nurse that she was to fill that pad with

boiling water, it would have struck her as an extraordinary thing, and one calling for some explanation. . . . It was a thing that could not have been done by Dr. B., unless through a slip of the tongue."

Of course, a surgeon cannot shield himself from the results of an improper order. He has at the operation table no more right to make a slip of the tongue than a slip of the knife, and must guard against both equally.

But granted that an order is a real order of the medical man, a nurse is justified in obeying it unless it is plainly dangerous; and, not being guilty of negligence herself, she cannot by so acting render her employers liable for damages for her acting in accordance with such an order.

Here the facts do not bring the nurse into such a condition. Where a patient is or has recently been under an anæsthetic, there is a standing order in all hospitals to keep the bed warm; "it is," says the matron, "a standing order to warm the bed;" this is taught by "the doctors originally training the nurses." The nurse under whose charge the patient is, attends to the heating of the bed, and to the heating of bricks if bricks are used for that purpose. It was the duty of the nurse "when she was told that she had charge of the room where the patient was . . to see that the bed was properly warmed," and "the doctor would not give her any direct order." If then the doctor finds the bed not such as he thinks it should be, he may give such orders as he sees fit, and these orders must be obeyed, but he does not ordinarily inspect the bed. As I have heard it said by a very eminent surgeon: "If I cannot trust my nurse, I must give up surgery."

My learned brother at the trial put the facts quite accurately as follows: "That narrows it to this extent, it is the duty of the nurse in the first place to do as suggested to her, in seeing that the bed is properly warmed for the patient, and then if the doctor comes in it may be his duty to see if it is over-heated or under-heated, and give his directions in regard to that; but, in the absence of any directions in regard to that, it stands that it is the nurse's duty."

There is much evidence, more or less loose, about the nurses

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being under the doctor's orders and the like, but the above fairly represents the result of the evidence taken as a whole.

In the present case the operating surgeon assisted in placing the patient in her bed after the operation, but took it for granted that the bed was properly heated, made no inquiries and gave no orders—and indeed such was the usual course; "they" (the doctors) "consider them" (the nurses) "all right, competent."

It cannot, therefore, be successfully contended that the nurse, in placing as she did an over-heated brick to the foot of the patient, was following the doctor's orders; and it is quite clear that he knew nothing about what she did, and that he gave no directions of any kind.

The main contention of the defendants is, that they are not liable for the negligent act of the nurse, and many cases are cited in support of that proposition.

The first English case in point of time relied upon is *Perionowsky* v. *Freeman* (1866), 4 F. & F. 977. There the plaintiff came into St. George's Hospital in London suffering with a disease which required a warm hip-bath, which was ordered by the surgeons. The nurses gave him a hip-bath, hot, too hot, so hot that he was severely scalded, but the surgeons were not near to give specific directions. They followed the usual course, "gave their directions that patients were to have hot baths, and left it to the nurses to see to the baths . . . the usual hospital practice . . . a surgeon no more knew what was a fit temperature of hot water for a bath than a nurse, who was necessarily quite familiar with it." The patient sued the medical men; but it was proved that they had no control over the nurses as to appointment or dismissal, and therefore the relationship of master and servant did not exist, and, as the Lord Chief Justice, Sir Alexander Cockburn, said, they "would not be liable for the negligence of the nurses, unless near enough to be aware of it and to prevent it." The defendants had a verdict.

In that case the hospital board were not sued, and there is no suggestion anywhere in that case that the board would not have been liable if they had been sued. No doubt, it satisfactorily decides that, had the plaintiff in this case sued Dr. Gray, instead

of the hospital, she could not have succeeded, but it decides nothing more.

In *Hall* v. *Lees*, [1904] 2 K.B. 602, an association called the Oldham Nursing Association was formed to supply aid and instruction in skilled nursing by nurses located in Oldham. It appointed nurses and paid their salaries, making charges for the services of their nurses to those who were supplied with them. A patient who had to undergo a serious operation was supplied with two nurses by the association, one or other of whom negligently applied a hot bottle to her when still insensible from the anæsthetic, and burned her severely. The association was sued, but the action was dismissed. The Master of the Rolls in giving judgment puts the case in a nutshell (pp. 610, 611): "The question therefore is whether, under the circumstances of the case, and having regard to the rules and regulations of the association and the other documents, the contract is to nurse the patient, or only to supply a nurse to the patient." The learned Master of the Rolls, after discussing the rules and regulations, etc., comes to the conclusion (p. 614): "The correct view of the contract is that the association merely undertook to supply competent nurses, who were to be under the orders of the patient's medical man and not the servants of the association, for the purpose of nursing the patient. . . . When the association sent the nurses, I do not think they were sending them to do in their place that which they had themselves undertaken to do. They never undertook . . . to nurse the female plaintiff, but only to supply a competent nurse for that purpose." Stirling, L.J., says (p. 615): "The question broadly stated is whether the association contracted to nurse the female plaintiff, or merely to supply properly qualified nurses for that purpose." He thinks that there was no power in the association to interfere with the nurse, once supplied, in "her duties in nursing the patient as between her and the employer." Mathew, L.J., puts his decision squarely on the ground that "the plaintiffs" (i.e., the patient and her husband) "were the nurses' employers for the purpose of nursing the patient" (p. 618). The Court was unanimous, and the action was dismissed.

It seems to me that the *ratio decidendi* of the case just cited

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is conclusive of the present. The test is, did the defendants undertake to nurse, or did they undertake only to supply a nurse? The matron herself says that the $9 paid per week was to include nursing; and this concludes the defendants from denying that they contracted to nurse the patient.

Evans v. *Mayor, etc., of Liverpool*, [1906] 1 K.B. 160. The Corporation of Liverpool had a fever hospital, to which a child suffering from scarlet fever was taken; the medical man in charge ordered the child's discharge, and he was taken home; it turned out that the discharge was premature, and three of the boy's brothers contracted the disease. The father sued the corporation for the expense he had been put to, but failed. The jury found that from the facts there was to be implied an undertaking by the corporation that their physician should act with reasonable care and skill. But the Court (Walton, J.) held, in the circumstances of the rules, etc., that the doctor, while he was an officer of the corporation, and in certain matters had to obey the directions of the committee, was responsible for the freedom from infection of the patient when discharged. The corporation had no power to control his opinion in any kind of way, and indeed it would be wrong for them to attempt to do so. The finding of the jury was set aside and the action dismissed; but that case has no bearing on the case under consideration; the defendants there did not undertake to discharge the boy at the proper time, but only when the doctor said so.

Certain expressions in *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B, 820, are strongly pressed upon us; but all these must be read in connection with the facts of the case. As is said in *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 506: "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expository of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

Hillyer, a medical man, entered St. Bartholomew's Hospital, in London, solely for the purpose of being examined gratuitously under an anæsthetic; there was no bargain of any kind ex-

pressed. Mr. Lockwood, a consulting surgeon attached to the hospital, examined him, but through some carelessness Hillyer's arm was allowed to come into contact with a hot water tin and was badly burned, and also bruised in some way. He sued the hospital, but his action was dismissed by Grantham, J. In appeal the decision of the trial Judge was affirmed. Farwell, L.J., expressly approves *Glavin* v. *Rhode Island Hospital* (to be considered later), and holds that the doctors were not at all the servants of the board, but "all professional men, employed by the defendants to exercise their profession . . . according to their own discretion . . . in no way under the orders or bound to obey the directions of the defendants." "It is true that the corporation has power to dismiss them, but it has this power not because they are its servants but because of its control of the hospital where their services are rendered."

The learned Lord Justice considers the nurses to be on a different footing, and assumes that they are the servants of the corporation; but he says (p. 826): "Although they are such servants for general purposes, they are not so for the purposes of operations and examinations by the medical officers; . . . as soon as the door of the theatre or operating room has closed on them for the purposes of an operation (in which term I include examination by the surgeon) they cease to be under the orders of the defendants. . . . The nurses . . . assisting at an operation cease for the time being to be the servants of the defendants, inasmuch as they take their orders during that period from the operating surgeon alone." Then he says: "The contract of the hospital is not to nurse during the operation, but to supply nurses. . . I take the test applied" (in *Hall* v. *Lees*) "by Lord Collins, then Master of the Rolls: 'They are not put in his place to do an act which he intended to do for himself.' The nurses . . . are not put in the place of the hospital to do work which the governors of the hospital intended to do themselves, because they had not undertaken to operate or assist in operating." Kennedy, L.J., while holding the defendants not liable, does appear to hold that the hospital, "by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care," do not undertake that the nurses shall use

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proper care; but this is far from saying that in an express agreement for nursing, the contract is only to supply a competent nurse. Cozens-Hardy, M.R., agrees in the result.

It will be seen that this case does not carry us further, when considered in relation to its facts; one Lord Justice confines his remarks to the operating room, while the remarks of the other are made in the case of a person coming to a hospital solely to be examined (and consequently not expecting to be out of the operating theatre or to receive nursing) without any special contract. The expressions so made use of are not intended to be an exposition of the whole law, and are not to be taken literally in a case wholly different in its facts.

The duties of the nurse, when the default occurred in the present case, were not to assist the surgeon "in matters of professional skill," but to "perform domestic duties in the way of seeing that the bed was right," "with everything in order," as the matron swears.

I find nothing helpful in the cases referred to in Taylor's Medical Jurisprudence, 6th ed., vol. 1, pp. 87 *sqq.*

The Irish cases are not helpful. In *Dunbar* v. *Guardians Ardee Union*, [1897] 2 I.R. 76, the son of the plaintiff was a patient in the workhouse hospital of the defendants, Poor Law Guardians; his death was caused—at least accelerated—by neglect to provide him as a patient with the care and attention which he required. The mother sued under Lord Campbell's Act, but the action was dismissed. In that case the nurse did all she could, but the master and perhaps the porter failed to do their duty, whereby the patient escaped from the hospital, and suffered severely from exposure. The Court at the trial dismissed the action; this was affirmed by the Exchequer Division, and the plaintiff took the case to the Court of Appeal. That Court approved *Levingston* v. *Guardians of Lurgan Union* (1867), I.R. 2 C.L. 202, that Guardians are answerable to their patients for the wrongful acts, and apparently the negligently injurious acts, of those acting under their orders or on their behalf; but held that, on the proper construction of the statute of 1838, the Irish Poor Relief Act (1 & 2 Vict. ch. 56), the ministerial work of poor law relief is intrusted to officers whose *status* is recognised

as to some degree independent of the Guardians, and who are rather parts of the system controlled by the Commissioners, than servants or agents of the Guardians, discharging duties which primarily fall on the Guardians themselves. To paraphrase the decision—the duty of the Guardians is not to care for the poor but to appoint officers to do so.

The Court approved a former case of *Brennan* v. *Limerick Guardians* (1878), 2 L.R. Ir. 42, which decided that in such cases the Guardians were not liable because they had done their own duty. All they were required by the statute to do was to appoint the officers.

The same principle is laid down in a case not in other respects applicable, *O'Neill* v. *Drohan and Waterford County Council*, [1914] 2 I.R. 41; same case in appeal, *ib.* 495.

The Scottish case of *Foote* v. *Directors of Greenock Hospital*, [1912] Sess. Cas. 69, is next to be considered. The plaintiff had her leg broken and was advised by her doctor to go into the Greenock Infirmary "in order to have the advantage of the medical appliance there." She went as a paying patient, but without any special contract; the house surgeons, it was alleged, treated her in an unskilful and negligent manner, to her great physical and pecuniary loss and injury. She sued the hospital, but the Court held she could not succeed, as, in the absence of a special contract, the hospital undertook to furnish to the public the services of competent medical and surgical practitioners, and nothing more. It is pointed out that the board had no control over the doctors, and could not interfere with them except to discharge them. To paraphrase the language in *Hall* v. *Lees*, what the defendants undertook to do was not to treat the plaintiff through the agency of the doctors, their servants, but merely to procure for her duly qualified doctors. Had there been a special contract to treat her, as in our case to nurse the plaintiff, the case would be, in my opinion, wholly different.

The American cases are not few; some of them will be mentioned.

In *Benton* v. *Trustees of Boston City Hospital* (1885), 140 Mass. 13, the trustees of the hospital were held not liable for the negligence of the superintendent of the hospital who

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left the stairs unsafe. The Court held (1) that the defendants were but the managing agents of the city in maintaining the hospital. This is quite in accord with our law, and is alone sufficient to dispose of the case: *Ridgway* v. *City of Toronto* (1878), 28 U.C.C.P. 579; *McDougall* v. *Windsor Water Commissioners* (1900-01), 27 A.R. 566, 31 S.C.R. 326. The Massachusetts Court, however, goes further and holds (2) that the city would not be liable, and (3) consequently the trustees could not be. The former of these conclusions is to be found in very many of the American decisions, and it is based upon the principle which is laid down in *Holliday* v. *St. Leonard's Shoreditch* (1861), 11 C.B.N.S. 192, 30 L.J.C.P. 361, 4 L.T.N.S. 406, 8 Jur. N.S. 79, 9 W.R. 694. It may be thus stated (substantially in the words of the head-note in 11 C.B.N.S.): "Persons intrusted with the performance of a public duty, discharging it gratuitously, and being personally guilty of no negligence or default, are not responsible for an injury sustained by an individual through the negligence of servants employed by or under them." This was supposed to be the law of England, but it received its quietus in *Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93, 119, 11 H.L.C. 686, 723. See also *Foreman* v. *Canterbury Corporation* (1871), L.R. 6 Q.B. 214; *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, *ut supra*.

In Massachusetts this assumed principle was applied to a city in *Hill* v. *City of Boston* (1877), 122 Mass. 344, the *locus classicus* in which the earlier cases are reviewed.

Tindley v. *City of Salem* (1884), 137 Mass. 171, decides that the exemption extends to acts in the discretion of the city, and is not confined to acts done in performance of a duty, statutory or otherwise.

Then an offshoot from this doctrine, logically distinct but analogous, is the theory that where any individual or corporation carries on any undertaking for the benefit of the public with funds mainly derived from public and (or) private charity held in trust for the purposes of the undertaking, he or it cannot be held liable for the negligence of servants selected with due care. This is laid down in *McDonald* v. *Massachusetts General Hospital* (1876), 120 Mass. 432.

I do not further investigate the decisions in Massachusetts, as the law there is not the same as ours.

In New York, *Laubheim* v. *De Koninglyke Nederlandsche Stoomboot Maatschappy* (1887), 107 N.Y. 228, decides that a steamship company has (in the absence of a statute or, I add, a special contract) done its full duty by a passenger when it supplies him with a competent surgeon, and is not liable for the negligence of the surgeon supplied.

In *Ward* v. *St. Vincent's Hospital* (1903), 78 App. Div. N.Y. 317, the contract sued upon was "to furnish the services of a skilled and experienced nurse to the plaintiff while she was undergoing a surgical operation and recovering therefrom in" the defendants' hospital (p. 319). The nurse supplied was skilled and experienced, but failed in this instance; and the Court held that the contract had been carried out; an inevitable result. The defendants did not undertake to nurse, and they did supply a skilled and experienced nurse, which was all they were called upon to do by their contract.

Cunningham v. *The Sheltering Arms* (1909), 119 N.Y. Supp. 1033, shews that it is the law of New York that "a charitable institution, from which no financial benefit accrues to its directors or organisers, is not liable to a recipient of its charity (for damages) resulting from the negligence of one employed in furtherance of its objects, provided due care is exercised in selecting the employee." But even here the absence of a special contract is of importance; the Court refers to *Ward* v. *St. Vincent's Hospital*, 50 N.Y. Supp. 466, 39 App. Div. N.Y. 624, 65 App. Div. N.Y. 64, 78 App. Div. N.Y. 317. That was a case of a patient making "an express contract whereby the defendants agreed to furnish her a skilled, competent, and trained nurse" (57 N.Y. Supp. 784). She was furnished "a mere pupil in the defendants' training school, not a trained nurse, in the sense of being a graduate, having studied only nine months." The nurse, while the plaintiff was unconscious, applied an unprotected rubber bag containing very hot water to the patient's leg and caused serious injury, and an action was brought against the hospital. The trial Judge held that the action was in tort (as it might undoubtedly have been had it been brought against the

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nurse), and that there was no breach of duty on the part of the hospital; he accordingly dismissed the action, and his decision was affirmed by the Supreme Court (50 N.Y. Supp. 466). On appeal the Appellate Division held that the action against the hospital was in contract, i.e., the contract to supply a skilled, competent and trained nurse, and that, while one act of negligence would not necessarily prove the nurse not to be such, a jury might infer that this act of negligence was attributable to her inexperience and lack of skill. A new trial was ordered. On the new trial the plaintiff had a verdict for $10,000, but the trial Judge refused to charge the jury that the defendants were not bound to assign to the plaintiff the best nurse in the hospital, but only a nurse ordinarily well trained and ordinarily competent and skilful, and the unfortunate plaintiff, the flesh on whose leg had been "literally cooked to the bone," had to have another trial: 65 App. Div. N.Y. 64. This time the trial Judge made another mistake by ruling out evidence, and the verdict of $19,420 was set aside: (1903) 78 App. Div. N.Y. 317. I do not find any report of the next trial if there was one. Perhaps the plaintiff died or despaired of a trial without the Judge making a mistake, or possibly the hospital paid up. At all events there is nothing in that case of use in the present. It was not a contract for nursing which was in question there, but a contract to supply a particular kind of nurse.

Many cases in New York—the latest I have seen is *Schloendorff* v. *Society of New York Hospital* (1914), 105 N.E. Repr. 92, 211 N.Y. 125—decide that, in the absence of an express contract, the action against a hospital for the negligence of its physicians, nurses, etc., is in tort, and that the hospital is not liable unless the physician, nurse, etc., be chosen without due care: *Noble* v. *Hahnemann Hospital of Rochester* (1906), 112 App. Div. N.Y. 663; *Cunningham* v. *The Sheltering Arms* (1908-9), 115 N.Y. Supp. 576, 61 Misc. R. 501, 119 N.Y. Supp. 1033, 135 App. Div. N.Y. 178; *Wilson* v. *Brooklyn Homœopathic Hospital* (1904), 97 App. Div. N.Y. 37, 89 N.Y. Supp. 619.

Without expressing any opinion as to the law in Ontario in such a case, it will be sufficient to say that that is not the present case.

In Pennsylvania, a long line of cases, one of the latest of which is *Gable* v. *Sisters of St. Francis* (1910), 227 Pa. St. 254, makes it clear that a purely public charity cannot be made liable for the tort of its servants. This doctrine is explicitly declared to rest "fundamentally on the fact that such liability, if allowed, would lead inevitably to a diversion of the trust funds from the trust's purposes:" 227 Pa. St. at p. 258.

The same law and for the same reason is found in Michigan; see for example *Downes* v. *Harper Hospital* (1894), 101 Mich. 555; Ohio; see for example *Taylor* v. *Protestant Hospital Association* (1911), 85 Oh. St. 90, which in effect repudiates the authority of the late English cases and follows the earlier rule of *Holliday* v. *St. Leonard's Shoreditch*, 11 C.B.N.S. 192; Maryland; see for example *Perry* v. *House of Refuge* (1884), 63 Md. 20.

Glavin v. *Rhode Island Hospital*, 34 Am. Reps. 675, 12 R.I. 411, is in the opposite sense, and holds that where the employee of the hospital is in the situation of a servant to the hospital, the hospital is liable for the negligence of the servant in the pursuance of his duties. This case is cited with approval by Farwell, L.J., in the *Hillyer* case; it is said that the State Legislature changed the law so as to be more favourable to the charities.

The most recent American case I have seen is one which eluded the vigilance of the diligent counsel, but was quoted and discussed during the argument. It is in the Supreme Court of Alabama, *Tucker* v. *Mobile Infirmary Association* (1915), 68 Sou. Repr. 4, which, if I may say so without presumption, contains a very valuable discussion of the law. There the plaintiff alleged that she went into the defendant's hospital, and the "defendant undertook and promised to properly nurse and care for plaintiff, preparatory to and during a surgical operation . . . and thereafter until she had sufficiently recovered to leave" it; that "by reason of the negligence of one of the nurses employed by the defendant . . . after she had been operated on . . . plaintiff was badly scalded with boiling water both internally and externally." The defendant pleaded that it was a charitable institution, not operated for

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profit, having no stock and no stockholders, and exercised due care in the selection and retention of the nurse complained of, and had no notice or knowledge of her incompetency. To this the plaintiff demurred; the demurrers were overruled, and the plaintiff appealed to the Supreme Court. The Court, Anderson, C.J., McClellan, Sayre, Somerville, Gardner, and Thomas, JJ. (Mayfield, J., dissenting), held (1) that there was no difference between the case of a patient with an express and an implied contract, citing *Duncan* v. *St. Luke's Hospital* (1906), 113 App. Div. N.Y. 68; (2) that a charitable hospital is in no higher position than any other corporation in respect of liability for the negligence of its servants, the "charitable trusts" theory, though supported by a great weight of authority in the American Courts, being untenable. The demurrers then were allowed. Most of the cases of moment are cited, and many discussed, in the very able judgment of Gardner, J. (speaking for the majority of the Court), and Mayfield, J., dissenting. I unreservedly approve the conclusions of the majority of the Court.

The same result is reached by Macdonald, J., in the Supreme Court of British Columbia, in *Thompson* v. *Columbia Coast Mission* (1914), 15 D.L.R. 656, a judgment which, like that in Alabama, is characterised by masculine common sense, as well as a deep knowledge of law.

The only case in our Courts of which I am aware did not go further than the trial Court. If the law was there correctly laid down—and I think it was—it would be conclusive of the present case in favour of the plaintiff. It is, however, not binding upon us; and it is not necessary in the present case to go so far as that did. In *Everton* v. *Western Hospital*, there was no special contract, the patient being admitted in the usual way to the Western Hospital, Toronto. He was a somewhat dissipated individual, and was suffering from pneumonia. He was placed in a ward on the top flat of the hospital building, about twenty-five feet from the ground, which at the time was frozen hard. The nurse on duty was proved to be very careful, skilful, and conscientious. She had been in the ward, looked at the patient carefully and found him quite quiet and apparently asleep. She then went out quietly into the hall to do something, but was still

near the patient. Unfortunately, after this visit by the nurse, he got out of bed and made for the window, which he opened. He was going out head foremost when the nurse rushed into the ward and seized him by the night-dress; unfortunately it gave way, or she lost her hold. He sustained a fracture of the skull, and died on the 14th February, 1903. The wife brought action, and the case was tried before Mr. Justice Britton and a jury at the Toronto jury sittings. A verdict of $250 was awarded the plaintiff against the hospital. There was no appeal, counsel (*pars magna fui*) for the hospital thinking the *Glavon* case would probably be followed.

After all the cases, it is plain that once the "trust fund theory" is got rid of—and it is conceded that it has now no footing in our law—the case is reduced to the question, what did the defendants undertake to do? If only to supply a nurse, then supplying a nurse selected with due care is enough; if to nurse, then, the nurse doing that which the defendants undertook to do, they are responsible for her negligence as in contract —*respondeat superior*.

I am of opinion that the plaintiff should succeed.

The only question remaining is as to the amount of damages to be awarded.

The patient, who should have left the hospital in two weeks, was forced to remain seven, she was then unable to walk and had to be carried out of the hospital; for more than four weeks she sat in a chair, and when she put her foot to the ground the leg would swell so as to require bandaging; a consultation of doctors resulted in the advice to return to the hospital, she being then just able to hobble, putting a little weight on the toe; she remained in the hospital nearly two months, slightly improving, but not permitted to put weight on the foot; even at the end of the time compelled to use a crutch; and now many months after, and after treatment with electricity, etc., is still lame, the foot being very painful at times; she is forced to have a pillow under the back of the heel in bed or she could not sleep. Dr. Gray thinks that the pain is caused by the implication of the nerve in the scar tissues, and that an operation would be of advantage. Dr. Reddick once was of that opinion, but, after

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consulting some who he thinks know more than he does and who have a different opinion, can only say: "My own opinion is still that there is a possibility of something being done by an operation . . . it is a very questionable operation, whether it would be beneficial or may be make it worse;" and he gives reasons. Dr. Ferguson had his own opinion, "that, if this pain was being caused by a nerve fibre caught in the scar, as I supposed it was, if it could be severed, it might stop the pain." In this state of medical opinion, it cannot be said that it is unreasonable for the plaintiff to refuse (if she did or does refuse) to submit to an operation.

After an examination of the cases I laid down the rule in *Bateman* v. *County of Middlesex* (1911), 24 O.L.R. 84, at p. 87, that "if a patient refuse to submit to an operation which it is reasonable that he should submit to, the continuance of the malady or injury which such operation would cure, is due to his refusal and not to the original cause. Whether such refusal is reasonable or not is a question to be decided upon all the circumstances of the case." This rule was not questioned by the Divisional Court or the Court of Appeal: (1911-12) 25 O.L.R. 137, 6 D.L.R. 533, 27 O.L.R. 122.

Dr. Reddick, her own physician, who had attended her before and after being in the hospital, cannot do more than say that the operation might do good and might do harm. He does not seem to have advised it. In these circumstances, it cannot be said that the condition of the patient is due to unreasonable refusal to undergo the operation. Were I permitted to draw on my own experience I could tell of a patient who refused to allow his arm to be amputated—the surgeon advising the operation, but saying he could not be quite certain that it would do good. The patient made an excellent recovery, with the arm almost as useful as before.

Dr. Reddick's prognosis I give in his own words:—

"Q. Has she recovered yet? A. No.

"Q. What is your opinion as to whether she will ever recover? A. Very doubtful, to my mind, that she won't always be a sufferer more or less—perhaps get some better."

Little evidence is given of pecuniary damage. Perhaps most of such damage is that of the plaintiff's husband, who is not a party to this action, and whom we must leave to bring his own action if so advised.

But the pain and disability, past, present, and future, call for a substantial assessment of damages; and, with every regard for the defendants' position as a most estimable charity, I think the sum of $900 cannot be regarded as excessive.

The appeal should be allowed with costs, and judgment entered for the plaintiff for the sum of $900 and costs.

It may not be amiss to add a few statements:—

(1) We proceed on the ground of an express contract to nurse, and express no opinion as to the law in the ordinary case of a patient entering the hospital without such contract.

(2) As a corollary of the above (while we think an implied contract has the same effect as an express contract in the same terms) we express no opinion as to the contract implied from a patient entering a hospital.

(3) We express no opinion as to what the result would have been had the negligence occurred in the operating theatre.

(4) None of the cases in any of the jurisdictions expresses any doubt that, whether the hospital is or is not, the nurse is liable for her negligence in a civil action in tort; in some cases also criminally for an assault, simple or aggravated, and in fatal cases for manslaughter.

(5) There is no hardship in the present decision. The hospital can protect itself as was done in *Hall* v. *Lees* and in some of the American cases.

LATCHFORD, J.:—The contract between the parties expressly included the nursing of the plaintiff; and the damages which she sustained resulted undoubtedly from the negligence of a person employed by the defendants to do that nursing.

In the circumstances, I think the maxim *respondeat superior* applies. "He who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it:" Best, C.J., in *Hall* v. *Smith*, 2 Bing. 156, 160.

This principle is not, in the case at bar, subject to exception

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because of the exemption from liability enjoyed ordinarily by a hospital for the malpractice of a physician or surgeon selected by the hospital with reasonable care. The ground for that exception is that he is not the servant of the hospital. The hospital does not undertake to treat the patient through the agency of the physician, but only to procure his services for the patient. This is the principle of the decision in *Hall* v. *Lees*, [1904] 2 K.B. 602, where an organisation which undertook to provide nurses —not to do nursing—was held not liable for the negligence of one of its nurses. Nor would the defendants be liable if the nurse was, at the time her negligence caused the injury, acting as the agent of the physicians, and not as a servant of the defendants. In such a case the hospital would be no more liable for her negligence than for that of the physician: *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820.

The law as to the liability of a hospital for the negligence of a servant employed by it is ably reviewed in *Glavin* v. *Rhode Island Hospital*, 34 Am. Reps. 675. The hospital was held liable on the ground that the relation of master and servant existed between it and the intern through whose negligence the plaintiff was injured. It is true that in 1882 the Legislature of Rhode Island passed a statute, ch. 162, exempting hospitals, maintained by charitable contributions or endowments, from liability in such cases—as organisations administering definite trusts were and are exempt; but, so far as I can ascertain, no doubt has ever been cast upon the correctness of the decision.

It is mentioned by Beven, 3rd ed., vol. 2, p. 1165, as eliminating the doubtful elements in the earlier case of *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432, and as making a searching investigation into the principles applicable where the trustees of a public hospital are sued for unskilful treatment of a patient.

It is cited with approval in a judgment of the Supreme Court of New Brunswick: *Donaldson* v. *Commissioners of General Public Hospital in St. John* (1890), 30 N.B.R. 279. Fraser, J., says (p. 299): "I adopt in their entirety the judgments delivered in *Glavin* v. *Rhode Island Hospital*, by Durfee, C.J., and Potter, J."

The *Glavin* case was considered in the New Zealand Court of Appeal in *Auckland District Hospital and Charitable Aid Board* v. *Lovett* (1892), 10 N.Z.L.R. 597, where the relation of master and servant was held not to exist between the hospital and its medical superintendent selected with due care. Williams, J., while stating that direct English authority on the point at issue was scanty—as indeed it was at that time—says (p. 605): "The law appears to me, however, to be correctly laid down in the case of *Glavin* v. *Rhode Island Hospital*."

To the same effect is the recent Alabama case, referred to upon the argument by my brother Riddell as containing an exhaustive review of the law applicable to the present case.

The only difficulty which this case presents is one of fact. Was the nurse whose negligence caused the injury acting at the time as the servant of the defendants—nursing the plaintiff as the defendants had contracted to nurse her—or was she the agent in what she did of the attending physicians?

The evidence on the whole seems to me conclusive that she was engaged in a matter of routine nursing—doing for the defendants part of the very service which they had contracted to render to the plaintiff. The defendants are, therefore, liable for her negligence.

I agree that a reasonable amount to award as damages is $900, and think judgment should be entered in the plaintiff's favour for that sum, with costs here and below.

Kelly, J.

KELLY, J.:—On the 1st February, 1913, the plaintiff, a married woman, who was suffering from internal trouble, after consultation with her physician, entered the Smith's Falls Hospital with the object of undergoing a surgical operation. The operation was performed on Monday the 3rd February, at the hospital, by Doctors Gray and Ferguson of Smith's Falls, whom the plaintiff had selected. It is stated in the evidence that all the doctors resident in Smith's Falls brought patients to and attended patients in this hospital.

After the operation, and while still under the influence of an anæsthetic, the plaintiff was removed to her room by one of the doctors who had operated and nurses engaged in the hospital.

The practice is, in this as in other hospitals, to have the bed

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well heated in which a patient is to be placed after an operation; and this is accomplished, the evidence shews, by placing in the bed hot objects, such as hot water bottles, hot bricks, etc. Such preparation was made in this instance; and two of the nurses say that when they brought the patient to her room after the operation they saw some bricks wrapped in paper on the bed.

The operation took place between nine and ten o'clock in the morning, and from the evidence it appears that the patient did not regain consciousness from the effects of the anæsthetic until late in the afternoon, when she complained of a pain in her foot, and on investigation, as shewn by the evidence of the medical men who examined and afterwards treated her, this was found to have been from being burned by a brick which remained in the bed after her return from the operating room. The action is brought for damages for the injury. The trial Judge, who tried the case without a jury, dismissed the claim, on the ground mainly that the relationship of master and servant does not exist between the directors and the physicians and nurses and other attendants assisting at an operation.

It becomes important, therefore, to determine not only what was the contract between the parties to the action, but also the relationship between these parties and the surgeons and nurses at the time of the happening which caused the injury.

The learned trial Judge in his reasons for judgment finds that the plaintiff applied to the defendants for admission, and that it was agreed that she would be admitted to a room of her own selection; that the charge would be $9 a week for room and board; that she paid $9, being one week in advance; that nothing was specially said about attendance, but a nurse in training had charge of the room which she occupied, and the attendance reasonably necessary was implied in the arrangement made; that the customary attendance was—and it was so in this case—that a nurse in training should have charge of certain rooms, and to one was assigned the room of the plaintiff.

The evidence quite supports the view that the contract was that attendance reasonably necessary was included; indeed it is sworn to by the lady superintendent, who, on the plaintiff's admission to the hospital, told her what the fee would be—that that

fee was to include her board and attendance and nursing. The liability arising from such a contract is distinguishable from that under a contract merely to supply a nurse for the patient. Under the former, liability attaches to the person or body agreeing to do the nursing for want of care by those whom they engage to do that service, unless in certain excepted cases such as I shall later on refer to; under the latter, the duty and the consequent liability for its disregard are limited to the using of due care and skill in the selection of nurses. The distinction was considered at length in *Hall* v. *Lees*, [1904] 2 K.B. 602. The defendants, an association whose object it was to provide for the supply of duly qualified nurses to attend on the sick in a certain neighbourhood, and who for that purpose appointed and paid salaries to nurses for whose services they made charges to persons on whose application the nurses were supplied, were sued for an injury resulting to a patient from what was said to be the negligence of two nurses engaged to nurse her, and it was held that the contract with the defendants was, not to nurse the patient through the agency of the nurses as their servants, but merely to procure for her duly qualified nurses, and that the nurses were not nursing the female plaintiff acting as the servants of the association, and, therefore, the defendants were not liable in respect of the negligence of the nurses so supplied. The Court clearly drew the distinction between the two classes of contract, and Collins, M.R., at p. 610, laid it down that the question of whether the association who supplied the nurse is responsible to the patient for the consequence of her negligence depends upon the true effect of the contract between the association and the person to whom the nurse was supplied, and that "if the association undertook to nurse the patient, then they are responsible for the failure of the person by whom they nursed her to use due care."

The same view was expressed by Kennedy, L.J., in the later case of *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820. At p. 829 he says: "It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patient for the due performance of their servants within the hospital of

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their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like. The management of a hospital ought to make and does make its own regulations in respect of such matters of routine, and it is, in my judgment, legally responsible to the patient for their sufficiency, their propriety, and observance of them by the servants."

This liability of the hospital is, however, subject to qualification and exception in cases where for the time being the nurse ceases to be in performance of duties for the hospital, and where, at the time of the injury charged to the nurse's negligence, the latter is solely under and subject to the order and direction of the physician or surgeon in whose care the patient is. This qualification is traceable to and is consequent upon the relationship between the hospital and the physicians and surgeons who compose the staff. That relationship in the very nature of things is essentially not one of master and servant in its ordinary acceptation. In respect to the professional staff in attendance the only duty undertaken by the governing body of a public hospital towards a patient who is treated in the hospital, is to use due care and skill in selecting those who compose that staff, and these when appointed are not, in the exercise of their professional skill, under the orders or bound to obey the directions of the hospital. In the discharge of his professional duties, such as the performance of a surgical operation, the surgeon is supreme and is not subject to the control of or interference by the hospital. This is essential to the success of the operation; and in such circumstances the hospital, if it has chosen its staff with due care, has in that respect fulfilled its obligation to the patient.

This opinion is expressed in an elaborate judgment of the Supreme Court of Rhode Island in the case of *Glavin* v. *Rhode Island Hospital*, in 1879, reported in 12 R.I. 411. The subject was there discussed at length, and both English and American cases were considered. The case was the subject of much adverse criticism by the respondents' counsel in the course of the argument before us. I find it, however, cited with approval as

recently as 1909 in the *Hillyer* case, cited above. It was also approved by the Supreme Court of New Brunswick in 1890 in *Donaldson* v. *Commissioners of General Public Hospital in St. John*, 30 N.B.R. 279, and by the Court of Appeal of New Zealand in 1892 in *Auckland District Hospital and Charitable Aid Board* v. *Lovett*, 10 N.Z.L.R. 597.

In the present state of the authorities, that may be taken as the law on the subject of the relationship between the hospital and its staff of physicians and surgeons. The relationship of the nurse, while assisting the physician or the surgeon in the performance of his professional duties towards the patient, must also be considered, and it is on this aspect of the case that the defendants ground their claim to immunity from liability. Nurses employed by the hospital, though they may be its servants for general purposes, are not so for the purposes of operations, in which they take their orders from the surgeon alone, and not from the hospital. The relative position of the parties in such conditions is stated in the *Hillyer* case, the effect of the judgment in which is that the relationship of master and servant does not exist between the governors and physicians and surgeons who give their services at the hospital; and the nurses and other attendants assisting at an operation cease for the time being to be the servants of the governors, inasmuch as they take their orders during that time from the operating surgeon alone, and not from the hospital authorities. At p. 826, Farwell, L.J., says, speaking of the relationship between the physicians and surgeons of the staff, that the nurses stand on a somewhat different footing; that, assuming that they are servants of the hospital for general purposes, they are not so for the purpose of operations and examinations by the medical officers—"If and so long as they are bound to obey the orders of the defendants, it may well be that they are their servants, but as soon as the door of the theatre or operating room has closed on them for the purposes of an operation (in which term I include examination by the surgeon) they cease to be under the orders of the defendants, and are at the disposal and under the sole orders of the operating surgeon until the whole operation has been completely

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finished; the surgeon is for the time being supreme, and the defendants cannot interfere with or gainsay his orders."

If, therefore, in the present case, the nurse responsible for the injury to the plaintiff was, in the sense indicated by these authorities, acting in obedience to the orders of the doctor, liability of the defendants would not arise. The evidence, however, fails to establish that position; and it is in that regard that I think, with all due respect, the trial judgment errs. As I view it, what was done by the nurses with reference to the heating of the bed for the plaintiff was not in obedience to the orders of the doctors, but was a matter of routine duty under the direction of the defendants. The practice, above referred to, of heating the bed for the patient, was in this instance observed, hot bricks wrapped in paper having been used. Some of these were removed before the plaintiff was put to bed, but through some oversight the one which did the damage remained. The evidence of the lady superintendent of the defendants is important on this question. She is asked on cross-examination (p. 68):—

"Q. His Lordship is asking, as I understand it, in regard to the preparation of the bed; is there anything special about that? A. Nothing special. It is a standing order in all hospitals that a bed for a patient under an anæsthetic is well heated.

"His Lordship: Now then, Miss Thomas knew when she was told that she had charge of the room where that patient was, didn't I understand you to say before that it was her duty to see that the bed was properly warmed? A. Yes.

"Q. That would not be in accordance with any doctor's orders? A. Not in her special case. The doctor would not give her any direct order."

And at p. 69:—

"Q. Take a case where the patient is put to bed in an unconscious condition, has the nurse any discretion to exercise, has she any duty to exercise, or who exercises discretion then, about the condition? A. I think the nurse would.

"Q. Would do what? A. Use her discretion.

"Q. About what? A. About the warming or cooling the room.

"Q. But would she be subject to any order in regard to that? A. I think the doctor would order her.

"Q. That is what I was getting at, the doctor would order her?

"His Lordship: That narrows it to this extent, it is the duty of the nurse in the first place to do as suggested to her, in seeing that the bed is properly warmed for the patient, and then if the doctor comes in it may be his duty to see if it is over-heated or under-heated, and give his directions in regard to that; but, in the absence of any direction in regard to that, it stands that it is the nurse's duty.

"Mr. Watson: Do you know if the doctor ordinarily inspects the bed, or does he not? A. I think not."

And on p. 70:—

"Q. And then I understand you that the nurses are performing domestic duties in the way of seeing that the bed is right? A. Yes."

Neither Dr. Gray nor Dr. Ferguson gave any orders about heating the bed. Dr. Gray was asked (p. 79):—

"Q. Did you give any orders about heating the bed or anything of that sort? A. No.

"Q. Did you see the room at all before she was taken to it, just immediately before she was taken to it? A. I don't recollect."

And at p. 80:—

"Q. And did you give any definite or specific instructions to any nurse at any time while she was an inmate of that ward? A. Not that I recollect."

Dr. Ferguson was asked (p. 87):—

"Q. Did you give any orders regarding the room she was to occupy, as to specific directions? A. No.

"Q. Did you see the room or examine the bed in it before she was taken to it? A. No.

"Q. Did you see whether or not any means were supplied to heat the bed? A. I did not look for any. I don't recollect that I did.

"Q. You do not recollect that you did? A. No.

"Q. You made no inquiries? A. No.

"Q. And gave no instructions? A. No."

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To me the plain meaning of the evidence is that, in preparing and heating the bed, the nurses were not acting under the control and directions of the doctors, but were performing routine duties in their capacity as the servants or representatives of the defendants. In that view, the defendants are liable, the case resting on the defendants' contract, which included nursing the plaintiff, and, as found by the learned trial Judge, attendance reasonably necessary being implied in the arrangement made.

The line of liability may be difficult to draw in instances where doubts arise as to the real contract; but the contract in the present case is sufficiently clear to exclude that difficulty. Moreover, the rules and regulations under which the hospital carries on its work, and subject to which patients are admitted, may play an important part in determining the liability of the institution to the patient. In every case the rights and liabilities of the parties must be considered with these in view.

In addition to the authorities already cited, *Foote* v. *Directors of Greenock Hospital*, [1912] Sess. Cas. 69, may be referred to; and also *Tucker* v. *Mobile Infirmary Association*, a judgment delivered in the present year by the Supreme Court of Alabama, reported in 68 Sou. Repr. 4, which contains an exhaustive discussion of the law and a review of many cases.

Mersey Docks Trustees v. *Gibbs*, L.R. 1 H.L. 93, is authority against the contention that damages for negligence of their servants are not recoverable from the defendants, a body operating gratuitously a public hospital.

On the question of damages I am in accord with the other members of the Court. I think $900 not an unreasonable sum to award. The appeal should be allowed with costs and judgment entered for that sum with costs.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—I had prepared a judgment proceeding along the same lines and reaching the same conclusion as that arrived at by my learned brothers. But, having been favoured with a perusal of their opinions, completely covering the whole ground, I consider it inadvisable to overburthen the reports with another pronouncement, and I therefore content myself with concurring in their judgments.

The appeal is allowed and judgment is to be entered for the plaintiff for $900, with costs here and below. *Appeal allowed.*

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Ex. C.

Exchequer Court of Canada, Audette, J. December 9, 1915.

1. DAMAGES (§ III L 2—240)—EXPROPRIATION OF LAND FOR MILITARY CAMP—BASIS OF COMPENSATION—VALUES.

Where land is expropriated by the Crown for a military camp, the proper compensation to be paid is the market value of the land as a whole, as it stood at the date of the expropriation, the compensation not to be assessed at the bare market value, but on a liberal basis.

[*Dodge* v. *The King*, 38 Can. S.C.R. 149; *Fitzpatrick* v. *The Town of New Liskeard*, 13 O.W.R. 806; *The King* v. *Kendall*, 8 D.L.R. 900, 14 Ex. C.R. 71; *The King* v. *The New Brunswick R. Co.*, 14 Ex. C.R. 491, referred to.]

2. COSTS (§ I—8)—IN EXPROPRIATION MATTERS BY CROWN.

On an information exhibited by the Attorney-General of Canada in pursuance of sec. 3 of the Expropriation Act (ch. 143, R.S.C. 1906), to determine the amount of compensation for the expropriation of land for a public work of Canada, the court may allow the defendant the costs of the action notwithstanding that his claim is extravagant and is materially reduced by the court.

Statement

INFORMATION to determine the compensation for land expropriated.

G. G. Stuart, K.C., and *E. Taschereau*, for the Crown.

F. Murphy, K.C., and *A. Laurie*, for the defendant.

Audette, J.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that, in pursuance of sec. 3 of the Expropriation Act (ch. 143, R.S.C. 1906), certain lands and real property, in the said information described, belonging to the said defendant, have been taken and expropriated for the purposes of the Valcartier Training Camp, a public work of Canada, by depositing of record, on September 15, 1913, a plan and description thereof, in the office of the Registrar of Deeds for the Registration Division of the County.

The defendant's title is admitted.

The lands so expropriated are in severality described in the information, and are composed of 2 farm lots, respectively known as lots 21 and 25, of the Cadastre of the Parish of St. Gabriel of Valcartier, containing an area of 275 acres: and 2 bush lots, respectively known as lots 62 and 63 of the said parish, and containing an area of 180 acres.

The Crown, by the information, offers the sum of $5,500 for the farm lots, and $900 for the bush lots, making in all the sum of $6,400. The defendant by his plea, claims the sum of $29,377.30 as therein particularly set forth.

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While the expropriation took place on September 15, 1913, the defendant was allowed to remain in possession of his property for quite a long while after that date. He, with his family, left his house only on November 22, 1915, and had his crops for the years 1913 and 1914, but not the crop of 1915. It is conceded by the Crown that interest may run on the compensation moneys from May 1, 1915.

On behalf of the defence, Hugh McLaughlin, the owner, testified he had as good a farm as any in that neighbourhood and valued it at $25,000—that amount to cover everything—the farm lots, the bush lots and all the buildings. He contends, that in 1913, he made $3,000 out of his farm, without making any allowance for labour, food, etc.; but he has failed to satisfactorily establish that estimate, prepared, as he says, with the joint help of his children.

Ernest Vallee, who has no knowledge or experience respecting the value of farms at Valcartier, bases his valuation upon the knowledge he has of farm lands at Beauport and elsewhere, and begins by placing a value upon the buildings at the sum of $2,857. This is upon the re-instatement basis, or what it would cost to put up new buildings like those upon the property in question, and he values the whole farm at $19,481 with the bush lots at $2,000. However, in this valuation at $19,481, as appears by ex. "B," his valuation of the wood lots is put down at $4,320, proceeding upon a wrong basis as hereafter mentioned. This valuation also includes the scow and a bridge.

Thomas Murphy values the whole farm, bush lots, exclusive of buildings, excepting 3 old ones, at $17,334, including a few other items, as appears by ex. "C," and says that, "the McLaughlin bush lots have been cut over quite a bit"—some parts long ago, and some other parts quite recently. He purchased a 90-acre farm and bush lot—22 acres not cultivated—with pretty fair barn and stable, but house in poor condition, for $2,600. He bases his valuation upon his own farm, 7 miles from McLaughlin's place.

Arnold Maher values the whole property, exclusive of buildings, at $17,104, as appears by ex. "D," which includes a few items other than the property itself. He is not aware of any

sale in Valcartier, but he calculated his valuation upon a gross return from the farm of $3,000 to $4,000.

Alexander H. V. McKee, while placing a value of $2,700 to $3,000 upon the buildings, values the farm and bush lots exclusive of the buildings at $17,104; but in that valuation, as appears by ex. "E," are included several items outside of the value of the property. He further testifies that if he were to buy a farm, he would value it as a whole and not as he was asked, to severally value so many acres at so much and so on—and he adds he never heard of a farm being sold in that way. He does not know of any sales in the neighbourhood.

This closes the owner's evidence. And before passing to the Crown's evidence, I wish to say that farmers, when valuing, buying or selling a farm are in the habit of treating it as a whole, not separating the buildings from the land and placing a specific value upon acreage in severality, as has been done by the defendant's witnesses, and recognized as erroneous by some of his witnesses themselves. An inflation of the true value of the land, *per se,* may very naturally result from this method of valuation, which is a departure from the usual course.

On behalf of the Crown, witness *Col. William McBain,* valuing the defendant's farm, exclusive of bush lots, says it would not be possible to get for it $100 over $3,500. Coming to the bush lots he says that all the large timber has been taken away, and that as an adjunct to the farm, he would value them at $600. He produces as ex. 3, a list of 31 properties purchased for the Valcartier Camp, which he says he acquired at the average price of $16.57 per arpent, and is taken over several of these sales by counsel, by way of comparison, with McLaughlin's farm.

John Hornby values the bush lots at $900 to $1,000. All the good stuff has been taken away. It would not fetch that price at a sale, but that is the value to a farmer for his own use.

Fred Lepere valued the wood lots at $900 to $1,000, adding that it would not be worth that to a (marchand de bois) wood dealer, or lumberman; but it may have that value to a farmer living close by. He himself sold a 50-arpent wood-lot, at Stoneham, for $140.

Captain A. E. McBain, speaking of the character and qual-

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ity of the defendant's farm, says it is an average farm in the locality. He compares it with the McBain farm, of 270 acres, which was sold in 1911 for $2,700, saying it is as good as the defendant's, with good buildings, good house, and several small buildings, located right in the village, with a brook running through it. Comparing again the defendant's farm with the Thomas Billing property of 270 acres, which was sold in 1913 for $3,150, including buildings, stock and agricultural implements, he says the latter property is worth more than the defendant's. He places no specific value upon the defendant's property.

Thomas Billing is heard, and corroborates the previous witness's statement with respect to the sale of his farm, and gives full details.

The general character of the defendant's property must be taken to be an average farm in Valcartier with good buildings, about 200 acres cleared, of which 30 to 50 were yearly put under crop, but in 1913, with only 30 to 35 under crops. The property is assessed at $950. The soil is light and sandy, and, while the 30 acres on the river front are good, other parts are only fair, with about 35 to 40 acres *marshy* and *swampy*—these are the defendant's own words. A large portion is covered with moss. Some witnesses state that it is not possible to get a crop on lot 25. Lot 21 would be about an average farm in Valcartier, while lot 25 would be below the average. On the latter lot there is also a dip of about 150 to 200 feet, at a slope of about 15 degrees, and the dip is all sand.

Witness McBain purchased for the camp 31 farms, at Valcartier, as appears by ex. No. 3, at an average of $16.57 per arpent.

The defendant, after the expropriation of 1913, when property in that neighbourhood must be taken to have gone up, in October, 1914, purchased a 75-acre farm, adjoining the camp for $3,000, with buildings thereon erected. And it was rightly or wrongly pointed out and hinted that it had been so bought because engineers had been seen staking out land in that neighbourhood for military purposes, but which, however, were taken to be in anticipation of further expropriation in that direction.

The defendant sold to his neighbour in 1912 lots numbers 17 and 18, a 320-acre property, with a barn on it, for $400. The purchaser sold it afterwards to Giguere for $1,200. The Fogarty farm, 459 acres, was sold for $9,000.

In December, 1913, or January, 1914, the defendant also bought a wood-lot—3 arpents by 30—about 3 lots outside of the camp for $80.

Notwithstanding the large estimate made by the defendant of his income from the farm, he was yearly buying hay.

There is in this case a special feature with respect to a certain offer for settlement, made by the Assistant Deputy Minister of the Department of Militia and Defence, under the following circumstances. On July 20, 1915 (see ex. "A"), the Deputy Minister of the Department wrote to the defendant, advising him he was sending his assistant

to visit him with a view to ascertaining whether it will not be possible to come to some mutual agreement as to the price to be paid for his property.

On July 29, that official, accompanied by his secretary and one Mynot, whose honesty of purpose has been questioned in the course of the trial, offered the defendant for his lands and all damages, the sum of $17,850, which offer, however, he declined *as not being enough*. The offer was afterwards withdrawn as shewn by ex. 2. The official did not visit the farm, and stated he was not a valuator; but had only been sent to try and arrive at a settlement out of Court. It is to be regretted that this official, through illness and absence, has not been heard as a witness.

The offer was obviously made by way of a compromise to avoid litigation, and a much larger amount than the value of the property was thus offered, to arrive at such a settlement—*pour acheter sa paix*, as is said in French. While an offer of this kind is often a starting point—a basis to arrive at a proper valuation of a property, I, however, feel quite unable to use it in this case in any manner whatsoever, because the amount is too much out of proportion with the true value of the farm, considering the evidence before the Court.

Indeed, while the defendant in a case of this kind is en-

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titled, not only to the bare value of his property, but to a liberal compensation, it does not follow that because his property is expropriated by the Crown and that the compensation is to be paid out of the public Exchequer, that the Crown, in matters of expropriation is to be penalized, and it is not because the owner claims a very extravagant amount that he should be paid a larger amount than the market value of his property assessed on a liberal basis.

What is then sought in the present case is the market value of this farm as a whole, as it stood at the date of the expropriation—the compensation, as already said, to be assessed, not at the bare market value, but on a liberal basis. We have, as a determining element to be guided by, a number of sales in the neighbourhood between private individuals, besides the large number of farms acquired by private agreements and sales for camp purposes at prices which, by comparison, go to make the defendant's claim very extravagant. The prices paid, under these circumstances, afford the best test and the safest starting-point for the present inquiry into the market value of the present farm: *Dodge* v. *The King*, 38 Can. S.C.R. 149; *Fitzpatrick* v. *The Town of New Liskeard*, 13 O.W.R. 806.

For the farm and the buildings thereon erected, I will allow $30 an acre, which is indeed a high price for farms in that locality, making, for the 275 acres, the sum of $7,250.

And considering that the buildings were perhaps a little better than the average farm buildings, I will add to that the sum of $250, making in all for the farm and buildings, $7,500.

Coming to the valuation of the wood-lots, it must be stated that much of the evidence in this respect, in fact all of the defendant's evidence, as will more particularly appear by exs. "B," "C," "D," and "E," has been adduced upon a wrong basis, upon a wrong principle. As was said in the *Woodlock* case, it is useless to juggle with figures, and to measure every stick of wood upon a lot, estimate the number of cords of wood upon the same, and upon that basis estimate the profits that can be realized out of that lot to fix its value according to such profits. In other words, it would mean that a lumber merchant

buying timber limits would have to pay his vendor of limits, as the value thereof, the value of the land, together with all the foreseen profits he could realize out of the timber upon the limits. In the result, leaving to the purchaser all the labour and giving to the vendor all the prospective profits to be taken out of the limits. Stating the proposition is solving it; because it is against common sense, and no man with a slight gift of business acumen would or could become a purchaser under such circumstances.

The defendant is entitled to the value of his wood lots, as a whole. *The King* v. *Kendall*, 8 D.L.R. 900, confirmed on appeal to the Supreme Court of Canada: *The King* v. *The New Brunswick Railway Co.*, 14 Can. Ex. 491. A deal of evidence has been adduced in respect to the value of these bush lots, and while I am of opinion that such lots are not worth more than $200 to $500, I have evidence on behalf of the Crown which induces me to allow the sum of $950. Then the defendant has been cutting extensively upon these lots, even since the expropriation, during the winters of 1914 and 1915, and at present they must be well nigh exhausted.

As already said, any damage the defendant suffered with respect to his crop has been settled out of Court, but he has been put to some expense and serious trouble in moving and finding a new home; some of his pulpwood has been taken and used by the Militia; he will lose in the sale of his scow, and for such damages and others incidental to the expropriation, I will allow the sum of $350.

Coming to the question of costs, I feel and realize that the case at bar is one where the amount offered is not unreasonable and the amount recovered somewhat in excess of the offer made by the information; but where the amount claimed is so very extravagant that the (*temeraire plaideur*) the reckless suitor should be punished and deprived of his costs under the decision of the case of *McLeod* v. *The Queen*, 2 Can. Ex. 106. However, in view of the very large amount offered for settlement, by the above mentioned official, an incident which must have been a great factor in prompting and encouraging the defendant in magnifying his claim, I will allow costs.

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In recapitulation, the assessment of the compensation will be, as follows, to wit: For the farm and buildings thereon erected, $8,500; For the wood lots, $950; For expenses incurred in moving, looking for a home, and all other damages incidental or arising out of the expropriation, etc., $350; To this amount should be added 10 per cent. for the compulsory taking—the defendant neither needing nor wishing to sell $880—$10,780.

From this amount should be deducted the sum of $100 which the defendant offered to credit on the compensation he would be declared entitled to receive, if he were allowed to remove and take away the old barn upon his farm, which was at trial accepted by the Crown's counsel—leaving the net sum of—$10,680, with interest and costs, which, under the proper appreciation of all the circumstances of the case is thought to represent a very liberal, fair and just compensation to the defendant.

There will be judgment as follows:—

1. The lands and real property expropriated herein are declared vested in the Crown, as of September 15, 1913.

2. The compensation for the land and real property so expropriated, with all damages arising out of or resulting from the expropriation, are hereby fixed at the sum of $10,680, with interest thereon at the rate of 5 per cent. from March 1, 1915, to the date hereof.

3. The defendant McLaughlin is entitled to recover from and be paid by the plaintiff the said sum of $10,680, with interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, charges, rents and incumbrances whatsoever; the whole in full satisfaction for the lands taken, and all damages resulting from the said expropriation, and is further declared entitled to the old barn above mentioned.

4. The defendant is also entitled to the costs of the action.

Judgment accordingly.

HYDE v. The CHAPIN CO.

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Alberta Supreme Court, Harvey, C.J., Stuart and Beck, JJ.
January 26, 1916.

1. MORTGAGE (§ II B—40)—NATURE OF ESTATE CREATED — ATTORNMENT CLAUSE—PRIORITIES.

Under the Alberta system of land titles, the mortgagor does not convey the fee to the mortgagee as under the English system; the mortgage creates only a statutory charge against the land, the legal title still remaining in the mortgagor, and an attornment clause in the mortgage cannot create any real tenancy in the mortgagor, and, therefore, sec. 1 of the statute 8 Anne, ch. 14, cannot apply.

[*Yates* v. *Ratledge*, 5 H. & N. 249; *Cox* v. *Leigh*, L.R. 9 Q.B. 333; *Morton* v. *Wood*, L.R. 4 Q.B. 293, distinguished; *Jellicoe* v. *Wellington Loan Co.*, 4 N.Y.R. 330, applied.]

Statement

APPEAL from a judgment in favour of a mortgagee in an action on the attornment clause in a mortgage, which is reversed.

McLeod & Grey, for plaintiffs.

Clarke, Carson & Macleod, for defendants.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—Appeal from a judgment of McNeil, Dist. Ct. J. A statement of facts agreed upon by the parties was submitted to the Judge and he was asked to give his opinion upon the point of law raised by these facts. The facts are that the Chapin Co. are execution creditors of one Michael Kunkel and one Anna Kunkel by virtue of a writ of execution filed in the sheriff's office for the Judicial District of Macleod, on July 27, 1914, which writ is still in force and unsatisfied. On March 1, 1908, Anna Kunkel had given a mortgage on certain lands for the sum of $2,612 in favour of Hyde and had remained in possession of the lands covered by the mortgage. The mortgage contained an attornment clause in the following words:—

> And we do attorn and become tenant from year to year to the mortgagee from the day of the execution hereof at a yearly rental equivalent to, applicable in satisfaction of, and payable at the same time, as the interest upon the principal hereinbefore provided to be paid; the legal relation of landlord and tenant being hereby constituted between the mortgagee and ourselves, but it is agreed that neither the existence of this clause nor anything done by virtue thereof shall render the mortgagee in possession so as to be accountable for any moneys except those actually received.

The rate of interest payable under the mortgage was 7 per cent. per annum, payable yearly. The yearly interest was

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$182.82. On September 10, the execution creditor seized the crop grown on the land. By arrangement, the crop was sold and the sum of $472 was left in the sheriff's hands pending a decision by the Court upon the point whether the mortgagee had a claim to one year's interest or one year's rent in priority to the execution creditor.

The mortgagee claims priority by virtue of the provisions of the Statute of 8 Anne, ch. 14, sec. 1, which begins and proceeds as follows:—

> For the more easy and effectual recovery of rents reserved on leases for life or lives terms of years, at will, or otherwise, be it enacted, etc., that from and after (a certain date) no goods or chattels whatsoever, lying or being in or upon any messuage lands or tenements which are or shall be leased for life or lives term of years, at will, or otherwise shall be liable to be taken by virtue of any execution . . . unless the execution creditor first satisfies the landlord's claim for rent to the extent of one year's arrears but no more.

The question is, whether this statute applies to such a case as the present. The Judge below thought that it did and gave judgment in favour of the mortgagee. The execution creditors appeal.

It appears that the only point involved arises out of the difference between our mortgages and mortgages in England. In the latter, the fee is conveyed to the mortgagee, and an attornment in a mortgage there is, therefore, to a person holding the legal estate. Under our mortgages, the legal title does not pass but remains in the mortgagor.

It is clear that where there is an attornment clause in an English mortgage the statute applies, and the mortgagee is protected, *qua* landlord: *Yates* v. *Ratledge*, 5 H. & N. 249; Foa on Landlord and Tenant, 5th ed., p. 175; *Cox* v. *Leigh*, L.R. 9 Q B. 333.

We are, it seems, face to face with one of the difficult problems which inevitably arise from the necessity or supposed necessity of attempting to engraft upon our system of land titles, principles of the English law, statutory and otherwise, which were developed and worked out under a different system altogether. There is no question which has so profoundly

affected English decisions (I do not mean merely upon the particular point involved in this case, although in *Yates* v. *Ratledge*, the reference to the matter is very pointed), as the question, who has the legal estate in fee simple?

There is no doubt that in such cases as *Morton* v. *Wood*, L.R. 4 Q.B. 293, the mortgagee's right to distrain was held to exist, even though, being only second mortgagee, he did not possess the legal estate. But, while it may be an immaterial matter who holds the legal estate as long as the mortgagor does not, but has parted with it, it seems to me it is not so clear, by any means, that the fact that the mortgagor himself holds the legal estate in fee simple, and has never parted with it, may not have a very decisive influence upon the result.

How can the mortgagor be at the same time the owner of the legal estate in fee simple and also a tenant for a term of years? This could indeed happen if he had granted a lease, for example, for life, and then had taken a sub-lease for a lesser term to himself because another estate would have intervened and there would be no merger: Foa, 5th ed., p. 528.

But is there any intervening estate here? Certainly there is no legal estate. The mortgagee has a charge on the land to secure the repayment of his money. This charge is no doubt recognized by the statute and may be registered under the statute which is made notice to third parties. But in so far as the legal position between the parties is concerned, aside, of course, from the statutory legal right created by registration, there is nothing more created, it seems to me, than that equitable charge defined by Hals., vol. 21, p. 83, as

> a security which does not transfer the property with a condition for reconveyance, but only gives a right to payment out of the property (and) entitles the holder to have the property comprised therein sold to raise the money charged thereon . . . and the strict mode of enforcing it is by sale and not by foreclosure.

Is it possible to say that the legal relation of a tenant to a landlord was really created by the clause in question so as to bring about the operation of the Statute Anne? In an English mortgage the fee is conveyed and, of course, the

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holder of the fee can take the grantor as his tenant if they both so agree. And even to a second mortgagee the mortgagor may attorn and become tenant because he has no legal estate in the land at all but only an equitable right to redeem. But where he is the owner of the fee simple himself how can he be a tenant to the person to whom he has given a mere statutory charge? It may be true that the mortgagee has an equitable interest or a statutory charge which he can deal with and alienate, but certainly, if he can grant a lease of it, and assuming that he can, that would be a different thing from a lease of the land itself upon which his charge (which is his equitable estate) rests.

For these reasons I think the attornment clause in our forms of mortgages cannot create any real tenancy in the mortgagor, no matter what the parties say, so as to bring in the Statute of Anne. No doubt it is valid, as creating merely contractual rights between the parties, and the mortgagee, by virtue of the license given him, may distrain if there is no legal impediment in his way. But the seizure by the sheriff puts the goods *in custodia legis* and the statute of Anne does not help the mortgagee.

This view is the basis of the decision in *Jellicoe* v. *Wellington Loan Co.*, 4 N.Y.R. 330, a case under a similar statute to land titles.

With much respect, I do not see the application of the rule that a tenant cannot deny his landlord's title. That rule applies where there has been in very fact a demise or an attornment. But even then where the tenancy is alleged to have arisen in the first place by estoppel then the tenant is not estopped from denying title in the person claiming to be his landlord. See Foa, 5th ed., p. 462. Nor do estoppels hold as against third parties.

I think, therefore, the appeal should be allowed with costs, the judgment below set aside and judgment "given barring the claim of the mortgagee." The appellants should have the costs of the proceedings below. *Appeal allowed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. November 29, 1915.

1. BANKS (§ VIII A—160)—POWERS AS TO SECURITIES—CHATTEL MORTGAGE SECURING ASSUMPTION OF LIABILITIES.
A bill of sale as security for a promissory note, assigned to a bank with other securities, covering liabilities to depositors which the bank assumed in acquiring the business of a trust company, is a legitimate exercise of banking powers, and does not constitute a loan or advance in contravention of sub-sec. 2(*c*) of sec. 76 of the Bank Act, 3-4 Geo. V. (Can.), ch. 9, prohibiting advances or loans upon the security of goods, wares and merchandise. (IDINGTON, J., *contra.*)

2. BANKS (§ VIII B—174)—PROHIBITED SECURITIES—"GOODS" — FARM STOCK.
The word "goods" in sub-sec. 2 of sec. 76 of the Bank Act, 3-4 Geo. V. (Can.), ch. 9, which prohibits advances upon the "security of any goods, wares and merchandise," covers farm stock, though it does not cover every kind of personal property. (Per IDINGTON, J.)

3. CHATTEL MORTGAGE (§ II B—10)—SUFFICIENCY OF DESCRIPTION.
The Bills of Sale Act, R.S.B.C. 1911, does not require a specific description of the property comprised in the bill of sale; any description by which the goods can be identified is formally sufficient.

4. CHATTEL MORTGAGE (§ II A—7)—TRUE STATEMENT OF CONSIDERATION—NOTE FOR PAST DEBT.
The consideration in a chattel mortgage is truly set forth within the meaning of sec. 7 of the Bills of Sale Act, R.S.B.C. 1911, ch. 20, where it is stated to be for "a loan of $1,200 on a promissory note of even date," though it fails to set out the past debt for which the note is given.
[*Credit Co.* v. *Pott*, 6 Q.B.D. 295, followed.]

5. CHATTEL MORTGAGE (§ II A—5)—VALIDITY—OMITTING RATE OF INTEREST —FAILURE TO ANNEX NOTE.
A chattel mortgage given to a bank as security for the payment of a promissory note, containing recitals shewing particulars of the note and that interest was payable on the amount thereof, but the note itself not being annexed to nor registered with the instrument, and the rate of interest payable thereon not being specified, does not disclose a complete statement of the terms of defeasance or assurance, and is, therefore, inoperative under sec. 19 of the Bills of Sale Act, R.S.B.C. 1911, ch. 20, requiring all defeasances and conditions to be truly set out in the same instrument. (DAVIES and IDINGTON, JJ., holding same to be in substantial conformity to the section; FITZPATRICK, C.J., considering the instrument valid inter parties.)
[22 D.L.R. 647, 21 B.C.R. 267, reversed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, 22 D.L.R. 647; *sub nom. Royal Bank of Canada* v. *Whieldon*, affirming the judgment of Murphy, J., at the trial, 19 D.L.R. 875, 20 B.C.R. 242, by which the plaintiff's action was maintained with costs.

J. W. deB. Farris, for the appellants.

Geo. F. Henderson, K.C., for the respondent.

Sir Charles Fitzpatrick, C.J. (dissenting)

SIR CHARLES FITZPATRICK, C.J. (dissenting):—The claim in this case is under a bill of sale, a form of security beset with difficulties, and a fruitful source of litigation. In the case of *Thomas* v. *Kelly*, 13 App. Cas. 506, Halsbury, L.C., said:

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My Lords, I cannot say that any construction of this obscure statute (the Bills of Sale Act) seems completely satisfactory or gives an adequate solution to all the difficulties suggested in the argument, and Lord Macnaghten used even stronger language, saying the Act was beset with difficulties which could only be removed by legislation. The difficulties presented by the British Columbia statute are, I think, no less, and, as it differs from the English Act, we have not so much assistance from decided cases.

The defendant, the present appellant, raised many points, but, at the argument before this Court, two were, I think, mainly relied on; the first being the alleged insufficiency of the description of the goods and chattels covered by the bill of sale, and the second that the transaction by which the respondent acquired the chattel mortgage is void under the provision of the Bank Act, ch. 29, R.S.C. 1906, sec. 76, sub-sec. 2, par. (*c*).

That the description is quite inadequate for a proper bill of sale must, I think, be conceded; neither the nominal enumeration of the three items in the schedule nor the general words afford any satisfactory means of identification of the goods and chattels intended to be covered by the bill. There is granted, first, the three enumerated items of which the identification is not sufficient; I refer to the similar cases of *Carpenter* v. *Deen*, 23 Q.B.D. 566, and *Davies* v. *Jenkins* (1900), 1 Q.B. 133. Secondly, the goods on the farm at the time of the making of the instrument; these are, of course, not identified, so that it can be said that they are still on the land at the time when the mortgage is put in force. And thirdly, after-acquired property which may be brought on the farm.

In truth, a grant such as this is not so much a bill of sale as a floating charge, that is, a charge on whatever happens to be on the farm at the time when it is called into operation.

Under the English Bills of Sale Act no such charge can be given, as sec. 5 of the Act of 1882 (45 and 46 Vict. ch. 43) makes void, except as against the grantor, a bill of sale of any personal chattels of which the grantor is not the true owner.

In the case before the House of Lords of *Tailby* v. *Official Receiver*, 13 App. Cas. 523, at p. 540, Lord Fitzgerald said:

> In a case recently before the House Your Lordships considered that the policy of the Bills of Sale Act of 1882 was to prohibit, in cases coming within its provisions, bills of sale of property not in existence, but which might be acquired thereafter.

Even if permissible in British Columbia, it is only equitable title that the grantee can obtain in such after-acquired property.

In the case of *Jones* v. *Roberts*, 34 Sol. J. 254 (in 1890), Fry, L.J., said that this question of specific description in bills of sale was perpetually re-appearing, and was always embarrassing. The necessary description varied according to the circumstances of each case.

The question always was—Was the description one which could reasonably be required to assist in identifying the particular property in question? The description (in the particular case) was sufficient to diminish the difficulty of identifying the property in case an execution were put in.

Though, as will appear from the above remarks, I have some hesitation in holding that the description of the goods and chattels is sufficient, I do not on the whole think there is occasion for this Court to avoid the bill of sale on the ground of its being insufficient.

Both the trial Judge and the Judges of the Court of Appeal of British Columbia have declared themselves satisfied of the identity of the goods and chattels covered by the bill of sale with those sold by the appellant, and, that being so, I think the judgment should not be disturbed.

I have not thought it necessary to examine into the validity of the registration of the sale. Under sec. 19 of the B.C. Bills of Sale Act, a bill of sale is not void for failure to comply with its requirements. It is only the registration that is void. The B.C. Act is taken apparently from the Imperial Act of 1878, which did not require registration in all cases for the validity of a bill of sale; this is only provided by the amendment Act of 1882, sec. 8.

In the Bills of Sale Act, R.S.B.C. 1897, secs. 11 to 14 are under the caption, "Effect of Registration," and sec. 15, "Result of non-Registration."

In the B.C. Court of Appeal, McPhillips, J.A., insists

> that the appellant Ball was in no way a purchaser for value or otherwise entitled to the goods and chattels sold by him . . . The appellant in making the sale of the goods was selling not his goods, but the goods of the defendant Whieldon.

If it is true that the grantor of the bill of sale remained the owner of the goods, there is an end of any question, because the bill of sale certainly could not be void as against the grantor.

If, however, this is not the effect of the deed of August 11,

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1913, it is still necessary for the appellant to shew that he is one of the persons as against whom the B.C. Bills of Sale Act provides that an unregistered bill shall be void.

Section 7 of the Act is set out at p. 6 of the respondent's factum, but he does not hazard any suggestion as to which of the class of persons therein enumerated he belongs. As regards par. (*a*) in this section, it may be noted that the Imperial statute reads:

> As against all trustees or assignees of the estate of the person whose chattels or any of them are comprised in such bill of sale *under the law relating to bankruptcy or liquidations, etc.*

The words italicized are omitted in the British Columbia statute.

Even without such assistance as the comparison gives for reading the British Columbia provision, it does not seem possible that the appellant can be within any of the classes enumerated.

As for par. (*d*), the appellant cannot be considered a purchaser. He was entitled to hold neither the goods nor the purchase money.

I am not disposed to attach much importance to the point of a suggested contravention of the Bank Act. The transaction was one of legitimate banking business, and the taking over of this security was a small incident such as in no way brings it within the purview of the provisions of sec. 76 of the Bank Act.

The opinion that the taking by the respondent of the mortgage security is an infringement of the prohibition contained in sec. 76 of the Bank Act appears to be based on the assumption that "the company did not sell its business to the bank." I venture to suggest that this is not borne out by the facts and the agreement of January 13, 1913. It is not, of course, the opinion of the Judges of the Court of Appeal of British Columbia. The trial Judge says, "the agreement was for the purchase of a banking business"; and McPhillips, J.A.:

> The People's Trust Company had engaged in business—in some respects analogous to that engaged in by a bank subject to the Bank Act, but not in contravention of it—and to acquire the business so carried on was, in my opinion, the doing of something by the Royal Bank appertaining to the business of banking.

Turning to the agreement of January 13, 1913, whatever its effect, it certainly purported to dispose of the business of the trust company, because it recites (*inter alia*) that the company had been carrying on business as agents and trustees and as the receivers

of moneys paid on deposit at South Hill and various other places in British Columbia, and that the company was desirous of selling the said business at South Hill to the bank, and had agreed with the bank, for the consideration thereafter appearing, to transfer to the bank the business, together with the office, etc. And it was witnessed (*inter alia*), by par. 9, that the company should hand over to the bank all documents relating to all business carried on by the vendors at South Hill aforesaid, except as there mentioned, and, by par. 10, that the company should in no wise attempt to procure or induce any of the depositors to thereafter continue their business with the company or any of its other branches.

It would seem that one must naturally arrive at different conclusions concerning the effect of the agreement of January 13, 1913, and its legality according as the transaction is considered as being only a sale of the property, and a separate arrangement for discounting the company's note, or as one transaction for transferring to the bank the whole business of the company of which these are two incidental terms specially provided for. In the former case it might be contended that there was an advance on security prohibited by the Bank Act, but in the latter case the transaction is proper banking business, the loan is not made on the security of goods and the taking over of the security is merely incidental to the transaction, no evasion of the Act, and not to be considered as even technically within its prohibition.

I may add that I very much question whether the appellant was entitled to plead this as a defence to the action. I am of opinion that the appeal should be dismissed with costs.

Davies, J. (dissenting)

DAVIES, J. (dissenting):—There were several substantial questions argued upon this appeal. First, it was contended that the bill of sale in question did not contain a true statement of the note or debt for the payment of which it was given as collateral security and that the note itself, or, at any rate, a true copy of it, should under the statute have been annexed to the bill of sale.

I agree with the Court of Appeal for British Columbia that the question is concluded by the case of *Credit Company* v. *Pott*, 6 Q.B.D. 295, and that the recitals in the bill of sale in question in this appeal state with substantial accuracy, though perhaps not with strict or technical accuracy, the facts of the indebtedness due from the grantor to the grantee which the bill of sale was

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given to secure. It is true that neither the note nor a copy of it was attached to the bill of sale, but the recitals contain the date and the amount of the note, the time when it became payable, and that it carried interest. No question was or could be raised as to the *bona fides* of the transaction, and it seemed to me the objection was reduced to this, that the omission to state, in the recital of the note in the bill of sale, the *rate* of interest it carried, although all other particulars were correctly recited, was fatal as not complying with the statute. But, in my judgment, if the case of *Credit Company* v. *Pott*, 6 Q.B.D. 295, is good law, and I must say it commends itself to me as such, the objection cannot prevail.

It is a question whether the recitals contain with substantial accuracy a true statement of the consideration for which it was given so as to satisfy the requirements of the Bills of Sale Act of British Columbia.

In that case of *Credit Company* v. *Pott*, 6 Q.B.D. 295, the bill of sale recited that B. had agreed to lend A. £7,350, and the consideration for such bill of sale was stated to be £7,350 then paid by A. to B. It was held that although no such money was then actually paid by A. to B., it being a balance due on accounts stated between the parties, and by such bill of sale was to be paid by A. to B. with interest on demand in writing, nevertheless the bill of sale "truly set forth" the consideration for which it was given so as to satisfy the statute.

Brett, L.J. (afterwards Lord Esher), says, at p. 299:

Now I am inclined to agree that such facts are not strictly accurately stated, but then it will suffice if they are accurately stated either as to their legal effect or as to their mercantile and business effect, although they may not be stated with strict accuracy.

What took place was this: An account was stated between the parties, and it was agreed that a certain sum should be taken as the amount due to the company, and that, in consideration of the debtor giving the security of a bill of sale, the sum so due, and which might have been demanded at once of the debtor, should be held over until it was demanded in writing. That arrangement was carried out by the bill of sale in question. Then what is the effect? Why the old debt which was payable at once was wiped out, and a new debt constituted which was payable only after a demand in writing. A new credit was thus given, and the effect is the same as if after taking the accounts, £7,350, the sum found to be due, had been put into the hands of the creditors, and then handed back by them to the debtor to be repaid by him on demand in writing. Therefore, both the legal effect and the mercantile and business effect of the transaction was as if there had been an actual advance in money of the £7,350, and consequently the consideration is, I think, truly

described in this bill of sale, both according to its mercantile and business effect and its legal effect.

The next objection was that the transaction between the People's Trust Co. and the bank, as evidenced by the agreement of January 13, was, so far as this bill of sale was concerned, a violation of sec. 76 of the Bank Act.

Scrutinizing the transaction between the People's Trust Co. and the bank as a whole, I have had no difficulty in reaching the conclusion that it was one with respect to which, as said by Macdonald, C.J., neither party had any intention of evading the Bank Act. I think that it was within the permissive sections of that Act, and I do not think it can be held to be a transaction violating any of the prohibitory sections of that Act.

I cannot for a moment believe that, in taking the assignment of the People's Trust Co.'s assets and making the advance to that company it did on the security it took, the bank could be held to be "lending money upon the security of any goods, wares or merchandise," within the prohibition of sub-sec. (*c*), par. 2, of sec. 76.

The mere fact that for one of the many notes transferred to the bank as collateral security for its advances the trust company held a bill of sale as collateral which also passed to the bank does not create such a condition as is covered by this prohibitory section. We must ascertain and scrutinize with care the *real* transaction, and if and when one finds that to be within the bank's general powers he will be slow to hold that the inclusion and transfer as a part of the larger transaction of a trivial debt and its collateral security upon goods and chattels would necessarily make that security void in the hands of the bank. I venture to say that the existence of this bill of sale as collateral security to one of the many promissory notes transferred to the bank never entered into the calculations of any one, and I cannot hold that in taking an assignment of it under the circumstances it did the bank was guilty of any violation of the section of the Act referred to prohibiting the "lending of money upon the security of goods, wares and merchandise."

Then, as to the last point taken, namely, the identity of the goods sold, I think there was evidence justifying the inference of the trial Judge as to such identity, and that his conclusion and that of the Court of Appeal was correct.

The appeal should be dismissed with costs.

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Idington, J.

IDINGTON, J.:—The respondent recovered judgment against appellant for the sum of $1,136.30, being the amount of a promissory note secured by a chattel mortgage upon certain goods and chattels of which appellant became possessed and disputed respondent's right to enforce the chattel mortgage against him.

Of the several objections taken by appellant arising out of the alleged invalidity of the chattel mortgage itself, I agree with the Courts below that he must fail therein.

The consideration is truly set forth within the meaning of the Bills of Sale Act according to what was held by the Court of Appeal in England in the case of *The Credit Co.* v. *Pott*, 6 Q.B.D. 295, when construing the English Act using substantially the same language.

The omission (if there was in fact such) to annex to the registered instrument a copy of the promissory note which was to be secured thereby, seems of no consequence in face of the full description thereof in the document itself. The allusion therein to its being annexed, if, in fact, it never was annexed, may well be treated as surplusage, having under such circumstances no meaning.

If, in fact, there was a copy of the promissory note annexed to the instrument, it was quite competent for the appellant to have not only shewn that fact, but also to have made of it anything found arguable by shewing that it substantially varied from that described in the instrument.

In default of his having done so, I think it must be presumed that the certified copy of the instrument contains all that was registered, and that treated in the way already suggested.

Rather changing, I suspect, the ground taken in the Court below, reliance is put by appellant upon the provisions of sec. 19 of the Act, providing

> if the bill of sale is made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, etc.,

then that is to be written out and registered under pain of nullity of the instrument.

It seems to me quite clear that this promissory note is, within the plain ordinary sense of the words, "contained in the body" of the instrument, and the defeasance clause therein expressly provides that it is upon payment

of the aforesaid promissory note at maturity or any renewal thereof and all interest in respect thereof, etc.,

that these presents shall cease and be utterly void.

I fail to comprehand where any other defeasance or condition has been found. I cannot conjure it up, unless something more to rest upon than my imagination, which is too inactive to supply the obvious requirement of the section to give vitality to the objection.

This is not the case of a mortgage given for a debt, and a promissory note given for same debt is outstanding but never referred to in the mortgage. Nor is it a case of two promissory notes for same thing, or different things intended to be covered by the same mortgage.

The only formidable objection, as it appears to me, set up by appellant to the respondent's right of recovery, is, that its title to the mortgage rests upon what is an infringement of the prohibition contained in sec. 76 of the Bank Act, which reads:

76. Except as authorized by this Act, the bank shall not either directly or indirectly:

(c) Lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immoveable property, or of any ship or other vessels, or upon the security of any goods, wares and merchandise.

It is to be observed that this is such an absolute prohibition as to render such a transaction as within its terms illegal. To apprehend correctly what was done a brief statement of the facts is necessary.

The People's Trust Co. seems to have been engaged in a quasi-banking and insurance business, when the respondent, desirous of acquiring its place of business at South Hill, in South Vancouver, in which to establish a branch bank, made a bargain with it for the purchase of the building and its contents, excepting the safe and its contents, for the price of $12,500. That was a perfectly legitimate transaction, and was, I assume, the chief motive leading up to what followed. But the chief motive does not cover all that was done.

The company had in course of its business obtained money from its customers, by way of deposits earning four per cent. per annum interest, to the total amount of $30,341.31, and acquired, presumably by using said moneys in way of so loaning, and obtained in course of doing so, promissory notes and bills of exchange

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and other securities for the re-payment thereof to the amount of $25,578.50.

The assignment upon which the respondent's right to maintain its action and uphold the judgment now in question must rest, recites said facts, and further recites as follows:—

And whereas the company is desirous of selling the said business at South Hill to the bank and also of providing for the payment to the said depositors at the branch at South Hill aforesaid of the amounts due to them with interest, and for the transfer of the various securities held by the company as collateral security for the payments to the said depositors by the bank.

And whereas the company has agreed with the bank for the consideration hereinafter appearing to transfer to the bank the business carried on by the company at South Hill aforesaid, together with the office and office premises and the contents thereof, and also the moneys deposited by various depositors through the said branch of the said company at South Hill aforesaid, and the securities, bills of exchange, and promissory notes hereinafter mentioned.

And whereas the company has agreed to pay to the bank the difference between the amount of such deposit accounts and the total amount of such promissory notes and bills of exchange in cash upon the completion of this agreement.

Such is the scope and purpose of the agreement relied upon by which, in its operative part, the company agrees to transfer to respondent all the premises of the company as described, and all goods therein as described in a schedule, and the said deposit accounts (whatever that may mean) enumerated in a schedule.

It then proceeds as follows:

The company shall forthwith upon the transfer of the said accounts pay to the bank a sufficient sum to pay in full the total amount of ($30,341.31) so deposited with the company by any depositor in accordance with the said schedule, *which said sum shall be realized by the discounting by the bank of the promissory note referred to in clause 5 hereof, and the deposit of the proceeds with the bank.*

5. The company shall execute and deliver to the bank its promissory note for the said sum of thirty thousand three hundred and forty-one and 31-100 ($30,341.31) dollars payable to the bank on demand, with interest at eight per cent. (8%) per annum as well after as before maturity, which said promissory note shall be indorsed by R. D. Edwards, E. H. Mansfield, W. A. Pound, J. B. Springford, H. S. Rashleigh, Musgrave Norris, A. A. Falk, Charles C. Kilpin, A. Smith and J. K. Burden, the directors of the company.

6. The company shall also forthwith upon the execution of the agreement transfer and deliver to the purchaser the various promissory notes and bills of exchange in the hands of the company made by the customers of the said company in accordance with the third schedule hereunto annexed, *together with all securities for the payment thereof, held by the company,* which said promissory notes, bills of exchange, *and securities* shall be dealt with in the manner hereinafter appearing.

It further provides:

11. The said sum of thirty thousand three hundred and forty-one and

31-100 ($30,341.31) dollars, to be paid to the bank as hereinbefore set forth, shall be deposited to the credit of the company with the said Royal Bank of Canada in a special account to be opened as the People's Trust Company account in trust for depositors of South Hill branch, the said sum being derived from the proceeds of the promissory note to be given by the company and indorsed by the directors of the company as hereinbefore set forth, and neither the said company nor the said directors shall be at liberty to withdraw any portion of the said sum until the whole of the said depositors have been paid in full and the liability of the said company and the said directors to the bank and the said depositors is completely discharged, and thereafter such sum as remains to the credit of the said company shall be repaid by the bank to the company.

* * * * *

13. The bank shall pay upon the said promissory note for thirty thousand three hundred and forty-one and 31-100 ($30,341.31) dollars, hereinbefore mentioned, the amount which may be collected by the bank on account of the promissory notes and bills of exchange due to the company and by the securities collateral thereto transferred to the bank pursuant to clause 6 hereof.

There are provisions for working out the scheme thus provided for protecting the depositors and for the application of the payments received from said bills, promissory notes and other securities, upon said promissory note for $30,341.31 to be given by the company and indorsed by the directors, and also for returning any of said bills, promissory notes or other securities within six months if the bank should so elect, but if it did not so elect within that time they shall, as to all not so returned, at expiration thereof be deemed to be and shall be taken over by the bank as and for its own use and benefit and the company shall thereupon become entitled to credit therefor.

There is then the following clause:

In consideration of the premises and upon the due transfer of the various property, real and personal, to be transferred by the company to the bank as hereinbefore set forth, the bank shall pay to the company the sum of twelve thousand five hundred ($12,500) dollars.

There follows a clause of indemnity of company and directors, who, by the way, were not parties to anything except to the note.

The contention set up is that this was an agreement providing for the advance of money upon the "security of goods, wares and merchandise."

There can be no doubt, surely, that the promissory note of the company, indorsed by the directors, was in the very language of the instrument discounted to raise the desired and needed sum set apart to meet a class of the company's obligations.

There can surely be no doubt that, *pro tanto*, the amount of this chattel mortgage was a substantial part of the security upon which the advance was made. The company evidently was in

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deep water at the time. Its directors as indorsers had a right on the face of the agreement, and leaving aside for the moment all question as to the effect of sec. 76, to look to that as part of their protection. If not illegal, the bank could not discard, if it would, save under the six months' option, that part of the transaction, and insist upon the sureties so indorsing paying up and being disentitled to assert the ordinary rights of a surety and receive a transfer of that given the bank in way of security.

In passing, I may say that the security of this chattel mortgage was, in one sense, so clearly severable from the rest of the transaction that its relation thereto may, in some aspects of the matter, be arguable as not tainting the entire obligation; especially in view of the provision that it was not scheduled or specifically named in the agreement, and that the bank had a right for six months for any reason it saw fit, or without reason, to reject it.

Does that make any difference herein? It may well be that the bank could say it was through an oversight this was not rejected within the six months, and that it never would have deliberately accepted a chattel mortgage "on goods, wares or merchandise," or mortgage on real estate, as part of the security presented and in view at the time of agreeing to the advance upon which it made same.

Assuming that, which I think quite probable, I am not disposed to think in such a peculiar case the consequences of a violation of the Act must necessarily taint the whole transaction. The rule is that any part of the consideration of a contract being illegal, renders the whole void. Can it be said with this right of rejection of the evil part that it vitiated the whole?

However that may be, it is the question of the title of respondent that we must pass upon herein. And when it asserts the title it sets up it can only rest it upon the security having been part of the original consideration, which never can within the law form part of the security, given contemporaneously with the agreement, to make the advance which is made to rest thereon.

It so happens that there is no other title possible here for the bank to rely upon. It got an assignment later, but that was too late as an assignment for creditors had intervened. Hence, it comes back to the question of its possibly forming part of the original consideration or nothing.

It is only the comprehensive language of par. 6 of the agree-

ment and others in accord therewith which carry an equitable assignment of the mortgage in question.

And if we give this a fair construction, can we impute to the respondent the intention to bargain thereby for that which would by the taking thereof vitiate the whole? I incline to think not. If anything had transpired later between the parties, say at the end of six months, when the taking of the mortgage then might have been interpreted as taking an additional security for a past debt, that would have been quite legal. I can find nothing in the case to rest such a holding upon.

It is said the motive of the whole transaction was the purchase of the property and the business of the company, but it is distinctly a contract of a two-fold character. One relates to the purchase of the property and the other to the discounting of the company's note secured by the indorsement of the directors for a purpose entirely separate from the purchase.

If the company had chosen to go to another chartered bank and there discount the note indorsed by its directors, with the same collaterals including this chattel mortgage as security, and made same arrangement relative to the fund in every way, could there be any doubt of the invalidity of such a transfer of the chattel mortgage? It is not true that the company sold its business to the bank. It sold its business site and furniture for $12,500. It recites the absurdity of selling its indebtedness to the depositors, but can that be treated seriously? I think not.

The cases cited and relied upon do not seem to me to have much bearing upon the point raised herein. The case of *Bank of Toronto* v. *Perkins*, 8 Can. S.C.R. 603, is distinctly against the respondent.

It has occurred to me possibly the indorsers as sureties might have an equity to have the mortgage applied, but that, I imagine, would be only by way of subrogation, and I fail to find any equity on the part of the respondent through them in face of the express terms of the contract, which I interpret as excluding any intention to cover this mortgage. Indeed, no such argument was put forward.

The suggestion that the transaction was in fact a purchase of the securities, including this chattel mortgage, seems to me at variance with many provisions and stipulations in the agreement. If it had provided at the expiration of six months it might take

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over the securities and give up the company's note indorsed by the directors, such an argument might have been tenable and, at all events, what we should have expected to find if a sale and purchase of securities had been its purpose.

It might be arguable that the phrase, "goods, wares and merchandise," does not cover farm stock. No such argument was hinted at, but I have considered such a possible argument, and concluded that the word "goods" does cover farm stock, though it certainly does not cover every kind of personal property.

Standard dictionaries, such as "Murray," the "Century," and the "Imperial," have nothing to enlighten us in regard to the meaning of the word "goods." The various definitions given by Stroud certainly indicate that it does not cover every kind of personal property, and, as defined by Bouvier, I find the following:

> Goods, wares and merchandise. A phrase used in the Statute of Frauds. Fixtures do not come within it: I. Cr. M. & R. 275. Growing crops of potatoes, corn, turnips and other annual crops, are within it: 8 D. & R. 314; 10 B. & C. 446; 4 M. & W. 347; *contra*, 2 Taunt. 38. See Addison, Contr. 31; Blackb., pp. 4, 5; 2 Dana 206; 2 Rawle 161; 5 B. & C. 829; 10 Ad. & E. 753. As to when growing crops are part of the realty and when personal property, see 1 Washb. R.P. 3.

The rest of the definition in Bouvier evidently relates to the sense in which the word is used by local legislatures. I think we must take it that, coupled with the other words as in the phrase quoted, it cannot mean personal property in the wide sense of the term such as promissory notes, bills of exchange, or the like securities. Experience teaches us that bankers who have never hesitated in advancing upon collaterals of the latter description would certainly hesitate to take a chattel mortgage upon goods such as those now claimed herein.

I regret to have to come to the conclusion I have, but the long-standing policy of the Bank Act is so distinctly against countenancing loans by a bank on real or personal (so far as defined by the term "goods, wares and merchandise") property, that I think it should be adhered to and the appeal allowed, and the judgment below reversed with costs.

Duff, J.

DUFF, J.:—(1) As to the chattel mortgage.

(*a*) The description and identification of the goods. The description is formally sufficient, the British Columbia Bills of Sale Act not requiring a specific description of the property comprised in the bill of sale; any description by which the goods

can be identified being admissible. Of the identification of the goods I think there was evidence. (*b*) As to the statement of consideration. The point is covered by *Credit Co.* v. *Pott*, 6 Q.B.D. 295. (*c*) The objection from which at present I see no escape is based upon the fact (which I must, I am afraid, unavoidably find) that the "assurance" was embodied in two documents, one of which was not registered.

It is possible that the copy of the promissory note recited as being annexed and marked "B" was in fact annexed at the time of the execution; but, if so, the whole document was not registered because the registrar's certificate is conclusive that the document put in evidence is a true copy of the document registered. If there was no such copy, then the "assurance" was embodied in the two documents executed—the bill of sale, so called, and the promissory note. Whether the "assurance" was embodied in these two documents, or only in the document executed and registered, is, of course, a question of fact; but I do not see how I can find otherwise than as above indicated. The purport and intent of the "assurance" is to charge the goods with the payment of the principal and interest of the promissory note. The extent of this charge could only be ascertained by an examination of the note; and the two documents being executed at the same time, I think, having regard to the circumstances, I must hold as a fact that the note was part of the "assurance." This is consonant with the general effect of the earlier decisions upon the Act of 1854. See the judgment of Lindley, J., in *Cochrane* v. *Matthews*, 10 Ch.D. 80*n*, and the judgment of James, L.J., *Ex parte Odell*, 10 Ch.D. 76, at 84, in the same volume, and the judgment of Lord Esher in *Counsell* v. *London and Westminster Loan Co.*, 19 Q.B.D. 512, at 515.

(2) As to the objection based upon the Bank Act:

It was intended, no doubt, that in certain eventualities the bank should be entitled to assume the position and exercise the rights of a lender holding the promissory notes, etc., . . . of the trust company as collateral security for an advance. Assuming this to be so, I am inclined to think that the provisions enabling the bank to assume that position ought to be regarded as merely subsidiary to the main purpose of the contract, which was a sale and purchase of assets, and as such quite unobjectionable.

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But taking the most extreme view as against the bank, the loan was a loan upon the security of an "obligation" of a corporation within the meaning of sec. 76, sub-sec. 1, par. (*c*), of the Bank Act, and, that being the case, it is quite immaterial that this obligation was secured by a charge on the property of the corporation.

ANGLIN, J.:—Reluctantly, because a chattel mortgage taken with unquestionable good faith to secure an honest debt will be avoided on what may be regarded as a technical ground, I have reached the conclusion that the omission of the rate of interest from the recital in it of the promissory note of the mortgagor thereby collaterally secured, which was not otherwise registered, is fatal to the validity of the mortgage under sec. 19 of the B.C. Bills of Sale Act. Without a statement of the rate of interest, the mortgage did not "contain" the entire terms of defeasance. These could only be learned by referring to the promissory note. No doubt upon registration of the mortgage everybody was put on inquiry as to the contents of the promissory note, and, had that met the requirements of sec. 19, the mortgage might be upheld: *Winchell* v. *Coney*, 34 Alb. L.J. 210. But, in order to prevent fraud, the scheme of the statute is that the extent of the interest, both of the creditor and of the debtor in the property should appear upon the registered document itself.

If the words in the mortgage recital, "at interest," conclusively imported the statutory rate of interest, and if the mortgage would be defeasible on payment of the principal secured with interest at that rate, regardless of the rate stipulated in the promissory note, the latter might possibly be regarded as an additional security such as was held not to require registration in *Ex parte Collins*, 10 Ch. App. 367. But see *Edwards* v. *Marcus*, [1894] 1 Q.B. 587, which seems to be, if anything, a stronger case than that now before us, and much in point.

Here it is clear, from the defeasance clause in the mortgage, that it is redeemable only on payment of the promissory note according to its terms. It would, therefore, seem clear that the parties committed their contract to two instruments, that its whole tenor and effect could be ascertained only from both, and that, unless the full terms of the note were inserted in the chattel mortgage, it was necessary that the note itself should be registered. It was only by payment of the note that the mortgage could be

satisfied. I cannot distinguish this case in principle from *Counsell v. London and Westminster Loan Co.*, 19 Q.B.D. 512, relied on by the respondent. See, too, *Re Odell*, 10 Ch.D. 76.

What I have written suffices for the disposition of the appeal, but, having regard to the great importance of the question raised on the Bank Act, I think I should express the view which I entertain upon it.

The substance of the transaction between the People's Trust Co. and the Royal Bank was as follows. Its purpose was the taking over by the latter of the business of the former at South Hill. This entailed the assumption by the bank of the liabilities of this branch of the trust company's business, as well as the acquisition of its assets. As to the latter, the bank was prepared to take and pay for only such of them as it should, upon investigation, find to be worth purchasing. This involved the allowance of a period of time within which the bank might elect to take or to reject any of the assets. On the other hand, in order that the good will of the business to be taken over should be preserved, it was necessary immediately to provide for the payment of the liabilities assumed, especially for the claims of depositors. These latter amounted to $30,341.31. The assets in outstanding book debts and securities to be taken over had a face value of $25,578.50, which, if all the securities should be accepted by the bank, would be the amount to be paid in respect of them to the trust company. The company agreed immediately to transfer all the book debts and securities to the bank, and to pay it a sum which, added to their face value, would make up $30,341.31, which amount the bank on its part agreed to put to the credit of a special account to meet the claims of the company's depositors. To further secure itself the bank took the company's note for the whole $30,341.31. The company and its directors further bound themselves to immediately replace with its cash equivalent at face value any security which the bank should reject during the period of 6 months allowed for election. Book debts and securities not so rejected were to be deemed, after the expiry of that time, the unconditional property of the bank, and the company was to be entitled to credit for the face value thereof.

This was, in my opinion, a legitimate banking transaction, and, while the agreement no doubt refers to the advance of the $30,341.31 as made upon the company's promissory note, and the

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transaction took that form, its substance was the setting aside by the bank of that sum as the contingent purchase price of the assets handed over to it.

As to $4,764.81 paid in cash by the company to the bank contemporaneously with the taking over of the assets, the note was the merest form. It represented neither a loan nor a liability of the makers. As to the balance of $25,578.50, the note, in fact, served as security to the bank for the re-payment to it of the face value of such assets (if any) as it should reject. The transaction, in my opinion, was not within the mischief aimed at by sec. 76 (*c*) of the Bank Act, and should not be held to contravene it.

Brodeur, J.

BRODEUR, J., concurred with DUFF, J. *Appeal allowed.*

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CORNEA v. NATIONAL PAVING & CONTRACTING CO.

Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. January 8, 1916.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—MACHINERY—"ENGINEERING WORK."

The effect of sec. 2 and sub-sec. 4 of sec. 3, of the Workmen's Compensation Act, ch. 9, Sask. Stat. 1910-11, is that, if, in the construction of the particular work in which the injured servant is engaged at the time of the injury, machinery is used, though not being used at the particular time, he is entitled to recover, but if machinery is not ordinarily used in that work he cannot recover; and a steam roller used in one part of paving work, but which is not used in another part of the work in connection with which the injury arose, is not an injury "on or about engineering work" within the meaning of the Act, and for which no recovery can therefore be had.

[*Lord* v. *Turner*, 5 Mint-Sen. 87; *Chambers* v. *Whitehaven Harbour Com.*, [1899] 2 Q.B. 132; *Pattison* v. *White & Co.*, 20 T.L.R. 775; *Back* v. *Dick, Kerr & Co. Ltd.*, [1906] A.C. 325, followed.]

Statement

APPEAL from a judgment of a District Court Judge in an action for damages for injuries to a servant.

J. A. Allan, K.C., for respondent.

Lamont, J.

LAMONT, J., agreed that appeal should be dismissed.

Elwood, J.

ELWOOD, J.:—The plaintiff, at the time of the accident hereafter mentioned, was working for the defendant, and, on the day of the accident, in the morning, was working at the corner of Victoria and Albert Sts. in the city of Regina, repairing pavements. After finishing there, he went to Hamilton St. and did some repairing, and thereafter started to go over to the north side of the city to do some further repairing. While going over, and near Albert St. subway, he was injured, and this action is brought to recover damages in consequence of such injury.

The evidence shews that, in the making of the repairs at the corner of Victoria and Albert, a steam-roller was used, but that the steam-roller was not used in the repairs at Hamilton St., nor was it used on the repairs which he started to do on the north side. The reason, as I gather from the evidence, that the steam-roller was not used at these later repairs was that the repairs were small in extent, and, instead of being pressed into place by a roller, were tamped down by hand.

A number of questions are raised on this appeal, but, in view of the conclusion that I have come to, it is only necessary that I should consider whether or not the work in or about which the accident took place was an engineering work.

Sec. 2 of ch. 9, of the Statutes of Saskatchewan of 1910-11, is as follows:—

> This Act shall apply only to employment by the principal, on or in or about a railway, factory, mine, quarry, or engineering work. . . .

Sub-sec. 4 of sec. 3, is as follows:—

> "Engineering work" means any work of construction or alteration or repair of a railway, harbour, dock, canal, sewer or system of waterworks, and includes any other work for the construction, alteration, or repair of which machinery, driven by steam, or other mechanical power is used.

It will be noted from the above state of facts that part of the work upon which the plaintiff had been engaged prior to the accident was work in the construction of which machinery, as defined by the Act, was used. It will also be noted that the work which the plaintiff was engaged on immediately prior to the accident was work in which machinery was not used. The case of *Lord* v. *Turner*, 5 Minton-Senhouse, p. 87, was cited as authority for the proposition that the defendant was liable. In that case the question was considered as to the effect of not using the roller at the time of the accident, or for some time prior to the accident; and I apprehend that the effect of the decision in that case is simply this, that if in the construction of the particular work, machinery is used, though not being used at the particular time, then the person injured is entitled to recover; and if in the making of these small repairs such as the plaintiff did immediately prior to the accident, it was customary to use a steam-roller, then that case would be authority for the proposition that the plaintiff would be entitled to recover, even though in the particular instance the roller was not used. I

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gather, however, from the evidence, that in these small repairs it is not customary to use a steam-roller, and that these small repairs are always tamped down by hand instead of by steam-roller. In the case of *Chambers* v. *Whitehaven Harbour Commissioners*, [1899] 2 Q.B. 132, the facts were as follows: In a harbour there was a dredger worked by steam and used for the purpose of dredging the mud from the bottom and keeping the harbour in a fit state to receive vessels coming in. The deceased was employed to a certain extent on the dredger, but when a hopper had been loaded with the mud it was his duty, in turn with others, to take the hopper out to sea and let out the mud. On the occasion in question the hopper was about a mile and a half out at sea, and the deceased was letting out the mud when the accident happened. A question to consider was whether at the time of his death the deceased was employed "on, in, or about an engineering work" within the meaning of the Act, and it was held that he was not so employed. This case was followed in 1904 in *Pattison* v. *White & Co.*, 20 T.L.R. 775. In the latter case a workman who was employed as a carman to cart sand from a sand-pit to a place where a railway was being constructed met with an accident while driving a cart with sand in it at a place two and a half miles distant from the place where the work of construction was being carried on. It was held that the accident did not happen "about" an engineering work. In *Back* v. *Dick, Kerr & Co.*, [1906] A.C. 325, a workman in the service of the respondents, who had contracted to take up the rails of horse tramways in a town and lay down rails for electric tramways, while employed in unloading and stacking rails for the new tramways in a railway yard, was injured by an accident. The rails had been brought by the railway, and the contractors were allowed by the railway company to use the yard for the storage of the rails till they were required for the tramways. At the time of the accident the only work begun under the contract was the taking up of rails in a street about 700 yards from the railway yard. It was held by the House of Lords that the workman was not at the time of the accident employed "on, in or about" an engineering work. In *Mason* v. *Dean*, 69 L.J.Q.B. 358 at 361, Collins, L.J., makes use of the following:—

It is the work on which the respondent was engaged, and not that on which the workman was engaged, which it is material to consider.

From a perusal of that case, however, and from a perusal of *Pattison* v. *White, supra,* it is, I think, apparent that the words which I have quoted were being applied to the particular circumstances of that case. In that case it became material to consider whether or not the painting of the ceiling of a theatre was an employment within the Act, and it was in considering that question that these words were used: that is, the particular work that the plaintiff was engaged in was not material so long as it was a part of a work that would come under the Act. That would be applicable in this case if, for instance, the plaintiff were engaged in doing some act, a part of a work for the completion of which a steam-roller was used or was ordinarily used, following the decision of *Turner* v. *Lord, supra,* and that that is the only sense in which it was used seems to me clear from a perusal of the judgment of the Master of the Rolls in *Pattison* v. *White*. *Chambers* v. *Whitehaven, Pattison* v. *White* and *Back* v. *Dick,* all decide that the word "about" signifies a physical locality. It seems to me that *Chambers* v. *Whitehaven* is practically on all fours with the case at bar. In the case at bar the plaintiff had been engaged in work earlier in the day which would seem to me to have brought him within the Act. In *Chambers* v. *Whitehaven,* the deceased, while on the dredge, was engaged in work which brought him within the Act. When he left the dredge and entered on his duties on the hopper he engaged in another work which took him outside the Act. The plaintiff here, after finishing the work at Albert and Victoria, engaged in another work, that of performing the small patching. It may have been that this patching was all part of one contract. To my mind, that does not affect the question. It was work which did not, either on the occasion in question or so far as the evidence goes on any other occasion, require the use of a steam-roller. If the plaintiff had been engaged solely at the work of small patching and not at all on any work upon which the roller was used, it could not, I think, be successfully argued that because the employer had other work in which the steam-roller was used, therefore the work which was being done by the plaintiff was a part of the same work, or engineering work.

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To my mind the mere fact that some of the work which he was engaged upon did require the steam-roller cannot affect any accident which occurred with respect to work in connection with which a steam-roller was not used or ordinarily used.

In my opinion, therefore, the District Court Judge was correct in holding that the accident did not arise "on, in or about an engineering work." The appeal should be dismissed with costs.

Brown, J.

BROWN, J.:—It is not sufficient in this case that the accident should have arisen out of and in the course of the employment. It must also appear that the employment was on, or in, or about an engineering work. That the contrary is the case seems to me to be settled beyond question by what has been laid down by the House of Lords in the case of *Back* v. *Dick, Kerr & Co.*, [1906] A.C. 325. . . .

The accident in the case at bar happened while the workman was on the way from one piece of work to another, and not near either. It cannot, therefore, be said to have occurred while he was employed "on, in or about" an engineering work. The appeal, therefore, should be dismissed with costs.

McKay, J.

MCKAY, J., concurred with BROWN, J.

Appeal dismissed.

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BERNSTEIN v. SHAPIRO.

Quebec Superior Court, Charbonneau, J. February 14, 1916.

1. CONTRACTS (§ III D—270)—GAMING—VALIDITY OF CHEQUE GIVEN FOR PURCHASE ON MARGIN.

Purchasing stock on margin for speculative purposes, without an actual transfer of the stock certificates, does not constitute the transaction a gaming contract as affecting the validity of a cheque given to a broker in consideration thereof, whose only interest in the contract is his commission.

[*Forget* v. *Ostigny*, [1895] A.C. 318; *Stevenson* v. *Brais*, 7 Que. Q.B. 77, followed; Sec. 231 of the Crim. Code, R.S.C. 1906., ch. 146 referred to.]

Statement

ACTION on a cheque given for the purchase of stocks on margin.

Jacobs, Hall, Couture & Fitch, for plaintiff.

Cotton & Westover, for defendant.

Charbonneau, J.

CHARBONNEAU, J.:—The Court, having heard the parties and the witnesses and deliberated;

On the action of plaintiff, claiming the sum of $101 on a cheque dated Montreal, January 5, 1913;

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And on defendant's plea alleging that no consideration was ever given for said cheque; that on the date of the cheque the defendant was induced to give to plaintiff an order to sell 50 shares of the Union Pacific short of the markert at a time that said stock was selling at 150; that said $100 of that amount was supposed to be for a margin on the transaction and $1 for the broker's commission; that it was not the intention at the time, of either of the parties, to make a real transaction by the delivery of scripts representing said shares; that it was a pure gambling transaction;

Considering that it has been established that the $100 was a margin of two points which was to be paid by the defendant to the plaintiff who himself paid it to another firm of brokers to buy an option on said stock at a certain determined price, and that $1 was to be paid to cover the provincial tax;

Considering that all the interest the plaintiff had in the transaction was only half of one-quarter point which was the ordinary commission of brokers;

Considering that the only difference between this transaction and ordinary stock brokers' business is the amount that the defendant had to put up as a margin;

Considering that the absence of actual transfer of certificates of the shares could not in itself make the transaction a gaming contract;

Considering that the proof does not establish that the plaintiff was gambling with the defendant on the ups and downs of the shares in question; that his only interest, which was his commission, was the same whether the shares were quoted higher up or lower down, and that the commission for which the cheque was given was for a margin that the plaintiff had to furnish, and actually did furnish, for the benefit of the defendant to buy the option on the stock.

Considering that the buyer of an option whether on stocks, grain or real estate is a perfectly legitimate transaction and cannot be called gambling even if such option is bought for the purpose of speculation, which is not always the fact;

Dismisses defendant's plea and condemns said defendant to pay to the plaintiff the sum of $101, with interest from the date of the service and costs.

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See *Stevenson* v. *Brais*, 7 Que. Q.B. 77, also *Forget* v. *Ostigny*, [1895] A.C. 318, referred to in that case.

Speculation is the buying of something in the hope and for the purpose of selling with a profit. I fail to see how this differs from the general trade. Mostly all traders buy on margin and sometimes a very small margin at that, or no margin at all, when they buy on credit. If stocks were bought only for investment there would hardly be any need of a stock exchange, and a good many of our most prosperous companies would not be in existence. Section 231 of the Criminal Code has no application in this case. *Judgment for plaintiff.*

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British Columbia Supreme Court, Murphy, J. January 29, 1916.

1. CORPORATIONS AND COMPANIES (§ IV G 5—131)—LIABILITY OF DIRECTORS FOR MISAPPLICATION OF FUNDS—ILLEGAL LOANS.

Loans made by the managing director of a trust company contrary to the lending rules, and of the whole system governing loans, as established by the board of directors, are considered fraudulent if not criminal; but all the directors are not liable for any loss of the company funds by reason of such loans, where, without being negligent, they have failed to detect such fraudulent conduct.

[Compare *Re Traders' Trust*, 26 D.L.R. 41; *Joint Stock Discount Co.* v. *Brown*, L.R. 8 Eq. 381; *Re Liverpool Household Stores Assn.*, 59 L.J.Ch. 616; *Marzetti's Case*, 28 W.R. 541; *Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577; *Re Oxford Benefit Building and Invest. Soc.*, 35 Ch.D. 502; *Leeds Estate Bldg.* v. *Shepherd*, 36 Ch.D. 787; *Ottoman Co.* v. *Farley*, 17 W.R. 761; *Dovey* v. *Cory*, [1901] A.C. 477, referred to.]

2. CORPORATIONS AND COMPANIES (§ IV G 5—131)—LIABILITY OF DIRECTORS FOR ENGAGING IN ULTRA VIRES ACTS.

Where, by the Act of incorporation, a trust company is imperatively directed to keep company funds and trust funds separate and distinct, and in what securities trust funds should be invested, and that the affairs of the company be managed by the directors, defining what should constitute a quorum, the loss of trust funds resulting through disregard of these mandatory provisions will render such directors as were actually guilty of such disregard, or who must be held to have had knowledge of such disregard and remained quiescent, jointly and severally liable for such loss, both on the ground of *ultra vires* and of negligence.

[*Re Brazilian Rubber Plantations*, [1911] 1 Ch. 425; *Cullerne* v. *London and Suburban General Per. Bldg. Soc.*, 25 Q.B.D. 485, distinguished.]

Statement

ACTION against directors of a trust company for misfeasance.

Joseph Martin, K.C., and *M. M. Colquhoun*, for plaintiff.

W. J. Whiteside, K.C., for defendant Drew; *M. A. Macdonald* for defendant T. R. Pearson; *E. B. Ross*, for defendant James Stark; *L. B. McLellan & White*, for defendants James Ramsay

and E. W. Keenleyside; *R. Macdonald*, for defendants R. L. Reid and Edmund Bell; *J. S. Jamieson*, for defendant E. P. Miller; *Douglas Armour*, for defendants John Pitblado, W. H. P. Clubb, D. W. Bole and Dr. W. D. Brydon-Jack, J. N. Machray and F. R. Stewart; *McPhillips & Wood*, for defendant C. W. Twelves.

MURPHY, J.:—Misfeasance summons against directors. There are 168 specific acts of misfeasance charged—not all of the same character. This decision has to do with but one class, viz.: losses incurred by reason of the late managing director of the company, W. R. Arnold, without the knowledge of the other directors, making loans and advances in the nature of loans without security, either to himself, or to himself in association with others, or to other persons with whom he was not financially associated. To avoid a long inquiry which might prove a waste of time should the legal points involved be decided in their favour, it is admitted on behalf of each and all of the directors that as a result of these acts of Arnold, losses have actually been incurred which will have to be paid by the company. It is further admitted that such losses will exceed in amount any sums possible to be recovered either under Arnold's will or from his estate. The acts complained of being done without the knowledge of the directors sought to be charged, no fraud or moral obliquity can be imputed to them. This is admitted on behalf of the liquidator. This being so, in my opinion, the directors may possibly be liable for: (1) Losses incurred by *ultra vires* acts where such acts are of a nature that no director on a perusal of the charter of the company could fairly, honestly, or reasonably consider such acts to be *intra vires*: *Joint Stock Discount Co.* v. *Brown*, L.R. 8 Eq. 381; *Re Liverpool Household Stores Assoc.*, 59 L.J. Ch. 616; *Marzetti's Case*, 28 W.R. 541. (2) Losses incurred through the directors' negligence; meaning thereby that in considering their acts or omissions complained of you can deny that they did really exercise their judgment and discretion in a *bonâ fide* way in connection therewith: *Re Liverpool, supra; Marzetti's case, supra; Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577; *Re Oxford Benefit Building*

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& *Inv. Soc.*, 35 Ch.D. 502; *Leeds Estate Building* v. *Shepherd*, 36 Ch.D. 787; *Ottoman Co.* v. *Farley*, 17 W.R. 761.

The Dominion Trust Co. was incorporated by ch. 89, Stat. Canada (1912), hereinafter called the Private Act. Its charter contemplated and authorized the acquiring by the company of two kinds of assets: 1st—funds and property in its own right, such as capital, reserve and accumulated profits (hereinafter referred to as "company funds"). 2nd—trust funds received and administered for the benefit of *cestuis que trust* (hereinafter referred to as "trust funds"), the company receiving remuneration for such administration.

As to company funds, it cannot, in my opinion, be said that any loss of them that has occurred was the result of *ultra vires* acts of the directors—sec. 10 of the Private Act empowered their investment in certain securities but did not confine such investment thereto. The only disabling clause (it being always remembered that this judgment deals solely with loans and advances) is sec. 167 of the Companies Act, R.S.C. ch. 79, made applicable by sec. 16 of the Private Act. Sec. 167 prohibits loans to shareholders. Arnold was a shareholder, but it is not proven that any loss resulted through loans to him *qua* shareholder, and indeed, that is not made the ground of complaint. Apart from that limitation the directors had authority to loan company funds on any or no security as they saw fit.

There remains the second ground, negligence. This entails an examination of how the directors carried on the company's business. The Board by resolution delegated the operation of the affairs of the company to a committee called an advisory committee, made up of a number of directors. The managing director Arnold was an alternate member of this committee. It met regularly for the consideration of business—usually once a week. The Board itself met quarterly and at such meetings the minutes of the meetings of the Advisory Committee shewing in detail the business done were submitted, read and officially dealt with. Every 3 months a balance sheet shewing assets and liabilities, earnings and expenses was submitted and examined, first by the advisory committee, and then by the Board. Lending rules governing loans were drawn up and handed to

the managing directors and officials for their guidance. These authorized the managing director to make loans up to $2,000 on real estate first mortgages, and up to $1,000 on promissory notes secured in a specified manner. Any loans so made had to be submitted to the advisory committee at its next meeting. All other loans had to be authorized by the advisory committee. A yearly audit by auditors elected by the shareholders was provided for. This audit was actually made by a highly reputable firm. In addition, a representative or representatives of the auditing firm had access at all times to the company's books, and as a fact, there is evidence that some such representative was almost continuously employed on the books in the Vancouver office where the transactions herein considered took place. The Board further passed a resolution authorizing the managing director in conjunction with any one of a number of subordinates (all admittedly under his control and subject to dismissal at his hands) to draw, accept, sign, make and agree to pay all or any bills of exchange, cheques, orders, etc., on the company's bank account. This resolution, giving as it did the managing director absolute control over the banking account, enabled him largely to make the loans which resulted in the losses complained of. The other method he adopted was that known as "journal entries." He would draw up a voucher directing a credit to be entered in an account which he wished put in funds, and a debit of the like amount to some other account which was in funds and for which funds of course the company was and is responsible. Purporting to act presumably on the above resolution he would initial such voucher and have it initialled by some one of his named subordinates, and the transaction would go through. No security, either for cash advances or such voucher credit, would be taken. The voucher credits were of course used up by the parties (frequently, it is asserted, by the managing director himself), in whose favour they were thus created. This is probably the simplest example of his system. Frequently it was much more complicated, but the essential feature in all cases was the making of entries in the company's books on no other authority than vouchers initialled as stated, which entries in the long run resulted in

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loss to the company. These acts were in the teeth of the lending rules and of the whole system governing loans as established by the Board, and were fraudulent if not criminal. Directors are not responsible for such acts nor for failure without neglect to detect same: *Dovey* v. *Cory*, [1901] A.C. 477. Can one deny that they did really exercise their judgment in a *bonâ fide* way as to company funds in passing the resolutions? In the first place, in my opinion, such resolution never authorized the making of the "journal entries" at all. It is in terms confined to operations on the company's bank account. If so, the directors cannot be held liable for what they did not authorize and for what it was the business of the auditors to detect and report. Possibly they might be if it was proven that they had neglected to give proper instructions to the auditors, but there is no such evidence before me. Then, as to control of the bank account—remembering that only company funds to be used as loans are being dealt with. Admittedly Arnold was a man who inspired the greatest confidence, not only in the directors, but in everyone with whom he came in contact. The system and rules governing loans above outlined, if honestly carried out, would have absolutely prevented what Arnold did. In my opinion, looking at the matter with the directors' eyes at the time the resolution was passed, bearing in mind their lending rules, their, admittedly (with their then knowledge) merited confidence in Arnold's ability and integrity, their practically continuous audit by shareholders' auditors, the frequent meetings of the advisory committee, the submission of this committee's minutes to quarterly meetings of the Board and the submission at such quarterly meetings of a detailed balance sheet shewing not only assets and liabilities, but current revenue and expenses, it cannot be said they were negligent in the sense above defined, either in passing the resolution or in failing to detect what was going on. For these reasons, I hold the directors not liable for any loss of the company funds, caused by bad loans or advances made by Arnold.

There remains the question of trust funds. Sec. 9 of the Private Act imperatively directed the company to keep these separate and distinct from company funds. Sec. 8 imperatively

directed in what securities trust funds should be invested by the company. Sec. 6 imperatively directed that the affairs of the company be managed by the directors, and defined what would constitute a quorum. If loss of trust money has resulted through disregard of these mandatory provisions, in my opinion, it is clear that such directors as were actually guilty of such disregard, or who must be held to have had knowledge of such disregard and remained quiescent, are jointly and severally liable for such loss, both on the ground of *ultra vires* and of negligence.

First, as to *ultra vires*—in my opinion, no intelligent man who reads the Private Act could, honestly, or reasonably consider that company funds could be mixed with trust funds, or that trust funds could be invested in any securities other than those prescribed by sec. 8. It may be said that the directors did not read their charter. In my opinion, they are bound to read it and understand it, at any rate when they are actively about to perform acts as to which it contains directions. There must be imputed to a director special knowledge of the business he has undertaken. (*Re Liverpool Household Stores Association*, *supra*, at p. 619, citing Jessel, M.R., in *Marzetti's* case, *supra*). It may be, if a provision of such charter is obscured and competent advice which proves erroneous is obtained, a director would not be liable. But in the first place, as stated, the provisions of the Private Act are eminently clear, and it is not suggested that any advice, erroneous or otherwise, was sought or received. Further, in my opinion all the directors whom I consider liable, with the exception of Reid and Miller, cannot be heard to say they did not read the Private Act, for an official copy of it was laid before them at the meeting of provisional directors, held November 18, 1912. Reid was not present, but he is a member of the firm of solicitors who acted for the company throughout its existence, he constantly attended and took an active part in meetings of the Board, and even if I am wrong in holding that a director must know the provisions of his company's charter, at least in the qualified sense above stated, knowledge of those provisions of the Private Act which, in my opinion, makes some of the directors liable, must I think under

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the facts of the case be imputed to him. If a director has a special knowledge of the company's business he must give the company the advantages of such knowledge: *Re Brazilian Rubber Plantations*, [1911] 1 Ch. 425, at 437. Miller's case will hereafter be dealt with.

Now, admittedly, the company had but one bank account in Vancouver into which all funds, company and trust, were paid, a clear violation of the statutory duty imposed by sec. 9 of the Private Act. At the meeting of the provisional directors, held November 18, 1912, it was resolved the Canadian Bank of Commerce be the bankers of the company in Canada. At a meeting of the advisory committee held April 1, 1913, a motion was passed appointing a committee for making banking arrangements and directing such committee to report to the advisory committee. It is to be noted that it was on this date or the day previous that the Dominion Trust Company took actual control of the business of the Dominion Trust Co. Ltd., although the transfer was to be considered as dating from January 1, 1913. Up to this date, its banking had been only such as was necessary in connection with its organization and share subscriptions such as is contemplated by secs. 2 and 5 of the Private Act. It was now engaging in actual business for the first time through its own officers, and now for the first time it began to handle trust funds. All the directors, other than Miller (whose case is hereinafter dealt with), herein held liable, were aware that huge trust funds were coming to the company from the Dominion Trust Co. Ltd., for they were all directors of that company. The appointment of the banking committee was made for the purpose of making banking arrangements for the company as an active business concern. On April 8, 1913, this banking committee apparently reported to the advisory committee, for on that day the advisory committee at a regular meeting, passed a resolution that the Royal Bank of Canada be the bankers of the company in Canada, a change of banks it will be noted. On May 14, 1913, at a duly convened meeting of the Board, the minutes of the meeting of the advisory committee held on April 1, and 8, 1913, containing the above resolutions were read, and on motion were adopted as read. As

stated, there was but one bank account into which all funds, trust and company, were paid, and, in my opinion, every director who was at the meetings of March 31, 1913, when the advisory committee was appointed and the resolution empowering Arnold and a subordinate to handle the bank account was passed, and who was also present at the meeting of May 14, 1913, when the minutes of the advisory committee making banking arrangements were read and adopted, must be held to have known of the illegal mixing of funds, for, granted that there was but one banking account into which all funds were paid, it is a clear inference, I think, that the banking committee had arranged with the Royal Bank for only one bank account, and if first the advisory committee and then the Board approved of the banking committee's action, all the directors present must be held to have ratified the illegal banking, even if this was done without inquiry as to what that action was. Further, at every meeting of the advisory committee the first business reported was the bank account and such report—as of course it must—shewed only one bank account in operation. The minutes of each of these meetings was read and dealt with by the Board. This view, if correct, disposes of the argument based on the allegation that the reports of the auditors pointing out the illegality of the bank account were suppressed by Arnold.

The directors present at the meeting of March 31, 1913, who are amongst those sought to be charged in these proceedings were: Clubb, Stewart, Brydon-Jack, Ramsay, Henderson, Keenleyside, Stark, Riggs, Pearson and Drew. Those present at the meeting of May 14, 1913, were: Clubb, Brydon-Jack, Stewart, Pearson, Ramsay and Drew. Henderson, though not present on May 14, 1913, was a member of the banking committee and was present at the meeting of the advisory committee on April 8, 1913, facts which I think render him equally liable with those present at the two Board meetings, if loss resulted. The position of Stark, Riggs and Keenleyside will be hereafter dealt with. Reid occupies a similar position. He was present at both these meetings as a director and took part therein as a director, in fact he seconded the resolution passed on May 14, 1913, adopting the minutes of the advisory com-

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mittee meeting of April 8, 1913. As a matter of fact, he was not a director of the Dominion Trust Co. on those dates at all, being elected on May 15, 1913, at an extraordinary general meeting of the shareholders held on that date. This arose as follows: When the Private Act was passed all the directors of the Dominion Trust Co. Ltd. were made provisional directors of the Dominion Trust Co. Reid was not then a director of the latter company. He was elected a director of it at its 8th annual general meeting, held February 25, 1913. No meeting of the shareholders of the Dominion Trust Co. was held until May 15, 1913, when he was elected a director. In the meantime the Dominion Trust Co. as shewn had taken active control of the Dominion Trust Co. Ltd. business and it was forgotten that, although the provisional directors included all the directors of the Dominion Trust Co. Ltd. at the date of the passing of the Private Act, Reid had been added to that Board thereafter. If I were holding the directors liable solely on the ground of *ultra vires*, these facts might affect Reid's liability, but as I think them liable on the ground of negligence also for reasons hereinafter set out, and as he was duly elected on May 15, 1913, and was by his presence and active participation in the meetings of March 31, 1913, and May 14, 1913, in my opinion, affected with knowledge of the banking illegality. I do not need to pursue this phase of the matter.

In addition to keeping trust funds separate, sec. 8 of the Private Act, as stated, imperatively directed the manner of their investment. Now, if I am correct in fixing ratification of the illegal banking on the directors named in the resolution passed at the meeting of March 31, 1913—the result of which was to give Arnold control of the bank account—makes, in my opinion, all the directors fixed with that ratification, guilty of a second breach of statutory duty, for they, by passing that resolution and supplementing it by ratifying the illegal banking arrangements, parted with control of the trust funds to Arnold. In my opinion, when these trust funds were once received by the company it was the bounden duty of the directors to only part with their control of such funds on investments set out in sec. 8. As stated, sec. 6 directs that the com-

pany's affairs be carried on by the directors, and defines a quorum. To do any act that parted with the control of these funds to any but a quorum of directors, was, in my opinion, to do an *ultra vires* act. This does not necessarily mean that a quorum must sign all cheques, but it does mean the establishment of some system whereby trust funds could only be withdrawn when such withdrawal had been authorized by formal action of a quorum of the Board of Directors.

If I am wrong in these conclusions I think there is a shorter ground of liability which attaches to all the directors, who were at the meeting of March 31, 1913. If the resolution appointing the advisory committee was meant as an abdication in favour of the advisory committee of the directors' powers, then I think it *ultra vires* because it contravenes sec. 6 of the Private Act. Quorum, according to sec. 6, means a majority of the directors, whose number shall not be less than seven nor more than 21. On March 31, 1913, the actual number of directors was 16, all appointed by sec. 1 of the Private Act. A quorum therefore could not be less than nine. The advisory committee had only 5 members and according to the resolution its quorum was 3. It is true that the shareholders, by by-law 13, authorized such an advisory committee, but they could not, by by-law, change the provisions of the Private Act. Therefore whatever was the intention in passing the advisory committee resolution, its legal effect was, in my opinion, to constitute the advisory committee the servants or agents of all the directors present at the meeting of March 31, 1913, when such resolution was passed. If so, since the illegal banking arrangements was the act of this committee all such directors are responsible for same, and as the banking arrangements, combined with the other resolution, giving Arnold control of the bank account, gave him, likewise, control of the trust funds, I think, for reasons already set out, all such directors are responsible for all losses of trust funds which resulted from Arnold's control of the bank account. But it is said there has been no proof that loss resulted from such control. If this means there has been no loss proven of trust funds as distinguished from company funds, the answer is, that the directors herein held liable, have chosen to mix the two

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funds, and accordingly the onus is on them to shew what are trust funds and what are not. I express no opinion whether it is legally permissible for them, on the facts of this case, to seek to satisfy that onus. On the record as presented, no such attempt has been, or indeed, could be, made at this stage. It is, therefore, reserved for further consideration should such become necessary. But I apprehend what is really contended is, that the acts hereinbefore set out, whilst they may be a *sine qua non* are not the *causa causans* of the admitted loss, and *Cullerne* v. *London & Suburban General Per. Building Soc.*, 25 Q.B.D. 485, is relied on. In my opinion, that case is distinguishable. There, stress is laid on the fact that the resolution itself was innocuous, that in effect what was sought was to make the director liable, not for what he did, but for joining in a resolution—really *ultra vires*—that something might be done. The directors, I hold liable, did not resolve that control of these trust funds might be handed over to Arnold. They, in the teeth of their statutory duty, by the two acts of passing the resolution and ratifying the illegal banking arrangements, did actually hand control of the trust funds over to him. In the case cited, those doing the acts complained of were not the directors' servants or agents, but fellow directors of equal authority with the director sought to be charged. Hence the crux of the decision is, that the *causa causans* of the loss was a new wrongful act *by independent persons*. In the present case Arnold, in so far as he dealt with the bank account was not acting *qua* director, but under the direct authority of the resolution, and within its scope, and, therefore, as a servant or agent of the directors who passed it. If this view is correct, authorities are not necessary for the proposition that they are responsible for his acts.

If I am wrong in holding the named directors liable on the ground of acting *ultra vires*, I think the case against them made out on the ground of negligence. In *Marzetti's* case, *supra*, the test applied is, whether directors acting as those I find liable have acted, would be liable in an action at common law.

It is clear, I think, that where a statutory duty is imposed upon one person for the protection of another, and that duty is violated and loss results to such other person because of such

violation, an action would lie at the instance of the party damaged, against the person so violating such duty, to recover such loss: *Watkins* v. *Nat. Colliery Co.*, 28 T.L.R. 570. That it is true is a master and servant case but, if I understand it aright, the decision is merely a particular application of this general principle.

Or to use the standard set up in *Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577, on the facts as hereinbefore set out, cannot one perfectly well deny that the directors held liable did really exercise their judgment and discretion in a *bonâ fide* way in passing this empowering resolution, and then making it applicable to trust funds by ratifying the illegal banking arrangements without inquiry as to what those banking arrangements were? In that case Vaughan Williams, J., says:—

> To advance money on security without waiting for the security is so unbusinesslike an act that it cannot be called a mere error of judgment or imprudent act.

and if he had found as a fact this had been done he would have held the directors liable. In my view, that falls far short of what was done here.

It is useless to pursue the matter further. Much that has been said when dealing with the *ultra vires* viewpoint applied with even greater force to this question of liability on the ground of negligence. Where the acts complained of are *ultra vires* and also negligent, the view points are closely connected in *Marzetti's* case, *supra*, Jessel, M.R., seems to view the matter there dealt with more as an act without authority, *i.e.*, *ultra vires*, whilst the Court of Appeal, as I read the judgment, lays more stress on negligence.

I therefore hold the following directors jointly and severally liable for the loss of trust funds that has occurred—the exact amount to be the subject of further inquiry—Clubb, Brydon-Jack, Stewart, Pearson, Ramsay, Drew, Reid and Henderson. Reid, it is true, was not a qualified director (though he purported to act as such) when the acts complained of were committed, but he knew of them and participated in them, and, in my opinion, must be held liable at any rate for negligence for not taking decisive action as soon as he was elected to the

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Board, which was the day after the confirmation by the Board of the advisory's action on the banking committee's action.

There remains the question of the liability of the other directors named in the summons. Of these Machray, Pitblado, Bole, Twelves and Bell attended none of the meetings set out and had no part in any of the acts complained of nor any knowledge thereof. No case has been cited to me where directors who took no part in the misfeasance or breach of trust relied upon, and who had no knowledge thereof have been held liable. None of these parties resided or were in Vancouver at the time the things complained of were done—Bell and Machray were not even members of the Board. In my opinion, under the circumstances here, none of them are liable. See *Re Cardiff Savings Bank*, [1892] 2 Ch. 100; *Brazilian Rubber Plantations*, [1911] 1 Ch. 425, at 437; *Re Denham & Co.*, 25 Ch.D. 752, and *Re Perry's* case, 34 L.T. 716. On the same authorities I would, though with some hesitation, hold Riggs, Keenleyside and Stark not liable were it not for the view above expressed that the advisory committee must be regarded as the servants or agents of the directors who appointed them. Apart from that view, what was done at the meeting of March 31, 1913, did not in itself endanger the trust funds. If banking arrangements had been made by the advisory committee in accordance with the provisions of the Private Act, there would have been a separate account for trust funds, and a system established whereby no withdrawals therefrom could take place without formal action by a quorum of the Board. The empowering resolution would still be operative but only over company funds, and I have already held that would not, under the circumstances, entail liability on the directors. It is also true that Riggs, Stark and Keenleyside, and, to a less extent, Bell, attended some of the subsequent meetings of the Board, at which advisory board minutes, shewing only one bank account in operation, were acted on but on the whole I would hold this, standing alone, does not make them liable as having been negligent.

But, in the view I take of the legal effect of the advisory committee resolution, and the result of that legal effect when

coupled with the Arnold empowering resolution, I must hold Riggs, Stark and Keenleyside jointly and severally liable with the others already found liable for all loss of trust funds resulting from Arnold's control of the bank account.

As to the directors held not liable, the authorities cited shew that neglect of his duties by a director to attend meetings, etc., may, depending on circumstances, be a reason for refusing such director his costs on a proceeding against him such as this. The evidence so far adduced was not directed to this point, and therefore the question of costs of those directors who are held not liable is reserved for further inquiry. Miller was not elected a director until February 24, 1914. He attended a meeting of the Board on that day. He then, it is stated, was absent from the city in the course of his duties as general manager until July. He attended most of the meetings of the advisory committee (of which he was not a member, but apparently was there as general manager) from July 7, 1914, on. He was at the directors' meeting of September 25, 1914. He was general manager of the company from its inception. His duties as such are defined by by-law 16. As such general manager he submitted the official copy of the Private Act to the provisional directors at the meeting of November 18, 1912. He was present at the directors' meeting of March 31, 1913, when the resolutions hereinbefore dealt with were passed. He was a member of the banking committee, and was present at the advisory board meeting of April 8, 1913. He was not present at the directors' meeting of May 14, 1913. On these facts I think he must be fixed with knowledge, both of the illegal banking and of the provisions of the Private Act relevant thereto, and if so, I think he was guilty of neglect in not acting immediately he became a member of the Board. I hold him, jointly and severally with the others, liable for all losses of trust funds which resulted from Arnold's control of the bank account that occurred subsequent to his election as a director. The liquidator is entitled to costs against the directors found liable. If leave to appeal is necessary it is hereby granted to all parties including the liquidator.

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MURPHY, J.:—In giving my reasons for judgment an error of fact was made. It was assumed that the resolution re signing cheques that was communicated to the Royal Bank was the resolution passed March 31, 1913. This is incorrect. It was the resolution passed on December 18, 1912, that was so communicated as shewn by the minutes of April 8, 1913, of the advisory board. The correction, however, does not affect the reasoning, as all the directors held liable, except Reid, were present on December 18, 1912, and the resolution then passed had the same effect of giving Arnold control of the bank account, as did the resolution of March 31, 1913. Reid is held liable for negligence, and his absence from the meeting of December 18, 1912, does not cause me to change my opinion.

I desire also to add a word in reference to the directors, who are held not liable. As to them, negligence could be the only ground of liability. The onus of proving negligence is on the liquidator, and I have nothing before me but the bald fact of absence from meetings, which, under the circumstances, I do not think satisfied such onus.

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Alberta Supreme Court, Harvey, C.J., Beck and Stuart, JJ. January 26, 1916.

1. LANDLORD AND TENANT (§ III D 3—110)—DISTRESS FOR RENT—CONSTRUCTIVE SEIZURE AS CREATING PRIORITY AGAINST LIQUIDATOR.

A verbal arrangement between the local agent of a corporation tenant and the landlord's agent collecting the rent, that the furniture should remain on the premises until the rent was paid and that meanwhile the landlord will not enforce the power of sale or distress with respect thereto, and the landlord keeping the furniture locked up on the premises, the arrangement having been made prior to the winding up order against the tenant, of which neither parties had knowledge at the time, constitutes constructive seizure and distress which will entitle the landlord to hold the furniture for the rent as against the liquidator.

[*Wood* v. *Nunn*, 5 Bing. 10; *Cramer & Co.* v. *Mott*, L.R. 5 Q.B. 357, applied; *Eldridge* v. *Stacey*, 15 C.B. N.S. 458; *Re Colwell Candy Co.* 35 N.B.R. 613; *Re Jasper Liquor Co.*, 23 D.L.R. 41, 25 D.L.R. 84, considered.]

Statement

APPEAL from the judgment of Carpenter, J., in favour of a liquidator claiming furniture against distraining landlord, which is reversed.

Clarke, Carson & Macleod, for plaintiff.

Muir, Jephson & Adams, for defendant.

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The judgment of the Court was delivered by

STUART, J.:—This is an action of detinue brought by the plaintiffs, as liqudators, under the Winding-up Act, of the Canadian Mineral Rubber Co. Ltd., against the defendants, who were the landlords of the latter company, for refusing to deliver up certain office furniture and other chattels. The Rubber Company had rented certain offices from the defendants at $35 a month payable in advance on the 23rd of each month. On August 23, 1913, there was $170 due for rent including $35 for the month August 23 to September 23, the balance being arrears. The winding-up order was made by the Ontario Court on September 19. The defendants refused to deliver up the chattels in question because, as they contended at the trial, they had made a seizure for rent prior to the winding-up order. The action was tried by Carpenter, J., who gave judgment for the plaintiffs on the ground that what had occurred, no matter when it occurred, had not amounted to a distress.

The defendants were represented by one J. A. Irvine, who was their agent for collecting the rent. Irvine was the only witness called, and his oral testimony, together with certain correspondence, constituted all the evidence in the case.

In his examination-in-chief Irvine swore that the Rubber Company owed $170 on August 23, that sometime between that date and September 1 he took the bill in to the general manager of the company on the demised premises, that that person said they were leaving, that he, Irvine, stated to him that "the furniture would have to remain where it was until the rent was paid;" that the rent never had been paid, and that they (*i.e.*, defendants) kept the furniture locked up in the room.

Upon cross-examination he was confronted with two letters, one from the solicitors for the Rubber Co. to himself and the other being his own reply thereto. These letters are as follows:—

J. A. Irvine, Esq., October 8, 1913.

Re Canadian Mineral Rubber Co., Ltd.

Mr. H. E. Duncan of the above company has consulted us with reference to a verbal arrangement made between you and him with reference to the rental of their offices in the Leeson & Lineham Block, of which you are agent.

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Mr. Duncan states that the company will, on or about the 20th day of this month, owe you rent as follows: On three rooms for 1 month, $100; On one room for three months at $35, $105—$205.

He states that a verbal arrangement was made between you and him to the effect that, at the expiration of the present rental month they would be allowed to give up the tenancy of any rooms heretofore occupied by them in your block, on condition of their leaving the furniture in the room now occupied by them in the said room, as security for the payment of the rent above mentioned, you on your part to agree that the said furniture would be stored without cost to the company, and that you would not enforce any power of sale or distress with respect to the same until the expiration of at least two months from this date.

Kindly write us a letter confirming the above.

Messrs. Clarke, McCarthy, Carson & Macleod. October 15th, 1913.

In re Canadian Mineral Rubber Co., Ltd.

Gentlemen,—We agreed with their manager that, at the expiration of the present month's tenancy, to allow them to vacate the rooms occupied by them, on condition of their leaving the furniture in the said room as security for the payment of the rent due, $205, and will not enforce power of sale or distress with respect to the same without notifying you or their agents.

We expect, however, that the matter will be settled some time within a month or two. (Sgd.) J. A. IRVINE.

At the date of this correspondence, neither Irvine, nor Duncan (who was a local manager, the head office of the company being in Toronto or at any rate in the east), nor Messrs. Clarke & Co., was aware that the winding-up order had been made on September 19.

On the strength of these letters, counsel for the plaintiffs attempted to weaken Irvine's confidence in his assertion that his interview with the manager was about September 1, and to induce him to admit the possibility that the interview was towards October 1, but Irvine repeated: "I spoke to him around September 1." And he said again: "My arrangement with the general manager of the company was made between August 23 and September 1, and this letter was written by me." Again, counsel asked him:—

Q. The arrangement that you made with him, whenever it was made, was simply that they would not remove this furniture, and that it was to remain there as security to you for the payment of the rent? A. I notified him that I would not let it go until the rent was paid. (And again):—Q. You don't want to dispute this letter? A. No. Q. The furniture was to remain there as security for the rent? A. Yes.

The witness further said that the mention of $205 in his

letter was a mistake, and that it should have been $170. Witness also said that he had had only one conversation with Duncan, but had had several with a Mr. Robertson, who, perhaps the Court may judicially notice is a barrister in the firm of Clarke & Co. Mr. Robertson, he said, had demanded the furniture and he had refused. The date of this was not fixed. He said he made no inventory of the furniture in August, although a janitor took one later on. He also stated that as far as he knew, the company vacated on September 23, and again that it was on September 1 that the manager spoke to him about leaving. Then he was asked:—

Q. You are not disputing those (referring to the letters) as the terms upon which the furniture was left, no matter when that letter was dated? A. No, I considered it was the same as a landlord holding the furniture. Q. You are not clear as to when that was done? A. As far as I know this was around the first of September. (And again):—Q. Do you remember the exact words you said to the manager of this Rubber Company when you went in for the rent? A. I came in with the bill for the rent and he said that they were going out and I said I would have to hold the furniture until the rent was paid. Q. (By the Court): When was this? A. As near as I can remember on or about the first of September. It was a bill for $170.

Now, it is very evident why Irvine was somewhat hesitating about the date when the letters were shewn him. But I am clearly of opinion that the fact was that Irvine was right and that the interview did occur between August 23 and September 1. I see nothing in the letters to cast doubt upon this. At the date of the letters, another month's rent had fallen due, and it was quite natural that Irvine would take little notice of the added $35. He would, indeed, very naturally assume that the company recognized a liability for another month's rent. There had never been any proper notice to quit by either party. And I think the arrangement referred to in the letters might very well be an arrangement made about September 1, although owing to the lapse of time another month's rent was added in the correspondence.

But there is another circumstance which, in my opinion, tends very strongly to corroborate Irvine's statement as to the date. On June 30, 1914, he wrote to the company claiming only $170. He, repeatedly, in his evidence stated without objection that his books shewed only $170 charged up as rent.

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And he repeatedly stated that the bill he took to the manager was for $170. Now, if the interview with the manager took place at the end of September instead of the end of August and he took in a bill of the rent then overdue he would surely have taken a bill for $205 not for $170. The mention of $205 in the letters in October is as I say quite explicable. One can quite easily understand how such a letter as that of October 15 might have been written without reference to the books and without another $35 having really been entered in his books.

The trial Judge cast no doubt upon the testimony of Irvine and made no specific finding that the interview was not when Irvine said it was. I think, therefore, the real fact which should be found is, that this interview did take place about September 1st, and therefore before the winding-up order.

The question therefore arises: Did what was said constitute a legal distress? Upon the authorities, with much respect, I think it did. The two cases of *Wood* v. *Nunn*, 5 Bing. 10; 130 E.R. 962, and *Cramer & Co.* v. *Mott*, L.R. 5 Q.B. 357, seem to me to be conclusive. In the former the landlord said:—

> I will not suffer this or any of the things to go off the premises till my rent is paid.

In the latter the landlord's wife with his authority stood merely at the door and not actually in the premises and said, "The piano shall not be taken away till our rent is paid." It is true that in the former case the article was actually touched, but that was not so in the latter case, and it is clear there may be a constructive seizure. In the latter case, Cockburn, C.J., said that *Wood* v. *Nunn* was conclusive, and that a "seizure may be constructive as well as actual." He also said:—

> It is enough that the landlord or his agent takes effectual means to prevent the removal of the article off the premises on the ground of rent being in arrears and he does this when he declares that the article shall not be removed till the rent is paid.

Neither in *Wood* v. *Nunn*, nor in *Cramer & Co.* v. *Mott*, was anything rested upon subsequent actual removal. In the present case there was every reason why the defendants should not wish to remove the articles. It was not competent to them to remove them. Neither was any mention made in those two cases of the fact of the interference of a third party. With

much respect, I cannot see why the action or words of a third party, standing near, should have any effect upon the question whether there was a legal distress by the landlord or not. If it should be considered as affecting the question of how far he should go, one would think that it would necessitate his going further, where third parties were making a claim rather than minimize the requirements.

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I am also unable to see anything in the argument that a mere intention to distrain is not enough. Of course it is not. But a mere intention refers to a thought or purpose in a man's mind *unexpressed*. But *if expressed*, either in acts by a physical seizure or in words which, as the cases shew, may constitute a constructive seizure, then it has gone quite beyond mere intention, and enters the region of action either actual or constructive.

It was also contended that there was an abandonment. This is a question of fact: *Eldridge* v. *Stacey*, 15 C.B.N.S. 458. I am unable to find any evidence of abandonment. I do not read the letter of October 15 as amounting to anything more than a statement of what the defendants were willing to do. The condition as to leaving the goods as security is surely nothing more than stating the fact of seizure and the affirmance of it in another form. Just exactly why an expression of assent by a tenant to the constructive seizure and its purpose and significance, even though subsequent, should be looked on as a new arrangement I am unable to understand. Moreover, if there was any arrangement with Duncan after September 19, it is clear that he had no power to bargain on behalf of the company. The company was then in the liquidator's hands and any dealings between the manager and the defendants who were both ignorant of what had happened were a mere nullity.

With regard to the effect of sec. 84 of the Winding-up Act I agree with the view expressed by my brother Beck in *In re Jasper Liquor Co. Ltd.*, 23 D.L.R. 41, and I think this is not inconsistent with the view taken by the Court on the appeal in that case, 25 D.L.R. 84, as to the meaning of sec. 18, sub-sec. 7 of our Voluntary Winding-up Ordinance. The wording of the latter section is essentially different because the word "seizure"

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is used; and the effect of the general words of the earlier part of sec. 84 of the Dominion Act is such, in my opinion, as to shew that a judicial proceeding was intended, while the scope of sec. 18, sub-sec. 7, of our Local Act or Ordinance is obviously much wider. I think the decision in *Re Colwell Candy Co.*, 35 N.B.R. 613, is sound.

The appeal should, I therefore think, be allowed with costs, the judgment below set aside and the action dismissed with costs. The defendants are entitled to hold the goods for the rent, $170.

The trial Judge made no disposition of the counterclaim for judgment for the amount of the rent, and no complaint was made of this in the notice of appeal or on the argument. It was probably assumed that this claim would be allowed in the winding-up proceedings if the defendants failed in this defence or to the extent that the goods failed to realize the amount of the claim.

I doubt whether it is proper in this action to make an order for sale. At any rate it appears to me unnecessary because there would appear to be nothing to prevent the landlord from proceeding to sale himself except our own Act respecting extra judicial sales and an order under that Act is to be obtained not by action, but by summary application to a Judge in Chambers.

Harvey, C.J. Beck, J.

HARVEY, C.J., and BECK, J., concurred. *Appeal allowed.*

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Re SCARTH.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Magee, and Hodgins, JJ.A. January 10, 1916.

1. INFANTS (§ I C—11)—FATHER'S RIGHT TO CUSTODY—WELFARE OF CHILD—MOTHER LIVING APART.

The Court, empowered under the Infants Act, R.S.O. 1914, ch. 153, sec. 2(1), to award the custody of an infant, having regard to the welfare of the infant and to the conduct of the parents, will not deprive the father of his immemorial right to the control of his child, where he has done no wrong and is able and willing to support the mother and child, merely because the mother chose, without valid reasons, to live apart from him.

[*Re Mathieu*, 29 O.R. 546, followed.]

Statement

APPEAL from an order of Lennox, J., committing the custody of an infant girl to the father.

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

R. C. H. Cassels, for respondent.

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GARROW, J.A.:—Appeal by Amy H. R. Scarth, wife of James F. Scarth, the petitioner, and mother of the infant, from an order of Lennox, J., committing the care and custody of the infant to the father.

The father and mother were married in April, 1904, at the city of Toronto. The infant Mary Howitt Scarth, their only child, was born there on the 9th August, 1906.

At the time of the marriage, the father was an accountant in the Imperial Bank, on a salary of $1,300 per annum. The mother was the only daughter of William Henry Howitt, a physician practising in the city of Toronto.

After the marriage, the father and mother continued to reside together in the city of Toronto until the beginning of July, 1913, when the father was promoted to the position of manager at the town of Port Arthur. When the father left Toronto to assume his new duties, it was agreed between them that the mother should temporarily remain in Toronto with the child. The father returned to Toronto the following Christmas on a visit, and while on the visit, which began by being entirely friendly, there were disagreements, culminating in a demand by the father that the mother should at once come with him to Port Arthur, and a refusal by the mother to do so: a refusal which she has since maintained, although the father has repeatedly expressed his desire and willingness to receive and properly provide for her there.

The mother has, since a letter written by her to the father in January, 1914, declined to see her husband or to receive written communications from him, which have been returned unopened. The letter referred to above is as follows:—

"Maple Av., Jan. 22nd, 1914. My dear Jim: About the house at Port Arthur, I have thought it over and feel it is quite impossible for me to go up there at present. Your conduct and cruelty during the Christmas holidays have made a great difference to me and in my feelings towards you. I do not know if I shall ever forget about it, and it is impossible for me to think of going to live with you at present. I must ask you not to write to me about Port Arthur, as it upsets me, and I have not yet nearly recovered from your recent treatment. If you keep on writing on this subject, I shall have to return your letters unopened."

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And from that time forward she declined all correspondence with him or to see him personally when he came to the city.

The quarrel at Christmas was all concerning the mother's dealings, in the father's absence, with the house which, with the aid of her father, they had built in Toronto. The father of Mrs. Scarth gave the lot, costing $3,000, to his daughter; $5,000 was borrowed by Mr. Scarth on a mortgage, his wife joining, and a policy of insurance on the life of the father; and the mother's father agreed to advance a further sum of $2,000 towards building. The father of the infant also expended of his own money considerable sums, which he estimates at over $1,000; and in the end the house was built and afterwards occupied by them until he left for Port Arthur.

An agreement was also executed by the husband and wife and her father, whereby the property was transferred to Dr. Howitt, upon certain trusts therein stated, and whereby the father of the infant covenanted to pay taxes, water rates, and local improvement taxes upon the land, to pay the premiums of fire insurance upon the house, to keep the house in repair, to make payable to or cause to be made payable to the mother the life insurance policy, to pay the premiums thereon, and to pay to the mother $25 a month for her personal use, but such payment was not to prejudice her right to full maintenance. And it was also agreed that Dr. Howitt might, upon the written request of his daughter, sell the lands, and in the event of selling he was to receive out of the proceeds the $2,000 he had advanced, and should hold the balance of the proceeds upon the like trusts.

During the absence of the father of the infant at Port Arthur, the mother, without consulting her husband and entirely without his knowledge or consent, sold the house to her father. On the husband's return he was informed of the sale, but the parties, both father and daughter, absolutely declined to give him any particulars of the so-called sale; the daughter informing him in effect that it was none of his business, that the house belonged to her and she could do with it what she pleased. At which the husband, it is said, became very angry, and gesticulated and used loud and even violent language, which was by no means assuaged by the wife's retort which she admits to have made, and which her father in his affidavit also states: "I often feared it was money you were after; now I am sure of it"—surely a strange sort of oil

to pour upon the troubled waters. The husband thereupon demanded that the wife should return with him to Port Arthur at once, although before the explosion he had apparently been quite willing to leave her with her father and mother for a further period.

In his review of the facts, Lennox, J., expressed the opinion that all the so-called instances of misconduct on the part of the father prior to the quarrel at Christmas should be ignored as trivial and unimportant. He also expressed the opinion that the father's violence of gesture and language at that time—for that, after all, is all it amounted to—were, under the circumstances, natural and justifiable.

I agree with the views and conclusions of the learned Judge both upon the facts and the law.

The facts resemble those before a Divisional Court in *Re Mathieu*, 29 O.R. 546, except that here the child is considerably older. At p. 549 Street, J.—a very wise and careful Judge—says: "Where a husband has done no wrong and is able and willing to support his wife and child, this Court will not take away from him the custody of his child merely because the wife prefers to live away from him and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. There is no reason here, apart from the mere caprice of the wife, why the child should not have the advantage of living with both her father and mother: to do so would be far better for her than to live with either the father or mother alone, and it must be the aim of the Court not to lay down a rule which will encourage the separation of parents, who ought to live together and jointly take care of their children."

I do not quote further: but the whole judgment is singularly applicable to the situation in this matter.

The Infants Act, now R.S.O. 1914, ch. 153, sec. 2 (1), originally 50 Vict. ch. 21, sec. 1 (1), was not, in so far as it expresses concern for the welfare of the infant, intended to exalt the interest of the infant into one of paramount importance, as contended by the learned counsel for the mother, nor was it even the introduction of a new principle, but rather the adoption by the Legislature of a rule which had been long acted upon by the old Court of Chancery. See *Andrews* v. *Salt* (1873), L.R 8 Ch. 622, 640. The exact language is, "having regard to the welfare of the infant, *and* to

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the conduct of the parents, *and* to the wishes as well of the mother as of the father." Other things, such as the conduct of the parents, being equal, when it happens that the wishes of the parents conflict, the Court must determine, having regard however to the father's practically immemorial right to control, unless he has forfeited that right by misconduct. Here no misconduct has been established against the father. It is not even suggested that he is a man of bad habits; he is not charged with having at any time committed physical violence, nor is it said that he is not fond of the child. The worst that is said is that he is not responsive enough, that he is cold, lacking in affection; on an occasion he actually preferred to dine with his own relation when in New York with his wife rather than break the engagement at the instance of his wife and dine with hers. He has been, it is said, parsimonious, but a bank clerk on $1,300 a year, or even on twice that sum, with a house in Toronto and a wife and a child to keep, must go carefully. He is evidently a man of ability, trusted by his employers, and likely, with a fair chance, to advance still further. He has already in ten years advanced from the position of an accountant to that of a manager at an important commercial centre, and from a salary of $1,300 to one of $3,000.

From all the evidence before us, and there is, at least in the bulk of the numerous affidavits and depositions filed, enough and to spare, it is to me very apparent that there is no sufficient reason for this husband and wife continuing to reside apart. The husband does not desire it, and there is no reason in his conduct towards his wife to justify it; I would even infer from the tone of the letter which I have before set out that the wife at that time had not given up all intention of resuming her place at her husband's side, and the activity of Dr. Howitt, even after the Christmas quarrel, undertaken with the concurrence, if not at the request of his daughter, to induce the head office to recall the infant's father to Toronto, points very strongly in the same direction. The mother, it is also said, suffers from occasional ill-health, and desires to remain near her father, who is also her physician; but, considering her duty as the petitioner's wife, she might at least make a trial of the change, which might even prove to be beneficial, especially if the trial is undertaken with a determination to make the best of things rather than the worst. Port Arthur is not yet of course Toronto, but I believe it is quite a

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civilised place, and even not without a plentiful supply of competent physicians.

I think the appeal must be dismissed, but without costs; and the order should not issue until the petitioner has satisfied the Court that he has made due provision to receive and properly care for the infant.

MAGEE and HODGINS, JJ. A., concurred.

MACLAREN, J.A.:—After a careful reading of the papers in this matter, I find myself unable to agree with the order appealed from.

I am of opinion that, in the circumstances disclosed in the affidavits in this case, an order should not have been made that Mrs. Scarth should "forthwith deliver the said infant into the custody of the said James Frederick Scarth," the father. It appears that he has no home to take her to, and until that is provided I do not think a tender, delicate girl of ten years of age should be thus dealt with. Our statute, R.S.O. 1914, ch. 153, sec. 2 (1), provides that in deciding as to the custody of an infant regard should be had (1) to the welfare of the infant, and (2) to the conduct of the parents. In this case it appears to me that sufficient regard was not had to what the statute has placed in the foreground as being of prime importance.

I do not think that any useful purpose would be served by going in detail into the criminations and recriminations that have been put forward; but, taking into consideration all the facts, I have come to the conclusion that it is not in the interest of the child that she should be now removed from the care of her mother, where she is being confessedly well-cared for, but that she should be allowed to remain there in the meantime, subject to proper arrangements providing for the father having ample opportunities of seeing her and possibly having her with him from time to time, as may be arranged.

Appeal dismissed; MACLAREN, J.A., *dissenting.*

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Nova Scotia Supreme Court, Graham, C.J., Longley, J., Ritchie, E.J., and Harris, J. January 11, 1916.

1. ASSIGNMENT FOR CREDITORS (§ VIII A—65)—DISPUTED CLAIMS—CORROBORATION—SUFFICIENCY.

There is no difference as to the degree of corroboration required between a claim attacked under sec. 5 of the Statute of Elizabeth, ch. 13, and a claim where one seeks to rank as a creditor; and where

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any such claim is disputed the items thereof must be established by sufficient corroborative evidence.

[*Merchants Bank* v. *Clarke*, 18 Gr. 594; *Morton* v. *Nihan*, 5 A.R. (Ont.) 20; *Koop* v. *Smith*, 25 D.L.R. 355, 51 Can. S.C.R. 554; *Maddison* v. *Alderson*, 8 App. Cas. 467; *Holmes* v. *Bonnett*, 24 N.S.R. 279; *McDonald* v. *Dominion Coal Co.*, 36 N.S.R. 15, applied.]

Statement

APPEAL from the judgment of Meagher, J., allowing plaintiff to rank as a creditor, which is reversed.

H. Mellish, K.C., and *V. J. Paton*, K.C., for appellant.

W. L. Hall, K.C., for respondent.

Graham, C.J.

GRAHAM, C.J.:—Moses O. Thomas, late of Milton, perpetrated a very considerable fraud on his creditors. He purchased on credit a large quantity of goods for his shop (he had one at Milton and one at Liverpool) and very shortly afterwards, *i.e.*, on October 3, 1914, by a sharp sale, sold those in the Milton shop to his brother Abraham Thomas, a pedlar, for a mere fraction of their value. The goods at their invoice value, taken by the assignee for creditors, amounted to $17,000. That may include $5,500 in the Liverpool shop. But those in the Milton shop were actually sold by the assignee for $7,500 cash. Moses O. Thomas went through the form of selling to his brother these goods for $1,500; his book debts, some $2,000, for $150, and his two horses for $150. His liabilities turned out to be some $30,000. Of course the attempted sale to his brother was set aside in this Court as fraudulent and void. He was also tried criminally and served a sentence of sorts. The plaintiff, Abraham Josephs, had been a pedlar, selling goods on the road for Moses Thomas, but in March, 1914, became his manager in the shop at Milton. He and Moses and Abraham Thomas and Helen Thomas, the sister of the latter, all lived together at a house in Milton. I have no doubt from the evidence that the plaintiff was aware at the time of the fraud that Moses was perpetrating it and aided and abetted him therein.

Before passing, it will be seen that if $1,000 of the amount supposed to be paid to the debtor was simply passed over to Allie Youbie, an alleged creditor, the position of the creditors generally was not much improved by the transaction. However, there was a creditors' assignee appointed to the estate of Moses. When the time came for putting in claims of creditors this plaintiff turned up with a claim. On November 6, 1914, he

swore to his claim. This is the account attached to the sworn statement:—

Moses O. Thomas. Milton, Nov. 6th, 1914.

To Abraham Josephs, Dr.

1910.			
Oct. 11	To loan (cash) to Moses O. Thomas	$867.29	
	Interest on $867.29 at 7 per cent. to date as agreed	245.00	$1,112.29
1914.			
March 1	To 5 months' wages peddling at rate of $500 per year from Oct. 1, 1913 to March 1, 1914		209.17
Oct. 1	To 7 months' wages managing store in Milton at $50 per month from March 1, 1914 to Oct. 1, 1914		350.00
			$1,671.46

Later, when the claim was contested, the plaintiff put forward a promissory note for part, which is as follows:—

$837.96. Milton, N.S., October 11th, 1910.

I promise to pay to the order of Abraham Josephs at the Bank of Nova Scotia, Liverpool, N.S., the sum of eight hundred and thirty-seven 96/100 dollars with int. 7%. Value received.

No. 29. M. O. THOMAS.

Now, the statute requires a creditor holding any security, to put that forward with his claim, and it is worthy of remark, that although he had a solicitor to prepare his claim, the note was not put forward until afterwards. Moreover, he put it forward as a cash loan. Now, it turns out to be not a cash loan at all but a note made upon that date of earlier notes or items. It is to be noticed that the principal claim, the amount other than the wages, namely, $867.29, was 4 years old and would be stale at least. But I believe it is fictitious as well as the claim for wages.

It is incredible that this plaintiff stood by when the $17,000 worth of goods and other property was transferred to the debtor's brother, leaving nothing behind, and $1,000 of the consideration handed over to Allie Youbie in his presence, and no provision made for him of this long-standing claim, and no demand made all those years for payment. It does look as if part of the fiction was that the old claim and the note were merely fabricated to take up the balance of the consideration,

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$1,850 (after paying Allie Youbie) supposed to have been paid by the brother, Moses O. Thomas, so that creditors would have nothing at all to look for.

One naturally looks in a case of this kind for corroboration of the evidence given by the parties to the transaction. A wholesome principle has been adopted in Ontario, requiring corroborative evidence in cases where such claims have been put forward. I see no difference between a claim attacked under the statute of Elizabeth, ch. 13, sec. 5, and the claim here, when the supposed creditor seeks to rank as a creditor.

In *Merchants Bank* v. *Clarke*, 18 Gr. 594, a case under the statute 13 Eliz. ch. 13, Mowat, V.-C., said, p. 595:—

> There is no evidence whatever except that of the parties themselves that this transaction was really a sale, or that the alleged purchase money was paid; and it has frequently been observed, that transactions of this kind ought not to be held sufficiently established by the uncorroborated testimony of the parties to it.

And in *Morton* v. *Nihan*, 5 A.R. (Ont.) 20, 28, it is said:—

> The rule laid down in *Merchants Bank* v. *Clarke*, 18 Gr. 594, even if not of universal application, is in general a safe and judicious one to be observed.

This principle has been recognized in the Supreme Court of Canada, *Koop* v. *Smith*, 25 D.L.R. 355, 51 Can. S.C.R. 554. I also refer to *Maddison* v. *Alderson*, 8 App. Cas. 467, Lord Blackburn. This principle has been invoked here: *Holmes* v. *Bonnett*, 24 N.S.R. 279; *McDonald* v. *Dominion Coal Co.*, 36 N.S.R. 15.

Now, in this case, Moses O. Thomas, the other party to this transaction, has not been called. But the trial Judge has put reliance on the testimony given by a sister of the Thomases, namely, Helen, a girl of 23, and when the note was written would be 19. She lived, as I said, in the house with them and the plaintiff who boarded there. This note is in her handwriting. As to its preparation she alleges that the amount of the note was taken from a book of Moses O. Thomas. That the "No. 29" appearing on the note was the page of that book.

Now, the books of account handed over to the creditors' assignee, including a ledger (which has leaves skilfully removed) contain no account of that character and make no reference to such an amount. In fact there is no account of this claim for Allie's wages or anything of that kind in any book.

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But it is contended that this must be in an older book nearer in date to the note's apparent date, which Moses did not hand over to the creditors' assignee. Well, none is produced to corroborate its earlier existence. And if it was an earlier ledger it would, one would suppose, be carried forward into the current ledger. But she gives no corroborative testimony as to the existence of a consideration for the note between them.

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I think I would not have considered her as an independent witness. But the important feature in connection with her testimony is how little she proves. The only fact is that the note was made in 1910 instead of 1914 with the circumstances moved back. That gives the note the appearance of validity. Moreover, the plaintiff would have had much more difficulty in making up a consideration at the later date. Even if it is moved back, there is difficulty. For of the supposed $800 only $300 can really be shewn to have passed at the earlier date from the plaintiff to Moses O. Thomas by the savings bank book which is produced in corroboration of this testimony and shews he once had that much. And, in passing, I think there was abundance of opportunity at least for that to be repaid.

My opinion is, that the claim on the note is supported only by the testimony of the plaintiff himself and that the testimony of Helen Thomas and the entries in the savings bank book constitute no real or trustworthy corroboration of the plaintiff's story.

I can hardly understand Moses keeping on foot a loan for which he was paying 7 per cent. and no hint made by anyone as to the plaintiff's board bill at the house during that long period.

The claim for wages does not shew any credit for board and no payments appear to have been made to the plaintiff by Thomas. It is difficult to know how he lived without expense during this period. There is no corroborative testimony to support the claim for wages of any kind.

I think the judgment appealed from should be reversed and the action dismissed with costs.

RITCHIE, E.J., concurred.

Ritchie, E.J.

LONGLEY, J.:—I regret to say that the facts in this case as

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they present themselves to me, are not favourable to upholding the judgment. I have had the plaintiff and various witnesses supporting him before me in another case and I was unable to believe a word that they said. It was found in that case that Moses O. Thomas had, at the instance of the plaintiff Josephs, disposed of stock and goods for the sum of $1,500 which were afterwards found to be worth much more, and were bought from the assignee *en bloc* for $7,500. I found at this time that the defendant Moses was indebted to the plaintiff, if we can believe his story, for the whole amount now sued on, and yet he deprived himself by this act of fraud of receiving any part of his money. When the claim was filed it was not a note but a mere statement of so much money advanced to the said Moses. The note was, in my judgment, got up afterwards, and the story of the girl who wrote the note does not, to my mind, seem worthy of belief for a single instant. The note was said to be due upon circumstances which were stated in one of the books by Thomas. All of the books of Thomas are in the hands of the assignee and no account of that description is shewn. The place where the entry should have been, if there were any entry at all, was torn out and a blank space remained. From what I know of the plaintiff and his associates, I fail to believe a single word that they utter, and I regard the case as one calling for the exercise of common prudence in believing it. I do not know whether the Judge below had ever sat on a case in which judgment was given setting aside the sale and permitting the assignee thereby to receive $7,500 for the stock of goods, but all the circumstances which the plaintiff and his witnesses attested to at that time were shewn to be false, and my judgment is that no evidence on their part should be believed or any judgment passed upon it. If the case had come before me I should have been compelled to have found for the defendant.

Harris, J. (dissenting)

HARRIS, J., dissented. *Appeal allowed.*

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BROWN v. COLEMAN DEVELOPMENT CO.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. December 29, 1915.

1. CONTRACTS (§ I E 2—70)—STATUTE OF FRAUDS—PROMISE TO REPAY ADVANCES TO CORPORATION.

An oral promise by an officer of a company to repay money advanced to the company is an original undertaking and not a promise to

answer the debt of another within the meaning of the Statute of Frauds as affecting its enforcement.

[*Lakeman* v. *Mountstephen* (1874), L.R. 7 H.L. 17, followed; *Guild* v. *Conrad*, [1894] 2 Q.B. 885; *Thomas* v. *Cook*, 8 B. & C. 728; *Wildes* v. *Dudlow* (1874), L.R. 19 Eq. 198, referred to; 24 D.L.R. 869, 34 O.L.R. 210, reversed.]

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Statement

APPEAL by the plaintiff from an order of Middleton, J., allowing an appeal from the report of an Official Referee. See 24 D.L.R. 869, 34 O.L.R. 210.

W. M. Douglas, K.C., and *S. W. McKeown*, for appellant.

H. S. White, for defendant Gillies, respondent.

Riddell, J.

RIDDELL, J.:—I accept the findings of my learned brother, so far as they set out the facts out of which the alleged contract arose, and the terms in which the said contract is expressed—and indeed the learned Judge is "unable to interfere with the findings of fact which has been arrived at by the Referee."

But I find myself unable to agree with the conclusion that the promise undoubtedly made was one made by Gillies to answer the debt of the company so as to let in the Statute of Frauds.

The promise was, "You advance this money and I will return it to you:" and this, as it seems to me, was an express contract of Gillies' own and only his own. It is of no importance that some third person, corporation or otherwise, has the advantage of the advance: *Thomas* v. *Cook*, 8 B. & C. 728; *Wildes* v. *Dudlow* (1874), L.R. 19 Eq. 198; *Guild & Co.* v. *Conrad*, [1894] 2 Q.B. 885 (C.A.); *Lakeman* v. *Mountstephen* (1874), L.R. 7 H.L. 17.

In this last case, Mountstephen had a contract with the board of health of a town, but was not inclined to perform a necessary part of it; Lakeman, the chairman of the board, said to him, "Go on and do the work and I will see you paid;" the Court of Queen's Bench held that this could only be a promise to pay if the board did not: *Mountstephen* v. *Lakeman* (1870), L.R. 5 Q.B. 613. On appeal, the Exchequer Chamber held that there was evidence that the chairman had made himself primarily liable: *Mountstephen* v. *Lakeman* (1871), L.R. 7 Q.B. 196. The defendant appealed to the House of Lords; the appeal was dismissed. The leading judgment was given by the Lord Chancellor (Lord Cairns), who thought the *primâ facie* and natural meaning of the words was, that the contractor was to go on and do the work, not troubling himself about the board, and the chairman would pay. Lord Selborne goes further and says that there is not a particle of evi-

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dence from which the House "ought to conclude that the board was actually liable" (p. 26). The present case, as it seems to me, is *à fortiori*.

It is argued that the plaintiff rendered his account to the company—but the same thing took place in the *Lakeman* case, L.R. 5 Q.B. 613, at p. 615; and the subsequent transactions between the parties here are, to say the least, as favourable to the plaintiff's as to the defendant's contention.

I would allow the appeal with costs, and reinstate the Referee's finding with costs before the Weekly Court.

Latchford, J.

LATCHFORD, J.:—The learned Judge appealed from found himself unable to interfere with the finding of fact arrived at, upon contradictory testimony, by the Referee—that the advance made by the plaintiff was an advance to Gillies, and not to the company. Yet because Brown afterwards, in an account rendered to the defendant, included the amount of such advance, $9,247, with what he claimed to be due him for salary, and subsequently agreed to accept $7,000 from the company in consideration of releasing the company and Gillies from any claim which he had against them, the conclusion was reached that the promise made by Gillies was in truth a promise to answer for the debt of another—the company—and, therefore, within the Statute of Frauds.

With great respect, I find myself unable to agree in the judgment appealed from. In rendering the account and making the subsequent agreement, Brown did not release Gillies from the liability attaching to the original agreement as found—"Advance this money and I will repay you." It was a matter of indifference to Brown whether the moneys were repaid by Gillies or by the company. When the company did not pay the reduced claim of $7,000, in consideration of which payment Brown was to release, not only the company, but Gillies, the original liability of Gillies, whatever it was, remained unimpaired.

That liability, according to the finding, was to repay Brow the amount which he was requested by Gillies to pay out on behalf of the company.

It was a direct primary liability of Gillies to Brown. The statute has no application to such a case.

I therefore think the appeal should be allowed with costs here and below.

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Kelly, J.

KELLY, J.:—In the form this matter has assumed, the crucial question is, whether there was or was not original liability on the part of the respondent (Gillies) to pay the appellant the money he advanced. That there exists a liability of some one to the appellant, to the extent of $7,000 and interest, both the Referee and my brother Middleton, to whom an appeal was taken from the Referee's judgment, agree; the former finding that the respondent made himself primarily liable, while the latter's view is that the promise made was in truth a promise to answer for the debt of the defendant company (which he finds liable to the appellant); and, it not being in writing, the Statute of Frauds affords a defence to the promisor. My brother Middleton finds himself unable to interfere with the Referee's findings of fact. On these facts the case must be determined.

As I read the evidence, the respondent's promise was, not to pay the company's debt, but to repay the appellant's advances made on the company's account or for the company's benefit at the respondent's request and on his promise to return the money. His later promises and admissions are corroborative of this view. That it was the company that was deriving immediate benefit from these advances is not of itself conclusive of a debt due by it; nor does that circumstance exclude original liability by the respondent any more than in *Lakeman* v. *Mountstephen*, L.R. 7 H.L. 17, the fact that the local board of health, of which Lakeman was the chairman, benefited from the work done by Mountstephen, absolved the former from original liability. The form of promise here was that if the appellant would advance the money "and keep the thing alive" (that is, money to the workmen to keep the operations of the company going), he (the respondent) had moneys coming in and would return it to him. This language is not more indicative of a promise to pay the debt of another, in the event of that other's default, than was the promise made in the *Lakeman* case: "Go on and do the work" (for the benefit of the local board) "and I will see you paid."

The one arguable circumstance throwing any doubt on the respondent's original liability was, that the appellant rendered his account to the company, including in it a claim for wages, admittedly the company's debt, and that in the action he made the company a defendant as well as the respondent. That, however, is not necessarily a bar to his right to succeed against the latter,

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unless it can be deduced, *aliunde*, either that the promise was to pay not his own debt but that of the company in the event of its default, or that he abandoned his right to hold the respondent to personal liability on what I think was an express promise to pay his own obligation, contracted, as the Referee has found, as a debtor to whom the appellant gave credit. In the *Lakeman* case, while the contractor did the work on the order given him by the chairman of the board, and under the superintendence of the surveyor of the board, he sent in his account therefor to the board, debiting them with the amount; and when almost three years had elapsed and the board had not paid, he then for the first time applied to the chairman personally for payment; and in the final result of his action to enforce this claim against the chairman he succeeded.

After careful consideration of the evidence to ascertain the real effect of the respondent's promise, I am not able to say that the Referee's conclusions were not correct; and my opinion is, that the order appealed from should be set aside and the judgment of the Referee restored, with costs.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—I agree with the result arrived at by all my brothers.

The appeal will be allowed, and the Referee's finding reinstated, with costs here and below. *Appeal allowed.*

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CITY OF SWIFT CURRENT v. LESLIE.

Saskatchewan Supreme Court, Sir Frederick W. G. Haultain, C.J., Lamont, Elwood and McKay, JJ. January 8, 1916.

1. ARBITRATION (§ III—18)—MODE OF ATTACKING AWARD—AMENDMENT OR PLEA NO WAIVER OF STATUTORY PROCEDURE.

An action does not lie to set aside an award, but application for that purpose should be made by motion under the Arbitration Act, and where an action has been commenced, the error cannot be cured by amendment or waived by filing a defence.

[*Heming* v. *Swinnerton*, 5 Hare 350, applied; *Spettigue* v. *Carpenter*, 3 P.W. 361; *Ives* v. *Medcalfe*, 1 Atk. 63, referred to; *Smith* v. *Whitmore* (1864), 2 DeG. J. & S. 297, 46 E.R. 390; *Wilkerson* v. *McGugan*, 2 D.L.R. 11; *Vernon* v. *Oliver*, 11 Can. S.C.R. 156, distinguished.]

2. PLEADING (§ I L—81)—SUFFICIENCY OF RELIEF PRAYED—DECLARATORY ORDER.

A statement of claim is not open to objection on the ground that a merely declaratory judgment or order is sought.

[Rule S.C. 222; *London Assocn. etc.*, v. *London & India Docks, etc.*, [1892] 3 Ch. 242; *Chapman* v. *Michaelson*, [1908] 2 Ch. 612, [1909] 1 Ch. 238 C.A.; *Oram* v. *Hutt*, [1913] 1 Ch. 259, [1914] 1 Ch. 98, C.A.; *Guarantee Trust Co.* v. *Hannay & Co.* 84 L.J.K.B. 1465, referred to.]

Statement

APPEAL from an order of Newlands, J., which is varied.

G. E. Taylor, K.C., and *C. E. Bothwell*, for appellant.

W. B. Willoughby, K.C., and *D. Buckles*, for respondents.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—This is an appeal from the order of my brother Newlands, striking out the statement of claim in this action. For the present purposes it will only be necessary to set out the last paragraph of the statement of claim, which is as follows: 28. The plaintiff claims:—

(1) Judgment, setting aside the said award.

(2) A declaration that no damage is payable by the plaintiff to the defendants by reason of the failure of the plaintiff to carry out the provisions of the agreement, dated the 8th day of December, A.D. 1911, and that the said agreement in so far as it requires the said corporation to perform the work aforesaid, was not made by the said corporation, and is *ultra vires* thereof.

(3) Such further or other relief as to this honourable Court shall seem meet.

The defendants entered an appearance in the action and on February 16, 1915, filed a statement of defence and counterclaimed for judgment on the award, and leave to enforce it as a judgment of the Court. Later, on April 15, the defendants served notice of motion to set aside the writ as an abuse of the practice and procedure of the Court, and to strike out the statement of claim on the ground that it did not disclose any reasonable cause of action against the defendants. This application was heard by my brother Newlands, and on May 19, he ordered the statement of claim to be struck out, for the reason that an action does not lie to set aside an award, but application for that purpose should be made by motion under the Arbitration Act.

The plaintiff now appeals from this order, its principal grounds for appeal being:—

(1) That the action to set aside an award was properly brought.

(2) That, in any event, that part of the action asking for the declaration mentioned above should have been allowed to stand.

3. That, after defence and counterclaim filed in the action, the defendants waived any irregularity in the matter of procedure.

In support of the first ground of appeal it was asserted that the plaintiff had the choice of applying to the Court in a summary way under the Arbitration Act, or to bring an action to set aside the award.

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Haultain, C.J.

There can be no doubt that the Courts of Chancery in England frequently set aside awards in suits brought for that purpose, on the ground of fraud, corruption, mistake, etc. When the submission was by agreement out of Court, the Courts of common law had no authority to set aside an award until the Stat. 9 Wm. III. which is now repealed.

For misbehaviour of the arbitrator, the only remedy, apart from statute, was by bill in equity, since it could not be pleaded as a defence to an action on the award. Many of the earlier decisions on the subject are very conflicting as to the jurisdiction of the Court in the case of awards made under submissions, which, under the Stat. of 9 Wm. III., could be made a rule of a Court of record.

Where the Act of Wm. III. did not apply, there is no doubt that the Court of Chancery would set aside an award on equitable grounds properly established. The Court of Chancery also acted in another way in such cases. An action at common law could always be brought to enforce an award, and the defence at common law was very limited.

When an award is put in suit at law, no extrinsic circumstance, nor any matter of fact *dehors* can be given in evidence to impeach it: if it be open therefore to any objection of this kind, the defendant must apply for relief either to a Court of equity by bill, or, if the submission has been made a rule of any Court of law, to the summary and equitable jurisdiction of that Court, of which submission has been made a rule: Bacon Abridgment, vol. 1. Title, Arbitrament and Award, p. 316.

See *Whitmore* v. *Smith*, mentioned in the headnote to *Smith* v. *Whitmore*, 2 DeG. J. & S. 297, 46 E.R. 390.

By the Stat. of Wm. III. provision was made by which the parties to a submission might agree that their submission should be made a rule of any of His Majesty's Courts of record. The Act further provided the procedure for the enforcement of the award, and further enacted as follows:—

And be it further enacted by the authority aforesaid, that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect and accordingly set aside by any Court of law or equity so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties anything in this Act contained to the contrary notwithstanding: Rev. Stat. (Eng.), vol. II., p. 71.

It was held in some earlier cases (*e.g.*, *Spettigue* v. *Carpenter*, 3 P.W. 361, referred to later), that even if the jurisdiction of the Court of Chancery was taken away by the Act, it was not excluded if the bill was filed before the submission was made a rule of Court. But this has been overruled by *Heming* v. *Swinnerton*, 5 Hare 350, referred to later.

It was holden by Lord Talbot (in *Spettigue* v. *Carpenter*), that in awards under the statute, the confirmation of the submission must precede the making of the award; but this hath been overruled; and properly enough, for it may happen that the award may be made in the vacation and before any term after the submission: Com. Dig. Arbitrament and Award, vol. 1, p. 321.

The case of *Heming* v. *Swinnerton* (1846), 1 Coop. T. Cott. 386, 47 E.R. 909, seems to me to finally decide main point in this case. The headnote to the case is as follows:—

Chancery has no jurisdiction over an award under the statute of Wm. III., although the bill be filed before the submission is made a rule of Court.

The Court of Chancery, on the equity side, is a Court of Record within the meaning of the statute. The notion which once prevailed that the jurisdiction of the Court was not barred by the statute, long since determined to be incorrect.

The jurisdiction of the Court excluded, where the submission is to be made a rule of the Court under the statute, unless exercised in the manner there prescribed.

(See also *Auriol* v. *Smith*, Turn. & Russ., 121, referred to by Lord Cottenham in *Heming v. Swinnerton* (*supra*), at pp. 921-923).

In the case of *Ives* v. *Medcalfe*, 1 Atk. 63, cited by the appellant, an award *and releases executed in pursuance thereof* were set aside in a suit in Chancery on the ground that a certain very material document was only shewn to one of two arbitrators. There is nothing in this case to shew that the submission was made under the statute, and the question of jurisdiction was not raised or discussed.

Another case very much relied on by the appellant is *Smith* v. *Whitmore* (1864), 2 DeG. J. & S. 297, 46 E.R. 390.

The facts of this case clearly distinguish it from *Heming* v. *Swinnerton*, and the present case. There was no provision in the submission to arbitration for making it a rule of Court, and it had not been made a rule of Court under sec. 17 of the

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Common Law Procedure Act, 1854. It must also be noticed that the plaintiff in equity was asking to be relieved against a judgment in a common law action brought on the award, in which it was held that a defence attacking the award was not available to the defendant at law. Turner, L.J., whose dictum is relied on by the appellant, goes no further than to say: (46 E.R. at p. 394) :—

> Now, looking at the case independently of authority, it cannot be denied that there has at all times been jurisdiction in this Court to set aside awards, nor, as I think, can it be contended that the fact of exclusive jurisdiction having been given to Courts of law to set them aside in certain cases and under certain circumstances, can take away the original jurisdiction of this Court in cases in which those powers have not been invoked.

The case of *Johanneson* v. *Galbraith*, 1 W.L.R. 445, 3 W.L.R. 275, was decided under rules of Court and statute law, which make it quite inapplicable to the present question. Mathers, J., at p. 277, 3 W.L.R., says:—

> There is nothing to shew that the award in question is one to which the provision of the statute 9 & 10 Wm. III. ch. 15, applies.
>
> No question, therefore, arises on this appeal as to the jurisdiction of the Court to set aside an award otherwise than by applying the summary proceedings provided by that Act, and within the time limited by it.

In *Wilkerson* v. *McGugan*, 2 D.L.R. 11, a case in our own Court, an award was set aside in an action brought for that purpose. In that case both parties submitted to the jurisdiction of the Court and fought out the case on the merits. The case therefore cannot be considered as of any authority on the present point.

The case of *Vernon* v. *Oliver*, 11 Can. S.C.R. 156, decided that a Court of equity in New Brunswick had power to set aside an award on bill filed for that purpose. It does not appear in the report of the case (*Vernon* v. *Oliver*), nor can I discover in the Statutes of New Brunswick that there was any legislation in that province similar to sec. 17 of the Common Law Procedure Act (1854), or to our Arbitration Act. The decision, therefore, in my opinion, does not bind in this case.

In *Re Humberstone and the City of Edmonton*, 14 W.L.R. 492, only decided that an award under the provisions of the Edmonton Charter was not an order of a Judge within the meaning of "An Act respecting the Enforcement of Judges

Orders in Matters not in Court," and that, consequently, no appeal lay from the award. It also decided that the Arbitration Ordinance (Alberta), which is identical with our own Act, does not apply to an enforced statutory arbitration. The opinion was expressed by several members of the Court that, as there was no submission that could be made a rule of Court and the Arbitration Ordinance did not apply, the award could not be set aside by motion, and, consequently, the equitable jurisdiction of the Court could be invoked by action.

Sec. 14 of the Judicature Act (R.S.S. ch. 52), enacts that:—

The jurisdiction of the Supreme Court shall be exercised so far as regards the procedure and practice therein in the manner provided by this Act, and the rules of Court in force in Saskatchewan, or in the manner provided by rules of Court made from time to time under the authority of this Act and where no special provision is contained in this Act or the said rules, it shall be exercised as nearly as may be as it was exercised in the Supreme Court of Judicature in England, as it existed on the first day of January, 1898.

Our rules 589 and 590 can hardly be said to provide the procedure and practice for setting aside an award. But Rule S.C. 796 provides that:—

Where no other provision is made by the Act on these rules, the present procedure and practice remain in force.

The "present procedure and practice" will be found in the Judicature Ordinance, ch. 21, Cons. Ords. N.W.T. (1898).

The provisions of the Ordinance relating to this question are as follows:—

3. The jurisdiction of the Supreme Court of the North-West Territories shall be exercised so far as regards procedure and practice in the manner provided by this Ordinance, and the rules of Court, and where no special provision is contained in this Ordinance or the said rules, it shall be exercised as nearly as may be as in the Supreme Court of Judicature in England, as it existed on the first day of January, 1898.

20. The practice and procedure in the Supreme Court of the Territories shall be regulated by this Ordinance and the rules of Court; but the Judges of the Supreme Court, or a majority of them, shall have power to frame and promulgate such additional rules of Court not inconsistent with this Ordinance as they may from time to time deem necessary or expedient.

21. Subject to the provisions of this Ordinance and the rules of Court, the practice and procedure existing in the Supreme Court of Judicature in England on the first day of January, 1898, shall, as nearly as possible, be followed in all causes, matters and proceedings.

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Rules of Court: Every action, except as otherwise provided, shall be "commenced by writ of summons. . . ."

458. Applications for summonses, rules and orders to shew cause and applications, authorized to be made by these rules, may be made *ex parte*. Other motions in Court shall be by notice of motion and other applications in Chambers by summons, except where otherwise specially provided. But the Court or Judge, if satisfied that delay caused by proceeding in the ordinary way would, or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or Judge may think just; and any party affected by such order may move to set it aside or to vary it.

459. Every notice of motion or summons to set aside, remit or enforce an award, or for attachment or committal or to strike off the rolls, shall state, in general terms, the grounds of the application; and where any motion is made by notice, a copy of any affidavit intended to be used shall be served with the notice of motion: Rules of Court, Genl. Practice and Procedure (1898).

These provisions clearly introduce the practice and procedure as they were in England on the 1st January, 1898.

The jurisdiction of the English Courts in the particular matter in question was exercised under a practice and procedure which had been long established, that is by motion in Court or Chambers as the case might require.

Our Rule of Court No. 1 (which is the same as Rule 1 in the Judicature Ordinance) enacts that, "every action, except as otherwise provided, shall be commenced by writ of summons."

Action is defined by the Judicature Act as follows:—

Action shall include suit and shall mean a civil proceeding commenced by writ or in such other manner as is, or may be, prescribed by this Act, or by rules of Court.

It is clear from the foregoing that: (1) The practice and procedure to be followed in this province for setting aside an award is the practice and procedure as it was in England on the 1st January, 1898; (2) The jurisdiction of the Court is to be exercised according to that practice and procedure; (3) The "action" in this case should have been commenced by motion and not by writ in the manner prescribed by the Act and Rules of Court.

I am further of opinion that this is not a mere question of wrong procedure which can be cured by amendment or waived

by filing a defence, and on this point I follow the decision of my learned and distinguished predecessor in *Gray* v. *Balkwill*, 5 W.L.R. 257.

Having disposed of the 1st and 3rd grounds of appeal, I shall now consider the second ground, which is: That in any event that part of the statement of claim asking for the declaration mentioned above should be allowed to stand.

This question involves the consideration of Rule S.C. 222.

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

This rule is identical with the English rule, Order 25, r. 5, and has been dealt with so fully in the cases mentioned below, that I shall merely state my opinion that the appellant is entitled to ask for the declaration, and the appeal to that extent should be allowed.

London Assocn., etc. v. *London & India Docks Joint Committee*, [1892] 3 Ch. 242; *Chapman* v. *Michaelson*, [1908] 2 Ch. 612, [1909] 1 Ch. 238, C.A.; *Oram* v. *Hutt*, [1913] 1 Ch. 259, [1914] 1 Ch. 98, C.A.; *Guaranty Trust Co. of New York* v. *Hannay & Co.*, 84 L.J.K.B. 1465 (affirmed [1915] 2 K.B. 536).

In the last cited case, Buckley, L.J., at p. 1474, said:—

The concluding words of Order XXV., rule 5, are capable of being read as empowering the Court to make declarations where relief could not be claimed. The language of the Chancery Procedure Amendment Act, 1852, sec. 50, was, "No suit . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief." The words of Order XXV., r. 5, are, "whether any consequential relief is, or could be claimed, or not." But it is impossible, I think, to read the words of the rule as giving the Court power to make a declaration where there is no cause of action. If that were its effect, this part of the rule would be *ultra vires*. If there is no cause of action, there is, in my opinion, no jurisdiction. A rule cannot create jurisdiction. The rule is only one of procedure—*per* Lord Davey, in *Barraclough* v. *Brown* (66 L.J.Q.B. 672, 677; [1897] A.C. 615, 624).

He, in effect says, that, while the rule is capable of being read as empowering the Court to make declarations where relief could not be claimed, it cannot bear that construction because it would create a new jurisdiction which the Rules Committee had no power to create.

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This difficulty does not exist here. Our rule 222 will be found in the Judicature Ordinance (R.O. ch. 21), as rule 152. The rules at that time were not made as they are now by the Judges under the authority of the Judicature Act, but were statutory enactments forming part of the Ordinance. If necessary, therefore, we can assume that the new jurisdiction was created by the legislature, and under sec. 13 of the Judicature Act is now possessed by this Court. The result of this appeal will, therefore, be as follows:—

As to the 1st and 3rd grounds, the appeal is dismissed, and as to the 2nd ground the appeal is allowed, and the order appealed from will be varied by limiting it to that portion of the statement of claim which deals with setting aside the award.

As the appellant has been unsuccessful in the main part of its appeal, and has only succeeded on a point which was very casually dealt with by counsel on both sides, there will be no order as to costs. *Judgment varied.*

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Judicial Committee of the Privy Council, Viscount Haldane, L.C., Earl Loreburn, Lord Moulton, Lord Sumner and Sir George Farwell. July 6, 1914.

1. EMINENT DOMAIN (§ III C 1—143)—COMPENSATION — SUBJACENT AND ADJACENT SUPPORT.

The effect of the Railway Act with regard to the expropriation of land by a railway company differs from that of the Railway Clauses Consolidated Act, 1845, in that under the former Act the company acquiring the surface has a right of support from minerals subjacent and adjacent to the line.

2. EMINENT DOMAIN (§ III C 1—143)—COMPENSATION—MINERAL RIGHTS.

Under the Canadian Act the owner of minerals is entitled to compensation for loss arising from the restriction of his rights, without waiting until he wishes to work the minerals; this compensation is to be ascertained as at the date of the deposit of plans, and once for all.

[*Davies v. James Bay R. Co.*, 13 D.L.R. 912, 28 O.L.R. 544, 16 Can. Ry. Cas. 78, varied.]

Statement

APPEAL and cross-appeal from a judgment of the Court of Appeal for Ontario, reducing an award of arbitrators appointed under the Railway Act of Canada (R.S. Can. 1906, ch. 37).

Sir R. Finlay, K.C., *A. W. Ballantyne*, and *Geoffrey Lawrence*, for the appellant.

P. O. Lawrence, K.C., *R. B. Henderson*, and *Tyrrell Paine*, for the respondents.

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The judgment of their Lordships was delivered by

VISCOUNT HALDANE, L.C.:—This appeal raises a question of importance as to the interpretation of the Railway Act of Canada. The case has been twice argued before the Judicial Committee. At the conclusion of the first argument it became clear that, of several points at first raised, the real one on which the parties had been so divided as to be unable to come to a settlement, was the point which became by agreement the exclusive subject of argument on the second hearing.

The relevant facts may be stated very briefly. The appellant claimed compensation from the respondents for the compulsory taking of part of the land owned by him in the Don Valley near Toronto. His claim related to several pieces of this land, and included compensation for damage sustained by the exercise of the powers of the railway company. The claim was referred to the arbitration of three arbitrators, who awarded in satisfaction a total sum of $238,583. On appeal to the Court of Appeal of Ontario this sum was reduced to $122,171. Both parties have appealed to His Majesty in Council from this decision. The cross-appeal of the respondents related to a claim in respect of a small piece of land which, as the result of arrangements come to after the first hearing, is not now in controversy. The case of the appellant on the second hearing was exclusively concerned with his rights as regards the minerals lying under the railway track over the land taken, and with certain minor matters which, including a question as to adjacent minerals, have been disposed of by the agreement of counsel. The remaining issue was, at the close of the first hearing, reduced to one of principle determining the compensation to be made. If the appellant is not to be paid for shale under the right of way (meaning the track of the railway), the award is to be for $119,831, while if he is to be so paid, the award is to be for $230,820.

The question which thus arises for decision relates to the basis of compensation, and depends on the construction of the Railway Act of Canada. Under this Act the respondents took such land of the appellant as was required for the purposes of the track. Under it is shale of considerable value. It is agreed

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that this shale can only be got by surface working, and in addition must be left practically entirely unworked in order that the surface occupied by the railway may be supported. Because the appellant was practically deprived of his right to mine for this shale the arbitrators agreed that he was entitled to be compensated for the injury thus inflicted on him. The Court of Appeal, on the other hand, took the view that as the respondents had not bought the minerals their value could not be taken into account in the present proceedings, but ought to be taken into account if the appellant applied hereafter to the Board of Commissioners established under the Railway Act for permission to work the shale. The reasons for this divergence of view will appear when their Lordships refer to the provisions of the Railway Act.

Before doing so it will be convenient, as the analogy of the law of England, and particularly of the Railways Clauses Consolidation Act, 1845, has been much referred to in the arguments, both in the Court below and before the Judicial Committee, to state what that law is, not only apart from, but as affected by, that Act. It is the more desirable to do so because the Railway Act of Canada is framed on a scheme which is in many respects different from the scheme adopted in England. In Canada the conditions to which railway construction is subject are different from those which prevail here, and the differences appear to have been carefully kept in view by the Dominion Parliament when deciding on the scheme of the Railway Act.

Apart from the English Railways Clauses Consolidation Act, when land is sold with a reservation of the minerals to the vendor, he cannot, in the absence of special bargain, work them so as to let down the surface which he has sold. The reason is that there is a natural right of support for the surface which passes to the purchaser when he buys it. Although the vendor retains the minerals and the right to work them, he can exercise this right only at his own risk. It is inaccurate to say that the purchaser buys, in addition to the surface, an easement of support for that surface. He acquires the right of support, not as a separate easement, but as a natural feature of the title to his

land. The value of this necessary right, which is incident to his ownership, is thus primâ facie included in the price which he has paid.

Such is the common law both in England and Ontario, but in England it has been completely altered in the cases to which they apply by secs. 77 to 85 of the Railways Clauses Consolidation Act, 1845. Under these sections, so far as concerns mines and minerals under the railway, or within the prescribed distance, which is normally forty yards on each side, the company is deprived of the natural right to support which it would have under an ordinary conveyance. Unless it has expressly purchased the minerals, the owner may work them in the fashion which is usual in the district, and even by open working in a way which may destroy the railway. He may let down the surface, for the natural right of support has been taken from its owner. But he must before working, give the company thirty days' notice of his intention, and the company may, then or thereafter, if it is willing to pay compensation, give him a counter notice, and so, on paying compensation, stop the working. These provisions are valuable to the company, for they enable it to defer finding capital for the purchase of the minerals under the land until, for the sake of safety, it becomes necessary to do so. On the other hand, the mine owner is, for a time at least, free to work, though the amount he receives as the price of the surface is diminished by the taking away from it of the incidental and natural right to support. If the owner claims on a compulsory sale of the surface for injurious affection of his title to the minerals, the answer to him is that his title is not at present injuriously affected inasmuch as he can work freely until he receives a counter-notice, after which he may be able to claim full compensation for the minerals themselves.

In the Dominion of Canada the law has been differently moulded. Their Lordships have given much consideration to the group of clauses in the Railway Act which deal with the policy adopted, and they think that their effect is as follows:—The company which acquired the surface was not, as by the English Act, deprived of the natural right to support from subjacent and adjacent minerals. It was, on the other hand, put

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on terms to compensate the mineral owner at once for loss of value arising from the liability to support which rested on him after severance of the titles to the minerals and to the surface. This compensation having been paid, the mineral owner was, by sections which have a separate and distinct purpose, restrained from working his minerals excepting under such conditions as might be imposed by the Railway Board in the interest of the safety of the public. These conditions, in the case of adjacent minerals, might be very easy. In such a case, just because the Board was likely to leave him comparatively free to work his mines, the initial compensation would be small. And where the minerals lay under the railway, and especially where they could only be won by surface working destroying the railway track, the compensation awarded initially would be heavy, inasmuch as the title to the minerals and their present value for working or for sale, would be materially impaired. Their Lordships recognize that considerations may have presented themselves to the Parliament of Canada quite different from those which presented themselves to the Parliament of Great Britain. In the latter country comparatively little land was available, and a different scheme from that adopted might have placed a heavy burden of finding immediate capital on the railway companies, and might also have unnecessarily interfered with the liberties of many mineral owners in the comparatively small areas dealt with. In Canada, on the other hand, where the railways were likely to extend over great stretches of undeveloped country, it may well have been wisest to proceed on the footing that mineral rights were likely to be less frequently of immediate practical importance and would be less often asserted. It would, in this view, be natural to let the railway companies assume at once under such circumstances liability to compensate for injurious affection of title to minerals, while, on the other hand, the mineral owner, whose title had been so affected, was placed under restrictions to be imposed when he, if he ever should, desired to proceed to work. The discretion was intrusted to the Railway Board, a judicial body intended to be presided over by a Judge and to have the assistance of experts.

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If this be the result of the Canadian legislation it was proper to take the course which the arbitrators took in the present case, and to award compensation for injurious affection.

Their Lordships now turn to the sections on which their view of the question of principle is founded. Section 26 defines the jurisdiction of the Commission. It is to decide on complaints that any company or person has failed to do any act, matter, or thing required to be done by the Act or the special Act, or by regulations, orders, or directions made under the Act, or that any act, matter, or thing has been done in violation thereof. By sec. 151 the company may purchase any land or other property necessary for the construction, operation, or maintenance of the railway. Sec. 177 enacts restrictions on the quantity of land so to be taken. Sees 169 to 171 relate to mines and minerals. The company is not (sec. 169), without the authority of the Board, to locate the line of its proposed railway or construct the same so as to obstruct or interfere with or injuriously affect the working of or the access to any mine then open, or for the opening of which preparations are being lawfully made. The company is not (sec. 170), unless the same have been expressly purchased, to be entitled to any mines or minerals under lands purchased or taken by it under the Act, except such parts as are necessary to be dug, carried away or used in construction. No owner, lessee, or occupier (sec. 171) of any such mines or minerals lying under the railway or its works, or within forty yards from them, is to work the same unless leave has been obtained from the Board. On any application to the Board for leave to work, the applicant is to submit full plans. The Board may grant such application upon such terms and conditions for the protection and safety of the public as to the Board seems expedient, and may order that such other works be executed or measures be taken as under the circumstances appear to the Board best adapted to remove or diminish the danger arising or likely to arise from such mining operations. The provisions as to compensation are to be found in sec. 191 and the following sections. Plans, profiles, and books of reference are to be deposited, and then application may be made to the persons who are owners of, or interested in lands

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(which by the definition section are defined in terms wide enough to include mines) to be taken, or which may suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway, and thereupon agreements may be made touching the lands or the compensation to be paid for the same, or the damages, or as to the mode in which such compensation is to be ascertained, and there may be a reference to arbitration. The amount of compensation or damage is, by sec. 192, to be ascertained as at the date of the deposit. By sec. 193 the notice served is to contain a description of the lands to be taken or of the powers intended to be exercised in regard to them, and a declaration of readiness to pay a certain sum or rent as compensation for the lands or the damages.

The sections referred to are those which appear to be most important for the purposes of the present question. Their Lordships interpret them as meaning that there is to be an immediate claim for compensation for the value of the lands taken and for injurious affection of any other hereditaments the title to which is affected, such as subjacent or adjacent mines and minerals. In default of agreement they think that the entire amount of compensation is to be ascertained by the arbitrators as at the date of the deposit of the plans and once for all. For the rest the mine owner remains entitled to his minerals but subject to any obligation of natural support which attaches on severance. The Board is to regulate the exercise by him of his remaining rights in the future, and the primary purpose of the intervention of the Board is to be the protection, not of the mineral owner or of the railway, but of the public. If the Board refuse him leave to work, his grievance is against the Board, to whom, and not to the railway company his application is to be made. The principle on which the Legislature has proceeded is apparently to dispose of the claim against the company once for all on the occasion of taking the land. Their Lordships do not think it necessary to decide whether, either in sec. 26, or in sec. 59, which relate to the powers of the Board to direct the construction of buildings and works on proper terms as to compensation, or in sec. 171, or elsewhere in the Act, any power can be found which enables the Board to award to the owner of

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mines and minerals, who has applied to it for leave to work, compensation by reason of the Board having restricted his liberty in the interest of the public. It may be that the Legislature has thought it right to give no such power. The only point which it is either necessary or proper to decide now is that power to award compensation as between the railway company and the owner of subjacent or adjacent mines for injurious affection of the title to the minerals has been intrusted to the arbitrators. The principle adopted is, as has been already observed, one which the case of a country of great extent, with its minerals widely scattered, might not improbably commend itself as more adapted to the circumstances than the principle of the English statute. At all events this is the principle which the language of the statute appears to lay down.

Their Lordships have examined the reasoning of the careful judgment of Hodgins, J., as delivered on behalf of the Court of Appeal, in which the decision of the arbitrators was reversed. There are two main grounds on which, after consideration, they find themselves unable to concur in his reasoning. They think that the arbitrators were right in holding that the mineral owner suffered immediate damage as the consequence of the duty of support which, on severance, the law imposed on him, and that so far as the shale under the railway track was concerned, he substantially lost the value of his shale, the more plainly so because it could only be worked from the surface. It is no answer that the owner probably did not desire to get at his minerals at once. His title to them was practically, so far as it was possible to foresee, destroyed, and he suffered immediate loss accordingly. They are further, for the reasons already given, of opinion that even if they were satisfied of the correctness of the view of the learned Judge on the other point, they ought not to treat it as arising at present. That view was that the Board has the power, upon the application of the mineral owner, to order the railway company to "acquire such part of the minerals as in England would be covered by the counter-notice of the railway company; or to put it in another form, to so support and maintain their line, and to acquire the necessary land and

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minerals for that purpose." They are not, as at present advised, prepared to express the opinion that the Canadian Act has substituted for the English system of notice, counter-notice and compensation the interposition of the Board, and that the latter has jurisdiction to protect the mine owner and the railway company by its order. It appears to their Lordships that it may well be that the powers of the Board to impose conditions on the action of the mineral owner are conferred for a wholly different purpose, and do not extend to the making of any such order. But they hold that the question does not arise for immediate decision if it is once established that injurious affection has occurred to the extent of depriving the mineral owner of the present value of his subjacent minerals by the imposition of the duty of support and the taking away of the right of surface working. They think that the arbitrators in substance dealt with the question of compensation on a proper principle. As to adjacent minerals no controversy arises.

In the result their Lordships think that the appellant was entitled to be awarded compensation for loss of title, a loss substantially equivalent under the circumstances to the value of the shale. They hold that the arbitrators were bound to take this loss into account in assessing the compensation to be paid, and that the respondents must therefore pay to the appellant the agreed sum of $230,820, and they will humbly advise His Majesty accordingly.

As the appeal has resulted in a settlement of other questions in dispute, and as the victory in the litigation is a divided one, they think that the proper mode of dealing with the costs will be analogous to that adopted in the Court of Appeal, and that there should be no costs either of the first hearing of this appeal or of the cross-appeal, or of the hearing in the Court below. The respondents ought, however, to pay to the appellant the further costs limited to those occasioned by the attendance of counsel and solicitors at the second hearing before this Board.

Judgment accordingly.

MILK FARM PRODUCTS AND SUPPLY CO. v. BUIST.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. January 10, 1916.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION—USE OF PROPERTY PREVENTED BY MUNICIPAL BY-LAW.

Rescission of a sale and the recovery of purchase money paid on account thereof cannot be had merely because the prospective use of the property is rendered impossible by a municipal by-law.

Statement

APPEAL from the judgment of Middleton, J., dismissing an action for the rescission of an agreement.

S. F. Washington, K.C., and *A. M. Lewis*, for appellants.

D. Inglis Grant, for defendant, respondent.

Garrow, J.A.

GARROW, J.A.:—The action was brought to obtain the rescission of an agreement dated April 24, 1914, made between the plaintiffs and the defendant, for, among other things, the sale by the defendant to the plaintiffs of certain premises on Emerald street south, in the city of Hamilton, upon which the defendant was then carrying on a dairy business, and a return of $8,500 which had been paid upon account of the purchase-money.

The grounds upon which rescission is sought, as set out in the statement of claim, are: (1) that the agreement became impossible of performance; (2) that the object and purpose of the agreement were frustrated and the consideration for it failed; (3) that the agreement was and is illegal; and (4) that the parties to the agreement were mutually mistaken as to the existence of a certain by-law of the city which rendered their contemplated enterprise under the agreement illegal.

There seems to be little or no dispute about the facts. The plaintiffs, an incorporated company, contemplated entering extensively into the business of supplying milk and milk products at the city of Hamilton. The defendant had been successfully carrying on, upon the land in question, business of a somewhat similar nature, and it was deemed advisable to acquire not only his premises but his goodwill and his services as manager of the new business, all of which are provided for in the agreement. It was also intended considerably to enlarge the buildings and plant so used and occupied by the defendant, and considerably to extend and increase the then existing business. But, shortly after the agreement had been entered into, what appeared to the

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parties to be a serious obstacle, preventing the enlarging of the existing buildings upon the land, developed, in the shape of a city by-law passed on the 27th October, 1913, which had included the defendant's land in a residential area and prohibited the erection within it of any "factory," among other things. Efforts were made for a time by both sides to obviate the difficulty which appeared to be thus interposed, but in the end without success, with the result that the whole enterprise was apparently given up by the plaintiffs, and the defendant—who had been in possession as manager for the plaintiffs under the agreement—resumed possession as owner after notice to the plaintiffs that he intended to do so by reason of the plaintiffs' default in carrying out the agreement. Thereupon this action was brought.

The defendant does not ask that the agreement should be performed, but is apparently content to accept a cancellation if the plaintiffs' claim for a refund is disallowed.

Middleton, J., was of the opinion that rescission could not be granted, because the plaintiffs were not in a position to restore the defendant to the position of things which existed before the agreement was entered into. He also expressed the opinion that the agreement should be regarded as executed and not merely executory, because the plaintiffs had taken possession; and that it could not be said that there had been a complete failure of consideration sufficient to justify rescission upon that ground.

It is not, in my opinion, a material circumstance, as was urged before us, that a considerable portion of the purchase-money, now sought to be recovered, was paid after both parties were aware of the existence of the by-law. Both parties were, when the payments were being made, of the opinion, or at least indulging in the hope, that the difficulty created by the by-law would be overcome, and were looking forward to a full performance of the agreement. Nor is it, in my opinion, material to consider whether the by-law, which by one of its clauses permits the city council to suspend its operation in individual cases, was a valid by-law which the parties were bound to obey: a somewhat similar provision having been held fatal in *Re Nash and McCracken* (1873), 33 U.C.R. 181; for both parties ac-

quiesced in the conclusion that it was a valid by-law and that it presented an insuperable obstacle to carrying out the original intention.

The plaintiffs' real difficulty, it seems to me, is that while disappointed in the enlarged use to which it was proposed to put the defendant's land, by extending and increasing the buildings and plant, they did get, or at least could have got, under the agreement, this very land, with the business and goodwill agreed to be purchased. Under such circumstances, it is, I think, quite out of the question to say that there was a total or even a partial failure of consideration; there being no evidence that the price agreed upon was made in any way to depend upon the proposed additions and enlargements.

The defendant is in no way shewn to be responsible for the plaintiffs' disappointment. He practised no deceit and made no false or erroneous representations for the purpose of bringing about the sale. Indeed, so far as appears, he was probably as much disappointed as the plaintiffs; for, in addition to the disturbance of his own affairs, he lost the management, at what seems a large salary, of the proposed new business.

Nor was there any mistake, mutual or otherwise, about the parties, the subject-matter, or the consideration—the usual grounds for relief upon the plea of mistake. I have not been able to find, nor did I expect to find, a single case in which relief had been granted to a purchaser because he was disappointed in the use to which he might be able to put the purchased property, unless some other ground intervened.

A somewhat similar question is discussed in *Smith* v. *Hughes* (1871), L.R. 6 Q.B. 597. That case, it is true, arose upon a sale of goods, to which in some respects different principles apply, but it clearly determines that a wrong impression upon the part of a purchaser as to the quality of what he is buying (new oats instead of old) is harmless unless brought about by the vendor: a conclusion, it seems to me, quite as applicable to a sale of land as to a sale of goods.

Other cases, such as *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149, and *Scott* v. *Coulson*, [1903] 1 Ch. 453, before Kekewich, J.,

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and, in appeal, [1903] 2 Ch. 249, acknowledge the correctness of the principle. In the former, at p. 164, Lord Cranworth puts the plaintiff's right to be relieved upon the ground of mistake in accepting a lease of his own property upon the ground that he had been honestly but mistakenly misled by the uncle of the lessor, under whom she claimed. And in *Smith* v. *Coulson* it appears, at p. 453 of the report in [1903] 1 Ch., in the statement of facts, that the defendant Coulson had received information which led to the belief that the person on whose life the policy of insurance respecting which the parties were contracting had been issued, was dead, and that he, Coulson, had, before the close of the negotiations, undertaken to communicate to the plaintiffs any information which he might receive as to the existence of the assured, but did not disclose the information he had received. See also *Tamplin* v. *James* (1880), 15 Ch. D. 215.

Even if it should be assumed, as the plaintiffs contend, that there was a failure of consideration, the plaintiffs' position would not, in my opinion, be improved. In what are called the "coronation" cases the principle applied in *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651, was approved, and it was laid down more than once that money which had been paid upon the contract before the failure could not be recovered back. See *Herne Bay Steamboat Co.* v. *Hutton*, [1903] 2 K.B. 683, in which the defendant unsuccessfully counterclaimed for a return of a deposit. There was a similar counterclaim in *Krell* v. *Henry*, in the same volume at p. 740, but it was not pressed. See also *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, in the same volume at p. 756, an unsuccessful action to recover a payment made before the event.

In my opinion, the appeal fails and should be dismissed with costs.

Maclaren, J.A. MACLAREN, J.A.:—I agree.

Magee, J.A. MAGEE, J.A.:—I agree in the result.

Hodgins, J.A. HODGINS, J.A.:—It was, no doubt, the purpose of both parties to erect a factory for the purpose of the proposed milk business on the lands purchased. That was the underlying idea which induced the appellants to do what they did. This element was common to both parties. The acquisition of the title, the

employment of the respondent as manager, the inclusion in his salary of $100 per month to superintend the construction of the new plant, and his acquiring stock in the company, were all done to put the appellants in a position to carry out their project, in which the respondent, as a stockholder, became largely interested. The respondent admits that going into the milk business was the primary object, and that, if a plant for pasteurising milk could not be put up, it would frustrate the main object of the agreement. He seeks to limit this view to the appellants, but, I think, unsuccessfully.

Pursuant to the contract, the appellants became the owners of the business of the respondent, and were, in legal contemplation, ready and willing to carry out the purpose they contemplated.

The prohibition in by-law number 1534 existed at the date of the contract; and, if it rendered the purpose an impossible one on that date, the contract would be void *ab initio*, subject to whatever qualifications in the consequent rights of the parties might be found to subsist owing to its having been executed partly or in whole: *Clark* v. *Lindsay* (1903), 88 L.T.R. 198; *Blakeley* v. *Muller & Co.*, [1903] 2 K.B. 760 (note); *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903] 2 K.B. 756, 764; *Chandler* v. *Webster*, [1904] 1 K.B. 493; *Elliott* v. *Crutchley*, [1904] 1 K.B. 565, [1906] A.C. 7.

In view, however, of the decision in *Re Nash and McCracken*, 33 U.C.R. 181, the by-law was always bad on its face. The underlying purpose of the contract, therefore, has never been rendered legally impossible. I do not see that mistake in appreciating the effect of the by-law makes any difference in this result. The appellants found their case upon the contract having been always impossible of performance. If that position cannot be maintained, their mistake in imagining that it could be, is not relevant, as it seems to me.

In the result, the appeal must be dismissed and the judgment affirmed. If the legal effect of the by-law was what the appellants assert, I am not prepared to say that their right, if under the circumstances they have any right, to recover back the

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money paid, could be completely met on the ground stated in the judgment in appeal, though it is not necessary to decide that question.

MEREDITH, C.J.O.:—I agree. *Appeal dismissed.*

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REX v. DE MESQUITO.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, and McPhillips, JJ.A. July 13, 1915.

1. APPEAL (§ VII M3—535)—ERROR WARRANTING REVERSAL OF CONVICTION —CONFESSION IMPROPERLY ADMITTED.

Where the whole circumstances negative any reasonable inference that the accused freely and voluntarily made the confession or admission put in evidence against him, the uncontradicted evidence being all one way to shew that the accused was terrorized into making it, a conviction made in reliance upon such confession will be set aside on an appeal by case reserved; no order will be made remitting the case for a new trial if in the opinion of the Court of Appeal the interests of justice do not require it.

[*R.* v. *Lai Ping*, 8 Can. Cr. Cas. 467, 11 B.C.R. 102; *R.* v. *Mulvihill*, 18 D.L.R. 189, 22 Can. Cr. Cas. 354, referred to.]

2. EVIDENCE (§ VIII—674)—CONFESSION—PROOF THAT VOLUNTARY.

Where the master accompanied by a police constable threatened his servant saying "you will be arrested if you do not say where the stolen goods are," the statement made by the servant should be excluded from being put in evidence against him because it was not made freely and voluntarily.

[*R.* v. *Thompson*, [1893] 2 Q.B. 12; *Ibrahim* v. *The King*, [1914] A.C. 599; *R.* v. *Ryan*, 9 Can. Cr. Cas. 347, applied; and see *R.* v. *White*, 15 Can. Cr. Cas. 30, 18 O.L.R. 640; *R.* v. *Steffoff*, 15 Can. Cr. Cas. 366, 20 O.L.R. 103; *R.* v. *Rossi*, 17 Can. Cr. Cas. 182; *Trepanier* v. *The King*, 19 Can. Cr. Cas. 290; *R.* v. *Bogh Singh*, 12 D.L.R. 626, 21 Can. Cr. Cas. 323.]

Statement

CROWN case reserved.

W. M. McKay, for the Crown.

J. W. DeB. Farris, for the appellant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The question submitted for our decision was this: "Was the said written confession or admission properly admitted in evidence by me, or should I reject the same?"

My answer to this is that it was not properly admitted and it should have been rejected and the conviction should be set aside.

Martin, J.A.

MARTIN, J.A.:—The question of law reserved for us is whether or no the confession of the accused was properly admitted in evidence. The learned Judge in stating the case simply says that he "held the statement in writing was voluntarily made" but does not set out the evidence which he considered in coming to that conclusion as should be done: *R.* v. *Sleeman* (1853), Dears. C.C. 249; *Rex* v. *Todd* (1901), 4 Can. Cr. Cas. 514, 13 Man. L.R. 364; but simply attaches to the reserved case a transcript of the whole evidence taken at the trial. This has

caused a good deal of inconvenience and additional work to us because instead of the evidence on the question of the admissibility of the evidence being all taken at one time, according to the established practice, on the decision of that preliminary question by the Judge, which is a trial within a trial (*Boyle* v. *Wiseman* (1855), 24 L.J. Ex. 284; *R.* v. *Viau* (1898), 7 Que. Q.B. 362, 364, 368; *R.* v. *Ryan* (1905), 9 Can. Cr. Cas. 347, 9 O.L.R. 137; *R.* v. *Booth* (1910), 5 Cr. App. R. 177), it was taken at different times and is scattered about through the course of the trial and the confession was let in subject to its being later displaced—a practice which, if I may say so, is inconvenient and undesirable before a Judge solus, and before a jury is still more so, and will result in a new trial: *R.* v. *Sonyer* (1898), 2 Can. Cr. Cas. 501.

In determining the question of the propriety of the admission of the confession, the onus is upon the Crown to—

"prove affirmatively to the satisfaction of the trial Judge that it was made freely and voluntarily and not in response to any threat or to any suggestion of advantage to be inferred either directly or indirectly from language used by a person in a position of authority in connection with the prosecution of the person by whom the confession was made."

Per Osler, J.A., in *Rex* v. *Ryan* (1905), 9 Can. Cr. Cas. 347, 9 Ont. L.R. 137, who "among the legion of varying voices on the subject" adopts that very clear language from *R.* v. *Thompson*, [1893] 2 Q.B. 12, 17 Cox C.C. 641.

On the evidence it appears to me clear beyond doubt that the confession should have been rejected because the case is one where the master with a police constable in attendance (in plain clothes but known to the accused to be a constable) threatened his servant, saying "You will be arrested if you do not say where the goods are," thus bringing this case within *e. g.*, *R.* v. *Thompson* (1783), 1 Leach, 291; *R.* v. *Richards* (1832), 5 C. & P. 318; *R.* v. *Hearn* (1841), C. & Mar. 109; *R.* v. *Luckhurst* (1853), Dears. C.C. 245; *R.* v. *Rose* (1898), 67 L.J.Q.B. 289; and *R.* v. *Jarvis* (1867), L.R. 1 C.C.R. 96 (*per* Kelly, C.B., and Willes, J., at 99, as to the technical meaning of such expressions), some of which cases are not indeed so strong in favour of the respective prisoners as this is.

This admitted fact was alone sufficient to exclude, apart from what might be said about the other statements to the effect that

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if the servant would pay for the goods the matter would be kept from the knowledge of his wife who was ill; and also the evidence of the constable that the master and servant were "trying to fix it up between them." To my mind the whole circumstances entirely negative any reasonable inference that the accused was acting "freely and voluntarily;" I think, in short, he was terrorized to an unusual degree. The only suggestion that could be made to the contrary was that the threat, or inducement, related to another subject-matter, viz., certain goods at Chilliwack not the subject of the present charge (of stealing goods valued at $128.50 in the master's Vancouver office on 14th December, 1914), and therefore could not be imported into it: *R.* v. *Todd*, *supra*. But that is not the case on the facts here, because though the Chilliwack matter was mentioned, as well as some difficulty in Calgary, yet the conversation also related to the Vancouver theft and the threat or inducement extended to that as well as to the others. The accused indeed swore that before he signed the confession his master charged him with having broken into the Vancouver office in December, which is not in any way denied, and that is why he put the following note at the end of the confession, which covers the missing Vancouver goods:—

"Willing for goods taken from office, $128.50, to settle at $2.50 a week."

I wished judgment to be reserved primarily out of respect to the learned Judge below so that I could consider if there was any proper ground for refusing to confirm his decision because it was submitted that there was evidence before him on which he could reasonably have reached the conclusion he did and that consequently we could not interfere as this Court has no jurisdiction to entertain questions of fact except by leave under sec. 1021. See *R.* v. *Mulvihill* (1914), 18 D.L.R. 189, 22 Can. Cr. Cas. 354. *Mulvihill* v. *The King*, 18 D.L.R. 217, 23 Can. Cr. Cas. 194, 49 Can. S.C.R. 587.

I agree that if it were the case that the Judge had made a finding on conflicting facts before him, it would seem to be impossible to escape from it because it has long been decided that this question of fact must be tried and adjudicated upon by the Judge alone. Starkie on Evidence, 4th ed. (1853), 788; Russell on Crimes (7th ed., 1910), 2157; Taylor on Evidence (10th ed., 1906), par. 23A, p. 25; par. 872, p. 612; 9 Hals. 395; *Rex* v.

Hucks (1816), 1 Stark. 521, 523 (n); *R.* v. *Garner* (1848), 1 Den. 329, *per* Erle, J.; and *Bartlett* v. *Smith* (1843), 11 M. & W. 483, particularly the criminal cases cited by Baron Parks.

Two of the Judges of this Court of Criminal Appeal expressed the opinion in *R.* v. *Lai Ping* (1904), 11 B.C.R. 102, 8 Can. Cr. Cas. 467, that:—

"Where the question as to whether or not the Judge was right in his estimate of the credibility of the witnesses . . . it would generally happen that an appeal would be fruitless but that makes the question none the less a question of law and capable of being preserved."

My view was [11 B.C.R. 108]:—

"I am strongly of the opinion that where the point of law depends upon conflicting facts the finding of the magistrate is of the first consequence as to what facts are established by the evidence."

The fourth Judge, Mr. Justice Duff, said:—

"If the question reserved were whether or not there was any evidence upon which the trial Judge could hold that a confession was free and voluntary, that would be a question of law. On the other hand, if the decision of the preliminary question turned upon conflicting statements of fact made by witnesses, I should have thought that it was fairly clear that the correctness of such a decision could not be raised on a question of law. I should certainly find some difficulty myself in stating a case arising upon such a decision in the form of a question of law."

This case was cited by me in *R.* v. *Mulvihill*, 18 D.L.R. 189, 22 Can. Cr. Cas. 354, 19 B.C.R. 197, at p. 211, in support of the contention that the exercise of a Judge's discretion in postponing a trial was a question of law, but that view was not taken by a majority of my learned brothers or by the Supreme Court of Canada (18 D.L.R., 217), so it would follow that Mr. Justice Duff's opinion is the one that should be given full effect to. The Court of Criminal Appeal in England in *R.* v. *Booth*, *supra*, recognised the question of "custody" as being one for the determination of the Judge in this finding of fact in the "trial within a trial" before him.

And in *Lewis* v. *Harris* (1913), 24 Cox 66, the same Court at 71, *per* Darling, J., in allowing an appeal from magistrates who,

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the facts not being in dispute, excluded a confession on the wrong assumption that because no caution was given by the constable it was their duty to disregard it, said, after pointing out that the magistrates had not in reality exercised any discretion:—"That is a wrong decision in law and therefore this appeal should be allowed."

If the Judge can determine the often crucial fact of custody why not any other such as the "person in authority," etc.? This Court has no power conferred upon it to rehear or review any question of fact whether found by Judge or jury, save as aforesaid. In civil cases of course, the Judge's finding of fact may be reviewed: *Boyle* v. *Wiseman*, 24 L.J. Ex. 284, *supra*, per Alderson, B.

The Privy Council, as their Lordships recently said in *Ibrahim* v. *The King*, [1914] A.C.599, 83 L.J.P.C. 185, 24 Cox 174, at 184, stands in "a particular position" in regard to criminal proceedings, and does not exercise "the revising functions of a general Court of Criminal Appeal," but refuses to grant leave to appeal except on certain specified grounds (*e. g.*, violation of natural justice), and in that case their Lordships refused to interfere with the discretion exercised by the trial Judge in allowing a certain confession to be admitted as evidence. The case is noteworthy because of its valuable review of the decisions and the statement, p. 184, that "The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials." I respectfully venture the suggestion that one cause, if not the principal one, of this unsettlement arises from overlooking the point that it is the exclusive province of the Judge below to deal with facts, the Appellate Court frequently without any objection assuming, without jurisdiction, to deal with what are matters of fact instead of confining itself to the law.

But in view of the case at bar, it is not a question of sufficiency of evidence but of no evidence, which is admittedly a question of law: *R.* v. *Lai Ping* [8 Can. Cr. Cas. 467], *supra; R.* v. *White* (1914), 24 Can. Cr. Cas. 74.

The uncontradicted evidence here is all one way and the learned Judge should have decided himself that no one could reasonably have found that the confession was free and voluntary, and consequently should have rejected it.

It follows that as there is no other evidence upon which the conviction can be supported, it should be quashed.

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REX v. DE MESQUITO

McPhillips, J.A.

GALLIHER, J.A., concurred with the Chief Justice.

McPHILLIPS, J.A.:—The question to be determined is whether the confession or admission was properly admitted in evidence?

At the outset I may say that the alleged confession or admission is in itself an unintelligible jumble of words and figures. In saying this, I do so with the greatest of deference to the learned trial Judge, he having as I can only assume some way of giving a meaning to that which is otherwise meaningless; and with every respect to the learned trial Judge, in my opinion too much weight was given to this writing. In fact it would appear that, upon this, guilt was held to be established. The questions arising are then—whether this confession or admission was improperly admitted and if improperly admitted did some substantial wrong or miscarriage take place on the trial?

It would appear that the accused was a commercial traveller in the employ of one Crowe, the business being the selling of cigars and tobacco, and the accused was charged with unlawfully breaking into and entering the shop of Crowe in the City of Vancouver and stealing therefrom cigars and tobacco to the value of $128.00.

The confession or admission of guilt which was admitted in evidence by the learned trial Judge was obtained from the accused by his employer Crowe, and it is apparent that the circumstances attendant upon the giving of the confession or admission were such that wholly disentitled same from being admitted in evidence. I will not here set forth in detail all the evidence which to my mind conclusively establishes that it was not freely or voluntarily given, as that is quite unnecessary. It is sufficient to say that threats of arrest were made by Crowe preceding the giving of the writing unless the accused stated where the goods were; and the accused was taken into the detective's room and, Crowe and the accused being there, Crowe stated that he did not want the goods but that the accused should admit that he had stolen the goods and what he had done with them. And it is apparent that Crowe, the employer, induced the accused to make the confession or admission with the representation that, if made and the accused accounted for the goods in money, there would be no prosecution. This is well established in my opinion by the police officer Crewe. Further Crowe, the employer, as a matter of further inducement

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it would appear, stated that he would continue the accused in his employment. It is true that this latter inducement rests upon the evidence of the accused alone but it is to be noted that Crowe, although called in rebuttal, does not deny the statement. Upon all of the facts it cannot be said that the accused in giving the writing which was admitted in evidence gave same fully or voluntarily.

In *Ibrahim* v. *The King*, [1914] A.C. 599, Lord Summer at pp. 609, 610, said:—

"It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Reg* v. *Thompson*, [1893] 2 Q.B. 12, a case which, it is important to observe, was considered by the trial Judge before he admitted the evidence."

When *Reg* v. *Thompson*, *supra*, is read it has elements similar to the present case. There the prisoner made out a list of moneys which he admitted had not been accounted for by him, the prosecution being one for embezzlement. The chairman of the company had said to a brother of the prisoner: "It will be the right thing for your brother to make a statement;" and the Court drew the inference that the prisoner when he made the confession knew that the chairman had spoken these words to his brother; and it was held that the confession of the prisoner had not been satisfactorily proved to have been free and voluntary and that therefore evidence of the confession ought not to have been received.

In the case we have before us we have the direct statements of the employer Crowe to the accused, his employee, and what was said by Crowe was much more far-reaching than what was shewn to have been said in *Reg* v. *Thompson*, [1893] 2 Q.B. 12.

Cave, J., said in *Reg* v. *Thompson*, *supra*, at p. 15:—

"The question in this case is whether a particular admission made by the prisoner was admissible in evidence against him.

. . .

"If it flows from hope or fear, excited by a person in authority, it is inadmissible."

And at pp. 16-17, further said:—

"These principles are restated and affirmed by the present Lord Chief Justice in *Reg* v. *Fennell* (7 Q.B.D. 147, at p. 150) in the following words: 'The rule laid down in Russell on Crimes is that a confession in order to be admissible must be free and voluntary; that is must not be extracted by any sort of threats or violence nor obtained by any direct or implied promises however slight nor by the execution of any improper influence. It is well known that the chapter in Russell on Crimes containing that passage was written by Sir E.V. Williams, a great authority on these matters."

It is exceedingly pertinent to the case now before us to note what Cave, J., continuing and at pp. 18 and 19 said:—

"I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession—a desire which vanishes as soon as he appears in a Court of justice."

In this particular case there is no evidence of the guilt of the prisoner unless it be that this confession or admission be held to establish it; and apparently the learned trial Judge (His Honour Judge McInnes) proceeded upon the confession or admission—which he interpreted as establishing guilt—as in giving judgment he made use of the following language:—

"The only difficulty I had about this case to determining the admissibility of this in accordance with outlying principles, whether that confession, if it can be deemed such, was admissible or not. I was of the opinion and I am now that it is admissible, and with that admission before the Court I cannot possibly see how the accused can escape.

"Mr. Farris:—Would your Honour hear further argument on the law on that?

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"The Court:—If you wish, but as I was about to say, in this confession there is this statement: '*Willing for goods taken from office to settle.*' I do not see why a person of common sense would make such a confession if he didn't take them. I believe the evidence is admissible, that being so I have to find the accused guilty. I do not find him guilty of shop-breaking, but I find him guilty on the charge of theft."

It is therefore clear that it was upon the *confession or admission* that the learned trial Judge went—a confession or admission which was not satisfactorily proved to have been given *freely and voluntarily* and which consequently should not have been received.

This Court—sitting as a Criminal Court of Appeal and passing upon questions of improper admission or rejection of evidence or anything done not according to law at the trial or some misdirection given—is not to set aside the conviction or direct a new trial although error is found, unless of the opinion that some substantial wrong or miscarriage was thereby occasioned on the trial (Can. Crim. Code, sec. 1019).

In the present case in my opinion substantial wrong and miscarriage was occasioned, as unquestionably it was upon the confession or admission (which in my opinion was erroneously admitted) that the learned trial Judge proceeded and upon which he found the accused guilty; and without the confession or admission upon which the learned Judge so greatly relied it can well be said that there is no evidence upon which the accused could be convicted, and to allow the conviction to stand would offend against the principles of natural justice. In *Ibrahim* v. *The King*, [1914] A. C. 599, *supra*, Lord Sumner at pp. 613–614, said:—

"The learned trial Judge in the present case, in addition to the argument of counsel for the defence, had before him a case decided in 1908 by the Full Court at Hong Kong, *Rex* v. *Wong Chiu Kwai* (3 Hong Kong L.R. 89), in which the English authorities up to that time were very fully examined. Before admitting the evidence of the appellant's statement he consulted Gompertz, J., who had been a party to that decision, and accordingly it is clear that he admitted the statement only after the fullest consideration. The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many Judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such

statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred. If, then, a learned Judge, after anxious consideration of the authorities, decides in accordance with what is at any rate a 'probable opinion' of the present law, if it is not actually the better opinion, it appears to their Lordships that his conduct is the very reverse of that 'violation of the principles of natural justice' which has been said to be the ground for advising His Majesty's interference in a criminal matter. If, as it appears even on the line of authorities which the trial Judge did not follow, the matter is one for the Judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shewn to have been exercised improperly.

"Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English law ought to be, much as it is to be desired that the point should be settled by authority, so far as a general rule can be laid down where circumstances must so greatly vary. That must be left to a Court which exercises, as their Lordships do not, the revising functions of a general Court of Criminal Appeal: *Clifford* v. *The King-Emperor*, [1913] L.R. 40 Ind. App. 241."

This Court, being a Court of Criminal Appeal and in particular charged by Parliament with deciding the question whether any substantial wrong or miscarriage was occasioned on the trial, when of opinion that some evidence was improperly admitted cannot be affected by the question of the Judge's discretion.

It follows that the discretion of the learned trial Judge in admitting the evidence was improperly exercised. There can be no fetters upon the powers of the Criminal Court of Appeal other than those imposed by Parliament, in deciding questions so momentous in safeguarding the liberty of the subject.

The conviction should be quashed, it not being in my opinion a case for the direction that a new trial be had. *Conviction quashed.*

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BEAMENT v. FOSTER.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. January 20, 1916.

1. WILLS (§ I D—37)—TESTAMENTARY CAPACITY—DELUSIONS—BURDEN OF PROOF.

Where the provisions of the will itself prove that it was not affected by insane delusions, it must be found that it was not so affected; and after the court is sufficiently satisfied of the due execution of a will as required by law by an apparently competent testator, the *onus* of proving that the will was affected by insane delusions is shifted upon the party opposing the will on that ground.

[*Skinner* v. *Farquharson*, 32 Can. S.C.R. 58, applied; see also *Momberg* v. *Jones*, 25 D.L.R. 766.]

2. APPEAL (§ VII L 3—489)—REVIEW OF FACTS—TESTAMENTARY CAPACITY—INSANE DELUSIONS.

Where no error in law is shewn, an Appellate Court will not interfere with the findings of a trial judge upon a question of fact, that the dispositions made by a testator were not affected by insane delusions.

3. COURTS (§ V B—295)—STARE DECISIS—FINDINGS OF FACT—BINDING EFFECT.

A finding of fact in one case cannot have any binding effect in any other case, except by way of estoppel.

4. JUDGMENT (§ II E 1—154*a*)—CONTEST OF WILL—RES JUDICATA—ABSENT BENEFICIARIES.

A judgment in an action for the contest of a will is binding only between the parties to the action and cannot prejudicially affect any beneficiaries not before the court.

5. COSTS (§ I—1)—RULE OF AWARDING—EXCEPTIONS.

As a general rule costs are awarded to the successful party, and the subject of costs is mentioned only when an exception to that rule is made.

Statement

APPEAL by the defendant from the judgment of the Surrogate Court in favour of the plaintiff, the executor, in an action to establish the will, arising out of the plaintiff's petition for a grant of letters probate.

Glyn Osler, for appellant.

A. H. Armstrong, for plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—This appeal arises out of contentious business in the Surrogate Court of the County of Carleton. The plaintiff is the executor of the last will of Robert Foster, deceased, and, as his duty required, he brought the will into that probate Court and took the usual proceedings there, in common form, to obtain a grant of probate of it.

The testator's only child and heir at law—the appellant and the only defendant in the Surrogate Court cause—interposed for the purpose of resisting the grant, and thereupon the proceed-

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ings assumed the contentions form and were duly carried down to trial in that Court.

The cause was tried by the Judge of the Court—a Judge of great experience in matters testamentary—without the intervention of a jury; and eventually the will was upheld and a grant of probate directed.

The main, if not the only, opposition to the will was based upon mental incapacity, it being said that the testator was subject to insane delusions.

It is undeniable that he was subject to insane delusions—a delusion, it is said, that his own wife and his son's wife desired and attempted to poison him, and a delusion, it is also said, as to his wife's chastity; that he was subject to the former delusion was well proved; I doubt very much the assertion as to the latter; an aggravated form of jealousy not unknown, if indeed extremely uncommon, in human beings, may have been the cause of all that was said or done in this respect; and, however it may be, it is not a matter of very great consequence in this action, in view of the other delusion.

The law relating to trials of such cases as this is quite familiar. The onus of proof that the document propounded is in truth the last will of a capable testator is, in the first place, upon him who propounds that will, but that onus is sufficiently satisfied by proof of the execution of the will in the manner required by law, by an apparently competent testator; and the onus then shifts to him who opposes the will, and that onus is in turn satisfied, in such a case as this, by proof of an insane delusion such as was proved in this case, and then the onus shifts back to the propounder of the will—the onus of proof sufficient to satisfy the conscience of the Court that the dispositions of his property made by the testator in the will were not affected by the insane delusion.

It is not suggested that the learned Surrogate Judge erred in any matter of law throughout the trial, or that he disregarded in any way the law applicable to the trial of such a cause as this; the appeal is one entirely upon a question of fact, a question of fact determined by a Judge of much experience and care, and one who had the benefit, which we have not, of hearing and

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seeing the witnesses. It is obvious, therefore, that we cannot rightly reverse his finding unless well convinced of error in it.

During the last nine months of his life the testator lived, and then died peacefully, in his own home, with the two women who, he sometimes thought, wished to poison him, and as the husband of one of them. His delusion must have been absent or much attenuated then; and indeed all his married life was spent with his wife, as man and wife, and with his son and his son's wife as part of the family after the son's marriage; with the exception of two or three short absences, caused, it is said, by his fear of being poisoned by these women; so that his delusion could not have been a very wide-spreading delusion in its effect. It had no effect upon his business capacity or business transactions; his family physician described that capacity as "splendid;" but, like many another delusion, it was a thing to talk about, if opportunity given, but forgotten when business had to be attended to.

Once, when it had greater possession of him than usual, he left his home on account of it, but soon returned again; and once, when ill enough to go to a hospital for treatment, dangerously ill with the disease called "double pneumonia," he was taken to such an institution, because, it was said, his delusion possessed him so that it was thought it might interfere with his treatment and recovery. But the outstanding facts are that, speaking generally, during all the years of his affliction he lived with his wife as her husband without violence towards her or other conduct but such as might have been if he were never subject to any delusion; it did not generally affect his conduct in life or affect at all his conduct in business matters. It was that not uncommon partial insanity which exercises itself most in talk, and talk especially when such talk is roused or encouraged.

Then the man lived for two years after making the will; and, as the testimony of the witness Mrs. Eadie, as well as that of the solicitor who drew it, shews, he had a lively knowledge and memory of the making and contents of his will, yet never altered it or gave any intimation of any desire to alter it, though living with his wife, as I have said, in the intimacy of husband and wife nearly all that time.

And again, the will was made, it is said, when he was away from his home, and so away from any exciting cause of his delusion; and not long before it had spent itself and he was about to return to his home; and, according to the defendant's own testimony, the delusion was, as one might expect, intermittent. As he stated it, "every two or three weeks he would take spells; he would take those spells; and every three weeks or so he would go out for the groceries and buy milk and crackers and eat them in his bedroom."

The will was drawn with care by a competent and careful solicitor, and made without an exhibition of any kind of resentment against his wife or any member of his household.

And again, the will itself bears testimony against the contention that it was made as it is because of the man's insane view that his wife wished and tried to poison hm. It seems to be a carefully considered will of a business man attending strictly to the business in hand, to the exclusion of all delusions; just as he dealt with all his other business affairs. If he really had it in mind that his wife meant to, and would if she could, poison him, it is hardly likely that, sane or insane, he would have left her $1,000 and one-seventh of his residue, as the reward of a foul murderer or intending murderer of himself. And in the inclusion of his near relations in the benefits of his will he may have been doing only an act of justice, as it seems that he had got the lion's share of his father's property, under his father's will, against the expectations of his brothers, one of whom, in his evidence at the trial, made it pretty plain that he looked upon the benefits I have mentioned as something like a fair restitution only.

I am not convinced that the learned Judge erred in his finding in favour of the will; and that is enough to dispose of this appeal adversely to the appellant; but I may add that I am, upon Mr. Osler's argument alone, almost, if not quite, convinced that the learned Judge was entirely right.

It is said that the findings were based entirely upon the judgment of the Supreme Court of Canada in the case *Skinner* v. *Farquharson*, 32 S.C.R. 58; that the Surrogate Court Judge deemed that he was bound by the authority of that case to find as he did.

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But that cannot be. No one knows better than that learned Judge, that which every lawyer knows, that a finding of fact in one case cannot have any binding effect in any other case, except by way of estoppel; that it is impossible that it could; no two cases are precisely alike. What the learned Judge meant, no doubt, was this: that, acting upon the principle applied in the *Farquharson* will case, he was bound to find in favour of the will in this case. That principle, when plainly stated, is no more than this: that, when the provisions of the will itself prove that it was not affected by insane delusions, it must be found that it was not so affected.

The appeal fails. It must be dismissed.

But there is something more that should be said before the case is parted with here.

Unfortunately, the fact that only one of the beneficiaries under the will in question is a party to this cause seems to have been overlooked until the case came here. In these circumstances, no judgment should be pronounced that could prejudicially affect any of the absent beneficiaries. What, then, should be done? Whatever is done must be inconclusive. To send the case back to be prosecuted over again, but regularly, would be the less convenient and satisfactory choice of evils; it is better to deal with it now finally between the parties to it, leaving others concerned, if any of them chooses to do so, to litigate the matter all over again, between themselves, as any one of them may do, if not a party in any way to this cause, by calling upon the executor to prove the will in solemn form, or in any other of the ways open to them: a thing, however, extremely unlikely now, as all except the widow are interested in upholding the will, and she can hardly desire to contest the will, or she would have done so with her son in this action.

If the defendant had sustained his contention here, all that could be done would be to hold the will to be invalid in so far as it concerns him, and admit it to probate with the gifts to him expunged, which would hardly be to his liking, as in an intestacy as to that he would gain nothing, but lose a good deal; so it is in his own interests, if there be no further litigation, that the whole will be admitted to probate.

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And in this connection it is important to add that the defendant, who alone complains of the will, and asserts that his just rights were cut down by his father's insanity, must remember that he gets under the will of a mind so poisoned $1,000 and one-seventh of the residue, but nothing whatever under an earlier will, made when it is admitted his father was quite sane, and the only other will the man is known to have made. It is just as reasonable to say that the man's insane delusion gave his son $1,000 and one-seventh of the residue, as it is to say that it took away from any one anything that that one would otherwise have received.

Armstrong. I ask for costs of the appeal.

MEREDITH, C.J.C.P.:—The rule of this Court is, costs to the successful party. It is necessary to mention the subject of costs only when an exception to that rule is made.

Appeal dismissed with costs.

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New Brunswick Supreme Court, McLeod, C.J., and White and Grimmer, JJ. November 26, 1915.

1. INTEREST (§ I A—1)—WHEN GENERALLY ALLOWED.
Interest may be allowed when authorized by statute, when payable by contract, or when a contract to pay can be inferred from trade or mercantile usage or from the course of dealing between the parties.
[*Wilmot* v. *Gardiner*, [1901] 2 Ch. 548, referred to.]

2. INTEREST (§ I C—25)—AS DAMAGES—WHEN REFUSED—CONTRIBUTION BY JOINT OWNER JUSTLY WITHHELD.
Interest by way of damages will not be allowed on moneys justly withheld by a joint owner from his share of contribution towards the expense and upkeep of the premises, where such course was brought about by the conduct of the other owner in refusing to execute a conveyance settling the former's interest in the property.
[*London, Chatham R. Co.* v. *South Eastern R. Co.*, [1893] A.C. 429; *Johnston* v. *Rex*, [1904] A.C. 817, considered; *Raymond* v. *Hay*, 3 N.B.R. 99, distinguished.]

3. COSTS (§ I—1)—DISCRETION IN AWARDING—REVIEW.
The question of awarding costs is within the discretion of the trial Judge, and will not be interfered with even where on appeal the defendant succeeds in sustaining his defence.

Statement

APPEAL from judgment of Barry, J., in favour of defendant in an action to recover possession of leasehold property, which is varied.

Daniel Mullin, K.C., supported the appeal.

J. H. A. L. Fairweather, for the (plaintiff) respondent, *contra.*

McLeod, C.J.

MCLEOD, C.J.:—This action was brought in the King's Bench Division by the plaintiff against his brother John Duffy, to recover

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the possession of the lower flat of a house and premises situate on a leasehold lot of land in the city of St. John. The plaintiff claimed to own the property, and he alleged that in December, 1894, it was agreed between him and the defendant that the defendant might occupy the flat in question at the will of him, the plaintiff, upon paying one-half of the annual taxes, water rates, insurance premiums, and the ground rent payable under the lease, and also paying half the other annual charges and expenses for the upkeep of the house. He claimed that under this agreement the defendant went into possession of the lower flat, and for seven years, or until the year 1902, paid one-half of the expenses as he agreed, but that in that year he stopped paying. The friendly relations existing between the plaintiff and defendant seem at this time to have come to an end, and matters continued in this way until January, 1914, when the plaintiff gave the defendant notice to quit, and this action was brought to recover the possession of the flat.

The defendant pleaded an equitable defence. He alleged that the plaintiff was not the sole owner of the leasehold property, but, on the contrary, he, the defendant, was a part owner thereof. He claimed that some time in December, 1894, there was an agreement between him and the plaintiff under which they were to get a lease of the lot of land on which the house was built, and the plaintiff was to build the house, the defendant furnishing one-half the money, and he alleges that he did furnish one-half the money for building the house, and that he paid half of the upkeep and expense to and including the year 1902, and that he then ceased paying because the plaintiff refused to execute to him a transfer of one-half the interest in the property. He claims that by an agreement the lease was taken out in the name of the plaintiff, but that whenever the defendant desired to have his half interest transferred to him the plaintiff was to make such transfer, and he alleged that on the plaintiff making the transfer of one-half the interest he was ready and willing to pay the one-half share of the arrears of the said annual charges to the plaintiff.

The case was tried before Barry, J., without a jury, in St. John, in January, 1915, and the trial Judge sustained the defendant's contention, and held that the defendant was a part owner of the premises; and he proceeded himself to take an account of the amount that would be owing to the plaintiff.

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Evidence was given by the plaintiff as to the cost of the house and an ell attached to it, and also of a shed and wharf that was built by the plaintiff on the water-front, and a small barn and some other matters in connection with the house, and also as to the ground rent, taxes and water rates that had been paid by the plaintiff from 1902 to 1915—thirteen years—and also insurance premiums which had been paid for nine years. After giving the defendant credit for the amount which it was claimed he had paid toward the erection of the house, which was $330, he found that the amount owing by the defendant for one-half the costs of the building and one-half of the ground rent, taxes, water rates and insurance premiums paid by the plaintiff, was $753.01, and he allowed the plaintiff interest on those amounts from the time they were severally paid, which amounted to $494.21, in all $1,247.22, and he ordered that upon the payment by the defendant to the plaintiff of that sum that the plaintiff execute a proper conveyance of an undivided one-half interest of the lands and premises to the defendant.

The order further directed what the plaintiff should be at liberty to do in the event of the defendant failing to pay that sum.

The plaintiff accepted the finding of the Judge as to the agreement between himself and the defendant, and no question arises now on that finding. The defendant, however, appeals from that judgment, and asks that it be varied in so far as the finding of the sum of $1,247.22 due the plaintiff, and asks to have an order directing a reference to a Master to take an account of all the moneys that may be due and payable by the defendant to the plaintiff. In his factum, filed with the Court, the defendant takes no exception to the allowance of interest by the Judge, but on the argument before the Court it was claimed that the Judge was wrong in allowing interest on the amounts paid out. The Judge stated that he would take the account between the parties himself in order to save the expense of a reference to a Master. He had the right to take the account if he so chose; the only question that could be raised would be, did he take the account properly?

The whole agreement between the parties was an oral one, and there were no books kept as to the expenditure. The Judge, however, heard the evidence given by both parties as to what the house and other buildings cost. The plaintiff stated the moneys paid out—speaking, of course, largely from memory—and he gave

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evidence of the work he had done on the house and on the other buildings. He admitted that the defendant had paid him, whilst the house was being built, $330, and he also admitted that the defendant had paid half the upkeep from 1894 to 1902, and he stated the value of the work he put on the house. The house was largely built by his own labour. The defendant in his evidence admitted that the statements as to the value of the house were correct, or at all events he did not deny them, and there appeared to be no difference between them as to the amount of money that the defendant had paid. If the defendant is to have half of the building, it seems certainly reasonable that he should pay half the cost. There is no pretence by the defendant that the contract was other than that he should pay one-half the cost of the house. The amounts that were paid for ground rent, taxes and water rates, for thirteen years, are admitted by the defendant. The nine years' insurance paid is also admitted by the defendant. I am, therefore, unable to see that the Judge, having the right, as I say he did have, to take the account, took it improperly. But the Judge allowed interest on all these amounts. Dealing first with the interest allowed on the amounts paid for the work done on the building of the house and other buildings, with great deference, I think the interest was improperly allowed. In the first place, taking the cash that appears to have been actually paid out, the defendant paid nearly half that amount. A good deal that is charged is for work and labor done by the plaintiff himself and others. Whilst the plaintiff would be entitled to be paid for half that, he is not entitled to interest on the amount so allowed. I know of no authority which would warrant the allowing of interest on such a claim. The plaintiff does not appear to have ever presented any bill to the defendant for the amount, or ever asked for payment. In my opinion, therefore, the interest on that should not have been allowed.

Referring then to the interest that was allowed on the amount paid for ground rent, taxes, water rates and insurance, the defendant claims that in the year 1902 he asked that a transfer of an undivided one-half of the property be made either to him or his wife, and the plaintiff refused to make it. The Judge in his judgment makes no finding on that fact, that is, as to whether the defendant asked for a transfer of an undivided one-half of the premises and the plaintiff refused to make it, but in the evidence

it appears, I think, sufficiently clear that the defendant did ask for the transfer and the plaintiff refused to make it. It is true the plaintiff says in some parts of his evidence he was not asked but in speaking of the time when the defendant ceased to pay one-half of what I will call the upkeep of the premises, he says that the defendant continued not to pay for about 3 years, and he is asked what happened then, and he says as follows: "He came to me one day in the back yard—I was overhauling the house—and he says 'Alice (the defendant's wife) says she will pay no more unless you put the half of the house in her name or mine.' I said 'No, the house is to stay where it is,'" and then he says the defendant said, "I am going to pay this thing up myself," and the defendant gave him in two or three payments the sum of $17 and paid no more. And both the defendant and his wife say in their evidence that the defendant did ask for a transfer of an undivided one-half of the premises, either to himself or his wife, and that the plaintiff refused it.

On the finding of the trial Judge that the property belonged jointly to the plaintiff and defendant, the defendant would be entitled to have an undivided one-half transferred to him, and if the plaintiff refused to make the transfer and paid these charges himself, in consequence thereof he could not recover interest on the payment from the defendant. In my opinion, therefore, the interest on that was improperly allowed. I therefore have come to the conclusion that the verdict entered by the Judge should be reduced by the amount of interest he allowed; that is, that the order should be varied by entering the verdict for $753.01, and that in other particulars the order of the Judge should remain. The Judge in entering his verdict, ordered that up to the date of his order there would be no costs to either party. The defendant claims that as his defence was sustained he should have had costs. The costs were in the discretion of the Judge, and I can see no reason to interfere with that discretion. The result will be that the verdict entered by the trial Judge will be changed in the manner I have stated, but there will be no costs on this appeal.

WHITE, J.: Agreeing as I do with the judgment of the Chief Justice, I desire to add only some observations on the questions of interest. Prior, at least, to the statute 3-4 William IV, (Imp.), ch. 42, secs. 28 and 29, which are substantially re-enacted in our

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Judicature Act, secs. 24 and 25, the law governing the question as to when interest was recoverable on a debt was in a very confused and unsatisfactory condition. In the note to *De Havilland* v. *Bowerbank* (1807), 1 Camp. 52, a number of cases are referred to, and the reporter adds, "It would fortunately be a very difficult matter to fix upon another point of English law, on which the authorities are so little in harmony with each other."

In Sedgwick on Damages, 8th ed., secs. 282 to 292, the subject of English law as affecting interest is dealt with, and a number of cases are referred to. An attempt to reconcile some of these cases with others of them will, I think, confirm the observation of the learned reporter in the note mentioned.

Before the statute 37 Henry VIII., ch. 9, interest was prohibited. This was, doubtless, owing to the belief then prevalent that interest was identical with usury, and therefore condemned by the teachings of Holy Writ: *Lowe* v. *Waller* (1781), 2 Doug. 736. By that statute it was provided that none could take for any loan or commodity above the rate of £10 for £100 for one whole year. This rate was by a later statute reduced to 5%. From the time of Henry VIII., down to nearly the close of the eighteenth century, there appears from the cases to have been a growing disposition to allow interest. So far had this tendency to allow interest progressed, in 1789, that we find Lord Thurlow, in giving judgment that year in *Craven* v. *Tickell*; 1 Ves. Jr. 60, saying:

> It is the constant practice at Guildhall (I do not speak from my own experience but from conversations I have had with the Judges on the subject) to give interest upon every debt detained.

In subsequent cases, down to 3 and 4 William IV, the courts do not appear to have accepted fully the law upon this point as stated by Lord Thurlow, but different Judges successively laid down varying and divergent rules governing the allowance of interest. The question came before the House of Lords in 1893, in *London, Chatham & Dover R. Co.*, appellants, and *S.E. R. Co.*, respondents, 63 L. J., Ch. 93; [1893] A. C. 429. The facts in this case as stated in the head notes are as follows:

> By an agreement and an award the profits of certain railway traffic were to be shared between two railway companies, accounts exchanged monthly, and verified, and the balances paid by the fifteenth of the following month. A dispute arose whether certain traffic was included under the agreement; and in an action for account, the official referee found a large sum to be due from the respondents to the appellants, and allowed interest on that sum.

It appears that the appellants claimed interest on two grounds;

first, as being entitled under the statute 3 and 4 William IV. ch. 42; and, failing that, then secondly, by way of damages in respect of the wrongful detention of the debt. Having disposed of the first contention, adversely to the appellants, on the ground that by the terms of the award the money withheld was not a debt or sum certain, within the statute, since by the terms of the award it was payable only provisionally, while no demand had been made, so as to bring the case within sec. 29 of the statute, the Lord Chancellor (Lord Herschell) proceeds to deal with the plaintiff's second contention. He reviews in their chronological order *Eddowes* v. *Hopkins* (1780) 1 Doug. 376; *De Havilland* v. *Bowerbank* (*supra*), *Arnott* v. *Redfern* 3 Bing. 353, and *Page* v. *Newman* 9 B. & C. 378, and in accepting the law as laid down in the last mentioned case, rather than that enunciated in the prior cases mentioned, points out, that the Court which decided the last mentioned case was presided over by Lord Tenterden, who was the author of the statute 3 and 4 William IV. referred to. He reaches the conclusion that the appellant's claim for interest by way of damages for the wrongful detention of their debt is not one that is legally enforceable, although he admits its justice, at least as to interest since the commencement of the action. The other Judges who took part, Lord Watson, Lord Morris, and Lord Shandall, agreed with the Lord Chancellor.

Since the decision in that case, it must be accepted as law that interest will not be allowed upon any of the grounds discussed and overruled or dissented from in the judgment of the Lord Chancellor. That is to say, interest will not be allowed merely because of "long delay under vexations and oppressive circumstances;" or because the money has been actually used and interest made of it (except, of course, in the case of trust moneys, which are governed by a different principle); nor because the debt has been wrongfully withheld by the defendant after the plaintiff has endeavored to obtain payment of it.

Pursuant to the decision in the case mentioned, interest may be allowed, 1st, when authorized by statute; 2nd, when it is payable by contract, and I take it that a contract to pay interest may, like any other contract, be inferred from trade or mercantile usage, or from a course of dealing between the parties: *see Wilmot* v. *Gardiner*, *In re Marquis of Anglesey*, [1901] 2 Ch. 548.

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There are a number of cases in which interest has been allowed upon the grounds not affected by the decisions in the London, Chatham and Dover Railway case.

For instance, in 1904 the case of *Johnston* v. *Rex*, [1904] A. C. 817, came before the Privy Council on appeal from the Supreme Court of Sierra Leone. The appellant, while acting as a contractor with the government, had obtained, by means of fraudulent vouchers, a sum of £8,029-8-6 more than he was entitled to. In an action brought by the government to recover this amount the Crown intentionally put aside all questions of fraud and accepted judgment upon a count for money had and received as for money paid by mistake. The trial Judge allowed interest; and from that allowance the defendant appealed. The Committee, in their judgment, say:

> Having regard to the law as settled by the judgment of the House of Lords in the case of *London Chatham and Dover R. Co.* v. *S.E.R. Co.*, it is impossible to support the decision of the acting Chief Justice on the ground upon which it was rested.

And later on in the course of the judgment the Committee further say:

> In order to guard against any possible misapprehension of their Lordships' views, they desire to say that in their opinion there is no doubt whatever that money obtained by fraud and retained by fraud can be recovered, with interest, whether the proceedings be taken in a Court of Equity or a Court of Law.

With reference to a suggestion made during the argument that the appellant, being a trader, must have made a profit by the use of the money, the Committee merely say, "that is very probable, but there is no proof of it."

In *Ex parte Bishop, In re Fox Walker & Company*, 15 Ch. D. 400, it was held that interest may be allowed on a contract of indemnity on the ground that such contract contemplates making the surety whole. And see *Petre* v. *Duncombe*, 15 Jur. 86; 20 L. J. Q. B. 242.

So, likewise, it appears to be well settled law that trustees wrongfully retaining moneys in their hands may be made to pay interest.

But it would serve no useful purpose in this suit to attempt to specify all cases in which it has been held, or would doubtless be held, that interest may be allowed upon grounds not touched by the decisions in the *London Chatham & Dover R.* case.

It is sufficient for the purpose of the present case to say that,

except as to moneys paid for taxes and water rates, no such grounds exist here. Except as to such taxes and rates, all moneys paid by the plaintiff were paid under and pursuant to contract, and the right to recover the same rests primarily on contract.

But it seems to me that as to the taxes and water rates paid by the plaintiff, the right to interest rests upon a principle wholly independent of the contract between the parties. The payment of these taxes and rates was not a voluntary payment, but was compulsory, inasmuch as without such payment the property would have been liable to be levied on and sold to realize the same. As the defendant is invoking the aid of the Court upon equitable grounds, I think the Court may well require, as a condition of granting such aid, that the defendant himself should do what is equitable. And to my mind it would have seemed clearly equitable that the defendant should reimburse the plaintiff for all taxes and rates paid as to the half of the land of which the defendant is, in equity, the owner, together with interest thereon, were it not that it appears the plaintiff's own conduct from 1903 down to the institution of this suit justified the defendant in refusing such payment. For in 1903, as the defendant alleges, and in 1905, as the plaintiff concedes, the plaintiff refused, and has since continued to refuse, to convey to the defendant the half of the property to which the latter is entitled. And it appears that down to the time of such refusal the defendant had from time to time paid his share of the taxes and rates.

I should, perhaps, add, in reaching the conclusion I have stated I have not overlooked the case of *Raymond* v. *Hay* (1840), 3 N. B. R. 99, before our own Court. Since that case was decided the law governing the allowance of interest has been somewhat clarified, and, I think I may say, better defined than it was then. Moreover, the circumstances of the case were peculiar. The Court appear to have felt that the defendant in withholding payment had acted, if not fraudulently in the strict sense of that term, at least so as to be guilty of a clear breach of good faith. Botsford, J., says (p. 102):

> With regard to interest, I have no doubt it was very properly allowed; the defendant's recommending the plaintiff to go into Chancery with an amicable proceeding to determine the right and on finding it against him, violating the understanding, by putting in an answer, acted very improperly, and I thought his conduct liable to animadversion.

Therefore, assuming that the decision in that case is unaffected

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by later decisions, the facts upon which that judgment was based are so entirely different from those in the case before us that the judgment there given cannot serve to govern the decision in this case.

I agree the appeal should be allowed to the extent stated by the Chief Justice, and that there should be no costs of appeal to either party.

Grimmer, J. GRIMMER J., agreed. *Judgment as to interest varied.*

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Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Magee, J.A., Riddell and Latchford, JJ. January 19, 1916.

1. BROKERS (§ I—1)—WHEN LIABLE AS PRINCIPAL—ACTING AS PURCHASER. A broker constituting himself the actual purchaser of bonds, though he is to receive a certain allowance in the nature of a commission by way of deduction from the price, is liable, in the event of his refusal to accept the bonds in accordance with the contract, in the capacity of principal and not as agent.

2. CONTRACTS (§ I E 5—95)—STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM—CORRESPONDENCE. The written memorandum required by the Statute of Frauds (R.S.O. 1914, ch. 102) is sufficiently met if from correspondence between the parties the terms of the sale are ascertainable.

[Court divided; 25 D.L.R. 787, 34 O.L.R. 403, affirmed.]

Statement APPEAL by the defendant from the judgment of Clute, J., 25 D.L.R. 787, 34 O.L.R. 403.

N. W. Rowell, K.C., for appellant.

J. B. Clarke, K.C., for plaintiffs, respondents.

Magee, J.A. MAGEE, J.A.:—The defendant appeals from the judgment against him for $16,911.77 and interest, as damages for not carrying out an alleged agreement by him to buy from the plaintiffs bonds of the par value of $223,700 made by the Lacombe and Blindman Valley Electric Railway Company, guaranteed by the Province of Alberta.

The evidence fully warrants the finding that the defendant verbally agreed, on the 2nd June, 1914, to buy the bonds himself, and was not acting either as agent for the plaintiffs or ostensibly as agent for any disclosed or undisclosed principal in Ontario or elsewhere. That he expected to make, with his associate in New York, a dealer's profit without accountability to any one, and not an agent's commission, is, I think, manifest. He has not chosen to disclose at what price he had arranged to sell the

bonds. Although a so-called "commission" was to be allowed him by the plaintiffs on the purchase, the word was manifestly used, ultimately at least, in the sense of a deduction equal to a commission.

Into the merits of his defence that the plaintiffs untruly represented to him on the 29th May, 1914, that the bonds had not previously been offered for sale in New York, I do not propose to enter. Intentionally or otherwise, the plaintiffs have left his statement that such a representation was made, not specifically denied, and it would seem at least that he was disagreeably surprised to find his almost completed resale of the bonds in New York blocked owing to a previous attempt of the plaintiffs to sell them there. Nor, in the view which I take of the legal result, need I consider whether, after learning of the untruthfulness of the alleged misrepresentation, he condoned and waived it, and ratified his purchase by his subsequent negotiations.

But one question is, whether there was a memorandum in writing of the bargain, signed by him, sufficient to satisfy the Statute of Frauds, if that statute applies. There were numerous conversations by telephone and *vis-à-vis* between the defendant and the plaintiffs, and also between him and Edmund Daude, his associate in New York, and between the latter and the plaintiffs; but it is to the letters and telegrams, as the only writings, that we must look, except for explanation of the circumstances when necessary. The only documents that appear to me to be at all necessary to be referred to for the purposes of the statute are the following:—

1. The printed circular issued by the plaintiffs beginning and ending with their name and stating, "We own and offer $250,000 five per cent. first mortgage bonds . . . price $100.77 and interest to yield 4.95 per cent.," and setting forth the date of maturity and name of the issuing railway company and other particulars and fact of guarantee by the Province. One of these circulars, with the amount changed to $230,000, was left with the defendant on the 26th May, 1914, by Norman Davies, of the plaintiffs' office.

2. Letter of the same date, 26th May, from the defendant to Daude, enclosing that circular and stating: "Mr. Norman

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Davies, one of the firm of W. L. McKinnon & Co. . . . called on me to-day to see if I could handle $230,000 worth of bonds of the Province of Alberta. They originally had $250,000, but have disposed of $20,000, leaving a balance which they now have of $230,000. Selling price, etc., explained in the enclosed circular. All the commission they can offer us is half of one per cent., which equals to us $1,150. Can you handle these? If so, kindly let me know by wire."

3. Telegram from the defendant to Daude of the 29th May, 1914: "McKinnon will sell Alberta bonds $223,700 less $2,500 to us subject to Toronto payment and delivery small quantity sold since writing."

4. Telegram from the defendant to Daude of the 3rd June, 1914: "The Alberta bonds which you have particulars of no one else has for sale. I absolutely bought them yesterday after our 'phone conversation they agreeing to our terms—put sale through at once."

5. Telegram of the 15th June from the defendant to Daude: "All Alberta bonds we have are guaranteed by Province Alberta and certified by Canada Trust Company. McKinnon wants this matter closed . . . answer."

6. Letter of the 15th June from the plaintiffs to the defendant: "Re $223,700 Prov. of Alberta (guaranteed) bonds, bearing 5 per cent., maturing 1943. We are enclosing our statement covering the above bonds, figured as at to-morrow, June 16th, shewing the value as at that date to be $224,585.98, which we trust you will find to be correct. As we understand that funds are now being transferred here from New York, and that you wish to take delivery to-morrow, we shall try to get in touch with you by telephone in the morning in order to ascertain an hour for delivery to suit your convenience."

The statement enclosed reads: "J. J. Doran, Esq., in account with W. L. McKinnon & Co. Statement figured as at June 15. To purchase $223,700 Prov. of Alberta bearing 5% payable Oct. 22, April 22, and maturing Oct. 22, 1943.

Value at 4.95% (100.775) $225,433.68

Accrued interest on $225,433.68 at 4.95%

from April 22 to June 16 (55 days) . . . $1,681.49

Less int. on int., 128 days	29.19	
		$ 1,652.30
		$227,085.98
Less $2,500		2,500.00
		$224,585.98

7. Telegram from the defendant to Daude of the 16th June: "Alberta bonds must be paid for to-day—McKinnon statement shews them worth $227,085.98 less our commission $2,500 or $224,585.98 to them. Answer at once."

There were other letters from the plaintiffs besides that of the 18th June above quoted, notably a letter from them to the defendant of the 2nd June, of which the defendant denies receipt, but which, although the evidence of mailing is not clear, the learned trial Judge considered he must be taken to have received. That letter, therefore, in the ordinary course of post, may or may not have been received before the defendant's telegram to Daude of the 3rd June was sent. It reads thus: "Following your telephone conversation with our Mr. McKinnon, we take pleasure in confirming to you the sale of $223,700 Province of Alberta (guaranteed) bonds bearing 5 per cent., payable semi-annually, maturing October 22nd, 1943. The price is a rate to yield you 4.95 per cent., less an allowance to you of $2,500. The legal opinion of J. B. Clarke, K.C., has already been obtained; however, the legal files are not as yet completed. Mr. Clarke is at present out of town, and upon his return, which is expected in a few days, we will take the necessary steps to have the legal papers completed and forwarded to you in order that your solicitor may approve legality."

There is a telegram of the 22nd July from the plaintiffs to Daude saying, ". . . Value to-day basis sale to Doran is $225,680," and letter of the 11th August from the plaintiffs to the defendant: "Re $223,700 Province of Alberta guarantee debentures, 5 per cent., 1943, sold you by us on June 2nd last," reporting sale of $15,000 of the bonds. But none of these two letters or telegram is referred to or indicated even remotely in any letter or telegram from the defendant or from Daude, whose

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agency for the defendant is asserted by the plaintiffs in their letter of the 14th August to him. Nothing else in the correspondence appears to me to have any bearing upon the present question.

I may also here note that the defendant swears that on the 5th June he had refused to sign confirmation of the sale to him, and he is not contradicted nor even cross-examined as to the truth of that statement. It is not disputed that on the 31st July he refused to sign such a confirmation in the absence of Daude and without his consent. His telegram of the 3rd June to Daude that he had absolutely bought the bonds is not wholly inconsistent with a purchase really as agent, but on its face must be taken against the defendant as meaning a purchase for himself.

It appears to me clear that up to and after the sending of the defendant's telegram of the 3rd June, and his subsequent one of the 15th June, there was no compliance with the statute. There was nothing whatever in writing to shew what "our terms" were, or upon what terms the purchase had been made; even assuming that the identity of the property bought and of the vendor was sufficiently disclosed. The utmost that can be gathered, if so much can be gathered, up to this stage, is, that he has bought from the plaintiffs the bonds of this railway company, guaranteed by Alberta, to the amount of $223,700, on some unknown terms—unknown both as to amount and time.

Then comes his telegram to Daude of the 16th June; and let us assume in the plaintiffs' favour that the words "Alberta bonds" therein sufficiently refer to these bonds. The defendant's witness Daude swears there were no other. Let it be assumed also in the plaintiffs' favour that by the words "McKinnon statement" in that telegram the defendant has incorporated in it the statement of the 15th June sent to him by the plaintiffs, in which he is debited "in account with" the plaintiffs and charged "To purchase."

What more can then be read from all the writings than: "On the 2nd June I bought these bonds, $223,700 of this railway, from McKinnon & Co. They must be paid for this 16th June, and they have sent me a statement calculating the price

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at $224,585.98 and debiting me, as purchaser, with that amount. Answer."

It is a good deal to assume that so much can be spelled out of the telegrams. But can it be said that he is, in writing, acknowledging that he had agreed to pay that amount which the plaintiffs claimed? It does not appear to me that it can.

I agree with the learned trial Judge that the Statute of Frauds applies. In the absence of evidence, it cannot be presumed that the statute is not still in force in Alberta; so that, whether the law of that Province or of Ontario should govern, there must be a memorandum in writing. The bonds refer to the trust deed which conveys the real property of the railway company to the trustees to secure the payment.

I would allow the appeal with costs.

Latchford, J.

LATCHFORD, J.:—I agree.

Riddell, J.

RIDDELL, J.:—With a tolerably large experience in financial matters and a tolerably extensive acquaintance with brokers and other financial men, I have never seen a more bare-faced attempt to get out of a plain and simple bargain, and to defraud a vendor. But, glaringly dishonest as the conduct of the defendant is, he is entitled to the law as we may find it to be.

The first defence fails—it is a dishonest attempt to take advantage of the word "commission," as shewing that the defendant was an agent to be paid by commission. Over and over again he speaks of the transaction as a sale, and so do the plaintiffs, without protest—the plaintiffs' letter of the 2nd June to him and his of the 3rd June to Daude are sufficient to refer to here.

The sole foundation for the second defence is the statement of the defendant that Pettes on the 29th May "stated that these bonds should be easily sold in New York, because they had not been offered there previously." That the bonds had been offered in New York is certain, and the fact is not denied.

The defendant does not swear that this statement had any influence upon him; but this would not be conclusive against him—if the statement is " of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of

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fact that he was induced to do so by the statement:" *per* Lord Blackburn in *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, 196; *Hughes* v. *Twisden* (1886), 55 L.J. Ch. 481; *In re London and Leeds Bank Limited, Ex p. Carling* (1887), 56 L.J. Ch. 321. This inference is not a necessary inference *juris et de jure*: *per* Jessel, M.R., in *Smith* v. *Chadwick* (1882), 20 Ch. D. 27, 44; *per* Halsbury, C., in *Arnison* v. *Smith* (1889), 41 Ch. D. 348, 369. In view of the facts of the case and the want of prominence given to the alleged misrepresentation, I should not hold that the alleged misrepresentation had any effect *dans locum contractui*.

But, in any case, after the defendant discovered the falsity of the alleged representation, he did not repudiate, but continued on, recognising the contract as in full force; that in itself would prevent his taking advantage of such a defence: *Clough* v. *London and North Western R.W. Co.* (1871), L.R. 7 Ex. 26; *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A.C. 330; *Selway* v. *Fogg* (1839), 5 M. & W. 83; *Vigers* v. *Pike* (1842), 8 Cl. & F. 562; and hundreds of other cases.

Moreover, as there is no express contradiction of the statement—probably from oversight of counsel (and all who have had much experience of counsel practice can understand how that might happen)—I have seen the learned trial Judge, and he informs me that he did not believe the defendant in that regard. The point is not mentioned in the learned Judge's reasons for judgment, and does not seem ever to have been pressed except before us. The second ground of defence also fails.

The third ground, even if based on fact, is not open to the defendant: he expressly approved the legality, probably (although that is not of any consequence) because of his solicitor's advice—even if such an opinion had been stipulated for, it was waived by the defendant, independently of the effect of his attempted repudiation of the contract.

The sole ground of defence which requires serious consideration is the fourth, that of the Statute of Frauds.

Whether these bonds are such as come under the 4th section of the Statute of Frauds (sec. 2 of R.S.O. 1914, ch. 102) is a question of great interest from a purely legal point of

view—I do not enter upon the inquiry, but assume in favour of the defendant that they are so.

Nor do I dwell upon the doctrine of *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, followed in *Kendrick* v. *Barkey* (1907), 9 O.W.R. 356 (see p. 362), that the Statute of Frauds will not be permitted to assist in committing a fraud.

It seems to me that the statute is fully met—e.g., in the telegram of the 3rd June the defendant asserts that he has absolutely bought "the Alberta bonds which you have particulars of"—his correspondent had received particulars of the bonds in question by a circular sent him by the defendant: the terms appear in the telegram of the 29th May: "McKinnon will sell Alberta bonds $223,700 less $2,500 to us subject to Toronto payment and delivery small quantity sold."

The bonds were those Alberta bonds McKinnon was selling—what they were, even if uncertain, could be rendered certain—*id certum est quod certum reddi potest.*

In *Owen* v. *Thomas* (1834), 3 Myl. & K. 353, the letter relied upon was: "I have this day sold the house, etc., in Newport to Mr. John Owen for 1,000 guineas . . . the money to be paid as soon as the deeds can be had from Mr. Deere; and you will be pleased to lose no time in getting them from him"—the letter was addressed by the vendor to his solicitor. The Court (Sir John Leach, M.R.) held that, as the house referred to in the letter was that the deeds of which were in the possession of Mr. Deere, it might easily be ascertained—*id certum est quod certum reddi potest.* In the present case we have quite as definite a statement.

Plant v. *Bourne*, [1897] 2 Ch. 281 (C.A.), is another case of somewhat the same kind. In *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53, "Mr. Ogilvie's house" was held a sufficient description; so in *Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90, "the property purchased at £420 at Sun Inn;" and in *Bleakley* v. *Smith* (1840), 11 Sim. 150, "the property in Cable-street." See also Sugden on Vendors and Purchasers, 14th ed., p. 134; Fry on Specific Performance, 5th ed., pp. 166, 169.

The alleged term that the sale should be subject to the legal opinion of the defendant's solicitor, it is said, does not appear in

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writing. But that is not a term of the contract at all—it is a condition without which there could be no sale, and could be proved by parol *dehors* the contract.

I am glad that this deliberate attempt at fraud cannot succeed.

The appeal should be dismissed with costs.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—I agree in the result arrived at by my learned brother Riddell.

In the result, as the Court is equally divided, the appeal is dismissed with costs. *Appeal dismissed.*

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Nova Scotia Supreme Court, Drysdale, J., Ritchie, E.J., and Harris, J. February 26, 1916.

1. PLEADING (§ I N—112)—AMENDMENT—SETTING UP NEW CAUSE BARRED BY LIMITATIONS—ORIGINAL CONSIDERATION OF NOTE SUED ON.

The principle, that a claim cannot be amended as introducing a cause of action which had become barred by limitations since the issue of the writ, has no application to a case where in an action on a promissory note an amendment of the statement of the claim setting up the original consideration is allowed, though between the date of issuing the order allowing the amendment and the actual taking out of the order limitations had meanwhile intervened.

[*Hudson* v. *Fernyhough*, 61 L.T. 722; *Weldon* v. *Neal*, 19 Q.B.D. 394, distinguished.]

2. MOTIONS AND ORDERS (§ II—5)—WHEN GOING INTO EFFECT—DATING.

The word "made" in O. 52, r. 12, which provides that orders shall take effect from the time they are *made*, refers to the time when they are pronounced or announced, and are to be dated accordingly.

[*Reeves* v. *Irvimey* (1890, unreported), Ann. Prac. 1915, p. 934; *Grant* v. *Grant*, 36 N.S.R. 547, considered.]

Statement

APPEAL from the judgment of Graham, C.J., allowing plaintiff to amend his statement of claim by setting up the original consideration for the promissory note sued on. Affirmed.

L. A. Lovett, K.C., for respondent.

Ritchie, J.

RITCHIE E. J.:—This action was brought upon a promissory note. On October 29, 1912, the Chief Justice granted an amendment by which the plaintiff was given leave to add a paragraph to his statement of claim setting up the original consideration. Though this amendment was granted on October 29, 1912, the order was not taken out until December 22, 1915. This long delay was accounted for to the satisfaction of the Chief Justice. Mr. O'Connor, K.C., rested his case entirely upon the ground that an amendment should not be granted introducing a cause of action which had become barred by the Statute of Limitations since the

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issue of the writ. This is a perfectly clear and well understood proposition of law. The mere statement of it is sufficient without referring to the authorities. This point however, in my opinion, does not arise in this case. It was incumbent on the defendant to show that the statute had barred the claim on October 29, 1912. He did not do this and an affidavit was produced on behalf of the plaintiff which makes it clear that the statute had not run at that time. On the date when the order was taken out, namely December 22, 1915, the claim would have been barred if this action had not been brought. The only real question in this case is in very small compass, namely, was the amendment made on October 29, 1912, or was it made on December 22, 1915? If on the former date the appeal should be dismissed because the claim had not then become barred by the statute. If on December 22, 1915, the appeal should be allowed because the claim at that time had become barred. In my opinion r. 12 of O. 52 settles the point against the defendant. It is as follows:

> Every order, if and when drawn up, shall be dated the day of the month and the year on which the same was made, unless this Court or a Judge otherwise directs, and shall take effect accordingly.

It is very obvious that the making of the order is one thing and that it is made by the Judge, and that the drawing up and dating of the order is another thing, and that it is not done by the Judge. The order should have been dated the day of the month and year when the Chief Justice made it, namely, December 29, 1912. I treat it as if the proper date had been inserted and would dismiss the appeal with costs.

DRYSDALE J. concurred.

Drysdale, J.

HARRIS, J.:—The plaintiff sued on a promissory note payable at the Union Bank of Halifax, Sherbrook, N.S., and did not allege in his statement of claim that the note was presented there for payment. In October, 1912, a motion was made to the Chief Justice at Pictou to set aside the statement of claim as disclosing no cause of action. On October 30, 1912, the Chief Justice filed his decision that the points of law should be disposed of on the trial and giving plaintiff leave to amend his statement of claim by adding a paragraph setting up a cause of action on the original consideration of the note.

Harris, J.

No order was taken out at the time on this decision and no amendment was then made. Some three years after, in Novem-

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ber, 1915, the plaintiff changed his solicitor and his new solicitor filed an amended statement of claim pursuant to the decision of the Chief Justice. This amended statement of claim was set aside by Patterson, J., as a Master, and the plaintiff then applied to the Chief Justice for an order pursuant to his decision filed on October 30, 1912, and he accordingly granted an order dated December 23, 1915, that the points of law should be disposed of on the trial, and giving plaintiff leave to amend by setting up the cause of action in respect to the original consideration of the note and limiting the time for the delivery of the amendment.

The defendant appeals from the portion of the order granting leave to amend and the argument is that on October 30, 1912, when the original motion was made, and on December 23, 1915, when the order was taken out the original cause of action was barred by the Statute of Limitations and for this reason the order should not have been made.

An affidavit has been produced which, I think, shows that the original cause of action was not barred on October 30, 1912, when the decision on the original motion was filed, but that it became barred on November 6, 1912.

The question therefore arises as to the proper date for the order and whether the Chief Justice, when he was asked for an order in 1915 upon his decision filed in 1912, should have taken into consideration the fact that the claim had, between the date of filing his decision and the date of the application for the order, become statute barred, and have refused to grant an order upon his decision.

I think the order should have been dated as of the day when the decision was filed, i. e. on October 30, 1912, and that it ought to be amended accordingly.

The practice under the Judicature Act in England has been settled for 25 years, at least that orders should be dated as of the day they are pronounced—and this is the obvious meaning of our O. 52, r. 12, which is a copy of the English O. 52, r. 12.

The word "made" in this rule means pronounced or announced. In the case of *Reeves* v. *Ivimey* (April 15, 1890), an appeal had been dismissed on February 6, 1889. The order was not drawn up for more than 12 months and on February 9, 1890, the appellants desiring to appeal to the House of Lords filed an affidavit of service and the order was drawn up and dated as of that date.

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The Court held that the order must be dated the day it was pronounced and that the time for appealing had expired. This case is not reported but it is cited in the Annual Practice for 1915, p. 934.

The result of the decision in *Reeves* v. *Ivimey*, *supra*, was that the appeal was held too late. In Nova Scotia this result would not have followed because under our O. 57, r. 3, the time for appealing dates from the moment when the appellant first had notice that the order had been made. But the point of the decision in *Reeves* v. *Ivimey* is that an order should be dated as of the day when the decision is announced, and it takes effect as if dated on that day unless in a proper case the Court or a Judge otherwise orders. In this case it is clear that the Chief Justice intended simply to grant an order on his written decision, and that he did not consider the question of altering the date of the order. The order was dated December 23, 1915, by the solicitor, no doubt, because of a practice sometimes followed of dating the order as of the day when it is issued. This practice is wrong and the proper date for the order is the day when the decision is announced, and according to the English case it takes effect as of the day it was announced. On a proper case being made out the Court or a Judge could, no doubt, insert a clause in the order that it should take effect as of a date different from that on which his decision was filed, but the Chief Justice has not done that and his order, whether dated October 30, 1912, or December 23, 1915, takes effect as of the date of the filing of the decision.

Then, should the Chief Justice have taken into consideration the fact that the Statute of Limitations had, since October 30, 1912, barred the cause of action? There is no doubt that a Judge can, before an order is taken out, alter his decision: *Grant* v. *Grant*, 36 N.S.R. 547; but I do not think there is any authority for saying that he can take into consideration circumstances happening after his decision was announced. The plaintiff's right to the amendment was fixed and determined when the decision was filed but under *Grant* v. *Grant*, no doubt the Judge when he came to settle the order could alter or vary his decision, but I do not think he could or should do so by reason of anything happening after his decision was filed. The power or jurisdiction of changing the order is one reserved to the Judge for correcting any error which may have crept into the decision at the time when it was announc-

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ed, but it does not in my opinion justify a change such as is asked for in this case. The order for the amendment was the proper order to make on October 30, 1912.

It is unnecessary to determine whether *Hudson* v. *Fernyhough*, 61 L.T. 722, *Weldon* v. *Neal*, 19 Q.B.D. 394, and cases of this class apply where the proposed amendment is simply to set up as in this case a claim on the original consideration of the note sued on. That case would have arisen for our consideration if the application in December, 1915, had been an original application. It does not, in my opinion, arise here because the application in December, 1915, was simply for an order upon a decision properly given on October 30th, 1912.

I think under the circumstances it would be better to amend the order of the Chief Justice by dating it October 30, 1912. I would subject to this, dismiss the appeal with costs.

Appeal dismissed.

WILLS v. FORD AND DOUCETTE.

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Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. December 10, 1915.

1. BROKERS (§ I—3)—STOCK BORROWING TRANSACTIONS—RIGHTS TO CLAIM SHARES—DETINUE.

Since "borrowing" in stock-broking circles does not imply a return of the very stock certificates borrowed, the borrower having the right to return the stock at any time and demand the return of money paid as security, a stock broker, who lends mining stock to another broker upon the customary security representing the market value, cannot, after his refusal to comply with the borrower's demand for a return of the money and to take back the shares when the values declined, compel the delivery of the shares upon a rise of the price, or recover their value where the shares have meanwhile been sold.

APPEAL from the judgment of Meredith, C.J.C.P., dismissing an action for the return of shares, for an account, and damages.

H. H. Shaver, for appellant.

No one appeared for the defendant Doucette, the respondent.

Riddell, J.

RIDDELL, J.:—The plaintiff, a member of the Standard Stock Exchange, Toronto, had some "Dome Mines" stock: the defendant Ford, another member of the Standard Stock Exchange, wanted some Dome stock and "borrowed" 400 shares on the 8th July, at $9, and 350 on the 20th July, at $9.50, i.e., he "borrowed" the shares, putting up in the plaintiff's hands as security $3,600+$3,325=$6,925. Of the 750

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shares, 500 have been returned; the plaintiff, alleging that he had demanded the remainder but the defendants refused, brought his action for "a return of the said 250 shares," an accounting by the defendants of their dealings with the same, and special damages—the defendant Doucette had by an arrangement taken Ford's place in the contract.

This is apparently a simple action in detinue: a perusal of the evidence, however, shews that "borrowing" in stock-broking circles does not imply a return of the very stock certificates "borrowed;" but that, on such a borrowing, the loan is repaid by the return of stock certificates of the same amount and kind of stock as that borrowed.

On such a borrowing, it is manifest from the evidence, the borrower has the right to return the stock or any part of it at any time and demand the return to him of the amount of money paid by him as security for that stock or an aliquot part thereof.

By a subsequent arrangement, as already said, Doucette was substituted for Ford as the borrower, with all Ford's rights and duties.

At the trial before the learned Chief Justice of the Common Pleas, the action was dismissed as against Doucette, it already having been dismissed against Ford.

The plaintiff now appeals.

The action is on a contract to deliver 250 shares of Dome stock—the defence is in substance—offer by the defendant and refusal by the plaintiff.

It is plain that, so long as the value of the stock so lent is lower than the price at which it is lent, the lender, having the use of the money put up as security, will not be desirous of a return of his loan; but the borrower will be desirous of paying back the stock. That is what took place. Doucette asked the plaintiff several times if he would take up the stock; he said he would when the Exchange opened; the Exchange did open in December, but the stock was not all taken up. On the 2nd February, 1915, Doucette wrote demanding that 200 shares should be taken up, or the "margin" reduced to $6, i.e., that Wills should pay him the difference in cash between the $9 or $9.50, at which the stock was borrowed, and $6 (200 shares had been taken up

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at $9.50 on the 12th December, and another 100 at the same rate.) On the 15th March, 200 shares were taken up at $9; and no more at any time, but the stock has gone to $22.

When the stock was low, the plaintiff "was jollying them along;" he wanted "to hold that money naturally as long as" he could—Doucette had the stock and wanted to return it, but the plaintiff would not accept it: accordingly, when the stock came up again to the price at which it was borrowed, the defendant sold it—this was in March or April, 1915.

The performance of the contract of Doucette (or Ford) to deliver to him the stock, the plaintiff prevented, and he can have no damages for the non-delivery. He cannot claim to be put in a better position than if he had carried out his contract to receive the stock when the other party desired to return it—then he would have had the stock, but he would be obliged to repay the sum of money he had received; and this would be more than—or at least not less than—the value of the stock he would receive. Of course no formal tender is necessary in such a case.

I am of the opinion that the appeal should be dismissed—as no counsel appeared for the respondent, the dismissal will be without costs.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B., concurred.

Latchford, J.

LATCHFORD, J., agreed in the result.

Kelly, J.

KELLY, J.:—It is manifest from the plaintiff's own admissions that his plan was to retain Doucette's money (for the use of which he paid nothing) so long in any event as the selling value of the 250 shares of Dome Mines stock was less than that money, the stock having declined after Doucette had obtained the loan of it. He says: "I wanted to hold that money, naturally, as long as I could." He was quite positive in his statement to Ford, representing Doucette, that Doucette must not return the shares, and that, if they were sent by the latter to Ford for that purpose, he (plaintiff) would not accept them. He complains not of refusal to return them, but of want of formal tender, a proceeding he himself rendered unnecessary, and so he excused Doucette from going through that formality. He was simply, as he himself puts it, "jollying" the defendant,

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retaining his money and preventing him from returning the stock, and thus leaving him to run the risk of loss through the decline in its value. Had the stock not advanced, as it did later on, there is little doubt he would have continued the "jollying" with the object of holding on to Doucette's money and evading accepting the return of the stock. I am satisfied that the judgment appealed from is correct, and that it should be upheld, for the reasons stated by the learned trial Judge. The plaintiff's "jollying" scheme is not one to which the Court should give the stamp of its approval.

Appeal dismissed without costs

REX v. McPHERSON

Saskatchewan Supreme Court, Haultain, C.J., and Lamont, Elwood, and McKay, JJ. November 20, 1915.

SASK.

S. C.

1. INTOXICATING LIQUORS (§ III A—56)—PROOF THAT INTOXICATING—ALCOHOLIC PERCENTAGE.

The Sales of Liquor Act (Sask.) specifically declares by sec. 2, sub-sec. 1, that every spirituous and every fermented and every malt liquor is within the prohibition of the Sales of Liquor Act, and it is therefore unnecessary as to such spirituous, fermented or malted liquors to prove that they are intoxicating or that they contain more than one per cent. of alcohol and should therefore be conclusively deemed to be intoxicating under that sub-section.

[*R. v. Marsh*, 39 N.B.R. 119; *R. v. Scaynetti*, 25 Can. Cr. Cas. 40, referred to.]

2. CERTIORARI (§ I A—9)—SUMMARY CONVICTION—UNLAWFUL SALE OF LIQUOR—ONUS.

The Court on certiorari will not consider the weight of conflicting evidence but where there is no legal evidence at all to support the finding the conviction cannot be upheld; and a summary conviction for illegally keeping liquor for sale where there were no facts from which an inference of guilt could be drawn and where the testimony for the accused was corroborated and uncontradicted that he purchased the liquor then in transit as the agent for friends of his, and was to be reimbursed only the amount expended will be set aside notwithstanding a statutory provision such as that contained in the Sales of Liquor Act (Sask.), sec. 128, that the burden of proving the right to keep liquor shall be on the person accused of improperly or unlawfully keeping for sale.

[*Re Trepanier*, 12 Can. S.C.R. 111; *R. v. McArthur*, 14 Can. Cr. Cas. 343; *R. v. Allingham*, 12 D.L.R. 9, 21 Can. Cr. Cas. 268; *R. v. McElroy*, 14 D.L.R. 520, 22 Can. Cr. Cas. 123, referred to; *R. v. McPherson*, 25 Can. Cr. Cas. 60, reversed.]

Statement.

APPEAL from an order of Brown, J., refusing defendant's application for discharge on habeas corpus.

D. A. McNiven, for accused (appellant).

H. E. Sampson, K.C., for the magistrate.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The appellant in this appeal was convicted

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before a justice of the peace for unlawfully keeping liquor for the purposes of sale, barter or exchange, contrary to the provisions of the Sales of Liquor Act. He made an application for a writ of habeas corpus and by way of certiorari to my brother Brown in Chambers, but his application was refused. He now appeals to this Court.

The evidence shewed that the accused was collecting some accounts for the man who had kept the hotel at Kennedy. In such occupation, he had occasion to go to Brandon in the Province of Manitoba. Before going, five of his friends in Kennedy asked him to bring them some whiskey from Brandon. While there he purchased a case of twelve bottles of Scotch whiskey, which he brought back with him. Arriving at Langbank, he took an automobile for Kennedy; reaching there he lifted the case of whiskey out on to the sidewalk, and a constable, who appears to have been on the ground, took possession of it. The accused testified that he had paid $13.00 for the case, and each one of his friends was to pay him, for the quantity he got, just the amount that the appellant paid for it. It was supposed that each would take two bottles. Not only was this evidence not contradicted, but the names of the parties who authorized the accused to get whiskey for them were given, and two of them were called to give evidence. They corroborated the accused. Notwithstanding this, the magistrate found him guilty.

On behalf of the accused two points were raised in argument: (1) That there was nothing to show that the liquor in question was intoxicating; (2) That there was no evidence that the liquor was kept for sale, barter or exchange.

As to the first of the above points: I would be prepared, were it necessary, to go as far as my brother Brown, and hold that I can take judicial notice that whiskey is intoxicating. In my opinion, however, it is immaterial under the Act whether it is intoxicating or not. The conviction was made under sec. 91 of the Act. That section, in part, reads as follows:—

"91. Any person not authorized by this Act to expose or keep for sale or sell liquors in Saskatchewan for use or consumption in Saskatchewan, who exposes or keeps for sale or sells, or barters or exchanges any *liquor* in Saskatchewan except to a person in another province or in a foreign country for uses and purposes

outside of Saskatchewan shall be guilty of an offence and liable to a penalty of $300 and imprisonment for three months for the first offence."

Section 2, sub-sec. 1, defines what liquor is. It is as follows:—

"(1) 'Liquor' or 'liquors' means every spirituous and every fermented and every malt liquor and every wine, and any and every combination of liquors and drinks or preparations or mixtures capable of human consumption which is intoxicating, and any mixed liquor or liquid capable of being used as a beverage and part of which is spirituous or otherwise intoxicating;

"Any liquid which contains more than one per cent. of alcohol shall be conclusively deemed to be intoxicating;

"Unfermented grape juice in hermetically sealed bottles shall not be considered intoxicating."

This section establishes three distinct classes of liquids embraced in the term "liquor."

The first class embraces liquor which is either spirituous, fermented or malt, also wine.

The second class embraces any combination of liquors or mixtures which is intoxicating; while the third class covers any mixed liquors capable of being used as a beverage, one of the component parts of which is either spirituous or otherwise intoxicating.

So far as the first class is concerned, it is immaterial whether or not there is evidence that they are intoxicating. Once it is established that the liquor in question is spirituous, or fermented, or malted liquor or wine, it is within the prohibition without evidence as to its intoxicating character.

The liquor in question in this prosecution is proved to have been whiskey. Whiskey is defined in the Concise Imperial Dictionary to be "an ardent spirit, usually made from barley, sometimes from wheat, rye, etc." A Court is at liberty to inform itself from dictionaries or books on a particular subject concerning the meaning of any word. *Rex* v. *Scagnetti*, 34 O.L.R. 373, at p. 375, 25 Can. Cr. Cas., 40. This definition shews that whiskey is spirituous in its nature. Notice of this fact can be taken once the liquor is shewn to be whiskey; being spirituous it comes within the absolute prohibition of the first class above referred to. Evidence that it was intoxicating was, therefore, unnecessary. See *Rex* v. *Marsh*, 39 N.B.R. 119.

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On the second point, I am of opinion the appellant is entitled to succeed. I cannot find any evidence at all that the accused had the liquor for sale, barter or exchange. All the witnesses who gave evidence on the point testified to the contrary. There is no evidence which casts any doubt upon the truth of the accused's story. There was, therefore, no evidence upon which the magistrate could find that the accused had the liquor either for sale, barter or exchange. On behalf of the prosecution, it was contended that the magistrate having found, as a matter of fact, that it was kept for these persons, we could not, on certiorari, question the correctness of his finding.

I agree that, where there is evidence upon which a summary conviction can be based, an Appellate Court will not consider the weight of conflicting evidence; but, where there is no legal evidence at all to support the finding, the conviction cannot be upheld. *In re Trepanier*, 12 Can. S.C.R. 111, at p. 129; *R.* v. *McArthur*, 14 Can. Cr. Cas. 343; *R.* v. *Allingham*, 12 D.L.R. 9, 21 Can. Cr. Cas. 268; *R.* v. *McElroy*, 14 D.L.R. 520, 22 Can. Cr. Cas. 123.

Counsel for the respondent referred to sec. 128 of the Act. That section reads as follows:—

"128. The burden of proving the right to have or keep or sell or give liquor shall be on the person accused of improperly or unlawfully having or keeping or selling or giving such liquor."

It was contended that, as the onus was on the accused to prove his right to have possession of the liquor, he could not be said to have discharged that onus until the magistrate was satisfied.

If this contention prevailed, it would mean that no matter how clearly the evidence established the right of the accused to the possession of the liquor, the magistrate, without any evidence to the contrary, or anything from which an inference of guilt could be drawn, could arbitrarily find the accused guilty and such finding could not be questioned by an Appellate Court.

I am of opinion that an Appellate Court may look to the depositions to ascertain whether or not there is any evidence at all to support the magistrate's finding. If there is no evidence, the conviction must be quashed.

In this case, as there was no evidence upon which the magistrate could base a conviction, the appeal will be allowed and the conviction quashed. No order as to costs. *Conviction quashed.*

TRAVATO v. DOMINION CANNERS Ltd.

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S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. January 10, 1916.

1. LIMITATION OF ACTIONS (§ IV B—163)—ACTIONS AT COMMON LAW AND UNDER WORKMEN'S COMPENSATION ACT—REVIVOR—RENEWAL OF WRIT.

An action at common law and under the Workmen's Compensation Act (R.S.O. 1914 ch. 146), the cause of action under the Act being barred at the expiration of six months from the occurrence of the accident unless kept alive by the renewal of the writ of summons, cannot, after the writ is expired and no valid service having been effected, be revived by a renewal of the writ, though the common law cause of action has not become barred.

[*Doyle* v. *Kaufman*, 3 Q.B.D. 7, 340; *Hewett* v. *Barr*, [1891] 1 Q.B. 98, followed; *Williams* v. *Harrison*, 6 O.L.R. 685; *Mair* v. *Cameron*, 18 P.R. (Ont.) 484, referred to.]

2. WRIT AND PROCESS (§ I—8)—RENEWABILITY AFTER ACTION BARRED.

Where owing to the expiry of a writ of summons a cause of action has become barred by the Statute of Limitations, leave to renew the writ *nunc pro tunc* ought not to be granted.

Statement

APPEAL from an order of Clute, J., setting aside the renewal of a writ of summons.

A. W. Langmuir, for appellant.

W. Morrison, for defendant company, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from an order of Clute, J., dated the 2nd September, 1915, setting aside an order dated the 16th August, 1915, made by an Official Referee, sitting for the Master in Chambers, allowing the renewal of the writ of summons after it had expired.

The action is brought to recover damages for personal injuries sustained by the appellant while employed by the respondent, which it is alleged were occasioned by the negligence of the respondent. The appellant's claim is based upon the common law as well as upon the Workmen's Compensation for Injuries Act.

The cause of action, if any there is, arose on the 6th September, 1913, when the appellant was injured.

The writ of summons was issued on the 5th March, 1914, and was not renewed until the 27th August, 1915, when it was renewed for one year fron the 4th March, 1915, under the authority of the order of the 16th August, 1915.

The cause of action, if any, under the Workmen's Compen-

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sation for Injuries Act, R.S.O. 1914, ch. 146, was barred at the expiration of "six months from the occurrence of the accident causing the injury," unless kept alive by the issue and renewal of the writ of summons (sec. 9), but the common law cause of action is not yet barred.

The acting Master in Chambers was of opinion that, in the circumstances disclosed in the affidavits, a case had been made for allowing the renewal, and that he had power to allow it, although the effect of the renewal would be to revive the right of action under the Act, which was barred.

According to these affidavits, Atkinson & Winter, solicitors in Simcoe, were retained by the appellant in the autumn of 1913, and a Buffalo solicitor named Klein was, in the spring of 1914, retained to advise with Atkinson & Winter, with a view to expediting the action. He deposed that on more than one occasion while in Simcoe—when, he does not say—he inquired of Mr. Winter whether the writ had been served, and was told by him on each occasion that it had not been, but that he would immediately attend to it; that he subsequently spoke of the matter by telephone to Winter, who again assured him that he would see that the writ was served; that on the 16th February, 1915, he wrote to Winter asking to be informed immediately whether or not the writ had been served, and recalling the fact that in the previous October and November he had been assured by Winter that he would serve the writ on the next day. He does not say whether he received any reply to his letter, or, if there was one, what it was. He further deposes that on the 26th February last he spoke by telephone with Mr. Atkinson, who informed him that Winter was seldom at his office, that he (Atkinson) knew nothing of the action, as it was being looked after by Winter personally, and that "he" (Atkinson) "would rather not be interested in it at all;" that "immediately thereafter," and shortly before the expiration of the twelve months from the 5th March, 1914—on what date he does not say—he ascertained that the writ had not been served, and that on the 2nd March, 1915, he instructed Messrs. Bruce, Bruce, & Counsell, of Hamilton, by telephone, to "see that the plaintiff's interests were protected."

According to Mr. Counsell's affidavit, this telephone message to his firm was received on the 3rd March, and it was a request to his firm to communicate with Atkinson & Winter and see that the

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writ was served; that he telegraphed them asking if the writ had been served, and asking them, if it had not been, to send it and a copy that day, if possible, for service. Mr. Counsell's affidavit is silent as to whether he received any answer to his telegram or to the letter which he sent on the same day confirming it. He on the 4th March applied to a Local Judge in Hamilton and obtained from him an order renewing the writ for "another twelve months," but this order was subsequently set aside. Since then he has taken the necessary steps to have the solicitors changed, and the plaintiff arranged to put up security for costs. He states that the delay in moving "for an order for renewal and leave to serve had been by reason of the plaintiff's financial condition," whatever that may mean. Mr. Counsell's affidavit was sworn on the 24th July, 1915, and the application to the acting Master in Chambers was made on the 14th August following. No affidavit has been made by Atkinson or Winter, nor has either of them been examined for the purpose of the motion.

The writ was issued on the 5th March, 1914, the last day of the six months within which the action must have been brought under the provisions of the Workmen's Compensation for Injuries Act. An affidavit of Mr. Morrison, the solicitor for the respondent, in answer to the application, was filed, and in it he deposes that in or about January, 1915, Klein informed him that the writ had been issued; that he would have it served; and that he intended seeing Mr. Counsell and "directing him to do the same." There is no denial of this by Klein, and it shews that in January, four or five weeks at least before the writ would expire, Klein knew that it had not been served; and there was, therefore, ample time, before it did expire, to serve the writ or to have it properly renewed. There was never any difficulty in serving it upon the respondent, at its place of business, either in Simcoe or in Hamilton.

Upon this state of facts, no case was made for allowing the writ to be renewed, even if, had a case been made, it was in accordance with the practice of the Court to permit a renewal so as to revive a cause of action which had become barred. There is no explanation of the reason for failing to serve the writ while it was yet in force; and, with the knowledge that Klein had in January that it had not been served, there was no reason why it was not served before it had expired, or why an order was not obtained

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while it was yet alive for its renewal. If there was any difficulty in obtaining possession of the writ, a duplicate writ might have been issued (Rule 8) and a copy of it served before it had expired, or, if it was desired to renew it, leave to serve less than two days' notice of the application for leave to renew might have been obtained from a Local Judge in Hamilton, and the application have been made before the writ had expired. In addition to all this, there is no satisfactory explanation of the delay of upwards of four months between the 3rd March, when Mr. Counsell was instructed, and the making of the application to the acting Master in Chambers.

In my opinion, where, owing to the expiry of the writ of summons, a cause of action has become barred, leave to renew the writ *nunc pro tunc* ought not to be granted. Even where the writ is yet alive, the plaintiff may not, as he formerly might have done, take it to the proper office and have it renewed, but he must obtain leave to renew it, and apparently the only ground upon which such an application is based is that for a sufficient reason any defendant has not been served (Rule 9). The practice in England is well settled, and it is that leave to renew will not be granted if the cause of action has been barred by a statute of limitations.

It was so decided by Chief Justice Cockburn in *Doyle* v. *Kaufman*, 3 Q.B.D. 7; and his judgment was affirmed by the Court of Appeal (3 Q.B.D. 340), which intimated its opinion that the principle of the decision of the Court below was right, but dismissed the application on the ground that the plaintiff himself had been guilty of such laches as disentitled him to a renewal of the writ.

That case was followed by the Court of Appeal in *Hewett* v. *Barr*, [1891] 1 Q.B. 98, and in delivering his judgment Lopes, L.J., said that in his experience the practice as laid down in *Doyle* v. *Kaufman* "had been followed ever since." Kay, L.J., while concurring in the judgment of the Court, was disposed to think that the Court had power under exceptional circumstances to grant such an application as that which was being dealt with, and said that he could "imagine a case where, it being proved that every kind of effort had been made to serve the writ, and by accident or mistake no application to extend the time having been made within the year, it would be very hard that the plaintiff should

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lose all remedy because the period of limitation had in the meantime expired."

In *Smalpage* v. *Tonge* (1886), 17 Q.B.D. 644, *Doyle* v. *Kaufman* was distinguished, on the ground that in it the right of action had gone, while in the case under consideration it had not gone because the writ had been regularly renewed and was still in force, and all that the plaintiff was asking was for leave to issue a concurrent writ and to serve it out of the jurisdiction. No doubt was suggested as to the correctness of the decision in *Doyle* v. *Kaufman*, but on the contrary it was treated as a binding authority for what was decided in it.

The same practice has been followed in this Province. One of the cases in which it was followed is *Williams* v. *Harrison*, 6 O.L.R. 685, a decision of the Master in Chambers, affirmed by the now Chief Justice of the Common Pleas. I refer also to *Mair* v. *Cameron* (1899), 18 P.R. 484.

This case differs from *Doyle* v. *Kaufman* in that the common law cause of action is not barred; but that affords no reason for allowing that to be done which will revive the cause of action that is barred.

There is nothing to prevent the appellant from issuing a new writ and proceeding with an action based upon his common law claim, and that he should be left to do.

I would affirm the order and dismiss the appeal with costs.

Appeal dismissed.

BOEHNER v. SMITH.

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Nova Scotia Supreme Court, Graham, C.J., and Longley, Drysdale, and Harris, JJ. February 26, 1916.

1. SALE (§ I B—6)—DELIVERY OF LOGS—CONDITIONS PRECEDENT—INSPECTION—NOTICE.

A provision in a contract for the sale of logs that they are to be delivered and safely boomed in cove and notice given that the driving operations had ceased for the time being and inspection of them had been made and found satisfactory, creates conditions precedent to be complied with to the passing of the property in the logs.

2. DAMAGES (§ III A 4—70)—MEASURE OF—SALE OF LOGS—SELLERS' FAILURE TO DELIVER.

In assessing damages for breach of contract to deliver logs, the resort to market value, though one of the commonest, is not a conclusive test, but merely an aid; and where there is no market value the buyer is entitled to estimate the loss as that which is directly and naturally resulting in the ordinary course of events from the seller's breach of contract; nor is it necessary that the buyer purchase other logs elsewhere and thus establish his loss.

[*Graham* v. *Bigelow*, 3 D.L.R. 404, 46 N.S.R. 116, affirmed in 15 D.L.R. 294, 48 Can. S.C.R. 512, applied.]

N. S.

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BOEHNER v. SMITH.

APPEAL from the judgment of Meagher, J., in favour of plaintiffs in an action claiming damages for non-delivery of logs according to contract. Varied.

H. Mellish, K.C., and *J. A. McLean*, K.C., for appellants.

A. Roberts, K.C., for respondents.

The judgment of the Court was delivered by

Harris, J.

HARRIS, J.:—This is an appeal from a decision of Meagher, J., on a trial which took place before him at Bridgewater.

The action was for damages for loss of profit for non-delivery of 347,743 ft. of logs, part of a quantity of 824,564 ft., which defendants agreed to deliver to plaintiffs under a written contract. The provisions of the contract which are important are the following:—

> The said John W. Smith and J. A. Jodrey hereby agree to sell to the said Boehner Bros. a lot of spruce, pine and hemlock logs, as per scale bills from Reuben Doliver for the months of November and December, 1913, and January, February and March, 1914, for 27,403 pieces, scaling 828,564 ft. Said logs to be delivered afloat in cove at West Lahave Ferry, excepting the logs that are at present yarded on bank of ferry landing, which are to be delivered where they now lie. All logs above referred to to be delivered on or before November 1, 1914, and held by sufficient booms, double on the outside, to safely hold in cove until removed. If cove will not hold all logs when driving down brook, the said Boehner Bros. are to remove a boom of same to upper cove to make more room to receive logs. When logs are delivered and safely boomed in cove and driving operations stop, at any time, logs are to be at Boehner Bros.' risk, after notice has been given that driving operations have ceased for the time being and inspection of booms has been made and found satisfactory. The said John W. Smith and J. A. Jodrey also agree to sell five lots of logs along Lahave River bank, delivery of said lots to be taken at any time after above date, lots as follows from John Lohnes, Jonas Wilkie, George Lohnes, Louis Corkum, Amos Murphy as per scale bills from Reuben Doliver, dated March 21, 1914, containing 400 pieces, scaling 24,642 ft. Total quantity of timber contained in said lots 853,206 ft. at $11.50. Eleven $\frac{50}{100}$ dollars per M. scale measure as per scale bills before referred to.

Under this contract it is, I think, clear that the property in the logs did not pass until the logs were delivered and safely boomed in cove, and notice given by defendants to plaintiffs that driving operations had ceased for the time being and inspection of the booms had been made and found satisfactory. Benjamin on Sales, 322 and 323 and cases cited.

So far as the case discloses, no notice under the contract was given, nor were the booms inspected and found satisfactory by plaintiffs. What the defendants say did happen is that the plaintiffs came down and took away what logs had been put

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into the booms. The defendants admit that 185,337 ft. of the logs sold plaintiffs were never delivered. The plaintiffs claim that 347,743 ft. were undelivered.

The real question is how many logs did plaintiffs take away from the booms? They produced the mill or saw survey of all defendants' logs which passed through their mill amounting to 479,342 ft. produced from 16,812 logs. The contract called for 27,403 pieces scaling 828,564 ft. This left a shortage of 10,591 logs scaling 349,222 ft. I take no account of the 400 logs scaling 24,642, along the Lahave river, as there is no controversy about them.

The plaintiffs say that the 479,342 ft. produced from the 16,812 logs is all that they ever received, and the trial Judge has adopted the mill count as being the most reliable evidence before him. I entirely agree with what the trial Judge has said on this subject. All other evidence was merely estimates of defendants which I do not think can be relied upon. The defendants not having shewn delivery notice and inspection of the booms required by the contract in my opinion have failed to establish delivery of anything except what plaintiffs took actual delivery of, and I think the trial Judge correctly found that the mill count was the best evidence of that. There was some evidence of logs having been lost out of the boom, but the logs were not at plaintiffs' risk until they had received notice under the contract and had inspected and found the booms satisfactory. There is no evidence that any logs were lost after plaintiffs took possession.

On the argument, counsel for defendants strenuously contended that the logs referred to in the contract as yarded on the bank of the ferry landing and which were to be delivered to plaintiffs where they then lay, did not form part of the 479,342 ft. which was shewn by the mill count or saw bills.

I think it is absolutely clear that they were part of the 479,342 and that the whole trial proceeded on that theory.

If this contention of defendant's counsel was correct it would shew that defendants had delivered 99,479 ft. more logs than existed. There is no dispute that the quantity on the bank was 263,364 ft. The total quantity, including these, was 828,564 ft. The difference is 565,200 ft. Now, if the 263,364 ft. did not form part of the 479,342 ft. we have to add to that the 185,337

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ft. admittedly not delivered and we find a total of 664,679 ft. delivered. Whereas there were only 565,200 ft. according to Doliver's scale. This would mean about 2,700 logs scaling practically 100,000 ft. that Doliver's count had omitted. If there was nothing else, this would, I think, be sufficient to disprove the contention, but an examination of the case shews that the 479,364 ft. shewn by the mill count included the 263,364 ft. on the bank.

If we look at the plan we find that the only way the logs on the bank could be got to the mill was by putting them into the cove with the other logs.

Pernette who measured all the logs sawed by plaintiffs says he measured and marked every log as it was sawed. He kept an account of the sawing each day. He says the saw bills:—

shew all the logs sawed from Smith and Jodrey's logs. All that came in the mill from them. (And on cross-examination he says): I know that all the logs up the cove were sawed before I went away except those in the brook that were sawed after I came back.

Jodrey, one of the defendants, in speaking of the 828,564 ft., says:—

Some of them were in the back of the cove, some up the Pernette brook and some up the Lahave. And again: Q. This cove which Mr. Johnston shews on his plan is the cove where those logs up the Pernette brook were to be delivered? A. Yes. The lot of 828,564 ft. The others were on the Lahave river. And in referring to the logs delivered he is asked: Q. So you delivered this two fillings of the lower boom and one of the upper? A. Yes. They got the logs on the river bank. Q. Have you made an estimate of the logs you put in those two booms at the cove? A. Yes, 23,891.

He then proceeds to say that they did not deliver 6,587 pieces scaling 183,738 ft.

Now, if we add the 23,891 which he says they put in the boom to the 6,587 pieces which he says were not delivered, we get a total of 30,478 pieces. Whereas the contract shews that there were only 27,403 pieces in the whole 828,564 ft. The 828,564 ft. includes the 263,364 ft. on the bank. It is, therefore, obvious that Jodrey, throughout, was treating the 263,364 ft. as part of the logs in the booms and the logs in the booms are what produced the 479,342 ft. shewn by the saw bills.

Throughout Jodrey's evidence he treats the 263,364 ft. on the bank of the cove as part of the lot up the brook, and part of what was in the booms. Smith, the other defendant, was asked:—

Q. Did you use that lower boom after that? A. We used the same boom this spring and it held 6,000 and some logs, and we sawed out 170,000

superficial feet of lumber from them. Boehner Bros. only gave us credit for 215,000 in the whole thing.

The only way Smith could arrive at the 215,000 ft. is by assuming that the mill count or saw bills, 479,342 ft., included the 263,364. He deducts the 263,364 from the 479,342 ft. and thus finds that there are only 215,000 and some odd feet which he complains is all they are being allowed by the plaintiffs for the other logs which came down the brook.

In my opinion, the 263,364 was part of the 479,342 ft. and it was so treated throughout the trial by all parties and the trial Judge so understood it.

It was also argued that the damages were not assessed on the right basis and that plaintiff should have gone out and bought other logs and thus established their loss. The resort to market value, though one of the commonest, is not a conclusive test, but merely an aid. There is no evidence of the market value and the plaintiffs are entitled to the estimated loss directly and naturally resulting in the ordinary course of events from the sellers' breach of contract.

See *Graham* v. *Bigelow*, 3 D.L.R. 404, 46 N.S.R. 116, affirmed on appeal, 15 D.L.R. 294, 48 Can. S.C.R. 512.

Plaintiffs would have made a profit of $2 per thousand on the logs. The trial Judge has fixed these damages at $650, and I think his finding as to the amount should stand.

There is, however, a further question in the case. The plaintiffs in settling with the defendants deducted a sum of $324, being $1.50 per thousand on 216,000 ft. of logs which came down the river. The plaintiffs' claim is that only the smallest of the logs up the river were delivered, and the evidence shews that small logs cannot be cut to the same advantage as larger ones.

After giving careful consideration to the evidence bearing on this question I think plaintiffs have failed to satisfactorily establish this claim and the evidence that defendants agreed to and did settle on this basis is contradicted.

Though not without doubt on the point I have finally reached the conclusion that this $324 should be deducted from the $650, and the judgment below should be varied accordingly.

An affidavit was read on behalf of defendants in support of the motion for a new trial. This affidavit, if true, could not,

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in my opinion, affect the decision, and it is contradicted. I would dismiss the application for a new trial and the appeal with costs, subject to the reduction of the judgment by the sum of $324 referred to. *Judgment varied.*

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Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. December 20, 1915.

1. LANDLORD AND TENANT (§ II D—31)—ACCEPTANCE OF SURRENDER—RECEIVING KEY—ADVERTISING FOR RENT.

Acceptance of the surrender of a tenancy depends on the intention, merely receiving the key or putting up an advertisement for rental is not necessarily an acceptance of the premises by way of surrender.

[*Mickleborough* v. *Strathy*, 23 O.L.R. 33, referred to.]

2. APPEAL (§ VII M 3—535)—WHAT ERRORS WARRANT REVERSAL—AS TO EVIDENCE.

It is the plain duty of an Appellate Court to reverse the findings of the trial judge, if it appears that he has misapprehended the effect of the evidence, or failed to consider a material part thereof, leading him to erroneous conclusions.

[*Beal* v. *Michigan Central R. Co.*, 19 O.L.R. 502, applied. See also *Western Motors Ltd.* v. *Gilfoy*, 25 D.L.R. 378; *Holt Timber Co.* v. *Re Callum*, 25 D.L.R. 445; *Kerley* v. *Edmonton*, 21 D.L.R. 308.]

Statement

APPEAL by the plaintiff from the judgment of Denton, Jun. Co.C.J., dismissing without costs an action for rent.

H. M. Mowat, K.C., for appellant.

S. W. Burns, for defendant, respondent.

The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—This is an action for rent brought by a mesne tenant against his subtenant—at the trial, before His Honour Judge Denton, the action was dismissed without costs; and the plaintiff now appeals.

Denuded of irrelevant detail, the facts of the case are few and devoid of complication.

The plaintiff, being about to rent a large building in Toronto from Mr. Greey, entered into negotiations with the defendant to let to him three storeys of it. He contends that it was agreed that the defendant should become his tenant for six months certain; the defendant contends that his tenancy was from month to month.

The learned County Court Judge does not discredit either party, but on the whole case he is "unable to find as a fact that the defendant at any time actually obligated himself to take the premises for six months."

On an appeal of this kind the duty of an appellate Court is correctly stated in *Beal* v. *Michigan Central R.R. Co.*, 19 O.L.R. 502, in part thus (p. 506): "If it appears from the reasons given by the trial Judge that he has misapprehended the effect of the evidence or failed to consider a material part of the evidence, and the evidence which has been believed by him, when fairly read and considered as a whole, leads the appellate Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the plain duty of the Court to reverse these findings."

The County Court Judge has accredited the witnesses Greey and Archer, but thinks that their evidence is not helpful—as it seems to me, the evidence of Greey and Archer is conclusive.

The admitted facts are that both parties expected the defendant to become the plaintiff's tenant, and that the plaintiff was endeavouring to get terms from Greey and the defendant which would justify him in taking a lease from Greey; the defendant was willing to pay a certain amount, but not more, as rent—this was not sufficient to answer the plaintiff's purpose. Now the stories of the two parties begin to differ—the plaintiff says that the defendant, while declining to pay any further amount explicitly as rent, agreed to pay $100 as a "bonus," which would be the same in effect as paying an increased rent. The defendant's story is that the $100 was to be paid—that it was to be paid is admitted—towards the expense of a stairway. Mr. Greey swears that the whole expense of the stairway would not be $50, and he is expressly accredited by the trial Judge.

Mr. Archer says that the defendant said he would give the $100 "as a bonus," and Mr. Archer is expressly accredited.

I think it obvious that these two pieces of evidence were entirely overlooked, and that, had they received due consideration, the result would have been different.

Under the rule in *Beal* v. *Michigan Central R.R. Co.*, it seems to me our clear duty to allow this appeal.

The claim here is for the balance of the six months' rent; and, unless there is something in the conduct of the plaintiff which bars him of his right, judgment should go for the full amount.

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The defendant gave a notice to quit, on the assumption that he was a tenant from month to month; and he asserts that his landlord took possession.

The facts are that, when the defendant claimed that his tenancy was at an end, the plaintiff wrote him as follows: "As you returned the key and otherwise expressed yourself not wishing to occupy the premises, also did not pay rent on the 1st of March as agreed, I have instructed Mr. Greey to go ahead and get a tenant for the three floors or all of the building; and, if he can get one, I would move on a month's notice; and, if he can rent same, will only ask you to pay rent up to when he gets the other tenant, but expect the rent from you until such a time as he gets one." No objection was made by the defendant; Mr. Greey put up a placard in the premises advertising them for rent, etc.

Such acts as receiving the key, putting up an advertisement for rental, etc., etc., are not necessarily an acceptance of the premises by way of surrender—it depends on the intention. Most of the cases are considered in *Mickleborough* v. *Strathy*, 23 O.L.R. 33, and need not be here repeated.

It is abundantly clear that all that was done by or for the plaintiff in connection with the premises was in effect to endeavour to obtain another tenant—if such tenant could be obtained, the attempted surrender of the defendant would be accepted and effective at that moment, but not till then.

Had a different conclusion been arrived at, it would have been necessary to consider whether the plaintiff was not entitled to at least one month's rent. As at present advised, I think the notice fatally defective, and I should not follow the Missouri case, *Drey* v. *Doyle* (1887), 28 Mo. App. 249—but this need not be pursued.

The appeal should be allowed and judgment entered for $730, interest from the teste of the writ, and costs of this appeal and in the Court below. *Appeal allowed.*

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New Brunswick Supreme Court, McLeod, C.J., and White and Grimmer, JJ. October 22, 1915.

1. RAILWAYS (§ I—7)—SUBSIDIES—EXTENT OF GOVERNMENT'S POWER TO RETAIN PROCEEDS IN PAYMENT OF INDEBTEDNESS—SUB-CONTRACTORS.

The preceding part of sec. 18 of the Railway Subsidy Act (N.B.), 4 Geo. V. ch 10, as it stood prior to its repeal by sec. 6 of Act 5 Geo. V. ch. 9, and substituted by sec. 12 of the latter Act, providing for the retention by the government, out of the proceeds of bonds authorized thereunder, amounts sufficient to cover "all outstanding indebtedness due contractors or others employed in the actual work of constructing the railway, and for materials, wages and supplies that have gone into the construction," refers only in respect of indebtedness by the company itself and does not cover indebtedness of sub-contractor or others.

Statement

THIS action was commenced by the plaintiff against the defendants, the Hibbard Co., Ltd., James S. Neill & Sons, Ltd., and Samuel Davidson, claiming a declaration as to the rights of the plaintiff company against the defendants under an agreement dated October 27, 1914, between the plaintiff company and the defendant The Hibbard Co., Ltd. The parties concurred in stating the questions of law arising therein in the form of a special case for the opinion of the Court under O. 52, r. 5, and O. 34, r. 1, and the facts set forth in the special case material to the judgment are as follows:

The St. John and Quebec R. Co. entered into a contract with His Majesty the King, dated December 12, 1911, to construct a certain line of railway known as the "Valley Railway." The contract provided for the guarantee of bonds and the payment of cash to the company, and by sec. 17 it is provided that before being entitled to any guarantee of bonds or before payment of cash the company shall furnish evidence satisfactory to the Lieutenant-Governor-in-Council establishing that all just claims against the company or against the contractors and sub-contractors for materials and supplies furnished, for wages, for work and labour done for the purpose of construction of that part of the section of the said railway in respect of which the guarantee of bonds or payment of cash is required, had been fully paid or satisfied. This contract was confirmed by Act of Assembly passed in March, 1912. By a contract dated May 8, 1912, the railway company and the Hibbard Co. entered into a contract for the construction by the Hibbard Co. of a portion of the railway, and in this contract sec. 21 provided:

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In case any sum due for the labour of any foreman, workman or labourer, or for the use of any horses, or other animals, or waggons or other plant, employed upon or in respect of the said works, or any of them, remains unpaid, not paid, the company may pay such sum, and the contractors covenant with the company to repay at once any and every sum so paid, and if the contractor does not pay the same within two days the company may deduct the amount or amounts so paid by it from any sum that may then or thereafter be or become due by the company to the contractor, and it is agreed that so long as any such sum remains unpaid the contractor's pay rolls, time books and other books of account and vouchers relating to such unpaid sum, shall be open for inspection by the authorized representatives of the company, etc.

The work of construction proceeded, and on March 11, 1914, an Act was passed by the Legislature whereby the government was authorized to guarantee second mortgage bonds of the railway company to the extent of $10,000 per mile, of which, however, only $8,000 per mile could be used for the purpose of construction between Centreville and Gagetown. The first mortgage issue of $25,000 per mile having been exhausted, or nearly so, sec. 18 of this Act provided:

From the money obtained from the sale of the bonds guaranteed under this Act there shall be retained by or deposited with the Provincial Secretary-treasurer an amount sufficient to cover and provide payment for all outstanding indebtedness of the company now due or to become due to the said contractors, or others employed in the actual work of constructing the said railway, and for materials, wages and supplies that have gone into the construction as well as for right of way heretofore acquired or taken.

The section then provides for an arbitration between the company and the claimants and provides that all claims agreed upon or established shall be filed with the Provincial Secretary-treasurer within 60 days of the passing of the Act or of the time when the said indebtedness shall become due. There is a further provision that the Lieutenant-Governor-in-Council may, at the request of any contractor, require the company to submit any dispute to arbitration; and further, that before becoming entitled to any guarantee of the bonds or payment under this Act the company shall furnish the Lieutenant-Governor-in-Council satisfactory evidence that all just claims against contractors or subcontractors for materials, wages and supplies in connection with work hereafter to be done on said roadway shall have been paid and satisfied.

By agreement dated October 27, 1914, the railway company took over the work under contract with the Hibbard Co. as completed, and the parties further settled between them the amount

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due the Hibbard Co. As certain claims had been filed with the Provincial Secretary-treasurer, it was provided by the agreement that it should be left to the Court to decide whether the railway company was liable to pay or satisfy any of such claims, whether if liable to pay such claims the company was entitled to deduct from the payment to the Hibbard Co. the amount of the claim for which it was liable, or to be indemnified by the Hibbard Co. against such claims.

The questions submitted for the opinion of the Court are set out in the judgment of the Court:

H. A. Powell, K. C., for the plaintiff.

F. W. Hibbard, K. C., of the Montreal Bar, and *Fred. R. Taylor* K. C., for the defendant company.

R. B. Hanson, for the defendants, James S. Neill and Sons, Limited and Samuel Davidson.

The judgment of the Court was delivered by

White, J.

WHITE, J.: This matter coming before the Court upon a case stated under the provisions of O. 25, r. 5, upon the hearing on the fifth day of May last, the arguments centred almost entirely upon the question as to what is the true construction to be given sec. 18 of the Act 4 Geo. V. ch. 10. That section was repealed by the Act 5 Geo. V. ch. 9, sec. 6, passed on the same day the argument in this matter was heard; and by sec. 12 of this last mentioned Act new provisions were enacted providing for the retention by the Government out of the proceeds of bonds authorized under said Act 4 Geo. V., ch. 10 of moneys to cover certain claims of contractors and others specified in the section.

In view of the last mentioned legislation and of the repeal thereby of sec. 18 of the Act 4 Geo. V., which is the section we are required to construe in order to answer the questions submitted in the stated case, it appeared to the Court that no practical end would be served by delivering judgment in the case submitted. The Attorney-General, evidently entertaining the same view, informed the Court through the Chief Justice that the new legislation had rendered judgment in the stated case unnecessary. Recently, however, the Premier of the Province has asked that judgment be given in the matter. In complying with this request we wish to point out that in giving this judgment we are necessarily dealing only with the facts set forth in the stated case and with

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the law as it stood prior to the enactment of the said Act 5 Geo. V. ch. 9.

Although the case stated sets out sec. 18 of the Act, 10 Edw. VII. ch. 6, it is not alleged that the Lieutenant-Governor-in-Council has refused to guarantee any bonds by reason of the provisions of that section, nor that the plaintiff company, in order to obtain such guarantee, has been obliged to pay any claims against contractors or sub-contractors as provided by said section, nor if the plaintiff company had paid, or shall pay, any claims under that section, are we asked to state what right the plaintiff company has, or would have, to be recouped from any contractor or sub-contractor in respect of such payment.

Upon examination of sec. 18 of the Act 4 Geo. V. referred to, it will be observed that the last eight lines thereof relate exclusively to "claims against contractors or sub-contractors for materials, wages and supplies in connection with work *hereafter to be done*," and in no way modify or affect the meaning of the preceding part of the section. It was stated upon the argument that no question arises as to claims covered by these last eight lines.

It is likewise apparent that the provisions of all that part of the section which precedes said last eight lines—and which for convenience I will hereafter refer to as the first part of the section—apply only to "moneys obtained from the sale of bonds *guaranteed under*" said Act 4 Geo. V. ch. 10.

I think it quite clear also that the moneys which this first part of the section requires to be retained by or deposited with the Provincial Secretary-treasurer are "to cover and provide payment for all outstanding *indebtedness of the company*," due either at the passing of the Act or accruing due thereafter where such indebtedness is either "to sub-contractors or others employed in the actual work of constructing said railway," or is "for materials, wages and supplies that have gone into" such construction, or is "for rights of way heretofore acquired or taken." In other words, it is only in respect of indebtedness by the plaintiff company itself and not to cover indebtedness of sub-contractors or others for which the plaintiff company is not liable, that the moneys are to be retained by the Government, that this is so, is, I think, apparent not only upon giving to the language of the first nine lines of the sec-

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tion its ordinary grammatical meaning, but from a consideration of the subsequent clause of the section requiring that the amount due "shall have been agreed on between the company and the person claiming," or "shall have been established by the judgment of a court of law or by the award of arbitrators as in the section provided." The arbitration provision referred to provides "that the Lieutenant-Governor-in-Council may at the request of any contractor by order in Council require the *company* to submit any matter in dispute between it and any contractor to arbitration," etc.

Question 1 which we are called upon to answer is as follows: "Is the railway company liable to pay or satisfy any, and if so what claims now or hereafter to be filed by sub-contractors or others with the Provincial Secretary-treasurer *under* ch. 10, 4 Geo. V?"

The provision for filing claims under said Act is that contained in said sec. 18, and reads as follows:

provided also that a claim *for the same so agreed upon or established* shall be filed with the Provincial Secretary-treasurer within sixty days of the passing of this Act or of the time when said indebtedness shall become due.

It is quite evident that the claims which may thus be filed are those against the plaintiff company in respect of its own indebtedness, and not claims against sub-contractors. The answer to this question is therefore, "No."

Q. 2 reads: "Should there be retained by or deposited with the Provincial Secretary-treasurer any amount, being the proceeds of the said bonds, sufficient to cover and provide payment of the *above claims* or some and what portion thereof?" The answer to this question is "No."

Q. 3 is: "If the railway company is liable to pay said claims or any thereof, or there should be retained or deposited with the Provincial Secretary-treasurer any such amount to cover and provide payment of the said claims or any thereof, and the said claims or any thereof are paid out of the sum so deposited, is the railway company entitled to be recouped or repaid by the Hibbard Co., Ltd.?"

The answer given to questions 1 and 2 render any answer to this question unnecessary.

Judgment accordingly.

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RÉAUME v COTÉ

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Magee and Hodgins, JJ.A. January 10, 1916.

1. ADVERSE POSSESSION (§ I A—1)—JURISDICTION OF COURT TO CONFIRM TITLE—DECLARATORY ORDER—DISCRETION.

The discretion which exists in the court under sec. 16(*b*) of the Judicature Act, R.S.O. 1914, ch. 56, to grant or withhold a mere declaration of right, is not to be exercised to confirm a title to land claimed by possession under the Statute of Limitations (R.S.O. 1914, ch. 75).

[*Miller* v. *Robertson*, 35 Can. S.C.R. 80, followed; *Foisy* v. *Lord*, 2 O. W.N. 1217, affirmed in 3 O.W.N. 373 distinguished.]

Statement

APPEAL from the judgment of Sutherland, J., in favour of plaintiff in an action for a declaration that the plaintiff was entitled to the fee simple in certain land.

J. H. Rodd, for appellants.

J. Sale, for plaintiff, respondent.

Garrow, J.A.

The judgment of the Court was delivered by

GARROW, J.A.:—The plaintiff is in possession of the land in question, and the action was brought to obtain a declaration that she is entitled in fee simple as against the defendants. The plaintiff's alleged title as against them is solely derived by length of possession for a period exceeding the ten years prescribed by the Statute of Limitations; and the relief which has been granted is simply a declaration that she is so entitled.

Sutherland, J., was of the opinion that the fact of possession for more than the statutory period had been established by the evidence: a conclusion upon which, for reasons which follow, I express no opinion.

A question was raised before us, apparently for the first time, as to the propriety of granting a declaratory judgment under the circumstances.

This question, besides being of general importance, is, in view of the numerous authorities on the subject, both in our Courts and in England, one of some nicety.

Relief by means of a declaratory order or judgment is borrowed from the old Chancery practice. There was no similar practice in the Courts of Common Law. Our Chancery General Order 538, which for many years prescribed the practice, said: "No suit is to be open to objection on the ground that a merely declaratory decree or order is sought thereby; and the Court may make a binding declaration of right without granting consequential relief."

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GARROW, J.A.

Clause (*b*) of sec. 16 of the present Judicature Act (R.S.O. 1914, ch. 56) provides that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

This statutory provision was first introduced by the Administration of Justice Act, 1885, 48 Vict. ch. 13, sec. 5, and is identical in language with the English Order XXV., r. 5.

In *Bunnell* v. *Gordon* (1890), 20 O.R. 281, Ferguson, J., expressed the opinion that the difference between the law under the provisions of Order 538 and under the statute was, that the former enabled the Court to make a binding declaration when consequential relief was or might have been claimed, and the latter to do so whether consequential relief is or is not claimed. And that the effect of the statute was not to make a radical change in the rules and practice of the Court, but only to empower the Court in a proper case to make the declaration, even though consequential relief could not be claimed. In that case relief was asked by way of a declaratory judgment in respect of an inchoate right of dower, and was refused.

In an earlier case, *Austen* v. *Collins* (1886), 54 L.T. R. 903, 905, cited by Ferguson, J., in his judgment, Chitty, J., had expressed a similar opinion upon the effect of the English Order XXV., r. 5, which, as I have before pointed out, is identical in terms with out statute. At p. 905 that learned Judge also said: "The rule leaves it to the discretion of the Court to pronounce a declaratory judgment when necessary; but it is a power which must be exercised with great care and jealousy."

Similar relief was refused by a Divisional Court in *Stewart* v. *Guibord* (1903), 6 O.L.R. 262, in which the declaration was sought to enable the plaintiff to collect from the Government a money demand which was also claimed by the defendant. It may not be amiss, however, to point out that the cases to which Street, J., in delivering the judgment of the Court, refers, stand upon a somewhat distinct ground of their own, namely, the impropriety of the Court interfering by a declaratory judgment in a matter for the determination of which another tribunal has been provided. See also upon this branch the remarks of Meredith, C.J.O., in

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Garrow, J.A.

Ottawa Young Men's Christian Association v. *City of Ottawa* (1913), 15 D.L.R. 718 at 723-4, 29 O.L.R. 574, at 581.

But the case of *Miller* v. *Robertson*, 35 Can.S.C.R.80—the head-note of which says, "A Court of Equity will not grant a decree confirming the title to land claimed by possession under the Statute of Limitations nor restrain by injunction a person from selling land of another"—seems to be almost precisely in point, and is of course an authority which we should follow even if we doubted its reasoning; which I do not.

In that case, as in this, the plaintiff's title rested entirely upon his possession. The plaintiff's action was for an injunction to restrain a threatened sale by the defendant, the owner of the paper title, and a declaration that the plaintiff was entitled. The Judge in Equity had made a decree declaring the plaintiff to be the owner in fee of the land. This was reversed by the Supreme Court, and the action dismissed. The case, it is true, came from New Brunswick; but it is evident from the course of the argument, and also from the judgment itself, that the decision did not proceed to any extent upon any peculiarity in the law of that Province. In that case, as in this, the objection which prevailed had not been taken in the Courts below; but, notwithstanding, full effect was given to it, although the defendant was quite properly deprived of his costs.

There can be no doubt, therefore, upon all the authorities—to only a few of which I have referred—that now in all cases a discretion exists in the Court to grant or to withhold a mere declaration of right. That being so, a very proper case for the exercise of the discretion adversely to the plaintiff seems to be such a case as this.

Upon the argument we were referred to the case of *Foisy* v. *Lord*, 2 O.W.N. 1217, affirmed in 3 O.W.N. 373, in which a similar judgment was pronounced; but the point was apparently not raised in that case any more than in this. Moreover, the facts considerably differed from those now before us. The action was brought to rectify a deed, and rectification was also asked by the defendant. In the end the claims on both sides for rectification were disallowed, and a declaration made that the defendant (not the plaintiff) had acquired a title under the statute, by possession. The judgment in the Divisional Court is contained in two lines,

thus: "The Court, Falconbridge, C.J.K.B., Britton and Latchford, JJ., dismissed the appeal with costs."

Under these circumstances, that case is not, I think, an authority of value for the plaintiff in this case.

For these reasons, I think the appeal should be allowed, but, under the circumstances, without costs, and the action should be dismissed, also without costs. *Appeal allowed.*

NOLAN v. MONTREAL TRAMWAYS CO.

Quebec Court of Review, Archibald, A.C.J., Lafontaine and Mercier, JJ. October 28, 1915.

1. STREET RAILWAYS (§ III B—25)—UNAUTHORIZED BOARDING OF SPECIAL CAR—EJECTION—LIABILITY.

The conductor of a "Special Car" not receiving any passengers is not justified in throwing off a person while the car is in motion, after the latter had safely boarded the car in disregard of that fact, and his doing so will render the street railway company liable for injuries resulting therefrom.

Statement

REVIEW of judgment of St. Pierre, J., in favour of plaintiff in an action for damages against the Montreal Tramways Co. The plaintiff Nolan, standing at the corner of Papineau Ave. and Craig St., saw a car coming along and signalled it to stop. It was marked "Special car," and was conveying a picnic party eastward, and thus was not in the ordinary service of the public. Disregarding this fact, Nolan, as the car did not stop, made a run for it, grabbed the hand-rail and embarked upon the steps. The conductor did not stop the car, but remonstrated with Nolan and attempted to make him disembark. Nolan declined to get off, whereupon the conductor put his foot against Nolan's stomach and pushed him off the moving car, with the result that Nolan suffered the injuries which formed the basis of this suit. The jury found the company solely at fault and granted him a verdict for $2,500 against the defendant.

St. Pierre, J., presiding over the jury trial, reserved the case to be submitted to the Court of Review on the defendant's motion.

The verdict was confirmed by the Court of Review which rendered the following judgment:—

"Considering that the irregularities referred to were not sufficient to nullify the proceedings in this case and that the defendant has, moreover, no interest in alleging the same, inasmuch as the case comes before the Court of Review practically upon its own motion;

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"Considering that there was evidence that the accident was caused by the sole fault of the defendant;

"Considering that the damages awarded are not so exaggerated as to convince the Court that the jury must have acted under the influence of grave error or improper motives;

"Considering that there is no sufficient ground to grant the defendant's motion for the dismissal of the action or for a new trial;

"Doth confirm the verdict of the jury and doth condemn the defendant to pay and satisfy to the plaintiff the said sum of $2,500 with interest and costs."

Dessaules & Garneau, for plaintiff.

Perron & Taschereau, for defendant.

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—If the accident had happened whilst Nolan was attempting to embark on the car, which he had no right to do, he would have been himself to blame, but Nolan had already embarked on the car in a position of safety; he was injured because he was thrown off from such position whilst the car was in motion.

Therefore the jury was right in holding that the fault of the plaintiff in obtaining entry to the car could not be considered as a contributing cause to the plaintiff's accident, because that did not give the conductor the right to put him off in the manner in which he did, so that, in reality, the whole cause of the accident was the violent ejection of the plaintiff from the steps of the car while the car was in motion. And this was solely the act of the defendant's conductor.

I should hope that circumstances like those disclosed in the present case would induce the Tramways Co. to take somewhat more care in the selection of its employees.

The conduct of the plaintiff in forcing himself aboard the car was such as naturally to provoke the conductor and in some measure to excuse him. But the manner in which the conductor ejected the plaintiff by the use of his feet was brutal in the extreme, and not such as a man of proper feeling would have been guilty of, even when angered. As to the quantum of the award the Court should not interfere with such a matter, unless it appeared so exaggerated in one direction or the other as to lead the Court to think that the jury must have been influenced by improper motives or led into grave error. *Judgment affirmed.*

CHALMERS v. MACHRAY.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. February 7, 1916.

1. BROKERS (§II B 1—10)—OF REAL ESTATE—COMMISSIONS—SURPLUS ABOVE AMOUNT OF SALE—VARIATION OF TERMS.

An agreement, whereby a real estate broker is entitled to the surplus over and above the amount of the sale by way of commissions, does not entitle the broker, upon his procuring the purchaser, to claim such commissions from the funds paid by the purchaser to the vendor's agents under terms at variance with the commission agreement.

[*Chalmers* v. *Campbell*, 21 D.L.R. 635, reversed.]

2. JUDGMENT (§ II E 1—150)—RES JUDICATA—CONCLUSIVENESS AS TO PARTIES—PRINCIPAL AND AGENT.

A judgment, recovered by a real estate broker in an action against the owner for his commissions, is not binding upon the owner's agents who were not parties to the action, and cannot be set up as *res judicata* in an action by the broker against the agents for the commissions he claims to be entitled to out of the funds in their hands, nor is it admissible evidence of the facts established by it.

[See *Brennen* v. *Thompson*, 22 D.L.R. 375, 33 O.L.R. 465.]

3. PLEADING (§ VII F—390)—ACTION FOR COMMISSIONS—GENERAL DEMURRER—EFFECT OF OVERRULING.

An order of court disallowing a general demurrer to a statement of claim, the "matter of demurrer" or points of law not being specifically raised as required by r. 302 of the King's Bench Act (Man.), does not thereby dispose in the plaintiff's favour of all the legal questions involved in the action nor give effect to the interpretation of a commission agreement sought by the plaintiff, but is analogous to the former equity practice, that where a general demurrer is overruled without prejudice the defendant may raise the same objections at the hearing.

[English Judicature Act, O. 25, rr. 1-3, considered; *Makarsky* v. *C.P.R. Co.*, 15 Man. L.R. 53; *Gardiner* v. *Buckley*, 15 Man. L.R. 354; *Brooke* v. *Hewitt*, 3 Ves. 253; *Hope* v. *Hope*, 22 Beav. 351, referred to.]

4. ASSIGNMENT (§ III 25)—OF CHOSE IN ACTION—PRIOR EQUITIES—RIGHTS OF ASSIGNEE.

The assignee of a chose in action takes subject to the equities existing between the assignor and the debtor or fundholders, whether the assignment is under the King's Bench Act (Man.) or is an equitable assignment, and the assignee cannot, by giving notice, create for himself higher rights than the assignor possessed.

[*Mangles* v. *Dixon*, 3 H.L. Cas. 702, referred to.]

5. DEPOSITIONS (§ I—4*a*)—DE BENE ESSE—CREDIBILITY—REVIEW ON APPEAL.

The Court of Appeal stands in as good position as the trial judge to weigh the value of evidence taken *de bene esse* and estimate the credibility to be attached to it.

[*Creighton* v. *Pac. Coast Lumber Co.*, 12 Man. L.R. 546; *Gordon* v. *Handford*, 16 Man. L.R. 292, referred to.]

Statement

APPEAL from the judgment of Curran, J., 21 D. L.R. 635, in favour of plaintiff in an action for broker's commissions. Reversed.

G. A. Elliott, K.C., and *M. G. Macneil*, for plaintiff.

E. K. Williams, and *B. V. Richardson*, for defendants.

Richards, J.A.

RICHARDS, J. A.:—It seems to me that the letter of December 17, 1913, on which the plaintiff bases his claim, did not provide

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that the plaintiff should be paid either out of the first moneys received, or out of any surplus over $20,000 which should be paid in cash by the purchaser. As I read that letter the plaintiff would, on its terms, only become entitled to the last of the purchase money after Campbell had received his $50,000 out of it. That the plaintiff so understood it seems fully proved by his knowledge of the contents of the defendants' letter of February 6, 1914, to the bank manager and the fact that he made no objections to its terms, but took it himself to the bank manager and tried to negotiate on its security a discount of Campbell's note. The letter is fully discussed in my brother Perdue's judgment.

If I am right in the above view, the plaintiff could have no right whatever to any part of the $22,000 received by the defendants, if it had all been paid on purchase money.

Even if the plaintiff's contention as to the effect of the above letter should be the correct one, the evidence shewed, I think, that the purchaser he procured was unable to pay down $20,000 on the purchase price. He had only $22,000 available, and had to furnish $6,000 to make improvements, without which the owners of the building would not have consented to the sale. It simply happened that the defendants were solicitors for the owners, and so the $6,000 was paid to them to secure the improvements, while only $16,000 was paid to them on the purchase money.

The fact that the defendants were solicitors for both the owners and the vendor and so received the whole $22,000 puts the matter in no different position from that which would have arisen if the $16,000 only had been paid to the defendants and the $6,000 had been paid to other parties than the defendants, to be held as security for the completion of the improvements.

It must be borne in mind that the plaintiff's present action is not for commission on the sale, but for a surplus over $20,000, which he says was received by the defendants for his use.

I express no opinion as to the other questions raised on the appeal. I would allow the appeal with costs, set aside the judgment for the plaintiff and enter judgment for the defendants with costs, as set out in the judgment of my brother Perdue.

Perdue, J.A.

PERDUE, J. A.:—At the time when the transactions in question in this suit took place, the plaintiff was a real estate agent and the defendants were and are a well known firm of solicitors in Winnipeg.

The plaintiff alleges that one T. B. Campbell made an agreement with him respecting the sale of Campbell's interest in the Mariaggi Hotel. The agreement was in writing and is in these words:

To H. A. D. Chalmers, Winnipeg. Dec. 17, 1913.
Winnipeg.

Re Mariaggi Hotel.

Dear Sir,—In the event of your making a sale of my interest in the above, I will agree to sell at fifty thousand dollars ($50,000) net to me, twenty thousand dollars ($20,000) cash, balance in one and two years, 6 per cent. interest. Anything over and above this amount you may retain for your commission. The purchaser to assume payments on two cash registers and half cost of kitchen range, total on above articles, $1,150.

(Signed) T. B. CAMPBELL.

I shall refer to this as the commission agreement.

The plaintiff then alleges that he sold the interests of Campbell in the hotel to one Morgan for $52,000, which sale was accepted by Campbell and carried out and that pursuant to it Morgan paid to the defendants who were acting as agents for Campbell $22,000 as the first payment on the purchase price. The plaintiff avers that while the moneys remained in defendants' hands he notified them by letter, dated January 26, 1914, that the sum of $2,500, part of the $22,000, were the moneys of the plaintiff and not the moneys of Campbell, and requested them to pay the money to him and not to Campbell, and that the plaintiff on January 26, 1914, produced and filed with defendants a true copy of the above agreement. He alleges a demand on the defendants for payment to him, made on the last mentioned date, other demands, and refusal to pay.

The statement of defense categorically denies all material allegations in the statement of claim. It denies that the sale was carried out on the terms alleged or that $22,000 was paid by Morgan as the first payment of the purchase price. The defendants deny that the $2,500 belonged to the plaintiff. Amongst other defences they set up that they disbursed all moneys in their hands before they had notice of the plaintiff's claim; that $6,000 was paid to them by Morgan to be held as a guarantee that Morgan would carry out alterations and improvements to the property, as a condition required by the owners of the freehold before they would accept Morgan as their tenant. Defendants deny that when the alleged notice was given the plaintiff had any right or interest

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in the money in question. The defendants add a demurrer in these words:

12. The defendants demur to the statement of claim and say that the same discloses no cause of action against the defendants.

The action was tried before Curran, J., who entered a verdict for the plaintiff for $2,000. From this the defendants appealed.

Before the trial of the action the plaintiff applied for and obtained an order directing that the demurrer be set down and argued before the issues of fact were determined. The argument took place before Prendergast, J., who made an order that "the said demurrer be and the same is hereby disallowed." No appeal was taken from this decision. Both at the trial and on this appeal plaintiff's counsel contended that the judgment on the demurrer decided in the plaintiff's favour all legal questions involved in the action, and that it placed the interpretation which he sought to place on the commission agreement.

R. 302 of the King's Bench Act directs that the statement of defence shall contain, amongst other matters of defence, "a statement of any matter of demurrer intended to be argued." It has been held that this expression has the same meaning as the corresponding phrase in the English Judicature Act, O. 25, rr. 1-3, namely, "points of law"; see *Makarsky* v. *C.P.R.*, 15 Man. L.R. 53, *Gardiner* v. *Bickley*, 15 Man. L.R. 354. R. 466 provides that a Judge may make an order for the argument of a question of law before any issue of fact is determined. This order should only be made where a serious point of law has been raised which, if decided in favour of the party raising it, would dispense with any further trial, or, at any rate, with the trial of some substantial issue in the action: An. Pr. 1916, p. 419; *Gardiner* v. *Bickley*, *supra*. In the present case the demurrer is put in the very widest form. No "matter of demurrer," that is to say, no point of law, was stated or specifically raised by the defendants. The whole question that came up upon the argument of the demurrer was this: has the plaintiff on his own showing made a case entitling him to relief? There is no cause or ground of demurrer assigned. The demurrer was, no doubt, aimed at the vague manner in which the plaintiff set out his case. The Judge who heard the demurrer ruled, in effect, that there was a cause of action shown by the statement of claim. If the Judge thought that there was a possibility of the plaintiff making a case at the trial, or if the

facts were complicated and the circumstances not all before him, or if there was not a neat point of law which would decide the case, he might, on the analogy of the former practice in equity, overrule a general demurrer: *Brooke* v. *Hewitt*, 3 Ves. 253; *Hope* v. *Hope*, 22 Beav. 351. If the demurrer were overruled on any such ground, it was the practice to do so without prejudice to the defendant raising the same objection at the hearing: Lewis' Eq. Drafting, p. 250.

It is argued that the Judge who heard the demurrer put an interpertation upon the commission agreement. He was not required to put any meaning upon it other than the plain, ordinary meaning of the words. A copy of what purports to be a brief note made by the Judge was handed to the members of this Court during the argument of the appeal. He gives his opinion as to the effect of notice of the "sale and commission agreement," taken in connection with the other facts alleged. He does not, as I understand his note, put any interpretation upon the writing other than it bears upon its face. The view he takes could have binding effect only where the actual facts are the same as these stated in the pleading. The allegations in par. 3 may be intended, although imperfectly expressed, to show, and give notice of, a specific appropriation in the plaintiff's favour of $2,500 of the money made subsequently to the commission agreement. In fact the plaintiff's case at the trial turned largely upon an attempt to do this, the pretended appropriation, or equitable assignment, and notice of it being claimed to have been made and given at a meeting where Campbell, the plaintiff, and the defendant Sharpe were present. The Judge states that "all facts from which such finding of law (the effect of the notice) arises are sufficiently set out in the statement of claim." Clearly he based his finding of law upon the state of facts alleged in the statement of claim. But if the real facts were not set out (as is actually the case), we are not concerned with any legal point arising from a supposititous state of facts which has no existence. It would be merely academic, and the opinion expressed by the Judge as to what arose out of such a state of facts would not be binding in this appeal.

If, as is alleged in the statement of claim, the cash payment was only $22,000, and the plaintiff was entitled to $2,500 of it, then Campbell would not get his full cash payment of $20,000.

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There must therefore have been some further agreement, other than the written one, whether it is sufficiently averred or not.

The document set up in the statement of claim is capable of only one construction. Campbell says, "I will agree to sell at $50,000 *net to me*, $20,000 in cash, balance in one and two years, 6% interest. Anything *over and above this amount* you may retain for your commission." Campbell is to get his price, so much cash, and so much in deferred payments, and it is to be *net* to him, that is, clear, not subject to any deduction. Then if the plaintiff can sell for a higher price he will be entitled to the surplus by way of commission. The words "over and above this amount" must refer to the price fixed, $50,000. They cannot refer to the $20,000, because if that construction were adopted and the plaintiff found a purchaser who would buy for $60,000, of which only $20,000 was paid in cash, the plaintiff would receive nothing, whereas on the natural construction of the document he would be entitled to the surplus of $10,000. It was, no doubt, open to the plaintiff and Campbell to make a further arrangement or a variation of the first by which the plaintiff would be entitled to the excess of the cash payment over $20,000, but as the writing stands, Campbell is entitled to his $50,000 first out of the purchase money, without any deduction, and the plaintiff is entitled to the remainder of the purchase money as a reward for his services.

The document above referred to was signed by Campbell on December 17, 1913, and on the same day the plaintiff notified him that he had secured Morgan and Green as purchasers, the price to be $52,500, of which $22,000 was to be paid in cash. On the same day an interview took place at which Campbell, the plaintiff and Mr. Sharpe, one of the defendants, were present. This interview was held at Sharpe's office, he being Campbell's solicitor throughout the transaction. Instructions were then given for the preparation of the formal agreement of sale. The agreement was prepared and it was executed on, and bears the date of, December 18, 1913. The agreement sets forth the terms of sale as at first agreed upon. The property consisted of the lease, goodwill and contents of the Mariaggi Hotel in this city. The price was $52,500, payable, $7,000 in cash, $15,500 on December 22, 1913, $15,000 within a year, $7,500 in 2 years, and $7,500 in 2½ years from date. The terms differ somewhat from those

mentioned in the commission agreement in that the payments are spread over 2½ years instead of 2. Possession was to be given when the payment of December 22 was made. Taxes, insurance, rent, business tax and "all other adjustments" were to be made as of the date of giving possession. The agreement was subject to the consent of the landlords and subject to the consent of the License Department to a transfer of the license. A clear title was to be given to the goods and chattels covered by the agreement.

The $7,000 cash payment was made to Mr. Sharpe who at first acted for vendor and purchasers, but within a few days another solicitor, Mr. Swift, took charge of the purchasers' interests. It was found that Campbell's lease had expired in April, 1913, and that he was holding the premises under an agreement by the lessors to grant a new lease for 7 years at a greatly increased rental. By this agreement he covenanted to make at his own expense certain very important improvements and repairs to the premises, to be in accordance with plans prepared by a firm of architects and to the satisfaction of the License Department of the province. These improvements were to be completed by July 1, 1913, otherwise the landlords could re-enter and forfeit Campbell's rights. At the time of the sale a considerable part of this work had been done, but it had not been paid for. A number of mechanics' liens had been registered against the property and these had to be satisfied. He appears to have been out of money. It was estimated that it would take $10,000 to complete the improvements. He owed the landlords $7,500 for arrears of rent and their bailiff was in possession for this amount. The License Department insisted upon the alterations being made, otherwise the license would be refused. There was a chattel mortgage on the property made by Campbell to the Wine & Spirits Co. and to the E. L. Drewry Co. for $10,000, which had to be paid off to give a clear title. The purchasers had only $22,000 available. Without much more than this last sum it would be impossible for Campbell to clear off the incumbrances, furnish title and carry out the sale. The result was that after considerable negotiations between the vendor and the purchasers in which the solicitors, the landlords and the chattel mortgagees assisted, a modification of the terms was agreed upon. The landlords made a reduction in the alterations and repairs which remained to be done and Morgan agreed to do these for $6,000, which was to be deducted from the cash

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payment. A further agreement was accordingly entered into between the parties. This agreement was made between Campbell on the one part and Morgan and Green on the other, and is dated January 19, 1914. It recites that the parties have varied by mutual consent the agreement of December 18. It provides that the sum of $22,000 is to be paid in cash into the hands of the defendants, solicitors for the vendor; that out of this sum $6,000 is to be retained by them and repaid to Morgan upon his completing the alterations in the premises, certain improvements being dropped, the work to be done under the superintendence of one Girvin; the balance of the cash payment, namely $16,000, is to be applied on the purchase price of the property which is declared to be $42,500, instead of $52,500, the purchasers to assume and pay the chattel mortgage of $10,000. The further payments of the purchase price under the former agreement were, by the later agreement, to be reduced by the sum of $10,000, $5,000 being taken off the first payment and $5,000 off the subsequent ones. To the subsequent payment the above sum of $6,000, retained for Morgan, was to be added and paid to the vendor. The sum of $500, part of the original $22,500, was to be paid at the end of a year. It was agreed that the $22,000 paid into the defendant's hands was to be retained by them until the license for the premises had been transferred and the consent of the License Department given, and, in the event of the license not being transferred, the amount was to be repaid to the purchasers. Except as varied by the later agreement, the former one was to remain in force. There were other provisions in the agreement of January 19th, but I do not think they affect the matters in question in the present suit.

It is pointed out that the effect of the second agreement is that the purchasers are made to pay $6,000 too much. This amount taken out of the cash sum of $22,000 was expended in making the alterations for which Campbell was liable, and wherewith he was chargeable. If used by Morgan for that purpose, he should not be charged with it again and it should not have been added to the subsequent payments, unless Morgan in fact assumed the liability for the alterations. But I do not see how the plaintiff's case against the defendants is affected by the fact that the purchasers were by the agreement made liable for the alterations in addition to the purchase price.

The agreement as varied was acted upon. On January 20,

Morgan paid to the defendants two separate sums of $6,000 and $9,000, which made up the full sum of $22,000. These two sums and also the previous sum of $7,000 were all entered by the defendants in an account in their ledger, headed "T. B. Campbell." As Sharpe explains, this was merely a matter of bookkeeping. It might have been better to have opened an account under some such heading as "Mariaggi Hotel," but the evidence shows that the money was held in trust for the purposes of the transaction and that Campbell had no control over it.

The $6,000 held by defendants for Morgan was paid out to him on progressive certificates issued by Girvin, as the alterations were completed. Out of the $16,000 the arrears of rent and liens against the property were paid. Carroll, one of the landlords, says that the $16,000 was covered by arrears of rent and improvements made at the time of the sale, that the improvements had gone on to the extent of about $9,000 which had not been paid and that the $16,000 went to pay this and the arrears of rent. Sharpe says that all the money was paid out and that Campbell received none of it. Defendants attempted to show more specifically the expenditure of the money, but the evidence was not received. Both Sharpe and Swift in their testimony clearly show that unless the new agreement had been made the sale would have fallen through. I have no hesitation, after reading the evidence, in finding that the original agreement could not have been carried out.

The facts established by the evidence are widely different from those alleged in the statements of claim. The agreement of December 18 was not carried out. It was varied in very material respects. No part of the cash payment came to Campbell's hands. It was used in paying off encumbrances so that the sale could be carried out. Instead of a cash payment of $22,000, there was one of $16,000. Other most important variations were made. The plaintiff seeks to show that there was an equitable assignment to him of a part of the cash payment and that notice of this had been given to the solicitors. He claims that this assignment was made orally by Campbell at the meeting with Sharpe on December 17. If we assume that the plaintiff did show the commission agreement to Sharpe on December 17, and Campbell did at that time say to Sharpe that anything over $20,000

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belonged to the plaintiff, how in the changed circumstances, with the terms altered and with the whole cash payment appropriated to other necessary purposes, can the plaintiff claim that he is still entitled to the $2,000? Campbell himself could not have claimed this money. It had to be used to pay off encumbrances or there would have been no sale. The assignee of a chose in action takes subject to the equities existing between the assignor and the debtor or fundholder, whether the assignment is under the King's Bench Act or is an equitable assignment. The assignee cannot, by giving notice, create for himself higher rights than the assignor possessed. If authority is required for this proposition I would refer to *Mangles* v. *Dixon*, 3 H.L. Cas. 702, and to other cases cited in 4 Hals., p. 386. The defendant held the money, not for Campbell alone but for him and the purchasers, until the transaction was completed. When the alleged assignment or appropriation was made and the notice given, Campbell could not have enforced payment to himself. When the new terms were agreed to, there was no excess over $20,000 of cash payment. The total cash payment had been reduced to $16,000. The trial Judge adhered to the view that, notwithstanding the second agreement, the cash payment was $22,000. He expresses the view that it was "merely juggling with figures to reduce the cash payment by $6,000 and then add it to the deferred payments." The matter cannot be disposed of so simply. It was agreed in express terms by the agreement of January 19, that the $6,000 was to be repaid to Morgan when he had completed the alterations he undertook to make. It was actually repaid to him from time to time as the alterations were made, the money being used by him in doing the work. The transaction appears to me to have been honestly conceived and there is no evidence of unfair dealing.

The extensive variation in the terms of the agreement, as amended and carried out, dispose of the case as made out in the statement of claim. There was not, as alleged, $22,000 paid to the defendants as agents for Campbell. The only notice claimed in the statement of claim to have been given to the defendants by the plaintiff was what was contained in the letter of January 26, but at that time, terms of sale widely different from those mentioned in the commission agreement, or those alleged in the statement of claim, had been entered into and put

in binding form. The plaintiff, who was, no doubt, aware of the importance of establishing earlier notice to Sharpe, endeavoured to prove oral notice to him at the first meeting on December 17. There is a direct conflict between the evidence of the plaintiff and that of Sharpe upon this point. The trial Judge accepted the statements of the plaintiff. The plaintiff's evidence had been taken *de bene esse* and was read to the Court and filed at the trial. It is merely a written document, not unlike an affidavit. The Judge had no opportunity for observing the demeanour of the witness. The Court of Appeal is therefore in as good a position as the trial Judge to weigh the value of the plaintiff's evidence and estimate the credibility to be attached to it. I would refer to *Creighton* v. *Pac. Coast Lumber Co.*, 12 Man. L.R. 546, Killam, J., at 558-559; *Gordon* v. *Handford*, 16 Man. L.R. 292. Plaintiff stated that the commission agreement was shewn to Sharpe at that interview. This is flatly denied by Sharpe. The onus is on the plaintiff and he has no corroborative evidence to support his statement. Even if that document had been produced, it would only have been evidence of its own contents and would not have shewn any claim on the moneys in Sharpe's hands. Towards the end of plaintiff's examination in chief he was asked:—

121. Q. What did you arrange with Mr. Sharpe? Just tell me what did you arrange? A. When that sale was consummated according to that agreement, that if that sale went through — put it this way—When that sale went through, the money was paid over, I was to be entitled to $2,500 commission. That was an arrangement made with Mr. Campbell in Mr. Sharpe's presence. Campbell was to pay me $2,500 if that sale went through, out of the cash payment.

His counsel then proceeded to ask him a number of questions which were objected to, but answered. The witness said it was understood that if the sale went through he was entitled to anything over $20,000. He was then asked by his own counsel:—

129. Q. How was it understood or why was it understood? A. I think I have already explained that—when Mr. Campbell and myself went to see Mr. Sharpe in reference to this commission, Mr. Campbell was to receive by that agreement $20,000 cash. Anything over and above that I was to receive. Mr. Sharpe was told that by Mr. Campbell and by myself.

This answer places a construction upon the agreement. It is the construction that the plaintiff has all along sought to put upon it. I have no doubt that plaintiff believed at first that it

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was only necessary to say that the agreement had been shewn to Sharpe, then after further questioning he attempted to reinforce his earlier statements and gave the above. Sharpe flatly denies that such a conversation took place. In plaintiff's cross-examination we find the following passage:—

137. Q. Now, am I correct in saying that at that first interview the sole discussion was with reference to putting this deal into legal form? A. I think you are correct. 138. Q. And that no mention was made of commission at that first discussion? A. Well, I would not swear to that, *because I think probably it was discussed on account of it reading there, "anything over and above."* 142. Q. What did Mr. Sharpe say to that? A. Just made notes. 143. Q. Just made notes. He made no comment? A. As far as I can remember. 144. Q. Beyond that remark of Mr. Campbell's was anything said about commission at that time? A. No. 145. Q. And all your energies at that meeting were directed to giving Mr. Sharpe particulars as to the sale? A. Yes. 154. Q. Now, when was the next time (after December 18) that you saw Mr. Sharpe? A. I think I saw him practically every day. 177. Q. Now, at any of these conversations did you say any more to Mr. Sharpe than you said at this particular conversation when you asked when you could get your commission? A. No. 178. Q. And at none of these conversations, am I correct in saying, that the question of $2,000 or $2,500 was discussed? It was simply referred to generally as your commission? A. Yes. 179. Q. And that was as specifically as your commission was referred to at any discussion with Mr. Sharpe? A. I don't think the amounts were mentioned. 212. Q. You did not make a demand for your commission from Machray, Sharpe & Dennistoun? A. I think I did. 213. Q. When? A. All the time. 214. Q. Definitely, did you ask them to pay your commission? A. No, I simply asked him when I am going to get this commission. 277. Q. Do you claim that Machray, Sharpe & Dennistoun received $2,500 of your money? A. No.

On February 6, 1914, Chalmers obtained from Sharpe a letter addressed to the manager of a bank in this city to be used for the purpose of obtaining money on Campbell's notes (if notes were given). Chalmers made use of this letter, but he failed to get a loan. The letter states that the property was sold and "the cash payment of $16,000 made through us;" that "this is barely sufficient to pay the preferred claims consisting of rent, wages and liens;" that the balance of the purchase price, $26,000, would be payable to defendants' firm for ordinary creditors; that the total claims would aggregate about $15,000, leaving a considerable equity for Campbell. Sharpe also states that Chalmers had agreed to accept Campbell's note for the commission secured by an order to be filed with defendants' firm to pay Chalmers his commission out of the moneys *to be received* by them. The whole letter, which is somewhat

lengthy, strongly bears out Sharpe's evidence. One cannot easily believe that the plaintiff would obtain and make use of this letter, if the evidence given by him at the trial was a true account of what actually took place in regard to the commission.

The plaintiff afterwards brought action against Campbell for his commission. The suit was contested but the plaintiff obtained a judgment. He has therefore his judgment against Campbell and may take any proceedings available at law to obtain payment out of the unpaid purchase money. The action of the plaintiff against Campbell was tried before the same Judge who presided at the trial of the present suit. At the beginning of the trial the trial Judge ruled that the issues tried by him in the suit of *Chalmers* v. *Campbell* were binding on the defendants, although they were not parties to that suit. Certain amendments in the statement of defence were refused largely, as I understand, on this ground, although notice of an application to amend at the trial had been given. The trial Judge took the view that the doctrine of *res judicata* applied against the defendants and that the only defence they could set up was to shew that they disbursed the money before they got notice of plaintiff's claim. For the Judge's ruling upon this matter I would refer to the following pages of the evidence: 6, 7, 8, 11, 59*a*, 71, 72, 75, 96, 97, 127. This ruling, which appeared frequently throughout the conduct of the case, coloured the whole proceedings at the trial. With great respect, I think that there was no foundation for the application of *res judicata*. The defendants were not parties to the action, the proceedings were *res inter alios acta*, there was no estoppel and the judgment in the former case, even if it had been put in, was not admissible evidence of the facts established by it; see 4 Hals. 343-344.

The plaintiff largely rested his right to recover upon the statement he alleges Campbell made to Sharpe at the interview on December 17. He claims, in effect, that this was a specific appropriation of $2,000 of the purchase money, that Sharpe had notice of it, and that this operated as an equitable assignment of that sum. An equitable assignment may be made by words only, if the intention is clear: *Lee* v. *Magrath*, 10 L.R. Ir. 45, 49; *Tailby* v. *Official Receiver*, 13 App. Cas. 523, 4 Hals. 375,

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The plaintiff's account of what passed at the first interview is by no means clear. I have above quoted the evidence relating to the alleged verbal assignment and the notice to Sharpe. The plaintiff's testimony on this point is far from being clear, definite or satisfactory. It is not, in my opinion, sufficient to establish an equitable assignment. But the plaintiff must go further and prove that notice of the assignment was given to the defendants. Otherwise, they are not bound. The plaintiff admits that the conversation in which the alleged notice was given took place in the presence of Sharpe at an interview where the sole discussion was with reference to putting the deal through, that Sharpe was taking notes and made no comment. The plaintiff would not swear that Sharpe heard the statement about the commission (Questions 140-145). Evidence such as this is not sufficient to prove notice so as to charge the defendants with a serious personal liability. In *Saffron Walden* v. *Rayner*, 14 Ch.D. 406, the sufficiency of the parol notice was dealt with. There the plaintiff endeavoured to prove notice to trustees of a mortgage on a reversionary share. Notice in writing had been given to the solicitors of the trustees but the Court of Appeal held that this was not good notice to the trustees. An attempt was then made to prove direct verbal notice. A member of the firm of solicitors deposed that at a lengthy meeting which had been called for another purpose the notice was read to the trustees. Two of the trustees denied this and the third denied all recollection of it. It was held that evidence that parol notice had been given to the trustees in the course of a conversation, at the end of a meeting called upon other business, could not be relied upon as fixing the trustees with notice in opposition to their denial of having received it. James, L. J., summed up the expressed opinions of all the members of the Court in these words:—

> To my mind it is too dangerous to allow a notice with the consequences of it to be proved by something mentioned in the course of a conversation at a meeting on other business, which may have been heard and attended to by one, and not heard or attended to by others of the parties present.

I would refer to the judgments at large delivered by James, Baggallay and Bramwell, L.JJ., as to the inadequacy for the purpose of proving notice, of merely giving evidence of the casual mention of something in the presence of the party to be charged with notice, while he was intent upon something else and may not have heard what was said.

It appears to me that the above decision exactly applies to the present case. The proof, both of the verbal assignment and the notice, is very weak. The plaintiff's answers to questions 137 and 138, and 140 to 145, admit that the whole discussion at the first interview, the one at which it is alleged the assignment was mentioned to Sharpe, was taken up with putting the sale into legal form. Plaintiff only arrives at the conclusion that commission was mentioned at all by a process of reasoning from the contents of the commission agreement (Q. & A. 138). It is unheard of that a solicitor should be made liable personally for a large sum of money because there is vague and extremely doubtful evidence of a remark having been made in his presence while he was busily engaged upon, and his attention occupied by, the details of an important transaction, a transaction quite distinct from the matter concerning which the remark was made. The onus being upon the plaintiff he should have procured the evidence of Campbell to corroborate his statement of what occurred at the first meeting if Campbell would corroborate it. But the plaintiff has chosen to rest his case on his own unsupported testimony. Sharpe positively contradicts him, and even if the alleged statement by Campbell had been made, but not heard by Sharpe, the evidence of notice to the latter is not sufficient under the *Saffron Walden* case. The letter of January 26 makes no mention of an oral assignment and gives no notice of one. As far as I can ascertain from the evidence, the first mention of an oral assignment was made by the plaintiff at the trial.

There are a few more points in the evidence to which I might make reference. Sharpe, after refreshing his memory, as to dates, by reference to the documents, stated that the first time he saw the commission agreement was on January 26, 1914, a week after the second agreement had been made between Campbell and the purchasers. Sharpe also states that the plaintiff knew of the arrangements that were being made with regard to the second agreement. The plaintiff admits that he saw Sharpe "practically every day" after December 18 (Q. & A. 154, 176); that he was helping in winding-up the details of the sale and that Campbell's liabilities were discussed (Q. & A. 45). The letter of February 6, 1914, which he obtained from Sharpe gave him notice that the parties had varied the first

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agreement so as to reduce the cash payment to $16,000. This was a change which was most material from his standpoint, yet he raised no objection and made use of the letter as correctly expressing the facts. He admits that he did not demand payment from the defendants at these interviews with Sharpe, but looked to Campbell for his commission (Q. & A. 212-216). He sued Campbell and recovered judgment against him. Only when he found difficulty in enforcing the judgment did he seek to make the defendants liable.

I have no hesitation in coming to the conclusion that the appeal should be allowed with costs, the judgment already entered set aside and judgment entered for the defendants with costs, including those of the *de bene esse* examinations and the examinations for discovery.

Cameron, J.A.

CAMERON, J.A.:—I have given the evidence and the various questions of law involved in this case my best consideration and have reached a conclusion different from that arrived at by the Judge who tried the action. I have read the judgment of Perdue, J., and concur therewith.

Haggart, J.A. (dissenting)

HAGGART, J.A., dissented. *Appeal allowed.*

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DIPLOCK v. CANADIAN NORTHERN RAILWAY CO.

Saskatchewan Supreme Court, Newlands, Lamont, Brown and McKay, JJ. January 8, 1916.

1. CARRIERS (§ II H 1—141)—DUTY TOWARD TRESPASSERS—LIABILITY FOR INJURIES TO.

Even to trespassers a railway company owes a duty not to wilfully injure them nor endanger their safety; and where trespassers are stealthily riding on a ledge 14 inches wide at the back of the tender, and the brakeman, while in the course of his employment and without ascertaining the dangerous position of the trespassers as a reasonable man would, forces one of them from the ledge thereby knocking him against the other and causing the latter to fall beneath the train and seriously injuring him, it is sufficient to warrant a jury's finding of the company's negligence; whether or not the brakeman had knowledge of their position, or whether he acted as a reasonable and prudent man, are questions of fact for the jury.

[*G.T.R. Co.* v. *Barnett*, [1911] A.C. 361, 22 O.L.R. 84, applied; *Bondy* v. *S.W.A.R. Co.*, 24 O.L.R. 409, considered; *Lowery* v. *Walker*, [1911] A.C. 10, distinguished; see also *Nolan* v. *Montreal Tramways Co.*, 26 D.L.R. 527.]

Statement

APPEAL from the judgment of Elwood, J., in favour of the plaintiff in an action for personal injuries to a trespasser. Affirmed.

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

A. E. Bence, for respondent.

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The judgment of the Court was delivered by

LAMONT, J.:—The ground on which the appeal is based is: that upon the answers of the jury judgment should have been entered for the defendants.

The action was brought for personal injuries sustained by the plaintiff, by being run over by the defendant's train.

The plaintiff and one Thacker were stealing a ride on the defendant's train. They rode on a ledge about 14 inches wide at the back of the tender, and between the tender and the baggage car. The space between the cars was about 3 feet. They rode in this way from Dundurn to Hanley. At Hanley, a conductor put them off. As soon as the train started they got on again. The conductor said to brakeman Wagner: "There are two men on the end of the car, go and put them off." Wagner went through the baggage car, and, as he opened the door next the tender, he saw Thacker standing on the ledge, holding on to a ladder that ran to the top of the tender. The plaintiff says he was on the outside of Thacker, holding on to the handrail. When Wagner saw Thacker he asked him to come into the car; Thacker refused, believing that he would be handed over to the police. Wagner then caught hold of him and tried to drag him in; Thacker pulled back. Wagner then said: "Well then, get off," and gave him a shove; Thacker struck against the plaintiff, who fell to the ground and the train ran over his leg.

Wagner, in his examination-in-chief, testified that he did not see the plaintiff, and that he did not know he was on the west side of Thacker. On his cross-examination he admitted that he expected to find two men between the cars, and that he assumed both men were there. It was night, and there was but a dim light in the baggage car.

The jury found that the plaintiff was injured by being pushed off the train, as a result of Wagner's pushing Thacker, and that Wagner was acting within the scope of his employment in pushing him off. They were asked: "Did Wagner know that Diplock was in the position he was?" To which they answered: "Dubious." They were also asked: "If he did not know, should he have investigated to find out before he shoved or kicked Thacker?" To this they answered "Yes."

For the appellants it was contended that, as the plaintiff

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was a trespasser, these answers entitled them to judgment in their favour. There is no question but that the plaintiff was a trespasser on the defendant's train. The duty owed to a trespasser is set out in 21 Hals., par. 664, as follows:—

> The occupier of premises owes no duty to persons who come upon them as trespassers. He must not, however, encourage or attract trespassers to a place where they are exposed, whether intentionally or not, to some specific danger of which he is cognizant, nor may he, when aware of the presence of a trespasser on his premises, do any act which endangers his safety.

In *G.T.R. Co.* v. *Barnett*, [1911] A.C. 361, the plaintiff was a trespasser riding on the appellant company's train, and was injured through the negligence of the company's servants. In giving the judgment of the Privy Council, Lord Robson, at p. 369, said:—

> The case must, therefore, be taken on the footing that the respondent was a trespasser, and the question is: What, under those circumstances are his rights against the appellant company? . . . The railway company was, undoubtedly, under a duty to the plaintiff not wilfully to injure him; they were not entitled unnecessarily or knowingly to increase the normal risk by placing unexpected danger in his way. But to say that they are liable to a trespasser for the negligence of their servants is to place them under a duty of the same character as that which they undertake to those whom they carry for reward. (And on p. 370, he says): The general rule, therefore, is that a man trespasses at his own risk.

In order to succeed, therefore, the plaintiff must shew that Wagner wilfully injured him, or that he "unnecessarily and knowingly increased the normal risk" which he (the plaintiff) was running by riding between the cars.

Where the space between the cars is so small, the pushing about of one person must necessarily increase the danger to any other person who is also riding there. Had Thacker been injured by being pushed off, it is admitted that the company would be liable. Had Wagner seen the plaintiff, the defendants would have been equally liable; because the natural and probable result, as the jury found, of pushing Thacker would be to shove the plaintiff off. The only defence argued before us was that Wagner did not know the plaintiff was there. This raises the question: Is actual personal knowledge of a trespasser's position necessary in order to give him a right of action for injury sustained by him? If an owner of land is told that a trespasser has just walked behind a little bluff on his land and he takes his gun and discharges it at the bluff and the tres-

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passer is injured thereby, I take it that the owner may be held liable, as he would be making the premises more dangerous for the trespasser.

He might say he did not know the trespasser was there as he had not seen him. The answer to that would be, he had been told that a trespasser was there and, under such circumstances, should have known. It would be a question of fact for the jury to determine whether or not a reasonable and ordinarily prudent man would, under the circumstances, have known. If the jury answered in the affirmative the owner would be liable. This, I think, is borne out by the authorities.

When the case of *G.T.R. Co.* v. *Barnett* was before the Court of Appeal in Ontario, 22 O.L.R. 84, Meredith, J. A., in his dissenting judgment (which was upheld by the Privy Council), at p. 91, said:—

> One may not knowingly injure a mere trespasser. One may not, knowing that he is in the way, run down another, merely because that other has no right to be in the way, but does one owe any duty to another who has no right to be at the place where he is injured *and whose presence is, not unreasonably, not known?* See *G.T.R. Co.* v. *Anderson* (1898), 28 Can., S.C.R. 541.

In *Bondy* v. *Sandwich, Windsor and Amherstburg R. Co.*, 24 O.L.R. 409, the action was for damages for the loss of a horse, killed on the defendants' track by one of their cars. The horse was a trespasser. The jury found that the motorman should have seen the horse on the track in time to enable him to stop the car. The Divisional Court held, Britton, J., dissenting, that there was no duty on the motorman to keep a look-out for trespassing horses; that he owed no duty in respect of the horse until he discovered it. In his judgment, Riddell, J., said: p. 413:—

> The horse was admittedly a trespasser . . . and I think the sole duty to the plaintiff arose when the horse was discovered. The case would, or might, of course, be different had it been proved that the township was in the habit (as in *Breen's* case) of permitting a violation of the by-law, so that horses might be expected upon the highway, or if, for any other reason, horses running at large were to be expected to be on the road, and therefore on the track—but nothing of the kind is suggested.

In 36 Cyc. 1487, the rule is laid down as follows:—

> As a general rule a street railroad company is under no duty to keep a look-out for trespassers on its track . . . but its only duty is to use all proper precaution to avoid injuring such trespasser after discovering his peril, as by sounding the gong or whistle, and taking proper precaution

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to stop the car when necessary. But where, from the locality and circumstances known to the company, there is reason to apprehend that the tracks will not be clear . . . it is the duty of the driver or motorman to keep a look-out for children and others on the streets, and to use all reasonable precautions upon the first appearance of danger to avoid injury.

These cases make it clear that a person owes no duty to a trespasser until he knows of his whereabouts, or has reason to apprehend his presence; but, from that moment, a duty arises in respect of such trespasser not to wilfully injure him or to subject him to additional dangers.

The case of *Bondy* v. *Sandwich, Windsor and Amherstburg R. Co., supra*, was cited as shewing that no duty existed in respect of a trespasser until he was discovered. All that case decided, however, was that, as the motorman had not seen the trespassing horse and had no reason to apprehend he would be on the track, no duty arose to keep a look-out for him. There is no presumption that a person will be trespassing and, therefore, no duty is owed to him until his presence is known, or under the circumstances should have been known. In the case referred to, Riddell, J., in the portion of his judgment above quoted, clearly points out that the decision would have been different had the motorman had reason to suspect that horses would be on the track.

The case of *Lowery* v. *Walker*, [1911] A.C. 10, was also cited. This case turned upon the question whether the plaintiff was a trespasser or not. The House of Lords held he was not. The case was cited on behalf of the defendants for the dictum of Lord Halsbury when he intimated that if the plaintiff had been a trespasser he could not have recovered. That is quite true, but it is of no assistance to the defendants here. The plaintiff would not have been entitled to recover because, not being in the field when the savage horse was turned out, and the defendant having no reason to apprehend that he would be there, owed no duty to him to keep a look-out. If, however, the defendant in that case had had good reason to believe when he turned the horse out that the plaintiff (a trespasser) was in the field although he had not actually seen him, the defendant, in my opinion, would have been liable.

The question upon which, in my opinion, the present case turns is not: "Did Wagner know the position of the plaintiff on the ledge?" but, "Had he sufficient reason to apprehend

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that both trespassers were between those two cars, so as to cast on him a duty to ascertain the whereabouts of the plaintiff before doing any act which would make the space between the cars more dangerous to ride in. This is a question of fact for the jury, and if they have not pronounced upon it, there should be a new trial to have it determined.

I am of opinion they have pronounced upon it. The findings of the jury must be read in the light of the evidence. In view of the admissions of Wagner, that he expected to find both men between the cars, and that he assumed both were there, the answer to the question, "Did Wagner know that Diplock was in the position he was?" can only mean that he did not know his exact position on the ledge. It cannot, in my opinion, be read as meaning that it was doubtful if Wagner knew Diplock was between the cars. Their finding that Wagner should have investigated to find out the position of the plaintiff before shoving Thacker is, in my opinion, to be read, not as a finding that there was a duty to investigate and find out if the plaintiff was between the cars, but, assuming—as Wagner says he did—that both men were between the cars, there was a duty cast upon him to ascertain the position of Diplock on the ledge before doing an act, the natural and probable result of which was to make the premises (the space between the cars) more dangerous for the plaintiff. If Wagner had not had good reason to apprehend the presence of the plaintiff as well as Thacker between those two cars, I quite concede that the argument on behalf of the defendants should be given effect to, but having been informed he was there and assuming he was there, he was under a duty not to make the space more dangerous for the plaintiff without first investigating to find out his exact position on the ledge, and satisfying himself that the pushing of Thacker would not injure him. In other words, that with Wagner's information and believing as he did, any reasonable man would have known that by pushing Thacker he was increasing the danger to the plaintiff. The question was, perhaps, not as happily worded as it might have been, but I think the answer, in the light of the evidence, makes it sufficiently clear that the jury was finding what a reasonable man would have done, rather than expressing an opinion as to a legal duty.

In *Jamieson* v. *Harris*, 35 Can. S.C.R. 625 at p. 631, in giving

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the judgment of the majority of the Supreme Court of Canada, Nesbitt, J., said:—

We also fully agree that 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 supported.

If I am right as to the meaning of the answers given by the jury, the judgment was properly entered for the plaintiff. The appeal should, therefore, in my opinion, be dismissed with costs.

BROWN, and MCKAY, JJ., concurred with LAMONT, J. NEWLANDS, J., dissented. *Appeal dismissed.*

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McINDOO v. MUSSON BOOK CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren and Magee, JJ.A. January 11, 1916.

1. COPYRIGHT (§ I—1)—WHAT SUBJECT OF—TITLE OR NAME OF BOOK—"PASSING OFF."

Generally the title or name of a book cannot form the subject of copyright, unless the title itself amounts to a literary, scientific, or artistic composition within the meaning of sec. 4 of the Copyright Act, R.S.C. 1906, ch. 70; the words "The New Canadian Bird Book" or "The Canadian Bird Book" are merely descriptive, and unless public reputation of the title of book is established, or a design of "passing off" is shewn, there is no right to complain of marketing the book under a similar name.

[*Rose* v. *McLean Publishing Co.*, 27 O.R. 325, 24 A.R. (Ont.) 240, distinguished.]

Statement

APPEAL from a judgment of Masten, J., dismissing an action to restrain the defendant from infringing the plaintiff's copyright in a book.

The judgment appealed from is as follows:—

Motion for judgment on the pleadings and affidavits filed. The parties by their counsel consent to the final disposition of the action on the material filed, and that affidavits be received in evidence in lieu of oral testimony, so that, read together, they shall constitute admissions of the resulting conclusions of fact, and that the motion shall be considered as a renewal of the injunction motion which was before the Court in June last. All material filed on the former motion, as well as on this motion, to be evidence on the motion, and the parties to have the right of appeal as after an ordinary trial. On this basis I direct that the motion may be entertained—and order accordingly.

The plaintiff is the publisher of a book entitled "The New Canadian Bird Book," in which he holds the copyright. The defendant is the publisher of another book on the same subject

entitled "The Canadian Bird Book." The plaintiff's book was first placed on the Canadian market at or about the date of the copyright, and the defendant's book was issued and sold to the public in Canada in or about the spring of 1915, some three or four months later than the plaintiff's book.

The plaintiff's claim is based, first, on copyright. The certificate of copyright is produced. It is marked exhibit H. to McIndoo's affidavit. It appears to be in the usual form. The right which the registration confers is that set out in sec. 4 of the Act respecting Copyright, R.S.C. 1906, ch. 70. The subject-matter to which that right relates and in which it inheres is a *literary composition*. In this case there is no complaint that the literary composition forming the body of this work has been infringed. The two works are absolutely different. The complaint relates solely to the title.

In the case of *Dick* v. *Yates* (1881), 18 Ch. D. 76, Lord Justice James said (p. 93): "I desire to add that in my opinion, and I understand the Master of the Rolls to have expressed the same opinion, there cannot in general be any copyright in the title or name of a book."

This dictum appears to have been accepted from that time, and it is certain that under our statute, unless the title itself amounted to a literary, scientific, or artistic work or composition, it cannot form the subject of copyright.

No one can suggest that the words "The New Canadian Bird Book" amount to such a work or composition. The words are purely and simply descriptive of the book, nothing more or less.

The plaintiff also puts his case on another ground, namely, that the defendant is selling its book under the name or title of the plaintiff's work.

This is a phase of the ordinary doctrine of "passing off" usually treated in connection with the law of trade marks.

In order to succeed in such an action the plaintiff must shew that his book has become known to the public and sought for under the title adopted by him; to put it in another way, that it has acquired a public reputation under its title.

Secondly, the plaintiff, having thus acquired by user a prior right to the title, and having established a reputation by such user, must prove that the defendant is so acting as to pass its book off as that of the plaintiff, by using a similar title. The

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cases on this branch of the law are well collected in Scrutton's Law of Copyright, 4th ed., pp. 56 to 59 inclusive, and I find nothing in the Canadian decisions at variance with what is there laid down. Each case must be determined upon its own facts; but I am of opinion that upon the facts of this case the plaintiff must fail.

When the defendant's book appeared, the plaintiff's book had been on the market so short a time (about three months at the most) that its public reputation had not been established; and it is also very questionable whether, on the evidence afforded on this motion, there was adequate evidence of "passing off." This differs the case from *Rose* v. *McLean Publishing Co.* (1896-7), 27 O.R. 325, 24 A.R. 240, which was specially relied on by the plaintiff.

Judgment will go dismissing the plaintiff's claim.

L. F Heyd, K.C., and *E. C. Ironside*, for appellant.

George Wilkie, for defendant company, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—We have come to the conclusion that the appeal fails.

It was conceded by counsel for the appellant that the ruling of the learned Judge from whose decision the appeal is brought, that the appellant has no right by reason of his copyright to prevent the publication and sale of the respondent's book could not be successfully attacked; and, therefore, the case must rest upon there having been established a "passing off," as it is termed; and we do not think that such a case has been made out.

There is no evidence that, before the respondent's book was brought out, the name "Canadian Bird Book" had been attached, in the public's understanding, to the appellant's book, or that anybody, deceived by the alleged similarity of title, had purchased the respondent's book thinking that it was the appellant's; nor is there any evidence that any loss has been sustained by the appellant, or that there is a probability of loss by reason of the title of the respondent's book. The books are different in style, different in appearance and in price, and different in that they appeal to a different class of reader. The appellant's book

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was not intended to be sold to the book trade in the ordinary way. The only sale to the trade was to Mr. Britnell of fifty copies, and that was a special arrangement. The purpose of the appellant was to sell his book through the agency of canvassers and to the school authorities and to teachers.

Upon both grounds, therefore, we are of opinion that no case is made by the appellant sufficient to warrant us in interfering with the decision of the learned Judge.

Some of the members of the Court think that there was ground for suspecting that there may have been an intention on the part of the respondent, by the use of the title given to its book, to appropriate the benefit of the appellant's book; and, in view of that circumstance, we dismiss the appeal without costs.

Appeal dismissed.

MARUZECZKA v. CHARLESWORTH.

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Alberta Supreme Court, Scott, Stuart and Beck, JJ. February 19, 1916.

WITNESSES (§ III—53)—RIGHT TO CONTRADICT OWN WITNESS.

Sec. 23 of The Alberta Evidence Act (St. 1910, 2nd sess., ch. 3), expressly provides that, although a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, he may contradict him by other evidence, and there is no rule of evidence by which a party cannot contradict by other evidence the statements of any witness called on his own behalf.

[*Ewer v. Ambrose* (1825), 3 B. & C. 746; *Greenough* v. *Eccles* (1859), 5 C.B. (N.S.) 786, referred to.]

Statement

APPEAL by the defendants from the judgment of Crawford, D.Ct.J., in favour of the plaintiff.

Alex. Stuart, K.C., for plaintiff.

V. R. Baldwin, for defendants.

Scott, J.

SCOTT, J.:—The plaintiff's claim is for $350 which he alleges was advanced by him to the defendants as a deposit on cattle and hogs which he agreed to accept from them in payment and which the defendants refused to deliver. The defendants claim that, pursuant to their agreement with him, they tendered him cattle to the value of $5,747.60 which he did not accept, and that they afterwards sold them at a loss of $785.94. They counterclaim for the balance of $435.94.

The plaintiff in his evidence upon the counterclaim stated that he saw the three defendants together and demanded the repayment of the $350 and that they then promised to repay it with interest if he would wait. The defendant Holt who was

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called by the defendants made certain statements upon cross-examination and, while it was proceeding, the trial Judge stated that he was going to assume from those statements that the defendants had promised to pay the amount. The defendants then proposed to call the other defendants to show that no such promise had been made, but the trial Judge refused to receive such evidence on the ground that the defendants should not be permitted to contradict their own witness.

In my opinion the trial Judge was wrong in his refusal to admit such evidence. There is no rule of evidence which would authorize its exclusion upon that ground. On the contrary, sec. 23 of The Alberta Evidence Act (ch. 3 of 1910, 2nd sess.) expressly provides that, although a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, he may contradict him by other evidence.

I would allow the appeal with costs and direct a new trial; the costs of the first trial to be in the discretion of the Judge presiding at the new trial.

Stuart, J.

STUART, J., concurred with SCOTT, J.

Beck, J.

BECK, J.:—This is an appeal from the judgment at the trial of His Honor Judge Crawford. The appeal is limited to two grounds. The plaintiff sued for the return of $350 paid as a deposit on the purchase price of some cattle and hogs to be delivered by the defendants. The defendants counterclaimed for damages for breach by the plaintiff of his contract to accept the animals. At the trial the defendants, as plaintiffs in the counterclaim, began: The defendants were called as witnesses in the following order: Charlesworth, Smith & Holt.

In the course of the cross-examination of Holt, this took place:

Q. MR. BENNETT:—(for plaintiff)—Did they (Charlesworth, Smith & Holt) not say, Mr. Holt, that they would pay Mr. Maruzeczka interest on that deposit? A. I cannot say anything about that. Q. Surely your memory is good enough for that; don't you remember interest being mentioned? A. I am not sure. Q. It might have been? A. Yes.

Q. THE COURT:—Can you swear that they refused positively to give back that deposit? A. They didn't refuse to give it back; they didn't have it.

Q. MR. BENNETT:—One of the three of you said that you were hard up but that you would pay Mr. Maruzeczka interest on that deposit? A. I didn't. The others might have. Q. You are not quite sure whether interest was mentioned or not? A. No.

Q. THE COURT:—I suppose when you said, "the others might have" you meant they quite likely did so? A. Yes, they may have. Q. If that is all

you have to say, I am going to assume that they did promise to pay; Is that all right? A. I guess so."

The plaintiff's evidence followed that of the three defendants. He swore that during the month of November, 1914, at Holt's office in Bashaw, the defendant Charlesworth, in the presence of Smith & Holt and on behalf of all the defendants, promised to repay to the plaintiff the $350 deposit.

In rebuttal the defendants' counsel called Charlesworth & Smith. In his examination of Charlesworth, he put to him what the plaintiff had said as to this alleged promise and asked him what he had to say about it.

The Judge intervened saying that counsel for the defendant could not contradict his other witness—meaning Holt, and refused on that ground to permit Charlesworth to give any evidence by way of denial of the plaintiff's statement as to the alleged promise.

There is not and never was any rule of evidence that a party could not contradict the statement of any witness called on his own behalf. Such a rule would be utterly unreasonable, for a party might of necessity have to rely upon the evidence of a certain witness to prove certain facts and the same witness might quite honestly be laboring under a mistake as to certain other facts and such a rule would prevent the party from showing the witness' mistake in this respect.

The reasons for permitting such evidence are well expressed in *Ewer* v. *Ambrose* (1825), 3 B. & C. 746. The unreasonableness of the contrary rule is so apparent that the Courts refused so to interpret the words of the Common Law Procedure Act 1854 as meaning what they appeared to say: but preferred to suppose a confusion in the words:—

> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, *in case the witness shall in the opinion of the Judge prove adverse*, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony.

See *Greenough* v. *Eccles* (1859), 5 C.B. (N.S.) 786 at 789. Stephens Dig. of Evidence note XLVII. Phipson on Evidence, 5th ed. p. 461.

Our own statute, The Alberta Evidence Act (ch. 3 of 1910, 2nd sess.) puts the words in the correct order and so reads as follows:—

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23. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character but he may contradict him by other evidence, or, if the witness in the opinion of the Judge or other person presiding proves adverse, such party may by leave of the Judge or other person presiding prove that the witness made at some other time a statement inconsistent with his present testimony.

It is quite plain therefore that the trial Judge was wrong in refusing to permit the defendants' counsel to contradict by Charlesworth, one of the defendants, a statement—assuming it had been made—made by another of the defendants as a witness.

In my opinion, too, the Judge was wrong in saying that the witness Holt had in effect said that there was such a promise.

The question to the witness was:—

Q. One of the three of you said that you would pay Maruzeczka interest on that deposit? A. I didn't; the others might have.

Q. THE COURT:—I suppose when you said, "the others might have" you meant they quite likely did so? A. Yes, they may have. Q. If that is all you have to say, I am going to assume they did promise to pay: Is that all right? A. I guess so.

None of the other defendants stated that any such promise had been made. The plaintiff had sworn that one had done so in the presence of the others. The Judge undoubtedly had a right to believe the plaintiff even if all three defendants denied the statement of the plaintiff; but I think he had no right on the evidence to say, as it appears from the discussion during the course of the case and from his reasons for judgment, that he did, that this witness Holt admitted that such a promise was made. The witness had given his evidence according to his memory of what occurred. Counsel might urge to the Judge any proper inference from his evidence and the Judge himself might draw any proper inference from it; but neither counsel nor the Judge had a right to insist on the witness himself drawing any inference or accepting any inference either of them chose to draw. The last question put by the Judge to the witness in my opinion therefore ought not to have been put. No doubt if such a question is put and the witness chooses to answer it, it is evidence; but I do not understand that the witness intended at all to assent to the Judge's inference.

See Kenny's Outlines of Criminal Law, 4th ed. 351. *Reg* v. *Simon Bernard*, 8 St. Tr. (N.S.) at p. 935; 1 F. & F. 240.

It is impossible to suppose that the rejection of the evidence of Charlesworth had no effect in the result and therefore there

should be a new trial. Counsel for the plaintiff urged the same objection to the evidence as was taken by the Judge, and under these circumstances I think the plaintiff should bear the costs of the appeal. I think the costs of the first trial should follow the result of the new trial. *Appeal allowed.*

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Re GRAMM MOTOR TRUCK CO. OF CANADA

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Ontario Supreme Court Appellate Division, Falconbridge, C.J.K.B., Hodgins, J.A., Riddell and Kelly, JJ. December 31, 1915.

1. CORPORATIONS AND COMPANIES (§ V F 3—255)—LIABILITY AS SHAREHOLDER—CONDITIONAL SUBSCRIPTION—APPLICATION TO REMOVE NAME FROM REGISTER.

One who agrees to subscribe for shares of preferred capital stock and to pay the par value of the shares when the value is ascertained, upon condition that he is to be elected a director and made vice-president as long as he retains his shares of stock in the company, the shares to become his absolute property without any conditions attached, and who afterwards becomes a director and has these shares allotted to him and votes on them with the consent of the directors and shareholders, although payment is not due until the value of the shares is ascertained, is properly upon the shareholders' register and is liable for the amount unpaid upon the shares in accordance with his contract, and an application under secs. 118, 119 and 121 of the Companies Act, R.S.O. 1914, ch. 178, for a mandatory order directing the removal of his name from the register of shareholders will be refused.

[*Re Railway Time Tables Publishing Co.*, 42 Ch.D. 98, *Re Wiarton Beet Sugar Co., Jarvis's Case*, 5 O.W.R. 542, and *Re Modern House Man. Co.*, 14 D.L.R. 257, *Cameron* v. *Cuddy*, 13 D.L.R. 757, [1914] A.C. 651 referred to.]

Statement

APPEAL from the judgment of Latchford, J., dismissing motion under secs. 118, 119, and 121 of the Companies Act, R.S.O. 1914, ch. 178, for a mandatory order directing the removal of a name from the register of shareholders of the company.

The judgment appealed from is as follows:—In this motion Galusha seeks to have the name of Bennett struck from the books of the Gramm Motor Truck Company of Canada, on the ground that it has been placed there improperly. Bennett, it would appear, agreed to subscribe for 199 shares in the company, at a valuation to be made by a firm of accountants in Detroit. Shortly afterwards, an action was begun by Galusha against Bennett, on the ground that the agreement contemplated the sale of the stock to Bennett at less than its par value. Probably as a result of these proceedings, a meeting was held on the 15th May, 1914, at which it was agreed that the amount which Bennett should pay was not to be less than par. A valuation of the assets was subsequently made, but not by the firm of accountants mentioned

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in the first agreement with Bennett. The valuation shews a surplus of about $12,000.

Among the assets mentioned is a claim, estimated at $34,000, which the Canadian company had against the parent company at Lima, Ohio, and which at the time was in litigation. It appears that a judgment was obtained in these proceedings, not for $34,000, but for about $13,000, and that the Lima company is now appealing against that judgment, while there is no cross-appeal by the Canadian company, and therefore no likelihood that the amount will be increased. Instead, therefore, of a surplus existing according to the valuation made, there will be a deficit of about $9,000.

It is therefore argued that Bennett will necessarily pay less than par for his shares.

I cannot accept this contention. The valuation under which Bennett was to pay for the shares for which he subscribed has not yet been made, and in any case he is to pay par or over.

I do not think an order should be made under the sections quoted, except in a very clear case. All the cases cited, and others which might be cited, are cases where it was clear that the register should be rectified because shares were issued by the companies when they had no right to issue them. Such was the fact in the cases cited to me.

I think the application fails, as it should be clearly established that the name of Bennett is on the books of the company without sufficient cause. That has not been established; and the motion is dismissed with costs.

A. C. Heighington, for the appellants.

H. E. Rose, K.C., and *J. W. Pickup*, for Bennett, the respondent.

Riddell, J.

RIDDELL, J.:—This is an appeal from an order made by my brother Latchford; the appeal was fully argued several months ago—for certain public reasons we reserved our judgment, and a further delay has arisen from a misunderstanding between the officers of the Court. It is now, however, ripe for decision.

The order appealed from is a refusal to accede to the prayer ostensibly of the Gramm Motor Truck Company of Canada and one Galusha—in fact there is a controversy concerning the constitution and control of the company, and the application is by

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Galusha. It is for an order under secs. 118 and 119 of the Companies Act, R.S.O. 1914, ch. 178.

The facts are correctly set out by the learned Judge—I entirely agree with him that, in the result, Bennett is obligated to pay at least par for the stock, and that there can be no objection to him on that account.

That he has not paid for the stock is no reason for saying he is not a shareholder—it may be that the company can sue or can be compelled to sue for the purchase-price—but that is not the present proceeding.

I think the appeal fails and must be dismissed with costs.

This dismissal will be without prejudice to any action the applicants or either of them may bring for a declaration that Bennett is not a shareholder—all the facts may not be before us, and many of the allegations are contentious. I entirely agree with my brother Latchford that the sections in question are not to be invoked except in a reasonably clear case.

I am not to be understood as expressing any doubt that the respondent is a shareholder in the company—I have no such doubt, on the material before us.

Falconbridge, C.J.K.B.

Kelly, J.

FALCONBRIDGE, C.J.K.B.:—I agree.

KELLY, J.:—The order appealed from refused an application to have the name of the respondent, William M. Bennett, removed from the books of the Gramm Motor Truck Company of Canada Limited, if it was "contained therein as a stockholder and officer." The application is expressed to be made under secs. 118 and 119 of the Ontario Companies Act, R.S.O. 1914, ch. 178. Section 121 should also be referred to.

On the material before us, in which there is much contradiction, it cannot be truthfully said that the contention that Bennett's name is properly on the list of shareholders is without foundation. He agreed to subscribe for stock and to pay for it when its price was ascertained by the method prescribed by the agreement; and afterwards he acted in the capacity of shareholder and director and vice-president of the company.

The order asked for should not be summarily granted except in cases where it is made clear that the name objected to has been, without sufficient cause, entered, or retained, upon the list of shareholders. The present is not such a case; and I do not think it necessary to go further than to say that the application,

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on the controversial evidence submitted, was quite properly refused.

The order appealed from should not be disturbed; the appellant should pay the costs of the appeal.

HODGINS, J.A.:—Appeal from an order refusing a motion to remove the name of William M. Bennett from the register of stockholders of the Gramm Motor Truck Company of Canada, as the holder of 199 shares.

These shares were the subject of an agreement dated the 9th July, 1913, between Bennett, the company, and Acason and Galusha. The latter, a shareholder, is an applicant here together with the company.

Bennett agreed "to subscribe for 199 shares of preferred capital stock of the above-named company, to be paid for by him at the actual value of the said shares, at a time hereinafter mentioned, when a valuation is made of said shares. Said value to be determined by a proper taking of stock and valuation of the assets and liabilities of the said company by the firm of McPherson Weiss & Company, auditors, Detroit."

Provision was made for the basis of valuation, which was to be the actual value outside the goodwill, etc., which was fixed at $30,000. The audit and valuation were, it was agreed, to be postponed until after the litigation with the Gramm Company of Ohio, U.S.A., was settled, but were to take place "before said stock subscribed for is paid."

The shares were to be "issued as fully paid-up shares, and be preference shares in accordance with the by-laws of the company creating same, and the said party of the first part shall be entitled to all the benefits pertaining to said shares."

There was to be a transfer by Bennett of certain patent rights which the company agreed to purchase and to pay for by the issue of common stock to the value of $10,500. (These shares have not appeared in his name, so far as the material filed goes.)

Acason and Galusha then covenanted to cause the said Bennett to be elected a director and to be made vice-president, "as long as he retains his shares of stock in the company."

Bennett agreed to give his entire time and talents to the business of the company for a salary of not less than $3,600 per annum, payable monthly.

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The last clause of the agreement is as follows: "The said shares of stock subscribed for by the party of the first part shall be, when issued to him, his absolute property without any conditions attached except what are provided for in the by-laws of the company. And it is agreed that all necessary steps shall be taken and all things done by all parties hereto to put into operation immediately all terms and conditions of this agreement, excepting that part which provides for the valuation of said 199 shares of stock, when the matters in litigation between the before-mentioned companies have been finally settled, and except also that said party of the first part shall have sufficient time to complete any details and matters now pending between himself and the International Electromotive Company before the obligations herein contained become effective, in so far as anything in this agreement is concerned which may be affected by the matters between himself and said company."

It is to be noted: (1) that Bennett does not actually subscribe, but agrees to subscribe; (2) payment is to be made on the basis of actual value, after a valuation by a firm of Detroit auditors, which valuation is postponed until after certain litigation is ended; (3) that the shares are to be issued as paid-up shares; (4) that the shares, when issued, become his absolute property without any conditions attached; (5) that he is to be elected a director and made vice-president as long as he retains his shares, which may refer to common stock only or both kinds; (6) that he agrees to devote himself to the company's business and get a yearly salary for it; (7) that the obligations in the agreement become effective, in so far as they are affected by any matters between Bennett and the International Electromotive Company, after he has had sufficient time to complete them.

I should read this agreement as indicating that Bennett would subscribe for paid-up shares when their value was ascertained, as provided; that value being all that Bennett would have to pay.

On the 15th May, 1914, a further agreement was made, to which Bennett, the company, and Acason were parties, which contains the following clauses:—

"Now it is declared and agreed that it was the understanding of the parties to the said agreement, that the said Bennett should, in any event, pay not less than par for the said shares subscribed

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for by him as aforesaid, and in confirmation thereof, and to settle any doubt as to his liability, the said Bennett hereby covenants and agrees with the company that the price to be paid by him as aforesaid for the said stock shall be not less than the par value thereof.

"And it is further declared and agreed that the holder of the said stock shall be entitled to dividends from time to time in respect thereof, calculated upon the amount which shall have been paid by the said Bennett on account of his said subscription."

If Bennett had adhered to the terms of these agreements, it is clear that, till the value was ascertained, he was not bound to subscribe for the shares nor to pay for them, and in the meantime he would not be a shareholder.

But he did not do so. He seems to have decided to become a shareholder, holding these 199 shares, payment for which would not be due till their value was ascertained; and, consequently, his name appears as the holder of these 199 shares in the company's books. He acted as director from July, 1913, as he might do if he held shares and was not in arrear for any payment due on them, as was the case here, for the price had never been settled. He was twice elected director and vice-president, and acted as such for about two years. He voted on these shares more than once. The affidavits filed shew that he did this with the full knowledge and consent of the directors and shareholders, so far as they were consulted.

Upon the authority of *Morrisburgh and Ottawa Electric R. Co.* v. *O'Connor*, 23 D.L.R. 748, 34 O.L.R. 161, he became a shareholder in respect to these 199 shares, by reason of allowing his name to remain on the register and by acting as owner of them. An actual subscription is not required, nor is formal allotment. Conduct may take the place of both. Crocker, one of the directors, however, in his affidavit speaks of these 199 shares as having been allotted to Bennett.

He had the right under his agreement to refuse to accept anything but paid-up shares, and to refuse to pay for them till their value was ascertained in the way provided. The time arrived for that ascertainment on the 15th March, 1915, when the litigation between the company and the Ohio company was terminated: *Gramm Motor Truck Co. of Canada Limited* v. *Gramm Motor Truck Co. of Lima Ohio* (1915), 8 O.W.N. 121.

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But, if he chose, as he undoubtedly did, to allow his name to be put upon the register, to qualify as director and vice-president upon them, to vote on them, and to take an active part in the company's affairs, before they could be legally issued as paid-up shares, he elected to take them with the liability properly attaching to them.

This is the effect of such cases as *In re Railway Time Tables Publishing Co.*, 42 Ch.D. 98; *Re Wiarton Beet Sugar Co., Jarvis's Case*, 5 O.W.R. 542; and *Re Modern House Manufacturing Co.*, 14 D.L.R. 257; 29 O.L.R. 266.

The shares were always intended to be shares paid-up in money by Bennett when the value was ascertained. In acting as he did he became a shareholder *in præsenti*, but no alteration was made in his contract to pay, which remains as it was. The only difference is, that he became a shareholder, instead of remaining only an intending one.

I think this disposes of the application adversely to the applicant, and leaves Bennett as properly upon the shareholders' register, and liable for the amount unpaid upon the shares in accordance with his contract. He covenanted to pay at least par for them, and that is exactly the amount for which the company could properly issue shares.

Various questions may arise later on, such as whether it was Bennett's duty or that of the company to have the value ascertained, and whether the then or present directors have neglected or are neglecting their duty of requiring payment for these shares, and in any event whether, if no valuation can be had by the named firm, the principle laid down in *Cameron* v. *Cuddy*, 13 D.L.R. 757, applies. This Court has at present nothing to do with them, although this decision will have some effect in their consideration.

I cannot part with the case, in view of the affidavits filed subsequent to March, 1915, without remarking that, if the Court had been properly informed of the real position of affairs on the 11th March, 1915, when the case was argued, the decision would not have been delayed until now. Evidently from what transpired in April, 1915, there was no real obstacle in the way, and the reasons put forward in March were unsubstantial. Counsel, no doubt, acted on their clients' instructions, but those instructions were not in accordance with the real situation. For these

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reasons, while the judgment should be affirmed upon grounds different from those appearing in the reasons given, there should be no costs of this appeal.

Appeal dismissed; HODGINS, J.A., *dissenting as to costs.*

READ v. COLE.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ., November 2, 1915.

1. SOLICITORS (§ II A—22) — FIDUCIARY RELATIONSHIP — ACCOUNTING TO CLIENT FOR PROFITS OUT OF JOINT VENTURE.

A solicitor, who is retained by his client to assist him in procuring a tribal transfer of Indian lands and agreeing to an equal division of profits realized therefrom, stands in fiduciary relationship throughout the transaction and is bound to account to the client in respect of such profits though the transaction was later completed by the intervention of a third party at the instance of the solicitor.

[*Cole v. Read*, 22 D.L.R. 686, 20 B.C.R. 365, affirmed.]

Statement

Appeal from the judgment of the Court of Appeal for British Columbia, 22 D.L.R. 686, 20 B.C. R. 365, reversing the judgment of Hunter, C.J., at the trial, and maintaining the plaintiff's action with costs. Affirmed.

J. A. Ritchie, for the appellant.

J. W. de B. Farris, for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—This was an action brought by the respondent against the appellant (defendant) for a share of a commission received from the sale of lands. The plaintiff alleged an agreement with the defendant to use his influence with certain Indians to secure their consent to a sale of their reserve to the provincial government, and if successful he was to receive $20,000 as his commission. The defendant denied the alleged agreement and denied that he ever received any commission from the government for services rendered in connection with the sale. The trial Judge found in favour of the defendant. The case turned apparently upon the question whether a third party named Alexander, who received a commission from the Government, was an *alter ego* of Read. The trial Judge held that this was not established. This judgment was reversed by the full Court, Martin, J., dissenting. The defendant now appeals.

The case for the appellant is that, accepting the version of the transaction as given by witness Alexander, the deal was off on the Saturday, and that he, Alexander, took it up again on the Monday following at the direct request of the Indians and in-

dependently of all that had previously transpired. When it was subsequently put through Alexander, being then alone interested in the transaction, paid out of the profits which he made not a commission but a bonus to the defendant. It is urged that whatever may have been the previous relations between Read and the Government they had ceased on the Saturday.

Sir Charles Fitzpatrick, C.J.

In my opinion Read should be held as a trustee in view of his professional relations with Cole. He would never have been brought into the transaction were it not for Cole, and on the whole evidence I am satisfied that the sale effected by Alexander, who had previously failed to secure a surrender of the Indian title, was the consequence of the previous negotiations carried on by Read and Cole in respect to which Read was bound to pay Cole $20,000. I entirely agree with the Court of Appeal that judgment should go for that sum.

The appeal is dismissed with costs.

Davies, J., concurred with DUFF, J.

Davies, J.

IDINGTON, J.:—A perusal of the evidence herein and careful consideration thereof and especially the admitted facts and circumstances presented therein do not lead me to the conclusion that respondent entirely failed, as pretended by appellant, in accomplishing what they had jointly agreed upon attempting but, on the contrary, that he had practically succeeded in bringing about all but the formal conclusion of the bargain with the Indians; and that formal part he was prevented from assisting in by the curious conduct of appellant.

Idington, J.

Any other view must imply that the lavish commission the Government allowed to be included in the price was little short of scandalous in light of the marvelous celerity and unanimity with which the Indians got through with the pow-wow and the signing of their surrender. It seems inconceivable that such an afternoon's work alone could be so handsomely compensated for unless upon the hypothesis that much labour had preceded it.

Appellant was confessedly ignorant of the Indians and everything relating to them till respondent sought him out as a solicitor in a position to be possibly helpful to pave the way for respondent's efforts being made to bear fruit, and instructed him accordingly.

Alexander seems to have been brought into the matter as a person who had tried and failed a year previously but apparently

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of necessity had to be conciliated. He has been compensated accordingly. Securing him as an assistant or instrumental agent was only a step in the pursuit of that at which the parties hereto aimed.

Disagreeable surmises may arise in one's mind in surveying the unpleasant features of the whole transaction, but I cannot see how we can well do otherwise than assent to the reasoning upon which the Chief Justice and Irving, J., have proceeded in the Court below.

If the parties hereto and Mr. Alexander, magnifying their importance, or the importance of their services, have misled the Crown by making misrepresentations to the Attorney-General as to the value of their services, then it might well be that none of them are entitled to anything in law. The appellant has not presented, indeed could not present with hopes of success for himself, such a defence. If it turns out as the result of this litigation that such a surmise is well founded and the Crown imposed upon, the remedy lies with the Attorney-General. On this case as presented we are helpless in that regard.

I think, therefore, this appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I have no difficulty in this case in concluding that the judgment of the Court of Appeal is right and that the present appeal should be dismissed with costs.

Indeed, there is considerable reason to think that the appellant is fortunate in not having been compelled to account for the whole sum received by him after deducting a reasonable allowance for professional services. The respondent approached the appellant as solicitor, exposed to him, as his solicitor, the business in respect of which the appellant's professional assistance was required. At the appellant's suggestion the respondent consented to an arrangement by which they became jointly interested in that business. That was an arrangement which it was the appellant's duty not to permit the respondent to conclude with him, his professional adviser, without insisting upon independent advice being obtained. The respondent has not impeached the arrangement on this ground, but the relation of the parties has a most important bearing when the reciprocal rights and the duties of the parties under the arrangements come to be considered.

The relation between the parties being such as it was, and the appellant having allowed the respondent to leave his interests

entirely in the appellant's hands, the appellant could not be heard to say that he failed to do what the most rudimentary notions of professional duty required him to do; namely, to include in the arrangement between him and the respondent every stipulation which reasonable prudence might suggest for the respondent's protection.

He cannot be allowed to say that the agreement in fact permitted him to act so unfairly towards the respondent as he now pretends he is entitled to do, to appropriate the entire profit of the business into which he was introduced as the respondent's solicitor to the entire exclusion of the respondent.

I do not think the respondent's claim can properly be treated as resting merely upon an agreement to pay a commission on a certain result being obtained, but, even on that basis, the appellant manifestly fails when the facts are looked at broadly. The conception of the respondent's rights put forward by the appellant is absurdity itself, the conception, that is to say, that the appellant's rights rest upon the condition that the Indians should be induced to execute an agreement with the appellant, *eo nomine*, for the "sale of their rights." The so-called "option" in itself (as any reasonably intelligent person who had taken the slightest trouble to inform himself of the status of the Indians must have known) could not be a thing of any legal substance; such a document could possess importance only as evidencing the terms by which the Indians were willing to consent to a transfer of the reservation. Its value consisted in the fact that the persons desiring to purchase the reservation were willing to pay a reward for obtaining it. The thing of substance was to get the consent of the Indians in order to earn this reward. Whether the consent was given in the form of an option granted to the appellant, *eo nomine*, or an option granted to somebody else (so long as it should be accepted as sufficiently evidencing consent and giving the appellant a title to the expected reward) was a matter of absolute indifference. The condition in substance was performed, the consent was obtained, the reward was paid and the sum received was no less than the sum that would have been received if the so-called option had been taken in the appellant's own name instead of the name of Mr. Alexander.

The respondent's title to relief, even on this basis, is thus complete.

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ANGLIN, J.:— I think the correct conclusion from the whole evidence is that which the Chief Justice of the Court of Appeal appears to have reached, namely, that the sale effected nominally through Alexander was in reality the very sale in respect of which Read admits that he had agreed to pay the plaintiff Cole $20,000. Read's course of conduct in this matter, having regard to his professional status and his relations to the plaintiff, was indefensible. But still more amazing, if the story told by both parties to this action be true, was the assurance said to have been given by a member of the Government of British Columbia that if the twenty Indians interested in the Kitsilano Reserve could be got to give options for the acquisition of their rights in it for a payment to them of $10,000 apiece the Government would purchase such options for the sum of $300,000.

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

Brodeur, J.

BRODEUR, J.:—This is an action for commission concerning the sale of Kitsilano Indian Reserve.

Cole, the plaintiff respondent, was trying to induce the Indians, owners of that reserve, to sell their rights. He had an interview with Mr. Bowser, Attorney-General of British Columbia, at his legal office in British Columbia, who intimated that the Government was prepared to purchase.

Cole wanted to have an option prepared in connection with the proposed sale of the reservation. He was directed by Mr. Bowser to confer with Hamilton Read, an employee in his office, who took his instructions. The option, however, was not prepared immediately; but some other interviews took place between Read and Cole and it was agreed that they should share the profits which would be made if the deal went through. Formal meetings of the Indians were called, and at one of those meetings some of the Indians wanted to consult with Mr. Alexander, a prominent citizen of Vancouver, who had always entertained friendly relations with them.

The appellant Read came back from that meeting, put himself in communication with Mr. Alexander, and it was understood between the two that they would divide the profits of the sale. An option was then prepared in Mr. Alexander's name which was signed by the Indians. The lands were sold to the govern-

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ment and after the amount was paid a sum of about $80,000, representing the profits of the transaction, was divided between Mr. Alexander and Read. Cole now sues to have his share in the profits which Read realized.

Read became connected with this matter as Cole's solicitor, and their relations are those of solicitor and client, relations which have never been terminated. If Read has thought fit to make a deal with some other persons he has acted contrary to the mandate which it was his duty to execute.

The Court of Appeal found that he should give to Cole a share of the profits which he made on the sale of those lands. I cannot see how he could escape from being condemned to pay that share.

In these circumstances, the judgment condemning him to pay that share should be confirmed with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. December 9, 1915.

1. NEW TRIAL (§ III B—15)—CONFLICTING FINDINGS AS TO NEGLIGENCE—ACTION FOR INJURIES TO LOCOMOTIVE FIREMAN.

The findings of a jury in an action for personal injuries sustained by a locomotive fireman by reason of the escape of steam from a valve in the engine, that the injuries were caused by the negligence of the defendant in not seeing the valve properly closed, and that the plaintiff by the exercise of reasonable care in examining the valve could have avoided the accident, are conflicting and ground for a new trial under r. 501(1) (Ont.).

[*St. Denis* v. *Baxter*, 13 O.R. 41, 15 A.R. (Ont.) 387; *Australasian Steam, etc., Co.* v. *Smith* (1889), 14 App. Cas. 321, followed; *Kerry* v. *England*, [1898] A.C. 742, distinguished.]

Statement

APPEAL from the judgment of Sutherland, J., in an action for damages.

The judgment appealed from is as follows:—

This is an action in which the plaintiff, a fireman employed by the defendant company, alleges that he opened the injector on an engine of the defendant company to let water into the boiler, and then began to clean up the floor of the cab and deck of the engine, and, while doing so, moved a heavy shaker-bar and also a hopper-key, which were resting against the squirt-hose attached to the boiler of the engine. He says that, as soon as he did so, the nozzle of the said squirt-hose, which up to that time had been held down through

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a hole in the floor of the cab by the weight of the shaker-bar and key, flew up, by reason of the pressure of steam and hot water from the boiler, and a stream of scalding water therefrom struck him in the face and completely destroyed the sight of his right eye and severely scalded his face. He asserted that the injuries were caused by the negligence of the defendant company or its servants or agents.

At the trial, the jury found, in answer to questions, that the injuries of the plaintiff were caused by the negligence of the defendant company, and that such negligence consisted in not seeing that the valve was properly closed. They also, in answer to a question whether the plaintiff's injuries were the result of his own negligence, found that they were not; but, in reply to certain further questions, that, by the exercise of reasonable care, the plaintiff might have avoided the accident, and that what he could have done was to have examined the valve before attempting to use the hose.

The answers of the jury with reference to the plaintiff's conduct are, it seems to me, conflicting and such as to make it difficult, if not impossible, to enter a verdict thereon, in spite of the finding of negligence against the defendant company.

Upon consideration thereof, I am of opinion that it is a case for the application of Rule 501(1), which is in part as follows: ". . . where the answers are conflicting so that judgment cannot be entered upon such findings, the action shall be re-tried as in the case of a disagreement."

I therefore order a re-trial of the action; the costs to date to be in the cause.

H. E. Rose, K.C., for appellants.

A. A. Ingram, for plaintiff, respondent.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—I am of the opinion that there was evidence proper to be submitted to the jury on all branches of the case.

The answers of the jury to the written questions are set out in the judgments of my learned brothers. They are, I think, plainly conflicting, and I agree with the learned trial Judge, who, in a considered judgment, held, that it was a case for the application of Rule 501(1), and directed a new trial.

The appeal ought, therefore, to be dismissed with costs.

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Latchford, J.

LATCHFORD, J.:—The judgment in appeal directs, under Rule 501(1), a new trial, on the ground that the answers of the jury "are conflicting and such as to make it difficult, if not impossible, to enter a verdict thereon, in spite of the finding of negligence against the defendant company."

The jury found that the injuries sustained by the plaintiff were not caused by his own negligence, and were caused by the defendants' negligence, consisting in not seeing that the valve referred to in the pleadings and evidence was properly closed.

There was, I think, evidence to support each of these findings of fact. The case accordingly falls to be considered, not upon the two first grounds urged in the appeal—that there was no evidence of the defendants' negligence to go to the jury and that there was no real finding upon the question of their negligence—but upon the findings made as affected by the answers of the jury to the questions: "(5) Could the plaintiff by the exercise of reasonable care have avoided the accident?" and "(6) If so, what could he have done?" To (5) they answered "Yes," and to (6) "By examining the valve."

There is what seems to me a contradiction in saying, as the jury said, that there was no negligence on the part of the plaintiff, but by exercising reasonable care in examining the valve, that is, by being not-negligent, he could have avoided the accident. His injuries are found to result from his want of reasonable care—in other words, from his negligence; and they are found not to result from his negligence.

In *St. Denis* v. *Baxter* (1887), 13 O.R. 41, an appeal from the judgment at the trial directing, upon inconsistent answers by the jury, that the action be dismissed, the Court equally divided as to the effect of the answers, and the appeal consequently failed. Mr. Justice Proudfoot thought the judgment should not be disturbed. Chancellor (now Sir John) Boyd considered that there should be a new trial, unless the defendants were content to let the verdict go to the plaintiff for $100, as the jury recommended. This view was affirmed by the Court of Appeal (1888), 15 A.R. 387. Hagarty, C.J.O., while concurring in the opinion that there should be a new trial, held the dissenting view that neither party was entitled to judgment.

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I adopt the language of the learned Chancellor in the *St. Denis* case (13 O.R. at p. 44): "I cannot find any practice which justifies me in disregarding any material part of what the jury have returned to the presiding Judge." Here the jury, while finding the defendants negligent, found the plaintiff negligent and not-negligent. It is a case which, in my opinion, falls properly within the scope of the Rule referred to by the learned trial Judge.

A case that might at first sight appear to render the rule inapplicable is *Kerry* v. *England*, [1898] A.C. 742, where a refusal to grant a new trial was held to be proper; but there the answers were not inconsistent. Here they plainly are.

In *Australasian Steam Navigation Co.* v. *Smith & Sons* (1889), 14 App. Cas. 321, it appeared that contradictory verdicts had been given on separate trials involving the same questions, and that the evidence was so fairly balanced that a jury might have found either way. Their Lordships decided that both cases should be tried again, not separately, but together.

Here the answers are as contradictory as if given by two juries trying the same issues.

In my opinion, judgment should be rendered dismissing the appeal with costs.

Kelly, J.

KELLY, J.:—This action is for damages resulting, it is alleged, from the defendants' negligence. At the trial questions were submitted. In answer to one of these, the jury found that the plaintiff's injuries were caused by such negligence. One reason given for the appeal is, that there was no evidence to support that finding. I think, however, that there was, and the appeal cannot succeed on that ground.

Whatever difficulty there is as to the result of the findings has arisen from the manner in which the jury answered the questions bearing upon the plaintiff's conduct in the matter. Their answer to question 3: "Or were the plaintiff's injuries the result of his own negligence?" was in the negative, while to question 5: "Could the plaintiff, by the exercise of reasonable care, have avoided the accident?" they answered "Yes." They answered the next question: "If so, what could he have done?" thus: "By examining valve."

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These findings the learned trial Judge concluded were so conflicting as to make it proper to apply Rule 501(1), and he therefore directed a new trial, as in the case of a disagreement.

Standing by itself, the meaning of the answer to each of these two questions (3 and 5) is clear, and viewed in that way they are contradictory; for, taking the answer to question 5, as it must be taken, as meaning that the plaintiff was negligent, we have one finding that he was negligent and the other that he was not negligent.

But importance is sought to be given to the introduction of the word "or" at the beginning of question 3, as indicating that that question and question 1 were intended to be in the alternative, and that the jury having found in answer to the earlier question that the defendants were negligent, they felt bound by the connection thus made between the two questions to answer the third as they did answer it, notwithstanding what they had in mind as the proper answers to questions 5 and 6; and therefore that the real meaning of their answers, considered together, is, that the plaintiff, by the exercise of reasonable care, could have avoided the accident, thus rendering him liable for such contributory negligence as disentitled him to judgment.

Unless by disregarding some material part of the findings, I cannot so interpret the meaning of these answers. The answers are conflicting and the meaning the jury intended to convey doubtful. Neither party is entitled to judgment on the findings.

The course adopted by the learned Judge was, under the circumstances, a proper one, and I think the appeal should be dismissed with costs.

Riddell, J. (dissenting)

RIDDELL, J., dissented.

Appeal dismissed.

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Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, Brown and Elwood, JJ. January 8, 1916.

1. ELECTIONS (§ II D—75)—CORRUPT PRACTICE—GIVING LIQUOR TO VOTERS. Having a two-gallon jug of whiskey in a stable back of a polling place, out of which an agent of a candidate treated voters after they had voted, does not amount to a drink given to any voter "on account of his being about to vote or having voted" within the meaning of sec. 227 of the Election Act, R.S.S. 1909, ch. 3, but is merely corrupt practice of a

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"trivial, unimportant and limited character" within the meaning of sec. 236(*c*) of the Act, and not affecting the validity of the election.

[*Re Lennox*, 1 O.E.C. 41; *Somerville* v. *Laflamme*, 2 Can. S.C.R. 216; *Re West Prince*, 27 Can. S.C.R. 241; *Re South Oxford*, 1 O.W.R. 795, applied; 8 W.W.R. 793 reversed.]

2. WITNESSES (§ III—53)—ELECTION CONTEST—TESTIMONY ADVERSE TO PARTY CALLING HIM—MODE OF CONTRADICTION.

If a witness disappoints the party calling him, another witness may be called to give a different account of the transaction; therefore, a petitioner, in an action contesting the validity of an action on account of personal bribery, is not bound by the testimony of a witness he called but which testimony was adverse to the interest of the party calling him.

[*Melhuish* v. *Collier*, 15 Q.B. 878, 19 L.J.Q.B. 493, followed.]

3. NEW TRIAL (§ III B—15)—ELECTION CONTEST—FINDINGS INFLUENCED BY TESTIMONY OF WRONG WITNESS.

The Court's findings in an action contesting the validity of an election on account of personal bribery, influenced by the testimony of a witness who has not been subpœnaed but attended in place of another witness of a similar name who has been subpœnaed, is ground for a new trial.

Statement

APPEAL from a judgment of Newlands, J., on an election petition. Reversed.

P. M. Anderson, for appellant.

H. V. Bigelow, K.C., for respondent.

Brown, J.

BROWN, J.:—Newlands, J., dismissed all the charges made by the petitioner with one exception. This exception is described as "the Doucette charge," and on it the trial Judge finds as follows:

The last charge referred to by Mr. Bigelow is the most serious one. It is that Victor Doucette gave a number of voters intoxicating liquor on election day. It was proved that Doucette was the duly appointed agent for Bashford at the Elberfeldt school, where a poll was held; that in a stable behind the school-house there was a two-gallon jar of whiskey, out of which he treated some six voters at different times during election day, after they had voted. He did not confine the treating to Bashford's supporters, because one witness, who swore he was a Conservative, said Doucette told him after he voted that he might have a drink, too, and he went and had one. Doucette said he did not bring the jar to the stable, which, in my opinion, makes no difference, as he made use of it to treat voters during the voting, and afterwards took the jar home with him.

This charge comes under sec. 227 of the Elections Act, which is to the effect that the giving, or causing to be given, to a voter on polling day on account of his being about to vote, or having voted, any drink, etc., shall be a corrupt practice.

This liquor was kept in a stable at the polling place, and was given to voters after voting by a duly appointed agent of the respondent. It is therefore a corrupt practice.

Section 235 says that if an election Court determines and reports that a corrupt practice has been committed by a candidate or his agent, the election of the candidate, except in the case mentioned in sec. 236, shall be void.

Section 236 provides:

"If the election Court determines that an agent of the candidate was guilty of a corrupt practice that would otherwise render the election void, and further finds that:

"(*a*) No corrupt practice was committed at such election by the candidate

personally, and that the corrupt practice of the agent was committed contrary to the order and without the sanction or connivance of the candidate;

"(b) The candidate took all reasonable means for preventing the commission of corrupt practices at such election;

"(c) The corrupt practice was of a trivial, unimportant, and limited character; and that

"(d) In all other respects so far as disclosed by the evidence the election was free from any corrupt practice on the part of the candidate and of his agent;

"then the election of the candidate shall not by reason of the corrupt practice be void."

Now I am prepared to report that "no corrupt practice was committed at such election by the candidate personally, and that the corrupt practice of the agent was committed contrary to the order and without the sanction or connivance of the candidate," and that he "took all reasonable means for preventing the commission of corrupt practices" at the election, and that, excepting the Doucette charge, so far as was disclosed by the evidence, "the election was free from any corrupt practice on the part of the candidate and of his agents," but I am not of the opinion that the Doucette charge, *i.e.*, the having a two-gallon jar of whiskey in a stable back of the polling place, out of which he treated voters after they had voted, is "a corrupt practice of a trivial, unimportant and limited character," under the meaning of that subsection. It is, in my opinion, a serious charge, and, although the evidence shewed that it had no effect upon the election, still it is a corrupt practice forbidden by the Act, and thus voids the election.

As to the quantity of liquor consumed, Doucette says that he thinks the jug was a gallon jug, and Jones in his evidence says: "I should think between a gallon and two gallons, something like that." There is no other evidence on the point. Assuming that the jug was full when placed in the stable, on which point there is no evidence, only one-half of its contents was consumed, as the evidence indicates that when Doucette took the jug home in the evening it was still half full. It would appear from this that the drinking must have been very limited in its scope.

There is no evidence to indicate that, apart from Doucette himself, more than 6 persons had a drink during the day. These were Jones, King, Kenney, Henschel, Goldschmidt and Oloron. The first three-named were voters, but there is no evidence that the other three were voters. As to the three voters, the evidence shews that none of them had a drink, or the promise of a drink, before voting.

Doucette was the agent at the poll of the Liberal candidate, and of those who got a drink, Kenney, at least, was a Conservative. It does not appear what the politics of the other two who voted were. If Kenney had obtained his drink before he voted, or if, before he voted, he had the promise or the expectation of getting

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it, then the fact that he was a Conservative might be an element against the appellant, but the fact that he got the drink afterwards, regardless of his politics, is a factor in the appellant's favour, in that it goes to shew that whatever drinking took place was carried on regardless of how the parties voted. Under such evidence, can it be said that the drink was given to these voters or any of them "on account of his being about to vote or having voted"?

In *Re Westminster*, 1 O'M. & H. 89, at 95, Martin, B., says:

But I think I am justified, when I am about to apply such a law, in requiring to be satisfied beyond all reasonable doubt that the act of bribery was done, and that unless the proof is strong and cogent—I should say very strong and very cogent—it ought not to affect the seat of an honest and well-intentioned man by the act of a third person.

And in the *Warrington Case*, 1 O'M. & H. 42, at 44, the same Judge says:

I adhere to what Willes, J., said at Lichfield, that a Judge to upset an election ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter, and not to be lightly set aside.

In *Re Lennox*, 1 O.E.C. 41, one Storms, being an agent of the respondent, on election day brought some whiskey to a blacksmith's shop near a poll, being a place where the neighbours were in the habit of congregating to warm themselves, etc., there being no tavern or public-house in the neighbourhood, and treated those present, most of them being voters, without reference to their voting and without distinction as to whose side they supported; and it was held not a corrupt practice.

Osler, J.A., at p. 49, says:

The consequences of any infraction of the section are highly penal, and we must be careful not to extend it to any case which does not plainly come within its terms. Full effect must be given to the expression, "on account of such voter being about to vote or having voted." It will not do to say: "If there had been no voting the voter would not have been there, and then there would have been no treating (so to call it); therefore, the treating must have been on account of the voter having voted or being about to vote."

Spragge, C.J.O., in the Court of Appeal, says, at p. 56:

I think it very clear that the giving of liquor by John Storms to several persons at the blacksmith shop of Lockwood is not within either secs. 152 or 153. I so entirely agree with the judgment of my brother Osler upon that point, given in the Court below, that I have nothing to add to it.

And Cameron, J., in appeal, at p. 63, says:

The words in that section, "on account of the voter being about to vote or having voted," must have some significance, and I agree with the opinion expressed by Mr. Justice Osler that the giving of meat, drink, or refreshment, to be a corrupt practice under that section, it must be given in reference to and in connection in some way with the voting of the party treated. The

mere fact that the party has come to the neighbourhood of the place where the treat is given for the purpose of voting, or just after having voted, will not make the act of treating, without more appearing, a giving of drink on account of the voter being about to vote, or on account of his having voted.

In *Somerville* v. *Laflamme*, 2 Can. S.C.R. 216, Richards, C.J., at p. 244, is reported as follows:

This seems to me to explain the origin of the 23rd section of the English statute, and the reason why it was passed. It is substantially re-enacted under the last paragraph of the 94th section of the Dominion statute, and made a corrupt practice, but to make it a corrupt act the meal, drink, or refreshment must be given on the day of nomination, or on the polling day, and *on account of the voter having voted, or being about to vote*. This, perhaps, would make the illegal act a corrupt practice, though the refreshment was not given with a corrupt intent. The observations of Willes, J., shew clearly that it was not enacted for the purpose of preventing drinking on the nomination or polling days.

I am of opinion that the evidence in the case at bar does not warrant a finding that the drink was given to any voter "on account of his being about to vote or having voted." Moreover, even though such finding were warranted, I am of opinion that, under the authorities, it should be held that "the corrupt practice was of a trivial, unimportant and limited character," within the meaning of sec. 236 of the Act.

It is not shewn that more than three voters got drink, and even such three got it after they voted, and they voted, apparently, without the promise or expectation of it, and the giving of it had no effect on the election.

In *Re West Prince*, 27 Can. S.C.R. 241, a canvassing agent of the candidate took a bottle of whiskey with him while canvassing. He stopped at one O'Brien's, and, after going into the woods with two of the O'Briens and remaining there some five minutes, he took Patrick O'Brien into the barn and gave him two or three drinks out of the bottle, and asked him to vote for the candidate for whom he was canvassing. This was held to be a "corrupt practice," but "of a trivial and unimportant character."

In the *Lennox* case, *supra*, where Storms gave liquor to voters and others in the blacksmith shop, Galt, J., at p. 45, referring to this and other charges, says:

They had reference to acts done by agents, and not by the respondent personally, nor with his knowledge or consent, and cannot, therefore, affect the result of the election, as they were (if corrupt, which is the question now before us) of such trifling nature and extent that in my opinion the result cannot have been affected or be reasonably supposed to have been affected by such acts.

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In *Re South Oxford*, 1 O.W.R. 795, the agent had hired horses and conveyances from two livery-stable keepers for the purpose of conveying voters to and from the polls on election day. It was held by Street and Britton, JJ., who were the trial Judges, that these corrupt practices were within the saving clause of the Act, as they were of such a trifling character that it could not be reasonably supposed that they affected the result of the election. On both grounds, therefore, I am of opinion that the appeal should be allowed. This is not a case of overruling the trial Judge on a finding of disputed fact, but, rather, as to the proper inference to be drawn from admitted facts.

The respondent has cross-appealed on several of the charges that were dismissed by the trial Judge. Only one of these charges requires any consideration at all, as, in my opinion, the trial Judge was obviously justified in the disposition which he made of the others. The exception to which I refer is known as "the Hamm charge," and it is one that involves personal bribery on the part of the appellant. On this charge the judgment is as follows:

The first of these is, that respondent gave to John H. Hamm, a nephew of the petitioner, a paper on which he wrote the words: "Bearer O.K., W.B.B." and sent him with the same to R. J. Wells, and Wells gave him $2. That the respondent gave Hamm the paper because he voted for respondent.

The facts in this case were practically undisputed; only the intentions of the parties were in question. The facts as proved at the trial were that Mr. Bashford gave Hamm a paper with "O.K." and his initials on it, and that he took this paper to Wells and got $2. Up to this point the parties are agreed, but no further. Hamm says he got the $2 for his vote. Bashford's story is entirely different. He says that he was standing on the steps of the town-hall in Rosthern on election day; the vote was being taken in the town-hall; that Hamm arrived in an automobile in an intoxicated condition; that he stumbled when going up the steps to the town-hall, and he, Bashford, caught him by the arm and said, "Be careful, John, don't spoil your ballot." That after Hamm came out from voting he went to Bashford and wanted money from him to go out and bring in some voters for him, and he refused to give him any; that Hamm was in that condition in which he was a nuisance, and, not being able to get rid of him in any other way, he wrote "O.K." and his initials on a slip of paper, and sent him to Wells, and as soon as Hamm left he telephoned Wells and told him to take the paper from Hamm and kick him out. There was some question raised as to Hamm's condition, but the weight of evidence is that he was drunk. Bashford swears he was; Wells, who was called as a witness by Mr. Bigelow, also swears he was, as does Gerhard Fast, who was driving for Mr. Braden and brought Hamm in to the poll to vote. He says that Hamm and another man he was bringing with him drank a half bottle of whiskey on the trip.

On the other hand, two witnesses swear he was sober: E. G. Hodgson and A. P. Seibert. Hodgson, however, I did not consider a reliable witness, because in his direct examination he swore positively that he saw Bashford

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write the paper for Hamm, and then, on cross-examination, he admitted that he did not see him do so, but only saw him stoop over as if he was writing. There were, therefore, three witnesses against one as to Hamm's condition.

After getting the paper, Hamm went to the Liberal committee rooms to find Wells, but he was not there, and he found him afterwards in the hotel. Wells, who I have stated was called as a witness by Mr. Bigelow, gave the following account of the interview:

"About 12 o'clock Mr. Bashford called up the committee room and I happened to be in and answered the 'phone, and he said young Hamm had been bothering him for some money to bring some votes from across the river, and that he couldn't get rid of him so he gave him a note, 'O.K., W.B.B.,' to the committee room and he said: 'When he comes down there and presents it, if he presents it to you put him off, stand him off.' I said, 'All right.' I saw him between half-past one and two at the hotel, and he presented this note, and I said, 'What do you want?' and he said, 'I want about 15 or 20 dollars to get some votes from across the river that I can get in.' I said, 'I have no money for you,' and he bothered me for fully 10 minutes; he was very drunk and his breath was very strong; and I said, 'Have you voted?' and he said, 'Yes.' 'Well,' I said, 'here's two dollars to help you get back to Laird, out of my own pocket.' That's exactly the conversation."

In answer to the question, "Did the slip of paper that was handed to you have anything to do with your giving him the $2?" he answered: "Nothing whatever. So far as Bashford was concerned his instructions were not to give it to him. Those were his instructions over the 'phone." He further said that the $2 was his own money and he had never been repaid it.

The above evidence having been given by a witness called by the petitioner, he is bound by it, and, as it corroborates the evidence given by Bashford, I accept it as the correct statement of what occurred, and, therefore, dismiss this charge.

It is contended that the Judge was in error in holding that the petitioner, having called Wells as his witness, was bound by his evidence, and I am of opinion that the Judge did err in that respect.

In *Melhuish* v. *Collier*, 19 L.J.Q.B. 493, Coleridge, J., at 496, says:

> If a witness disappoints the party calling him, it is clear that another witness may be called to give a different account of the transaction.

And Erle, J., at p. 497, says:

> . . . it is quite clear that where, by a witness called by one of the parties, facts are established contrary to such parties' interest, another witness may be called to prove that the facts are otherwise if relevant to the cause.

But although the petitioner should not be bound by the evidence of Wells, yet that evidence does corroborate the evidence of Bashford; and, as the trial Judge must have believed Bashford, this Court would not be justified in reversing his finding.

This is clearly a case of disputed fact. The trial Judge does not seem to have explicitly dealt with that phase of this charge which alleges that Wells, on behalf of Bashford, paid to Hamm $2

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on account of Hamm having voted. The evidence of Hamm and Wells is absolutely contradictory on this point, and if Wells did pay the money on behalf of Bashford, he must, in view of the findings of the trial Judge, have done so contrary to the explicit instructions of Bashford. Moreover, in view of the fact that the Judge disbelieves Hamm on the main charge, and believes in preference the evidence of Bashford and Wells, this Court would not be justified in believing Hamm in preference to Wells on the associated charge. I am, therefore, of opinion that the cross-appeal must fail on all the grounds raised.

The petitioner has made application for a new trial on what is known as "the Fehr charge," which is also one that involves personal bribery on the part of Bashford. On this charge the judgment is as follows:

The second of the personal charges is: That respondent paid money to Wm. I. Fehr to induce him to vote at the election.

The facts in this case, too, are admitted, the only question being as to the intention of the parties. About three weeks before the election, at the Occidental Hotel at Rosthern, the respondent gave Fehr $2. Fehr says that when this money was given to him Bashford told him to go and treat the boys, and he did so. Bashford says that Fehr asked him to lend him $2, which he did. This is the only evidence upon this charge. There was some evidence that Fehr treated, although all the witnesses called upon this point say that they do not know who paid for it. Fehr said that one Peter Harden told him that he saw Bashford pay him this $2. Harden, who was also called as a witness by the petitioner, said that he neither saw Bashford pay the money to Fehr nor did he tell Fehr so. Fehr is, therefore, not a reliable witness.

It has been shewn on affidavit material that there are two men by the name of Peter Harden at this point, and that, apparently, both men were present on the occasion in question. The Peter Harden who gave evidence was not subpœnaed by the petitioner, but the Peter Harden who did not give evidence was subpœnaed. The witness, Peter Harden, having learned that his namesake had been subpœnaed, apparently went to him, and in some way led him to believe that a mistake had been made, and got the subpœnea and attended with it at the trial. When the witnesses were giving evidence and the name "Peter Harden" was called, the Peter Harden who was not subpœnaed responded, took the witness-box, and gave evidence. It was not until some time after the trial that the mistake was discovered by the interested parties. It is shewn that the Peter Harden who was subpœnaed but did not attend the trial, would likely give evidence in corroboration of Fehr. As the trial Judge apparently disbelieved

Fehr on the ground that Harden had contradicted him, I am of opinion that on this charge there must be a new trial. I am also of opinion that this trial should, if possible, be conducted by Newlands, J.

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It was objected by counsel for the appellant that there was no evidence that Fehr was a voter, and that for this reason a new trial should not be ordered. This charge, however, is laid under sub-secs. (*c*) and (*e*) (sec. 222) of the Act, and under these sub-sections it is not necessary that Fehr, to whom the money was paid, should be a voter.

In the result, the appeal should be allowed with costs and the cross-appeal dismissed with costs. The appellant should have the costs of the trial in the Court below. All costs up to the trial should be left to be disposed of by the Judge who presides at the re-trial of the Fehr charge.

Elwood, J.

ELWOOD, J.:—I have had an opportunity of reading the judgment of my brother Brown in this matter, and I concur in the conclusion that he has come to.

So far as the portion of the charge dealing with the payment made by Wells to Hamm is concerned, I wish to add to what has been said by my brother Brown, that in my opinion this whole transaction, both so far as Bashford is concerned and so far as Wells is concerned, is of a most suspicious character; and it is quite possible that if I had been trying the case I should have come to a conclusion different from that reached by the trial Judge. However, I do not think that this Court would be justified in reversing the finding of the trial Judge; but I do not wish to be taken to hold that the account of the transaction as given by Wells himself does not shew a corrupt practice. I arrive at my decision on this branch of the case on the ground that, even if it is a corrupt practice, it is not, standing by itself, of such a nature as to avoid the election.

Haultain, C.J.
Lamont, J

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

Appeal allowed.

RE TORONTO R. CO. AND CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Riddell, Latchford, Kelly and Lennox, JJ. October 6, 1915.

1. STREET RAILWAYS (§ I—7)—FRANCHISES—EXCLUSIVE RIGHT SUBJECT TO FRANCHISES OF OTHER RAILWAYS—REMOVAL OF RESTRICTIONS.

A municipal corporation granting a street railway company the exclusive right to operate surface street railways in the city, for a term of years,

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subject to certain restrictions, effected by the franchises of other railways, cannot, after the removal of restrictions upon the termination of the other franchises, within the period of the grant, withhold its consent to the right to operate upon the portion of a street vacated by another franchise, in the same manner as upon the other streets of the city.

[*Toronto Ry. Co.* v. *Toronto*, [1906] A.C. 117, followed; 5 O.W.R. 130, 132, affirmed.]

Statement

APPEAL by the Corporation of the City of Toronto from a judgment of the Ontario Railway and Municipal Board.

G. R. Geary, K.C., and *Irving S. Fairty*, for appellants.

H. S. Osler, K.C., for the railway company, respondents.

Riddell, J.

RIDDELL, J.:—At the time of the agreement between the City of Toronto and the Toronto Railway Company, in 1891, a company, the Metropolitan Street Railway Company, had a "franchise" from the County of York, over part of Yonge street, including a piece running from the (present) Canadian Pacific Railway tracks to Farnham avenue. This had formerly been in the township of York, but had, a short time before the agreement, been taken into the city and still continues to be in the city.

A company called the Toronto and Mimico Electric Railway and Light Company (Limited) had, before the enactment of the Act validating this agreement, obtained a "franchise" over that portion of Queen street west of Dufferin street. The former company had a road constructed and running at the time of the agreement.

The agreement with the city will be found printed in the Ontario statutes for 1892, p. 899, as schedule A to 55 Vict. ch. 99. By clause 11, the city grants the right to the Toronto Railway Company "to operate surface street railways in the city of Toronto, excepting on the island and on that portion, if any, of Yonge street from the Ontario and Quebec Railway (now the Canadian Pacific Railway) tracks to the north city limits over which the Metropolitan Street Railway claims an exclusive right. . . . . and the portion, if any, of Queen street west . . . over which any exclusive right . . . may have been granted by the . . . County of York, and also the exclusive right . . . over the

said portions of Yonge street and Queen street west . . . so far as the said corporation can legally grant the same." This agreement was declared valid, legal, and binding by the Act 55 Viet. ch. 99, sec. 1, and the term made 30 years from the 1st September, 1891: "Provided always that nothing contained in this Act nor the confirmation of the said agreement shall limit . . . the right" of the Corporation of the County of York, the Toronto and Mimico Electric Railway and Light Company (Limited), or the Metropolitan Street Railway Company.

The franchise of the Metropolitan company ran out in June, 1915, and the Toronto Railway Company insist that they have the right to run their undertaking over this part of Yonge street. The Ontario Railway and Municipal Board have affirmed that right, and the city corporation now appeal.

Whatever conclusion we would have arrived at in the absence of binding authority, I think we are precluded from holding that the right claimed did not pass.

The case of the Queen street west extension has been before the Courts and passed upon by our Court of Appeal and the Judicial Committee: *City of Toronto* v. *Toronto R.W. Co.*, 5 O.W.R. 130; *Toronto R.W. Co.* v. *Toronto Corporation*, [1906] A.C. 117.

There the Toronto Railway Company, who operated an extension on the excepted part of Queen street, contended that their right to operate was not derived from the agreement with the city; but this contention was negatived by the Courts. In the Court of Appeal, giving (5 O.W.R. at p. 132) the grounds of the judgment, Moss, C.J.O., says, interpreting the language quoted above: "The grant extends to every portion of the territory. . . . Of the exceptions, the only absolute one is that of the island. The others are qualified. As to them the main grant was intended to take effect and operate save only so far as the existence of any existing conflicting grant might create a restriction. If those portions of Yonge street and Queen street west were part of the city at the time of the agreement, they were covered by the main grant, subject to the restriction. . . . And once they formed part of the city, it would not be open to the plaintiffs to contend that upon the removal of the restric-

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tion during the period of 30 years they could withhold from the defendants the exclusive right to operate upon those parts in the same manner as upon the other streets of the city."

Some parts of this judgment are no longer law, but the parts quoted have not been overruled or questioned so far as they affect the present case. The Judicial Committee, [1906] A.C. 117, affirming the judgment, does so in different terms, but does not question the reasoning of the Court of Appeal. The Chief Justice's judgment, is concurred in by the full Court of five Judges. We must follow the decision in its reasoning; if it is to be overruled, it must be overruled by superior authority—we are bound by the statute.

The result is that, the "restriction" effected by the franchise of the Metropolitan company being removed "during the period of 30 years," the city cannot "withhold from the (company) the exclusive right to operate upon (this) part in the same manner as upon the other streets of the city."

This disposes of the main ground of the appeal.

It is however said by the city that the City Engineer did not withhold his approval of the plans. Perhaps that might be so, if only that is to be considered which took place before the application to the Board; but the proceedings before the Board were, I think, a sufficient submitting of the plans to him under clause 12 of the conditions of the agreement, p. 908 of the statutes of Ontario for 1892.

The appeal should be dismissed with costs.

Latchford, J.
Lennox, J.

LATCHFORD and LENNOX, JJ., concurred.

Kelly, J.

KELLY, J.:—Appeal from an order of the Ontario Railway and Municipal Board.

The city, in the railway company's application to the Board wherein the order now appealed against was made, contended that the company have not and never had any right to construct and operate a street railway upon that portion of Yonge street referred to in the application, from their present northerly terminus at or near the Canadian Pacific Railway crossing northerly to a point near Farnham avenue.

The agreement by which the franchise under which the company now operate was granted was made in 1891. By it the city

granted the exclusive right, for the term there specified, to operate surface street railways in the city of Toronto, excepting on the island and on that portion, if any, of Yonge street from the Ontario and Quebec Railway (now the Canadian Pacific Railway) tracks to the north city limits over which the Metropolitan Street Railway claimed an exclusive right to operate such railways, and the portion, if any, of Queen street west (Lake Shore road) over which any exclusive right to operate surface street railways may have been granted by the Corporation of the County of York: "and also the exclusive right for the same term to operate surface street railways over the said portions of Yonge street and Queen street west (Lake Shore road) above indicated so far as the said corporation can legally grant the same." The agreement was declared valid and legal by an Act of the Legislature (1892), 55 Viet. ch. 99, and the term of the franchise declared to be for the period of 30 years from the 1st September, 1891. When the agreement was made, the city extended at Yonge street to a line near Farnham avenue.

The franchise of the Metropolitan Street Railway Company to operate a railway on that part of Yonge street expired on the 25th June, 1915, and thereupon the respondents claimed the right under their agreement to extend their tracks upon and operate their railway over that portion of Yonge street for the balance of the term of their franchise, confirmed to them by the statute above referred to. The city disputes the interpretation put upon the agreement by the respondents, and contends that it does not confer upon the railway company the rights they now seek to assert.

Whatever views may be entertained as to the right of the municipality to grant a franchise such as this, not to take effect or which may not come into operation for years after the grant, are, in the present circumstances and so far as this Court is concerned, subject to the judicial interpretation already put upon that agreement.

The part of the agreement now in issue was passed upon by the Court of Appeal in 1905 in *City of Toronto* v. *Toronto R.W. Co.*, 5 O.W.R. 130, where the action of the railway company in

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laying their tracks upon and running their cars over a portion of Queen street, or Lake Shore road, referred to in the agreement, was under consideration. The judgment of the Chief Justice of the Court, in which the other four Judges composing with him the Court concurred, is quite positive in the expression of the Court's interpretation of that part of the agreement. At p. 132 the learned Chief Justice says: "Now in this agreement we find, in the first place, a grant in very wide terms, the exclusive right for a period of 30 years to operate surface street railways in the city of Toronto. Standing alone, without the exceptions, this embraces every part of the territorial area comprising the city of Toronto, not only at the date of the agreement, but during the period of 30 years over which the right is to extend. The grant extends to every portion of territory acquired or made to form part of the municipality during the 30 years. Of the exceptions the only absolute one is that of the island. The others are qualified. As to them the main grant was intended to take effect and operate save only so far as the existence of any existing conflicting grant might create a restriction. If those portions of Yonge street and Queen street west were part of the city at the date of the agreement, they were covered by the main grant, subject to the restriction. . . . And once they formed part of the city, it would not be open to the plaintiffs to contend that upon the removal of the restriction during the period of 30 years they could withhold from the defendants the exclusive right to operate upon those parts in the same manner as upon the other streets of the city."

That view was not disturbed by the Privy Council.

Mr. Geary forcefully urged a distinction between the cases of the two excepted portions of streets—Yonge street, where at the time of the agreement the Metropolitan railway was in operation, and the Lake Shore road, on which the road had not been constructed. I am unable to reach the conclusion that, if there is any distinction between these two, it is such as to take the present case out of the application of the Court of Appeal's decision.

The only other matter requiring consideration is one of procedure, in the mode by which the respondents laid the founda-

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tion for their application to the Ontario Railway and Municipal Board, the contention being that the plans were not, as required, submitted to the City Engineer. Possibly that is so in the first instance; but, when the application came before the Board, and this objection was taken, an adjournment was made, and the attention of the Engineer specially drawn to the purpose for which the plans reached his hands. There was from that time either a neglect or refusal to entertain the plans; and, later on, the Board acted. Under these circumstances, the objection should not prevail.

The appeal fails, and must be dismissed with costs.

Appeal dismissed.

BRITISH AMERICA ELEVATOR CO. v. BANK OF B. N. A.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. February 7, 1916.

1. BANKS (§ IV C—113)—LIABILITY FOR WRONGFUL DISCOUNTING—AGENT'S DRAFTS.

Where a bank has agreed to furnish "currency" to the plaintiff's agent by "cashing" the agent's drafts on the bank, and where the bank knows that the money supplied is to be used solely for the purchase of grain, it is a breach of trust on the part of the bank to allow the money to be used to reduce the agent's personal or firm account, and where loss has occurred the bank is liable.

[*Gray* v. *Johnston*, L.R. 3 H. L. 1, followed; *Shields* v. *Bank of Ireland*, [1901] 1 Ir. R. 222; *Coleman* v. *Bucks*, [1897] 2 Ch. 243, distinguished.]

2. BANKS (§ IV A 2—58)—DRAFTS—APPLICATION OF TRUST FUNDS—COMPLIANCE WITH DIRECTIONS.

Where a bank's customer draws on an outside party and directs the bank to credit the proceeds to his firm's account, the bank is justified in carrying out the instructions, in the absence of notice prohibiting it from doing so, even though it may know that the draft is part of a trust transaction.

[*Coleman* v. *Bucks*, [1897] 2 Ch. 243; *Gray* v. *Johnston*, L.R. 3 H.L. 1, and *Ross* v. *Chandler*, 45 Can. S.C.R. 127, referred to.]

3. BANKS (§ IV C—113)—RIGHT TO PAY AGENT'S PROTESTED CHEQUE WITH DRAFT ON PRINCIPAL.

If an agent gives his personal cheque to cover an amount due to his principal for which there are no funds in the bank, but after the cheque has been protested, the agent has drawn on the principal for an amount sufficient to cover the cheque, the bank is justified in paying the cheque and is not liable to the principal.

[*Toronto Club* v. *Dominion Bank*, 25 O.L.R. 330, followed.]

4. DAMAGES (§ III J—203)—MEASURE OF—MISAPPLICATION OF BANK FUNDS.

Where the plaintiff's agent and the defendant bank have, by collusion, deflected money deposited by the plaintiff to be used for a particular purpose, the measure of damages is the actual amount of the loss sustained because of the wrongful deflection, and if none is proved then merely nominal damages.

[*Ross* v. *Chandler*, 45 Can. S.C.R. 127, referred to; *British American Elevator Co.* v. *Bank of B.N.A.*, 20 D.L.R. 944, varied.]

Statement

APPEAL from a judgment of Galt, J. 20 D. L. R. 944, which is varied.

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HOWELL, C.J.M.

Hugh Phillipps and *C. S. A. Rogers*, for plaintiffs.

I. Pitblado, K. C., and *A. C. Ferguson*, for defendants.

HOWELL, C. J. M.:—The defendants agreed with the plaintiffs that they would furnish from their Rosthern branch, "currency" to the plaintiff's agent at Waldheim by "cashing" the agent's drafts on the defendants at that branch. There is nothing in the agreement to indicate how the money was to be transferred from that branch at Rosthern to Waldheim, a distance of about 8 miles. In carrying out the agreement the defendants' agent at Rosthern commonly sent the bank's circulation for the amount of the draft, by express, to Youngberg, the plaintiffs' agent at Waldheim, and when this was done the express charges were paid by the bank and added to the draft and this, with $1.25 per $1,000, was repaid by the plaintiffs. There appears to have been no agreement about sending the money to Waldheim.

The dealings of Rostrop, the defendants' agent and manager at Rosthern, are set out in detail in the judgment of Galt, J., and I shall not repeat them. Rostrop undoubtedly knew that it was Youngberg's duty to use this money solely in the purchase of grain and that the plaintiffs provided this money solely for that purpose. It is also clear that the currency was not furnished by the defendants for a certain number of these drafts, but on the contrary, the sum for which each of these drafts was drawn was from time to time carried to the credit of Youngberg or Youngberg & Vassie (a firm of which the former was a partner) in accounts which these parties had in that branch of the bank.

These several credits had the effect of fortifying the bank in relation to these accounts and in many instances in wiping out or reducing overdrafts. From the evidence I think it is fair to conclude that after September 15, 1911, when the agreement was made these drafts were in several instances brought in by Youngberg and deposited to the credit of the firm in order to satisfy insistent demands made by Rostrop to reduce the firm's overdrawn account. It is significant also that when Youngberg's own account was overdrawn it was, in several instances, credited with the proceeds of drafts all of which must have been well known to, and must have been approved of by, Rostrop. It is clear that the defendants did not comply at all times with the letter of the agreement by supplying "currency" for the drafts and, on the contrary, they assisted the plaintiffs' agent in diverting the drafts to accounts

between the bank and the agent, and I think I am bound to infer, in some instances, to the material benefit of the defendants.

Rostrop explains in the evidence that Youngberg & Vassie were country merchants at Waldheim, carrying on a large credit business with farmers, and that when grain was brought in at Waldheim for sale, numbers of the debtors of the firm would sell their grain to the plaintiffs, and Youngberg would not pay them in cash, but simply credit their accounts with the firm. At least this is what Youngberg told Rostrop as the reason why he did not take currency for the drafts which were carried to the credit of the firm. He gives no reason for depositing drafts to the credit of Youngberg's private account. The first deposits to this account were apparently $200 on December 11 and $1,250 on December 12, leaving his account to credit of something over $1,400, it having been overdrawn about $30 before the 1st of these 2 deposits. These 2 deposits seem from the accounts and evidence to be portions of 4 drafts amounting to $5,000 which were to the extent of $2,700 deposited to the credit of the 2 accounts on the dates above mentioned.

It was argued that depositing money to the credit of Youngberg in his bank account was the same as handing him bank notes, and it permitted him the more safely to deal with the plaintiffs' money by giving cheques and by drawing the money as he might require it. There is some evidence that he did give cheques on this account for grain purchased for the plaintiffs, for the plaintiffs at the trial produced several cheques on that account which they claim he gave for grain and which had been dishonoured.

It is well to keep in mind that in these transactions the bank was primarily acting for its customer, the plaintiffs, and was required to hand over bank notes to a person not its customer so far as these transactions were concerned; it might be said that the bank was the plaintiffs' agent to hand to Youngberg the plaintiffs' money to be used by him to buy grain for his principals. Youngberg did not present those drafts to the bank as his property, but as the property of the bank's customer, the plaintiffs. The bank's duty ended by handing over current money to Youngberg, and if he had taken this money so paid to him and had requested the bank to deposit it to his private credit, or to the credit of the firm, and if the bank knew that the identical money so tendered was that paid on the draft, on the authority of *Shields* v. *Bank of*

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Ireland, [1901] 1 Ir. R. 222, and *Coleman* v. *Bucks*, [1897] 2 Ch. 243, I would hold the bank not liable unless it was shown that Youngberg thereby intended to commit a breach of trust to the knowledge of the bank, and the bank assisted to that end. It seems to me that the bank is as much bound to receive a deposit of lawful money tendered by a customer as it is to honour a cheque, as in *Gray* v. *Johnston*, L. R. 3 H. L. 1.

The cash was not paid over on these drafts, apparently the amount of each draft was simply deposited to the credit of the required account by a deposit slip being made out and signed sometimes by the teller of the bank and sometimes by Youngberg, apparently with the consent always of Youngberg, but I think I must infer that the draft and slip were often accelerated by the insistence of Rostrop to have overdrafts covered or reduced.

In *Gray* v. *Johnston*, above referred to, the Lord Chancellor, at p. 11, states the law as follows:

> I apprehend that you will agree with me when I say that the result of those authorities is clearly this: in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must in the second place, as was said by Sir John Leach, in the well known case of *Keane* v. *Roberts*, 4 Madd. 332, be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shewn that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed.

When I consider that the bank stopped short of paying over the money and merely credited the amount of these drafts to the accounts, it seems to me that Youngberg and Rostrop often yielded to the temptation to easily and simply place these accounts in good condition at the expense of the paintiffs. Some of the drafts so diverted, notably the first two credits to Youngberg's account above referred to, might not seem suspicious, but this cannot be said as to the subsequent ones; but as no reason has been given for these credits, I think I should follow the decision of the trial Judge and hold the defendants liable.

It seems to me, however, that the bank is not liable for the draft for $500 which was, on September 14, mailed to the bank at Rosthern and received and credited there on the 15th as requested by Youngberg. The agreement between the parties was made by letter of plaintiffs dated September 15, and a copy was by letter

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of 16th forwarded to Rostrop, who would not get it before the 17th or 18th, and so he had no notice of the agreement when he received and credited this draft. There is no evidence to show that Youngberg did wrong in so acting. It was an ordinary banking transaction. The bank's customer drew on an outside party and directed the bank to credit the proceeds to his firm's account. If the bank did wrong it is only because Rostrop did wrong: See *Bank of N. S. W.* v. *Goulburn*, [1902] A. C. 543. Even if Rostrop then knew that the draft was a part of a trust transaction, it does not follow that the bank is liable: *Coleman* v. *Bucks*, [1897] 2 Ch. 243.

In February 1912, at an inspection of Youngberg's accounts by the plaintiffs' inspector at Waldheim, Youngberg paid over to him $5,000 in cash and gave a cheque on Youngberg's private account in the bank for $1,000, and the inspector gave him an acknowledgement for $6,000. The inspector took this cash and cheque to another bank and deposited the whole as $6,000 to the credit of the plaintiffs. The other bank sent this cheque in due course to the defendants' branch at Rosthern for collection and there being no funds to Youngberg's credit, it was protested, but before the cheque was returned to the other bank dishonoured, Youngberg called and put in a draft on the plaintiffs for $1,000, which was credited to his account, and thereupon the cheque was paid and the money forwarded by the defendants to the other bank. If this cheque had not been paid by the defendant bank the plaintiffs would have received $5,000 instead of $6,000. At the trial, counsel for the plaintiff in questioning Rostrop as to this transaction, asked the following question and got the reply: "Q. That was Elevator Company money which paid that cheque? A. Yes."

The bank got the draft of February 13, for $1,000, and out of it paid the plaintiffs' cheque for a like amount. I cannot see why the bank should be held liable for this draft. In *Toronto Club* v. *Dominion Bank*, 25 O. L. R. 330, it was held that where the club secretary had wrongfully deposited the club money to his private credit in the Imperial Trust Co. under such circumstances that the company was liable but had given to the club a cheque on that account, it was held that the company's liability must be reduced by the amount of the cheque.

I think that the gross amount for which the defendants may

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be liable should be $1,500 less than the judgment pronounced.

The plaintiffs gave no evidence, at the trial to show what if anything they lost because of the deflection of the drafts. At the trial it seemed to be taken for granted that the plaintiffs had sustained considerable loss and the trial Judge, towards the close of the case, made a statement that would lead one to think he intended to refer the matter to the Master to take accounts.

It seems to me clear that Youngberg is quite as liable as the bank, and that whatever the bank did improperly was really done to help him and I am surprised that he is not a party to this suit. If he was a party, and if it had been shown that before action he had made good all these breaches of trust to the plaintiffs, or if he had purchased grain for the plaintiffs up to the full amount of the drafts, it seems to me that the plaintiffs would not be entitled to any relief. Can it be that the plaintiffs have greater rights because Youngberg was not made a party to this suit? The plaintiffs were not to get this money back but were to get grain from Youngberg for these drafts and there is nothing to show that grain was not received by them and no loss has been proved. If Youngberg had accounted to the plaintiffs in grain for the full amount of the drafts he would have done his part.

The plaintiffs having proved that the bank and Youngberg by collusion deflected this money, they are liable, and the plaintiffs are entitled to damages. If none is proved, then nominal damages at most.

From what took place at the argument, I strongly suspect that the plaintiffs did not, in their dealings with Youngberg, lose the whole amount of the drafts in dispute or that he returned to the plaintiffs a substantial part of the moneys so deflected, and as it was assumed at the trial that there had been a material loss, I think justice could be done by a reference.

The troublesome part is as to the terms of the reference. At first sight it would seem to be for the plaintiffs to show what loss they suffered because of these drafts being credited to the accounts instead of being paid to Youngberg in cash. It might be very difficult for the plaintiffs to show this. If Youngberg had been made originally a party defendant, the matter would be much simpler, but at the hearing no question was raised on this point.

If at the time when the drafts were put in Youngberg had purchased more grain than the cash he had received would repre-

sent, no doubt he could have used the drafts to repay himself. If by placing the drafts to the credit of these accounts Youngberg was thereby enabled to purchase and deliver, and did purchase and deliver, grain to the plaintiffs, the bank should have the benefit of it.

The bank has been a wrong-doer in this matter, and I think that justice will be done by referring it to the Master to find: 1st. The amount which the plaintiffs have lost through their dealings with Youngberg in this grain account in the pleadings mentioned; 2nd. The amount, if anything, they have received from or on behalf of Youngberg on account thereof; and 3rd. The amount of grain, and the value thereof, which the plaintiffs received after December 5, 1911, which was paid for out of charges made in the bank account of Youngberg or Youngberg & Vassie.

And let it be declared that the defendant is liable for the sum found in the 1st par. of the reference, less the sums, if any, found in the 2nd and 3rd paras. The total amount of the defendants' liability, however, shall not exceed the sum of $12,028.10.

The judgment entered will be varied to accord with the above. Further directions and the costs in the Master's office will be reserved. The judgment as to costs of the trial will stand and the defendants will have the costs of appeal.

RICHARDS, J. A.:—I agree with the trial Judge that the evidence shows that the bank's manager misapplied the funds in question by putting them to the credit of Youngberg or Youngberg & Vassie, to cover the indebtedness of those 2 accounts to the bank, and to enable those parties to use the money for their own purposes. It seems to me that the plaintiffs have distinctly proved their claims to the extent of the whole $13,528.10, and that the bank has been properly charged with that amount.

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As to the first $500 draft, I agree with the view taken by my brother Cameron. As to the $1,000 draft the proceeds of which are said to have been used to pay the $1,000 cheque given to the plaintiff's inspector, I differ, with deference, from the view taken by the Chief Justice. The cheque was, to the knowledge of the bank manager, given to pay back $1,000, part of certain moneys of the plaintiffs in Youngberg's hands which the plaintiffs had required him to repay to them, and the bank manager knew that it was so received by the plaintiffs. If the proceeds of the draft were, in fact,—which I think has not been proved—used to pay the

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cheque, then the bank manager was a party to misleading the plaintiffs by causing them to think that the cheque had been paid out of Youngberg's own funds, and the bank should not be permitted to set up their own wrongful act as a defence. The decision in *Toronto Club* v. *Imperial Trusts Co.*, 25 O. L. R. 330, does not seem to me to apply to such facts as the above.

The bank, however, claims that if Youngberg is, as between him and the plaintiffs, charged by the latter with the entire $13,528.10, or with the $12,028.10, found by deducting the above $500 and $1,000 drafts from that sum, the accounts between them are such that the plaintiffs' loss would be less than either of those sums, and that Youngberg, in fact, delivered to the plaintiffs (who got the benefit of it) more grain than that purchased with the moneys received by him from the plaintiffs other than such $13,528.10 (or $12,028.10) and in other ways recouped part of the plaintiffs' loss.

On the argument the plaintiffs' counsel, in answer to questions from the Court, admitted that their actual loss was much less than either the $13,528.10 or the $12,028.10; but contended that it was not open to the bank to raise that question after having taken the plaintiffs' moneys. He stated, however, that it was not the intention of the plaintiffs to, in fact, exact more than what should be found to be their actual loss.

The weakness of that position is that it would leave the bank legally liable by matter of record to pay the plaintiffs more than their actual loss and to make it possible for the latter, by insisting strictly on their rights as judgment creditors, to not merely recoup their loss, but to exact payment of a large additional sum and so make a very appreciable profit out of the matter.

While personally not doubting that the plaintiffs would treat the bank fairly, I think the latter should not be put in such a position as the above. That they must make good the plaintiffs' loss goes without saying. But they should not be legally liable beyond that loss.

The matter may be looked on as a joint misappropriation by Youngberg and the bank, and, so considering it, it seems just that the bank should be at liberty to take advantage of any set-off or counterclaim which Youngberg could have availed himself of if this action had been against him.

I think that the plaintiffs have proved their case to the ex-

tent of the full $13,528.10, and would prefer to add to the judgment by allowing a reference to the Master to enable the defendants to show, if they can, the balance, if any, which would be due by the plaintiffs to Youngberg on a taking of accounts between them, if he, Youngberg, were not chargeable with the $13,528.10 or any part of it; the judgment to be reduced by the amount of such balance.

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As, however, it is desirable that some conclusion may be concurred in by a majority of the members of the Court, and as I am satisfied that the balance that will on the reference be found in the plaintiffs' favour will be less than the $12,028.10 mentioned in the Chief Justice's judgment, I am content to reduce my finding of the misappropriations to that amount and to concur in the reference named in that judgment.

The above will in fact make no difference in the result from what it would be if the whole $13,528.10 were found by the Court against the defendants, because, in taking the accounts between the plaintiffs and Youngberg, the latter will have to account for the total sums received less $12,028.10, instead of less $13,528.10, so that the balance in his favour, of which the defendants can avail themselves to reduce the plaintiffs' claim, will thus be $1,500 less. In other words, the $1,500 taken off the amount found by the trial Judge will also, as a result of the above, be taken off the sum by which the plaintiffs' damages are to be reduced.

Perdue, J.A.

PERDUE, J. A.:—(After stating the facts)—

The arrangement contemplated was that when the plaintiffs' agent at one of the places agreed upon presented at the branch of the bank a draft drawn by him on his principals at Winnipeg, the bank at its branch would cash the draft. I think the term "cash the drafts" meant that the bank would either pay the agent the proceeds in money or place them at his disposal. The defendants had a branch of their bank at Rosthern, a place some eight miles from Waldheim. There was no bank at Waldheim. Under the arrangement made it was open to the bank, when cashing a draft for the plaintiffs' agent, to pay the proceeds to the agent in money or send it to him by express, as appears to have been sometimes done. When the agent received the money there was nothing to prevent him from depositing it in the defendants' bank to his own credit, so that he could withdraw the money from that account as it was needed for the purposes of the plaintiffs'

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business. Instead of receiving the actual money and depositing it, I can see nothing to prevent him from depositing, or the bank from receiving, the drafts as deposits to an account opened by the agent in his own name for the purposes of his principal's business. This would be an ordinary banking transaction and, as long as the bank acted in good faith and had no notice of wrongdoing, it would be protected: *Ross* v. *Chandler*, 45 Can. S. C. R. 127; *Toronto Club* v. *Dominion Bank*, 25 O. L. R. 330; Bank Act, 3 & 4 Geo. V. ch. 9, sec. 96. There was in fact an account opened with the defendants by Youngberg in his own name which Rostrop, the defendants' manager at Rosthern, states was opened for the purpose of paying for grain bought for the plaintiffs. In this account Youngberg deposited a number of the drafts.

There was also at the same branch an account of Youngberg & Vassie, a firm in which Youngberg was a partner. In December, 1911, and at various times thereafter, Youngberg deposited drafts made by him on the plaintiffs in the Youngberg & Vassie account, where the proceeds of these drafts became mixed with the moneys of that firm. The manager of the defendants' branch at Rosthern was aware that drafts drawn upon the plaintiffs for the purpose of buying grain were deposited in the Youngberg & Vassie account and that these moneys, or part of them, were used from time to time to pay claims against that firm. Liabilities of Youngberg & Vassie were paid with the plaintiffs' money and overdrafts of the account were covered by the deposit of drafts drawn by Youngberg on the plaintiffs. It is clear that the local manager was aware that Youngberg was mixing the plaintiffs' money with that of his firm in the bank account, and that cheques were issued by the firm for its general purposes against that account. The explanation offered is that Youngberg informed him that Youngberg & Vassie who carried on an implement business and a store and dealt in hay, feed, flour, harness, etc., received grain from farmers in settlement of accounts due to them from the farmers, that this grain was turned in to the plaintiffs and that the drafts deposited in Youngberg & Vassie's account were being used by them to repay themselves in that way what was due to them by the plaintiffs for the grain so turned in.

At that time Youngberg & Vassie were believed, both by the plaintiffs and defendants, to be quite solvent and to be worth a considerable amount over and above their liabilities. The

plaintiffs received daily reports from Youngberg and they knew how much money he had from time to time. The forms of drafts were furnished by the plaintiffs and were numbered consecutively so as to aid them in keeping themselves informed as to the drawings. Plaintiffs' superintendent from time to time visited Waldheim and enquired into the state of Youngberg's account and the amount of money and of grain on hand and the superintendent fully reported the result to them. This superintendent, one Black, does not appear to have found any irregularity in Youngberg's accounts. On April 11, 1912, some 10 days after the last draft was put through, Black reported to the plaintiffs as to the Waldheim elevator and as to the position of Youngberg with the plaintiffs in regard to their various dealings with him respecting wheat, coal and certain outstanding transactions with farmers, the meaning of which is not quite clear. Black in his letter of above date states that a draft for $3,350 would be sent to the plaintiffs by the next mail. This apparently "cleaned up" Youngberg's account. At this time, Black reported Youngberg to be worth at least $20,000. Black, when going to inspect the elevator, used to visit Rostrop and make inquiries of him. Until some time after the transactions in question in this suit had taken place the plaintiffs appear to have had no suspicion that there was anything wrong with Youngberg's accounts. They knew daily the amount of money he had received, the quantity of grain he stated he had bought and the amount of money on hand. It was Black's duty to examine the accounts, estimate the grain in the elevator, count the money on hand and generally inspect the account. The plaintiffs, with the aid of careful inspections, found nothing wrong with Youngberg's accounts. Rostrop, the defendant's manager at Rosthern, states that he did not suspect Youngberg's actions until about February 13, 1912, when the latter gave Black a cheque for $1,000 on the bank, as a return to the plaintiffs of part of the balance in Youngberg's hands. There were no funds to meet this cheque. Even then Black came and reassured the manager, telling him that Youngberg would provide funds to meet the cheque, a thing which he did by depositing a draft on the plaintiffs.

If the plaintiffs trusted Youngberg and had sufficient confidence in him to entrust large sums of money to him as their buying agent, Rostrop can hardly be blamed for believing in his honesty and in the truth of the explanations he gave for deposit-

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ing the drafts in the Youngberg & Vassie account. If Rostrop had no knowledge that Youngberg was intending to commit a breach of trust when he deposited the drafts to his own account or to that of Youngberg & Vassie, can the bank be held liable simply because the bank manager, knowing the purpose for which the drafts were made, allowed them to be so deposited and allowed cheques for other purposes than grain buying to be paid out of the proceeds?

The authorities show that it is not enough, in order to fix a banker with liability for a breach of trust, that the bank, knowing the money to be trust funds, permitted him to obtain it and so to be in a position to misapply it. The injured party must go further and show that the bankers knew of and concurred in the intention to misapply, a knowledge which will be presumed if the banker derives a personal benefit from the transaction designed or stipulated for: *Gray* v. *Johnston*, L. R. 3 H. L. 1; *Bank of N.S.W.* v. *Goulburn* [1902], A. C. 543; *Shields* v. *Bank of Ireland* [1901], 1 Ir. R. 222; *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282; *Ross* v. *Chandler*, 45 Can. S. C. R. 127, 131; *Coleman* v. *Bucks*, [1897] 2 Ch. 243. In the last mentioned case a sum of money was remitted to the bank expressly for the credit of a trust account of one of its customers. There having been no trust account opened, the bank placed the money to the customer's private account. At that time the customer's account was considerably overdrawn, but the bank had no suspicion as to his solvency. The banker knew that the money was trust money, but having regard to what he knew of the customer's position, no special inquiry was made. It was found as a fact that the bank had no intention of benefiting itself by what was done. A further overdraft was allowed to the customer until his bankruptcy occurred. It was held that the bank was not liable for the trust moneys so lost.

In so far as the drafts deposited to the Youngberg account are concerned, it appears to me that Rostrop had confidence in Youngberg's solvency and had no reason to suspect an intention to misapply, and that neither the manager nor the bank derived any benefit from the placing of the money in a current account in Youngberg's name. *Coleman* v. *Bucks*, *supra*, is particularly applicable and applying the principles referred to in that case, I think there was nothing improper upon the part of the defend-

ants in allowing the drafts to be deposited in the private account of Youngberg, especially when Rostrop understood that this account was used by Youngberg for the plaintiffs' business. If in the course of subsequent dealing it came to the manager's attention that a breach of trust was being committed it would then be his duty to abstain from lending his assistance to it.

In regard to the deposit of drafts in the Youngberg & Vassie account, the case against the defendants is very much stronger. When Youngberg had already a personal account in which he might place moneys of the plaintiffs for the purposes for which he received them, there was not the same justification in allowing large sums of money belonging to the plaintiff to be placed in the Youngberg & Vassie account. Debts of that firm were constantly being paid out of this account, and drafts on the plaintiffs intended to be used for wheat buying were, at Rostrop's request, deposited in this account in order to cover overdrafts of the account. It is true that much, if not all, of the plaintiffs' money used by Youngberg & Vassie to pay their own liabilities may have been replaced by them by reason of their dealings with parties who paid them in wheat which was turned over to the plaintiffs. But it is only by taking accounts and thoroughly investigating the transactions that the liability, if any, of the bank to the plaintiffs can be ascertained. The evidence put in by the plaintiffs justifies the belief that there were diversions of the plaintiffs' money to Youngberg & Vassie's account in the case of certain of the drafts under circumstances which would make the bank liable for loss sustained thereby, but the evidence is not sufficient to fix the defendants with a definite liability.

The plaintiffs offered no evidence as to what, if any, loss they have sustained by reason of the matters complained of. They allege in their statement of claim that by reason of the agreement with the defendant it became a trustee for the plaintiffs of the proceeds of the drafts and accountable to the plaintiff for same and that the application thereof as set forth constituted a breach of trust. They base their claim upon an alleged breach of trust by the defendant. But the defendant was not a trustee for the plaintiffs. The agreement was to cash drafts made by the plaintiffs' agent upon the plaintiffs for the purpose of enabling him to buy grain for them. The acts that are complained of did not arise out of the agreement. The defendant came into the trans-

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actions out of which the acts complained of arose, by reason of being also the banker of Youngberg and of Youngberg & Vassie. The bank can only be made liable by being shown to have participated in a breach of trust or in a fraud on the part of Youngberg by which the plaintiffs have suffered.

The plaintiffs must show that they have sustained a loss, even if the plaintiffs' moneys were improperly diverted by Youngberg in such a manner as to make the bank responsible for the loss, the plaintiffs must show the loss they suffered. There is no evidence that shows that the plaintiffs have suffered any loss. There was a suggestion that some time after the matters in question had taken place the plaintiffs were called upon to pay, and did pay, certain farmers for wheat delivered. These farmers, it is claimed, had taken Youngberg's cheques or I. O. U.'s in payment for wheat and had held these to accommodate him. The evidence offered, even if it were admissible, did not connect these transactions in any way with the bank or show that they were the result of the bank's dealings with the drafts. Apparently these farmers were assisting Youngberg and it is not certain that the plaintiffs were responsible to them.

The trial Judge has entered a judgment against the bank for the full amount of the drafts alleged to have been misapplied. Amongst these is a draft for $500, dated September 15, 1911, and deposited on the same day to the credit of Youngberg & Vassie. This draft was enclosed in a letter from Youngberg, dated on the 13th of the same month. Now the letter from the plaintiffs to the bank requesting the cashing of drafts made by the Waldheim agent was written on the same day that the draft in question was deposited at Rosthern, and two days later than Youngberg's letter enclosing the draft to the bank. It is obvious, therefore, that the bank manager at Rosthern dealt with this draft in the ordinary course of banking business and not in pursuance of the arrangement between the plaintiffs and the bank. There is no evidence to show that at that time he had any knowledge of wrong doing on the part of Youngberg. The draft appears to have been received in the ordinary manner in which any negotiable instrument would be received from a customer. Following the reasoning of the majority of the Supreme Court in *Ross* v. *Chandler*, 45 Can. S. C. R. 127, there was nothing improper on the part of the bank in placing the draft to the credit of Youngberg & Vassie in accord-

ance with Youngberg's instructions, the bank having no notice of any wrongful intention. When the money was deposited in the firm's account, the bank was justified, in fact it was bound to honour cheques made on that account: See *Gray* v. *Johnston*, L. R. 3 H. L. 1, and particularly the passages cited by Davies, J., in his judgment in *Ross* v. *Chandler*, *supra*; also, *Bank of N. S. Wales* v. *Goulburn*, [1902] A.C. 543. Clearly, I think, no case has been made against the bank in respect of this draft.

There is another item to which attention must be called. In February, 1912, the plaintiffs sent their inspector, one Black, to inspect their business at Waldheim. Black made a report to the plaintiffs of the results of his inspection. He failed to discover any of the irregularities complained of in this action and Youngberg seems to have accounted to him, or satisfied him, that he had on hand the balance of cash he should have, after deducting payments made on behalf of the plaintiffs. Black found that Youngberg had in his hands at that time cash belonging to the plaintiffs to the amount of over $10,000, and Black took from him $6,000 which he sent to the plaintiffs. Black received from Youngberg a cheque for $1,000 on his private account with the defendant's Rosthern branch, and this appears to have been a part of the $6,000. Payment of the cheque was refused by the bank and the cheque was protested. Two or three days later the cheque was paid, Youngberg having in the meantime deposited to his credit a draft on the plaintiffs for $1,000 in order to pay the cheque. It is clear that as between the plaintiffs and Youngberg this left his indebtedness to them in the same position as it was before the cheque was given. The plaintiffs had received $1,000; but had paid it back to the bank by paying the draft. The trial Judge has, however, charged the bank with this draft for $1,000 and included it in the amount for which he finds them liable to the plaintiffs, without giving any credit for the amount received on the cheque. This $1,000 should, therefore, be deducted. It is also claimed by the defendant that another draft included in the judgment was paid by currency sent by the bank to Youngberg at Waldheim.

The trial Judge stated during the progress of the trial that if he decided in favour of the plaintiffs he would refer the matter to the Master. He has not, however, granted a reference, but

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has entered judgment against the bank for the full amount of all the drafts the misappropriation of which was claimed, together with interest, and including the two sums of $500 and $1,000 to which I have referred. On the first argument before this Court it was admitted by counsel for the plaintiffs that a very considerable some of money had been received by the plaintiffs from, or on behalf of, Youngberg which would reduce the amount of his indebtedness to them to a little more than $8,000 and stated that the plaintiffs did not intend to exact from the bank more than the sum for which they were properly liable. Counsel insisted, however, on the plaintiffs' rights to hold the judgment for the full amount at which it was entered. Now, the measure of the bank's liability cannot be more than that of the defaulting trustee or agent, and the measure of his responsibility is to replace the capital which has been lost and pay interest as the Court may direct: *Att.-Gen.* v. *Alford*, 4 De. G. M. & G. 843; *Burdick* v. *Gerrick*, L. R. 5 Ch. 233; Underhill on Trusts, 7th ed. 460. There is no pretence that Youngberg made a profit by the use of the money. The plaintiffs would have, in any case, to establish such a contention. If, therefore, Youngberg has used a part of the money, proceeds of the drafts in question, for the plaintiffs' benefit in their business or has repaid, directly or indirectly, a part of the funds misappropriated, he would be entitled to receive credit for such sums of money and would be chargeable only with the balance representing the plaintiffs' actual loss. This actual loss would at the utmost be the measure of the defendant's responsibility. If the judgment stands as it has been entered, the plaintiffs will, in view of the admission of their counsel, be in a position to make a considerable profit out of the breach of trust by their agent. The judgment while it stands is conclusive between the parties and a mere expression of an intention to do the right thing by the bank is not enough. Even the best intentions may be altered when there are no means of enforcing them. The bank has been implicated, if at all, by the actions of their agent, the manager of the branch at Rosthern. I think he acted as he did, not through conscious wrong doing, but from inexperience and lack of judgment and through not appreciating the consequences that might result from what was being done. I see no reason why the bank should be subjected to a penal liability and compelled to pay over

all the money, no matter whether the plaintiffs had got it back or not.

We now come to the consideration of what relief can be granted to the plaintiffs in this case. Even admitting impropriety in the use of some of the drafts, no loss has been proven. The loss, if any, cannot be established until the accounts have been gone into between the plaintiffs and Youngberg and perhaps between them and Youngberg & Vassie. Youngberg is not a party to this suit. It will be difficult to take the account without his being a party. The bank might become bound by it as between itself and the plaintiffs, but Youngberg would not be bound if the bank claimed relief against him. If the bank had been a trustee for the plaintiffs, which was not the case, it might have shown the application of the funds placed in its hands and have shown that alleged misapplications were not such in fact and that no loss had been sustained by the beneficiary. In the circumstances of this case the evidence connected with the wheat buying and other transactions between the plaintiffs and Youngberg is in the control of these parties. It would manifestly be wrong to make the bank liable in the first instance for the whole amount when it is admitted that their liability is much less. Until accounts are taken, I fail to see how judgment can be entered against the bank for any definite sum. The case of *Ross* v. *Chandler*, 45 Can. S. C. R. 127, contains expressions by several members of the Court which appear to me to bear upon this question.

The plaintiff in that case, together with his two partners had almost finished the work upon a certain contract in Quebec, when he went away leaving his partners to complete the work and collect any balance due. The two partners finished the work and received a cheque for $56,000, the balance due. These two partners then came to Toronto and formed a new partnership of which the plaintiff was not a member. They cashed the cheque at a bank in Toronto and deposited the money at a branch of the bank to the credit of the new firm and the whole sum was eventually drawn out by the new firm. The majority of the Court, confirming the Ontario Court of Appeal, held that the bank was not liable, it not being established that there was a misapplication of the proceeds, and, in any event, that the bank had no notice

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of any intention to misapply. The case is only important in the present consideration as showing the relief to which the plaintiff would have been entitled in that case if he had succeeded in implicating the bank in wrong doing. At p. 131 Davies, J., who formed one of the majority of the Court, says:

> The utmost he (the plaintiff), could claim would be a declaration to the effect that the bank was liable for whatever share of that $56,000 would ultimately be found to belong to Ross on the adjustment of the accounts, and any such declaration could only be made as and when it was shewn that the bank was party and privy to some misappropriation of these funds and to the extent that such defrauded Ross.

Idington, J., who held that the plaintiff was entitled to succeed against the bank, gives on p. 148 the relief to which, in his view, the plaintiff was entitled. It is as follows:

> I think the appeal should be allowed with costs throughout, the judgment of the trial Judge be set aside and such judgment be framed *as will give appellant upon a taking of accounts* the relief he is entitled to which is not so very obvious, nor will be until accounts are taken.

Anglin, J., who was of opinion that the plaintiff was entitled to recover, pointed out that it would not be clear what was the plaintiffs' interest in the cheque until accounts had been taken. He considered that the bank should be held accountable to the plaintiff only for whatever sum, not exceeding the sum claimed, might be found to be the balance due to him upon the taking of the partnership accounts; pp. 164-165.

The analogy between the present case and *Ross* v. *Chandler* is very close. In the present case the amount to be recovered depends upon the state of the account between principal and agent, in the other between one partner and his two co-partners.

The judgment entered in this case should be set aside. I have much difficulty in coming to a conclusion as to the relief, if any, to which the plaintiffs are entitled in view of the fact that they have offered no proof that they sustained loss, that it is not shown that accounts between them and Youngberg have been taken, that Youngberg is not a party to this suit. Even if the defendant's agent was guilty of wrong doing, the damage may have been nominal only. Several examinations of Youngberg's accounts with the plaintiffs were made by their agent, Black, while the transactions in question were being carried on and after they were completed the agent reported that Youngberg's accounts were satisfactory. It may well be that the plaintiffs' losses, if

there were such, arose out of other actions on the part of Youngberg in which the bank was not implicated.

With the greatest reluctance, I agree to a judgment directing accounts to be taken. The judgment should be so framed that the bank will only be made liable to pay to the plaintiffs the amount of the loss, if any, which it shall be found on a taking of accounts they have sustained by reason of the participation by the bank in a wrongful diversion of the proceeds of the drafts. I have already pointed out that the bank is not liable in respect of the $500 draft of September 15, and that the payment of the $1,000 cheque must also be credited to the bank, or, what would amount to the same thing, if the cheque is not allowed, the bank should not be charged with the draft for $1,000 which provided funds to pay the cheque. The limit of the bank's liability would therefore be $12,028 and interest, subject to reduction to the amount of actual loss sustained by the plaintiffs when an account has been taken of all payments, receipts, credits, benefits, etc., received by them from Youngberg or Youngberg & Vassie, or any other person, properly applicable in reduction of the amount claimed.

Much was said on the argument as to where the onus of proof should be placed in case an account were granted. As above mentioned, the plaintiffs' inspector, Black, on several occasions examined the state of their account with Youngberg and reported to them. I would refer to Black's reports of March 19, 1912, and April 11, 1912. From these it would appear that the account, meaning Youngberg's account, was "cleaned up" to the last mentioned date, and, as that is 10 days later than the latest draft in question, all the drafts must have been taken into the account. It would obviously rest upon the plaintiffs to show in what respect and to what extent the account is wrong.

In this case there has been great diversity of opinion amongst the members of the Court. With much hesitation, I concur in the conclusion indicated by the Chief Justice.

Cameron, J.A.

CAMERON, J. A.:—The plaintiff company owned and operated an elevator at Waldheim, in the Province of Saskatchewan, of which George E. Youngberg was in charge. It was necessary, in the course of business, to supply him with moneys to be used in the purchase of grain. On July 21, 1911, the defendant bank applied to the plaintiff to enter into an agreement to cash grain

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tickets, etc. The correspondence is fully set forth in the judgment of Galt, J., appealed from. In this the plaintiff's letter of September 15, 1911, is of importance as it contains the authority to the bank to furnish currency to the plaintiffs' agent at Waldheim.

It is alleged in the statement of claim that Youngberg had a personal account at the Rosthern agency and that the firm of Youngberg & Vassie, of which Youngberg was a member, kept their partnership account with that agency also, that said firm was indebted to the said bank on February 20, 1912, in a sum exceeding $3,000, and that on February 21, Youngberg, for the said firm and to the knowledge and at the request of the bank, delivered to the bank two drafts on the plaintiff for $400 and $800 respectively, and that the defendant bank presented the drafts to the plaintiff, which paid them, in the belief that the moneys represented thereby had been applied in pursuance of the agreement, but that, in breach of the agreement, the bank applied the proceeds in payment of the indebtedness of the said firm to itself.

A similar allegation is made with reference to a draft dated February 13, 1912, except that the proceeds were applied in reduction of the personal indebtedness of Youngberg and not to that of the firm. Similar allegations follow as to other drafts made on the plaintiff through the Rosthern agency, the proceeds of which were, or in some cases, part of the proceeds of which was, not remitted in currency to Waldheim, but applied by the bank on the indebtedness either of Youngberg or Youngberg & Vassie. The aggregate amount alleged to be so misapplied was $13,528.10, for the recovery of which the action is brought.

The plaintiff alleges that by reason of the said agreement the defendant became trustee for the plaintiff of any moneys representing the proceeds of such drafts and is accountable for the same.

The defence set up is that there was a previous course of dealing between the plaintiff and Youngberg whereby proceeds of similar drafts were placed to Youngberg's credit and paid out on Youngberg's cheque, and of this the defendant bank was aware and that moneys placed to Youngberg's credit were so placed by his directions to be used for the plaintiff's purposes. It is further alleged that cheques issued by Youngberg to an amount equal to the credits given him were issued by him for payment of grain

purchased for the plaintiff. There is also an allegation that these methods of using the plaintiff's funds were carried on with the plaintiffs' knowledge and consent. As to this allegation there is no pretence that it is supported by evidence. The defence admits the payment of the drafts by the plaintiff.

The real issue tendered on the pleadings was whether the proceeds of the drafts admittedly received by the defendant bank and applied by it on the accounts of Youngberg and Youngberg & Vassie were so applied by it in violation of the agreement, and whether, in the circumstances, the bank is accountable to the plaintiff for them. Neither Youngberg nor Youngberg & Vassie are parties to the action, and we have nothing to do with the state of account of either of them with the plaintiff.

The action was tried before Galt, J., who gave judgment for the plaintiff for the full amount of the drafts set out in the statement of claim. His reasons for judgment set forth the facts and the circumstances in, and methods by, which, Rostrop, the defendant's manager at Rosthern, connived in, suggested and effected the misapplication of the plaintiff's moneys. I take his judgment as refusing to accept Rostrop's version of the statement made by Youngberg as justifying the transfer of the proceeds of the drafts in question to the accounts of Youngberg & Vassie.

The relation between the defendant and the plaintiff was not the ordinary relationship existing between bank and customer. It was a special relationship under the contract referred to by which the authority of the bank was clearly defined.

The bank was agent for the plaintiff for certain limited purposes. Youngberg was also agent for the plaintiff for certain purposes. Both the bank and Youngberg, therefore, stood in a fiduciary relation to the plaintiff company, each having rights and duties to be exercised for the benefit of the plaintiff.

Whether the funds alleged to be wrongly applied were trust funds belonging to the plaintiff in the hands of the bank (as is alleged in the statement of claim) or in the hands of Youngberg and misapplied with the bank's knowledge and to its benefit does not seem to me material. The facts of the case have been brought out with great particularity and any necessary amendments will be made to meet the facts.

I consider the liability of the bank fixed by the statements and

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and admissions of Rostrop, those referred to by the trial Judge and others set out in the evidence. There are facts and circumstances in the case also supporting this view. There are the variations of dates in the dealing of the bank with the transmission of the drafts and crediting of the amounts which, not of importance in themselves, are so frequent as to arouse attention. There is the insistence of the bank, exerted even before September, 1911, on Youngberg to have his overdraft reduced. There are the considerable payments made out of these accounts, kept in funds by proceeds of drafts on the plaintiff, for objects wholly unconnected with the plaintiff's business, to Rostrop's knowledge. I regard the draft made by Youngberg out of which he paid the $1,000 cheque given to Black as illustrative of the tranactions. Payment of this cheque had been refused by Rostrop, who says in his evidence:

"Q. So that as soon as Mr. Black's back was turned you got a draft from Mr. Youngberg? Three or four days after Mr. Black had gone away you took another draft from Youngberg and paid the cheque? A. Yes. Q. That was elevator money which paid that cheque? A. Yes."

The history of the Harry Stirk transaction is also significant. Without going into that transaction in detail, it does seem that the proceeds of the draft by Youngberg on the plaintiff for $620, dated March 18, deposited March 16, were placed there for the purpose of meeting the cheque in Stirk's favor on a land transaction for $618 issued by Youngberg March 23, 1912, and paid after being initialled by Rostrop on March 25. The effect of the deposit of the $620 had been to reduce the overdraft to that extent.

Moreover it is to be noted that Rostrop permitted draft No. 112 C., for $2,000, to be split and deposited so that Youngberg & Vassie's account showed an overdraft of $1,373.46 while the personal account of Youngberg showed a credit of $1,418.43. Clearly Youngberg could not have the benefit of the alleged arrangement by which the farmers' accounts due to the firm were to be offset against their sales of wheat to the firm. The explanation put forward by Rostrop to justify the deposits of the proceeds of the drafts to Youngberg & Vassie's account has no application to the deposits made to Youngberg's private account.

Some question was raised on the argument as to the first draft for $500, the proceeds of which were deposited by Youngberg

before the receipt by Rostrop of the exact terms of the agreement between the bank and the plaintiff company. It was argued that the plaintiff ought not to recover for this. But the knowledge of any one of the officials or agents of the bank is the knowledge of the bank. This action is not against Rostrop, but against the bank. Moreover, there was ample opportunity for Rostrop to have Youngberg correct his position and his firm's account in accordance with the true agreement between the bank and the plaintiff company, but there was no attempt on his part to do anything of the kind.

It was also objected that the proceeds of the draft for $1,000, which were used to pay the cheque issued by Youngberg in Black's favour, cannot be recovered from the bank as the plaintiffs have already received that amount and if now ordered to pay it the bank would be paying it twice. But in substance and in fact it was not the bank that paid the cheque but the plaintiff whose funds were used for the purpose. And the bank did transfer the plaintiff's funds, in breach of its agreement, to the account of Youngberg & Vassie for the purpose of paying this liability of Youngberg's and is therefore liable to refund that amount.

It is to be noted that the defence treated all these drafts, the proceeds of which went to Youngberg & Vassie's account, as standing on the same footing and justified their application on the same ground.

On the whole, therefore, I adopt the view of the Judge at the trial, and hold that these two amounts of $500 and $1,000 and the other amounts claimed by the plaintiff have been shown to have come into the possession of the defendant in circumstances which make it liable to refund them.

It was argued that the judgment should be set aside or amended and a reference granted to ascertain the loss actually sustained by the plaintiff as a result of its dealings with Youngberg. But Youngberg is not a party to this action, as already pointed out. Youngberg's relation as agent for the plaintiff extended over a period prior to that covered by the drafts in question, and how is it possible that transactions between Youngberg and the plaintiff over that prior period can have any bearing on the case? In my humble judgment the relations between Youngberg or Youngberg & Vassie and the plaintiff at any time, whether before

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or after the date of the agreement between the parties to this action, and the present state of the account between them, can have nothing whatever to do with the true ownership of the proceeds of the drafts made upon and paid by the plaintiff company and appropriated by the bank in respect of which this action is brought, and which is the issue before us.

It is said that the true measure of damages sustained by the plaintiff must be the net loss arising to the plaintiff out of its transactions with Youngberg. But there is no evidence of any connection between the proceeds of the drafts so applied by the defendant bank and the transactions of Youngberg in the purchase of grain for the plaintiff.

We are told that the bank should repay the plaintiff such amount only as the plaintiff actually lost by its transactions with Youngberg. I cannot accept this view.

If it be the fact that the plaintiff lost by Youngberg's various transactions the net sum, let us say, of $5,000, what is the bank's position. The bank is shown to have received $13,500 of the plaintiff's moneys. If it refunds only $5,000, why should it retain the balance of $8,500? That is clearly still the plaintiff's money and, as against the just claims of the plaintiff, the bank has no right to retain it to satisfy Youngberg's debt. The only course open to the bank is to refund the $13,500 and say to Youngberg: "We have credited you with moneys belonging to the Elevator Company. This we had no right to do, and we must refund them. We look to you, Youngberg, to pay up your overdrafts."

In a word, the bank has this money, clearly that of the plaintiff, by virtue of a participation in a breach of trust, and must restore it to the plaintiff in full.

Had the bank advised the company that it was applying the proceeds of the drafts in the way in which they were applied and that it was doing so on the understanding or agreement with Youngberg that he was to use an equal amount for the purchase of grain for the plaintiff, then, unless the company disavowed that understanding, it would be bound by it. But the bank did not do this. The company never, in any way, became a party to, or acquiesced in, such understanding. The bank cannot now, therefore, ask that the plaintiff company be bound by such an understanding, agreement, course of dealing or whatever it may

be called, which was in plain contravention of the agreement between the bank and the company, and wholly regardless of the plaintiffs' rights.

The allegation that Youngberg & Vassie had contra accounts against farmers from whom wheat was purchased for the plaintiff, and that such contra accounts were set off against the amounts of the drafts placed to the credit of Youngberg and his firm and that the plaintiff was aware of this course of dealing and approved of it is wholly without evidence to support it.

There can be no contention, on the evidence, that the very moneys wrongfully paid into the accounts of Youngberg and Youngberg & Vassie were, in fact, paid out in the purchase of wheat for the plaintiff.

With reference to the statement that Rostrop accepted Youngberg's story as to why he was having the proceeds of his drafts on the plaintiff passed to the credit of his firm, it is apparent as I have already indicated that the trial Judge did not accept this, and I would not feel justified in finding otherwise.

It was pointed out that to grant a reference as asked would in reality be a denial of justice. It would involve the investigation of hundreds of wheat tickets and the examination of, perhaps, hundreds of farmers in Saskatchewan—a tedious and practically impossible task. But, more than that, it would shift the onus of proof in an extraordinary and unjustifiable manner.

But in my view all that prolonged litigation which we are asked to set in motion is wholly foreign to this action as it has been framed and tried. The issue, as I see it, is not difficult. Did or did not the bank receive the plaintiff's moneys, and wrongfully and knowingly apply them contrary to the agreement in the manner and the circumstances and for the purposes set forth in the evidence and pleadings? That it did not so receive and apply them seems to me to have been fully established, and on the most elementary principles the plaintiff is entitled to full restitution. The bank took the plaintiff's moneys and applied them to its own benefit and advantage on the account of Youngberg, and Youngberg & Vassie with full knowledge of the facts. I would make no distinction between the accounts of Youngberg, and Youngberg & Vassie. The one account was intimately connected with the other and they can be regarded, so far as this action is concerned, as substantially the same.

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Counsel for the bank took the position that mere knowledge on the part of the bank of any breach of trust on Youngberg's part was not sufficient to fasten the bank with liability: to do this there must be more, there must be collusion or participation in the fraud. The law is thus stated in Hart on Banking, p. 167:

A banker will not be justified in . . . making any particular application of a balance when he knows that, by doing so, he will be participating in a breach of trust.

The decision of Mr. Justice Fry in *Foxton* v. *Manchester &c. Banking Co.*, 44 L.T. 406, was challenged by defendant's counsel as too broad in its terms and inconsistent with subsequent authoritative decisions. In that case "there was a benefit designed for the bank, who had been calling upon the parties having private accounts to reduce their overdrafts, and they did it with the intention of reducing their indebtedness." Mr. Justice Fry said that

those who know that a fund is a trust fund cannot take possession of that fund for their own private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment of the money.

It was sought on the argument in *Coleman* v. *Bucks*, [1897] 2 Ch. 243, to put on this the meaning that wherever an account is on the face of it a trust account and the customer draws a cheque on it, and pays it in to his private account, the bankers are bound to inquire into the propriety of the transaction. But Mr. Justice Byrne declines to put that meaning on the dictum. He says:

If bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of a trust, and if they are going to derive a benefit from the transfer, and intend and design that they should derive a benefit from it, then I think the bankers would not be entitled to honour the cheque drawn upon the trust account without some further inquiry into the matter.

A statement of the law which certainly seems unexceptionable. But he held that was not at all the case that was before him. Nor was it in any way the case out of which arose *Thomson* v. *Clydesdale Bank*, [1893] A.C. 282. It was true the broker in that case was guilty of fraud, but that could not avail the parties claiming the funds unless there was bad faith on the part of the bank, and nothing of the kind was established.

In *Bank of N.S.W.* v. *Goulburn Valley Co.*, [1902] A.C. 543, it was held that the bank in that case, acting in good faith and without notice of any irregularity, was not bound before honouring the cheques to inquire into the state of the account between

the company and its managing director. It is to be noted that the primary judge found that the bank had acted in good faith and without notice of any irregularity and breach of trust on the part of the managing director.

The *Foxton* case was, along with others, discussed at some length in *Shields* v. *Bank of Ireland*, [1901] 1 Ir. R. 222. There the law is thus stated:

On the other hand, the authorities clearly demonstrate it is not enough, in order to fix a banker or other agent of an executor with liability, to show that the executor actually committed a breach of trust, and that the bank, knowing him to be an executor and knowing that the fund was trust money, permitted him to obtain it, and so to be in a position to misapply it. You must go further and shew that the bankers knew of and concurred in the intention to misapply, a knowledge which will easily be presumed if the banker derives a personal benefit from the transaction designed or stipulated for. (p. 232).

In *Gray* v. *Johnston*, L.R. 3 H.L. 1, Lord Westbury says, (p. 14):

It has been very well settled that if an executor or trustee who is indebted to a banker, or to another person having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit.

A bank, in view of its position and responsibility with reference to its customers' cheques, is given a certain amount of immunity; but even it must regard the facts when they plainly point to wrongdoing.

Per Garrow, J. A., in *Toronto Club* v. *Dominion Bank*, 25 O.L.R. 330, at p. 343, citing *Gray* v. *Johnston* and other cases.

In *Earl of Sheffield* v. *London Joint Stock Bank*, 13 App. Cas., at p. 333, it was thought that the bank had actual knowledge that the person pledging the securities in question had only a limited authority to raise money upon them. And yet as will be seen on a perusal of the case this inference was drawn from no direct evidence, but from the consideration that the bank must be taken to have known the system of money-lending pursued by the pledger and were bound to inquire into his authority—a far-reaching decision, which was declared by counsel for the bank in the case before us to be bad law. But it was discussed and, on its particular facts, upheld in the House of Lords in *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, where the transaction in question (the negotiation of securities by a broker) was upheld on the ground that "there was nothing in the evidence to raise a doubt that it (the property in question) was honestly acquired by the bank." per Lord Halsbury, p. 212.

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In *Wilson* v. *Moore*, 1 Myl. & K. 127, it was held that the commercial correspondents of certain executors were chargeable to the testator's estate for proceeds of stock of the estate sold by them and applied in payment of a balance due from the executors, they, the correspondents, having full knowledge the stock was part of the estate. The Master of the Rolls said:

They (the correspondents), by being parties to a breach of trust, have themselves become trustees for the purpose of the testator's will.

All parties to a breach of trust are equally liable; there is between them no primary liability. (p. 147)

On the whole I fail to see any real conflict in the authorities when they are examined. The dicta of Mr. Justice Byrne in the *Coleman* case, of the Master of the Rolls in the *Shields* case, of Lord Westbury in *Gray* v. *Johnston*, and of the Master of the Rolls in *Wilson* v. *Moore*, which I have cited, are statements of the law which commend themselves to equity and common sense. They can be supplemented by reference to numerous other cases. There are differences in expression, but it is indisputable that the facts in each particular case must decide the application of the principles of law. Certainly it does seem to me that the bank here had much more than a slight knowledge or a reasonable suspicion that the moneys in this present case were being applied in breach of the agreement, and it is also the fact that it was intended and designed that the bank should receive a benefit from the application made of the moneys.

In addition to the cases cited, the principles involved have been applied in *Pearson* v. *Scott*, 9 Ch. D. 198, and *Bodenham* v. *Hoskins*, 21 L.J. Ch. 864.

The rules of this Court are perfectly well settled and are the rules of honesty and fair dealing, that no party to an illegal or fraudulent contract can derive any benefit from it, and that all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust will be compelled to restore such trust funds. This Court will follow them wherever they are to be found. *Gray* v. *Lewis*, L.R. 8 Eq. 526, 543, cited in Lewin on Trusts, p. 1107.

This is a sound and wholesome rule, and it is not open to a party participating in, suggesting and benefiting by a breach of trust, to complain of its enforcement.

An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. Per Lord Ellenborough, *Taylor* v. *Plume*, 3 M. & S. 562, 574.

In my humble judgment the decision appealed from should

be affirmed. I think the plaintiff company entitled to recover the amount claimed with interest. I would dismiss the appeal.

HAGGART, J. A., dissented. *Judgment varied.*

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Haggart, J.A. (dissenting)

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Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. November 6, 1915.

1. CONTEMPT (§ I B—7)—NEWSPAPER COMMENT—CHARGE OF MISCONDUCT AGAINST CROWN PROSECUTOR—MOTION FOR COMMITTAL.

For a newspaper to falsely publish pending the prosecution of a criminal charge that the Crown prosecutor had proceeded with the preliminary enquiry without the authority of the Attorney-General and that he was engaged in persecution and seeking notoriety in the matter, is contempt of Court punishable summarily on a motion to the Superior Court of criminal jurisdiction by committal or fine, as tending to impair the administration of justice; the article could not be considered as one directed to a criticism of the Attorney-General's Department as a branch of the public service so as to be exempt on that score.

Statement

MOTION on behalf of Mr. A. H. Russell, that an order be made committing one Frank H. Whiteside, the editor and publisher of a newspaper published at Castor, Alta., called "The Castor Advance," for contempt of Court for having published in that paper a certain article commenting upon a certain criminal charge then pending against one McInroy in such a manner as to tend to prejudice the fair trial of the charge.

Frank Ford, K.C., for the applicant.

E. R. Sugarman, for Whiteside.

The judgment of the Court was delivered by

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STUART, J.:—It appears from the affidavits that on the 25th of May, 1915, one John Tennant laid an information before a justice of the peace, a Mr. McLennan, of Red Deer, charging McInroy with having stolen $100.00 from a firm of Lee and Tennant, of which the informant was a member. McInroy was brought before Mr. McLennan at Red Deer and an adjournment took place, and pending the adjournment Mr. Russell received instructions from the department of the Attorney-General to have the hearing adjourned to Gadsby in the new Judicial District of Stettler, somewhat nearer, as I gather, to the residence of Mr. McInroy. The preliminary hearing took place at Gadsby on June 28th. In the meantime McInroy had been out on bail. Mr. Russell acted on behalf of the Attorney-General on the preliminary hearing and McInroy was committed for trial at

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the next Court of competent jurisdiction, which would be at Stettler.

Then on July 1st the publication was made which is complained of. The newspaper in which it appeared is published in the Stettler Judicial District and circulates in at least a portion of that district. It is unnecessary to quote the article in full. It bears the headlines "Crown Prosecutor Russell picks some easy ones." One paragraph reads:—"Whether the official representative of the Attorney General's Department is prosecuting or persecuting is hard to define; in any case the honour is all his own, no other representative wants it, at least, we are safe in saying the present representative of the Attorney General in this district (i. e., the new Stettler Judicial District) does not seek notoriety in just that way." The article refers to McInroy and another man named Wilson as having "Crossed the path of the doughty Russell" through the case in question and proceeds to give a statement of the facts of the case.

Whether this account is a true one of the real facts and whether it is a true account of the evidence given at the preliminary hearing seems to me to be a question with which we need not trouble ourselves because, in my opinion, the case may be decided on other grounds and in any case upon the argument before us very little stress was laid upon any suggestion of any inaccuracy in the statement I refer to.

The article next speaks of McInroy's arrest and of his having been "hurried off to Red Deer, presumably to be 'rip-sawed' before the aforesaid Russell." It then speaks of Wilson and McInroy's brother, advancing by cheque the money to settle with Lee and Tennant and of this being a double payment "to save Mr. Russell the pleasure of asking for a conviction." It then speaks of Wilson stopping his cheque and of his then being arrested for "attempting to defeat the ends of justice" and of his being "in turn carried off to Red Deer to accept the kind remarks of the mighty Crown prosecutor." It speaks then of both being released on bail and of the "change of venue" to Gadsby, "where on Monday Mr. Russell appeared with 'his own' J.P., John McLennan of Red Deer."

After observing on the fact that the justice of the peace had not thought it necessary to get another justice to assist him

although there were three in Gadsby the article proceeded to say:—

"Mr. McInroy's offence was too heinous for him (McLennan) to deal with and the accused was sent up for trial but admitted to bail. Mr. Wilson's offence was not so horrible, and besides a certain M.P.P. whose person carries 'weight' equal to or exceeding that of the justice himself, was present just to see that there was no 'submarine' attack. His appearance evidently had a disquieting effect and Mr. Wilson was dismissed through lack of evidence to prove identity."

Then, after quoting some remarks of the presiding justice which seem, according to Whiteside's cross-examination to have been correctly reported, the article proceeded to say:—

"Mr. Russell did not play his 'joker' until the following day nor until the 'guests' had all gone away, he and his J.P. included, when Mr. McInroy was rearrested on another charge and at this time of writing someone is wondering if times are so hard in Red Deer that the Crown Prosecutor has to come all the way to Gadsby to pull off the easy 'shoe.' Mr. Russell is acting on his own initiative and evidently still believes that as Crown Prosecutor he is a law unto himself."

Now, what is there in this article of a possibly objectionable nature. There are the suggestions that the authorized representative of the Crown instead of confining himself to a fair and impartial performance of his duties was engaged in persecution and seeking notoriety, and taking a pleasure in asking for a conviction, that he was seeking business for pecuniary reasons, 'times being hard in Red Deer,' and that he was acting on his own initiative, that is without authority. The evidence shows this last is untrue so far, at least, as the main charge against McInroy is concerned because the Attorney-General's Department were aware of the proceedings and indeed directed the change of the place of hearing to Gadsby. It is perhaps unnecessary to refer to the epithets "doughty," "mighty," and such like which have no bearing on the matter at all.

Then in the second place there is in two places a plain suggestion that the justice of the peace presiding at the preliminary was under the secret control in some way of Mr. Russell. The possessives "his own" and "his" clearly suggest this.

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Taking the whole article together it undoubtedly leaves the impression on the reader that the action of the presiding justice at the preliminary hearing in committing McInroy for trial was induced by some improper influence exercised by Russell, the agent of the Attorney-General. It may perhaps be right and proper for the agent of the Attorney-General in open Court at the preliminary hearing to demand a committal and perhaps the magistrate ought (I need not decide the point) to defer to the wishes of the Crown and make a committal even though he may have a doubt as to the propriety of that course. The Crown, at any rate, has other means under our procedure of arriving at the same result. But that the agent of the Attorney General should make this demand in open Court is a very different thing from possessing some secret improper influence over the justice and exercising that influence to secure a committal. This is clearly what the article suggests and I know of nothing more calculated to interfere with, prejudice and impair the fair trial of a criminal charge than the circulation of a suggestion that the committal by the justice was obtained in such a way. The suggestion that McLennan was improperly influenced in the case of McInroy is strengthened by the obvious suggestion also made that in refusing to commit Wilson he was improperly influenced by the presence, in Court, of a member of the Legislature. The references to Russell's motives are relevant to this matter of the influence exercised by Russell upon the magistrate and also lend strength to the suggestion made.

All this is quite apart from the references to Russell in their relation to himself alone. One of them was shown to be untrue. It was clearly a misstatement of the fact to say that Russell was acting on his own initiative which obviously means without the authority of the Attorney-General's Department. To say, or to make an insinuation, which is for our present purpose the same thing, that the representative of the Crown acting at a preliminary criminal hearing is engaged in persecution, is seeking notoriety, and taking action in order to earn money, if such statement is published abroad is, in my opinion, a thing which may tend to interfere with the fair trial of the criminal charge. It is true that it may tend, not against the accused, but in his favour, but there can be no difference in principle on that account.

For these reasons it seems to me impossible to say that the

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whole article did not tend to impair the due and impartial administration of justice.

One circumstance, of course, must be carefully noted and considered. The property alleged to have been stolen by McInroy and in respect of which he was to be tried was of the value of only $100 and under our criminal procedure there could in any case be no jury. The trial would inevitably be by a single Judge without a jury. If there had been a possibility of a trial by a jury which would be selected from the Stettler Judicial District there would be no more to be said. But the trial might be either by a single Judge of the Supreme Court or, by election of McInroy, before the District Judge under the Speedy Trials provisions of the Code. We were referred to some observations of Chancellor Boyd of the Supreme Court of Ontario in *Meriden Britannia Co.* v. *Walters, Re Lewis*, 25 D.L.R. 167, 9 O.W.N. 87, where he said:—

"The trial would be without a jury before a Judge of the Supreme Court of Ontario who would probably not see or hear of the newspaper discussion at all. What was complained of could not in any event tend to interfere with the due course of judicial determination of the controversy. There could be no suspicion that any of the parties would be prejudiced or benefited before the Court by what had appeared in the public prints."

That was a civil action dealing with certain municipal affairs of the city of Hamilton. While not in the least disagreeing with the views there expressed, I am of opinion that in the present instance the circumstances are not quite the same. It may be true that a Judge of the Supreme Court of Alberta would be very unlikely to see or read the article in question though Mr. Whiteside perhaps would not admit such obscurity in his paper. But it is not all so clear that the Judge of the District Court for the Stettler district who visits, in the performance of his duties, the smaller towns, might not see the article either by accident or by having it shewn to him by someone.

I think, therefore, it is not proper to rest anything at all upon the lack of probability that the article would ever be read by the trial Judge. With respect to the further point of the possibility of the reading of the article influencing the mind of the trial Judge there is, of course, no distinction to be made between the Judge of the District Court and a Judge of the Supreme Court. Comparing Judges with juries it is of course the case that Judges

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have their minds more rigorously trained to impartiality than the ordinary citizen who serves on a jury but, speaking only for myself, I hesitate to affirm with confidence that, were I to be selected as the presiding Judge at McInroy's trial, my mind might not be unconsciously, and in spite of myself, influenced by having read that article. The mere resolve to be uninfluenced by it might throw the balance of impartiality in the other direction. Furthermore it seems to me that it would be an exceedingly dangerous course to adopt to say that an editor of a newspaper provided only he discovers that a trial is to be by a Judge alone may publish whatever comments he pleases.

I quite agree with the views expressed in *In re North Renfrew*, 9 O.L.R. 79, and *Guest* v. *Knowles*, 17 O.L.R. 416, and the cases there cited, as to necessity for great care in the exercise of the summary jurisdiction of the Court to punish for contempt, but the facts of the present case, a criminal one, and the nature of the comments made are quite sufficient, in my view, to call for the exercise of that jurisdiction.

One thing, of course, must be remembered, *i. e.*, the right of the press to criticise the action of any department of the public service of the country; and the Attorney-General's Department, even in its exercise of the duty of conducting criminal prosecutions and administering the criminal law, cannot be free from liability to such criticism. But it seems clear that the article in question does not come within that saving principle. The attack was not upon the Attorney-General's conduct of the duties of his office. True, it was upon the conduct of his representative and agent, but there was no suggestion that the Attorney-General should be held responsible for the acts of his agent which should be the proper basis of a criticism of the conduct of the public department.

The article is of such a character that the Court should do something to discourage the publication of similar ones in the future. The editor has tendered a conditional apology to the Court but aside from the conditional character of the apology it should be pointed out that the idea of apology suggests a misconception of the situation. An apology involves the idea of some personal affront or insult. This Court was not affronted or insulted in any way whatever. The wrong consisted in publishing

something calculated to interfere with the due administration of justice. An expression of regret would be a more suitable way to speak in regard to such a matter except perhaps in so far as the justice of the peace himself is concerned with regard to whom the expression "apology" would be correct. The case is not, in my opinion, one in which the power to commit should be exercised. I think the necessary lesson may be given by the imposition of a small fine.

Mr. Whiteside will therefore pay a fine of $25 and the costs of the application. *Fine imposed.*

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ROBERTS v. CANADIAN PACIFIC R. CO.

Board of Railway Commissioners, Canada. March 29, 1915.

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1. CARRIERS (§ IV C 4—540)—TOLLS—SEASONED AND UNSEASONED WOOD—UNITY OF WEIGHT—EQUALIZATION—UNJUST DISCRIMINATION.

Railway companies are not obliged to equalize the disadvantages of the shippers from the standpoint of the costs of production. The basis of toll making so far as the unit of weight is concerned is 100 lbs., and the tolls vary with the weight. The Board will not require seasoned and unseasoned wood to be carried at the same C.L. toll, irrespective of weight, in order to equalize the disadvantage arising to shippers without capital as compared with shippers having capital, to do so would create unjustly discriminatory conditions.

[*Canadian Portland Cement Co. v. Grand Trunk and Bay of Quinte Ry. Cos.*, 9 Can. Ry. Cas. 211; *Blaugas Co. v. Canadian Freight Association*, 12 Can. Ry. Cas. 303, at p. 304; *British Columbia News Co. v. Express Traffic Association*, 13 Can. Ry. Cas. 176 at p. 178; *Canadian China Clay Co. v. Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos.*, 18 Can. Ry. Cas. 347, followed.]

Statement

APPLICATION to direct the respondent to establish a special winter freight toll on rough unpeeled pulpwood.

Com. McLean.

MR. COMMISSIONER MCLEAN:—In the complaint as launched by the applicant, reference was made to the fact that there was a large amount of green, unrossed wood available for pulp manufacture.

Pulpwood is variously defined with reference to the stage and method of preparation. It may be shipped green, with the bark on, *i.e.*, in the "rough." It may be peeled, *i.e.*, the wood is peeled in the spring when the tree is felled. Or it may be rossed, in which case it is peeled and prepared by machinery. In his complaint as launched, the applicant makes a comparison in weights as between the "green, unrossed wood" and the "peeled and partly seasoned" wood. But in his reply to the answer of the railway company he, in dealing with the compari-

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son of weights, refers to the difference in weight between "a cord of unseasoned, rough wood and a cord of seasoned, rossed wood."

In the application and in the supplemental statements a variety of descriptive adjectives are used by the applicant to differentiate two types of pulpwood. One type is variously described as green, unrossed, rough, unseasoned, while the other is, in one connection, described as peeled and partly seasoned, and in another connection as seasoned, rossed wood. The distinction in reality turns upon the difference in weight due to the degree of seasoning, and the two kinds of wood may, therefore, be sufficiently described as unseasoned and seasoned.

The applicant states that one ton of pulp is obtainable from a cord of wood. The green, unrossed wood weighs about 5,000 lbs. to the cord, while the rossed wood weighs approximately three-fifths of this. There is some dispute as to the figures, the railway stating that the unrossed wood weighs from 4,500 to 5,000 lbs., and the applicant, in a subsequent letter on file, stating that the rossed wood, when seasoned, represents a weight of 3,400 lbs. It is apparent that there is a considerable margin in the weight as between the unseasoned wood and the seasoned wood.

The applicant states that there is a large amount of this unrossed wood which is owned by operators of small means, who are unable to obtain capital to cut and ross the wood and wait until it is sufficiently seasoned; and he is of opinion that a special rate on unrossed wood would be justifiable. His application, therefore, is for a special winter freight rate on the unrossed wood, to be applicable until May 10th. What is asked for is that the rate should be exactly the same per car as a similar carlot would amount to for the rossed wood during that period.

Under the tariffs, a car under thirty-five feet in length, loaded with pulpwood, on a shipment to a point in the United States, to which destination the applicant desired to ship, has a minimum of 35,000 lbs. When a car is over thirty-five feet in length, there is a minimum of 40,000 lbs. The seasoned wood, when loaded to the minimum would represent 10.3 and 11.2 cords respectively; this, on the basis of 3,400 lbs. Taking the unsea-

soned wood at the basis of 5,000 lbs. to the cord, this would represent 7 and 8 cords respectively.

In support of this contention, the applicant says that if the railway met the shipper and purchaser half-way, and consented to haul the extra amount of water as contained in the unseasoned wood, it being stated this extra amount of water can be of no value to either of the parties concerned, the railway would obtain additional traffic. It is stated that to-day the upkeep, overhead charges, and running charges of the railway are the same in every respect when the engine is hauling a full load as when it is hauling one-tenth of a load, and that the only item which would be affected is the coal cost. It is stated, further, that from the standpoint of the shippers and producers, scattered along the lines of the different railways, there are numbers of settlers who at present are unable to afford to contract for large quantities of wood and erect a rossing plant, and that if the tariff was adjusted as requested, the small contractor would be able to sell his product.

The matter was set down for hearing. Subsequent to the hearing an application, modified in some respects, but widened in others, was put in, the applicant setting out his request as follows:—

"We request a flat car rate for all unseasoned pulpwood, firewood, or any soft wood timber whatsoever, not sawn or manufactured, the weight of which shall exceed 3,400 pounds to the cord of 128 cubic feet at the time of shipment. This rate to apply during any season of the year."

In explanation of this, it was stated that, under this arrangement, the weight of the wood alone would decide the tariff rate, so that wood weighing 3,400 lbs. to the cord will come under the flat car rate, and wood weighing less than 3,400 lbs. will be charged at the present rate per cord.

The applicant further amended the original application by stating that he did not see why the rate asked for should not prevail during the summer as well as the winter months, and further stated that the scarcity of wood within a reasonable distance of, say, Watertown, N.Y., makes a change in the present basis of freight rate imperative.

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The matter was taken up with the railways and the Board has received a further communication from the applicant, in reply to the answer of the railway, summarizing his position as follows:—

"1. All rough unseasoned wood used in the manufacture of pulp or paper when bought by cord measurement measuring 128 cubic feet to the cord, whenever the weight of same shall exceed 3,200 lbs., the freight on same shall be reckoned by the carload rate instead of by weight.

"2. The price per carload shall be equal in amount to the value in freight of the same car loaded with unseasoned wood on the basis of 3,200 lbs. to the cord, reckoned at the existing rate of freight per 100 lbs. from the loading point to point of delivery.

"The advantage accruing to the public and to the railroads from this arrangement would be as follows:—

"1. It will afford the man with only a small capital who is unable to erect a rossing mill, an opportunity to ship his rough wood to a mill in the United States that can handle said wood, and will thus increase the territory from which wood can profitably be shipped, thus placing the producer and the consumer in more direct communication, and cutting out two or three middlemen's profit.

"2. It will benefit the railroad by increasing the traffic in pulpwood, and where an engine hauls three or four cars, it will provide the same engine with a full load. The increase of freight thus obtained will far exceed the small expenditure for extra coal in transporting the increased weight.

"3. The earning power of the people having wood to sell will be increased. This will in turn benefit the railroads because the increased amount of goods purchased by those people will be hauled by the railroads at their present rate of freight."

The applicant sets out that "when I first made my request to your Commission, I had in mind the transportation of wood under my contracts for the season of 1915." He says, however, that on account of the delay necessary in the obtaining of facts for the Board, he fears the public cannot receive much benefit during this year, and he asks that the rate arrangement, which

he requests, should be directed to be continued for an indefinite period.

While the amended application takes up the question, not only of pulpwood, but also of "firewood, or any soft wood timber whatsoever not sawn or manufactured . . . ," the central point in the application, whether the original or the amended application is considered, is the rate on the unseasoned pulpwood.

The larger railway systems of Canada, including the Canadian Pacific, did away with the system of assessing charges on cordwood on the cord basis some years before the Board was organized.

The applicant takes the necessity of the shipper of the unseasoned wood as a measure of what the rate should be.

The obligation of the railway is to charge a reasonable rate. It has, however, so often been set out—that it is not necessary to labour it here—that it is not the obligation of the railway to equalize the disadvantages of the shipper from the standpoint of costs of production: *Canadian Portland Cement Co.* v. *G.T.R., and Bay of Quinte Ry. Cos.*, 9 Can. Ry. Cas. 211. See also *Canadian China Clay Co.* v. *C.P.R. Co. et al.*, 18 Can. Ry. Cas. 347.

The applicant desires a readjustment of the rates to equalize the disadvantage in point of ownership of capital of those shipping the unrossed wood as compared with those shipping the rossed wood. The initial making of the rates is in the hands of the transportation agency. It is not the Board's function, as delegated by Parliament, to make rates to develop business, but to deal with the reasonableness of rates either on complaint or of its own motion: *British Columbia News Co.* v. *Express Traffic Assn.*, 13 Can. Ry. Cas. 178.

A further question is concerned with the detail of the arrangement which the applicant asks for as to weight.

The application as amended in the latest statement of the applicant sets out that 3,200 pounds shall be the basis; that the existing rate shall apply; and that, in respect of any addition in weight per cord of the unseasoned wood over and above this 3,200 lbs., there shall not be any additional charge by the rail-

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way—that is to say, if, for the hauling of 10 cords of seasoned wood weighing 32,000 lbs., a certain return is received by the railway, then for the hauling of 10 cords of unseasoned wood weighing 50,000 lbs., the same return shall be received by the railway. That is to say, that in aid of the wood which is of greater weight, the railway shall charge the same rate as on the lower weight, thereby hauling 18,000 lbs. without any additional charge.

In the application of the Blaugas Company for a re-arrangement of its classification rating, the question of the weight of the cylinders used in transporting the gas was referred to; and the Board stated, 12 Can. Ry. Cas. 304:—

"The Blaugas Company also referred to the weight of the steel cylinder in which the blaugas was shipped, it being testified that a cylinder when full of the gas weighed 120 lbs., and that the cylinder empty weighed 100 lbs.; and it apparently was the opinion of the company that the tare connected with the transportation of the gas should be considered. So far as the question of the weight of the cylinder is concerned, the Board, in my opinion, would not be justified in considering this as a reason for a reduction in the outgoing rating of the cylinders when full. In reality, the heavier containner used in connection with this gas as compared with the gasoline container is one of the incidents of the business. In this respect they may be said to have a higher cost of production, so far as the laying down of the commodity is concerned, and it would not be fair to ask the railway to equalize the differences in cost of production."

In the application of L'Air Liquide Society, File No. 19367-16, in regard to the matter of the classification of oxygen gas, reference was made by the applicant to the fact that oxygen gas was shipped in steel cylinders, averaging empty 100 lbs. each, full 108 or 109; and in the report of the Board's Chief Traffic Officer, upon which Order issued, the following language is to be found:—

"The preponderant weight of the container is an unavoidable trade encumbrance, which while accentuated in the case of gas, accompanies with greater or less relative tare all packed articles

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of commerce, and cannot be differentiated in freight classification."

The situation in connection with the present application is analogous in respect of the difference between the weight of the seasoned wood and the weight of the unseasoned wood. This is a situation for which the railway is in no way responsible.

On what is stated by the applicant, the disadvantage as to the shipment of the unseasoned wood is a disadvantage which arises from the fact that the shippers have not sufficient capital to ross wood and hold it until it is more seasoned. This, then, is a situation for which the railway is not responsible.

The established basis of rate-making, so far as the unit is concerned, is 100 lbs.; and the unit having been so established, charges vary with weight. While the rate for a carlot quantity is differentiated from the rate for a less than carlot quantity, the basis is still 100 lbs. It is recognized that to quote a carlot rate without indicating the weight that is to go on the car would create discriminatory conditions. A carload quantity calls for a rate based on a certain minimum. Then above this minimum and limited by the maximum loading of the car, the payment for the movement of the car varies with the weight. What is asked for here is that the weight of 5,000 lbs., or a multiple thereof, shall be treated as if it were a weight of 3,200 lbs., or a multiple thereof—that is to say, an additional weight of 56% is to be carried without being charged for.

The pulpwood rate has not been attacked as unreasonable. The Board is not justified in directing the extension which is asked for as to the obligations of the railways in respect of the weight which is to be carried for this rate.

The ASSISTANT CHIEF COMMISSIONER and the DEPUTY CHIEF COMMISSIONER concurred.

Assist. Chief Commissioner.

Deputy Chief Commissioner.

NOTE.

It is no part of the obligation of the railways, under the Railway Act, to equalize costs of production, through lowered rates so that all may compete on an even keel in the same market. *Canadian Portland Cement Co.* v. *Grand Trunk and Bay of Quinte Ry. Cos.*, 9 Can. Ry. Cas. 209 at p. 211; *Imperial Rice Milling Co.* v. *Canadian Pacific Ry. Co.*, 14 Can. Ry. Cas. 375; *Dominion Sugar Co.* v. *Canadian Freight Association, ibid* 188;

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Hudson Bay Mining Co. v. *Great Northern Ry. Co.*, 16 Can. Ry. Cas. 254 at p. 259.

There are a number of similar decisions by the Interstate Commerce Commission. See *Hafey* v. *St. Louis & San Francisco Ry. Co.*, 15 I.C.C.R. 246. A carrier cannot be required to change a rate to accord with the differing values of the same commodity produced by different shippers—in other words—to equalize different business conditions. If this were so, the rate might be made to fluctuate not only to meet the value of the commodity, but the executive or business ability of each individual producer.

In a recent case of *Railroad Commissioners of the State of Florida* v. *Southern Express Co.*, decided January 6, 1914, 28 I.C.C.R., referring to the contention that rates should be reduced if they have a tendency to prohibit the movement of traffic, the Commission stated that while the fact that traffic moves freely has some bearing upon the reasonableness of the rates, it is not true that merely because traffic does not move the rates are therefore unreasonable. Carriers are entitled to reasonable compensation for the services they render, yet this compensation might require the establishment of rates upon which shippers could not do business at a profit, and in such a case the Commission could not lawfully prescribe rates unremunerative to the carrier. A similar contention has been advanced in other cases where producers seek lower rates, but it is unsound, although persistently urged.

The law does not require the carriers to regulate the price of transportation upon the basis of profits to the shipper and in authorizing the Commission to fix reasonable rates the law presumes that the measure of reasonableness will be based upon all the many elements of the particular traffic involved.

Ponchatoula Farmers Association v. *Illinois Central R.R. Co.*, 19 I.C.C.R. 513, 515.

The position of the growers is that such rates should be established as will permit them to market their products at a reasonable profit. No such test of the justness of a transportation charge can be admitted. *Florida Fruit & Vegetable Shippers Protective Association* v. *Atlantic Coast Line R.R. Co.*, 17 I.C.C.R. 552.

BERLINER GRAMOPHONE Ltd. v. POLLOCK.

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Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. December 11, 1915.

1. PATENTS (§ I—2)—LIFE AND DURATION—CIRCUMSTANCES OF TERMINATION—NON-MANUFACTURE AND ILLEGAL IMPORTATION.

In the absence of special circumstances, the "life of a patent," within

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the meaning of an agreement not to engage in the manufacture or sale of disc talking-machines *during the life of the letters patent* thereof, is the "term limited for its duration" as provided by sec. 23 of the Patent Act, R.S.C. 1906, ch. 69, unless it comes to an end by a judgment *in rem* of a court of competent jurisdiction declaring the patent void; nor are illegal importation and non-manufacture of the invention circumstances terminating the life of the patent within the meaning of the agreement, particularly where in the case of prohibited importation the patent might still be in existence *quoad* any one but the importers under sec. 38(*b*) of the Act.

Statement

APPEAL by the plaintiff from an order of Boyd, C., affirming an order of the Master granting leave to the defendant to set up a defence attacking the present validity of the plaintiff's patent, on the grounds of illegal importation and non-manufacture. The action was for an injunction restraining the defendant from manufacturing or selling talking-machines in breach of an agreement.

Leave to appeal was given by an order of MASTEN, J., in Chambers: see 9 O.W.N. 169.

R. C. H. Cassels, for appellant.

Casey Wood, for defendant, respondent.

The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—Prior to March, 1910, the defendant had been selling talking-machines which were infringements of the plaintiffs' patent No. 103332, and the plaintiffs sued him for infringement—in March, 1910, the parties entered into an agreement under seal, a copy of which is attached hereto.*

*"The agreement was made between the Berliner Gramophone Company Limited, called the "Berliner company," of the first part, and Arthur Bell Pollock, carrying on business under the name of Pollock Manufacturing Company, called "Pollock," of the second part, and was as follows:—

"Whereas the Berliner company has, through the Berliner Gramophone Company of Canada Limited, commenced an action against Pollock based upon the alleged infringement of Canadian patent No. 103332, relating to Tone Arms, and granted to Joseph Sanders on January 29th, 1907, and assigned to the Berliner Gramophone Company of Canada Limited.

"And whereas Pollock has sold talking-machines of the so-called disc type known as the Pollock talking-machine, phonola, etc., which it is admitted by Pollock are infringements of said patent No. 103332.

"And whereas both parties desire to settle and terminate said litigation.

"Now, therefore, for and in consideration of the sum of five dollars mutually paid by each party unto the other, and for other good and valuable consideration, the receipt of all of which is hereby acknowledged by each party, and of the mutual covenants and agreements herein recited, the parties hereto do hereby mutually agree as follows:—

"1. Pollock agrees to forthwith confess judgment in the action above referred to, and hereby acknowledges that the said Joseph Sanders was the first original, true, and sole inventor of the intention set forth and claimed

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The defendant sold all the stock of machines referred to in the agreement, to a company formed by himself, and in which it is said he has a controlling interest; the company then began

in and by the said Canadian patent No. 103332 aforesaid, and that the said patent is good and valid.

"2. Pollock agrees not to engage, either directly or indirectly, for himself or as agent or employee of any other person, firm, or corporation, in the manufacture or sale of disc talking-machines in Canada during the life of said letters patent No. 103332, with the exception of the sale of his present stock hereinafter referred to.

"3. Pollock agrees that, except to the Berliner company, he will not sell wholesale any machines hereinafter referred to at a lower price than as follows:—

"Eighty dollars for so-called Crown Prince machines;

"Fifty dollars for so-called Princess machines;

"Thirty-two and 50/100 dollars for so-called Duke machines and also for a so-called Table Cabinet machine known as model A.

"4. Pollock also agrees that these prices will only be given to jobbers or distributors who will purchase at least fifty assorted machines of the above-mentioned types.

"5. Pollock further agrees that, with the exception of the jobbers aforesaid, his lowest wholesale prices will be as follows:—

"One hundred dollars for Crown Prince machines;

"Sixty-five dollars for Princess machines;

"And forty dollars for Duke and model A. machines:

"except to dealers whose initial purchase will be at least one thousand dollars, in which case an extra ten per cent. discount may be given.

"6. Pollock further agrees that, at the expiration of two years from the date of this agreement, he will assign to the Berliner company the various industrial designs of the models of the machines he has secured in Canada.

"7. Pollock agrees to pay to the Berliner company as royalties in full for the machines he is licensed for by this contract the sum of three thousand dollars, payments to be made as follows:—

"$750 within thirty days from the date of this agreement;

"$750 on or before October 15th, 1910;

"$750 on or before April 15th, 1911;

"And $750 on or before October 15th, 1911.

"8. Pollock further agrees to furnish to the Berliner company, on the first of each and every month, until such time as the stock of machines herein referred to shall be exhausted, a statement of all machines sold by him during the previous month.

"9. The Berliner company hereby licenses Pollock, under all patents owned or controlled by it, to dispose of the said stock of machines held by Pollock, consisting of one thousand three hundred and fifty machines known as Crown Prince, Princess, Duke, and model A., and Pollock agrees that he will not sell any machines from this date other than those licensed herein.

"10. The parties mutually agree with each other that each will pay his own costs to date in the litigation referred to above and its own further costs, if any, incident to the formal determination of said suit.

"11. It is further agreed that the royalties above referred to shall be due only so long as any claim or claims of said patent No. 103332 shall not be declared invalid by a tribunal of competent jurisdiction; but, even in such event, the royalties already paid to the Berliner company shall be the property of the Berliner company, and shall not be returned.

"12. The Berliner company agrees that, if at any time any claim or claims of said patent No. 103332 shall be declared invalid by a tribunal of competent jurisdiction, it will release Pollock from any and all further

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and it continues to manufacture and to sell disc talking-machines, under the managership of the defendant. The plaintiffs brought this action claiming an injunction against the defendant manufacturing or selling such machines and for other relief; the defendant claimed that the agreement was obtained by misrepresentation, that it was void as in restraint of trade, etc.

After an examination for discovery of the plaintiffs' officer, the defendant obtained an order from the Master in Chambers as follows:—

"1. It is ordered that the defendant be at liberty to amend his statement of defence by alleging that the agreement sued on was based on the continuance in effect of the letters patent number 103332, and that the plaintiff company, upon the non-manufacture and non-user of the said invention, and, since the making of the said agreement, by importing and continuing as it is now doing, protected by the said letters patent, has surrendered to the public the rights covered by said letters patent, and the said letters patent are now forfeited and of no effect, and the plaintiff company should not be permitted to seek to enforce the said agreement; and by counterclaiming for a declaration of the

obligations under this agreement from the time such decisions may be handed down.

"13. Pollock further agrees to give access to any of his books to any authorised representative of the Berliner company at all reasonable times.

"14. The Berliner company agrees not to license other parties than those already licensed by it under patent No. 103332 for the period of two years following the date of this agreement, without the consent of Pollock, except the Bell Piano and Organ Company Limited and a certain Bennett.

"15. Pollock further agrees to place a typewritten label on the under part of the board holding the motor on each and every machine sold by him, said label to have inscribed on it the words 'Licensed under patent No. 103332.'

"16. Pollock agrees not to sell, wholesale to his jobbers, any machines without a contract from them and signed by them to maintain the prices as set forth in this agreement.

"17. The Berliner company agrees to notify its trade that Pollock has obtained a license under its patents, and that it has no further claims against any one with respect to the Pollock product, as the same is lawful henceforth.

"18. The Berliner company agrees that it will not attempt to further collect damages for past infringements with respect to the Pollock product either from Pollock or from any dealers who have purchased machines from Pollock.

"19. In the event of the Berliner company reducing the price of the Cabinet machines which it is now selling, Pollock shall be at liberty to reduce the prices of his own machines in the same proportion."

(Signed and sealed by the parties.)

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Court that the plaintiff company has forfeited the patent, and that the same is now of no effect.

"2. And it is further ordered that, in the event of the defendant amending his defence and counterclaiming as hereinbefore set out, the plaintiff company may, within ten days thereafter, deliver such reply and defence to counterclaim as it may be advised.

"3. And it is further ordered that Henry S. Berliner, vice-president of the plaintiff company, do attend before Jean Trudell, a special examiner in the city of Montreal, at such time and place in the city of Montreal as he shall in writing appoint, and submit to be examined *vivâ voce* upon oath as an officer of the plaintiff company, touching his knowledge of the matters in question in this action, pursuant to the Rules in that behalf made and provided.

(Paragraphs 4 and 5 of the order are not material.)

The plaintiffs appealed, and their appeal was dismissed by the Chancellor.

Leave was obtained from Mr. Justice Masten to appeal to this Court; and the plaintiffs now appeal.

Upon the argument it was suggested by the Court that the proposed defence might be allowed to be set up, and the examination for discovery postponed until after that issue was disposed of; to this the plaintiffs' counsel assented, but the defendant's counsel did not. It was then suggested that the examination for discovery should be confined to such facts and circumstances as might indicate that the wording of the agreement did not bear what would be its ordinary, usual meaning in law in the absence of special facts and circumstances. This the defendant also rejected, and insisted on an interpretation of the contract as it stands—there is no pretence of any fact or circumstances modifying or affecting the meaning of the words employed.

So far as affects the present motion, counsel for the defendant does not contend that his case is advanced by paragraph 12—no doubt wisely, but in any case *quilibet renuntiare potest lege pro se introducto*. He confines his claim to paragraph 2.

"2. Pollock agrees not to engage, either directly or indirectly, for himself or as agent or employee of any other person, firm, or

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corporation, in the manufacture or sale of disc talking-machines in Canada during the life of said letters patent No. 103332, with the exception of the sale of his present stock hereinafter referred to."

He claims that, by virtue of the acts of the plaintiffs set out in the proposed amended statement of defence—he abandons his counterclaim—the "life" of the patent has gone, and the time during which he is bound has expired. The result is, that we must now determine what in this agreement is meant by the "life of said letters patent."

The life of a patent is a very common phrase—my Lord on the hearing referred to a recent instance, *Carrique* v. *Catts and Hill*, 20 D.L.R. 737, 32 O.L.R. 548, at p. 565—but it does not seem ever to have been judicially interpreted.

I have no doubt that the life of any patent is, in the absence of special circumstances, "the term limited for the duration:" R.S.C. 1906, ch. 69, sec. 23.

I do not think that the mere occurrence of the circumstances set up in the proposed amended defence brings the life of a patent to an end within the meaning of this contract—there might be no discovery of the facts—if such discovery should be made, no one might be sufficiently interested to dispute the continuance of the patent, etc., etc.

Moreover, as to the alleged importation, at least, the patent might be in existence *quoad* any one but the importer: sec. 38(*b*).

It may well be that, if a judgment *in rem* of a Court of competent jurisdiction were obtained declaring the patent void, the "life" would be considered to have come to an end—but there is nothing of that kind here.

I think the appeal should be allowed with costs throughout.

Appeal allowed.

ADAMS v. ACHESON.

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Alberta Supreme Court, Harvey, C.J., Beck and Stuart, JJ. January 18, 1916.

1. CONTRACTS (§ II A—125)—ONUS OF ESTABLISHING CORRECT INTERPRETATION.

Where an agreement is capable of being taken in several meanings, the *onus* is upon the party seeking to shew that his interpretation is the correct one, to establish it with reasonable clearness.

[*Falck* v. *Williams*, [1900] A.C. 176, applied.]

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2. CONTRACTS (§ I C—15)—FAILURE OF CONSIDERATION—AGREEMENT TO ASSIGN COMMISSIONS FOR OIL STOCK—COMPANY NOT FORMED.

There is an important distinction between the interest which a shareholder has in a lease owned by the company and the interest a partner has in a lease owned by the partnership; and an agreement, whereby one agrees to assign his share of commissions earned in the negotiation of oil leases in consideration of shares to be issued to him out of a company to be formed in taking over those leases, does not, in the absence of positive evidence that he shall become a joint owner or partner of the leases, effectuate the creation of such an interest therein as debarring him from retaining his commissions upon a failure of consideration resulting from the non-floatation of the company.

Statement

APPEAL from the judgment of Winter, J., in favour of the defendant in an interpleader action for a share of commissions, which is affirmed.

Stack, for plaintiffs.

W. D. Gow, for defendant.

Harvey, C.J.

HARVEY, C.J.:—It appears to me clear that whatever arrangement, definite or indefinite, there was between the plaintiffs and the defendant, what the defendant was to receive for his $500 was an interest that was to come out of the company to be formed. It is admitted that only one sum of money was considered and that was $1,000 but that different amounts of shares were considered. It seems quite clear therefore that it never was within the contemplation of the parties that the defendant was to acquire any definite proportional interest either in the property which was to be turned over to the company or in the assets of the company.

Inasmuch as the shares in the company cannot be given by the plaintiffs and as they do not offer to give the $1000 which they admit the defendant was to receive, I would agree with Winter, J., that they have no right to any interest in the $500 the consideration for which was to be the $1,000 and the shares. I would therefore dismiss the appeal with costs.

Beck, J.

BECK, J.:—This is an interpleader issue. Acheson sued Adams and one Neville. The claim was this: that Neville agreed to pay Acheson $500, one-half of a commission of $1000 which he alleged he had assisted Neville in earning as a commission on the sale of certain natural gas rights for one Burns. Neville admitted that he owed the $500 but objected to pay it to Acheson because Adams and Hanauer claimed to be entitled to it. The $500 was consequently paid into Court by Neville to abide the result of this issue.

I find the facts to be as follows: Neville had an option from

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Burns on some "oil leases" from the Dominion Government, the purchase price to be paid being $20,000, payable in two payments of $10,000; Neville in case he or his assigns took up the option being entitled to a commission of 10%, payable as each instalment of the purchase price was paid.

Adams and Hanauer took an option from Neville for a day, paying $25 for it. They went to F. C. Lowes and Co. with the result that Lowes and Co. arranged with them to incorporate a company . . . the Royal Canadian Oil Co., which should take over the leases and pay for them $20,000 out of the first stock sold to the value of $30,000, and $50,000, of stock when Lowes and Co. had sold 200,000 shares of stock, i.e., $100,000 worth of stock, the shares being proposed to be put on the market at 50c. on the dollar.

Having made this arrangement with Lowes they paid Burns the down payment of $10,000. Subsequently they satisfied the remaining $10,000 owing to Burns and thus acquired Burns' title to the leases.

Acheson had an arrangement with Neville under which he was entitled to half of Neville's commission. Adams and Hanauer proposed to Neville and Acheson that they should turn in to them their commission on the sale to Burns and take an interest with them in the leases then subject to the arrangement with Lowes and Company. Neville distinctly declined to accept this proposal. Acheson discussed it and negotiations with him continued for some few days. As a result Hanauer put the following in writing as a proposal to Acheson:

> We got on our deal $20,000 of the first $30,000 raised; in addition you receive 5,000 shares in the Royal Canadian Oil Co., owning 3,000 of the choicest acres in the South Country, adjoining all the best wells. Your interest in deal is $1,000 cash for privilege of going in a deal on same basis as outlined above.

This Adams and Hanauer on the one hand and Acheson on the other supposed meant that if Acheson would turn over to Adams and Hanauer his half of the commissions earned by Neville from Burns, i.e., $500, in respect of each of the payments to Burns of $10,000, Acheson should be entitled to $1,000 in cash out of the $20,000 coming to Adams and Hanauer from the Royal Canadian Oil Co. and 5,000 shares out of the shares coming to them. Both sides agree that this proposition was not accepted by Acheson.

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Both sides, however, agree that the final terms proposed to Acheson were, $1,000 to be paid out of the $20,000 realized from the sale of the shares realizing $30,000, and shares to the face value of $6,500 to come out of $50,000 shares which the agreement between Lowes and Co. and Adams and Hanauer provided should be allotted to them.

Acheson said that he was satisfied with this, but that he made it a condition that a lawyer should draw up the agreement so that he could submit it to his lawyer and thus be sure there were no "jokers" in it. Adams and Hanauer say that the terms of this proposal were embodied in a written memorandum signed by Adams, Hanauer, and Acheson, which they have lost. Acheson denies that he signed any memorandum. The trial Judge finds that there was an agreement, but I gather that he meant a concluded oral agreement. He does not explicitly deal with the question whether there was any intention to put it in writing. I have some doubt whether I should have found that there was any concluded agreement.

A very important question arises, supposing that there was a concluded agreement as the trial Judge finds, namely, was the effect of it that Acheson was turning in his $1,000 commission in consideration of the payment to him later by Adams and Hanauer of $1,000 and the assignment to him by them of shares to the amount of $6,500 in the Royal Canadian Oil Co., or was it that Acheson was turning in his commission in consideration of Adams' and Hanauer's agreement which itself effectuated the creation in Acheson of an interest in the leases as they then stood, subject to the agreement with Lowes & Co., and consequently an interest in the specific money and stock coming to Adams and Hanauer under the Lowes agreement, and in case of discharge of that agreement, from any cause, then in the leases freed from that agreement. If the latter, Acheson must suffer along with Adams and Hanauer by reason of the failure of the floatation of the company. If the former, there was a failure of consideration and Acheson is not bound to permit the $500 in the hands of Neville, part of the commission, to go to Adams and Hanauer. The onus of proving the liability of Acheson is on Adams and Hanauer. Unless they can show with reasonable clearness that the latter view is the correct interpretation of the agreement, which, whether really oral or written, was proved so

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far as it was proved only oral evidence, they cannot recover. *Falck* v. *Williams*, 69 L.J.P. C. 17; [1900] A.C. 176.

To my mind, the matter is left by the evidence in such a state of uncertainty that Adams and Hanauer fail to establish the latter aspect of the agreement, and therefore the former aspect must be taken to be the correct one. In that event it seems to me that there was a failure of consideration, and that the question of impossibility of performance does not arise, and that, therefore, Acheson is entitled to the $500 in Court together with his costs.

Stuart, J.

STUART, J.:—This appeal should, in my opinion, be dismissed with costs. As to grounds upon which judgment should be given for Acheson, it seems to me that the trial Judge had the whole affair quite properly appreciated at the close of Neville's examination-in-chief, that the view he then presented was correct and really settled the matter, and that all the evidence containing so much theorizing about the legal position of the parties which followed practically added nothing to the case.

The contention of Hanauer and Adams was that Acheson had really purchased an interest in the leases and had become a partner with them in respect thereof. I am quite unable to see any justification for this argument. There was not a word in the agreement as sworn to by Adams and Hanauer, stating that the latter were selling Acheson an interest in the leases. All they said to Acheson was this,—"If you agree to give us that $1,000 coming to you from Neville, we will give you $1,000 out of the money coming to us from Lowes and will procure for you the issue to you of 6,500 shares in the company on a certain contingency." These two things they admittedly cannot get for Acheson. Even if they could he could at once say, "then I am entitled to at least one-half the $1,000 you can get from Lowes, so what is the use of giving you the $500, when you are at once obliged to pay it back to me?" The plaintiffs in the issue have confused two things: the interest which a shareholder in a company has in a lease owned by the company, and the interest or share of a partner in a lease owned by a partnership of which he is a member. Acheson was to get the former to the extent of 6,500 shares and also $1,000 cash. There was no evidence that he was to become a partner or joint owner of the leases. That suggestion was purely theoretical and imaginary. Acheson was to get two very certain and indefinite things for his

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share of the commission. He did not and cannot get them and is therefore entitled to retain his share of the commission.

The appeal should be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. December 23, 1915.

1. SALE (§ II C—35)—PROMISE TO GIVE WARRANTY OF ANIMAL'S SOUNDNESS —BREACH—MALFORMATION OF FOOT.

Since equity looks upon that as done which should have been done, it is of no importance, where, in a sale of an animal the seller promises to give a written warranty of soundness, that the warranty is not reduced in writing, and a malformation of the animal's foot constitutes an unsoundness which will render the seller liable for breach of the warranty, if such unsoundness was existent at the time of the sale, although the purchaser had heard from others that the animal was unsound.

[*Head* v. *Tattersall*, L.R. 7 Ex. 7, applied.]

Statement

APPEAL by the defendants from the judgment of Boyd, C., upon the findings of the jury at the trial, in favour of the plaintiff.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The statement of claim in this action alleges that the defendants, on the sale to the plaintiff of a stallion, "agreed to warrant said stallion to be sound and right in every way," "to give . . a written warranty that the said stallion was sound and right in every way;" that the stallion was in fact unsound; and claims (1) damages and (2) that the notes given in payment for the stallion be delivered up to be cancelled. The statement of defence alleges that the plaintiff was well aware of the stallion's "qualities and character," and " bought on his own knowledge and examinations, and not on any representations of the defendants."

The action coming on for trial at Guelph before the Chancellor and a jury, the jury gave answers to questions as follows:—

"1. On or before the date of the sale, the 6th of February, 1915, did the defendant represent that the horse was sound and right in every way? A. He did.

"2. Did he then state that he would give a written warranty that he was sound and right in every way? A. Yes.

"3. Did the defendant say that the horse was a sure foal-getter, and that he had made a good season the preceding year? A. Yes.

"4. Did the defendant offer to give anything more than his own guarantee that the horse was a fifty per cent. foal-producer, the certificate of the veterinary surgeon that he was sound, and the horse's pedigree? A. Yes.

"5. If he said he agreed to give more, say what it was? A. His personal guarantee that the horse was sound and right in every way.

"6. If you think that the plaintiff should get damages, say how much? A. $1,200, and the defendant pay the costs of the Court.

"7. Was the horse reasonably fit to travel the country road as a stallion? A. No.

"8. If there was any warranty, was there any breach of it, and what was the breach? A. He didn't get a sound horse."

Judgment was thereupon ordered to be entered for the plaintiff for $1,200 and costs.

The defendants now appeal.

D. L. McCarthy, K.C., and *George Bray*, for appellants.

J. B. Clarke, K.C., for plaintiff, respondent.

The judgment of the Court was delivered by

RIDDELL, J. (after setting out the facts as above):—While counsel for the appellants does not admit the justice of the findings of the jury, he does admit that there is ample evidence to justify the answers, and does not ask us to set them aside—indeed it would be hopeless, on the evidence, to expect a reversal on the questions of fact found by the jury. But he relies upon the law as applicable to the facts appearing in the evidence—in great measure in the evidence of the plaintiff. Riddell, J.

The plaintiff is a farmer, who had never owned a stallion; when the defendant McIntyre came to his place in 1913 to try to sell him a Clydesdale, McIntyre asked the plaintiff to go down to his sale-stable, at Listowel, which he did in April, 1914—he was shewn several horses there, but not a lame one in a box stall—this was, as it turned out, the horse the plaintiff afterwards got. No sale took place; the subject was renewed two or three times, till at length, on the 29th January, 1915, the plaintiff went down to the defendant's stable, said he wanted a good Clydesdale stallion, and was shewn "Bonny Earl." According to the plaintiff's story, which the jury have believed, "he" (i.e., the

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defendant McIntyre) "said he would guarantee the horse to be a sound horse; guarantee him to be right every way, and when he led him out on the floor, I says, 'His feet look pretty flat-looking;' 'Oh,' he says, he would 'guarantee his feet sound, good feet;' and I asked him, was he a sure foal-getter? and he said he would guarantee him a sure foal-getter."

No purchase was effected that day. "He" (i.e., the defendant McIntyre) "asked me $1,800 for the horse on that day; drawed up notes to that effect, and wanted me to sign them, and I wouldn't, and he asked me to let him know later, and as I was leaving him that night he asked me to let him know later what I would pay, so I said I would let him know in a few days. I wrote to him on the 3rd of February and told him I didn't think I would bother buying the horse, as near as I can mind."

The letter is produced—it reads: "I don't think I will buy the horse at that price; but I will tell you what I will do. I will give you $1,600, and you pay all the insurance. If that will suit you, all right, let me know—but, on the other hand, I would rather not to buy for a few years yet."

On the 6th February, the plaintiff and McIntyre met and went together to a hotel at Mount Forest. What took place I give in the plaintiff's words:—

"He said that he thought I was asking a little too much off him when I asked him to take $1,600 and pay the insurance. I said I didn't think so, and I asked him what he was going to tax me for the horse, and he said $1,700, and I said I wouldn't do it, and he says: 'I will tell you what I will do: I will sell him to you for $1,650, and pay half the insurance;' and he drawed up notes to that effect.

"Q. It was three notes for $550 each? A. It was supposed to be that, but he didn't.

"Q. By mistake he drew up one for $50 too little? A. Yes, and I said I wouldn't sign the notes unless he would pay the insurance.

"Q. The insurance was to be $1,000? A. He said he would insure him for what he could get.

"Q. Now, before we talk of the signing of the notes; what was said about the horse on this particular occasion? A. He said he would guarantee the horse sound in every way, and he

said he would give me a veterinary's certificate to say that he was sound, and he would give me a veterinary's certificate for insurance. He said he would guarantee him a sure foal-getter.

"Q. Anything else? A. Said he would guarantee him to fifty per cent.

"Q. A sure foal-getter? A. Yes, sir.

"Q. Now, from what you say, you signed the notes there? A. Yes, sir.

"Q. And what took place after that? A. Well, he was to ship the horse on the 16th of February to Mount Forest, and I was to meet him there.

"Q. On the 16th? A. Yes, sir.

"Q. Were you to take the horse from him at Mount Forest or at your own place? A. No, I was to meet him at Mount Forest and take the blanket up in the rig that I had, and he was to fetch him up to my stable.

"Q. That is, the defendant was to bring him and deliver him at the stable? A. Yes, sir.

'Q. That is what you parted at when you finally closed? A. Yes, sir."

The defendant McIntyre took away the notes with him.

A few days after this, two men came to the plaintiff's place, told his brother that the horse was lamed, and the plaintiff made up his mind to get out of the bargain if he could. On the 15th February, he telephoned McIntyre saying that he did not want the horse and not to ship him—McIntyre reiterated his representations as to the horse, and the plaintiff said, if that was the case, to ship him. It is clear that nothing done at this time in any way modified the contract.

The same afternoon, Bender, one of those who had spoken ill of "Bonny Earl", came to the plaintiff and repeated his charges, and the plaintiff made another attempt to get out of his bargain—he telegraphed the defendants not to ship the horse, that he would not accept him, and that he would see them on a later day he named. This was an attempt at rescission, and, had the defendants concurred, there would have been an end of the matter—but they did not. The horse was shipped, certainly after the telegram was delivered, but also (McIntyre says) after all arrangements had been made for shipping him. The horse was shipped on the

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16th February to Mount Forest, in charge of one Winslow (in the defendants' employ), who informed the plaintiff that the horse was in Mount Forest, and who (McIntyre says) "left the horse at the hotel for him."

The plaintiff went down to Mount Forest the next day, the 17th February, and he and McIntyre met—the following took place:—

"He asked me what was the reason I didn't accept the horse. I said he was not what he was represented to me to be, and I said to him not to ship him.

"Q. Did you tell him what reports you had heard? A. Yes.

'Q. Now, tell us what you did hear? A. I told him Bender said he was around through the township of Wallace, and had not found any mares in foal to the horse, and that he was known as 'the lame horse.'

"Q. Now, what else did you repeat to Mr. McIntyre? A. I think that is all I repeated to him that day.

"Q. What answer did he make to that? A. He said he would still stick to what he had said before, that he would guarantee him a sound horse; that he was sound and right every way, and that he would give me a veterinary certificate, and that he would go still further; he would give me $1,000 if he was not as represented to be, and he asked me who my lawyer was."

They went to the lawyer's office—there is great variance in the several accounts as to what took place there, but all agree on the important points—McIntyre offered a written warranty, which did not include a warranty of soundness, the plaintiff refused to accept it, and left the conference.

This was an attempt on the part of the defendants to substitute a new contract for the old one by way of accord and satisfaction, but the plaintiff did not consent, and it takes two to make a bargain.

The defendants sent up another man, Anderson, to look after the horse; he asked the plaintiff to accept the horse; the plaintiff refused; Anderson then said that the horse was there at the plaintiff's expense, and that the plaintiff might as well take him home; the plaintiff refused, but, after thinking the matter over, came down on the 22nd February and allowed Anderson to take the horse to his (plaintiff's) place, to save expense.

To put this in plain English, the defendants attempted to

substitute a new contract for the old one and failed; the plaintiff, seeing that they were insisting on an existing contract, reluctantly submitted to the situation—and the original contract was in no way modified.

On the 24th or 25th February, the plaintiff noticed that the horse was lame, and told McIntyre so—McIntyre made no reply except to ask what kind of a stable he was kept in—but again reiterated that he was going after Bender for his falsehoods. The horse got no better, and, after another fruitless communication, the plaintiff on the 3rd March, 1915, wrote the defendants that the horse is lame on his front feet already, asked how he would be if put on the road, and said, "I think, if he gets no better, I will advertise him and put him up at public auction." The other defendant, Gabel, then came to the plaintiff's place, and insisted that the horse had good feet (though it was even then lame)—Gabel contended that the floor of the stable was in fault because of concrete (though it was well bedded with straw). Gabel said to the plaintiff that he had signed the notes and had to keep the horse. The plaintiff had the horse examined by two veterinary surgeons, who both swear that he was suffering from "seedy toe"—a "diseased foot"—that he was "unsound, not a sound horse"—"never knew a case to get better that I could say that it was permanently sound"—"it was unsound"—these are some of the expressions used.

The horse was advertised for sale, and sold for $400—thereafter the purchaser put him up five or six times at the plaintiff's place, and he was lame pretty near every time he was there.

This action was brought, as has already been said.

It seems to me clear beyond any question that the original contract is still in existence, and I should not have thought it necessary to discuss the matter at all were it not that a contrary conclusion was urged on us with impressive earnestness, at great length, and in much detail.

The case of *Head* v. *Tattersall*, L.R. 7 Ex. 7, is relied upon by the defendants. It seems to me, however, that, rightly considered, it is an authority against them. There the plaintiff bought at Tattersall's a horse which had been described as having hunted with certain hounds—he was informed by a groom, before taking away the horse, that that was a mistake, and it was argued that this notice, followed by the plaintiff's taking away the horse,

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prevented the plaintiff relying upon the representation. There was there a condition in the sale that in case the horse did not answer the description he was to be returned on the Wednesday following—the Court held that this notice did not deprive the plaintiff of the right to insist on the condition. Kelly, C.B. says (p. 10): "I do not think . . . that this bound the plaintiff to return it immediately. . . . He had till the Wednesday evening to consider whether he would keep it or not, to make further inquiries, if he thought fit, as to the truth of what he had heard, and to come to a final conclusion," i.e., the original bargain remained in full force. Bramwell, B. (p. 11): "He had no notice when he bought the animal, and so acquired a right to take it away and keep it until the time named in the special condition. This right was not, in my opinion, affected by the information he obtained from the gossip of the owner's groom. . . . The fact of the notice, such as it was, preceding the actual removal, seems to me to make no difference." Cleasby, B. (p. 13): "By taking the horse away he did no more than, under his contract, he had a right to do. . . . I think the plaintiff was still at liberty to take the horse away and to return it, if, upon further inquiry, it should turn out not to be in accordance with the warranty." The learned Barons say that if, before the horse was taken away, the plaintiff had had distinct notice that the warranty was a mistake, the case might perhaps (Cleasby, B.) or would (Bramwell, B.) be different. So, in the present case, if the plaintiff had been distinctly told that the horse was unsound, his taking the horse away thereafter might be considered a waiver of the warranty, but there is nothing of the kind pretended or proved.

It is indeed made manifest that the defendant McIntyre refused to give a written warranty of soundness; and, if the real cause of action were the omission or refusal to give a written warranty, an argument might well be based on the facts. But there is no case made out of damages arising from the refusal to give a written warranty—and the real cause of action is on the warranty of soundness implied and necessarily implied in the agreement to give a written warranty. When a person agrees to give a written warranty of soundness, he necessarily (1) asserts that the animal is sound, and (2) promises to give his assurance in writing.

It is a matter of no importance whether the warranty is ac-

tually reduced to writing—Equity looks upon that as done which should have been done.

Then it is argued that, on the admitted facts, the horse's malady could not be held to be an unsoundness. It is said that the *fons et origo mali* is a characteristic formation of the foot, a malformation, and that malformation is not unsoundness.

For this are cited *Dickinson* v. *Follett*, 1 Moo. & Rob. 299, and like cases. Alderson, J., in the *Dickinson* case, says (p. 300): "The horse could not be considered unsound in law, merely from badness of shape. As long as he was uninjured, he must be considered sound." No doubt; and, just as we should not consider a man with bandy legs unsound simply for that reason, so we should not consider a horse unsound simply because it had badly shaped feet. But if in either case disease resulted from the malformation, the man or horse would not be the less unsound because the disease had such an origin.

Whether an abnormal condition constitutes an "unsoundness" must depend largely upon the ordinary use of the word, and the opinion of experts—there is nowhere any decision indicating that what was found here is not an unsoundness. Oliphant's definition is perhaps as good as any other—Oliphant's Law of Horses, 5th ed., p. 63.

And while, of course, the unsoundness, to give an action on the warranty, must be existent at the time of sale, I think there is ample evidence that that was the case here.

It may not be without interest to observe, that while the defendants' contention is that they were not to guarantee soundness, but (as McIntyre says) "I told him he was sound and all right as far as I knew, and I would give him a veterinary certificate when the horse was delivered," the certificate actually furnished was not a certificate of soundness generally, but only for insurance purposes. It reads thus: "I have to-day examined the Clydesdale stallion 'Bonny Earl' for insurance, and consider him a sound and first-class risk." We have no information what degree of soundness (if any) is required for "a sound risk" "for insurance." It may be that horses which are "unsound" for travelling as stallions may be "sound risks" for an insurance company. My judgment, however, does not proceed on that ground.

The appeal should be dismissed with costs.

Appeal dismissed.

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TAYLOR v. TUCKER.

Nova Scotia Supreme Court, Graham, C.J., and Longley, Drysdale, and Harris, JJ. February 26, 1916.

1. GARNISHMENT (§ I D—31)—SITUS OF DEBTS—NON-RESIDENT GARNISHEE—FOREIGN INSURANCE COMPANY.

By virtue of O. XLIII., r. 1 (N.S.), a judgment creditor has no right to garnishee the funds of the judgment debtor in the hands of a garnishee not within the jurisdiction of the court; the fact that the garnishee, an insurance company, has an agent within the jurisdiction, or the garnishee's assent thereto, cannot change the result.

[*Terrell* v. *Port Hood R. & Coal Co.*, 45 N.S.R. 360; *Ranney* v. *Morrow*, 3 Pugs. (N.B.) 270; *Canada Cotton Co.* v. *Parmalee*, 13 P.R. (Ont.) 308; *Parker* v. *Odette*, 16 P.R. (Ont.) 69; *Boswell* v. *Piper*, 17 P.R. (Ont.) 257, followed.]

2. GARNISHMENT (§ III—63)—PRACTICE—SERVICE OF ORDER ON JUDGMENT DEBTOR.

Though there is nothing in Order XLIII. (N.S.), which requires the service of a garnishment order on the judgment debtor, the preferable practice, in order to prevent difficulties and questions arising from want of notice, is to serve such order on him.

[*Ferguson* v. *Carman*, 26 U. C. Q. B. 26, followed.]

3. GARNISHMENT (§ II A—35)—ASSIGNMENT OF DEBT BEFORE PROCEEDINGS—EFFECT.

The assignment of a debt sought by garnishment prior to the taking out of the garnishee order, and without notice thereof, is in itself ground for setting aside the garnishee order, though no notice of the assignment had been given.

Statement

APPEAL from the judgment of Russell, J., refusing to set aside a garnishee order. Reversed.

W. H. Covert, K.C., for judgment debtor.

D. Owen, for garnishee.

Longley, J.

LONGLEY, J.:—The plaintiff, having secured judgment against the defendant, obtained a garnishee order against the North West Fire Ins. Co., a corporation doing business in Winnipeg. It appears that the plaintiff's attorney was Daniel Owen, and Daniel Owen is the agent at Annapolis for the North West Fire Ins. Co. A certain sum, $1,125, was due to the defendant for losses incurred on his premises at Carlton's Corner, near Bridgetown, and the plaintiff proceeded to garnishee the amount of said insurance company. Under the law prevailing in Nova Scotia proceedings against a garnishee can only be taken when he is "within the jurisdiction." Under the law existing in this province, a garnishee order can be obtainable against no person, not within the jurisdiction of the Court. See *Terrell* v. *Port Hood R. & Coal Co.*, 45 N.S.R. 360. The same rule is applied in England, and in Ontario it is made still clearer by making it impossible to obtain a garnishee order against any person or corporation who does not reside in

Ontario. The order for judgment in the garnishee proceedings may, therefore, be regarded as void.

It is no answer to the fact that the insurance company gave its assent or in any wise concurred in it.

A motion was made before Russell, J., who had granted the order in the first instance, to reverse it, and he has filed a judgment declining to do so. On all principles governing the issue of garnishee orders, this failure seems to be inconsistent with the law of the country. It ought never to have been issued, and, when once issued, should have been set aside.

Longley, J.

In my judgment the order in the present case should be set aside with costs.

HARRIS, J.:—The plaintiff recovered judgment against the defendant, whose dwelling had been destroyed by fire, insured in the North West Fire Ins. Co. The policy had been adjusted and the sum of $1,125 was payable in respect to the loss. The head office of the company was at Winnipeg, Manitoba, and the money had been sent to Daniel Owen, at Annapolis Royal, to be paid to the defendant upon receiving a proper discharge. Mr. Owen was said to be an agent of the company, but what his powers were did not appear. There was some delay about the payment and in the meantime the plaintiff took out a garnishee order and attached the money. Before the garnishee order *nisi* was taken out the defendant had assigned his claim to the money to Oliver S. Miller, but no notice of the assignment had been given. Neither the defendant nor Miller had any notice of the garnishee proceedings, until after the order absolute had been made and the money had been paid over to the plaintiff. The defendant and Miller then applied to Russell, J., who had granted the order absolute, to set it aside, and he refused the application and the defendant and Miller have appealed to this Court.

Harris, J.

The first ground urged against the order is that it was without jurisdiction, because the garnishee was not within the jurisdiction. O. XLIII, r. 1, gives a judgment creditor the right to attach debts due to the judgment debtor where, among other things, it is shewn by affidavit "that any other person is indebted to such debtor, and is within the jurisdiction."

These words appeared in the section of the English Common Law Procedure Act (1854), dealing with attachment and have ever since been continued. They were copied into the Irish Com-

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mon Law Procedure Act of 1856, and also in the Acts of Nova Scotia, New Brunswick and Ontario, and in Ireland, and in all three provinces have been the subject of judicial decisions. The case of *Martyn* v. *Kelly*, Ir. R. 5 C.L., 404, was an attempt in Ireland to garnishee a sum of £180, which the Imperial Insurance Co., an English company, had admitted to be due on foot of a policy. Their head office was in England, but they had a local agency in Galway. The motion there was made by the judgment debtor to set aside and rescind an order which had been made by the Judge in Chambers attaching the debt due from the insurance company. A Court consisting of three Judges set aside the order on the ground that the company was not within the jurisdiction.

In *Ranney* v. *Morrow* (1876), 3 Pugs. (N.B.) 270, an attempt was made in New Brunswick to garnishee moneys due by the Ætna Insurance Co. to the judgment debtor. The head office of the company was in the United States, but it had made a deposit with the Dominion Government, as required by the Canadian laws, to enable it to do business in Canada, and had a general agent in Montreal for the Dominion and an agency in St. John to carry on insurance business, and an agent authorized to issue policies and to receive premiums, who resided in St. John. The question was raised by the garnishee and it was argued, because the company could be served with the order under the law in force in New Brunswick by delivering it to the agent in St. John, therefore the company could be made garnishees, but Duff, J., said:

> This is much the same as saying that because it could be served with process therefore the plaintiff has a right of action against it. It is inverting the order of the argument. The right to proceed is one thing; the mode of proceeding is another.

He held that the debt could not be garnisheed.

In *Canada Cotton Co.* v. *Parmalee*, 13 P.R. (Ont.) 308; *Parker* v. *Odette*, 16 P.R. (Ont.) 69, and *Boswell* v. *Piper*, 17 P.R. (Ont.) 257, the point raised here was decided adversely to the plaintiff's contention.

The first was a decision of the Common Pleas Division—Galt C.J., Rose and MacMahon, JJ. The second was the decision of a Divisional Court composed of Ferguson and Robertson, JJ., and *Boswell* v. *Piper* was also the decision of the same two Judges who affirmed the decision of Rose, J. In this case, it was sought

to distinguish it from the previous cases by contending that the garnishees had an agent or attorney and a chief agency in the province upon whom process could be served under an Act of the legislature. Ferguson, J., said: (p. 259).

I am unable to see that the facts of having an attorney and a "chief" agency in this province as required by and for the purposes of the provisions of that Act of the Legislature enable me to say that this insurance company (an English corporation), is within Ontario as required by rule 935 of the Consolidated Rules.

Robertson, J., concurred.

The present Chief Justice of this Court, then Graham, E.J., followed *Ranney* v. *Morrow*, in the case of *Terrell* v. *Port Hood & Richmond R. Co.*, 45 N.S.R. 360.

The foregoing cases effectually dispose of all the points raised at the argument.

The fact that the debt was assigned to Miller before the garnishee proceedings would, if the assignment were proved to have been properly made, also seem to be a good ground for setting aside the order, notwithstanding that no notice had been given of the assignment, but there may be some question as to the assignment having been executed by an attorney having authority to make it, and in view of the conclusion I have reached on the first question raised, it is unnecessary to discuss this.

The fact that the money was paid over by the insurance company under the garnishee order absolute before the proceedings were known to the judgment debtor or the assignee leads me to say that I think it is very advisable that the order attaching the debt should, in all cases where possible, be served on the judgment debtor, as well as the garnishee. Of course, there is nothing in O. XLIII. requiring such service, but if the service had been made in this case, the garnishee would not have found itself in the unfortunate position it is.

For more than 50 years, with practically the same rules in force as here, the Judges in Ontario have required notice to be given to the judgment debtor.

In *Ferguson* v. *Carman* (1866), 26 U.C.Q.B. 26, Draper, C.J., in delivering the judgment of the Court said, in speaking of the order attaching the debt (p. 28):

This summons was not required to be served on the judgment debtor which had been the course pursued by the different judges in Chambers for a long time past to prevent difficulties and questions arising from the want of notice

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to him. Had my attention been called to it at the time I would not have granted the summons without that being inserted.

And again, at p. 30:

Our statute in this respect follows the English Act and there is no practice so far as we can discover in England, such as has been frequently adopted with us, of requiring the judgment debtor to be served with the summons. This is, so far as we are aware, the first occasion on which the matter has been brought under the notice of the Court. It is, of course, imposing an additional duty and some expense upon the judgment creditor, and it might sometimes be found difficult to serve him and he might not always choose to appear or to give notice to his assignee. That the assignee as a measure of precaution should give notice of the assignment to the debtor of the assignor, the judgment debtor, is a measure of precaution he should never omit; and if the garnishee having notice of the assignment takes no notice of the summons to show cause, and does not choose to ask that no order should be made on him to pay the judgment creditor because of the alleged assignment, he must take whatever consequences may legally attach to such omission. Still we think the notice of the application to the judgment debtor would be in all cases a prudent step for the sake of the garnishee; the only doubt is whether we have the right to impose a condition on the judgment creditor which the legislature has not sanctioned.

Apparently, ever since this declaration of the Court of King's Bench, the practice has been settled in Ontario, to serve the judgment debtor because, in the case of *Beaty* v. *Hackett*, 14 P.R. (Ont.) 395, Winchester, sitting as a Master in Chambers, after discussing *Ferguson* v. *Carman*, says (p. 397):

The practice has been to serve the judgment debtor with the attaching or garnishee order *nisi*. (And again, p. 398): The practice, as I have already stated, has been to direct notice of the application to be served upon the judgment debtor, and it should have been followed in this case.

I think the practice followed in Ontario on this point should be adopted in this province.

I would allow the appeal with costs.

Graham, C.J.

GRAHAM, C.J.:—I concur in the opinion read by Harris, J. I wish to base my opinion on the insufficiency of the affidavit made in this case by Mr. O'Connor, on which the garnishee order *nisi* was obtained. It does not comply with the order of the Judicature Act respecting the attachment of debts, O. XLIII., r. 1, because it does not show that the company is within the jurisdiction or contain words to that effect. I limit myself to that.

Drysdale, J.

DRYSDALE, J., concurred with HARRIS, J. *Appeal allowed.*

IN RE GRAND VALLEY R. CO.

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Board of Railway Commissioners, March 4, 1915.

1. MUNICIPAL CORPORATIONS (§ II F 3—188) — OPERATION OF RAILWAY — POWER TO ACQUIRE DOMINION FRANCHISE—ASSENT OF MINISTER.

A municipality may acquire the undertaking of a Dominion railway, but under sec. 299 of the Railway Act is without power to operate it under the Act except under the authority of the Minister of Railways and Canals with the obligation of applying for an enabling Act at the next session of Parliament.

APPLICATION for an order of the Board.

Statement

THE CHIEF COMMISSIONER:—The Board's attention has been called, by the Ontario Railway and Municipal Board, to the anomalous position of this railway.

The Chief Commissioner.

The Port Dover, Brantford, Berlin, and Goderich Railway Company was incorporated by Dominion statute 63-64 Vict., ch. 73, with power to construct and operate a railway from Port Dover through Simcoe and Waterford in the county of Norfolk to Brantford; thence to Berlin, in the county of Waterloo; and thence, in a northwesterly direction, through the counties of Perth and Huron, to the town of Goderich.

By a further Act of the Dominion Parliament, 2 Edw. VII., ch. 91, the name of the company was changed to that of the Grand Valley Railway Company.

The Brantford Street Railway Company was incorporated under an Act of the province of Ontario, 42 Vict., ch. 73.

By the Dominion Act, 6 Edw. VII., ch. 102, authority was given the Grand Valley Railway Company to enter into agreements with the Brantford Street Railway Company and other companies under which the Grand Valley Railway Company might be empowered to acquire the undertaking of the Brantford Street Railway Company.

In May, 1907, application was made by the Grand Valley Railway Company to the Board, the application being made under the provisions of section 281 of the Railway Act, 1903, for an order of the Board sanctioning the proposed agreement under which that railway company acquired the undertaking and assets of the Brantford Street Railway Company.

As directed by the Board public notice of the application was given.

No objection apparently was made to the transfer by the

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city of Brantford, with a result that the agreement, which was subsequently dated August 27, 1907, was recommended by the Board to the Governor-in-Council for sanction by Order dated October 3, 1907, the agreement being ratified by Order-in-Council dated October 25, 1907.

As above noted, the whole of the railway owned by the Brantford Street Railway Company then became part of the Grand Valley Railway System, a recital of the agreement stating:—

"And whereas it is believed by the parties hereto that it will be advantageous as well to the parties hereto and their respective shareholders as to the municipalities through which the said respective railways now run, and to the public generally, that the railways so owned by the parties hereto should be so dealt with as to be capable of being operated as a continuous and connected line of railway."

The Grand Valley Railway Company has since become insolvent, and the city of Brantford, under the provincial statute 4 Geo. V. ch. 63, sec. 6, was authorized to pass by-laws for the purchase of the franchises, property, rights, and privileges of the Grand Valley Railway Company in the city of Brantford and counties of Brant and Waterloo.

Power, by the same Act, is given the corporation to pass by-laws providing for the election of a Commission to manage, operate, improve, and extend the railway subject to the provisions of the Public Utilities Act of the province, with the further provision that, until the election of such a Commission, the municipality may itself appoint a Commission to act in its stead. The Ontario Railway and Municipal Board points out that the city has acted on this legislation and acquired the system of the Grand Valley Railway Company.

Beyond all question, urban street railway systems, are matters which properly fall under the provisions of the British North America Act within the jurisdiction of the province, and apart from any legal question of, provincial rights but as a mere matter of expediency and public convenience should be operated under that local jurisdiction. The present case is, of course, complicated by the fact that the Grand Valley system was not merely an urban system, but also included lines run-

ning out of the city and which as contemplated under the Act of Incorporation were of considerable extent, therefore justifying to this extent the original incorporation.

Much doubt may be expressed, however, as to the advisability of ever incorporating into a railway system as contemplated by the Act of Incorporation of the Grand Valley the purely local service afforded by the Brantford Street Railway Company.

The city of Brantford has also purchased not only that part of the railway used for its local business but the whole system.

The Board wrote Mr. Henderson, solicitor for the city, stating that its attention had been called to the question of the right of the municipality to operate the railway, and asking for a reference to the statutes that might confer such right, and under what authority the railway was being operated. Mr. Henderson's reply is as follows:—

"Brantford, February 26, 1915.

"A. D. Cartwright, Esq.,
Secretary, Board of Railway Commissioners,
Ottawa.

"Dear Sir:—

File 23686—*Re Grand Valley and Brantford Street Railway.*

"Upon my return to the office I am in receipt of your letter of the 23rd instant.

"The corporation of the city of Brantford has assumed that it has the right to operate the Grand Valley Railway in pursuance of its purchase of same. If we are in any error with regard to our rights we shall be very glad to be set right by the Board and to take any steps that are needful to comply with its regulations in that regard.

"By ch. 63 of the statutes of Ontario of 1914, the city of Brantford obtained special legislation, and, among other things, you will observe by clause 6 that the city is empowered to pass by-laws for the purchase of the franchises, property, rights and privileges of the Grand Valley Railway Company in the city of Brantford and the counties of Brant and Waterloo. Pursuant to this authority a by-law was passed which is set forth in schedule 'A,' to the Act.

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"In pursuance of the further powers of the various subsections of the Act, the city of Brantford has appointed a commission to manage, operate, improve and extend the railway, and in due course it is the intention that a commission shall be elected to supersede the present commissioners. You will observe that the Act gives us power to appoint commissioners until such time as we shall elect same.

"The city of Brantford entered into possession of the road last August, and immediately thereafter proceeded to improve it both as to its road-bed and rolling stock, and I think I can safely say that any person who saw the railway previous to its ownership by the city would not recognize it now as the same railway.

"I hope the above will answer your question fully, and if not will be glad to furnish such information as required.

Yours truly,

"(Sgd.) W. T. HENDERSON."

In my opinion the right of the city of Brantford to operate this Dominion undertaking is subject to the provisions of sec. 299 of the Railway Act. So far as the acquisition of the line is concerned, I assume that it has been properly acquired by the city. So far as operation by the city is concerned, the question is as to whether it has any corporate power to operate a Dominion franchise. Undoubtedly the Ontario statute referred to gives the city enabling rights, such rights that allow it to purchase the assets of the railway company. I nevertheless think, that its provisions cannot clothe the city with the right to operate a Dominion railway. In other words a provincial legislature cannot authorize the operation any more than it could the construction of a railway declared to be for the general advantage of Canada. The result is that the city had the right to use municipal funds in the acquisition of the railway and now owns the undertaking, but without power enabling it to operate this Dominion franchise under the Dominion Act. In such case the provisions of the section apply, and the city may operate under leave of the Minister of Railways, with the obligation, during the next session of the Parliament of Canada, of applying for an

Act which would enable the city to hold, operate, and run the railway.

As a matter of fact only a comparatively small part of the railway authorized by the incorporation has ever been built, and it would occur to me that the advisability of the withdrawal of the railway from the jurisdiction of Parliament might be considered. An analogous action was taken by Parliament in the case of the Montreal Park and Island Railway, 1-2 Geo. V. ch. 115, under which that company was authorized to enter into an agreement with a number of provincially incorporated companies named for conveying or leasing to such companies or any of them, in whole or in part, its undertaking, including its charter, contracts, franchises, rights, powers, privileges, exemptions, and also the lands, railways rights of way, works, plants, machinery and other property to it belonging.

Should the city adopt this suggestion appropriate legislation would enable it to acquire the Grand Valley Railway and operate it under its existing provincial powers under the supervision of the Ontario Railway and Municipal Board.

I might add that the only other municipality, to my knowledge, operating a railway subject to Dominion jurisdiction is the city of London, lessee of the London and Port Stanley Railway.

In this instance express power was conferred on the city to "make, complete, equip, operate, alter, maintain, and manage the railway," 4-5 Geo. V. ch. 96, sec. 2; and sec. 5 conferred on the London Railway Commission "the whole management and control of the making, completion, equipment, operation, alteration, and maintenance of the said The London and Port Stanley Railway for, and as the agents of the corporation."

MR. COMMISSIONER MCLEAN concurred.

Com. McLean.

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Quebec Court of Review, Charbonneau, Demers and Greenshields, JJ. December 3, 1915.

1. CONTRACTS (§ IV A—321)—RECOVERY FOR EXTRA WORK—"EFFECTIVE" CONSTRUCTION OF COFFER-DAM.

A contract for the construction of a coffer-dam providing, that "whatever type of dam is used the contractor shall assume all responsibility for the effectiveness and maintenance thereof," renders the contractor responsible for the full effectiveness of the coffer-dam, and will preclude

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him from claiming any additional sum for extra work or delays in sealing the dam so as to make it effective.
[Art. 1690, C.C. Que., applied.]

2. CONTRACTS (§ IV C 3—357)—DELAY IN PERFORMANCE—ERROR—WAIVER.
A contractor is not responsible for the delay in the completion of a work occasioned by the joint error of the parties, particularly where such delay is condoned by their subsequent conduct.

3. CONTRACTS (§ II D 4—188)—LIABILITY OF CONTRACTOR FOR CONDITION OF BUILDING—WORKS IN WATER—COFFER-DAM.
Art. 1688, C.C. Que., making a contractor and architect jointly and severally liable for the work, even if the building perishes from the unfavourable nature of the ground, applies to works in water and to the construction of a coffer-dam.

Statement

REVIEW of the judgment of Archibald, J., Superior Court, which is varied.

The plaintiff's action is in recovery of $69,532.58 from the Canadian Light & Power Co., for work done in the Beauharnois canal in connection with its hydraulic power. J. G. White & Co., the other defendant, acted as the engineer, the agent and the representative of the former company. In the amount claimed, the sum of $15,861.87 was due on the engineer's certificate. There was no certificate for the balance. The plaintiff prayed for condemnation money against the first defendant, and that the other company be ordered, as engineer, to grant to the plaintiff his final certificate. The claim was later reduced to $65,605.87.

The defendant, Canadian Light and Power Co., pleaded in substance, that the plaintiff did not carry out its contract with the defendant in accordance with the condition of the contract; that no final certificate had been issued, and that it was a condition precedent to any payment that the contractor should obtain such a certificate. The defendant complained also of over-charges for extra works. It also claimed liquidated damages for delays, alleging that it was stipulated in the contract that for each day that the work shall remain unfinished after the delay fixed in the agreement, the contractor shall pay the company the sum of $100 per day. The amount so claimed by the company is $253,000 which it offered to plaintiff in compensation for its claim.

The defendant J. G. White and Co., did not plead, but *s'en rapporta à justice*.

The Superior Court maintained the action for $65,330.09 and declared that the plaintiff was not obliged to obtain a final certificate from the engineer defendant before bringing its action against the defendant Canadian Light and Power Co., and that

de bene esse, the judgment would stand in the place of this final certificate.

Davidson, Wainwright & Alexander, for plaintiff.

Foster & Martin, for the Canadian Light & Power Co.

Fleet & Falconer, for J. G. White & Co.

CHARBONNEAU, J.:—This contract is dated April 13, 1910, but appears to have been finally signed and made binding only April 28, 1910. It was originally negotiated between the Canadian Light and Power and Charles E. Fraser & Co., a firm which was afterwards replaced by the present plaintiffs.

A general perusal of the facts of the case shows that the whole difficulty between the parties, the cause of all the delays and additional work required, and therefore the origin of all the extras claimed by the plaintiffs and the liquidated damages claimed by the defendant is the common misapprehension of all the parties as to the nature of the bed of the river at the entrance of the canal, and as to the extent of the work required to build the coffer-dam by which such entrance was to be closed, so as to take the water out of the canal and execute the divers transformations which were necessary in order to utilize that canal for a water power.

After the contractors had built that coffer-dam according to the adopted plan, which was crib work, the parties soon found out that, through some cause or other, it would be insufficient to keep the water out of the canal, that the earth that had been dumped outside of the crib work was all slipping away into the lake and that it would be absolutely impossible to pump out the water and keep the canal dry during the work. A modification, apparently suggested by the plaintiffs and agreed to by the engineer in charge, was adopted. It consisted in throwing an additional crib work ahead of the coffer-dam and dumping more earth between the two so as to seal the coffer-dam and make it water tight. Every one expected that this would prove efficient, and it apparently did, but it took more than a month's additional time to do this work. I say that this new work apparently fulfilled its purpose, but when they began emptying out the canal they found out that the water was coming in such a large quantity, either through insufficiency of that improved coffer-dam or through leakage in the north bank of the canal that it would be,

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if not absolutely impossible, at least dangerous and impracticable to work, especially in the lower part of the canal. The defendant then required the plaintiffs to build an additional coffer-dam at lock No. 14, which was agreed to by all parties and arranged for as to cost. They also changed the conditions of the contract as to taking care of the water. That is provided for by a letter of date July 27, 1910. The enormous delays caused by this original trouble in the entrance coffer-dam are responsible not only for the additional claim made by the plaintiffs for that extra work put in it, but also for the extra cost added to the rest of the work by the fact that instead of being able to do that work during the summer time they had to do part of it in the winter. Those delays are also relied upon by the company defendant for its claim of liquidated damages for delays in the completion of the work.

Of course there are a few items for extras which do not depend on this single fact and will be dealt with separately; but the main question to be decided is who is responsible for the insufficiency of that initial work which was the key of the whole contract.

The first judgment admits that under ordinary circumstances the contractor would be held responsible. Art. 1688 makes it clear that the contractor and architect are jointly and severally responsible for the work, even if the building perishes from the unfavourable nature of the ground. There is no question that this applies to works in the water and to the coffer-dam in question in this case (See 6 Marcadé p. 560 on Art. 1792 C.N.; 4 Aubry & Rau No. 374; 2 Guillouard, Contrat de Louage, Nos. 864-865.)

But the judgment finds that the engineer who has furnished the plans should have known better and that he should be held responsible as towards the contractor for the sufficiency of the surveys and plans, that being the servant of the proprietor and acting under his orders he made the proprietor responsible in his place towards the contractor. In the opinion of the first judgment, the special circumstances of the case would justify the reading out of that article from the contract.

I will not discuss this theory which is based on a very elaborate and voluminous array of French doctrine and English jurisprudence, although it is still a very debatable question, at least as far as the French doctrine is concerned, whether a stipulation relieving either the contractor or the architect of all responsibility is valid, the contention of the *ecole* being that such a law is enacted

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in the interest of public safety and cannot be altered by private agreement. But if we put aside that interpretation, if we admit that the defendant is responsible for the plans of the engineer; and if such circumstances as mentioned by the judgment can alter the bearing of the art. 1688, surely the stipulation in the contract itself can restore to that article its full force and binding effect as against either of the two parties.

First of all, let it be observed that the contract specifically mentions that the contractor should not rely on the test borings or plans prepared by the engineer of the company. The contract says:—

The company has carried out investigations as to the character of the material to be encountered by means of steam drill test borings. The test borings made at various points along the canal have been completed by the company, to aid the contractor in forming an idea of the character of the materials to be encountered in the work to be done under this agreement, but it is understood that the contractor *shall determine for itself in making its proposal* as to whether said borings *correctly represent the material to be encountered*. It must also be understood by the contractor that, while these test borings were made substantially at the places shewn on the plans, and were carried to the depths indicated on the profile, the *Company does not express imply or agree* that this information, or any other general information with regard to existing conditions, as given on any of the plans, *is even approximately correct*.

Further on it is stipulated that the contractor shall take all the responsibility of the work and bear all possible losses even by the nature of the ground:—

The contractor shall *take all responsibility of the work* until its final acceptance by the company, and shall bear all losses resulting to it on account of the amount *or character* of the work, or because *the nature of the land* in or upon which the work is done is *different from what is assumed or was expected*, or on account of the weather or other cause, and the contractor shall assume the defence of and indemnify and save harmless, the company, its officers and agents from all claims of any kind in connection with the work to be performed hereunder.

Then comes the description of the work to be done and the specific responsibility of the contractor as to the coffer-dam.

A coffer-dam will be built across the canal entrance and extended into lake St. Francis just outside of the north bank of the canal at the intake as shewn on the plans or as directed by the engineer. The type of coffer-dam shall be stone filled timber crib, as shewn on the plans, except that, if the contractor so desires, *it may submit an alternate design* for approval by the engineer, but it is distinctly understood that *whatever type of dam is used the contractor shall assume all responsibility for the effectiveness and the maintenance thereof*.

The earth filling, timber, and other materials to be used, in whatever type of dam is constructed, shall meet with the approval of the engineer in size, kind and quality, but it is to be understood that the approval of the engineer

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as to the type of dam or quality of materials used therein does not relieve the contractor from the obligations to have the company harmless as above specified.

And on this the plaintiffs put in a tender for a lump sum of $18,500.

It makes no difference what type of construction he adopted as he had the choice between the different plans offered and could even submit an alternate design.

The contractor was bound to the effectiveness of the work. The letter of the managing director of the company defendant does not in any way alter the stipulation that whatever plans are adopted, whatever materials are used, whatever approval had been given by the engineers would not relieve the contractor from the obligation of keeping the company harmless and being responsible for the full effectiveness of the coffer-dam. The contractor did not agree to build a certain coffer-dam according to plans and specifications, but to build a dam that will absolutely close the water out, so that the work can be done behind it, and that for a lump sum of $18,500. With such a contract I fail to see how the contractor can claim any extras for the work that he had to do to seal his coffer-dam so as to make it effective, especially in face of art. 1690 C. C., which enacts that he cannot claim any additional sum upon the ground of a change of plan or specification or of an increase in the labour and material, unless such change or increase is authorised in writing and the price thereof is agreed upon. In this case the additional work that the contractor had to put was never allowed as an extra, either by the engineer or by the company proprietor. On the contrary, relying on the disposition of the law and on the clear agreement of the contract, the company defendant always maintained that the contractor was responsible for the effectiveness of the work under any circumstances.

The principles above enunciated would also apply to the extras claimed by the defendant for extra cost of labour on account of the delays that were caused by the defects of that original work and by the time occupied for building the supplementary coffer-dam.

There is an additional reason to reject mostly all those items, which seems as peremptory. Those items are called extras by the plaintiffs, but as a matter of fact they are damages claimed

for having been delayed into the winter season to make that part of the work. Supposing the plaintiffs were of opinion that those delays were attributable to the company defendant, their only recourse was to refuse to do the work for the same unit price, stop their men and if the company did not agree to a new scale of prices, give up the job altogether and claim damages.

Instead of that, they go on with the work without a word of protest until the whole is finished. This must be construed as an acquiescence pure and simple. The company defendant was absolutely justified in the belief that the plaintiffs were executing their contract for the unit price that had been set in it, as they had agreed and were bound to. Moreover by the contract all claims for damages must be made within five days from the time they are incurred. The plaintiffs never made any claim until long after the contract was at an end. Their claims are, in my opinion, formally debarred by that clause in the contract which was never waived. I have not found any valuable reason given either in the judgment, the respondent's factum or arguments why this part of the agreement should be ignored or set aside.

I would therefore suggest that the following items which were granted by the first judgment should be struck off: extra costs of rock excavation $4,976.86, extra cost of earth excavation $8,560.20, extra cost of concrete $3,968.31, extra cost structural steel erected $600, delay to shovel work on account of insufficient dump $5,475, extra work on coffer-dam $6,275, additional cribs placed in connection with same work $3,200—a total of $33,055.37 to be reduced from the judgment.

The other items being the balance due on the engineer's estimate of October 1911, and some extras for delays in furnishing material for intake piers should be allowed as also the cost of insurance on labour in taking care of the water.

Nevertheless I would not feel justified in granting the conclusions of the company defendant as to liquidated damages. It is true the contractor agreed strictly to pay them in case of delay, even if the quantities were increased; it is true, in my opinion, that the transferring of part of the work from the summer to the winter season is due to the initial mistake about the coffer-dam for which I hold the contractor responsible; but it is clear that it was a joint mistake. When the company agreed to share the expense of taking care of the water, it condoned those delays.

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FRASER BRACE & CO. v. CANADIAN LIGHT & POWER CO.

Charbonneau, J.

True it is that in this change which was made to the contract and which is contained in the letter of July 27, it was stipulated that the rest of the contract would not be altered; but it was the very fact that the water could not be taken out early enough that was the cause of those delays.

The company should, at least, be adjudged to have agreed to share that responsibility, and in this state of things, it would be unfair to insist on the claim of liquidated damages. In my opinion, the defendant is debarred from urging such a claim under the circumstances. Added to this there should also be the fact that the quantities were enormously increased, in some instances, as much as 100 per cent. It is utterly impossible to admit that the parties contemplated any such increase when they agreed to a clause so strict as the one relating to delays. Moreover, some of the minor delays were caused by the company, and according to the current jurisprudence, this should justify us in rejecting the conclusions of the company defendant.

The first judgment should also be maintained as to the demurrer of the defendant, which was duly dismissed, but in my opinion, it should be altered as to the amount granted to the plaintiffs and reduced by the sum of $33,055.37.

Demers, J. DEMERS, J., concurred.

Greenshields, J. (dissenting) GREENSHIELDS, J., dissented. *Judgment varied.*

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LONDON RAILWAY COMMISSION v. BELL TELEPHONE CO.

Board of Railway Commissioners, April 19, 1915.

1. RAILWAYS (§ II B—17*a*)—TELEPHONE WIRE CROSSINGS—LIABILITY FOR COST OF RAISING—SENIOR AND JUNIOR RULE.

Where the wires of a telephone company crossing the line of a railway company, which is changing its system of operation from steam to electricity, require to be raised, the railway being senior in construction, the telephone company must bear the cost of raising its wires where the fee of the property crossed is in the railway company, but at highways where the only right of the railway company is to cross with its tracks, the telephone company is senior with its construction to the railway company's new overhead wires and the latter must bear the cost of raising the telephone wires.

[*Hamilton Street R. Co.* v *Grand Trunk R. Co.* (*Kenilworth Avenue Crossing Case*), 17 Can. Ry. Cas. 393, followed.]

Statement APPLICATION for an order of the Board.

The Chief Commissioner. THE CHIEF COMMISSIONER:—The London Railway Commission has made application, in a number of cases, for Orders directing the Bell Telephone Company to raise its wires at

points where they cross the London & Port Stanley Railway Company's tracks. In this case, as well as in Files Nos. 25542.13, 25542.9, 25542.7, 25542.1, 25542.2, 25542.4, 25542.5, and 25542.3, the crossing occurs along the line of the public highway. In some other instances, the file does not shew that the crossing is on a highway, and it may well be that the crossing occurs over the private right of way of the railway company at the other points.

The London & Port Stanley Railway Company is changing its system of operation from steam to electricity. The electrical system the company is adopting is the overhead catenary, with the result that the present telephone construction has to be changed and the telephone wires changed at these crossings, and new poles put in, so as to provide proper clearance for the new railway overhead construction.

There is no reason why orders should not be made in each case, directing the Bell Telephone Company to change its plant at the points in question, as requested. The Bell Telephone Company, however, claims that the applicant should be at the cost of this work, and relies on paragraph No. 6 of the Board's Standard Conditions and Specifications for Wire Crossings. The railway company claims that its railway was constructed and in operation shortly after 1853, and was operating at the crossings in question long prior to the erection of the Bell Telephone Company's plant and equipment. The applicant states that it is senior to the Bell Telephone Company, and that, as changes which have been made are necessary for the proper operation of its line, the Bell Telephone Company should be at the cost of making the necessary change in its system.

In so far as any crossings over the actual right of way by the applicant are concerned, I am of the opinion that the London Railway Commission is correct in its submission, and that its seniority must prevail. The fee of the property crossed by the wires of the Bell Telephone Company in this instance, is in the railway, and, under the Board's practice, the right of crossing that the Board has permitted over the railway company's right of way must be subject to the reasonable exercise by the

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railway company of its proper rights, and as permitted by the Board.

In so far, then, as these crossings are concerned, an order will go that the work should be required, at the expense of the Bell Telephone Company. The larger number of crossings, however, consist of cases where the plant of the Bell Telephone Company is built, under the authority of the Dominion Act, along the highways, the wires crossing the railway construction along the line of the highway crossing. In this instance, so far as the record shews, the fee is in the municipality, with the right in the railway company to cross the highway with its track. When the crossing was first occupied by the Bell Telephone Company, this was the only right which the London & Port Stanley Railway Company had. It had at that time no right to cross the highway with wires, or to put any obstruction on the highway, except as authorized by the Railway Act and necessary for the purpose of carrying the railway, which was then operated by steam, over the highway.

Railway companies, under such circumstances, have no rights outside of the order of the Board, conferring the right of crossing, which right is confined to the actual work required to be done. So that a railway company, in case an elimination of the grade crossing is considered, with a one hundred-foot right of way on each side of the highway and only one track authorized across the highway, would, as of right, only be entitled to a consideration of the single track. *Re Hamilton and Grand Trunk Railway Company, Kenilworth Avenue Case*, File No. 23753.

While, therefore, at these highway crossings, the track of the London & Port Stanley Railway Company is senior to the construction of the Bell Telephone Company, the new overhead work requiring the change was not authorized at the time the Bell Telephone Construction took place, with the result that the railway company's new overhead work is junior to the Bell Telephone Company's construction, and the costs of all changes rendered necessary for the convenience of the new railway construction at highway crossings, must, therefore, be paid by the applicant.

Assist. Chief Commissioner.

THE ASSISTANT CHIEF COMMISSIONER concurred.

VANCOUVER BREWERIES LTD. v. DANA & FULLERTON.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. November 2, 1915.

1. LANDLORD AND TENANT (§ II D—30)—LESSOR'S FAILURE TO IMPROVE—FORFEITURE OF LIQUOR LICENSE—TERMINATION OF LEASE.

The forfeiture of a liquor license resulting from the failure of a lessor to improve the leased premises in accordance with a municipal regulation, as required by a covenant in the lease, does not in the absence of a provision to that effect express or implied, put an end to the lease so as to relieve the lessee from liability for rent thereunder.

[*Hart's Trustees* v. *Arrol*, [1903] 6 Sess. Cas. 36; *Grimsdick* v. *Sweetman*, [1909] 2 K.B. 740, followed; 25 D.L.R. 508, 21 B.C.R. 19, affirmed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, 25 D.L.R. 508, 21 B.C. R. 19, affirming the judgment of Morrison J., at the trial.

Lafleur, K.C., and *Harvey*, K.C., for the appellants.

Wallace Nesbitt, K.C., for the respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C. J.:—This is an action by the respondents (plaintiffs) to recover the rent of certain hotel property. The defence was that by certain covenants in the lease the plaintiffs or their assigns undertook to enlarge the premises so as to comply with the by-laws and regulations of the city governing places for which liquor licenses were granted. Their defence alleges that by those regulations an enlargement of the premises and certain structural changes with respect to heating, lighting, etc., were required. The plaintiffs refused to make the necessary improvements and as a result the appellants lost their license. They thereupon gave up possession and refused to pay rent and counterclaimed for damages. The trial Judge gave judgment for the plaintiffs (respondents) and dismissed the counterclaim. The appellants (defendants) thereupon appealed to the full Court and their appeal was dismissed.

I am of opinion that the judgment below should be confirmed on the very short ground that the land and house, and not the license, were the subject-matter of the lease and the right of the tenant to occupy the house for any other purpose continued after the cancellation of the license.

The appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—I think this appeal must fail, being concluded by the decisions in the case of *Hart's Trustees* v. *Arrol*, [1903] 6 Sess. Cas. 36, and *Grimsdick* v. *Sweetman*, [1909] 2 K.B. 740. In the latter of these cases it was expressly held that in the case of premises leased and described "as a beer house and premises with

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bakehouse in the rear," with covenants on the tenants' part to continue the premises as a beer house at all times during the term of the lease, the non-renewal of the license has not the effect of putting an end to the lease and the defendant was, therefore, liable for the rent.

In the former (a Scotch case) the same principle was affirmed. That was the case of the lease of a shop for ten and one-half years for the purpose of the tenants "carrying on therein the business of wine and spirit merchants." It was held that the lease was not brought to an end by the loss of the license and the consequent failure of the purpose for which the shop was let.

The reasoning upon which the conclusions of the Courts were reached in both cases was that it could not be said there was a total failure of consideration for the tenant's covenant to pay the rent or that the leases had come to an end by the non-renewal or cancellation of the licenses. The tenant's obligation to pay rent stands unless it can be shewn against the landlord that he has failed to do something that he has undertaken and so disabled himself from enforcing the obligation.

In the case at bar it seems clear that the landlord has undertaken no obligation whatever as to the continuance of the license. He therefore has not disabled himself from enforcing the obligation of the tenant to pay the rent. The lease continues and the premises may be used by the tenant for other and different purposes than those evidently intended when the lease was entered upon.

Mr. Lafleur's contention was that if the license was cancelled, for any cause except the lessee's fault, the lease ended and the lessee ceased to be liable for rent under it, but that contention is at variance with the principle on which the cases above referred to were decided and which commends itself to me as sound. Appeal should be dismissed with costs.

Idington, J.

IDINGTON J.:—The respondents, as lessors, recovered judgment against appellant upon the covenant to pay rent, contained in a lease dated November 15, 1905, whereby the lessors demised certain lands, described by metes and bounds, in Vancouver, for a term of years.

The premises so demised had then a building thereon used as a hotel duly licensed, until July 1, 1913, from year to year, to sell

intoxicating liquors therein. At the expiration of the year ending upon said date the duly constituted authorities in that behalf refused to grant any such license thereafter for said hotel. The appellant contends that thereby the lease was terminated and it as lessee was not to be further liable upon the covenant to pay rent. It insists that the original parties to said lease, in contracting therefor, contemplated that the premises so demised should be used only as a hotel so licensed. Counsel for it points out that in beginning the description of the land demised, the words, "all and singular the hotel and building situate," etc., and after giving the metes and bounds of the property, uses the words "which premises are now known as 'The Royal Hotel,' and formerly known as the 'Gambrinus Hotel,' together with the appurtenances thereto belonging," and that, coupling those and other like expressions with the covenants which follow relative to the license and the possible requirements which the retention of this house on the list of licensed hotels might involve, there is clearly implied a condition that upon the lessee's failure to obtain a license the lease should end.

It was easy to have expressed that intention, if existent, relative to its termination and quite as obviously a necessary thing to have expressed as was the possibility of destruction by fire and what was to happen in that event.

This express provision for the contingency of destruction by fire and absence of a like provision relative to the contingency of loss of license, seems to exclude the possibility of finding in the instrument any implied condition such as contended for.

It is further to be observed that the law never recognized the lessor as entitled to obtain a license. It is only the lessee who can be licensed. He is licensed to sell intoxicating liquors in the building in which he is the lessee. And as a condition precedent to his obtaining such a license he must be the lessee or owner of a property whereon are buildings which conform with the requirements of the law in that regard.

There was no lease of the license at all possible and none such existed, though mutual covenants were framed and entered into whereby the lessor might possibly assert a claim to the license at the expiration of the term or forfeiture of the lease, or prevent a transfer of the license against his will. The like devices have

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Idington, J.

long been resorted to by those who unhappily are proprietors of hotel property, but, whether effective or not, they neither expressly nor impliedly have any relation to the determination of the term of the demise unless expressly made so.

The license only issues for a year. It may be lost—as has happened—one year and be renewed the following. The hotel business proper can go on without a license. It might be argued that a tenant under a lease worded as this, must continue to carry on a hotel whether it paid to do so or not. Without an obligation relative thereto, I should think there was no such condition or covenant implied by mere words of description such as these parties have used. In this case words are used binding the lessee to obtain if he can, a license to be paid for by the lessor.

It is the land which is demised and in absence of stipulation to the contrary, it would be competent for the tenant to use it for a residence or for the purpose of carrying on any business neither expressly nor impliedly prohibited. As to cases cited they are for the most part entirely inapplicable to the question raised.

The expression of Blackburn, J., in *Taylor* v. *Caldwell*, 3 B. & S. 826, at p. 832, relied upon by Mr. Harvey, of counsel for the appellant, as intimating that the words "letting" and "rent" were of no consequence must be read in connection with the whole of what he says and in light of what he concludes. It is, as was usual with him, the very substance of the thing he looked at and into, as it were, and he concluded there was in that case no demise.

The broad distinction in our law between a demise and a mere license has to be borne in mind in looking at many such like authorities and the point of view taken by Lord Blackburn cannot be safely discarded in doing so. I think the appeal should be dismissed with costs.

Duff, J.

DUFF J.:—The appellants' contention, reduced to its simplest terms, is that the covenent to pay rent was subject to an implied condition having the effect of putting an end to the obligation to pay rent on the premises ceasing to be licensed premises owing to causes not arising from the fault of the lessor or lessee. It is not disputed that such a condition, if it can be implied, must be a condition affecting the existence of the term itself, that is to say, extinguishing the term upon the lapse of the license. There might have been a good deal of force in the appellants' contention

if the lease had expressly or impliedly required the lessee to use the demised property only as a licensed hotel; but no such restriction is expressed in the lease and there is nothing, I think, from which such a restriction can be implied.

It may be assumed that the parties did contract, both of them, in the expectation that the premises would continue to be licensed to the end of the term, but that is not a sufficient ground upon which to rest the implication of a condition such as that suggested. I find it impossible myself to say that the lessor and the lessee if they had contemplated the possibility of the license being cancelled during the term, must necessarily, as reasonable business men, have made such a condition a part of their contract. Having regard to the decisions, in analogous questions as between lessor and lessee, I think I cannot say that judicially; *e. g.*, *Paradine* v. *Jane*, Aleyn 26.

Duff, J.

The appellants rely upon the principle of *Taylor* v. *Caldwell*, 3 B. & S. 826, and *Appleby* v. *Meyers*, L.R. 2 C.P. 651, which principle was implied a few years ago in number of cases; *Krell* v. *Henry*, [1903] 2 K.B. 740; *Chandler* v. *Webster*, [1904] 1 K.B. 493; *Herne Bay Steam Boat Co.* v. *Hutton*, [1903] 2 K.B. 683, and the effect of these cases has been stated in a book which has a high reputation for accuracy, in the following words:—

> (*n*) Where from the nature of the contract it is clear that the contract is based upon the assumption by both parties to it that the subject matter will, when the time for the fulfilment of the contract arrives, still exist, or that some condition or state of things going to the root of the contract and essential to its performance will be in existence,the non-existence of such subject matter or of such condition or state of things when the time for the fulfilment of the contract has arrived, affords, in general, an answer to the claim for any further fulfilment of the contract, and also to one for damages for the failure to further carry out the contract.

Bullen & Leake's Precedents of Pleadings, 7th ed. at p. 494.

This principle is not sufficient for the appellants because it cannot be contended that the continuance of the license is essential to the performance of the contract.

The principle has not hitherto, moreover, been applied in the case of a demise of land under which possession has been taken and a term has become vested in the tenant.

ANGLIN J.:—If, as is undoubtedly the case, under English law, *Belfour* v. *Weston*, 1 T.R. 310; *Holtzapffel* v. *Baker*, 18 Ves. 115; *Counter* v. *MacPherson*, 5 Moo. P.C. 83, at 104-5, the destruction

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by fire or tempest of property demised does not terminate the lease or afford a defence to the tenant in an action for rent, I cannot understand how the mere refusal of the authorities to renew a license to sell liquor upon premises leased for the purposes of a hotel can, in the absence of an express condition in the lease, have that effect. *Krell* v. *Henry*, [1903] 2 K.B. 740, and cases like it are distinguishable on the ground that in them the right of the tenants to possession of the premises was conditional upon the existence of a state of things which became impossible. Although, no doubt, different in some of its circumstances, the case of *Grimsdick* v. *Sweetman*, [1909] 2 K.B. 740, relied upon in the Court of Appeal, appears to be in point, and the Scotch case of *Hart's Trustees* v. *Arrol*, [1903] 6 Sess. Cas. 36, there cited and specially referred to by Mr. Nesbitt, is, I think, indistinguishable. There has not been a total destruction of the subject-matter of the lease—the land and the house upon it remain—and the authorities do not warrant the implication of a condition that if the license should be taken away the lease should terminate. I agree in the view of Jelf, J. (*Grimsdick* v. *Sweetman*, [1909] 2 K.B. 740, at p. 747), that:—

> It would to my mind be a most extraordinary thing to say that because the licence has been taken away the tenant has no right to continue to live in the house.

Yet that would be the result if the cancellation of the license were to terminate the lease. I prefer not to rest the disposition of this case upon the ground that because the non-renewal of the license was something which the tenant should have anticipated and provided against, he cannot treat it as entitling him to cancellation of the lease. This test, formulated in *Baily* v. *De Crespigny*, L.R. 4 Q.B. 180, and referred to in *Krell* v. *Henry*, [1903] 2 K.B. 740, seems to me unsatisfactory—at least I am unable to understand why it should not have been applied in such a case as *Nickoll & Knight* v. *Ashton, Eldridge & Co.*, [1901] 2 K.B. 126, if it is decisive.

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

Brodeur, J.

BRODEUR J.:—The relations of the parties are those of lessor and lessee. The question is whether the non-renewal of the license of the hotel entitled the appellants to repudiate the lease and refuse to pay rent.

It had been stated in the defence that the non-renewal of the

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license has been caused by the fault of the lessor. But the case remains now to be considered only upon the construction of the contract.

It seems to me clear that the parties had not contracted on the basis of the existence of a liquor license. If a warranty had been stipulated on the part of the lessor against the non-renewal of the license, then he might be liable, but the parties did not so stipulate, and no such covenant could be implied; for in the case of damage by fire a suspension of rent was stipulated. If the contracting parties had also desired that in the case where the license would not be granted the rent should not be paid, then they would have mentioned it.

I am unable to distinguish this case from the *Grimsdick* v. *Sweetman*, [1909] 2 K.B. 740 case decided in 1909 in England. By an indenture of lease, certain premises described as "all that beer house and premises" were demised. The house had been licensed as a beer house for a great number of years. But the renewal of the license was refused under the Licensing Act. In an action to recover rent due, it was held that the non-renewal of the license had not the effect of putting an end to the lease and that the defendant was, therefore, liable for the rent.

Appeal dismissed.

SEATTLE CONSTRUCTION & DRY DOCK CO. v. GRANT, SMITH & CO.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. March 7, 1916.

1. EVIDENCE (§ V—505)—DEMONSTRATIVE EVIDENCE—SAMPLES OF SUNKEN WRECK—COURT'S DISCRETION AS TO ADMISSIBILITY—REVIEW.

Refusing to permit samples of the hull from the wreck of a floating dry dock to be taken for the use at the trial is within the discretion of the trial Judge under r. 659 (B.C.) and therefore not reviewable, although the preferable course would be an order for survey or inspection of the res.

[*Centre Star Mining Co.* v. *Iron Mask*, 1 M.M.C. 267; *Star Mining Co.* v. *White Co.*, 9 B.C.R. 9, 1 M.M.C. 468, referred to.]

Statement

APPEAL by defendant from an order of Morrison, J.

Bodwell, K.C., for appellant.

Maclean, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss this appeal. The Judge exercised his discretion in refusing to permit samples of the hull of the floating wharf (now sunk), to be taken for use at the trial, and I cannot say that that discretion was not rightly exercised. In saying this I do not wish it to be taken that I am of the opinion

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that it would be proper in any case to permit samples to be taken from a structure of this kind, I find it unnecessary to come to a settled opinion on that point in this case, but to me it sounds rather anomalous to speak of taking samples of a ship, for instance, or of the hull of a ship, or even of planks or pieces of planks from the hull for the purpose of exhibiting them in court. If such a course is permissible under the "sample" rule it should be ordered with great caution. It seems to me the preferable course is to permit an inspection and survey.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal, on the ground that the matter is one largely in the discretion of the Judge below.

Martin, J.A.

MARTIN, J.A.:—This is an application to take samples from the wreck of the floating dry dock in question which is now lying submerged in Esquimalt Harbour. Nothing was said in the summons about an order for inspection of the *res*, which is something quite apart from the taking of samples which in turn does not in general necessarily involve inspection, properly so called, nor does it in particular involve it in this case. All that I feel called upon to say is that it appears from the meagre materials before us that this matter is obviously one which under rule 659, was peculiarly within the discretion of the learned Judge below and I do not think we should be justified in interfering with his exercise of it. There is a series of instructive decisions under the old rule 514, identical with 659, on inspection and experimental work in mines in *Centre Star Mining Co.* v. *Iron Mask Mining Co.* (1898), 1 M.M.C. 267; and *Star Mining Co.* v. *Byron N. White Co.* (1902), 9 B.C.R. 9, 1 M.M.C. 468, and at 513.

With respect to the affidavits filed on the point of an alleged agreement between the solicitors to allow inspection, I express no opinion because that, as above noted, is an application of a different kind and should not be interjected into this one.

Galliher, J.A.

GALLIHER, J.A.:—Without deciding whether O. 50, rule 3, applies to a case of this kind, upon which I have some doubt, I am not inclined to interfere with the discretion of the Judge below on the material that was before him, and would dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I would dismiss the appeal—and as at present advised I am of the opinion that the case is not one in which it would be permissible to direct that a sample be taken—however, the matter should be open to be passed upon later upon a

further application before or at the trial—and the dismissal of this appeal should be, in my opinion, without prejudice to any such application.

Appeal dismissed.

SUDBURY BREWING & MALTING CO. v. CANADIAN PACIFIC R. CO.

Board of Railway Commissioners. April 7, 1915.

1. CARRIERS (§ IV A—515)—MILLING-IN-TRANSIT PRIVILEGE—BY-PRODUCT OF BREWERIES.

No instance can be found where a milling-in-transit privilege on the by-product has been granted, apart altogether from the main product, a brewing company, therefore, is not entitled to a milling-in-transit privilege on the offal of malt grain carried by the respondent on its line from Fort William to Sudbury, and there brewed in the applicant's brewery.

2. CARRIERS (§ IV A—515)—MILLING-IN-TRANSIT PRIVILEGE—UNJUST DISCRIMINATION.

Shippers are not entitled to a milling-in-transit privilege as a matter of right, and its allowance in the public interest by carriers to shippers in one section must be without unjust discrimination to shippers in another section served by its line.

[*Koch* v. *Pennsylvania R. Co.*, 10 I.C.C.R. 675; *Ontario & Manitoba Flour Mills* v. *Canadian Pacific R. Co.*, 16 Can. Ry. Cas. 430, followed.]

APPLICATION for an order.

Statement

THE CHIEF COMMISSIONER:—This is an application made by the Sudbury Brewing & Malting Company for an order of the Board directing that a milling-in-transit privilege should be applied on the "malt grain" carried by the Canadian Pacific from Fort William to Sudbury and there brewed in the Applicant's Brewery.

The Chief Commissioner.

The real question is the reduced rate on the dried grains, or as is termed the "offal" after the brewing operation has been completed, and which becomes a stock food.

The company is, of course, getting the local rates on the beer manufactured, and the applicants claim that, under such circumstances, it is only just that they should be able to ship the offal on the low through rate.

While, in the first instance, I was of the view that, owing to the fact that this feed came into competition in the East with the feed produced by the offal from mills, some relief could be granted the applicants; but on further considering the principles governing the milling-in-transit privilege, I have been obliged to change my opinion.

After all, the milling-in-transit privilege is just what it

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The Chief Commissioner.

says. It is a privilege and not a right. So much so is it a privilege that when the Interstate Commerce Commission, for example, first commenced its work, it seemed to be very doubtful whether or not the practice should be allowed to be continued at all. As I read their decisions, it probably would not have been continued if it had not been for the fact that the country's business had so long enjoyed the right and so many plants had been built at points which could not well continue operations if the right was removed, that the Commission thought that, in the public interest, the right of the railway companies to grant the privilege must be recognized, subject, of course, to the limitation that discrimination must not be practised.

Koch v. *Pennsylvania Railroad Company*, 10 I.C.C.R. 675, states the principle as follows:—

"Shippers are not entitled as a matter of right to mill grain in transit and forward the milled products under the through rate in force on the grain from the point of origin to the point of destination."

Under the practice of the Interstate Commerce Commission, however, the allowance of the privilege by the carrier to shippers in one section must be without wrongful prejudice to the rights of shippers in another section served by its line.

The judgment of the Board in the application of the Board of Trade of Montreal for an Order directing the Canadian Pacific Railway Company to furnish tariffs covering milling-in-transit arrangements for corn received at Montreal by rail from Georgian Bay elevator ports, and from Detroit, etc., deals with the question as follows:—

"We cannot require a railway company to establish a milling-in-transit rate on anything. It is optional with them to do it. If they choose to do it themselves, then they may come under our jurisdiction if it discriminates against anybody. But in the absence of any milling-in-transit rate on corn for local consumption, I do not see how it can come under our control at all. We cannot require them to put in such a rate as I understand it. If they do it, and then if discrimination follows, it would come under the discrimination clause."

On the basis of this question of discrimination, and in view

of milling-in-transit rates at other points on grain shipments, a milling-in-transit rate was required to be put in by the Board at Sudbury. This decision goes to the point of recognizing a discrimination as between millers, and to require the extension of the tariffs which the railway company has put in at other points under exactly the same conditions and circumstances and exactly for the same industry (see judgment of Assistant Chief Commissioner in *Ontario and Manitoba Flour Mills* v. *Canadian Pacific Railway*, 16 Can. Ry. Cas. 430). For example, the movement of the barley that the applicants are interested in may be over the Canadian Northern to Fort William. Before reaching that point the barley has been turned into malt, or as the applicants style it, "malt grain"; so that, so far as the Canadian Pacific is concerned, they receive not barley, but "malt grain" in the first instance; and as the applicants contend, the grain is entitled to one milling-in-transit privilege on each railway at least, the Canadian Pacific Railway Company should be obliged to grant it after the brewing operation has taken place.

I am unable to give effect to this argument. To my mind the furthest that the position can be urged from the applicants' standpoint is on the question of discrimination and discrimination alone. Can it be said that it is discrimination to give a milling-in-transit rate to a miller and refuse it to a brewer? The object of the brewing operation is certainly not the manufacture of feed. If the brewer is discriminated against, why not the manufacturer of sugar beets or starch. Why should not the sugar beet manufacturer get the special privilege on his dried beet pulp which may be used for feed purposes; or the starch manufacturer get the low rate on the by-products of the corn which he has brought into his factory and which, again, may be used for the purposes of feed.

The review that I have been able to give the authorities has not enabled me to find any case where an order as asked extending the privilege to breweries has ever been made. To grant it would seem to be to adopt a new principle which logically would have to be carried to such a point as to make such inroads on revenues of companies as to seriously embarrass their operation.

What is asked for here is distinct from what is granted under

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Chief Commissioner.

the transit privilege. The applicant asks for transit on the by-product when there is no transit privilege on the main product —the beer. In the milling-in-transit privilege it is because a transit privilege is provided for on the main product that it is also provided for on the by-product. One rule under the Canadian Pacific Railway all-rail milling-in-transit tariff provides that, for each car of grain in, a carload of manufactured product must be shipped out within ninety days. If, for example, the flour were sold locally and only the by-product shipped out, then if ten cars of grain were received inward and only five carloads of by-products shipped out, the miller would pay the local rate on the other five carloads of grain, which, when ground, went into local consumption, and would get the balance of the rate, plus the stop-over, only on the five cars of offal, or by-product, re-shipped.

While, in the example given above, it is the by-product which is shipped out and gets the advantage of transit, it is a case of the greater including the less. The origin of the milling-in-transit privilege on flour was concerned with facilitating the flour movement, not the by-product movement. But the former having been provided for, the latter was included. In exceptional cases, as indicated above, it may be that the by-product alone moves on transit, yet it is abundantly clear that it is the privilege granted to the main product which fixes the basis of the privilege.

The tariffs have been checked, and no example appears of the transit privilege being granted a by-product, apart altogether from the main product; and the Board is not justified in granting the extension asked for.

Assist. Chief Commissioner. Com. McLean.

THE ASSISTANT CHIEF COMMISSIONER and MR. COMMISSIONER MCLEAN concurred.

NOTE.

In *Douglas & Co.* v. *Illinois Central Ry. Co. et al.*, 31 I.C.C.R. 587, it was held that the denial to the complainant of the privilege of milling corn into starch under a milling-in-transit toll, the right being granted to other industries at Grand Rapids and elsewhere to mill corn into other uncooked products, does not constitute unjust discrimination under sec. 2 of the Interstate Commerce Act, nor undue prejudice under sec. 3 of that Act.

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S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. May 29, 1915.

1. RECORDS AND REGISTRY LAWS (§ III D—30)—REGISTRATION OF SUBSTITUTION—EFFECT OF SUBSEQUENT SALE UNDER EXECUTION—TITLE ACQUIRED.

A judgment creditor, who becomes the purchaser at a sheriff's sale of land under execution against an institute subsequent to the registration of the substitution, the will creating the substitution not having been registered before an abandonment by the institute, does not acquire a superior real right to the land as against the rights of the substitute.

[Arts. 938-941, 950, 953, 962, 411-412, 2090, 2091 Que. C.C. and art. 781 C.P.Q., referred to; *Vadeboncœur* v. *Montreal*, 29 Can. S.C.R. 9, distinguished; *Trudel* v. *Parent*, 2 Que. K.B. 578, referred to; 19 Rev. Leg. 444, affirmed, except as to amount of accounting.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, 19 Rev. Leg. 444, affirming the judgment of the Superior Court maintaining the plaintiff's action with costs.

A. Geoffrion, K.C., and *G. St. Pierre*, for appellant.

Mignault, K.C., and *Erroll Languedoc*, for respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J. (oral):—This appeal is dismissed with costs subject to a modification of the judgment appealed from directing that all questions as to amounts to be allowed the appellant for improvements and whether he is chargeable with rents, issues and profits from September 19, 1907, or some later date, shall be disposed of in the Superior Court after the *expertise*.

Idington, J.

IDINGTON, J.:—This case has been argued twice and as result of due consideration of all that has been urged in the somewhat varying arguments, I think this appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The registration referred to in each of the arts. 938, 939, 940, 941 and 950 of the Civil Code is, in my judgment, the same registration; that is to say, registration at the registry office of the domicile. It is not registration affecting immovables as such, but registration necessary to make operative an instrument creating a substitution which is unopened. I think the effect of arts. 950 and 953 of the C.C. and 781 of the Code of C.P. is that an unopened substitution registered in the sense mentioned, that is to say, pursuant to art. 941, C.C., is not affected by a sale under execution except in those cases provided for in art. 953, C.C. I think that is the effect of the explicit provisions of these two articles; and I think the reasonable conclusion is that to apply art. 2090, C.C. (relating to im-

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movables as such), in such a way as to prejudice rights otherwise arising from such registration would be opposed to the policy of the law. Art 781, C.P.Q., it may be observed, is an article dealing primarily with procedure and it ought to be construed as far as reasonably possible so as to effectuate rights resting upon the provisions of the Civil Code relating to substantive law. It must be read with art. 953, C.C., when the effect of a sale under execution upon an unopened substitution is in question and with art. 1447, C.C., when it is a question of customary dower. *Vadeboncœur* v. *City of Montreal*, 29 Can. S.C.R. 9, as I read it, does not proceed upon a construction of art. 781, C.P.Q., alone, but chiefly on the provisions of the Special Act upon which the respondent in that case relied.

Anglin, J.

ANGLIN, J.:—The defendant attacks the judgment against him rendered by the trial Judge, and confirmed on appeal with a slight modification, on several distinct grounds with which I propose to deal. I shall, however, first state the material facts.

It is admitted that by the will of Donald McIntosh, who died in 1846, a substitution of the property in question was created, of which the testator's son Archibald McIntosh, who died in 1866, was the institute and first *grevé*, Donald J. McIntosh, who died in 1907, was the second *grevé*, and his son, Archibald McIntosh, the younger, now of age, is the ultimate substitute. A demand of abandonment was made on Donald J. McIntosh prior to January 17, 1891. Curators of his estate were appointed on January 24, 1891. On the same day the will of Donald McIntosh was first registered. Subsequently, in 1896, the defendant became a judgment creditor of Donald J. McIntosh and under his judgment procured a sale of the land in question by the sheriff at which he became its purchaser. Before paying his purchase money, however, he obtained an order that the other creditors of Donald J. McIntosh should give him security against disturbance of his possession of the property by any person taking title under the substitution of which he then had full notice; and he received such security.

The appellant now claims that because the will of Donald McIntosh was not registered before the abandonment by Donald J. McIntosh, the right of Archibald McIntosh as ultimate substitute is defeated by the provisions of arts. 2090 and 2091 of the C.C. which read as follows:—

2090. The registration of a title conferring real rights in or upon the immovable property of a person, made within the thirty days previous to his bankruptcy, is without effect; saving the case in which the delay given for the registration of such title, as mentioned in the following chapter, has not yet expired.

2091. The same rule applies to the registration effected after the seizure of an immovable when such seizure is followed by judicial expropriation.

In my opinion these articles have no application. The title with which they deal is a title in or upon the immovable property of the bankrupt. The title of Archibald McIntosh the younger as ultimate substitute is in no wise derived from Donald J. McIntosh. Neither is it "in or upon his immovable property." It is a title which comes directly from the testator who created the substitution, and it confers real rights in and upon his property. It is not as the property of Donald J. McIntosh that Archibald McIntosh the younger receives the land in question (from him only possession is taken), but as the property of his great-grandfather. (art. 962, C.C.)

Moreover, the title asserted by the appellant is under the sheriff's sale. He is not claiming in this proceeding under the abandonment or the bankruptcy; and I incline to think it is only persons claiming under the abandonment in bankruptcy and who have actually demonstrated by a judgment of distribution or other equivalent legal procedure that they have sustained prejudice or loss in consequence of the registration, who can attack it under art. 2090, C.C. *Trudel* v. *Parent*, 2 Que. Q.B. 578. The registration of the substitution was not a nullity. It was effectual from the date at which it was made. (Art. 941, C.C.) That was long before the defendant acquired his interest under the sheriff's sale.

While the claims of creditors of the institute, which ante-dated the registration of the substitution, may, when duly preferred, prevail against the interest of the substitute (arts. 938 to 942; 2086-7, and 2109-10, C.C.), it does not follow that upon the sale under an execution issued upon a personal judgment, such as was that obtained by the appellant against Donald J. McIntosh, in a proceeding in which the substitute or his representative was not impleaded (art. 959, C.C.), and there was no question before the Court of his interest, the title which passed to the purchaser included that interest. On the contrary, it is provided by art. 781 of the Code of C.P. that a sheriff's sale does not discharge

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the property from rights of substitution not yet opened, and art. 950, C.C., states that—

> Forced sales under execution . . . are likewise dissolved in favour of the substitute by the opening of the substitution, if it have been registered.

This obviously means "if it have been registered" before the sale takes place or, at all events, before delivery of judgment by which the sale is authorized. The registration of the substitution was effectual from the date at which it was made. (Art. 941, C.C.) It would therefore seem that all that was acquired by the appellant under the sheriff's sale (no attack having been made up to that time on the substitution or on the interest of the substitute, which had then been registered for several years) was the personal interest of the institute subject to the substitution. The purchaser under the title thus acquired cannot defeat the claim of the substitute.

The next contention of the appellant was that the substitution is void because it was not published as required by art. 57 of the Ordonnance de Moulins of 1566. He contends that the modifying declaration of November 17, 1690, was never registered by the Superior Council of Quebec and is therefore not in force in that province. In 1855, registration was substituted for publication, 18 Vict. ch. 101. The decision in *Bulmer* v. *Dufresne*, 3 Dor. Q.B. 90, at 92; Cass. Dig. (2nd ed.) 873, Cout. Dig. 1380, is conclusive on this point against the appellant. Art. 941, C.C., which is not new law (*Meloche* v. *Simpson*, 29 Can. S.C.R. 375, at 385), embodies the former provisions as to publication and registration and declares the effect of compliance with its requirements.

The appellant next charges that the registration of the will was defective because in the declaration the testator's death is stated to have occurred in 1866 instead of 1846. That mistake was a mere clerical error. It could have misled nobody because the same declaration gave the date of probate of the will as January 20, 1846. Such a mistake did not affect the validity of the registration.

Counsel for the appellant further contends that as the plaintiff's declaration in this action shews Archibald McIntosh the younger to be the heir of Donald J. McIntosh and no renunciation by him of the inheritance is alleged or proved, Archibald McIntosh must be deemed to have assumed the burden of his

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father's debts. It is not in his quality of heir to his father that Archibald McIntosh takes the property in substitution. The plaintiff's declaration alleges only the facts material to establish his title as substitute. It is true that those same facts would establish his heirship to his father. But they are not alleged for that purpose and he is not, merely because he claims and takes his great-grandfather's property as ultimate substitute, to be deemed burdened with his father's debts in default of shewing that he had made a renunciation of his father's estate. Moreover, as a minor he would have taken with benefit of inventory.

The appellant finally maintains that he has been wrongfully held accountable for the revenue of the property—by the Superior Court from the date when he acquired it; and by the Court of Appeal from the date of the death of Donald J. McIntosh. He asserts that his liability to account is only from the date of the commencement of this action, because he was then first notified of the death of Donald J. McIntosh by proceedings at law. (Arts. 411 and 412, C.C.) This question may well be left open to be disposed of in the Superior Court after the report is made on the *expertise* directed. The judgment should be modified accordingly. With this modification the appeal should be dismissed with costs, the appellant having failed on all his principal grounds of attack. No adequate cause has been shewn for disturbing the order of the Court of King's Bench as to costs—a thing which is very rarely done in this Court when we dismiss an appeal on the merits.

BRODEUR, J., dissented. *Appeal dismissed.*

Brodeur, J. (dissenting)

GOVENLOCK v. LONDON FREE PRESS CO.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Magee and Hodgins, JJ.A. December 9, 1915.

ONT.

S. C.

1. LIBEL AND SLANDER (§ III C—111)—NEWSPAPER CHARGING EXPULSION FROM RACETRACK FOR ASSAULT—JUSTIFICATION—TRUTH.

The plea of truth in justification for a libellous statement published in a newspaper that the plaintiff had been fined and suspended from association racetracks for assaulting the starter at a race-meeting, the innuendo being that the plaintiff had been guilty of an unlawful assault and indictable offence and of improper conduct as a horseman, is not sufficiently established where the evidence shews that the alleged assault was committed by another person, but the fine had been erroneously recorded against the plaintiff, or that on a previous occasion he was fined for irregularities on the track not in connection with the incident charged in the libel.

2. PLEADING (§ I N—111)—LIBEL ACTIONS — PLEA OF JUSTIFICATION — AMENDMENT.

The pleadings in a libel action must define the issue which is being

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tried, and a defendant, upon a plea of justification, is limited to proving the truth of his assertion, and cannot be allowed, to the prejudice of the plaintiff, to amend the plea and adduce evidence raising a totally different issue.

Statement

APPEAL by the plaintiff from the judgment of Meredith, C.J.C.P., dismissing an action for libel, upon the verdict of a jury. Reversed.

R. S. Robertson and *R. S. Hays*, for appellant.

J. M. McEvoy, for defendant company, respondent.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—The jury have found a verdict for the respondent. The libel charged was as follows: "Horseman fined for assault on Race Starter. Wm. Cudmore and Wm. Govenlock also suspended from track at Seaforth. Mitchell, May 24. William Cudmore and William Govenlock, of Seaforth, were fined $100, and both suspended from any association track by Mitchell Sporting Association this afternoon for assaulting the starter at the Victoria Day Races, Mr. N. H. Conley, of Toronto. Their horses, Patron Dillard and Ritchie, were also suspended." The innuendo was: "Meaning thereby that the plaintiff had been guilty of an unlawful assault and guilty of an indictable offence and of improper conduct as a horseman."

The important plea is No. 3, which is expressed thus: "In so far as the said words consist of allegations of fact, they are true in substance and in fact, save that the plaintiff did not assault Mr. N. H. Conley, but was fined by him for irregularities on the race-track."

If this means anything, it is a plea of justification of the libel as set out, except as to that part which indicates, if in fact it indicates anything of the sort, that the cause of the fine was an assault by the appellant on the starter and that the latter fined him for it. This plea is a peculiar one, but it was treated as an ordinary plea of justification, the learned trial Judge having ruled that the libel did not in fact allege that the appellant had assaulted the starter, but did allege that he was fined for assault. It was, no doubt, intended as a plea of justification as to part only, but it fails in not specifying the precise matters justified. It, however, is an admission to the benefit of which the appellant is fully entitled.

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The ruling alluded to, given in the charge to the jury, seems to me to leave out of account the admission in the plea that the statement that the appellant was fined for assault was not true, but that what he was fined for was "irregularities on the race-track"—quite a different thing.

The evidence shewed that the assault was committed, not by the appellant, but by Cudmore, and that in fact the fine was intended to be imposed upon Cudmore and another person present when the assault took place. This was not the appellant, but his brother. It was recorded, however, as against the appellant, and in fact remained against him until it was removed in Chicago, on the facts which I have stated becoming known.

The plea, if treated as one of justification simply, was disproved when it was shewn that the starter intended to fine some one other than the appellant, notwithstanding that he recorded the fine against him. If dealt with as its language requires, it is an admission to the same effect. Fining may and probably does include both the imposition by word of mouth, the adjudication in fact, and its record, but the mere recording against one individual of a fine intended for and pronounced against another, is not sufficient to establish it, if it had no real existence in intention.

The learned Judge's charge contains the following: "It is said that he was fined for assault. Isn't that true? Was he fined? Conley said that he was, and Martin has said that he was. Has any one said that he was not? . . . Are you able to find in it anything that is untrue?"

Conley in his examination said, in answer to questions from the trial Judge, as follows: "Q. Well, now, what did you fine them and suspend them for? A. I fined them and suspended Cudmore for striking me in the face, and I thought they were together. I saw a man standing there with him which I took for Govenlock."

The learned Judge accepted the evidence given that the appellant was not present when the assault took place and the fine was imposed. The jury have found for the respondent, in face of an admission and against evidence that the libel is untrue as to one part—clearly libellous under the circumstances

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—and the verdict cannot stand: *Lumsden* v. *Spectator Printing Co.*, 14 D.L.R. 470, 29 O.L.R. 293.

Evidence was admitted, I think improperly, of a previous fine of $25 imposed during the day for irregularities on the track, which fine was withdrawn; a fact that was clearly irrelevant, having regard to the explicit terms of the article published. It was calculated to suggest to the jury that, although the fine of $100 might have been improperly imposed, yet, having regard to the ruling quoted, i.e., that the libel did not charge an assault by the appellant, he was fined, and properly fined, for other things, and that the article was justified in stating that he was fined, when this explanation was given.

There is one remark made by the learned trial Judge from which I must respectfully dissent. That is, that the plea—i.e., the third plea—if inaccurate, did not bind the parties, and that they could amend the pleadings as they pleased. The pleadings in a libel action must define the issue which is being tried. Justification means one thing, and one thing only: i.e., that the libel is true as printed. If the parties can shift their ground during the trial, and evidence can be given, not under the limitations imposed by such a plea, upon the theory that the pleadings do not bind the parties, utter confusion may be caused and a general verdict one way or the other may mean a mistrial. Examples of this may be found in many cases. See *Brown* v. *Moyer* (1893), 20 A.R. 509; *Manitoba Free Press Co.* v. *Martin* (1892), 21 S.C.R. 518; *Jackes* v. *Mail Printing Co.* (1915), 7 O.W.N. 677.

The defendant upon such a plea is limited to proving the truth of his assertion, and ought not to be allowed, to the prejudice of the plaintiff, to adduce evidence which may raise a totally different issue. The right to amend is one thing, but the binding effect of an admission or a plea in a libel action should not be frittered away.

I think the judgment in appeal should be vacated and a new trial ordered. The respondent should pay the costs of the appeal, and the costs of the former trial should be dealt with by the Judge presiding at the new trial.

New trial ordered.

SANDERS v. FLICK.

B. C.

C. A.

British Columbia Court of Appeal, Irving, Martin, Galliher and McPhillips, JJ.A. March 7, 1916.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—"UNDERTAKERS" IN OR ABOUT CONSTRUCTION OF BUILDING—PIPING STORAGE PLANT.

The work of piping forms a necessary part of the construction of a cold storage plant, even where the building itself is completed, and persons engaged in that work come within the phrase of "undertakers," within the purview of sec. 4 of the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, which makes the Act applicable to "employment by the undertakers in or about the construction of buildings."

[*Mason* v. *Dean* (1900), 69 L.J.Q.B. 358, followed.]

Statement

APPEAL from the judgment of Murphy, J., in an action under the Workman's Compensation Act. Affirmed.

W. S. Deacon, for appellant.

A. M. Harper, for respondent.

Irving, J.A.

IRVING, J.A.:—I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—I find myself unable to distinguish this case from the principle involved in *Mason* v. *Dean*, 69 L.J.Q.B. 358, and *Plant* v. *Wright*, [1905] 74 L.J.K.B. 331. It is often a very nice point of fact to determine whether or no a piece of work can fairly be considered as part of the construction of a building. In the present case there is evidence on which it was open to the arbitrator to reach the conclusion he did reach, and therefore his view should be affirmed.

The appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—In determining this question I think it is important that we should consider the purposes for which this structure was being erected, *viz*, for cold storage and the manufacture of ice. It was in contemplation from the beginning that this piping had to be put in—in fact without it the building would have been useless for the intended purposes.

It was urged that the building as erected under the contract with Baynes and Horie was a completed building. It may have been a completed shell or outside structure but not a completed building for the purposes for which it was designed. The piping for these purposes was just as necessary as the outer structure and was attached to and formed a part of it.

The cases of *Mason* v. *Dean*, 69 L.J.Q.B. 358, and *Hoddinott* v. *Newton, Chambers & Co.*, [1901] A.C. 49, are in favour of the respondent's (applicant's) contention.

I would dismiss the appeal.

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McPhillips, J.A.

McPHILLIPS, J.A.:—The appeal in my opinion fails—it is not a case of installing machinery in no way connected with the construction of the building itself—the building at the time of installation was still in the course of construction—and upon the questions of fact the arbitrator, Schultz, J., has found that "the respondents (appellants) herein were undertaking a substantial and necessary part of the construction of a cold storage plant and refrigerator warehouse and were undertakers within the meaning of sec. 4 of the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, and the employment was one to which the said Act applies." Turning to the evidence it can well be said that there was sufficient evidence upon which this finding could be made. Upon the questions of law submitted to Murphy, J., by the arbitrator, and answered by that Judge in the affirmative—confirmatory of the arbitrator's decision—I am in entire agreement, the questions being rightly in my opinion answered in the affirmative. The building under construction was a cold storage warehouse, and to bring it to completion and capable of use as such, it was a matter of absolute necessity that the cold storage plant should be installed consisting of a very considerable plant which in its installation cannot really be said to not form a part of the construction of the building—as much a part thereof as in these modern days the heating plant would be installed and carried throughout a building consisting of piping, etc.—carried through the floors and rooms thereof—in fact to even a greater degree in the case of a cold storage plant as it is a very substantial part of the building itself—as without it the building would to a very great extent be wanting in usefulness. Counsel for the respondents (appellants) in a very able argument endeavoured to show that the respondents were in no way "undertakers" within the purview of the Act and relied greatly upon *Mason* v. *Dean*, 69 L.J.Q.B. 358; and *Percival* v. *Garner*, 69 L.J.Q.B. 824—that is distinguishing *Mason* v. *Dean* from the present case and relying upon the *ratio decidendi* of the decision and in particular relied upon *Percival* v. *Garner*—in my opinion, however, these two authorities do not assist the respondents in this appeal. In *Mason* v. *Dean*, Collins, L.J., at 361, said:—

I am of the same opinion. I think that the County Court Judge made a mistake as to the application of the case of *Wood* v. *Walsh* (68 L.J.Q.B. 492), to this case. It is the work on which the respondent was engaged and not that

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on which the workman was engaged, which it is material to consider. The arbitrator found as a fact that the work on which the respondent was engaged was work of construction, and I entirely agree with him. The words of the specification obviously embrace work which, in any fair sense of the word, must be called construction rather than decoration . . . . . Now, in this case, the workman was engaged in painting the ceiling of the theatre, but the particular work on which the workman was engaged is immaterial. In order to come within the Act, it is only necessary that he should be employed by the undertakers upon work and that the work of the undertakers shall be within the Act.

And at p. 360, in the same case, A. L. Smith, L.J., said:—

Now, it must be premised that the building on which the workman was employed was an uncompleted building and the work which was put into the hands of the respondent was for the purpose of bringing the building, which was in the course of construction, towards completion.

With reference to *Percival* v. *Garner*, *supra*, that was a case where the person sought to be charged with liability had merely supplied labour for the building—to the building owner— the "undertaker" within the meaning of the Act.

I would dismiss the appeal. *Appeal dismissed.*

LEWIS v. GRAND TRUNK PACIFIC R. CO.

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S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Brodeur, JJ. November 15, 1915.

1. MASTER AND SERVANT (§ II A 4—85)—NEGLIGENCE CAUSING DEATH OF ENGINEER—DEFECTIVE ROADBED—RUNNING AT PROHIBITED SPEED —PROXIMATE CAUSE.

A sink-hole due to the inherent weakness of the sub-soil of a roadbed, over which place trains were ordered by the railway company to be run at a slow speed, is not necessarily negligence *per se* and will not support the findings of a jury, that an accident causing the death of a locomotive engineer was caused by the defective roadbed and not having a watchman for same, where the real cause of the accident arose from the excessive and prohibited speed at which the deceased was running his train.

[19 D.L.R. 606, 24 Man. L.R. 807, affirmed.]

2. CONFLICT OF LAWS (§ I E 1—105)—ACTIONS EX DELICTO—PLACE OF ACCIDENT IN ANOTHER PROVINCE.

A legal obligation *ex delicto*, where the *res gestæ* giving rise to the obligation have occurred outside the territorial jurisdiction of a province, may be enforced in the Courts of that province, if a like obligation would have arisen, had the accident occurred within that jurisdiction; and a right of action by common law, accruing in Ontario, where the accident occurred, is enforceable in the Province of Manitoba where a similar right of action would have arisen.

[*Phillips* v. *Eyre*, L.R. 6 Q.B., applied.]

Statement

Appeal from the judgment of the Court of Appeal for Manitoba, 19 D.L.R. 606, 24 Man. L.R. 807, setting aside the judgment entered by Galt, J., on the verdict of the jury, and entering nonsuit.

C. R. Bethune and *W. M. Crichton*, for appellant.

H. J. Symington, for respondents.

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LEWIS v. G.T.P.R. CO.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The jury found that the death of Edwin R. Lewis was caused by the negligence of the defendant company, and to the question:—

In what did such negligence consist?

answered:—

A defective roadbed, and not having provided a watchman for the same.

Now negligence is defined in many ways, but perhaps for general use the best definition is that—

Negligence is the absence of such care as it was the duty of the defendant to use.

It is clear that "a defective roadbed" is no real answer to the question: "In what did such negligence consist?" A railway company may be negligent either in constructing or maintaining its railway and perhaps the answer of the jury is to be interpreted as a finding of one or other of these causes of negligence, though it is at any rate exceedingly vague.

It does not appear from the evidence that there is anything to support a charge of negligent construction of the railway. What are known as "soft spots" or "sink-holes" are necessarily encountered more or less frequently on a long line of railway; they are simply places where owing to the loose or shifting nature of the subsoil it is impossible to get a firm foundation on which to rest the railway track. It may be possible to overcome the difficulty, as has often to be done for buildings, by sinking piles, putting in concrete foundations or by other costly expedients. As long, however, as a railway is made reasonably safe, it is impossible to say that there is negligence if it is not constructed in the most perfect manner; a railway is never perfect, it is always being improved, and a new line of enormous length like the one in question in this case must necessarily embrace a number of weak and more or less dangerous places which can only be eliminated gradually after long experience of working the line. Such dangers are found not only in the track itself, but in its surroundings, for instance, the liability to land slides in cuttings where it is impossible to remove sufficient earth to ensure perfect safety.

As to the maintenance of the roadbed, it is shewn that the arrangements made for the watching of this particular spot necessitated the sectionmen going over it at least twice every day, and a gang of men were constantly employed keeping up the level of the track by filling up with gravel the depression caused by the

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passage of trains. Though trains had been constantly passing there had been no previous trouble at this place and an inspection after the accident shewed no unusual conditions in the track.

It would seem to me that this disposes of any negligence which could properly be covered by the verdict "a defective roadbed." There is no finding of negligence in the operation of the road, but it may be pointed out that though no negligence is to be attributed to the respondent company in the construction and maintenance of the railway, the company was bound to exercise due diligence in endeavouring to protect the public and its own employees from known dangers which required to be guarded against at particular places.

It is not suggested the company was not alive to its duties in this respect or that it failed to take precautions. We find that the engineer and conductor were each furnished with a copy of an order directing that speed was to be reduced at this sink-hole to 5 miles per hour. It is in evidence that the rule is that such an order is to be understood as meaning that the speed is not to exceed 5 miles an hour. Further, there was a "slow sign," that is, a board about 3 feet wide, standing out 15 feet from the right-hand side of the track on the engineer's side and that sign said: "Slow."

Lewis, the engine-driver, had passed over this place dozens of times and knew the conditions perfectly; so had other men and always with safety. How then did the accident happen? It seems to me, in the absence of better explanation, that it is impossible to disregard that offered by the respondent that it was caused by the train proceeding at a rate of speed that in the circumstances was too high. I do not propose to examine the evidence to try and ascertain what that rate of speed was, because it seems indisputable that it was over 5 miles an hour. The excessive speed of the train at this dangerous spot is, I think, the only plausible explanation of the accident, and for that excessive speed the deceased himself was responsible.

The presence of a watchman could not have had the slightest effect in preventing the accident since at the time there was nothing unusual in the appearance of the road and no reason for holding up the train; the engine-driver knew all that a watchman could have known.

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As I have said before I do not think that the answer "a defective roadbed" was any statement of an act of negligence on the part of the defendant; but any negligence there was could, I think, only have been that of the deceased engine-driver himself.

I agree with the reasons for judgment of Mr. Justice Perdue in the Court of Appeal for Manitoba, and I think that this appeal should be dismissed and judgment entered for the respondents (defendants), the whole with costs.

Davies, J.

DAVIES, J.:—Many interesting points were discussed at bar in this appeal raising the question of the right of a party to bring an action in one province of the Dominion to recover damages for injuries received in another province for which damages, if sued for in the latter province, the defendants would be liable. The questions debated covered alike the common law liability and that created under the Workmen's Compensation for Injuries Acts, and, if under the latter Acts, whether the language declaring that the action must be brought within a fixed time after the accident with a proviso

> that in case of death the want of notice should be no bar to the maintenance of such action, if the Judge should be of opinion that there was reasonable excuse for such want of notice,

extended to another province than the one legislating.

It seems to be conceded that such question must depend largely upon whether the question of notice required and the excuse for its not having been given is or is not of the essence of the right of action created by the statute.

In the view, however, which I take of the facts as proved and of the jury's findings upon them, I do not find it necessary to discuss or decide any of these questions.

Assuming the appellant's contentions to be sound—that she had the right to sue in the Manitoba courts—and that the judge of that court was competent to determine the question of there having been a "reasonable excuse" for the want of the statutory notice, the question to be determined is whether the defendant company had failed in its duty to provide a railway track or roadbed which could be safely used for the purpose of operating a locomotive thereon and in not having provided a watchman at the soft spot or sink-hole where the accident occurred.

The answer of the jury to the question:—

In what did the negligence of the defendant consist? was:—

A defective roadbed, and not having provided a watchman for the same.

The evidence shewed that at the time of the accident there was nothing unusual in the condition of the roadbed at that point which would have attracted a watchman's attention, if he had been there. A watchman in such circumstances could only have signalled to the deceased if there was anything unusual or symptomatic of danger in the conditions. The evidence is clear beyond question that there was nothing of the kind when the engine in question passed the spot, and, in view of the order to slow at the point in question to five miles an hour given to the deceased engineer, and the slow-board some distance back to indicate when and where he should begin to slow, the finding as to negligence in not having a watchman seems superfluous and without any grounds or evidence to support it.

Then as to the defective roadbed the finding is general and in no sense specific as to negligence on defendant's part.

The deceased engineer had been running over this spot every day for several months. The soft spot had been in existence ever since the construction of the road. Its length was about 50 feet and the depression of the rails as the trains passed over it at times was from two to four inches. There was a section gang looking after the spot and they had crossed it once or twice on that day. An examination of the track after the accident shewed that it was in proper alignment and some eight hours afterwards, on the train being hauled away, there was no depression of the track over the sink-hole or soft spot. This soft spot was protected by a slow-order of five miles an hour and by a slow-board sign some 2,000 feet from it. There was no evidence to shew that the depression in question was dangerous when the speed of the passing trains was confined to five miles an hour. A railway roadbed may be quite safe for a speed of five miles an hour, but be dangerous for a speed of eight or twelve miles or more.

The evidence, however, was conclusive that the commencement of the accident, where the front pony-wheels of the engine first left the tracks, took place before the engine reached the depression and that it completely passed over the depression, some 200 or 300 feet, before it left the roadbed and fell down the em-

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bankment. Some cause for the derailment there must have been happening at the place it did, other than the depression or any defect in the roadbed at the depression. The only reasonable suggestion offered is the deceased engineer's disobedience of his express orders as to speed and his continuance of a speed beyond the prohibited rate up to the time the pony-wheels of his engine left the track. As to the actual rate of speed he was running, there is the usual discrepancy between the evidence of the different witnesses. Most of them put it from 6 to 8 miles; one of them 12 miles. But not a single witness puts it as low as five miles an hour, the limit of speed he was ordered to run at.

After listening to the able arguments of counsel and the careful analysis of the evidence made by them and reading all the evidence called to our attention on the crucial point of the defendants' alleged negligence, I have reached the conclusion that there was no evidence to justify the jury's finding of negligence on the defendants' part "in a defective roadbed and want of a watchman for same" and that the real cause of the accident arose from the excessive and prohibited speed at which the deceased was running his train.

It was argued that the finding of the jury that the deceased by the exercise of ordinary care could not have avoided the accident amounted to a finding that the speed of the train was not beyond the five miles an hour his orders prescribed. But I think that is asking too much of the Court. No witness ventured the statement that the speed was as low as five miles, while the facts proved did not admit of any reasonable inference being drawn to that effect. I do not think the jury intended in this indirect way to find that the rate of speed was in accordance with the orders.

I would dismiss the appeal with costs.

Idington, J. (dissenting)

IDINGTON, J., dissented.

Duff, J.

DUFF, J.:—This appeal should be dismissed. There is not in my opinion any reasonable evidence to support a finding either:-

(1) That the track and roadbed at the place in question were, assuming the order as to speed to be observed, so dangerous as to make it negligence on the part of the company, *vis-à-vis* the appellant, to operate for traffic; or

(2) That it was the state of the roadbed rather than excessive speed which was the real cause of the most unfortunate and dis-

tressing accident in which the husband of the plaintiff met his death.

I refer to the argument on the question of jurisdiction for the reason only that silence might be construed as implying some doubt as to the jurisdiction of the Manitoba Courts to entertain the action. The effect of the provincial and Dominion legislation [chapter 12 of the Statutes of Manitoba, passed in the year 1874 (38 Vict.) and section 6 of chapter 99, R.S.C. (51 Vict., ch. 33)] is that *primâ facie* the law of England as it existed in the year 1870 is, for the purposes of this appeal, to be regarded as the law of Manitoba. By the law of England, speaking generally, a legal obligation *ex delicto* (where the *res gestæ* giving rise to the obligation have occurred outside the territorial jurisdiction of the English Courts) may be enforced in those Courts if, according to the law of England, a like obligation would have arisen had the scene of the *res gestæ* been within that jurisdiction; *Phillips* v. *Eyre*, L.R. 6 Q.B. 1., at pages 28 and 29. Nothing has been suggested to create a doubt that this is the law of Manitoba to-day. The argument founded upon the limited legislative jurisdiction of the province misses the mark. If there could be anything in it in the absence of the Dominion legislation above mentioned the argument would be disposed of by reference to that legislation. It follows, therefore, that if a right of action by common law (the law of England) became vested in the plaintiff in Ontario the obligation to which that right of action was attached would be enforceable in Manitoba. The fact that the plaintiff's right to sue in Ontario rests upon Lord Campbell's Act is really no objection because Lord Campbell's Act is in force in Manitoba: and it is literally true to say that if the scene of the *res gestæ* had been in Manitoba the right to redress independently of the Workmen's Compensation Act would not have been any less there than in Ontario. As to the enforceability of any obligation imposed upon the respondents by the Workmen's Compensation Act I have formed no opinion upon the point whether the provisions of that Act relating to notice and to dispensing with notice are of the essence of the employees' rights to such a degree as to make that right enforceable in Ontario only.

I think it is proper to add that acknowledgments are due to counsel on both sides for the very admirable way in which the appeal was argued. *Appeal dismissed.*

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HAYDEN, CLINTON NATIONAL BANK v. DIXON.

Alberta Supreme Court, Scott, Stuart, Beck and Hyndman, JJ. February 19, 1916.

1. BILLS AND NOTES (§ V B 2—135)—HOLDER IN DUE COURSE—BANK — PRESUMPTION AS TO KNOWLEDGE OF FRAUD—DIFFICULT COLLECTION AS CIRCUMSTANCE.

The mere fact that a bank, when acquiring a note, knew officers of other banks which have had difficulty in collecting from the same makers does not raise a presumption that the bank had acquired information that the notes were tainted with fraud; and even if a bank has knowledge at the time it acquires a note that other banks had experienced difficulty in collecting other notes of a similar character, that fact would not be sufficient to disentitle the bank to recover as a holder in due course.

[Sec. 58 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, considered; *Peters* v. *Perras*, 42 Can. S.C.R. 244, 1 A.L.R. 201, referred to.]

2. BILLS AND NOTES (§ IV A—85)—DISCRETION AS TO COSTS UPON NON-PRESENTMENT—HOW EXERCISABLE.

The Court, in exercising its discretion as to awarding costs under sec. 183 (2) of the Bills of Exchange Act, R.S.C. 1906, ch. 119, in the case of non-presentment of a note, should not deprive the plaintiff of his costs unless it appeared that the defendant had been in some way prejudiced by the note not having been presented.

[*Canadian Bank of Commerce* v. *Bellamy*, 25 D.L.R. 133, 8 S.L.R. 381, followed.]

3. INTEREST (§ I A—8)—WHEN RECOVERABLE ON NOTE—MATURITY.

Under secs. 134 and 186 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, interest on a dishonoured note is recoverable as part of liquidated damages from the time of the maturity of the note.

Statement

APPEAL from the judgment of Ives, J., in favour of plaintiff in an action on a promissory note, which is varied.

O. M. Biggar, K.C., for plaintiff, respondent.

Frank Ford, K.C., for defendant, appellant.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—The action is upon a promissory note for $875, made by the defendants on March 2, 1909, payable on December 4, 1913, to McLaughlin Bros. or order, at the Canadian Bank of Commerce, Red Deer, with interest at 6 per cent. The plaintiff claims to be the holder thereof in due course.

The defences relied upon are that the plaintiff is not the holder in due course, that the note was not duly presented for payment, and that there was fraud and misrepresentation on the part of McLaughlin Bros. in the transaction in respect of which the note was given.

The plaintiff joined issue upon these defences, but nevertheless admitted for the purposes of the action that McLaughlin Bros. could not recover from the defendants upon the note, and that the plaintiffs' right to succeed depended upon its being the holder in due course.

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Under sec. 58 of the Bills of Exchange Act, where it is admitted or proved that the making of a note is affected with fraud, duress or force and fear or illegality, the burthen of proof is upon the holder to shew that he is the holder in due course.

It may be open to question whether the admission of the plaintiff that McLaughlin Bros. could not recover upon the note is, strictly speaking, an admission that it was affected with fraud or illegality. No evidence of fraud or illegality was given by the defendants but, as it appears from the case, that both parties considered that the burthen of proving that the plaintiff was the holder in due course was upon it, the Court is, I think, justified in treating the admission as one which cast that burthen upon the plaintiff.

The note in question was given by the defendants in part payment of a stallion sold or agreed to be sold by McLaughlin Bros. to the defendants. That firm appears to have been extensive dealers in stallions at Columbus, Ohio, and other places in the United States. Notes taken by it in the course of that business have been a fruitful subject of litigation in this and some of the other provinces, and in actions brought upon them the defence of fraud was usually set up, but none of those actions were brought by the plaintiff.

The only evidence adduced as to the circumstances under which the plaintiff acquired the note in question was that of Mr. Willard, the president of plaintiff's bank. He states that the plaintiff is a U.S. National Bank, having its office at Columbus, Ohio, which has a population of about 225,000, that it has the largest capital of any bank in that city, that he was its assistant cashier from 1905 to 1913, and its president from the latter date, that on December 2, 1911, plaintiff advanced McLaughlin Bros. $10,000 upon their note and took from them at that time the note in question and other notes, amounting in all to about $12,000, as collateral security for the advance, that that firm carried a regular deposit account with the plaintiff which was discounting their own notes from time to time taking as collateral security, notes given to the firm by its customers, the total advances outstanding at any one time varying from a minimum of $20,000 to a maximum of $50,000, that, under the agreement between the firm and the plaintiff, the latter was entitled to hold the notes given as security for each advance

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as collateral security for all the advances, and that the firm is now indebted to the plaintiff for such advances to an amount in excess of the amount due upon the note in question.

The defendants contend that the plaintiff has not satisfied the onus cast upon it by sec. 58, that it has not given the best evidence that it was the holder in due course, and that there are suspicious circumstances disclosed in evidence which tend to throw sufficient discredit upon the transaction to warrant the Court in holding that the bank has not satisfactorily shewn that it was such a holder.

Apart from the note in question, the only documentary evidence of the transaction in which the plaintiff acquired the note, is a list of notes made out by McLaughlin Bros. dated on the day upon which the advance of $10,000 was made to them. It contains 16 notes including the note in question, the whole amounting to $11,960, and Mr. Willard states that it was the usual custom of the firm to furnish such a list of the collateral notes delivered to the plaintiff when obtaining advances. Defendants' counsel contended that the plaintiff's books should have been produced as they were the best evidence of the transaction. Mr. Willard gives as the reason for their non-production that they were too bulky to bring to the trial.

If, without the production of its books, the plaintiff could furnish satisfactory proof of the transaction, their production was unnecessary, although they might have corroborated Mr. Willard's evidence. His evidence is to the effect that the note was acquired by the plaintiff in the ordinary course of its banking business and under circumstances which would constitute it the holder in due course. True, he is unable to state with certainty that he personally made the advance in respect of which the note in question was given as collateral security, but he does state that, by virtue of his position, he handled all the transactions and, such being the case, he must have been in a position to know that the advance was made and the terms upon which it was made.

One of the circumstances relied upon by defendants' counsel as tending to arouse suspicion is, that the note was endorsed by McLaughlin Bros. "without recourse." Mr. Willard was unable to explain why it was endorsed in that manner beyond stating that the firm occasionally sold their notes outright and

endorsed them in that manner, and that the note in question may have been so endorsed before its delivery to the plaintiff.

I doubt whether the fact of the note being endorsed in that manner was a circumstance tending to discredit Mr. Willard's testimony or one which should have put the plaintiff upon inquiry as to the circumstances under which the note was made. In my view, it was not unreasonable that the plaintiff should have accepted the note so endorsed. It was not necessary that the plaintiff should hold the firm liable upon it as they were liable upon their note given for the advance.

Another circumstance relied upon by defendants' counsel as throwing suspicion upon the transaction under which the plaintiff acquired the note, is the fact that the list of notes referred to contains another note given by the defendants, presumably in part payment for the same stallion. Mr. Willard is unable to state what became of that note. He, however, states that when any of the collateral notes remained unpaid at maturity it was the custom of the firm to take them up and substitute current notes for them, and that the missing note was probably returned to the firm in that way. I doubt whether the plaintiff should be called upon to explain what became of it but, even if it should, the statement of Mr. Willard affords a reasonable explanation.

Still another circumstance is charged as suspicious by the fact that there is endorsed upon the note credit for a payment of $125, made by one Fitch, who is not one of the makers, and credit was given by McLaughlin Bros. for that payment in the statement of collateral furnished by them to the plaintiff. I cannot see that the endorsement of this payment would lead the bank to suspect that there might be something wrong with the note. It might reasonably assume that the payment was made by an agent of the makers.

Mr. Willard admits that he knew the officers of other banks and financial institutions which had acquired similar notes of McLaughlin Bros., and the reported cases shew that these officers must have acquired the knowledge that some of their notes were affected by fraud. Mr. Willard, however, states that at the time the plaintiff acquired the note in question, he had never heard of any fraud in connection with any of the firm's notes;

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that up to that time the plaintiff had not sued upon any of their notes and that, although the plaintiff had acquired hundreds of their notes in the ordinary course of its banking business, it never had occasion to sue upon them until the firm became financially involved in 1913, as the firm had up to that time taken up the collateral notes from time to time, either before or at maturity, and substituted others for them.

The mere fact that Mr. Willard knew officers of other banks which had acquired other notes payable to the firm and which may, by reason of allegations of fraud, have had difficulty in collecting from the makers, would not, in my view, justify a presumption that he had acquired from them the information that even some of the firm's notes were tainted with fraud. I doubt whether it is the custom of bank officers to give any information respecting their banking transactions to officers of other banks. The reasonable presumption is that they would refrain from doing so. Even if the plaintiff had knowledge at the time it acquired the note in question that other banks had experienced difficulty in collecting other notes of the firm, that fact would not be sufficient to disentitle the plaintiff to recover as holder in due course. It appears to have been so held by the Supreme Court of Canada in *Peters* v. *Perras*, 42 Can. S.C.R. 244, and 1 A.L.R. 201.

In my view, there is nothing in the evidence of Mr. Willard, or in the circumstances appearing in the case, which tends to discredit his testimony to the effect that the plaintiff became the holder of the note in due course in December, 1911, and the finding of the trial Judge that it was entitled to recover upon it should therefore not be disturbed.

The trial Judge gave judgment for the plaintiff for the amount of the note, less the amount of the payment endorsed upon it, with interest at 6 per cent. to its maturity, with costs of suit. He disallowed the plaintiff's claim for interest after maturity.

One of the grounds of appeal is that, as there was no evidence to shew that the note in question was presented to the defendants for payment, the trial Judge erred in awarding costs of the action to the plaintiff.

Sec. 183 provides that where the note is, in the body of it, made payable at a particular place, it must be presented at that place; but sub-sec. 2 provides that, in such case, the maker is

not discharged by the omission to present it for payment on the day it matures, but if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in in the discretion of the Court.

As the note in question is payable at a particular place, presentment to the makers is unnecessary and therefore its non-presentment to them would not be a ground for depriving the plaintiff of the costs of the action. The appeal on the ground of such non-presentment must therefore fail.

There is no evidence that the note was presented at the place of payment at any time before the action was commenced, and, even if this ground of appeal is construed as one raising the question of the effect upon the costs of the action of such non-presentation, I am of opinion that the defendants should fail upon it. If the note is not presented for payment at the place of payment the costs are left to the discretion of the Court and, if it should follow as a matter of course that, in every such case, the plaintiff should be deprived of his costs, there would be no discretion left to the Court to exercise.

There appears to be a conflict of authority upon the question of the effect of such non-presentation. The cases bearing upon it are fully reviewed in the judgment of the Supreme Court of Saskatchewan in *Canadian Bank of Commerce* v. *Bellamy*, 25 D.L.R. 133, 8 S.L.R. 381. In that case the Court held that the reasonable interpretation of this provision is, that parliament intended to make presentation unnecessary against the maker, but that, if he were sued before presentation and it appeared that he had funds at the place of payment sufficient to satisfy the note, the Court should award the costs against the plaintiff.

In my view, that is the proper interpretation to be placed upon the provision, except that I think the Court, in exercising its discretion as to costs, should not deprive the plaintiff of his costs unless it appeared that the defendant had been in the manner indicated in that case, or in some other, prejudiced by the note not having been presented.

The plaintiff has given notice of his intention to cross-appeal on the ground that the trial Judge should have given judgment for the plaintiff as well for interest from the maturity of the note until judgment.

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Under secs. 134 and 186 of the Act, where a note is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be: (*a*) the amount of the note, and (*b*), interest thereon from maturity, or, if the note is payable on demand, from the time of presentment for payment.

I think it clearly appears from this provision that the plaintiff is as much entitled to recover interest after maturity as he is to recover the principal. I would therefore allow the cross-appeal.

I would dismiss the defendants' appeal with costs and would direct the judgment in the Court below to be amended by awarding the plaintiff, in addition to the amount already recovered, interest at the statutory rate, from the maturity of the note until judgment. I would also give the plaintiff the costs of the cross-appeal. *Appeal dismissed; judgment varied.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee, and Hodgins, JJ.A. January 13, 1916.

1. BONDS (§ II C 1—29)—CANCELLATION — TERMINATION OF OFFICE—RATIFICATION OF ACCOUNTS.

A municipality cannot be compelled to cancel its treasurer's fidelity bond after the treasurership had come to an end and the treasurer's account audited and ratified.

[35 O.L.R. 39, affirmed.]

Statement

APPEAL from the judgment of Meredith, C.J.C.P., dismissing an action for cancellation of a fidelity-bond.

The judgment appealed from is as follows:—Although the matters involved in this litigation are things of frequent occurrence, and the one legal question upon which the rights of the parties depends is a simple one, it is said, on both sides, that no precedent has been found for this action.

The plaintiffs are, a former treasurer of the defendant municipality, and his sureties for the due performance of the duties of that office under the bond in question in the action.

Upwards of two years ago that treasurership came to an end, and the treasurer's accounts were duly audited, and that audit was adopted by the council of the municipality, and payment over, by the old to the new treasurer, was duly made accordingly.

The sureties subsequently sought to have the bond cancelled, but the defendants refused to cancel it; and now this action is brought to compel a cancellation of it.

The plaintiffs, not without some reason, object to remain—after the final audit and payment in accordance with it—as if under the obligation which the bond created.

But the defendants, not without some reason also, say that it is impossible to be quite sure that the audit covered all things, that sometimes debts and other liabilities remain concealed for years, even without misconduct, and so they cannot properly release the plaintiffs, or give up the bond, as long as it would be legally enforceable, should it be found there is yet something for which the treasurer should have accounted, but has not; and they point to the case of *County of Frontenac* v. *Breden*, 17 Gr. 645, as shewing an instance of that kind and the need for retaining the bond as long as it has any validity.

Ordinarily it would be said that there is no need for a release from an instrument the obligations of which have been satisfied, and which is not negotiable; that it is dead, in whomsoever's hands it may be.

But it may be made the basis of an unsuccessful, if not a successful, action upon it, which would not have been brought if there were a release in writing of its obligations or if it had been cancelled; and it might be urged as a ground of disqualification for office in the municipal council, as well as being otherwise hampering.

There is, therefore, something to be said on each side of the question, even in a case such as this, in which no one has much, if any, doubt that the bond could be cancelled without any loss to the municipality.

Upon principle I cannot understand why an action should lie to have a valid instrument, not negotiable, delivered up to be cancelled, unless there is some real danger of its being used for an improper purpose, to the loss, in some way, of the party seeking its cancellation.

The familiar practice of Courts of equity, in decreeing cancellation of valid instruments, was exercised only in cases where there was actual danger of their improper use to the injury of the party seeking cancellation. The subject is dealt with fully in the case of *Brooking* v. *Maudslay Son & Field* (1888), 38 Ch. D. 636; and the subject of declaratory judgments in *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1915] 2 K.B. 536.

But, however that may be in a case in which the instrument

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has fulfilled all its purposes, it is quite a different thing in a case such as this, in which there is a possibility that it has not. In such a case I know of no law which gives such a right of action.

To give effect to the plaintiffs' contention would be to put a legal obligation upon the obligee of the bond to make up all his claims when demanded and to be forever bound by them, so made, though it might have been impossible to have made them up with certainty. Such a limit may of course be put upon an obligee in the bond or by other binding agreement, but otherwise I know of no limits except those which statutes of limitations provide. The fact that some of the plaintiffs are sureties only does not, as it seems to me, lessen the defendants' rights, in this action, in this respect.

The action must be dismissed; and the general rule, costs to the successful party, should prevail.

G. H. Kilmer, K.C., for appellants.

W. Proudfoot, K.C., and *P. A. Malcolmson*, for respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—Appeal by the plaintiffs from the judgment of the Chief Justice of the Common Pleas, dated November 29, 1915, after the trial of the action before him, sitting without a jury, at Walkerton, on the 9th day of that month.

No authority in support of the right of the appellants to the relief sought was cited, and we are of opinion that the action is not maintainable.

That a surety may bring an action to compel the principal debtor to pay off or discharge the debt or liability for which he has become surety, and to make the creditor a party to the action, may be admitted; but this is not that kind of an action.

If such an action as this would lie in any case, it would only be where all liability upon the bond was at an end.

Although, so far as is at present known, the condition of the bond in question has been satisfied, it must be borne in mind that it is a security available to the respondent if it should hereafter turn out that there have been breaches of duty by the treasurer which have not now been discovered, and the effect of the delivery up of the bond to be cancelled would be to deprive the respondent of that remedy or at all events to impair it.

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SHEWFELT v. TOWNSHIP OF KINCARDINE.

Meredith, C.J.O.

While it is not intended to suggest that anything of the kind has occurred in the case of this treasurer, there have been many cases in which defalcations have occurred and have been concealed for years. One of the purposes of the bond in question was to protect the respondent against just such eventualities; and to give effect to the appellants' intention would be to deprive the respondent of that protection.

Appeal dismissed with costs.

RITCHIE v. JEFFREY.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. November 29, 1915.

1. ASSIGNMENT (§ II—21)—EQUITABLE ASSIGNMENT—ORDERS—FUND PAYABLE UNDER BUILDING CONTRACT.

A written order for the payment out of a fund payable under a building contract is not enforceable as an equitable assignment in the absence of the owner's promise to pay it out of the fund, and where, owing to the contractor's failure, the owner is compelled to complete the work at an outlay which leaves no balance sufficient to meet the amount of the order. [21 D.L.R. 851, 8 A.L.R. 215, affirmed.]

Statement

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 21 D. L. R. 851, 8 A. L. R. 215, reversing the judgment of Ives, J., at the trial, and dismissing the plaintiff's action with costs.

Lafleur, K.C., for the appellant.

Gerald V. Pelton, for the respondent.

Sir Charles Fitzpatrick, C.J. Idington, J. (dissenting)

SIR CHARLES FITZPATRICK, C.J., and IDINGTON, J., dissented.

Duff, J.

DUFF, J.:—I have no doubt that the order in question was a good and effective equitable assignment of the fund over which the contractor should ultimately prove to have the power of disposition as between himself and the respondent. To give the appellant the right he now claims, the equitable assignment must be supplemented by something additional, that is by some act or acts of the respondent himself raising a right against him; such, for example, as a promise founded upon legal consideration or conduct precluding the respondent from disputing the existence of an equitable charge for the amount claimed. For such equitable relief no claim was made in the courts below and as such relief could only be granted as the result of an examination of the circumstances as a whole—which it cannot be said the evidence places before us—it is too late now to consider it.

As to promise—the finding at the trial is against it. On the

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Anglin, J.

whole I am constrained to the conclusion that the appeal should be dismissed with costs.

ANGLIN, J.:—Except in so far as he questioned the sufficiency of the order given by Horn to the plaintiff as, under the circumstances, a good equitable assignment, I am in accord with the views expressed by Beck, J., in delivering the judgment of the Appellate Division. There is nothing in the record which warrants extending the fund upon which that assignment should operate beyond moneys in the defendant's hands over which Horn had the right of disposition. The evidence does not warrant a finding of a promise by the defendant to pay upon the order in question more than this amount—and there has been no such finding. Neither does it establish a representation that the fund to which the order attached would be sufficient to meet it, or would amount to any specific sum. It may be that the plaintiff in refraining from registering a mechanic's lien relied upon his equitable assignment and the defendant's acceptance of it, but it has not been shewn that the defendant said or did anything which would warrant an inference by the plaintiff that he had relinquished in his favour his undoubted right to make out of the moneys payable to his contractor such payments as might be necessary to protect his property from liens and to ensure the completion of the building contract and to deduct payments so made from the moneys which would otherwise be payable to the contractor. The plaintiff has failed to make out a case either of a promise to pay the amount of his order or of an equitable estoppel precluding the defendant from denying the sufficiency of the fund in his hands to meet it.

I would, for these reasons, dismiss this appeal with costs.

Brodeur, J.

BRODEUR, J.:—The defendant Jeffrey was erecting a building and a man named Horn had a contract in connection with that construction. Horn, having purchased materials from the plaintiff Ritchie, gave, on January 27, 1914, the following order:—

W. S. Jeffrey, Esq., 2005 Jasper W.

Please pay to John Ritchie Lumber Co., the sum of $800 on account of material delivered and shipped to Jasper Park. C. R. HORN.

At the time this order was given and was notified to the respondent no money was due upon the Horn contract by Jeffrey. Horn seems to have been unable to carry out his contract and the proprietor had to pay money to third parties to finish the

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building. He had to pay some wages of labourers and when the building was finally completed $296.99 remained due to Horn, which he deposited in court for the plaintiff Ritchie.

It is clear from the evidence that the respondent Jeffrey never undertook to pay the full amount of the order. He was willing, however, out of the amount which would ultimately remain owing to Horn on the completion of the contract, to pay that amount to the plaintiff. It would have appeared ridiculous that he would have formally agreed to give an absolute and unconditional promise to pay when he did not know whether Horn would carry out his contract and when some liens could have been registered by wage-earners or others.

The trial Judge held that this order constituted an equitable assignment; but it is necessary, in order to constitute such an assignment, that the fund should be specified (*Percival* v. *Dunn*, (29 Ch. D. 128)); and, besides, this order was valid subject to any claim under the contract which would have been good against the assignor.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed.

HEINRICHS v. WIENS.

SASK.

S. C.

Saskatchewan Supreme Court, Newlands, Lamont, Brown and McKay, JJ. March 25, 1916.

1. JURY (§ IC—25)—RIGHT TO TRIAL BY—NOTICE—NON-COMPLIANCE WITH RULE OF COURT—AMENDMENT—FAIR TRIAL—NEWSPAPER COMMENT.

The failure to give notice of an election to a trial by jury in accordance with a rule of Court (r. 239 Sask.), which was promulgated shortly before the filing of the pleadings of which counsel had no knowledge, is not fatal to the claim of such right and may be cured by amendment; nor is such right affected because of newspaper comment upon the action the statements whereof not being prejudicial to a fair trial of the action by a jury.

[Secs. 50 and 51 of the Judicature Act, R.S.S. 1909, ch. 52, considered. For previous litigation of case, see 21 D.L.R. 68, affirmed in 23 D.L.R. 664, 8 S.L.R. 153.]

Statement

APPEAL from the judgment of Elwood, J., reversing the Local Master for refusing to grant trial by jury. Affirmed.

P. E. MacKenzie, K.C., for defendant, appellant.

P. H. Gordon, for plaintiff, respondent.

Brown, J.

BROWN, J.:—This action is brought against the defendants to recover damages alleged to have been caused by a conspiracy on the part of the defendants to injure the plaintiff in his business.

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Brown, J.

The plaintiff desires a trial by jury.

Rule of Court 239 which governs is as follows:—

239. Where by the Judicature Act either party may require the issues of fact and the assessment or inquiry of damages to be tried by a jury, the party so requiring a jury shall, if plaintiff in his reply or within the time limited for the reply, and if defendant in his statement of defence give to the other party notice that he requires the issues of fact and the assessment or inquiry of damages to be tried by a jury. The party giving such notice shall at least fifteen days before the first sittings of the Court for the trial of jury cases pay into Court the fees payable as provided by the Jury Act, otherwise such notice shall be void and the action shall proceed as if no such notice had been given. Notice of trial may be given by either party as provided by rule 237 within the time provided by rule 240, and such notice shall be to a sittings of the Court for the trial of jury cases.

The plaintiff neglected to intimate in his reply that he required a jury and made application to the Local Master at Saskatoon to be allowed to amend his reply in this respect.

R. 239 aforesaid was promulgated shortly before the plaintiff filed his reply and the reply was filed apparently in ignorance of the rule. Prior to the promulgation of this rule it was sufficient if the plaintiff demanded a jury at least 15 days before the day fixed for trial.

The Local Master in giving judgment, states as follows:—

Reading the pleadings and from the nature of the action, which is somewhat peculiar, it is I judge a case which might quite properly be tried by a jury, and I am satisfied that the omission to file the reply was merely a slip. The amendment to the rules that required that statement to be made in the reply had only just been promulgated a few days, and plaintiff's solicitors were not aware of the provision when they framed that pleading. In such circumstances it would undoubtedly be my duty I think to rectify such mistake.

But he dismissed the plaintiff's application because of the fact that prior to the application there appeared in the public press of Saskatoon and Winnipeg somewhat lengthy articles in which the history of the case was set out with considerable detail. The Local Master was of the opinion that this publication would prejudice the plaintiff in a fair trial of the action by a jury.

On appeal to Elwood, J., in Chambers, the Order of the Local Master was reversed and the defendant Wiens appeals from that decision to this Court.

That this is a proper case for relief, if it can be given without prejudice to the defendants, was apparently the view taken by the Local Master as appears from that portion of his judgment quoted above. I agree in that view and am further of the opinion,

which must have been held by the Judge in Chambers, that in granting such relief the defendants would not be prejudiced.

In so far as the newspaper articles are concerned, they appear to me to be simply such a statement of the case as an enterprising news editor might prepare from a perusal of the pleadings. I cannot find, after a careful perusal of the same, that they contain any statement which should prejudice the defendants in a fair trial of the action. The statement which is set out is practically such as is alleged in the pleadings and without any comment whatever on the part of the editor as to the merits of the case. If the articles had misrepresented the case or the proceedings it would be a different matter.

In 7. Hals. at p. 285 it is stated:—

> Speeches or writings misrepresenting the proceedings of the court or prejudicing the public for or against a party are contempts. Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. The effect of such misrepresentations may be not only to deter persons from coming forward to give evidence on one side, but to induce witnesses to give evidence on the other side alone, or to prejudice the minds of jurors.

Even in such cases, however, a change of venue would in all probability meet the needs unless the publicity were so general that it would be naturally assumed that no unprejudiced jury could be conveniently had in the province.

It was contended by counsel for defendant that the plaintiff having failed to comply with the rule it was incumbent on him before he could get relief to shew that this was a proper case to be tried by a jury. Assuming that such contention is correct, the answer appears to be found in a mere perusal of the pleadings themselves. Such perusal indicates that this is a class of action which prior to the English Judicature Act would be tried by a jury.

It is difficult to say what other satisfactory test can be applied.

It is not suggested that the defendants have taken any steps to set the case down for trial or taken any other proceedings in the action as a result of which they would in any way be prejudiced by the order appealed against.

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

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Lamont, J.

LAMONT, J.:—I concur in the conclusion reached by my brother Brown, but desire to put it solely on the ground that a change had been made in the rules of Court of which, evidently, the plaintiff's solicitors had not received actual notice.

The question whether this would be a proper case for a jury trial is not one which, in my opinion, can be considered on an application of this kind.

Sec. 50 of the Judicature Act provided that in civil trials the issues of fact and the assessment or inquiry of damages shall be tried, heard, and determined by a Judge without a jury. Provided, however, that in certain cases—of which the present case is one—either party to an action may, upon giving notice to the other and upon payment of certain fees, have the issues of fact determined by a jury. The right of a plaintiff to a jury, therefore, is not an absolute one but is conditioned upon his giving the notice required, and the payment of the fees. If he fails to give that notice, he has no right to a jury.

Where the notice is not given, the only way to have the issues tried by a jury is to obtain from the trial Judge an exercise of the discretion given to him by sec. 51 of the Act, and have him direct that the issues shall be tried by a jury. If the case be one in which a jury would be in a better position to find the facts, or assess the damages, than the trial Judge himself, he would doubtless direct a jury trial. Whether or not the case is one requiring a jury trial is, by the statute, in the absence of the required notice by the parties themselves, expressly left to the discretion of the trial Judge. Where the statute gives that discretion to the trial Judge, I do not think it is open to anyone else to exercise it. But in the present case, the plaintiff's solicitors not having been apprised of the change in the rules made by the Court, the plaintiff should not be deprived of a right to give the notice which he otherwise would have had.

Newlands, J. McKay, J.

NEWLANDS and MCKAY, J.J. concurred with BROWN, J.

Appeal dismissed.

CAN.

Ry. Com.

DESROCHES v. BELL TELEPHONE CO.

Board of Railway Commissioners. July 8, 1915.

1. TELEPHONES (§ I—4)—BUSINESS OR RESIDENCE TOLL—CLERGYMAN.

Under the provisions of sec. 315 of the Railway Act, a clergyman is entitled to be charged the residence toll and not the business toll for the use of the telephone installed in his residence.

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DESROCHES v. BELL TELEPHONE CO.

Assist. Chief Commissioner

APPLICATION to direct the respondent to cease charging the business toll to the applicant for his telephone and restore the residence toll.

The applicant appeared in person.

H. L. Hoyles, for the respondent.

THE ASSISTANT CHIEF COMMISSIONER:—In the city of Quebec the rate for a business telephone is $40 per annum, and for a residence telephone $25 per annum, with extras for desk 'phones, extra wiring, etc.

Prior to the 1st January last, Rev. Father H. Desroches, the parish priest of Notre Dame de la Garde, had a telephone in his residence, which was described in the telephone directory as "Presbytere, Notre Dame de la Garde." For this service he paid $25 per annum, plus $2 extra for a desk 'phone. On the 18th November, 1914, he was notified that his rate would be increased to the business rate of $40 per annum on the 1st January, 1915.

The complainant contends that he should not be charged a business rate, and asks that the company be ordered to continue his service for the residence rate. The notice that was served on the complainant by the local manager of the Bell Telephone Company in Quebec, dated November 8, 1914, contained the following paragraph, which has been translated from French into English:—

"We have been informed that, under the Railway Act, we must, under circumstances and conditions materially identical, charge uniform telephone rates to everybody; and that, in consequence, it is not advisable to continue charging the reduced rates you have been enjoying in Quebec."

The contention of the company, contained in a letter to the Board from its general counsel, dated June 9, is as follows:—

"That the question as to whether or not the business rate is asked depends not so much upon whether the subscriber is a clergyman, but upon whether the telephone is located in the sort of place from which it is obvious that the administration or business of the church or parish is carried on. In other words, we endeavour to apply the same principles as govern us in deciding whether or not the telephone of a layman is liable for the business rate. For instance, if the telephone is in the vestry or parish house of the church, or presbytery of the parish, or other

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similar place, we ask payment of the business rate, but we do not do so where the telephone is so situated that it is clearly installed only for personal use, such as where there is one telephone at the church and another telephone at the clergyman's residence, nor do we ask such of the parochial clergy as have not the secular administration of the parish in their hands to pay the business rate."

Rev. Father Desroches' telephone is in his residence, and is used by his housekeeper for securing supplies for the house. It is also used by Rev. Father Desroches in connection with the affairs of his church, and by those who wish to speak to him about the affairs of his church. From the evidence, it appeared to me to be practically the same use that any clergyman of any denomination in charge of a parish would make of a telephone in his residence. Rev. Father Desroches is liable to be called on his telephone to visit the sick of his parish or to arrange for a wedding or funeral service. This seems to me to be the use that might be made of a telephone in any clergyman's residence.

It is not necessary to decide the point raised by the company, already quoted from its counsel's letter of the 9th June, that the use made of his telephone by Rev. Father Desroches is really a business use, because, in my opinion, the equality clauses of the Railway Act have been violated in this case. On the question of the business use of a clergyman's telephone, I would like, however, to point out, in passing, that, unlike other professional men or business institutions, a clergyman in no way depends on the telephone for the remuneration he gets from his parishioners for his support. If Rev. Father Desroches' telephone was taken out, it would, doubtless, cause him some inconvenience, but it would not result in any financial loss to him. He would get exactly the same remuneration from his parish as he would get were the telephone maintained in his residence.

Section 315 of the Railway Act, which applies to the Bell Telephone Company, requires that all tolls shall always, under substantially similar circumstances and conditions, be charged equally to all persons at the same rate. The notice that the company's manager in Quebec sent the applicant last November shows that he was well aware of this provision of the statute.

I have gone over the Bell Telephone Company's list of sub-

scribers in the city of Quebec. I find that approximately 47 clergymen of all denominations have telephones. Of this number 17 pay the residence rate, and a number of the 17 are in charge of churches and are similarly situated to the complainant.

I have, therefore, come to the conclusion that the circumstances and conditions of the use of the applicant's telephone, and the use of the telephones of a number of other clergymen in Quebec, who only pay the residence rate, being substantially similar, the company erred in charging the rate of the applicant's telephone to the business rate in January last. The applicant is entitled to get a telephone at the residence rate, and should get credit for any amount he may have paid since January in excess of that amount.

Mr. Commissioner GOODEVE concurred.

NOTE.

Telephone Tolls—Business and Residential.—In *Bayly* v. *Bell Telephone Co.*, 11 Can. Ry. Cas. 190, the Board considered the case of a telephone in the residence of a professional nurse, and in *Medico-Chirurgical Society* v. *Bell Telephone Co.*, 16 Can. Ry. Cas. 267, the case of a telephone used by a doctor at his residence. In both cases the use of the instrument for business purposes, even at their residences by the complainants, was held to justify the imposition of the business toll rather than the lower or residential toll. In the case of clergymen, however, as the Assistant Chief Commissioner points out in the present case, the charge made for the use of telephones must be uniform under the equality clause of the Railway Act, sec. 315. The principle that a business use calls for the higher toll does not seem to be applicable under the circumstances of the present case.

STUART & STUART Ltd. v. BOSWELL.

Nova Scotia Supreme Court, Graham, C.J., Drysdale, J., Ritchie, E.J. and Harris, J., February 26, 1916.

1. USURY (§ II—24)—RELIEF AGAINST—COUNTERCLAIM FOR EXCESS—MONEY LENDERS ACT.

A Court of Equity will grant relief against an excessive charge of interest or where the transaction is harsh and unconscionable, and if the transaction is one arising under the Money Lenders Act additional relief will be granted by way of counterclaim under the Act.

2. CONFLICT OF LAWS (§ I B 2—26)—USURIOUS CONTRACT—MONEY LENDERS ACT—LAW GOVERNING.

The rights of parties respecting a usurious contract made in England are to be determined under the provisions of the Money Lenders Act of England applicable to such transaction.

N. S.

S. C.

STUART & STUART v. BOSWELL.

Statement

Harris, J.

3. PLEADING (§ I N—111)—DEFECTIVE PLEA OF USURY—AMENDMENT.

It is the duty of the Court in order that justice be done, no matter how bad or defective a defence of usury appears, to grant such amendments as are necessary to raise the real questions in dispute.

APPEAL from the judgment of Russell, J., refusing to set aside portions of defence as being frivolous and vexatious, in an action on two promissory notes.

A. Whitman, K.C., for appellant.

The judgment of the Court was delivered by

HARRIS, J.:—The plaintiffs are money lenders, residing in England and registered as such under the provisions of the Money Lenders Act, 1900, and the Money Lenders Act, 1911. The defendants resided in England at the time when the transactions hereinafter referred to took place, but now reside in Nova Scotia.

The action is brought on two promissory notes, each for £28, one dated May 29, 1912, and the other dated August 29, 1912. There was a defence put in and plaintiffs moved the Judge in Chambers to set it aside, some paragraphs as disclosing no reasonable answer, some as tending to prejudice, embarrass or delay the fair trial of the action, and the whole as being false, frivolous and vexatious.

The Chambers Judge dismissed the application and plaintiffs have appealed. The affidavits of the plaintiffs state that £20 cash was lent to the defendants on May 29, 1912, and further £20 on August 29, 1912. To each amount advanced was added the sum of £8 for interest during the currency of the note and the note for £28 was repayable in instalments of £2 per month for six months and the balance was to be repaid 6 months from the date of the note.

The male defendant swears that the two notes sued on are renewals of two notes dated 6 months earlier and that no moneys were advanced on May 29, or August 29. He says that 6 months before May 29, £20 was advanced and 6 months before August 26 another £20 was advanced, and when these moneys were advanced the defendants gave notes for £28, and during the currency of these notes they paid £2 each month on each of the said notes, *i.e.* twelve pounds on each note, or £24 in all. Notwithstanding this, they gave new notes at the end of the 6 months in each case for the full £28. If this statement is true, it shows that the plaintiffs received £24 interest on £40 for 6 months—that is, interest

at the rate of 120% per annum. The new notes, if regarded as the original transaction, add £8 for 6 months' interest, which is 80% per annum without taking into account the repayment of the principal monthly, which would, of course, considerably increase the rate. The rate of interest charged, when compared with our ideas in this country on this subject, is so monstrous as to produce in our minds, to use the words of Lord Thurlow in the case of *Gwynne* v. *Heaton*, 1 Bro. C.C. 1, 9, a sense of

> an inequality so strong, gross and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it.

The defence pleaded is either false or bad in law, and must be set aside except the following parts or portions of paragraphs:—1. As to par. 1 of the statement of claim—the defendants say that the said note has been fully paid. 3. As to par. 3 of the statement of claim—the defendants say that the said note has been fully paid. 6. Said notes are for amounts considerably in excess of the sum or sums of money actually advanced by the plaintiffs and this excess amount was included in the said note or notes without the knowledge and consent of the defendants.

The plaintiff has charged the defendants a usurious rate of interest for such advance or advances—and said usurious amounts of interest have been capitalized and included in the face of said notes, without the knowledge of the defendants, and on said notes compound interest has been charged ever since the making of the same.

The amount of said notes referred to in said statement of claim are therefore considerably in excess of the sum or sums of money actually advanced by the plaintiff.

All other parts of the defence are struck out and set aside.

It is obvious that the paragraphs allowed to stand do not sufficiently raise the real question in the case, which is whether the interest charged in respect of the sum actually lent is excessive, and whether the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, and whether the transaction should not be reopened and the accounts taken and the matter adjusted on the principles applied in England in cases arising under the Money Lenders Act, 1900, and amending Acts.

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Harris, J.

The contract was made in England, and the rights of the parties must be determined under the law of England.

A Judge at Chambers hearing this motion would have a duty to see that justice was done, no matter how bad or defective the defence was as a matter of pleading, and he ought to grant such amendments as were necessary to raise the real questions in dispute. That duty is no less binding on this Court.

The defendants will have leave to amend their defence by setting up the original transaction and notes and the payments made thereon, and upon the notes sued on; that the plaintiffs are and were at the time of the transactions money lenders under the Money Lenders Act, 1900; that the interest charged is excessive and the transaction harsh and unconscionable, or is such that a Court of Equity would give relief. They will also have leave to claim relief by way of counterclaim, under the Money Lenders Act, 1900, to have the whole transaction from the beginning reopened and an account taken and to be relieved from payment of any sum in excess of the amount fairly due in respect of principal, interest and charges.

The costs of the application to the Chambers Judge, of this appeal and any costs occasioned by the amendment, will be plaintiff's costs in the cause in any event. *Judgment accordingly.*

B. C.

C. A.

NEMO v. CANADIAN FISHING CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher and McPhillips, JJ.A. March 7, 1916.

1. SHIPPING (§ II—5)—TOWAGE—NEGLIGENCE—PROCEEDING OUT IN STORMY WEATHER.

In all contracts of towage there is an implied obligation that competent skill and best endeavours shall be used in doing the work, and the act of the master of a tug in venturing out in stormy and dangerous weather is negligence which will render the owners of the towing craft liable for the consequences of the wrongful act.

[*Smith* v. *St. Lawrence Tow and Boat Co.* (1873), L.R. 5 P.C. 308, applied.]

Statement

APPEAL by the defendant from the judgment of Schultz, Co. J., in favour of plaintiff in action for negligent towage. Affirmed.

Douglas Armour, for appellant.

W. C. Brown, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss this appeal. It was part of the contract that the plaintiff should be towed down at the end of the season. The Judge had before him evidence that the master of the defendants' towing craft was negligent of his

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duty to the plaintiff, in venturing out in the storm on the morning of the accident, whereby the plaintiff suffered the loss complained of. I do not think it can be said that the damages allowed were not such as the Judge could give on the evidence.

IRVING, J.A.:—I would dismiss this appeal. It was open to the Judge to find negligence on the evidence.

Irving, J.A.

The defendants are not to be regarded as insurers, but there were obligations imposed upon them—to have a suitable tug; that those in charge of it should exercise care and skill ordinarily exercised by those having experience in such matters; such care should be measured by the dangers and hazards to which the flotilla of small boat was likely to be exposed. It was in this respect that the defendants failed in the opinion of the learned trial Judge. I think I should have regarded it as an error of judgment rather than negligence, but there is much to be said in favour of the view taken by the Judge below. Undoubtedly it was incumbent on the defendants' master to have exercised care in determining whether he should or should not resume the trip on the morning in question, having before him the state of the weather, the character of the shore, the nature of the various boats he had in tow, the ability—or, hampered as she was by a scow—the inability he had to render assistance to any of them in the event of their getting adrift.

Volens was not raised in the pleadings, but all the other points discussed before us seemed to have been raised.

McPhillips, J.A.

McPHILLIPS, J.A.:—I agree that the appeal should be dismissed. The trial Judge has refrained from giving written reasons which renders it somewhat difficult to quite understand the express findings of fact at which he arrived—yet there would appear to be sufficient evidence upon which to find that there was a breach of contract and that the legal obligation was not performed—further, in all contracts of towage, there is an implied obligation that competent skill and best endeavours shall be used in doing the work. The responsibility which rested upon the appellants in the present case—the owners of the tug engaged in the towing—can be ascertained by referring to what Sir Barnes Peacock said in *Smith* v. *St. Lawrence Tow Boat Co.* (1873), L.R., 5 P.C. 308, at p. 314:—

> The rule was clearly laid down by Lord Kingsdownin the case of *The Julia*. Speaking of the duties of a tug steamer, he says, "A tug is to use proper skill and diligence, and is liable for any damage by her wrongful act. When the

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contract to tow was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board each; that neither vessel, by neglect or misconduct, would create unnecessary risk to the other or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of the contract, any inevitable accident happened to the one without default on the part of the other, no cause of action would arise. If, on the other hand, the wrongful act of either occasioned damage to the other, such wrongful act would create a responsibility in the party committing it, if the sufferer had not by any misconduct or unskilfulness on his part contributed to the accident."

This case is not one where it could be said that the respondent had any control—he was not a master mariner, skilled in towing or with any qualifications as a mariner—the whole responsibility was upon the tug. It was not a case of inevitable accident—I can only assume that the trial Judge in finding for the plaintiff found the appellants guilty of negligence and held the respondent guiltless of any misconduct or unskilfulness contributing to the accident. It would appear from the evidence that the master of the tug undertook to proceed in weather which was exceedingly dangerous—and this wrongful act occasioned damage to the respondent. The *quantum* of damages as allowed cannot be said to be such as would savour of being excessive under the circumstances.

I would dismiss the appeal.

Galliher, J.A. (dissenting)

GALLIHER, J.A., dissented. *Appeal dismissed.*

MUNICIPALITY OF BOW VALLEY v. McLEAN.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Stuart and Beck, JJ. February 19, 1916.

1. TAXES (§ III A—105)—ON LOT OR PORTION OF LAND.
For the purposes of sub-secs. 2 and 3 of sec. 297 of the Rural Municipality Act (Alta.), as amended by secs. 23 and 24, of Acts 1913, ch. 21, providing a mode of imposing, for municipal and school purposes, a tax on any "lot or portion of land," each tract of land assessed to one person should be treated as one parcel irrespective of whether different portions of the tract are separately assessed upon the roll.
[24 D.L.R. 587, varied.]

2. COSTS (§ I—2*c*)—SUBSTANTIAL SUCCESS ON APPEAL.
An appellant who succeeds to a substantial extent on the appeal is entitled to be allowed the costs of the appeal.

Statement

APPEAL from the judgment of WALSH, J., in favour of plaintiff, 24 D.L.R. 587, which is varied.

A. H. Clarke, K.C., for plaintiff.

H. W. McLean, for defendant.

Harvey, C.J.

HARVEY, C.J., concurred with SCOTT, J.

SCOTT, J.:—In my view the question involved in this appeal, is not whether the defendant was properly assessed or, not having appealed from his assessment, whether he is bound by it, but is merely a question of the proper imposition of the taxes upon the property as it is now assessed.

I am of opinion that, for the purposes of sub-secs. 2 and 3 of sec. 297, each tract of land assessed to one person should be treated as one parcel irrespective of whether different portions of the tract are separately assessed upon the roll. For instance, if the person assessed is separately assessed for several contiguous lots in a block, say lots one and two or one to six, they should be treated as one parcel only, and if a block is divided by a lane in the centre and he is separately assessed for all the lots in the block, it should be treated as two parcels only.

If I am correct in the view I have expressed, the number of parcels included in the defendant's assessment is fourteen, the assessed value of none of them exceeding $500. The rate imposed is three mills on the dollar for both municipal and school purposes. I think it may be assumed in the absence of any evidence to the contrary that one-half the rate was intended to be applicable to each purpose and it would therefore follow that the tax payable on each parcel would be less than one dollar and the amount which the plaintiff is entitled to recover is therefore $28. I would therefore direct that the payment in the Court below be reduced to $28 without costs.

I agree with the view expressed by my brother Beck as to the disposition of the costs of the action and of the appeal.

BECK, J.:—[This opinion was written first and made the basis of a discussion among the members of the Court. For that reason, I leave it as it is, though as a result of the discussion I concur with the conclusion arrived at by my brother Scott.]

The action is for taxes and the decision depends upon the provisions of the Rural Municipality Act (ch. 3 of 1911-12).

Sec. 251 provides for assessment and the preparation of an assessment roll.

It directs the assessment and entry on the roll of each "lot or parcel of land," and a form of roll is given which has a caption "Land Assessed," and a subcaption "Pt. of Sec. S.T.R.M.," and a caption, "No. of acres." Obviously in a rural municipality,

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the greater part of the lands are farm lands, the descriptions of which accord with the Dominion Government survey into sections, half sections, quarter sections and legal subdivisions.

The expression, "lot or parcel of land," is the only expression used to refer to such parcels of land. I think the "or" is intended to be used to express equivalence and that a section or any of the aliquot parts of a section are comprehended under the name "lot."

Sec. 44 and 45 designate as a "hamlet,"

> any area of land which has been subdivided into building lots, or as a townsite and a plan of which has been registered in the land titles office.

Such parcels of land as appear in such a subdivision are therefore also comprised under the designation, "lot or parcel of land," in the section providing for assessment.

The precise point in question calling for our decision arises upon sub-secs. 2 and 3 of sec. 297, as those sub-sections are made to read by ch. 21 of 1913, 2nd sess., sec. 23.

Sec. 293 provides that the council shall authorize the treasurer to levy upon all lands entered in the assessment roll such tax at a uniform rate on the dollar as shall be deemed sufficient to meet the estimate of expenditures.

The assessment roll provided by sec. 251 is a combined assessment roll and tax roll.

Sec. 297 directs the treasurer to enter on the assessment roll, in the appropriate columns, a statement of all taxes levied against each "lot or parcel of land" assessed.

The substituted sub-sec. 2 of sec. 297 reads:

> In the event of the tax payable on any lot or portion of land under this section for the purposes of the municipality being less than $1 the tax to be entered in the roll as payable for such *purposes shall be $1.*

Sub-sec. 3 is a similar provision in respect of school taxes.

The defendant owned lands in a "hamlet," namely, as set out in the statement of claim,

Lots 1 to 6 inclusive, in bl. 1; lots 3 and lots 7 to 10 inclusive, in bl. 2; lots 1 to 20 inclusive; lots 23 and 24 and lots 27 to 36 inclusive, in bl. 3; lots 1 to 9 inclusive and lots 13 to 38 inclusive, in bl. 4; lots 1 to 40 inclusive, in bl. 5; lots 1 to 40 inclusive, in bl. 6.

Inspection of the plan, which is in evidence, shows that a block consists of 40 lots. Lots 1 to 40, in bl. 5 and 6, represent, therefore, the whole of these lots. It also shows that bls. 3 and 4 are first subdivided into three portions separated from each other

by lanes, and that in bl. 3 lots 1 to 10 form one entire sub-bl., and in bl. 4, lots 25 to 38 also form one entire sub-block.

The defendant was assessed for each separate lot, even where he owned the entire block or sub-block; in all for 158 lots. The assessment having been so made, and a rate of three mills on the dollar having been struck, and it appearing that in respect of each of the 158 lots the tax payable on the basis of the uniform rate on the dollar amounted to less than $1 for municipal purposes and less than $1 for school purposes, the tax entered on the roll in respect of each of the 158 lots was $2.00. The defendant contends that this tax is wrong and that the tax ought to have been at the rate on the dollar of assessment.

The first question is what was the proper mode of assessment: and, if the mode adopted was wrong, is the defendant now precluded from raising the question, not having appealed.

My opinion is that the assessment was wrong in so far as it relates to the assessment of the two blocks and the two sub-blocks, the whole of each of which was owned by the defendant, if it ought not to be deemed to be an assessment of the blocks and sub-blocks, the mention of the lots being only a method of description.

I think the assessor in assessing any "lot or parcel (or portion) of land" was bound to take the whole parcel or the largest parcel into which it was sub-divided, owned by one person as the unit of assessment. For instance, if a ratepayer owned a whole section, the assessor would be bound to assess him in respect of the whole section, as one parcel, and could not assess him for two half sections, four quarter sections, or 16 legal sub-divisions. Under a system of assessment and taxation, which contained no discriminatory provisions, a breach of this principle would, though wrong in itself, not prejudice the taxpayer, and on that account could perhaps not be objected to; but under the system provided by the statute under consideration it might easily result, if it were effective, in a gross wrong to the owner of section of land, as, by an assessment of the section as 16 legal subdivisions, he might be forced to pay by virtue of the sub-section under consideration a tax much exceeding in amount what clearly the statute contemplates he should pay.

I think the same principle applies where the owner, for instance, of a quarter section has subdivided it into blocks, and the blocks

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into sub-blocks or lots. He could not, though he had sold no portion, insist upon being assessed for the entire quarter section, because he had ceased to be the owner of the whole, inasmuch as under our law there would have been a dedication of the *streets* to the Crown; but as I have indicated, I think that he would be entitled to insist upon being assessed for an entire block or sub-block, the whole of which he owned and for each *aliquot* part of a block or sub-block, and therefore for a half block, if there were in fact such a division; but, in respect of parcels made up of lots which together formed no *aliquot* part of a block or sub-block, the lots would be properly assessed as separate lots.

Hence in the present case, I think the defendant ought to have been assessed for bl. 5 and bl. 6, merely as one parcel each, and for lots 1 to 10, bl. 3, and lots 25 to 38, bl. 4, as one parcel each. The designation of the lots in these parcels may, I think, quite properly be taken as a proper method of describing them, but the total value of the several lots would be the single value of the total parcel. Now, if this was his right it was a right—a right *ex debito justitiae*—depending solely—the fact of ownership being admitted—on the statute and was therefore purely a question of law. It was, therefore, in my opinion not a question upon which the council sitting as a Court of Revision had jurisdiction to decide otherwise than according to law, had the defendant appealed as he might have done, in the hope of a proper decision; but, not having appealed, he nevertheless, was not bound by the illegal method of assessment. Indeed perhaps the assessment may be taken to have been unobjectionable, it may be said, and that the first wrongful step of the assessor of the municipality was this: that, instead of ascertaining the taxes payable by striking a rate of 3 mills on the dollar of the sum of the value of 40 lots in bl. 5, and carrying out the result, he first did this as to each separate lot and then finding the result to be less than one dollar, he carried out $1 as the taxes against each lot for municipal purposes and the like for school purposes, and similarly with regard to the other complete block and sub-blocks.

If I am right in saying that the defendant had a right to have his assessment made in the way I have stated and that it was a pure question of law, then he is not prejudiced by not appealing against the assessment; for the assessor, the Court of Revision,

and the Judge on further appeal would all be without jurisdiction to assess or confirm the assessment otherwise made.

In Township of London v. *The G. W. R. Co.*, 17 U.C.Q.B. 262, Burns, J., says:

> The distinction where it is necessary to appeal, and where the claims may be resisted by an action of trespass or replevin (or by defence to an action for the taxes, as was the case cited), is this: if the power existed to make the assessment, then there is a jurisdiction in those doing it, and in such case the remedy is by appeal only; but if the assessment be illegal then there is no jurisdiction to do it, and in such case the person resisting is not compelled to resort to the remedy of appeal, but may resist the illegal exaction.

This principle is perfectly well settled. Other cases which may be referred to are *London Mutual Life Insurance Company* v. *City of London*, 15 A.R. (Ont.) 629; *Toronto Railway* v. *Toronto Corporation*, [1904] A.C. 809.

I rather think, as I have already suggested, that the assessment may be treated at all events at the option of the defendant—the party assessed—as not improper and that he may place his objection thus; that the total assessed value of the several lots in each block and sub-block was in each case the amount of assessment of the blocks and sub-blocks respectively, and it was to these totals the rate on the dollar in fact and in law, did apply and ought to have been applied by the assessor.

In the result the amount of taxes by which the defendant has been overcharged is as follows:—

Bl. 5 (lots 1 to 40 assessed at $25 apiece—$1,000.)		
Amount charged $2 per lot	$50.00	
Amount chargeable 3 mills on $1,000	3.00	
		$ 47.00
Bl. 6 ditto		47.00
Sub-block: bl. 3 (lots 1 to 10, at $35 a piece—$350):		
Amount charged $2 per lot	$20.00	
Amount chargeable 3 mills on $350—1.05 which must be increased to	2.00	18.00
Sub-block; bl. 4 (lots 25 to 38—11 at $30, and 3 at $5—$345):		
Amount charged at $2 per lot	$28.00	
Amount chargeable, 3 mills on $345—$1.05 which must be increased to	2.00	26.00
Total overcharge		$138.00

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As will be seen, the total taxes properly chargeable in respect of these particular parcels amounts to only $7.00.

I think they could not recover this $7.00, had the defence been raised because the statute says (sec. 306) the taxes may be sued for but that they shall be deemed to be due on the day on which the tax notices provided by sec. 298 were mailed and the latter section says that the notice shall state not only the amount of the taxes but the *rate* of *taxation*. Had the rate been given in the notice—it was not given—it may be that, though the amount was in fact wrongly calculated, it could be properly said that the data were given by which the correct amount could be calculated and that what could be made certain was certain.

The plaintiffs can recover nothing more in respect of the parcels I have specially dealt with than the $7.00. Deducting the $138 from the $316 leaves $178 for which the plaintiffs are entitled to judgment. They claim under sec. 301 of the Act a penalty of 5 per cent. by reason of non-payment by December 31, 1914. I think they are not entitled to this inasmuch as the whole amount claimed was paid into Court by that date as stated in the defence.

The defendant has succeeded to a substantial extent on the appeal, and should therefore, I think, have the costs of the appeal. If the decision below had been, as I think it should have been, there would have been divided success, the contention of neither side being substantiated. Under these circumstances, I think, a fair order would be to give no costs of the trial.

I would, therefore, allow the appeal to the extent mentioned with costs, and direct judgment to be entered for the plaintiff for $178, without costs.

The payment out of Court of the money paid into Court as stated in the defence can, of course, be dealt with by a Judge.

Stuart, J. (dissenting)

STUART, J., dissented. *Appeal allowed in part.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Brodeur, JJ., December 29, 1915.

1. INSURANCE (§ III A—41)—VALIDITY OF POLICY ON HOUSE OF ILL-FAME—NOTICE OF CANCELLATION.

A policy of insurance on a house of ill-fame, which describes the risk as a "sporting house," is illegal on its face as facilitating the carrying out of an immoral and illegal purpose and unenforceable, though notice of its cancellation had never reached the assured.

[*Clark* v. *Hagar*, 22 Can. S.C.R. 510; *Bruneau* v. *Laliberté*, 19 Que. S.C. 425, followed; *Morin* v. *Anglo-Can. Fire Ins. Co.*, 3 A.L.R. 121; *Trites*

Wood Co. v. *Western Assur. Co.*, 15 B.C.R. 405, overruled; 21 D.L.R. 26, 9 A.L.R. 47, reversed.]

2. INSURANCE (§ III C—56)—NOTICE OF CANCELLATION—BROKER AS AGENT OF INSURED.

An insurance broker, who is instructed in case of cancellation of a policy to obtain insurance in some other company, is the agent of the insured for receiving such notice of cancellation.

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 21 D.L.R. 126, 9 A.L.R. 47, affirming the judgment of Beck, J., at the trial, maintaining the plaintiff's action with costs.

Statement

Hamilton Cassels, K.C., for the appellants.

C. T. Jones, K.C., for the respondent.

SIR CHARLES FITZPATRICK, C.J.:—I have come to the conclusion, with some hesitation, that this appeal must be allowed. This is certainly not from any desire to assist the appellants, for I think, as Lord Mansfield says in *Holman* v. *Johnson*, 2 Cowp. 341,

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the objection that a contract is immoral and illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant.

The objection is allowed on principles of public policy which the defendant has the advantage of contrary to the real justice as between him and the plaintiff.

In the appellants' factum it is said:—

It must be clearly borne in mind in dealing with this appeal that this is not one of those too frequently occurring cases of an attempt by an insurance company to escape by means of some technicality a liability deliberately assumed by it and for the assumption of which it has received its stipulated recompense.

These are brave words, but unfortunately are not borne out by the facts. The factum proceeds:—

The plaintiff is a foreigner of bad character.

I do not think it is particularly creditable for the appellants to allege as one of the grounds for trying to escape liability that the respondent is a foreigner, and, as to the fact that she is of bad character, it appears on the face of the policy, issued under the corporate seal of the company and the signature of its president, that the premises were kept by the insured as a disorderly house.

The law, I think, is stated in Phillips on Insurance, (5th ed.), in ch. III., sec. 2, on the legality of the insurable interest. We read sub-sec. 210:—

Insurance upon a subject is void if the interest insured is illegal or if the contract contemplates an unlawful use of it;

and this is carried further in sub-sec. 211,

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though there is no express prohibition in respect to a subject, still if insurance upon it is contrary to the spirit and general principles, or what is called "the policy" of the law, the owner cannot make a valid insurance upon it.

Again, sub-sec. 231, after referring to cases partly legal and partly illegal where a valid insurance may be made for the legal part, continues:—

In the preceding cases no illegality appeared on the face of the contract of insurance. Where such does appear, the whole contract is void, as in the case of an agreement to employ a ship in an illegal trade.

In *Pearce* v. *Brooks*, L.R. 1 Ex. 213, at 218, Pollock, C.B., said:—

No distinction can be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated it comes equally within the terms of that maxim and the effect is the same; no cause of action can arise out of either the one or the other.

In the notes to the case of *Collins* v. *Blantern*, 1 Sm. L.C. (12th ed.), 412, in Smith's Leading Cases (ed. 1915), it is said:—

Contracts made for immoral purposes are simply void. . . . . The illegality is equally fatal when created by statute.

Many cases are cited in support of this latter proposition. By sec. 228 of the Criminal Code the keeping of a disorderly house is an indictable offence and the purpose for which this house is used, being expressly stated in the policy, there can be no doubt of the illegality of the purpose for which it was used.

In *Scott* v. *Brown*, [1892] 2 Q.B. 724, at 728, Lindley, L.J., said:—

Ex turpi causâ non oritur actio. This old and well known legal maxim is founded in good sense and expresses a clear and well-recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. . . . . If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.

In his judgment in the case in this Court of *Clark* v. *Hagar*, 22 Can. S.C.R. 510, Gwynne, J., refers to a number of cases as establishing that the true test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case. In the present action the plaintiff, now respondent, could not, of course, succeed without proving the policy bearing on its face evidence of illegality. Such proof is offensive to the Court and cannot be received.

That we find in the English reports no case exactly in point

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is not, I think, matter of surprise. English insurance companies, it is well known, rarely dispute their liabilities, never except in gross cases. Further, I should think it probable that respectable companies would be unwilling to state in their policies an immoral purpose. Few people, one may suppose, are willing to advertise their own turpitude unnecessarily.

There is a case in the Circuit Court of Quebec of *Bruneau* v. *Laliberté*, 19 Que. S.C. 425, in which Andrews, J., held that insurance upon the furniture in a house of ill-fame is an illegal and immoral contract and will not be enforced by the courts.

I do not think it is necessary for me to dissent from anything said in the judgment above referred to of *Clark* v. *Hagar*, 22 Can. S.C.R. 510. It is relied on in the decision of *Morin* v. *The Anglo-Canadian Fire Ins. Co.*, 3 A.L.R. 121, in the Court of Appeal for the Province of Alberta, which the decision now under appeal professes to follow, and also in the later case of *Trites Wood Co.* v. *Western Assurance Co.*, 15 B.C.R. 405, in the Court of Appeal for British Columbia. It is, however, unnecessary to examine this judgment particularly, as I am unable to find in it anything to support the decisions in these cases in which, as in the present case, the illegality appears upon the face of the contract sued upon.

For the French law on the subject, see Planiol (6th ed.)., vol. 2, para. 1009 *et seq.*, and cases there cited. The modern tendency of the Cour de Cassation would appear to be, however, to maintain the validity of contracts such as the one here in question on the ground that the reciprocal obligations which the parties assume relate exclusively to the payment by the insured of the agreed premium and to the payment by the company of the stipulated indemnity in the event of the destruction of the thing insured. *Vide* Sirey, 1904, 1, page 509; but see S.V. 1896, 1, 289; Appert's note; S.V. 1913, 1, 497, note, and S. & P. 1909, 1, 188.

There is no provision in the Code Penal which corresponds with sec. 228 of the Canadian Criminal Code.

The appeal will be allowed and judgment entered for the defendants, the present appellants, but without costs.

Davies, J.

DAVIES, J.:—I think this appeal should be allowed upon the grounds submitted by Mr. Cassels.

In the first place, I think Carr was the agent of Nakata for the purpose of procuring the policy of insurance in question.

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The insured was the keeper of a "sporting house" which Mr. Jones, for the respondent, candidly admitted was well understood to be a bawdy house or house of ill-fame.

The husband of the plaintiff applied to Carr, an insurance broker, to obtain the insurance and was told by him that he could not take it in the insurance company for which he was agent, but would apply to other companies and was instructed to do so. He applied to the general agent in the province of the appellant company, who agreed to take it. The applicant paid to Carr a part of the insurance premium and shortly afterwards returned to Carr to obtain the policy, when he was told it was subject to cancellation at any time. He then paid Carr the balance of the premium and Carr handed over to him the policy.

Carr says that at that time he asked them whether in case of cancellation he would return the money or put the insurance in some other company—and he was told to put it in some other company.

The same afternoon Carr received notice that the head-office had cancelled the policy, whereupon he wrote and sent by registered post a letter to the plaintiff telling her the policy was cancelled. Carr had received the premium from the applicant, and on receiving notice of the cancellation of the policy made, as instructed, efforts to obtain insurance elsewhere, but was unsuccessful and the premium remained in his hands.

The trial Judge was of the opinion that

> the whole thing depended upon the question of the agency of Carr for the insured upon which there is much to be said upon both sides.

The Judge was not satisfied that Carr was an agent to receive notice of cancellation and this view prevailed in the Court of Appeal.

I am of opinion, however, that Carr was such an agent and that the premium having been left with him in case of cancellation to obtain insurance in some other company, that he was the agent of the insured for receiving notice of such cancellation.

On the other ground also, that the contract was one for facilitating the carrying on of an illegal and immoral object, I think the appeal should be allowed. The trial Judge and the Court

of Appeal felt themselves concluded by the case of *Morin* v. *Anglo-American Fire Ins. Co.*, 3 A.L.R. 121. I am not able to accept that authority or the reasoning upon which it was founded. I think the principle upon which the case of *Pearce* v. *Brooks*, L.R. 1 Ex. 213, was decided, the proper one to apply in this case.

That principle is, that one who makes a contract for sale or hire with the knowledge that the other party intended to apply the subject-matter of the contract to an immoral purpose cannot recover on the contract. As Pollock, C.B., said in that case, if an article was required and furnished "to facilitate the carrying on of the immoral purpose" that is sufficient. The Courts would not lend their aid to carry it out. It seems to be that the facts of the case now before us are stronger against the enforcement of the contract than those in the case of *Pearce* v. *Brooks*, L.R. 1 Ex. 213, which the Exchequer Court refused their aid to enforce. In that case, the plaintiffs sued for the hire of a brougham by a woman known by them to be a prostitute, and who used the brougham to their knowledge for the purpose of making a display favourable to her immoral purposes.

In the case of *Johnson* v. *Union Marine and Fire Ins. Co.*, 127 Mass. 555, the Court followed a previous decision of their own in *Kelly* v. *Home Ins. Co.*, 97 Mass. 288, and held that if a person engaged in the unlawful business of selling intoxicating liquors without a license at the time of the making and acceptance of a policy of insurance on his stock in trade and a month afterwards, the policy does not attach, although he made application for a license immediately after he began such business.

The grounds on which the decision was placed in *Kelly* v. *Home Insurance Co.*, 97 Mass. 288, above referred to were that the object of the assured in obtaining the policy was to make their illegal business safe and profitable, and that the direct and immediate purpose of the contract of insurance being to protect and encourage an unlawful traffic, the contract was illegal and never attached.

The same principle was held by Andrews, J., to govern in the case of *Bruneau* v. *Laliberté*, Q.R. 19 S.C. 425.

I think this principle should apply to this case, the contractual obligation of the company being in case of loss either to pay the same up to the amount insured or to "replace the property damaged or lost." Could it be fairly argued that the replace-

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ment of the property would not be an aiding or facilitating of the immoral purpose for the carrying on of which the house and furniture were used? I think the Courts of this land should not lend their aid to enforce contracts made to facilitate the keeping of houses of ill-fame, which, in my judgment, this insurance policy was calculated to do.

BRODEUR, J.:—The first question in this case is whether the contract of insurance was valid.

In the application for insuring the premises, it was stated that the plaintiff (respondent) was keeping a "sporting house," which was understood as being a house of ill-fame.

The policy was procured through the appellants' agents in Calgary. They had the power to accept risks, subject to cancellation by the head-office, as is the usual insurance practice. The head-office of the insurance company refused to maintain the policy and a notice of cancellation was given.

The agents of the appellant company in Calgary immediately notified the broker through whom the application had been made. This broker, Carr, on the same day, wrote to the plaintiff telling her the policy was cancelled and asking for its return. He did not enclose the premium because, as instructed by the plaintiff, he intended to try and get insurance elsewhere.

This letter was not received by the plaintiff and was subsequently returned to Carr.

A fire having taken place on the premises, the present action has been instituted for the purpose of recovering the amount of the insurance.

The company claims that the contract was illegal because it facilitates immorality.

It has been decided in a case of *Bruneau* v. *Laliberté*, 19 Que. S.C. 425 by Andrews, J., that an

> insurance upon the furniture in a house of ill-fame is an illegal and immoral contract, and will not be enforced by the courts.

Addison, on Contracts, p. 72, summarises the matter in stating:—

> Contracts tending to promote fornication and prostitution are void.

And Beach on Contracts, p. 2019, says that

> any contract auxiliary to the keeping of a bawdy house is void.

Halsbury, Laws of England, vol. 7, No. 829, p. 400, relying on

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the case of *Pearce* v. *Brooks*, L.R. 1 Ex. 213, says that if it appears that a work was done for the purpose of enabling a prostitute to exercise or assisting her in the exercise of her immoral calling, no action would lie.

Pollock on Contracts (7th ed.), p. 370, in speaking of transactions where there is an agreement for a transfer of property for a lawful consideration, but for the purpose of an unlawful use being made of it, says that—

> The later authorities shew that the agreement is void, not merely if an unlawful use of the subject-matter is part of the bargain, but if the intention of one party so to use it is known to the other at the time of the agreement.
>
> * * * * * *
>
> If goods are sold by a vendor who knows that the purchaser means to apply them to an illegal or immoral purpose he cannot recover the price.

I find in Dalloz, Répertoire Pratique, *vo.* "Contrats et Conventions en général," Nos. 398 and 401, that the contract whose consideration is the maintenance of a house of ill-fame is illicit and the action for the price of the service of a domestic in a house of ill-fame should not be accepted. I must say, however, that this latter decision has been severely criticized by some authors. Baudry-Lacantinerie, vol. 11, No. 313, says:—

> C'est l'obligation sur cause illicite que l'art. 1131 déclare sans effet. Il en est autrement de l'obligation dont le motif seulement est illicite. Ici donc apparaît encore l'utilité de la distinction entre la cause et le motif. Cette distinction est nettement établie dans quelques décisions judiciaires. Mais beaucoup d'autres l'ont perdue de vue et la confusion a engendré des décisions vraiment fantastiques. N'a-t-on-pas vu le tribunal de commerce de la Seine, refuser sur le fondement de la cause illicite, tout effet a l'obligation contractée par le directeur d'une maison de tolérance pour acquisition de vins de champagne destinés à être consommés dans son établissement?

On that first ground, I would be of opinion that the contract of insurance was illegal and that it should be set aside. The appeal should be allowed with costs.

IDINGTON, and DUFF, JJ., dissented.

Idington, J. Duff, J. (dissented)

Appeal allowed.

CLENDENNING v. COX.

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Quebec Court of Review, Archibald, A.C.J., Mercier and Greenshields, JJ. December 11, 1915.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—LAND OPTIONS—REVOCABILITY.

An option to purchase land for a fixed time for which no consideration is given creates merely a personal right revocable at any time before it has been formally accepted, and is, therefore, not subject of specific performance.

[Arts. 982-984, 1476, C.C. Que.; Arts. 1101-1103, 1589, Code Napoleon considered; *Clendenning* v. *Cox*, 45 Que. S.C. 157, reversed.]

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Statement

APPEAL from the judgment of Panneton, J., 45 Que. S.C. 157, which is reversed.

The plaintiff obtained from defendant on May 30, 1911, the following writing:—

I, the undersigned, give H. M. Clendenning or any other person assigned by him, the option on subdivision Nos. 84 and 85 fronting on Bagg ave., as part of official lot No. 642 of the plan and parish of St. Laurent, for the amount of $500 payable on the passation of the deed of sale. (Signed) JOHN COX.

This option to expire May 30, 1912, at these prices, and the same on the 30th May, 1913, at an advance of $50 per lot, viz.: a total of $600 instead of $500. (Signed) JOHN COX.

The plaintiff says that on June 6, 1911, he accepted this option and declared himself ready to pay the $500. The defendant was by him put in default to sign a deed of sale but refused to do so. The $500 were deposited in Court and the plaintiff prays that defendant be held to execute a deed of sale and in default that the judgment to be rendered avail as such.

The defendant contests the action and says that, on May 31, 1911, before the option was accepted by the plaintiff, he cancelled it and notified the plaintiff to that effect verbally. On June 3, 1911, he again, by writing, formally revoked the option.

The plaintiff in reply alleges that he had by the term of the writing a year to accept the option, and that he did accept it within this delay, and that the defendant had not the right to revoke his option; that when the plaintiff received the option he had a buyer and in fact had sold the property to one Gobeille.

The Superior Court maintained the plaintiff's action, but this judgment was reversed in review by the following judgment:—

B. Benoit, for plaintiff.

Davidson & Ritchie, for defendant.

Archibald, Acting C.J.

ARCHIBALD, Acting C.J.:—This is an action under art. 1476 of the C.C., by which the plaintiff seeks to have the defendant ordered to give a title to certain real estate in the declaration mentioned, and upon default that the judgment of the Court be equivalent to a title. The plaintiff sets up an option given to him by the defendant on May 30, 1911, in the following language: [Cited above.]

It is seen that this option at the price of $500 was for the space of one year. On the next day, May 31, 1911, Cox, the defendant, telephoned to the plaintiff that he had changed his mind and that he withdrew and cancelled the option in question, and on June 3,

defendant wrote to plaintiff withdrawing and cancelling the option. The letter of June 3, above mentioned, is as follows:—

Mr. H. M. Clendenning, 159 Grand Ave.

Confirming our conversation of May 31, by telephone, I hereby notify you that after re-consideration of the matter, I have decided not to sell lot 641 or 642, subdivision numbers 84 and 85, fronting on Bagg Avenue, Parish of St. Laurent, and cancel option given you on the same. (Signed) JOHN COX.

The plaintiff answered that letter on June 6, as follows:—

John Cox, Esq. Dear Sir: Your favor to hand and it is absolutely impossible for me to consider same as I am negotiating the sale and must hold you to the arrangement made with me and signed by you. Sorry to cause you any inconvenience. No doubt you would have given Mackintosh and Hyde's representative the option at the same figures; consequently, you should not be dissatisfied with the deal in question. Yours sincerely (Signed) H. M. CLENDENNING.

Later, on the 11th day of July following, the plaintiff sent a notarial protest to the defendant by which he set up the option of the 30th May, 1911, with its conditions, and then proceeded to say that:—

said requerant is now ready to exercise the said option and to purchase the said property for the price of $500, and that in consequence a contract of sale is formed between the said John Cox and the said requerant, and thereby the said John Cox becomes bound to deliver to the requerant the property described in the said option and the said requerant becomes thereby bound to buy the same at the said price; that requerant was ready to pay the $500 upon execution of the deed.

Thereupon the requerant proceeded to make a tender of the sum of $500 and declared his readiness to sign a deed, but he did not cause a deed to be prepared and signed by himself and offered to the defendant.

Defendant refused. Action was taken in March, 1913, nearly two years later.

There is no question of fact in the case. The option given by the defendant to the plaintiff was equivalent to an offer to sell this property to plaintiff or a person assigned by him at any time within one year of the date of the offer at the price of $500. The plaintiff, when the offer was written out and signed by the defendant, received it and took it away with him.

The Judge in the Court below finds that act an acceptance of the offer, but there was no word passed from the plaintiff to the defendant signifying acceptance or undertaking in any way to take any action or to do any act in reference to the purchase of the property. The question then remains wholly a question of law.

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Where an offer to sell has been made, accompanied by a delay within which acceptance of the offer may be made, can the proposed vendor withdraw the offer to the extent of preventing an acceptance producing a complete contract of sale?

French authorities are not unanimous, but the weight of opinion in France answers that question in the negative. There are, however, commentators of great weight who take a contrary view, among others, Larombière. Commenting upon art. 1101 of the C.N., in his first volume, at p. 12, No. 14, after having in the previous number pointed out that offers not accepted may always be retracted. [Citation.]

See Aubry and Rau, Vol. 4, p. 333.

I may say that this view concurs with that of the greatest part of the French commentators, and I should probably feel myself bound to decide in that sense if the interpretation of the matter in this jurisdiction was founded upon the same considerations as those which prevail in France. C.N., art. 1589, is as follows:—

Promise of sale is equivalent to sale when there is a reciprocal consent of the two parties upon the thing and upon the price.

Our article which is equivalent to that is 1476:—

The simple promise of sale is not equivalent to sale, but the creditor may demand that the debtor pass to him a deed of sale in accordance with the conditions of the promise, and that, in default by him to do so, the judgment may be equivalent to such deed and have all its legal effects; or he may recover damages according to the dispositions contained in the title of obligation.

Art. 1478: Promise of sale with delivery and actual possession is equivalent to sale.

It is perfectly plain that both of these articles of our Code refer to a bi-lateral promise of sale, where the vendor has promised to sell and the purchaser has promised to buy, because nobody pretends that a sale takes place before the acceptance of the purchaser; so that these articles are of very little assistance, except to show that, in one respect, our Code hesitates to go the length of the C.N., in the application of the doctrine that a contract of sale is perfect by the mere consent of the parties.

But what we have to do with here is a promise or offer to sell not accepted, and here we must compare again before accepting the reasoning of the commentators of the C.N., as governing us the extent of agreement of that Code with our Code on the question at issue. Art. 1101 of the C.N. defines what a contract is in the following language:—

A contract is an agreement by which one or several persons oblige themselves towards one or several others, to give, to do or not to do, something.

That is practically equivalent to the definition of contract which we have adopted. That article is followed by two others.

Art. 1102: A contract is synallagmatic and bi-lateral, when the contracting parties oblige themselves the one towards the other.

Art. 1103: It is unilateral, when one or several persons are obliged towards one or several others without any obligation undertaken by the latter.

Art. 982 of our Code says:—

It is the essence of an obligation that there will be a cause from which it arises and persons between whom it exists, and that it have an object.

Art. 984 says: Four things are necessary for the validity of a contract:—

Parties having the legal capacity to contract; their consent legally given; something which is the object of the contract; a legal cause or consideration.

There is not one word in our Code concerning what I mentioned in art. 1103 of the C.N. as a unilateral contract. It is plain indeed that there cannot be such a thing as a unilateral contract, because there must be, to any contract, the consent, of at least, two parties. Nor do any of the French decisions, to which I have above referred, pretend the contrary. But they say, and with justice, the contract between the parties is—that you should maintain your offer until the expiration of the time which you have specified, and I accept that agreement on your part; consequently you are bound to maintain your offer. But plainly that does not constitute a sale because there is no agreement on the part of the purchaser to buy, and when the proposed vendor says: I refuse to maintain my offer, his consent to make a sale is done away with and, therefore, an acceptation which comes subsequently cannot affect the agreement of the wills of the two parties. But there would be a breach of contract, but it would be breach of a contract to wait for the purchaser to declare his willingness to buy which, when broken, would give rise to damages, if any were caused, under art. 1065 of our Code.

It is true that that article says that, in cases which admit of it, specific performance may be ordered by the Court; and that is the reason why, when a sale has been effected upon the terms agreed to by both parties, the Court may order specific performance. But, in this case, the contract which was broken was not a contract of sale, but a contract to wait for a given time to give the proposed purchaser an opportunity to buy. That contract is

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not evidently susceptible of specific performance and a breach of it results only in damages.

I am aware that the policy of our codifiers was to omit definitions, unless they were clearly necessary and that, therefore, an omission of art. 1103 does not conclusively indicate that the commissioners proposed to make any change in the law as it existed under the C.N.

But in any event, that omission would throw us back upon general principles and probably more than in any other matter upon the authority of Pothier, whom the codifiers, in their introduction to the subject, expressly declare that they intended to follow.

If we refer to Pothier (Bugnet, 3rd. vol., p. 196, No. 476), we find that he defines a promise of sale to be an agreement by which one party obliges himself towards another to sell something. Pothier evidently speaks of the unilateral promise to sell, that is, without there being any promise to buy. He seems to attach to this promise of sale some kind of solemnity of language for he adds:—

It is necessary for a promise of sale that, when you have said or written that you will sell me a certain thing, it shall appear clearly by the terms which you use that you have intended to oblige yourself to do so and that it is a veritable agreement which has intervened between you and me;

And as he illustrates:—

If upon the sale of a library, the vendor should say: Je vendrai aussi mes tablettes pour la somme de tant, si elles vous conviennent,

this would only be a simple declaration of the actual will of the person at the time to sell and not a veritable agreement.

This distinction, I would think, is rather fine.

At number 479, Pothier discusses the question as to effect of the promise of sale. He says:—

When he who has promised to sell me a certain thing refuses to fulfil his promise, can I oblige him to specific performance in compelling him to pass me a title, or that the judgment of the Court should be equivalent to a title; or upon his refusal, can I only obtain from him a condemnation in damages?

Then he states the argument on the two sides: in the first place, that the object of the obligation being the passing of a deed of sale and the maxim of law being "*Nemo potest cogi ad factum*," the person refusing to pass the deed of sale cannot be condemned to do so and his breach of obligation is necessarily resolved in damages.

The argument on the other side is that the thing to be done is not an exterior and corporeal act by the person of the debtor, and

may be supplied by a judgment, and that, therefore, the Court may condemn the debtor to pass the contract.

Then, Pothier remarks that this opinion appears to be followed in practice as being more in harmony with the fidelity which ought to reign between men in the performance of their promises. Pothier expresses no opinion nor does he speak of any case in which the consent of the vendor to sell has been withdrawn before the consent of the purchaser to buy has been given.

Pothier, on Obligations, same edition, defines "Contract," vol. 2, p. 4, as an agreement by which two parties reciprocally, or one of the two, promises and engages towards the other to give something, or to do or not to do something.

Our Code speaks of the things which are the essence of the contract, at art. 984:—

Parties having a legal capacity to contract; their consent legally given; something which forms the object of the contract; a legal cause or consideration.

Here it appears that there cannot be a contract without at least two persons who have given their consent. The Code is seen to omit the part of the definition of Pothier in which he says that there may be a contract to which only one party has consented.

There is a class of cases which are to be found in the French reports which appear to me to be more or less irreconcilable with the view which I have referred to above, regarding the inability of the proposed vendor, who has given it for acceptance, to withdraw his offer. The cases in question concern matter of expropriation, and it has been held that in cases where a property which has been under offer, not accepted, is expropriated, the proposed purchaser is too late to accept after the expropriation, although the time given for acceptance has not yet expired.

In Dalloz, 1848, 1-185, is reported an appeal before the Cour de Cassation by *Pelletier* v. *Boget*. The holding of the appeal was:—

A promise of sale is only equivalent to sale in accordance with article 1589 C.C., from the date of the acceptation by the purchaser, and up to this date it constitutes only a simple pollicitation.

In the deed in which this promise was couched occurred the following:—

Sieur Boget, proprietor of the land situate at Paris, binds himself not to sell this land to any other person than the Sieur Pelletier during a period of four years. In consequence, and from the present time, he promises to sell to Sieur Pelletier, who accepts for him or his ayants cause, the above-mentioned land.

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This acceptation was only, of course, of the promise and not an acceptation as a purchaser. The difficulty arose near the expiration of the delay when a railway having been carried through the land, it was greatly enhanced in value and the purchaser hastened to make his acceptance of the purchase and the vendor refused claiming rescission on the ground of lesion—and the question was whether, for the purpose of lesion the value of the land should be considered as of the date of the promise or of the date of the acceptation of the promise. It was decided that the date of acceptation was the date to go upon and the sale was set aside for lesion.

The word "pollicitation" used in this report is defined as follows: "an engagement contracted by one person without its being accepted by the other." There is nowhere any pretence that such an engagement constitutes a binding contract.

Marcade, 6th vol., discussing art. 1589, in which it is said that promise of sale is equivalent to sale when there is reciprocal consent of the two parties upon the thing and the price, goes at length into the question as to what is meant by that article and argues, with what appears convincing force, that the article was intended only to bring to an end a controversy, which existed among the commentators before the Code, whether a promise of sale, accepted by the purchaser—that is a bi-lateral promise—authorized the buyer to compel the seller to sell, and enabled him to obtain a judgment equivalent to a deed of sale upon refusal of the vendor; or whether it only opened the recourse in damages. Marcade was clearly of opinion that it could not have the whole effect of a sale, when it was evident that the parties did not intend that it should have that effect, and that, therefore, it left the property at the risk of the vendor until the sale was effected.

Speaking of unilateral promises, Marcade, points out, that when a vendor promises to sell, although the purchaser does not promise to buy, yet he can accept the promise of the vendor, in the sense that he intends, at any rate, to have the opportunity of availing himself of that promise, and Marcade claims that this constitutes a valid obligation and not a sale. On p. 168, he remarks:

> Once again, every promise of sale in which there is no agreement as to the price, does not seriously bind the promisor and therefore does not constitute an obligation. It is in fact, one of the necessary conditions to the existence of an obligation that there should be an object certain, that is to say: an object

that the contract makes sufficiently determined or determinable so as that the promisor can be constrained.

As I have said, the French jurisprudence, upon this point, is not uniform. I find, for example, in D. P., 1847, 1-19, the following holding: [Citation.]

This decision was, however, commented upon somewhat unfavorably in a note in which the commentator remarks: [Citation.]

The author remarks that the decision was not in accordance with the ancient jurisprudence.

There is in the very next year (1848), a decision of the Cour de Cassation, in a contrary sense, and there are several later decisions in Dalloz to the same effect. It is, however, a little difficult to apply these decisions to the case now in hand, because the terms of the different promises of sale, which are treated of, are not disclosed in the report. I have noted above the definition given by Pothier of a contract as an agreement by which two parties reciprocally, or one of the two, promises and engages towards the other, to give something, to do or not to do something; and I have said that our Code has not followed this. It does not indicate that there can be a contract to which only one person is bound. As a matter of fact, a contract, when only one person is bound, is a contradiction in terms; so that our Code has omitted all reference to unilateral agreements. What Pothier means by a contract where only one person is bound, he explains himself by referring to such contract as a contract of loan where the obligation of the lender has already been performed, and the borrower remains the only person obliged; or in the case of insurance, where an insurance company is the only one who remains obliged because it has already received the premium. These are manifestly not such cases as we have here, that is to say: with regard to a promise of sale.

Taking a general view of all the French commentators, who, of course, write under the conditions made for them by the C. N., and particularly art. 1103, which speaks of unilateral contracts, it appears: That a promise of sale, with a delay fixed to accept, must itself be accepted to be anything other than a mere pollicitation, but that acceptation may be inferred from the acts of the promisee, such, for example, as if the promisor write out the promise, and give it to the promisee, who takes away with him, an acceptance of the promise, would be implied from that act;

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that, however, this acceptance is not in any way a contract of sale, and does not create any real right upon the property, and cannot be registered so as to have that effect; but that it persists, as long as the time stipulated, and the promisee may, during that time, accept the sale itself, and thereby complete the contract, and become entitled to demand title: that the promisor cannot, with impunity, withdraw his promise during that time, as so to prevent an actual sale being effected by the acceptance of the promisee; but that if the promisor has sold the property to a third person in good faith, the title of this third person cannot be affected by the promise; that a promise of sale without limitation of time cannot be withdrawn by the promisor; but the promisor may, if he think that the promisee has not accepted within a reasonable delay, take an action to compel the promisee to make a decision within such time as the Court may fix or to have the promise declared at an end.

That appears to be the view taken by the great majority of French authorities. It is, in many respects, contrary to the jurisprudence of our Courts. First, I would refer to the last item, viz.: that which prevents a promisor from withdrawing his promise before acceptance. That is completely condemned by our jurisprudence. A promise unaccepted is always revocable by the promisor, and if the promisor notify the promisee of his withdrawal, the promise is at an end, unless the promisee have previously notified the promisor of his acceptance. This is, undoubtedly our jurisprudence.

I have said before, that Pothier seemed to have much hesitation in approving of the opinion of those who held that a promise unaccepted could not be withdrawn, but he yields apparently to what he claims to have been the prevailing jurisprudence, on the ground that it was more in accordance with the equity which should reign between the contracting parties. It would appear that Pothier's judgment of legal principles was in the opposite direction.

Assuming that there may be a contract between a man who has property to sell, and another man who may want to buy the property, that the first shall wait for a certain time, in order to enable the second to reflect whether he shall buy or not buy—it is manifest that that contract is not a contract of sale; but it is simply an agreement by the property owner to wait for the pro-

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posed purchaser, for a given time, to enable him to purchase. If that is a contract, it must, I think, come under the usual definition of the essential elements of a contract, otherwise it is not binding. It must have all that the Code requires, and among other things, it must have a cause or consideration, otherwise it is not a contract and is not enforceable. That seemed also to have been in the mind of the Judge, who gave the judgment under review, inasmuch as he says that the proposed vendor had a consideration, because he knew that the proposed purchaser was a real estate agent, and would likely interest himself in the sale of the property. That is manifestly no consideration because a consideration must be something which the person, in whose favor the obligation is supposed to be contracted, is to give or to do or not do.

Now, in this case, there was absolutely nothing. There was no obligation to do or to attempt to sell, or to attempt to buy, or to do anything. Therefore, there was no legal consideration.

I know it is true, that gifts between relatives might be enforced, on the ground of a moral consideration; and also that consideration, though not expressed, may exist and be proved; but that does not apply here, because there is neither any moral consideration nor any legal consideration which is proved. A promised gift, by one man to another unrelated, in whom the donor has no interest whatever, is not enforceable because there is no consideration, and the donor may retract his promise.

Here, we have practically the offer of the vendor to hold his property out of the market for two years, without there being any obligation or any reason of any kind: without there being one dollar or one cent of profit to the vendor, if a purchase does not result. It seems to me evident that this promise does not create a legal contract. But, supposing that it did. What is the contract which has been violated? It is not a contract of sale, because there never existed any contract to sell—there never existed any concurrence between the will of the proposed vendor and the will of the proposed vendee to buy or to sell. If any contract were violated, it was the contract that the vendor should wait, to enable the vendee to purchase. What then, would be the result of the breach of that contract? Specific performance of the thing which is to be done can only be ordered where the judgment of the Court itself may stand in the place of the doing of the thing in the event of the person obliged refusing to do it, and that is

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the case with regard to sale, because the judgment of the Court may be registered as equivalent to a deed of sale. But the contract broken is not a contract to sell, but a contract to wait, so that the purchaser might have the chance to buy. It is plain that a judgment of the Court could not be substituted in the place of the will of the party to do the act.

I have not mentioned an opinion which has been promulgated by an author of authority. I refer to Planiol. He is practically alone in his view and is quite out of harmony with the jurisprudence of the Cour de Cassation. He claims that art. 1589, of the C. N. does not refer to bilateral promises of sale, but does refer to unilateral promises of sale—and in fact, he defines promise of sale as a contract by which one person engages himself to sell to the other person, something which the latter does not immediately consent to buy. Then he proceeds to say: [Citation.]

His view is not adopted by any of the other commentators of importance and is absolutely at variance with the terms of our Code, which says: promise of sale with possession is equivalent to sale.

The word "option" has come into our law, or rather into our practice, from the United States. I find in the 39th vol. of the Cyclopaedia of Law and Procedure, p. 1232, under the heading "Vendors and Purchaser," published in 1912, the word "option" defined as follows: [Citation.]

Then there are notes on this subject on p. 1234 containing illustrations of what would not be sufficient consideration, and among others, the following:

If the agreement to keep an offer to sell land open for a specified time is without other consideration, the mere fact that the person to whom it is made incurs expense on the faith of the agreement does not constitute a consideration, for he is not bound until he accepts the offer.

In this case it is impossible to say that any consideration whatever was given or promised by the plaintiff.

Benjamin on Sales, 5th ed., p. 66, 67, *Cooke* v. *Oxley* (1790), 3 T.R. 653, is cited as the leading case on the point.

The case of *Routledge* v. *Grant*, 4 Bing. 653;

This was a case of an offer by defendant to purchase a house, and to give plaintiff six weeks for a definite answer. Best, C.J., non-suiting the plaintiff. . . . on proof that plaintiff had retracted his offer within the six weeks, and on the rule to set aside the non-suit, said:

"If six weeks are given to accept the offer, the other has six weeks to put an end to it; one cannot be bound without the other."

There is no question that, under the circumstances, such as existed in *Clendenning* v. *Cox*, the plaintiff's action would be rejected in England.

I am, therefore, of the opinion that the withdrawal by the defendant of his offer to sell before its acceptance was valid, so far as regards its effect in preventing a subsequent acceptation from constituting a sale of the property. I have discussed this case on the assumption that the option in question did form a contract between the parties, but I might add that so far as this particular case is concerned, there was no undertaking of any description, on the part of the plaintiff, even to attempt to sell the property. There does not appear to have been any consideration of any description given by the plaintiff to the defendant for the option. The only thing that the plaintiff did was to put the paper in his pocket, and take it away without making any offer of any description as to what he would do in the matter. He could have remained for a whole year without taking any action whatever, and at the end of the year, he could, under the same contract, have remained for a second year without taking any action, and in the meantime the plaintiff would have been deprived of the opportunity of selling his property to anybody, without there being any intention even, on the part of the plaintiff, to buy the property or to get anybody to buy it. It looks to me exceedingly like a case where one of the essential elements of a contract fails, viz.: the consideration.

Greenshields, J.

GREENSHIELDS, J.:—The defendant inscribes in review, and submits (1). That under the facts disclosed in the pleadings, and upon the proof made, the paper writing of May 30, 1911, could only be regarded as a naked promise without consideration, a pollicitation, ineffective in law to bind the defendant until accepted by the plaintiff.

The proof establishes that on May 31 the defendant verbally cancelled and revoked, or purported to cancel and revoke, the option. On June 3, 1911, in writing, the defendant did cancel and revoke the option.

The first question then to decide, is, from and after the revocation of what is called in writing, an option, was the defendant bound in the manner and form in which the plaintiff

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seeks to bind him, and which the judgment under revision has declared he may be bound?

At the argument much discussion was had as to what name should be given to the paper writing upon which the plaintiff relies: whether it should be called an "option" or a "promise of sale." I am not greatly exercised about the name. I am more concerned about the thing itself.

It should be observed that the defendant received no consideration whatever for the delivery of this document signed by him to the plaintiff: the contrary is not pretended. All the defendant did, was to say in writing, and he might have said it by word of mouth, in which case it would have been equally as good if he were an honest man—Any time during the coming year, if you so desire, I will sell you my property for the sum of $500. I give you now, without consideration, the privilege of coming to me within a year and declaring to me that you accept the privilege I now give you to buy my property for $500.

The defendant no doubt became a debtor to the plaintiff to the extent of that obligation: he became personally obliged towards the plaintiff to sell his property to him, or to any one by him indicated, for the sum mentioned in the writing. It was nothing more or less than a personal obligation. The plaintiff did not, and could not, by the writing, acquire any real right in the defendant's property. No real or personal obligation existed or was created so far as the plaintiff was concerned: He was not bound to buy; he was not bound to offer to buy: in other words, it was a privilege given to the plaintiff without consideration, binding the defendant when accepted, and creating an obligation on the part of the plaintiff only when accepted. The trial Judge says in his judgment:

Considering that the defendant could not withdraw from the option given by him to the plaintiff when this last had manifested his intention of availing himself of the said promise, an unilateral obligation being created.

The plaintiff in his declaration says he manifested—to use the words of the judgment—his intention of availing himself of the said promise only on June 6, 1911. On May 31, 1911, the defendant had verbally withdrawn—again to use the words of the judgment—from the option, and in writing he had withdrawn on the 3rd of June, 1911. The Judge proceeds:—

Considering that though the plaintiff had not accepted the bargain or offer contained in the said promise, he had accepted the promise by his acts

in going to the defendant's place; preparing the option and getting it back from him.

Now, what the plaintiff did, was to go to the defendant and get the defendant to say—I give you the privilege of buying my property at a price for a year. The defendant said that over his signature, and the plaintiff got the physical possession of a piece of paper saying that, and took it away with him. If it had been given to him verbally, it would have been equally as effective, and the plaintiff would have carried it away, instead of in his pocket, in his head or in his memory. In neither case would he have been in any way, or in any sense, bound to buy the defendant's property. For one reason or another, rightly or wrongly, the defendant changed his mind, and before the plaintiff had ever bound himself by any acceptance, the defendant said—I revoke and cancel the option I have given you. In other words, I will not carry out my promise: I will not deliver to you what I promised to deliver to you. You may claim damages from me for going back on my promise, but I tell you now I will not part with my property to you, or to any one you may name. If you have a claim in damages against me, exercise that claim: enforce it, if you wish, but my property you will not get.

This is the whole question in the case, and upon it I declare, without hesitation my opinion. An option or privilege, or promise of sale, given by one to another without consideration, and for a fixed time, may be, at the will of the giver, revoked and cancelled at any time before it has been formally and in clear terms accepted by the person to whom it was given.

I further hold, that such a writing as that upon which the plaintiff relies, creates only a personal claim against the giver and confers, or transfers, or creates no real right upon the property mentioned in the writing. In this case I further hold, that there was no contract existing between the plaintiff and the defendant, the specific performance of which could be enforced by either party.

I further hold, that at any time before a formal acceptance of the option the defendant could sell his property to any one he pleased, and give a perfect title to the property. I further hold that the mere delivery to, and the receipt by the plaintiff of the writing was not in any sense an acceptance of the option or promise of sale, or whatever baptismal name may be given to the document.

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CLENDENNING v. COX.

Greenshields, J.

If the plaintiff has no claim against the defendant, and I am not called upon at the moment to express an opinion, it is not a claim to the ownership of the defendant's property. The option was cancelled before acceptance: the defendant had full legal right to so cancel it, subject to any claim other than the one made, that the plaintiff might seek to exercise.

Coming to this conclusion, I refrain from discussing the various other grounds upon which the defendant seeks reversal of the judgment, and for the reasons above stated then I should reverse the judgment and dismiss the plaintiff's action with costs.

Mercier, J. (dissenting)

MERCIER, J., dissented. *Judgment reversed.*

CAN.

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LACHANCE v. CAUCHON.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. November 26, 1915.

1. APPEAL (§ II A 1—35)—JURISDICTION OF CANADA SUPREME COURT—JURISDICTIONAL AMOUNT—TITLE TO LAND.

An appeal from an order for injunction restraining the defendant from carrying on dangerous operations in a quarry, the amount of damages awarded being merely $50, does not involve a title to land nor otherwise fall within the provisions of sec. 46 of the Supreme Court Act, R.S.C. 1906, ch. 139, and which the Supreme Court of Canada has, therefore, no jurisdiction to maintain.

[*Price Bros.* v. *Tanguay*, 42 Can. S.C.R. 133; *Hamilton* v. *Hamilton Distillery Co.*, 38 Can. S.C.R. 239, applied; *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.*, 43 Can. S.C.R. 650; distinguished; appeal from 24 Que. K.B. 421, quashed.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side (24 Que. K.B. 421), affirming the judgment of McCorkill, J., in the Superior Court, District of Quebec, whereby the plaintiff's action was maintained with costs.

Marchand, for the appellant.

Gelly, for the respondent.

The judgment of the Court was delivered by

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—This is an appeal from the Court of King's Bench affirming a judgment of McCorkill, J., which declared perpetual an interlocutory injunction and condemned the appellant to pay $50 for damages and the costs of the suit. The proceedings began by way of a petition for an injunction alleging that the defendant was the proprietor of a quarry situated in the village of Chateâu Richer, and the plaintiff had his home upon a lot of land a short distance from the quarry. The petition alleged that the quarry was owned by defendant Lachance and operated by defendant Baker, that the work was

dangerous to the life and property of the plaintiff through blasting, etc., setting out various occasions upon which rocks had been thrown upon his property and had endangered the life of members of his family and of the public. The petitioner claimed damages of $100 and asked for an interlocutory injunction enjoining defendants and their officers and agents from carrying on their dangerous operations.

The order made by McCorkill, J., sets out the facts shewing that the interlocutory order had been made, that a writ had been issued and served with a certified copy of the judgment granting the interlocutory injunction. He says that the plaintiff moved for a rule *nisi* ordering the defendants to shew cause why they should not be held in contempt for having violated the injunction, that this motion was granted, that the defendants pleaded separately to the said interlocutory order on the merits. He held that the defendants had failed to prove the material allegations of their defence and that the plaintiff had proved the material allegations of his petition. He maintained the plaintiff's action, made absolute and permanent the interlocutory injunction, and ordered the defendants to pay the plaintiff $50 damages. The Court of King's Bench confirmed this judgment and the defendant Lachance now appeals to the Supreme Court.

This appeal coming from the Province of Quebec is, of course, governed by the provisions of sec. 46, which say that no appeal shall lie—

(*a*) Unless it involves the validity of an Act of the Parliament of Canada.

. . .

(*b*) Relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound.

(*c*) Amounts to the sum or value of two thousand dollars.

This case clearly does not fall within any of the above subsections.

In a number of cases an appeal has been attempted to be brought to this Court where the remedy asked has been an injunction, but in all of them there was some foundation for the contention that titles to land were involved.

In *Price Bros.* v. *Tanguay*, 42 Can. S.C.R. 133, the plaintiffs complained that they were impeded in the right to drive logs down the course of a river and asked for the removal of a boom

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placed across the river by the defendants. This Court held that there was no jurisdiction.

In *City of Hamilton* v. *Hamilton Distillery Co.*, 38 Can. S.C.R. 239, the plaintiffs asked for a declaration that certain municipal by-laws were illegal and for an injunction restraining the defendants from levying or collecting certain water-rates. In this case also the Court held that they had no jurisdiction.

The case of *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.*, 43 Can. S.C.R. 650, does not assist the appellant because there the action was to set aside a by-law and an injunction prohibiting the carrying into effect a contract of sale made pursuant to the by-law and involving property worth $40,000. The majority of the Court held that the matter in dispute was the $40,000 provided for in the contract.

In the present case there appears to be nothing upon which the appellant can rely to support the jurisdiction of the Court.

Appeal quashed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

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DALES v. BYRNE.

Ontario Supreme Court, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. February 4, 1916.

SOLICITORS (§ II C 2—35)—*Lien for costs—Fund recovered by attachment in garnishee proceedings—Creditors Relief Act—Priority.*]—Appeal by the plaintiff's solicitor from an order of the County Court upon an application by the appellants for payment out of Court to them of the amount of their costs of attachment proceedings and of this action; the appellants claiming a lien upon the fund in Court upon the ground that it was created or preserved by their exertions. The order made upon the application, and now the subject of appeal, while it allowed the appellants their costs of the attachment proceedings out of the fund, directed that the balance should be paid to the sheriff for distribution among creditors, under the Creditors Relief Act, R.S.O. 1914 ch. 81.

T. N. Phelan, for appellants.

No one appeared to oppose the appeal.

MEREDITH, C.J.C.P., delivering judgment, said that the solicitors assumed that they had a lien upon the moneys in question, and then asked the Court to hold that the Creditors Relief Act did not deprive them of it; and it was obvious that they never had any such right, never having had possession of or any control over the moneys. Having recovered the judgment for their client, and attached the moneys, only they had the right to seek the equitable interference of the Court in aid of any equitable right they might have to payment of their costs out of these moneys: see *Hough* v. *Edwards* (1856), 1 H. & N. 171, and *Mercer* v. *Graves* (1872), L.R. 7 Q.B. 499: a right now expressly given in Rule 689.

Under the Creditors Relief Act, sec. 5(1), moneys attached in garnishee proceedings are deemed to be so attached for the benefit of all creditors.

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Any right the solicitors can have cannot be greater than the right of their client. Anything that may have been preserved or recovered has been recovered for the client's benefit; there is no conflict of interest between solicitors and client: see *Francis* v. *Francis* (1854), 5 D. M. &G. 108, and *Re Harrald, Wilde* v. *Walford* (1884), 51 L.T.R. 441.

The solicitors relied on *Bell* v. *Wright*, 24 Can. S.C.R. 656, but it is not in point, being a case of set-off of debts to the prejudice of a solicitor's claim.

The Creditors Relief Act, sec. 6(2), in unmistakable words, provides that the moneys in question shall go to the creditors, who come within its provisions, ratably, less the costs of the garnishee proceedings, which the attaching creditor—the client in this case—is to have. How then can client or solicitor have more than that?

The appeal should be dismissed.

LENNOX, J., was of opinion, for reasons stated in writing, that the appeal should be dismissed.

RIDDELL and MASTEN, JJ., agreed that the appeal should be dismissed. *Appeal dismissed without costs.*

McCAMMON v. WESTPORT MANUFACTURING AND PLATING CO. Ltd.
Ontario Supreme Court, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. January 24, 1916.

CORPORATIONS AND COMPANIES (§ VI F 1—345)—*Winding-up—Action by liquidator to recover machinery seized under execution—Title of company to chattels—Sale—Mortgage—Evidence—Minutes of company.*]—Appeal by the plaintiff from the judgment of Lennox, J., dismissing an action by liquidator (9 O.W.N. 6, reversed).

J. A. Hutcheson, K.C., for appellant.

D. A. McGee, for defendants, respondents.

HODGINS, J.A., read a judgment in which he said that the company of which the appellant was liquidator was on the 21st March, 1914, ordered to be wound up; and since 1911 the machinery now claimed was in a separate building, in which the insolvent company carried on business until a seizure was made by the sheriff under a writ of fieri facias at the instance of the respondent J. J. McGee. On the 23rd July, 1913, Witcher and

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W. R. McGee conveyed this machinery by a bill of sale to the insolvent company. In February, 1913, the insolvent company was incorporated, and it bought out the assets of a partnership called the Wood Working Company, owned apparently by Witcher and W. R. McGee. They had in fact been previously acquired by J. J. McGee under an agreement dated the 4th October, 1912. The Wood Working Company partnership, then consisting of one Witcher and one Edey, since deceased, was formed by the respondent company in June, 1911, to take over the wood working business and machinery, as its continued ownership by the respondent company would have violated the agreement with the Corporation of the Village of Westport, under which the village corporation had granted the company a bonus.

The formation of the insolvent company was admitted by the respondent J. J. McGee to be partly due to fear of the village corporation entering suit for violation of the agreement. He now alleged, as his reason for disputing on behalf of the respondent company and of himself the original title of Witcher and Edey to the machinery, that he could find no minutes of the respondent company authorising the sale to those men in 1911.

Certain facts, set out by the learned Judge, were given in evidence to support the title of the insolvent company; and it was pertinent to remark that the evidence of the respondent J. J. McGee that the mortgage of the 1st December, 1913, was intended to cover the assets of both companies, was contradicted by the fact, deposed to by him, that he was not aware till the 21st April, 1914, that the insolvent company did not own, as he believed, the machinery in question.

The facts led to the conclusion that there was an actual transfer of the assets now in question to Witcher and Edey in 1911, either for the purpose of misleading the village corporation in regard to the ownership of the wood working business, or with the bonâ fide intention of transferring them out and out. In the former case, the Court should not assist either of the respondents to dispute it; and, if the latter be the correct position, the appellant should succeed.

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The absence of the minutes is not conclusive against the actual testimony or against the other circumstances which appear in evidence. Three machines were acquired afterwards, the title to which did not depend upon this transfer.

The appeal should be allowed, the judgment below set aside, and judgment entered for the appellant, with costs, for delivery of all the machinery and chattels claimed by him.

GARROW and MACLAREN, JJ.A., concurred.

MAGEE, J.A., agreed in the result.

MEREDITH, C.J.O., dissented. *Appeal allowed.*

CURLEY v. VILLAGE OF NEW TORONTO.

Ontario Supreme Court, Falconbridge, C.J.K.B., Magee, J.A., Latchford and Kelly, JJ. January 5, 1916.

CONTRACTS (§ IV A—321)—*Claim for payment for work done—Extras—Certificate of engineer—Impartiality.*]—An appeal by the plaintiff from the judgment of Clute, J., dismissing the action with costs, and the counterclaim without costs (8 O.W.N. 274, affirmed).

J. J. Gray, for appellant.

W. A. McMaster, for defendants, respondents.

LATCHFORD, J., delivering the judgment of the Court, said that it was properly found by the learned trial Judge that the plaintiff had not completed, according to contract, any one of his undertakings with the defendants. What he was entitled to receive had been paid. He had no claim under the contract or for extras.

By a term in each of the three contracts between the parties, payments were to be made to the plaintiff monthly as the work progressed, on the engineer's certificate, at the rate of 80 per cent. of the value of the work done in the preceding month, and the remaining 20 per cent. was to be paid 35 days after the engineer had certified that the work had been completed in accordance with the plans and specifications. A further provision of each contract was, that the defendants should not be liable for materials supplied by the contractor which were not provided for in the plans or specifications or required (as extras) by the written instructions of the engineer. No certificates were

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issued subsequent to the 24th November, and no orders in writing were at any time given for extra work and materials.

If a certificate was a pre-requisite as to contract work, and a written order as to extras, no basis for a reference was established, and the action was rightly dismissed.

It was not disputed that the engineer refused to give any certificate subsequent to that of the 24th November.

On behalf of the plaintiff it was urged that the engineer departed from the judicial position assigned to him by the parties; and that, therefore, the defendants were precluded from setting up as a defence that the issue of the engineer's certificate was a condition precedent to any right of recovery on the part of the plaintiff. *Hickman* v. *Roberts*, [1913] A.C. 229. The principle of that decision is, that an architect or engineer appointed, by the parties to a contract, to act as arbitrator between them, must act impartially in the discharge of his high duty and must maintain his judicial position at all times.

Here, however, there was no evidence that the engineer had not always possessed the judicial independence necessary to persons in his position. All that was shewn was, that he was asked by the defendants to report upon the progress of the work—which was very unsatisfactory—and reported.

The certificates as to contract work and written orders as to extras are necessary pre-requisites to the plaintiff's right of recovery. In their absence, the action was properly dismissed.

Appeal dismissed with costs.

McKENZIE v. MORRIS MOTOR SALES CO.

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

FRAUD AND DECEIT (§ IV—15)—*Assignment of mortgage in exchange of personalty—False representations as to value of land—Materiality—Counterclaim to action for breach of contract to deliver personalty.*]—Appeal by the defendants from the judgment of Masten, J., at the trial without a jury, in favour of the plaintiff, in an action for damages for breach of an agreement whereby the defendants were to deliver to the plaintiff two motor cars, in consideration of an assignment by the plaintiff to the defendants of a mortgage of a farm.

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The defendants alleged that the plaintiff had misrepresented the value of the farm, as they discovered after they had delivered one of the cars, and they refused to deliver the other. The defendants counterclaimed damages for false representations.

Gordon Waldron, for appellants.

G. T. Walsh, for plaintiff, respondent.

GARROW, J.A., delivering the judgment of the Court, said that the material representation made by the plaintiff was, that he had recently sold the farm for $4,500. The mortgage assigned was for $2,306.10. The statement was not substantially supported by the proved facts. An exchange is not at all the same thing as a sale. The plaintiff also represented that the mortgage was worth the price of the two cars. The only possible conclusion upon the evidence was, that the plaintiff's opinion was not merely erroneous, but so grossly erroneous that it could not have been honestly held.

The defendants had satisfactorily proved that the statements of which they complained were false; that they were material; that they (the defendants) had relied upon the statements to their injury; and the only proper inference upon all the evidence was, that the statements were made with intent to deceive.

The action should, therefore, be dismissed with costs, and the defendants should have judgment upon their counterclaim with costs. The money realised from the sale of the farm should be fixed as the amount of the damages resulting from the fraud.

Appeal allowed.

BENSON v. MAHER.

Ontario Supreme Court, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. January 10, 1916.

MASTER AND SERVANT (§ II A 4—63)—*Injury to servant—Defective scaffolding—Breach of statutory duty—Building Trades Protection Act—Findings of jury—Negligence of fellow-servant—Determination of liability by Appellate Court.*]—Appeal by the plaintiff from the judgment of the County Court in favour of the defendant, in an action for damages for injury sustained by the plaintiff by reason of the collapse of a defective scaffold

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erected in a building of the defendant, upon which the plaintiff was working at the time of the collapse. The action was tried with a jury, and the judgment for the defendant was entered upon the jury's findings.

V. H. Hattin, for appellant.

W. N. Ferguson, K.C., for defendant, respondent.

HODGINS, J.A., delivering the judgment of the Court, said that the appellant was working upon a scaffold erected for the purpose of enabling joists to be replaced in a building of the respondent which had been damaged by fire. The scaffold was in fact erected by one Buckley, who was a foreman carpenter, but it was not clearly established that he occupied that position in regard to this particular work. The appellant and one Gordon were sent to the work by Cross, who had been told by Tucker, the respondent's manager or superintendent, to engage men for the work to be done, and Buckley was one of these men. The scaffold was erected before the appellant got to the work. The jury found, on sufficient evidence, that the appellant's injuries were caused by a defect in the manner of the construction of the scaffold, but they also found that the defect did not arise from any negligence on the respondent's part, and that the respondent furnished proper materials for the scaffold. They absolved the appellant from contributory negligence. The case went to the jury on a charge by the learned County Court Judge that the respondent was not liable if the injuries were caused by the negligence of a co-employee or fellow-servant of equal rank.

The attention of the learned Judge was not called to the provisions of the Buildings Trades Protection Act, 1 Geo. V. ch. 71, sec. 6, now R.S.O. 1914 ch. 228, sec. 6, nor to the decision in *Hunt* v. *Webb*, 13 D.L.R. 235, 28 O.L.R. 589, which is decisive against the respondent. The finding of the jury that the defect in the scaffold did not arise from any negligence of the respondent must be set aside, as their attention was not directed to the liability arising out of the breach of statutory duty.

The appellate Court having before it all the materials necessary for the determination of the matters in controversy relating to the question of liability, it was not necessary to send the

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case back for a new trial. The statutory duty having been neglected, the Court was enabled to give the proper judgment. The finding of the jury should be set aside and the judgment vacated, and in place thereof there should be a finding that the respondent was liable on account of the breach of the duty created by the Act referred to, and directing judgment for the appellant for $300, with costs of the action and appeal.

Appeal allowed.

REX v. CLIFFORD.

Ontario Supreme Court, Middleton, J. January 8, 1916.

INDECENCY (§ I—5)—*Indecent act—Public place—Information—"Wilfully"—Amendment—"Presence of one or more Persons."*]—Motion to quash conviction by Police Magistrate for committing an indecent act in a public place, contrary to sec. 205 of the Criminal Code.

T. C. Robinette, K.C., for applicant.

Edward Bayly, K.C., for Crown.

MIDDLETON, J.:—The accused is a woman who advertised massage treatment. The evidence discloses that this is a mere cloak for flagrant immorality; and that, upon the witness for the Crown going to this women's residence, an abominable offence against morals was committed by her. No one else was present, and the witness and the woman were both parties to the indecent act deposed to.

The information in the case is defective, as it omits to charge that the act was done "wilfully," which is essential: *Ex p. O'Shaughnessy* (1904), 8 Can. Crim. Cas. 136; *Rex* v. *Tupper* (1906), 11 Can. Crim. Cas. 199; *Rex* v. *Barre* (1905), 11 Can. Crim. Cas. 1. This is, however, a matter that can be cured by amendment, for the evidence undoubtedly discloses the wilful nature of the act.

The most serious question is, whether the act of immorality disclosed brings the case within the provisions of the statute. Omitting immaterial words, the statute (Criminal Code, sec. 205) provides: "Every one is guilty of an offence . . . who wilfully (*a*) in the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access."

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With every desire to uphold this conviction if possible, I am driven to the conclusion that the misconduct complained of is not within the statute. The two parties to the offence were alone present, and I do not think that the statute aims at the punishment of an act of indecency unless there is some third person present at the time of the occurrence.

The wording of the statute, bearing in mind the history of the law relating to the offence in question, is singularly unfortunate, and probably, in an endeavour to remove doubt with regard to one particular matter, the common law has been much narrowed.

In Stephen's Digest of the Criminal Law, 6th ed., p. 132, the common law is accurately summarised thus: "Every one commits a misdemeanour who does any grossly indecent act in any open and public place in the presence of more persons than one. . . . A place is public within the meaning of this Article if it is so situated that what passes there can be seen by any considerable number of persons if they happen to look."

The words "place" and "public place," as has been more than once pointed out, are exceedingly elastic, and the meaning must be determined having regard to the context and the purview of the legislation. The meaning attributed to the words by Stephen, in his endeavour to formulate the common law, is well justified by the cases, more particularly by the case of *Regina* v. *Wellard* (1884), 14 Q.B.D. 63, in which a conviction for indecent exposure in a public place was upheld, where the place was one to which the public had no right of access, but where trespass was freely permitted without interference.

In the English statute "any public and indecent exposure of the person" is prohibited. The wording of this statute is in accordance with the common law theory. The offence is in the nature of a nuisance; the exposure or the indecent act being punishable because made or done in such a place that it would offend the public or members of the public.

In numerous English cases the offence was committed on private property, but in such a place as to be easily visible to passers-by or the occupants of adjacent houses: e.g., *Thallman's Case* (1863), L. & C. 326.

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Unfortunately, in our statute this element of visibility to the public seems to have been lost sight of, and the act is punishable only when committed in any place to which the public have or are permitted to have access. I draw attention to this, hoping that Parliament may see fit to amend the statute by adopting the phraseology of the English statute (14 & 15 Vict. ch. 100, sec. 29).

In the Liquor License Act, as amended in 1912, by 2 Geo. V. ch. 55, sec. 13, a penalty is imposed upon any person found intoxicated "upon a street or in any public place." My brother Kelly, in *Rex* v. *Cook*, 8 D.L.R. 217, 27 O.L.R. 406, thought that the rule of *ejusdem generis* applied, and that the meaning of the words "or in any public place" in that statute was coloured by the words "upon a street," immediately preceding, and indicated that the public place referred to in that statute must be a place to which the public had access as of right, and therefore did not apply to an hotel.

While this decision is, no doubt, right as far as that statute is concerned, I am not prepared to hold that it applies to the statute now under consideration; and I think that the statute in hand may well be interpreted so as to include any place to which the public have access as of right or by the invitation or permission of the owner; and I would think that in this case the magistrate was justified in finding that this massage parlour, to which apparently all comers were admitted, was a place to which the public "are permitted to have access," within the statute.

But this is not enough to enable me to sustain the conviction; for it is of the essence of the offence that it should be committed "in the presence of one or more persons;" and I do not think that this is satisfied by holding that the man who participates in the offence is "a person" contemplated by the statute.

Because the common law offence was punished as an outrage upon the persons in whose presence it was committed, it was thought that there could be no punishment if the offence was committed merely in the presence of one person; and it is, no doubt, to get over this difficulty that the English statute already quoted was passed.

In *Regina* v. *Watson* (1847), 2 Cox C.C. 376, Chief Justice

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Denman, in quashing an indictment of this nature, said: "The general rule is, that a nuisance must be public; that is to the injury or offence of several." And in *Elliot's Case* (1861), L. & C. 103, where two persons committed fornication in sight of one witness only, it was held that there could be no conviction; shewing that a party to the offence could not be regarded as a person offended thereby. Our statute makes it enough that one person should be shewn to be present, but I think it follows that he or she must be a person other than those engaged in the offence.

To hold otherwise would be to render punishable under this section many acts which it is generally assumed our law does not reach, and to render unnecessary all the provisions of the Code with respect to the punishment of inmates and frequenters of houses of ill-fame.

The state of affairs disclosed in the evidence seems to call urgently for legislative interference, but cannot justify an undue straining of the statute passed *alio intuitu*.

The conviction will, therefore, be quashed, without costs, and with an order for protection. *Conviction quashed.*

SHAW v. UNION TRUST CO. Ltd.

Ontario Supreme Court, Riddell, J. December 11, 1915.

DISCOVERY AND INSPECTION (§ IV—31)—*Examination of officer of defendant trust company—Status of shareholder as plaintiff—Breaches of trust—Ultra vires or fraudulent acts—Scope of discovery.*]—Motion by the plaintiff for an order for the committal of the defendant for contempt of Court in refusing (upon the advice of counsel) to answer certain questions upon his examination for discovery as an officer of the defendant company.

E. B. Ryckman, K.C., for plaintiff.

G. H. Watson, K.C., and *W. B. Raymond*, for defendants.

RIDDELL, J.:—An action is brought by Leslie M. Shaw, on behalf of himself and all other shareholders of the Blake Contracting Company other than the defendants, against the Union Trust Company Limited, the Financial Securities Company of Canada Limited, J. M. McWhinney, W. Murray Alexander, C. R. Cumberland, A. J. Glazebrook, and the Blake Contracting Company. In the statement of claim it is set out that the Blake Contracting Company had a contract with the

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Richmond and Henrico Railway Company of Virginia to build a railway in that State; that it had entered into a contract with Burton et al., a firm of railway contractors in Richmond, Virginia, for that firm to build the road. The Union Trust Company and the Blake Contracting Company then entered into negotiations which resulted in a written contract between the Blake Contracting Company and "the Financial Securities Company (acting therein for and on behalf of and in the interest of the trust company)"—whatever that may mean. Under that contract, the Blake Contracting Company agreed to build the road, repay with interest to the Financial Securities Company any advance made by that company, assign to the Financial Securities Company all moneys, etc., payable to the Blake Contracting Company under its contracts; that, subject to an option to Kleinwort & Co., of London, England, the bonds which were to be issued by the railway company might be sold by the securities company or the trust company and applied on the advances; that the directors, etc., of the securities company were to be given a majority representation on the directorate of the Blake Contracting Company until repayment of advances; that an issue of bonds to the amount of $2,500,000 would be made by the railway company, and its stock increased to $1,250,000, the Union Trust Company to be trustee of the bond issue, etc.

The securities company agreed to supply sufficient money to complete the enterprise, not to exceed $500,000; and it was agreed that the railway bonds and stock should be held by the trust company as security for the repayment of the advances, etc., for sale, etc., at the request of the securities company (the Blake Contracting Company to assist in every way); accounts should be kept by the trust company; the right to vote on the railway stock and on "the said stock in the contracting company" to be in a nominee of the securities company, that company to have the right to inspect the work done and being done, etc., and to stop advances in case of default in finishing the road, etc., and to take possession of the work—with other provisions more or less usual, but of no consequence on this inquiry.

The statement of claim proceeds to set out that the contracting company transferred the money, the right to stock, bonds,

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etc., a majority of stock in the contracting company, "to the trust company and to the securities company," elected directors of these companies to its own board so as to be the majority, the trust company was appointed trustee as agreed, "the trust company and the securities company" were put in control of the construction of the railway, etc., and "so became trustees for the plaintiff and the other shareholders of the contracting company." It then is alleged that the trust company and the securities company well knew that the contract was "understood and agreed" to be "predicated wholly upon the said written contracts," etc.

Then it is claimed that the trust company and the securities company (a) procured the cancellation of the Burton contract, (b) cancelled an agreement with Kleinwort & Co. for an advantageous sale of the bonds of the railway company, (c) neglected to sell the bonds, (d) undertook the construction of the railway on their own account and at increased expense, (e) got an extension of time for building the road, (f) and in these acts used the control they had obtained on the board of the contracting company—they built a railway, etc., at the cost of $1,200,000, instead of a maximum of $625,000, and the trust company sold the undertaking for $700,000, for default under the bond mortgage.

The individual defendants are charged with personal misconduct and acting as mere agents of the offending companies. "The shareholders of the contracting company who transferred their shares in trust to the trust company and to the securities company and their nominees have demanded" the retransfer of their shares, but been refused; the plaintiff owns 300 shares of $100 each out of a capital stock of 1,000 shares; the two offending companies have failed to comply with the laws of New York State, under which the contracting company is incorporated—the trust company has no authority under its charter to do any of the acts complained of.

The prayer is: (1) for damages for breach of trust; (2) and for breaches of contract; (3) an injunction; (4) another injunction; (5) a third; (6) and a fourth; (7) an account by the two companies.

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The trust company in its statement of defence denies everything, asserts that the statement of claim discloses no cause of action, says the plaintiff has no status to sue, denies that it is a trustee for the shareholders, says it made no contract with them, denies control of the securities company or that it acted as shareholder of the contracting company, etc., etc.

An appointment was taken out for the examination of Mr. McWhinney "as an officer of the Union Trust Company;" upon the examination, the following took place:—

After rather formal questions and answers, from which it appeared that Mr. McWhinney was general manager of the Union Trust Company, and had been for two or three months only a director of the Financial Securities Company, his counsel took objection in these words: —

"Mr. Raymond: I am going to object now to the question we have now reached, a question which relates to issues raised in this action; the other questions were formal, but I am going to object to this question and any other questions which take the witness into the issues which the plaintiff has raised herein; my objection to this question and any similar questions will be that the plaintiff has no status—bringing this action as a shareholder only—has no status to bring the action in this form, and has no status to inquire into the issues he has raised here; the objection has already been taken in the statement of defence, paragraphs 2 and 3, I think; this objection is not taken at all with any intention to delay merely, but is a *bonâ fide* objection, taken to raise the question whether these issues can be properly inquired into in such an action as this; this is perhaps the most convenient time to raise it, and have it judicially determined.

"Mr. Ryckman: I maintain that, upon the statement of claim, and the transactions that were done and which took place by the Union Trust Company with the Blake Contracting Company and the Richmond and Henrico Railway Company, and with the promoters of the project at Richmond, and with the Financial Securities Company of Canada Limited, a party defendant, the relations and actions and inter-actions of the Union Trust Company with these different parties is the basis of our action, and such questions must of necessity be answered.

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"Ruling: Mr. Ryckman is entitled to inquire into the relations between the two companies in connection with this matter.

"13. Q. Do I understand, Mr. McWhinney, that, as an officer of the Union Trust Company, you decline to answer, on the advice of counsel, any questions with relation to the relations between your company and the Financial Securities Company of Canada Limited? A. I do.

"14. Q. You know your company, in its statement of defence, has denied the allegations of the plaintiff respecting the relations between your company and the Financial Securities Company—do you decline to answer questions that are based upon these denials contained in your own statement of defence?

"Mr. Raymond: On advice of counsel, he declines to answer questions going into the questions raised in your pleadings."

A motion is now made to commit Mr. McWhinney for a contempt of Court or for a writ of attachment, etc.

This is the correct practice where an officer of a corporation has declined to answer questions asserted to be proper: *Badgerow* v. *Grand Trunk R.W. Co.* (1889), 13 P.R. 132; *Central Press Association* v. *American Press Association* (1890), 13 P.R. 353; *McWilliams* v. *Dickson Co. of Peterborough* (1905), 10 O.L.R. 639; and while, if it be desired actually to commit the recalcitrant, the motion should be in Court (*Merchants Bank* v. *Pierson* (1879), 8 P.R. 123), it may well be in Chambers if all that is desired be an adjudication upon the propriety of the refusal—and this is the usual case and the usual practice. (If there is, and I think there is not, an irregularity in the practice, Mr. Watson most properly abandons all technical objections.)

The real foundation for the refusal to answer is sufficiently set out in the position taken by counsel at the examination, which was also taken on this motion, viz., that the plaintiff has no right to sue at all, and therefore has no right to discovery.

It is not a convenient way to bring up such an important question thus, but I cannot hold that it is altogether improper; and, if it must now be determined, no harm will be done, although it might have more satisfactorily come up in another form.

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The case of *Rogers* v. *Lambert* (1890), 24 Q.B.D. 573, decides that, whatever the state of the pleadings, the party is not allowed to compel answers to his questions which can be of no avail to advance his legal position. There, in an action for wrongful detention of goods by a bailee, he set up in his statement of defence the *jus tertii;* the defence was not moved against; he delivered interrogatories aimed at procuring admissions of facts which would not form a valid defence even if true: Charles, J., allowed the interrogatories, but his decision was reversed by a Divisional Court, Denman and Wills, JJ.; Denman, J., at p. 575, says: "Assuming these facts to be true . . . they would afford no defence." Wills, J., says, p. 577: "The defence, therefore, to which the interrogatories are directed, even assuming it were sufficiently raised upon the pleadings, would be no defence in law; and the interrogatories consequently, not being relevant to any matter which would afford a good defence to the action, must be disallowed."

I can see no difference between a defence and a claim—and think any questions concerning any matter which could not give, directly or indirectly, separately or in conjunction with something else, a cause of action, must be disallowed.

This is the same principle as the disallowance of examination upon matters which are alleged in the statement of claim, but can give a cause of action, etc., only if some other fact be first established—such cases as *Evans* v. *Jaffray* (1902), 3 O.L.R. 327, *Bedell* v. *Ryckman* (1903), 5 O.L.R. 670, etc., are on that principle. See also *Parker* v. *Wells* (1881), 18 Ch. D. 477 (C.A.); *Fennessy* v. *Clark* (1887), 37 Ch. D. 184; *Tasmanian Main Line R.W. Co.* v. *Clark* (1879), 27 W.R. 677; *Whyte* v. *Ahrens* (1884), 26 Ch. D. 717, 721 (C.A.); *Barham* v. *Lord Huntingfield,* [1913] 2 K.B. 193; *Hennessy* v. *Wright* (1888), 24 Q.B.D. 445, 448(*n.*); *Dawson* v. *Dover and County Chronicle Limited* (1913), 108 L.T.R. 481, at p. 484, and cases cited.

It is therefore necessary to find out precisely what the claim is and upon what it is founded.

While there are several more or less vague suggestions of direct dealing between the offending companies, it is perfectly manifest that the real complaint is based upon an alleged breach

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by these companies of an agreement or agreements with the contracting company. The contracts were with the contracting company, the damages, if any, were those of the contracting company—not at all of the shareholders. The shareholders as such are as distinct entities from the company as they are from each other; and, unless there are peculiar facts, they cannot sue for damages to the company or upon a contract with the company.

The statement of claim sufficiently alleges that the plaintiff and those whom he represents are minority shareholders and that the offending companies are majority shareholders—in that case the plaintiff can sue only if the majority are shewn to have acted *ultra vires* the company or in fraud. "The cases in which the minority can maintain . . . an action are . . . confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company:" *per* Lord Davey in *Burland* v. *Earle*, [1902] A.C. 83, at p. 93. The learned Privy Councillor goes on to say: "A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company. . . ."

The facts alleged are sufficient to bring the acts of the defendants as shareholders of the contracting company within the rule. See also *Exeter and Crediton R.W. Co.* v. *Buller* (1847), 5 Ry. Cas. 211; *Normandy* v. *Ind Coope & Co.*, [1908] 1 Ch. 84; *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56. This last case decides that if, when the action began, the defendants held such a preponderance of shares that they could not be controlled by the other shareholders, the minority might begin an action without an attempt to have the company approve of it. "An action in this form is far preferable to an action in the name of the company and then a fight as to the right to use its name." Many cases will be found mentioned in Palmer's Company Precedents, 11th ed., pp. 1359 *sqq.*

The objection, therefore, to answer questions, in the broad form in which it is made, cannot be sustained.

I make no ruling as to the propriety of any particular ques-

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tion: if any question be objected to, the examiner will rule, and another application may be made to the Court.

The order will be that Mr. McWhinney will attend at his own expense and answer all proper questions then put to him—he will also pay the costs of this application forthwith.

It may perhaps be that the Court will not compel answers to certain questions until the relationships of the two companies to each other and to the contracting company and (or) the plaintiff are established; but with that I have nothing to do—no such ground was urged at the examination or before me.

I may say that I am not at all impressed with the argument that the stand taken by counsel for the trust company was well based upon a supposed delicacy in the reputation of such a company, which would be fatally damaged by a breath and disappear like the bloom upon the peach. It seems to me that an honourable company, honestly conducted as I suppose this is, would be eager to let all the light possible into its dealings so as to shew the perfect propriety of its conduct—their is nothing like sunlight to kill the microbes of suspicion.

Ordered accordingly.

DAVEY v. CHRISTOFF.

Ontario Supreme Court, Masten, J. December 17, 1915.

LANDLORD AND TENANT (§ II B 2—15)—*Lease of theatre with equipment—Implied covenant for fitness for habitation—Inadequate heating—Surrender of lease — Acceptance — Lessee's refusal to transfer license—Lessor's retention of sum deposited as security.*]—Action by the lessee of a moving picture theatre against the lessors for the return of $400 deposited as security, for damages for breach of covenants, and for damages for deceit. Counterclaim for damages for breach of covenants.

J. W. Payne, for the plaintiff.

W. A. Henderson, for the defendants.

MASTEN, J.:—The plaintiff in October, 1914, became a sublessee from the defendants of a moving picture show and of the premises and equipment theretofore used by the defendants in connection therewith. The premises were known as

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"The Temple" and were situate at 1032 Queen street west, Toronto. The freehold in these premises belonged to a man named Vogan. The picture show was conducted on the ground floor, and occupied a space of 30 by 105 feet. On the next floor above was situate a billiard-hall, conducted by a man named McNichol, and the upper flat was occupied as apartments by a woman named Mrs. Murray.

The lease is dated the 8th October, 1914, and is in a somewhat extraordinary form. It is executed on a printed form of "farm lease," on which, in the space usually devoted to filling in the names of the parties, there is typewritten the following: "C. K. & B. Christoff and Robert F. Davey do hereby and agree to lease the Moving Picture Show known as the Temple, 1032 Queen St. W., for the term of two years from the twelfth of October, one thousand nine hundred and fourteen, at a monthly rental of $200.00 two hundred dollars to be paid in advance. It is understood that the lessor leaves the whole contents, including three hundred and eighty-seven seats more or less, piano, machines, and all other necessary equipment for the operation of the theatre. The lessee agrees to leave the same in good order and will replace anything carelessly broken during his term of rental. It is also understood that he will keep the building other flats above heated at his own expense. All expenses for hired help, electric current and other necessary claims will be paid by the lessee after the date he had taken possession. Further in consideration of the sum of four hundred dollars be deposited as a covenant for two months' rent in advance. It is further understood that the lessee will pay licenses when they come due. It is further understood between the both parties concerned that the four hundred dollars deposited will be applied to the last two months as rent they occupy the premises. It is further agreed that they will have extension of lease at the same rental if the lessee so desire."

The blanks in the printed form have not been filled up in any way whatever, and many of the provisos are wholly inapplicable to such premises. For example: the lessee covenants that he will "carefully protect and preserve all orchard, fruit, shade,

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and ornamental trees on said premises from waste, injury, or destruction, and will carefully prune and care for all such trees as often as they may require it, and will not suffer or permit any horses, cattle, or sheep to have access to the orchard on said premises." So far as the covenants and provisoes are applicable, I think they bind the parties. The lease is signed by both parties at the foot.

Under this lease the plaintiff went into possession on the 12th October, 1914. At the time he so went into possession, the undertaking forming the subject-matter of the lease was a going concern, which had up to that date been conducted by the defendants as a moving picture show, and from the time of taking possession the plaintiff continued to operate it in the same way until and inclusive of the 7th January, 1915.

At the time when the lease was made, the defendants Christoff were the owners of the seats, piano, and machines, which were in the theatre, and these were leased along with the premises to the plaintiff, the whole undertaking being in fact leased to the plaintiff as a going concern, and by the terms of the lease it was specially stipulated that the plaintiff, in addition to paying the rental of $200 per month, should, at his own expense, heat the two upper flats as well as his own premises by means of a hot water boiler and equipment, which formed part of the demised premises.

The plaintiff's claim arising out of these transactions is threefold:—

(1) He claims that he was wrongfully ejected from the premises by the defendants, and claims to be entitled to a return of the $400 put up by him as security and referred to in the lease above-quoted.

(2) He claims that during the currency of the lease there was a breach of a covenant, express or implied. The express covenant set up is the covenant for quiet enjoyment (which was very faintly urged), also the proviso in the lease that the lessor is to leave "all other necessary equipment for the operation of the theatre." The implied covenant is that, the theatre having been handed over as a going concern, there is an implied covenant or obligation on the part of the lessor that it shall be fit

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for operation as a moving picture theatre; and the plaintiff claims that the furnace was insufficient, that it was impossible to heat the theatre properly; and that, consequently, there was a breach of the covenant that it was fit for operation as a moving picture theatre.

(3) He claims damages for deceit, based upon alleged false representations made to him by the defendants at the time when the lease was entered into.

By their counterclaim the defendants allege that the plaintiff wrongfully abandoned the premises, and committed a breach of the obligations contained in the lease, and they claim the sum of $1,000 for breach of the covenant to pay rental, and for not carrying on the business according to the terms agreed upon under the lease in question.

I deal first with the occurrences which took place in January, 1915, when the lease came to an end.

I am of opinion and find as a matter of fact, upon the evidence, that there was an unequivocal intention on the part of both the plaintiff and defendants to surrender the lease in question, and that such intention was in part carried out by delivery of the key by the lessee (plaintiff) to the lessors (defendants) and the acceptance of the key by the lessors.

In the 9th paragraph of the statement of defence, the defendants deny that they wrongfully entered the premises and retook possession, and allege that the "said premises were handed over voluntarily by the said plaintiff to the said defendants at the suggestion of the plaintiff, after demand for payment of rental due to the defendants."

The plaintiff, on the other hand, alleges by his statement of claim that the defendants wrongfully re-entered the said premises and retook possession and ousted the plaintiff therefrom.

There is some difference between the evidence of the plaintiff and that of the defendants as to what actually took place, but it is undisputed that the last performance which the plaintiff gave in the theatre was on the 7th January, 1915. It is also common ground that in the end, either on the 8th January, or

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on Monday the 11th January, the plaintiff received the key. There is a difference in the account given of the exact circumstances under which the key was handed over, but I think it makes little difference which of the two accounts is accepted.

The fact was that an instalment of rent fell due on the 12th December, payable in advance, and that the same was not paid by the defendants, either then or at any time afterwards. It is plain upon the evidence, also, that the defendants had been from the time the rent fell due demanding payment of the same.

The lease contains in its printed portion the usual condition, "proviso for re-entry by the said lessor on non-payment of rent," and, under the terms of the statute, the instalment of rent falling due on the 12th December not having been paid for 15 days thereafter, the lessors were entitled to take possession and to forfeit the lease. Meantime, between the 12th December and the 1st January, the owner, Vogan, had been installing a new furnace, which, it was hoped, might adequately heat the premises, it being conceded on all hands that the furnace which had been in the place was insufficient for the purpose. The defendants swear that on the 4th January they again demanded payment of the rent, and the plaintiff asked them to let him have another week, saying that, if he was unable to pay them the rent, he would give up possession.

The plaintiff does not admit this conversation, and his account is considerably different. But, upon the whole testimony, I believe that a conversation of this general character did take place on some occasion, and that, while the plaintiff was throughout claiming that he was entitled to apply the $400 held as security by the defendants on account of the rent then due, he yet agreed in the end to give up possession and to surrender the lease, and handed over the key with that intention, took out any fixtures which he himself possessed, vacated the premises, and the defendants took possession of them.

I find that this was done with the intention which I have first set out, and that the lease was effectively surrendered.

I also find that this surrender was a surrender of the under-

taking as a going concern, and as it had been received and carried on by the plaintiff, and included not merely the building, but everything connected with the undertaking, including the provincial license, which had been originally issued to the defendants, and transferred on the records of the Department to the plaintiff on the 10th December (see exhibit 3).

It is clear that this surrender took place at the latest on the 11th January, 1915; and, had the plaintiff fairly carried out the terms of the surrender by assigning the license, as well as handing over possession, I should have held that the plaintiff was entitled to a return of $200, portion of the $400 put up as security. But the plaintiff did not hand over the license, and, when the defendants re-opened the theatre and carried it on for two days, the plaintiff notified them that they must desist from so doing, because the license stood in his—the plaintiff's—name. Thereupon the defendants attended the plaintiff with Mrs. Murray to get a transfer of the license, which was, I think, wrongfully refused by the plaintiff.

I think that this action was a breach of the terms of surrender, and I assess the damages in respect of it at the sum of $200.

With respect to the plaintiff's contention that he had the right to require that the sum of $400, referred to in the lease as put up for security, should be applied upon the month's rent which had fallen due, I am of opinion that he possessed no such right. The $400 was put up as security to be applied at the discretion of the lessors in payment of rent in case of default by the lessee, and in case of no default, at the discretion of the lessee, to be applied to the last two months of the term. The lessee had no discretion to apply it to any earlier instalment of rent. The lessors were, therefore, entitled on the 8th January to their remedy by requiring in the first place payment of the month's rent which fell due on the 12th December, and, in default of payment, possession; and I am of opinion that the plaintiff acceded to the demand of possession so made by the defendants, and that there was in truth and effect a valid surrender in law of the lease.

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It would be valueless to refer to the numerous and somewhat conflicting cases relative to surrender of leases, and I only notice in that connection (1) that the defendants possessed the legal right to resume possession; (2) that the plaintiff did not resist the giving up of possession, but on the contrary acceded to it by delivering the key; (3) that the defendants took and accepted the key; (4) that the defendants took actual possession of the premises and used it as a moving picture show for two days, and subsequently dealt with the premises in a manner inconsistent with any right of the plaintiff to resume possession; (5) that the plaintiff has never sought at any time to resume possession or to be restored to his rights as lessee. I refer as being most in point to the case of *Phené* v. *Popplewell* (1862), 12 C.B. N.S. 334, recently applied in *Gold* v. *Ross* (1903), 10 B.C.R. 80.

The above findings dispose of the claim of the plaintiff for return of the $400 put up by him as security. The defendants are entitled to retain that sum, for the reasons hereinbefore mentioned. It also disposes of the defendants' counterclaim for $1,000, the result of the surrender being, so far as the defendants were concerned, that they were not entitled to damages nor to any rental accruing due after the completion of the surrender.

I now come to deal with the plaintiff's claim that the premises were not fitted for operation as a moving picture show during the winter season, owing to the inadequacy of the heating arrangements, that there was a covenant, express or implied, between the parties, that the premises should be so fitted, and that the plaintiff is entitled to damages for breach of such covenant.

The legal obligation so put forward is based by the plaintiff on the following contentions: (1) that the whole substratum of the contract was the taking over by the plaintiff from the defendants of a going concern, to be continuously operated during the succeeding winter; (2) that, in the negotiations for the lease, the plaintiff, on learning of the requirement that he should heat the whole building, checked the negotiations until he received the defendants' assurance that during the previous win-

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ter they, the defendants, had burned only three tons of coal per month, which sufficed to heat the building; (3) that in the lease itself provision is made that the defendants shall "leave all other necessary equipment for the operation of the theatre."

I am of opinion that the second contention cannot be maintained, because I think the statement as to heating made by the defendants, whether it was in the terms contended for by the plaintiff or in the terms contended for by the defendants themselves, was not intended by the parties as a warranty.

The third contention cannot be maintained, because the words relied on and quoted from the lease relate manifestly to the equipment (seats and so forth) which belonged to the defendants. The furnace complained of did not belong to the defendants, but was the property of Vogan, the owner of the freehold. But I think that both the second and third contentions strengthen and assist the conclusion that the first contention, above mentioned, is well founded. Adopting the words of Lord Esher, M.R., in *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488, I think that, on considering the terms of the contract and the surrounding circumstances in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist.

This is fortified by the fact that the question of the heating formed the subject-matter of consideration in the progress of the negotiations, and that the terms of the lease, and particularly the clause relied on by the plaintiff, indicate clearly that the whole undertaking was to be turned over in a fit state for continuous operation.

Whether or not the heating plant was adequate was a fact regarding which the intending tenant was ignorant, while the lessors had occupied the premises during the preceding winter, and knew their condition.

It is plain that it was in the contemplation of both parties when negotiating that the leased premises should continue to be used for the purpose of a moving picture theatre, not only during the current month of October, but throughout the succeeding winter.

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I find as a fact that the basis of the contractual relation between the parties was that the premises should be reasonably fit for the purpose of carrying on a moving picture theatre, and that, as part of such fitness, the heating plant, forming part of the leased premises, should be adequate to heat them in a reasonable manner.

I find that the heating plant on the premises was inadequate for this purpose; that, in consequence, the theatre became excessively cold after about the middle of November; and that the plaintiff suffered damage.

The question is whether, on these findings, the plaintiff's claim comes within the rule established in *Smith* v. *Marrable* (1843), 11 M. & W. 5, and confirmed in *Wilson* v. *Finch-Hatton* (1877), 2 Ex. D. 336, viz., that "in the letting of furnished houses and apartments an undertaking is implied on the part of the lessor that they are reasonably fit for the purpose of habitation."

The rule has been adopted and applied in the Courts of Canada: see *Macleod* v. *Harbottle* (1913), 11 D.L.R. 126; *Miles* v. *Constable* (1914), 6 O.W.N. 362; *Gordon* v. *Goodwin* (1910), 20 O.L.R. 327.

It appears to be an artificial rule, as distinguished from a general principle, and the persistent disinclination of the Courts to extend it is evidenced by such cases as *Carstairs* v. *Taylor* (1871), L.R. 6 Ex. 217; *Blake* v. *Woolf*, [1898] 2 Q.B. 426; and *Robertson* v. *Amazon Tug and Lighterage Co.* (1881), 7 Q.B.D. 598.

Upon the best consideration that I can give the matter, I think the rule applies where furnished premises are demised with the primary and principal purpose that they are to be at once used for human occupation. If so, the present demise comes within, not only the spirit, but the letter, of the rule. But, if this case does not come within the technical rule above mentioned, it certainly comes within the broader principle enunciated in the cases quoted by Middleton, J., in *Brymer* v. *Thompson* (1915), 23 D.L.R. 840, 34 O.L.R. 194, at p. 196, applied by him in that case, and confirmed in the Court of Appeal, 25 D.L.R. 831, 34 O.L.R. 543.

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The understanding formed in the first place a condition the breach of which would have entitled the lessee to rescission, but, the lessee having gone into possession and occupied the premises, it may be treated also as a warranty, and the tenant can recover damages for the breach: *Harrison* v. *Malet* (1886), 3 Times L.R. 58; *Charsley* v. *Jones* (1889), 53 J.P. 280; nor does it, in my opinion, matter that the difficulty did not obtrude itself on the attention of the plaintiff until cold weather arrived in November. The defect did in fact equally exist from the 8th October, when the lease was made. The heating plant was then defective and deficient, as it had been all the previous winter. The conclusion is, therefore, not affected by the decision in *Maclean* v. *Currie* (1884), Cab. & El. 361, that the implied condition applies only to the state of the house at the commencement of the term, and that there is no implication as to its continuance.

The question, therefore, remains, what damages the plaintiff is entitled to recover. During the first four weeks the weekly receipts averaged $131, and during the succeeding eight weeks they averaged $59 a week, shewing in that way a depreciation of $72 per week, or, for the eight weeks, $576. It is impossible to estimate how much of this is attributable to the heating and how much to other causes; but, estimating the matter as best I can upon the evidence, I think that justice will be done by assessing the damages for breach of the implied covenant at $350.

With respect to the plaintiff's claim for damages for deceit based upon alleged false representations made to him by the defendants at the time when the lease was entered into, particulars of which are set forth in paragraph 3 of the statement of claim, I do not find any sufficient evidence of a statement by the defendants that they had done business in the premises during the previous year at the rate of $150 per week. There is evidence to the effect that they stated that there had been a net profit during the preceding year of $1,000. That statement, however, appears to have been made, not in connection with the negotiations for the lease in question, but rather in connection with an attempt to sell the property to the plaintiff; and, I think, the better evidence is, that the negotiations respecting

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the sale took place after the lease had been completed, and after the plaintiff was in possession as lessee. I am, therefore, unable to find that the allegation with reference to the amount of profits affords any basis for an action of deceit.

With reference to the claim for deceit based on an alleged false representation that three tons of coal would adequately heat the premises, it is only necessary to say that the evidence does not, to my mind, establish a sufficient basis for holding in the plaintiff's favour. The negotiations were oral, and the statements made are not clearly established. One of the defendants claims to have said that he told the plaintiff that he, the defendant, burned during the preceding winter three tons of coal per month.

No evidence is given of how much the plaintiff did burn; nor is it possible to conjecture whether the plaintiff was induced by the defendants' statements to conclude the negotiations.

I find this issue against the plaintiff.

In the result, there will be judgment for the plaintiff for $350, with costs.

[February 21, 1916, an appeal from the above decision was heard by Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. Appeal dismissed.]

CAPLIN v. WALKER SONS.

Ontario Supreme Court, Lennox, J. January 8, 1916.

MASTER AND SERVANT (§ V—340)—*Injury to teamster—Defective truck—Knowledge of defect—Voluntary assumption of risk—Remedy under Workmen's Compensation Act—"Services temporarily let or hired."*]—Action to recover damages for injuries sustained by the plaintiff by reason of the negligence of the defendants.

F. C. Kerby, for the plaintiff.

A. J. Gordon, for the defendants.

LENNOX, J.:—The plaintiff at the time of the accident was a teamster in the employment of George Nevin & Sons, persons carrying on a general transfer, cartage, and heavy teaming business. The business of the employers was of the character described in class 30 of schedule 1 of the Workmen's Compensation Act, 4 Geo. V. ch. 25 (O.). It would also come under what

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is constituted "a separate group or class" by sec. 73; "teaming" being one of the classes there specifically mentioned. It would not come within the classes of trade or business embraced in schedule 2.

About the 25th February last, the plaintiff was sent by his employers to work in the yard of the defendant company with his employers' team, and while there he was to perform such services in the way of team work as the defendants might require or direct; he was "a workman temporarily let or hired to another" by his employers, and Nevin & Sons continued to be his employers, as defined by clause (*f*) of sub-sec. 1 of sec. 2 of the Act.

The question is raised as to whether the plaintiff can maintain this action, or is limited to obtaining compensation, as a servant of Nevin & Sons, out of the accident fund. Section 10 will not, I think, help the plaintiff; for the employer, if liable, is not "individually liable," which, as I understand it, is the liability of the employer of the class embraced in schedule 2 only; and, even if sec. 10 applies, his claim would still be for compensation, and not for damages recoverable by action. "Employers in the industries for the time being included in schedule 2 shall be liable individually to pay the compensation:" sec. 4. "Employers in the industries for the time being included in schedule 1 shall be liable to contribute to the accident fund as hereinafter provided, but shall not be liable *individually* to pay the compensation:" sec. 5.

It is true that sec. 9 provides that "where an accident happens to a workman in the course of his employment under such circumstances as to entitle him or his dependants to an action against some person other than his employer," he may have the alternative of an action; but the difficulty as to this is, that here there was at most merely a failure on the part of the defendant company to provide proper and adequate machinery, plant, or equipment; and, whatever common law liability this might create in case of injury to one of their own employees, it could create no direct liability for injury to the plaintiff, where, as here, the relation of employer and employed did not exist. It was not

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anything in the nature of a trap or pitfall, giving a right of action in case of injury to even a bare licensee.

The common law obligation to provide adequate equipment or pursue a proper system is not a general obligation, but a duty arising out of contract to protect their workmen and servants from unreasonable risks.

There are expressions in the judgments in *Cory & Sons Limited* v. *France Fenwick & Co. Limited*, [1911] 1 K.B. 114, which might be regarded as favourable to the plaintiff, but they are not involved in the decision; and Halsbury refers to the case as authority for saying that "the workman cannot claim compensation from the person to whom he is lent or hired, though such person for the time may exercise over him all the rights of a master" (vol. 20, para. 421). And "no right to indemnity is reserved as against the temporary employer:" note (*t*) to para. 421. *Mulrooney* v. *Todd*, [1909] 1 K.B. 165 (C.A.), and *Skates* v. *Jones & Co.*, [1910] 2 K.B. 903 (C.A.), may be referred to. The English Employers Liability Act, and the difference in the provisions of the English Compensation Act, are to be kept in mind.

I can see no other provision that would even argumentatively include the application of the Act.

On the other hand, sec. 13 declares that "no action shall lie for the recovery of the compensation" of any kind, and all claims shall be determined by the Board. See also sec. 15. I am of opinion, then, that the plaintiff's rights, if any, are to be worked out under the provisions of the Workmen's Compensation Act.

But the Act, although the only objection urged, does not appear to me to be the only obstacle in the plaintiff's way. Aside altogether from this, I am very far from being convinced that the plaintiff is entitled to damages recoverable by action. I expressly refrain from expressing any opinion as to what his rights may be against his employers, upon proceedings taken under the Act. Leaving that question open, the plaintiff knew that the hammer-strap was broken, and that there was nothing to hold the top of the bolt. As a teamster he would know and appreciate the necessity and purpose of a strap, and that the smaller the bolt

used the greater the need—as well because a smaller bolt had less strength *in any position*, as that, not fitting snugly in the hole, it would inevitably tilt forward and so be liable to bend, break, or pull out as the team pulled upon it.

Without objection on his part, he discarded the stronger bolt provided by the defendant company—a bolt which, fitting snugly and standing upright and at right angles to the draught, would not be likely to pull out; and, without any direction from the yard foreman, and it may be without his knowledege, substituted a smaller bolt from his own waggon. It was this bolt that bent and drew out, and it was this, and not anything provided by the defendants, that was the immediate cause of the injury. He knew of the defect, and, as a teamster, he must at least be taken to have appreciated the danger as fully as the foreman. Knowing and appreciating the risk, he voluntarily assumed it; he was the author of his own misfortune.

Upon both grounds I think the action fails.

The objection taken at the trial involves the construction of a new statute and is not free from difficulty. I do not think I should make the plaintiff pay costs. The action will be dismissed with costs. *Action dismissed.*

BANK OF BRITISH NORTH AMERICA v. STANDARD BANK OF CANADA.

Ontario Supreme Court, Middleton, J. November 24, 1915.

BANKS (§ IV A 3—66) — *Liability for dishonouring customer's cheques received by other bank through clearing house—Right to costs incurred in litigation against indorsers.*]—Action by the plaintiff bank, as holder of five cheques drawn upon the defendant bank, to recover the aggregate amount of the cheques, also the amount of costs incurred in litigation with the endorsers of the cheques: see *Bank of British North America* v. *Haslip*, *Bank of British North America* v. *Elliott* (1914), 19 D.L.R. 576, 30 O.L.R. 299, 20 D.L.R. 922, 31 O.L.R. 442.

G. L. Smith, for plaintiff bank.

Wallace Nesbitt, K.C., and *R. Wardrop*, for defendant bank.

MIDDLETON, J.:—This action is the aftermath of the actions of *Bank of British North America* v. *Haslip* and *Bank of British*

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North America v. *Elliott*, 20 D.L.R. 922. The questions which now arise between the banks are, however, entirely different from anything involved in the earlier decisions.

Maybee & Wilson were customers of the Standard Bank, at its branch at the corner of King and West Market streets, Toronto. They issued five cheques which are now in question, upon the account of that bank: the first, dated the 30th September, 1913, in favour of T. Haslip, $1,864.49; the second, dated the 1st October, 1913, in favour of N. Stevens, $1,150.48; the third, dated the 1st October, 1913, in favour of William Watson, $1,666.77; the fourth, dated the 1st October, 1913, in favour of A. Stephens, $1,006.75; the fifth, in favour of Elliott, dated the 1st October, 1913, $1,041.03; making a total of $6,729.52.

The plaintiff bank has received dividends from the assignee of the estate of Maybee & Wilson, and has received the full amount of the Stevens cheque, so that the total liability now remaining in respect of all these cheques has been reduced to $2,918.23. In addition to this amount, a claim is made for $1,836.23, being the amount of costs incurred in litigation with the endorsers of the cheques. All these five cheques were endorsed by the payees to the plaintiff bank, the Bank of British North America; and it is now admitedly the holder of the cheques.

The cheques were deposited in a sub-branch of the West Toronto branch of the plaintiff bank, on the 1st October, 1913, and were put through the Clearing House in the ordinary course, and were received by the defendant bank at its main office on the morning of the 2nd October, and at its St. Lawrence Market branch (about a quarter of a mile from the main office) early in the morning of the 3rd October. The cheques were held until just before noon on the 4th October, when they were returned to the plaintiff bank unaccepted, and marked "not sufficient funds." The plaintiff bank thereupon gave a Clearing House slip, which is equivalent to cash, to take up the cheques.

This action is brought upon the theory that there was money standing to the credit of Maybee & Wilson at the time the cheques were presented, or that there would have been such money save for the improper acts of the defendant bank; and that it was, therefore, the duty of the defendant bank, which had received

the cheques through the Clearing House, to have marked them good and to have treated them as paid.

The ledger account of the firm of Maybee & Wilson at the Standard Bank is produced, and it discloses this state of affairs. According to the ledger, on the morning of the 3rd October there was a credit balance of $470.37. The first entry is a deposit, shewn by evidence to have been made between 11 and 12 o'clock that morning, of $6,390.07. This made the credit balance $6,860.44. The first debit is an item marked "Boucher," $1,691.69; then follow four items which are identified as cheques held by the Dominion Bank and by the Bank of Toronto. These are $616.60, $2,602.59, $551.11, and $1,897.07. This more than exhausted the credit balance. Some small cheques were then marked, making at the end of the day an overdraft of $1,044. On the morning of the 4th there was a credit item, a charge for interest on overdraft, and a cheque was accepted in favour of "E. Maybee trust account" for $394.22, to balance the account.

In arriving at the balance with which the account of the morning of the 4th was opened, there had been charged up against Maybee & Wilson two sums, $2,166.20 and $2,676.85, representing what are known as "the Porter drafts."

If all these debit items are properly chargeable against the account, then manifestly there were not funds sufficient to pay any of the cheques in question.

The propriety of the debit items charged up as representing the Porter drafts, and of the item marked "Boucher," and of the items representing the cheques held by the Dominion Bank and by the Bank of Toronto, is challenged.

The first Porter draft is one made by Maybee & Wilson upon Porter Brothers, Burlington, Ontario, on the 26th July, 1913, payable two months after date; so that it would fall due on the 29th September. The second Porter draft is drawn at two months on the 8th August, 1913, by Maybee & Wilson, upon the same firm, for $2,640.55; so that it would not be due until the 11th October, 1913.

These drafts had been discounted with the defendant bank on or about the respective dates. They were charged against Maybee & Wilson in their current account on the 26th September.

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I think I must find that this was with the privity and assent of Maybee & Wilson. It appears that the defendant bank suspected, though the suspicion may have been without foundation, that these drafts were not in truth *bonâ fide* trade documents, and that they did not represent any real transaction. How this may be as a matter of fact I cannot now say, as an action is pending against Porter Brothers in which liability upon the drafts seems to be admitted, but only in part.

The position of the four cheques held by the Dominion Bank and the Bank of Toronto is as follows. Three of them were issued on the 30th September; the fourth, that for $555.11, was issued on the 24th September. These four cheques reached the Standard Bank through the Clearing House on the 1st October, and were held until the 3rd October, when they were returned, as dishonoured, to the Dominion Bank and the Bank of Toronto respectively. Afterwards, and while the plaintiff's cheques were in the hands of the Standard Bank, instead of marking the plaintiff's cheques, the Standard Bank recalled these cheques from the Dominion Bank and the Bank of Toronto, and paid them.

I have no doubt that this was done with the intention of nursing the account of Maybee & Wilson. The Dominion Bank and Bank of Toronto cheques had been held as long as it was thought they could safely be held, and then had been returned dishonoured. By recalling and marking them, the failure of Maybee & Wilson would be postponed; for the intention was to hold the plaintiff's cheques as long as possible before returning them dishonoured. This was a matter of importance to the defendant bank, for the "Boucher" item had been charged on the 3rd October, but the cheque was not obtained till the 4th. The Boucher cheque was given to the defendant bank to take up a note made by Boucher, which had been discounted by the bank, and which was not due till November.

Though this item was charged in the bank ledger to Messrs. Maybee & Wilson as the first item on the 3rd October, this was at the time without any authority from them; the cheque for the amount being drawn on the 4th, at the same time as the cheque for $394.22, which closed the account, and after the Bank of Toronto and Dominion Bank cheques had been paid, and the plaintiff's cheques had been returned.

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The cheque itself is marked paid on the 4th (not the 3rd), and it bears date the 4th, and is shewn in the correct order in the bank pass-book.

The cheques paid to the Dominion Bank and the Bank of Toronto and the Boucher item exceed the amount of the five cheques upon which the plaintiff's claim is based.

If the plaintiff's claim was based upon the mere fact that there were funds in the hands of the defendant bank available for payment of those cheques, the plaintiff would fail: *Hopkinson* v. *Forster* (1874), L.R. 19 Eq. 74.

But here I think the situation is entirely different. The effect of the transaction in the Clearing House was, that the cheques drawn upon the plaintiff bank and held by the defendant bank were treated as cash items, and brought into an account with cheques drawn upon the defendant bank and held by the plaintiff bank, the balance being paid in cash. Each bank then became the holder of the cheques drawn upon it, paying for them either in cash or by the cheques which were treated as the equivalent of cash. This payment was intended to be an absolute payment if there were funds to meet the cheques; but it was conditional upon this; and, if there were not in fact funds to answer the cheques, the defendant bank was then entitled to return the cheques and to demand recoupment in cash. What was done here was to return the cheques with the statement that there were no funds to answer them, and so to obtain from the plaintiff a refund, evidenced by a Clearing House cheque, which was the equivalent of so much money.

So far as the Boucher cheque is concerned, the statement was not justified, for at that time the defendant bank had no authority whatever to charge this amount to the customer's account. So far as the Bank of Toronto and Dominion Bank cheques were concerned, these cheques had already been returned dishonoured, and the defendant bank had no right to recall them and certify them to the prejudice of the plaintiff's cheques then in their hands.

The obligation of the defendant bank towards the plaintiff is not that of a bank toward the payee of a cheque drawn by its customer. When it, by virtue of the Clearing House transaction, had itself become the holder of the cheque, its obligation was to

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mark the cheque good if there were funds available or funds which would have been available to meet the payment but for its own wrongful act. So long as it had or ought to have had funds to answer the cheque, it had no right to demand recoupment from the depositing bank; and the recoupment was obtained by that which was in truth a misrepresentation of the real state of affairs.

The case is of importance as indicating the possibilities of a situation that must frequently arise, and it is open to question whether legislation is not needed to remedy the evil. When a customer draws a cheque upon his bank, and there are funds to answer it when presented, why should the bank be at liberty to refuse to honour it, retaining the money to meet some demand of its own which has not yet matured, or to pay some other cheque drawn by the customer?

Or again, when cheques come in through the Clearing House, in one bundle, which in the aggregate exceed the amount of the customer's credit, why should the bank be at liberty to determine which should be paid and which should be rejected?

If the contention of the defendant bank in this action is right, a bank, on learning that its customer is in trouble, may refuse to pay any cheques, retaining the balance to the customer's credit to meet all liabilities, direct or indirect, which may thereafter accrue due to it by the customer.

No case is made here on which the plaintiff can recover in respect of the costs in the other unsuccessful litigation.

Judgment will therefore be for the plaintiff for the balance remaining due upon the five cheques, with interest and costs.

Judgment for plaintiff.

Re CLARKSON & CAMPBELLFORD, LAKE ONTARIO & WESTERN R. CO.

Ontario Supreme Court, Hodgins, J.A. January 14, 1916.

APPEAL (§ IV F—135)—*Review of award under Railway Act—Reasons of arbitrators—Examination of arbitrator as witness—Leave.*]—Motion by the railway company, the respondents in a pending appeal from an award under the Railway Act of Canada, to set aside an appointment issued by a special examiner, at the instance of the land-owner, the appellant, for the examination of His Honour Judge Morgan, one of the arbitrators, to ascertain the reasons actuating the arbitrators in awarding the

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amount of compensation fixed by them, and how they arrived at their figures.

Angus MacMurchy, K.C., for railway company.

W. R. Smyth, K.C., for land-owner.

HODGINS, J.A.:—The desirability of having the reasons for an award given by the arbitrators, and their duty in that regard, in cases of appeals from awards under the Railway Act (is pointed out by Lord Macnaghten in *James Bay R.W. Co.* v. *Armstrong*, [1909] A.C. 624, at p. 631, and, in a case of municipal arbitration, by my brother Britton in *Re City of Peterborough and Peterborough Electric Light Co.* (1915), 8 O.W.N. 564. In both these cases wide powers existed for increasing or decreasing the amount awarded and for reviewing the evidence.

That information, however, must be got in a proper way: either by the statement of a case by the arbitrators, or, more usually, by the delivery of written reasons, for the information of the Court. These must not be obtained *ex parte*, nor can the views of one of the arbitrators be used unless, at least, all have had the opportunity of stating theirs.

The examination of one arbitrator, pending an appeal, is not the proper way of obtaining the needed information. No doubt the arbitrator is a competent witness in an action on an award, and I see no reason why he should not be as competent on an appeal if it involved similar questions. But the limits set by the House of Lords on his examination shew clearly that just what is here wanted cannot be obtained by way of evidence from an arbitrator.

In *O'Rourke* v. *Commissioner for Railways* (1890), 15 App. Cas. 371, at p. 377, Lord Watson says: "Their Lordships are also of opinion that the Court below erred in authorising a general examination of the arbitrators 'with a view to the prothonotary informing himself as to the issues upon which the defendant succeeded.' The judgment of the House of Lords in *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418, upon which Windeyer, J., relied, is, when rightly understood, a direct authority to the contrary. The principle which was laid down by Cleasby, B., in that case (p. 433), and accepted by the House, was thus explained (p. 462)

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by Earl Cairns: 'He (i.e. the arbitrator or umpire) was properly asked what had been the course which the argument before him had taken—what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire *is not admissible to explain or to aid*, much less to attempt to contradict (if any such attempt should be made) *what is to be found upon the face of that written instrument.*' In this case it is obvious that an examination of the arbitrators would not disclose how far the defendant had succeeded, unless they were asked what sum, if any, they had awarded to the appellants under each count of the declaration—a line of examination which is plainly incompetent."

As the proceeding taken by the appellant here is for an examination of the arbitrator as a witness with a view to eliciting his evidence as such, for use on a pending appeal, it falls within the decision of the Second Divisional Court in *Crowley v. Boving and Co.*, 23 D.L.R. 696, 33 O.L.R. 491. The principle of that decision and of the cases which it follows is not avoided by saying that it is not really evidence that is wanted, but merely information which it would be proper to bring before the Court if obtained in another way.

I must deal with the proceedings as I find them, and they are for an examination of the arbitrator as a witness.

Appointment set aside. Costs to the respondents in the pending appeal.

MITCHELL v. FIDELITY & CASUALTY CO.

Ontario Supreme Court, Middleton, J. January 4, 1916.

INSURANCE (§ VI B 3—280)—*"Total disability" through accident—Sprained wrist—Recovery delayed by tubercular disease in system.*]—Action to recover $1,950, for disability payments, under an accident insurance policy.

J. H. Fraser, for plaintiff.

R. McKay, K.C., and *Gideon Grant*, for defendant.

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MIDDLETON, J.:—The plaintiff seeks to recover $1,950, being a quarterly payment alleged to be due under a policy issued by the defendant company on February 10, 1913, in respect of payments for disability, at the rate of $150 per week, during the thirteen weeks from March 1, 1915, to May 30, 1915.

In its defence the defendant company admits that it did "insure the plaintiff against bodily injury resulting in total disability," and denies that the plaintiff did sustain any bodily injury or suffer total or permanent disability. It also alleges that, if the injury stated was sustained, there had been total recovery therefrom, and, if there had not been total recovery, "it was by reason of his not securing any or proper medical attention and treatment for the alleged injury, and by reason of the plaintiff fraudulently preventing his alleged injury from healing and his recovery therefrom." At the trial an amendment of the defence was permitted by which it was alleged that the "injury sustained by the plaintiff did not, independently and exclusively of all other causes, result in immediate, continuous, and total disability," and that certain warranties in the application for insurance were untrue, and that by reason thereof the policy is void.

The plaintiff is a medical doctor, who, at the time of the issuing of the policy in question, practised his profession as an eye, ear, nose, and throat specialist at Valparaiso, Indiana. The terms of the policy are all-important in view of the issues raised at the hearing. By it the plaintiff is insured against "bodily injury sustained . . . through accidental means . . . and resulting, directly, independently, and exclusively of all other causes, in an immediate, continuous, and total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation. . . ."

If the assured suffers total disability, the company will pay him, so long as he lives and suffers the total disability, $75 a week, which amount is doubled if the injury is sustained while the assured is in or on a public conveyance.

While the policy was in force, on the 30th May, 1913, the plaintiff, travelling as a passenger upon a railway train, was thrown or fell from an upper berth in a sleeping-car, as the

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result of which the wrist of his left hand was badly sprained; and, although some two and a half years have now passed, the arm has not yet recovered, and any future recovery is problematical.

At the trial, much medical evidence was given with a view of explaining the cause of this delay in the healing of an injury from which recovery would ordinarily be expected within about six months.

In the first place, I am quite satisfied that there is no foundation whatever for the defence originally pleaded. The plaintiff has throughout submitted himself to the defendant's physicians, and has sought to follow their advice. He has, I believe, honestly done his best to bring about recovery, and there is no kind of foundation for the suggestion, which I venture to think ought never to have been made, charging him with fraudulently preventing recovery from his injury. Nor has his recovery been prejudiced or delayed by the use made of his automobile.

The exact cause for the delayed recovery is not by any means easy to ascertain. It must be sought in the evidence of Doctors Starr, Mabee, and Anderson. The suggestion is made by the defendant that the arm became infected by reason of the existence in the plaintiff's system of latent germs of tuberculosis.

At the trial the defendant company was not content to rest upon a general suggestion of infection, or the more particular suggestion of infection by tuberculosis, but sought to establish that the plaintiff had suffered from syphilis, and that the condition of his arm was the result of that malady. I accept the plaintiff's evidence that he had never suffered from this disease, and I do not think that the medical evidence on behalf of the defendant company, quite apart from the plaintiff's denial, was sufficient to substantiate the allegation. I cannot help expressing my regret that the defendant saw fit to make this charge upon so slight a foundation.

At the present time the injured arm is useless to the plaintiff, by reason of its swollen condition and rigidity. This condition is brought about by fibrous growth and inflammation of the tendon sheaths. So far as the condition of the arm can be ascertained from most careful examination and from X-ray

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photographs, there is not active tuberculosis in the arm. If the disease were there, active, as explained by Doctors Starr and Mabee, there would by this time be a far more serious and acute condition manifest; but, in view of the evidence of Doctor Anderson, as well as of the evidence of the two medical experts called by the plaintiff, I cannot help feeling that the condition of the arm can only be explained by the presence in the plaintiff's system of tuberculosis in some form. From Doctor Anderson's evidence it is clear that, prior to the accident, there had been a tuberculous lesion in the lung. This had apparently completely healed, and no doubt the plaintiff was entirely unaware of his ever having been diseased in this way. From seventy-five to ninety per cent. of all human beings have tuberculosis to a greater or lesser degree at some time of their existence. A very small portion of these are ever aware of the fact. The lesions are discovered upon an autopsy, or blood-tests made during life may disclose the fact. Upon the happening of an accident such as that which befell the plaintiff, the general vitality and power of resistance is lowered. The injured tissues form a good seed-bed, and the disease germs present in the blood, which would otherwise be innocuous, find a lodgment and an opportunity for growth. That this is what happened to the plaintiff is apparent from the fact that, not long after this accident, all the symptoms of tuberculosis became apparent. He had afternoon temperature and night sweats, and lost thirty pounds in weight. Following expert medical advice, he has taken up his abode at Swastika, in Northern Ontario, and the progress of the disease appears to have been arrested, at any rate to some extent, and it is possible that in course of time there may be improvement and even ultimate recovery; but up to the present time I think it is clear that the condition of his arm is such as to amount to complete disability within the meaning of the policy.

What the policy insures against is immediate, continuous, and total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation. By the application, his business is given as that of eye, ear, nose, and throat specialist, and the "duties of his occupation" (the words

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used in the policy) are described as "special work on eye, ear, nose, and throat." It was argued that because certain work, e.g., testing an eye for the fitting of glasses, could be done even by a one-armed man, and other things might be done with the aid of a trained assistant, there could not be total disability.

I do not think that this is so; but in this case it is quite clear to me that the plaintiff's injury entirely precludes him from doing any special work on the eye, ear, nose, and throat, which is, as I understand it, the thing that constitutes "total disability" within the meaning of the policy.

A more serious difficulty for the plaintiff, however, is that raised by the amendment made at the trial; for it is said that the bodily injury sustained by him did not result, "independently and exclusively of all other causes, in" his total disability; for the disease which has intervened, and which to some extent at any rate is said to be responsible for the present condition, is another cause within the meaning of the policy.

I have come to the conclusion that this is altogether too narrow a reading of the policy, and that there is a diseased condition of the arm, which thus far has resulted in total disability, and that this diseased condition is the direct result of the bodily injury sustained by the plaintiff when he fell from the berth in the sleeper. The tuberculosis of the system was harmless until, as the direct result of the accident, it was given an opportunity to become active. This diseased condition is not an independent and outside cause, but it is a consequence and effect of the accident.

In the case of *Coyle or Brown* v. *John Watson Limited*, [1915] A.C. 1, the reasoning of the Lords appears to me to be conclusive and in the plaintiff's favour. A wreck took place in the shaft of number 2 pit of a mine. The men were ordered to ascend by the shaft of number 1 pit, this being the downcast shaft for the air-current which ventilated the mine. There they had to wait for some time, exposed to the cold down draft. As the result of this exposure, the deceased caught a chill, which brought on pneumonia, from which he died. The plaintiff claimed that the death resulted from the exposure consequent upon the wreck in shaft number 2, and that there was therefore

liability; for the death, it was said, resulted from an injury by accident in the course of the employment of the deceased. There was an accident in the mine, and "there is no intervening circumstance depending on some cause other than the accident which occurs to break the chain of causation."

If, instead of a sprain, the plaintiff's arm had been broken, and disease had followed as the result of the laceration of the flesh, could it have been argued that the bone would not have broken if it had not been abnormally weak, and that the laceration of the flesh would not have occurred but for this abnormal weakness? The breaking of an abnormally weak bone would in one sense have caused the disability; nevertheless, there would have been the right to recover. It seems to me that there is liability in every case where the resulting disability directly flows from the accident, which alone disturbs the pre-existing condition of health, and that the provisions of the policy do not avail the defendant where the most that can be found is that the conditions disturbed were less stable because of some pre-existing infirmity. In this case the tuberculosis was latent, and would have remained harmless had it not been for the accident. The disease is, as already said, the direct consequence of that accident.

This is not the case of a pre-existing disease which would sooner or later cause the condition complained of, nor is it the case of some disease intervening as an independent cause after the accident. It is the case of an old malady, cured in the sense of being quite inactive and innocuous, but which had induced such a bodily condition at the time of the accident as to render recovery from the effects of the accident much slower and more difficult than it would otherwise have been.

When one considers how the advance of medical science has enabled the progress of disease to be followed, and how the chain of occurrences from the "accident" to disability or death is now understood, and how each change in that progression may be said to be caused by the conditions that preceded it, and to be itself a cause of the conditions which follow, and how in every change there is always the co-operation of concurrent conditions, it would require a policy to be expressed with great clearness

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before the Court would be justified in relieving the defendant from liability simply because at some stage of the process it was possible to point out that there was a concurrent influence at work aiding in the process.

It is a fundamental principle of modern surgery that any wound which does not heal at once by "first intention" refuses so to heal because of some infection or germ which has reached the wound in some way. This germ may be in some sense a cause of the continuance of the wound and of its delay in healing, but it cannot be regarded as an intervening cause within the terms of this policy.

So here, the germs present in this man's blood are not different in principle from the septic germs which originate putrefaction, everywhere present when conditions are not entirely aseptic, and cannot be regarded as other causes intervening to bring about the injury. Their lodgment in the wounded tissue is as much the consequence and effect of the accident as the carrying of the germs into the wound in *Mardorf* v. *Accident Insurance Co.*, [1903] 1 K.B. 584, or the lodgment of the germ of pneumonia in the collier's lung in *Coyle or Brown* v. *John Watson Limited, supra.* See *Beare* v. *Garrod* (1915), 113 L.T.R. 673.

This appears to me to be in accordance with *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591; followed in *Youlden* v. *London Guarantee and Accident Co.*, 4 D.L.R. 721, 26 O.L.R. 75, 12 D.L.R. 433, 28 O.L.R. 161. These authorities appear to bind me, and I think are to be preferred to American cases, of which *Penn* v. *Standard Life and Accident Insurance Co.* (1911), 42 L.R.A. (N.S.) 593, may be regarded as a type.

There will, therefore, be judgment for the plaintiff for the amount claimed, with interest and costs.

Judgment for plaintiff.

BURMAN v. ROSIN.

Ontario Supreme Court, Middleton, J. December 10, 1915.

ASSIGNMENT (§ III—28)—*Subject to "equities"—Set-off—"Mutual debts"—Unconnected transactions.*]—Summary ap-

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plication upon originating notice, for an order determining a question as to the right to payment out of a sum paid into Court.

G. T. Walsh, for Burman and Kirkpatrick.

W. M. Mogan, for Rosin.

MIDDLETON, J.:—Originating notice to determine the right to $95 now in Court.

The facts are not disputed. Burman sued Rosin for money due under a plumbing contract, and recovered judgment for $95. Rosin, under another contract, has a judgment against Burman for $135. These contracts were both completed about March, 1915. On the 31st August, 1915, Burman, for value, assigned to Kirkpatrick his claim against Rosin, and Kirkpatrick now resists Rosin's claim to set off one demand against the other.

Mr. Walsh contends that there cannot be a set-off to the prejudice of the assignee, because the transactions giving rise to the respective claims were in no way connected, and no right or claim to set off had been asserted before the assignment.

In my view, the claim to set off is entitled to prevail, and there is not any foundation for Mr. Walsh's contention.

Here the debts were both due and payable long before the assignment; both claims were disputed and were in litigation, and the exact amount due upon either had not been in any way ascertained; but this did not prevent these claims being mutual debts and as such liable to be set off.

The statute (Ontario Judicature Act, R.S.O. 1914, ch. 56, sec. 126) provides: "Where there are mutual debts between the plaintiff and defendant . . . one debt may be set against the other."

And (by sec. 49 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109) the right of an assignee of a chose in action is "subject to all equities which would have been entitled to priority over the right of the assignee" under the law in force prior to the Judicature Act.

That the right to set off mutual debts where there would have been set-off in a Common Law Court was such an equity, has never been doubted—though it might well be regarded as a defence to the claim, a defence which would wipe out the claim

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and cause it to cease to exist as effectually as a release or payment: *Jeffryes* v. *Agra and Masterman's Bank* (1866), L.R. 2 Eq. 674, 680. In order that there could be such common law set-off, it was at one time thought to be essential that the claim of the defendant seeking set-off should, at the time the plaintiff brought his action, be not only due but payable, but it was finally determined that set-off should be allowed if the claim was due at the date of the writ, even though not payable till a future date—*debitum in præsenti, solvendum in futuro: Christie* v. *Taunton Delmard Lane and Co.*, [1893] 2 Ch. 175, 183.

But a right to set-off cannot be maintained as against a plaintiff suing to enforce his demand, or as against an assignee, when the demand which it is sought to set off arises upon an independent contract and is not due at the date of the suit or the assignment—it has not yet become a "debt" so as to be subject to the statute: *Watson* v. *Mid Wales R.W. Co.* (1867), L.R. 2 C.P. 593.

There is, however, another equity which has sometimes been called "set-off," but which does not in any way depend upon the statute, which arises when the claims are upon the same contract or are so interwoven by the dealings between the parties that the Court can find that there has been established a mutual credit, or an agreement, express or implied, that the claims should be set one against the other. In all such cases, the defendant can set up against the plaintiff's demand his claim for an abatement of the plaintiff's demand—e.g., when the claim is for work done and the services are defective: *Young* v. *Kitchin* (1878), 3 Ex. D. 127. And this equity will attach to the claim in the hands of an assignee.

It was because there was no such "mutual credit," "in the sense that the parties have mutually trusted one another to make mutual payments," from which there could "be implied, or fairly be presumed from the transaction, an agreement, or an understanding amounting to a contract, that the one shall go in liquidation of the other," and because the transactions were independent, that the right of set-off was denied in *Watson* v. *Mid Wales R.W. Co.*, *supra;* and because the claims did arise out of the transaction or interwoven transactions that the claims were

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set off in *Government of Newfoundland* v. *Newfoundland R.W. Co.* (1888), 13 App. Cas. 199, 213; *Parsons* v. *Sovereign Bank of Canada*, 9 D.L.R. 476, [1913] A.C. 160.

Nowhere can there be found any foundation for the suggestion now made that where the debts are past due, and the statute gives the right of set-off, the assignee has any greater right than the assignor. The assignee simply has the same right as the assignor to refuse to set off where the claim is not due at the critical date—the date of the writ in the one case and the date of the assignment in the other—save where the equity which I have endeavoured to describe exists. Where there is the statutory right to set off, the assignee takes a claim against which there is a valid legal defence.

The set-off must be allowed, and the money will be paid to Rosin.

I understand there is an agreement as to costs.

Set-off allowed.

Re SOVEREEN MITT GLOVE & ROBE CO. v. CAMERON.

Ontario Supreme Court, Riddell, J. December 11, 1915.

PROHIBITION (§ IV—15)—*Disputing territorial jurisdiction of Division Court—Failure to appear at trial—Judgment on admission.*]—Motion by the defendant for prohibition to a Division Court.

C. M. Garvey, for defendant.

W. H. Irving, for plaintiffs.

RIDDELL, J.:—The plaintiffs, a company manufacturing mittens, etc., in Delhi, Ontario, on the 21st May, 1915, sued A. E. Cameron, the defendant, in the Fourth Division Court in the County of Norfolk, for $88.23, being the amount claimed as the balance of the value of goods sold and delivered to him, after crediting him with certain commissions—interest being added, $5.40, to the net balance, $82.83.

The defendant lives in Sudbury; he filed a dispute-note in which he (1) disputed the jurisdiction, (2) admitted the $82.83 as payable, but (3) alleged a set-off of $132.25, and (4) claimed damages for wrongful dismissal, $65. The result is that (omitting for the time being to consider the objection to the jurisdic-

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tion) the defendant took upon himself to prove (a) an excess of set-off and (b) breach of contract.

He did not appear at the trial; on the admission in the dispute-note, of course, judgment went against him, and interest was awarded, as it justly should be—while it is said that his counterclaim was dismissed. Since that time he has brought an action in Sudbury on his counterclaim, but with that I have nothing to do on this motion—the defendants there must plead *res adjudicata* or (and) otherwise as they are advised.

What I have to deal with, is the motion of the defendant for prohibition to the Delhi Court.

The admitted facts are that the defendant entered into a contract with the plaintiffs, dated at Delhi, whereby he agreed to become selling agent for them in Northern Ontario, receiving a commission of 8 per cent.; that he received quantities of goods from the plaintiffs; that, instead of receiving cash at all times, "the usual practice was for" him "to order sufficient goods to cover" his "commission account;" and, "a short time previous to" his "dismissal," he "had ordered and received an amount of goods;" and that it is the goods which he had ordered, for the value of which this action is brought.

The judgment complained of was rendered on the 21st July; the affidavit for prohibition sworn on the 25th November; notice of motion served on the 26th November; no application has been made to the County Court Judge, and no explanation given of the delay.

A Court by whose judgment I am bound has recently said: "Where a defendant does not attend at the trial of an action for the purpose of upholding his contentions, and where it is not made clearly to appear that any injustice will be done by allowing the judgment to stand, the Court ought not to grant a prohibition:" *per* Middleton, J., in *Re Canadian Oil Companies* v. *McConnell*, 8 D.L.R. 759, 27 O.L.R. 549, at pp. 550, 551.

So far as concerns the claim of the plaintiffs, the defendant's own admission shews that the amount was payable; as to the counterclaim, that was brought into the Court by the defendant himself, and he is himself to blame if his own act injures him—in any case, the Court had jurisdiction to try the claim.

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But, even if the *Canadian Oil Companies* case did not bind me, the only reason advanced by the defendant is, that the payment for the goods was to be made in Sudbury; it is undoubted law that the place of payment is where the creditor is—"the debtor must seek his creditor," and not *vice versâ*.

There can be no doubt that all the elements giving the cause of action must have occurred in the local jurisdiction of a Court foreign to the debtor's residence: *Re Doolittle* v. *Electrical Maintenance and Construction Co.* (1902), 3 O.L.R. 460; *Re Taylor* v. *Reid* (1906), 13 O.L.R. 205. Here this was so.

Even if it could be argued that the delivery was not at Delhi, that was a fact to be determined by the trial Judge; and not till he found that the delivery was not in Delhi would his jurisdiction be ousted.

It is argued that the contract of agency was actually signed at Sudbury and not at Delhi—this is emphatically denied, but it is wholly immaterial where that contract was signed—it is not sued upon; the contract actually sued upon is the implied contract to pay for goods sold and delivered.

Having arrived at the conclusion that the motion cannot succeed, I do not consider whether it should be entertained at all.

The motion will be dismissed with costs.

Motion dismissed.

Re HARTY v. GRATTAN.

Ontario Supreme Court, Middleton, J. (in chambers). January 14, 1916.

COURTS (§ II A 3—161) — *Division Courts — Jurisdictional amount——Cheque—Loan.*]—Motion by the defendant for prohibition to a Division Court.

Harcourt Ferguson, for defendant.

C. M. Garvey, for plaintiff.

MIDDLETON, J.:—The claim exceeds $100, and the Division Court has no jurisdiction unless the claim is ascertained as a debt by a document signed by the defendant, and the plaintiff's case is proved without other evidence than the proof of the signature (the Division Courts Act, R.S.O. 1914, ch. 63, sec. 62(1)(*d*).) The statute is plain, and the cases of *Slater* v. *Laberee* (1905), 9 O.L.R. 545, and *Renaud* v. *Thibert*, 6 D.L.R. 200, 27 O.L.R. 57, have well expounded its meaning.

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The plaintiff's claim is upon a cheque for $150, drawn by him, payable to the defendant. The cheque is endorsed; and, if the stamps on it may be regarded, as to which I have much doubt, the cheque was cashed by the defendant.

This, it is said, proves the loan and calls upon the defendant to shew that the money he received was not lent to him. I do not think this is so. When the parties to an action were not competent witnesses this question frequently arose, and the cases, which may be found well collected in Grant's Banking Law, 6th ed., p. 94, uniformly determined that the cheque was only evidence of the payment of money, and not proof of a loan, for the payment might equally well have been on account of a pre-existing debt or might have been a gift.

In addition to the English cases, there are several Canadian cases to the same effect—*e.g.: Foster* v. *Fraser* (1841), R. & J. Dig. 652; *Allaire* v. *King* (1908), Q.R. 33 S.C. 343.

It is, therefore, clear that there was no jurisdiction in the Division Court to entertain the action, and the motion must succeed.

Prohibition granted, with costs fixed at $25.

FRY AND MOORE v. SPEARE.

Ontario Supreme Court, Meredith, C.J.C.P. November 19, 1915.

ADVERSE POSSESSION (§ I F—25)—*Co-tenancy between parent and child—Presumption as to possession held by parent—Step-mother—Partition—Costs.*]—Issue in an action for partition or sale of land, whether the plaintiff in the issue had acquired title to the land by virtue of the Limitations Act.

D. Robertson, K.C., for plaintiff.

W. H. Wright and *D. Forrester*, for defendants.

MEREDITH, C.J.C.P.:—But for the cases referred to by Mr. Wright* I should have thought this case a simple and plain one, depending entirely upon a question of fact which ought to be found in the plaintiff's favour; and time taken for a more careful consideration of those cases enables me to say that none of them stands in the way of giving effect to that view.

*All the cases collected in Simpson on Infants, 3rd ed., pp. 99-102, and *Kent* v. *Kent* (1890-92), 20 O.R. 158, 445, 19 A.R. 352.

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The case, though coming on for trial in the form of an issue, is substantially an action to recover land from the plaintiff in the issue; and the law is, that no such action shall be brought but within ten years next after the time at which the right of action first accrued to the person bringing it: The Limitations Act, R.S.O. 1914, ch. 75, sec. 5.

The defendants first became entitled to undivided shares in the land in question upon their father's death in 1892, twenty-three years ago; and so their claim to the land would long since have become ineffectual, unquestionably, but for the contention which they now make, that they have ever since been in possession through their stepmother, the plaintiff in this issue; she having had actual possession in person and through her tenants, also unquestionably, during the whole time since the death of her husband and the defendants' father, in the year 1892; except for the possession of half of the land by her present husband, she living with him, since the year 1899.

The defendants' contention is, substantially, that, because the plaintiff is their stepmother, the law permits of no other conclusion than that her possession was merely as their "bailiff" as to their shares in the land; but I cannot consider that there is any such irrebuttable presumption. It must always be a question of fact for whom the possession was taken and held, and ordinarily the finding should be that the possession of the parent is that of the child, for parents do not ordinarily take undue advantage of their children, and generally, as in this case at the first, at all events, the children accompany them in their possession, or are maintained by the parent in whole or in part out of the profits of the land; and it is right to attribute possession to the person lawfully entitled to it when the circumstances of the case will warrant it.

I have found no case in which the decision of it required more than that, or in which it can be said that there was no evidence to support the judgment in favour of the child: and no law, nor any Court, can compel Judge or juror to find that to be true which is false.

In this case the stepmother and stepchildren, and mother and child, with the exception of the stepchild Dollena, who lived with her grandmother in the United States of America, continued, after the husband and father's death, to live on the land for nearly

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a year, when they went to the home of the plaintiff's mother, in this Province, and remained there for a couple of months, and then went to the stepchildren's grandmother in the United States of America, where the child Dollena was, and all lived together there with the grandmother and a brother and sister of the children's father, the plaintiff contributing towards the household expense that share which was by agreement between them to be borne by her; and that state of affairs continued until the year 1895, when the plaintiff returned to the land in question, bringing with her her own child only, the stepchildren being left with their grandmother and uncle and aunt in the United States of America, where they have ever since lived.

In the year 1897, the plaintiff married again, and went, at first, with her husband to live in Hamilton, in this Province; but, in the year 1899, they, and her child by the first marriage, went to the land in question to live there, and have ever since lived upon it.

The plaintiff has ever since the separation from her stepchildren, in the year 1895, dealt with the land just as she would have done were it her own. She has paid off a mortgage upon it, made by her first husband, for an amount nearly half the full value of the land, has completed the building of one of the houses which was not finished when her first husband died; has made repairs and paid taxes, and has received all the rents which were paid: and has always had the land assessed in her own, or her present husband's, name.

No other finding can be made than that, up to the time of the separation from the stepchildren in the year 1895, the possession of the plaintiff was the possession also of all the children, as well as of herself in virtue of any right she might have in or to the land.

But to find as a fact, with any regard for the truth, that, after the separation, in the year 1895, and the more so after the second marriage, in the year 1897, and the re-occupation of the land by the plaintiff, with her second husband, in the year 1897, the possession of the plaintiff was, in any sense, that of any of the stepchildren, is impossible.

She had removed them from the land and had separated herself from them completely, leaving them, and their care and interests, entirely in the keeping of their paternal relations.

She had deprived them of all use and benefit of the land and

of any voice in the management or control of it; and had converted to her own use, and that of her own child, all its rents and profits; and subsequently gave over the possession and control of half of it to her second husband, who has had such possession and control since the year 1899.

These acts spoke louder than words of the plaintiff's repudiation of any agency for the stepchildren, and of any concern in the land except in her own interests and the interest of her own child and second husband.

To hold that she was all along and still is their "bailiff" or other representative, and so more than all along acknowledging the right of the stepchildren to a share in the land, would be a palpable perversion of the truth, which no law can require. Since the separation there has been neither act nor word, nor any circumstance, indicating any kind of service or agency on the stepmother's part. Every act, circumstance, and word indicate the contrary, indicate only complete exclusion of all the stepchildren from any part or lot in the possession or control of the land and from any benefit from the rents and profits of it. They were out of possession and she was in possession for much more than five years after each became of age: see *In re Maguire and McClelland's Contract*, [1907] 1 I.R. 393; which contains the latest, and, as I think, most rational, exposition of the law on the subject.

It was never the legal duty of the stepmother to occupy and hold the land for the stepchildren; and, if it had been, there was a repudiation and breach of that duty in taking from the stepchildren all the benefits of it and converting it to her own use, a thing which called for legal action upon their parts to recover their property, which action, being delayed until these proceedings were commenced in the year 1915, although the youngest of the stepchildren attained full age in the year 1904, is too late.

The statutes of limitations make explicit provisions for the cases of infants and of tenants in common; and neither case nor Court, nor Judge or juror, can add to, or take away from, them, rightly: nor openly disregard, nor by false findings of fact, or other subterfuge or pretence, circumvent them, lawfully.

I find the issue tried between the parties to this matter in favour of the plaintiff therein; that—her husband assenting—she has acquired title to the rights and interests of the defendants in the issue, in the land in question, by length of possession, under

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the provisions of the Limitations Act; and, treating this trial as also a motion for the final disposition of the matter, I direct that the motion for partition be dismissed with costs, but without costs of this trial, which was quite unnecessary. There was no material question of fact really in dispute. There was no reasonable ground for raising any contest over any such fact, and so no excuse for failing to present the facts as they are, and were known to be, in the first instance; and having had the application finally disposed of then. The costs of the motion should be taxed as if that had been done. *Judgment for plaintiff.*

[March 21, 1916.—An appeal was heard by Meredith, C.J.O., and Maclaren, Magee and Hodgins, JJ.A.—*Appeal dismissed.*]

LATIMER v. HILL.

Ontario Supreme Court, Boyd, C. November 29, 1915.

PARENT AND CHILD (§ I—4)—*Liability of parent for maintenance of child—Implied promise—Quantum meruit—Services of infant.*]—Action for the recovery of $1,322.50 as the money value of the care and maintenance of the defendant's infant son for twelve years; or for damages for depriving the plaintiff of the services of the boy at an age when he had begun to be useful.

R. L. Brackin, for plaintiff.

J. H. Rodd, for defendant.

BOYD, C.:—In October, 1902, the defendant, his wife having just died, brought an infant son, about two years of age, to be taken care of by the plaintiff. The plaintiff's wife was aunt of the boy's mother. The plaintiff was willing to keep the child for a year or so without pay until the defendant had time to settle his affairs; but, apart from that, the understanding expressed between them was, that the custodian should have the benefit of the work and services of the boy according as advancing age enabled him to render such services. The father said he would not give any writings; but, if the child was with the plaintiff for any length of time, it would not be right to take the boy away when he became of use on the farm. This controlled the whole situation, and indicated that some compensation was contemplated as between the parties.

About two years after the mother's death, the father asked the plaintiff what he was going to tax him, and the plaintiff said, "nothing." The father, however, did not re-marry till 6 or 7

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years after, and then the plaintiff expected that the child would be taken back to the father and some compensation made for the intervening period, *minus* two years. But matters were left as they were, and the boy stayed on with the plaintiff till about the beginning of 1915, when the father induced him to leave. It was proved that the father had offered the lad $2,000 if he would come back and stay and work for him.

From all the evidence and the conduct of the parties, I can fairly draw the conclusion that the care and maintenance of the boy for all these years was not intended to be and was not understood to be on a gratuitous basis out of consideration for the bereaved father or from philanthropic motives. The arrangement was broken by the interference of the father when the boy was about 13 years of age. For 3 years prior to his leaving I thought that the work done by the boy about balanced the outlay upon him; and, deducting the first two years, for which nothing was asked, I allowed $500 as a reasonable sum for the care, maintenance, and education of the boy for 7 years. The intervention of the father disturbed and ended the engagement; and, in the circumstances, there is an implied contract to pay a *quantum meruit*.

Mr. Rodd, for the defendant, relies upon *Farrell* v. *Wilton*, 3 Terr. L.R. 232, a decision of Mr. Justice Wetmore in 1893, of which the head-note is, "that a father, who has given his child to another to adopt and rear, has, notwithstanding, the right to re-take the custody of the child at any time;" and, "further, that a father so re-taking his child is liable for maintenance during such period of adoption only by virtue of a contract express or implied." I do not quarrel with these legal propositions. And, in view of the learned Judge's holding on the facts that the child was taken over without any intention of charging anything to the father, i. e., upon a gratuitous basis, the dismissal of the action may have been right. Many of the statements in the reasons of the Judge do not appear to harmonise with some Ontario cases not cited.

Thus Hodgins, Master, in *Hughes* v. *Rees* (1854), 10 P.R. 301, decided that a father, whose children were maintained by another, and who could have obtained possession by *habeas corpus*, yet allows them to be so maintained, is liable for their support.

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This was based upon the decision of Blake, V.-C., in *Griffith* v. *Paterson* (1873), 20 Gr. 615, 618. No doubt, in both these cases the children had left because of the unpaternal conduct of the father—but should that make a substantial difference? There has been a development of the law in this regard: compare, for instance, the case of *Urmston* v. *Newcomen* (1836), 4 A. & E. 899, where it is queried by the Court whether a father deserting an infant child can be liable to a party who supplies the child with necessaries, no further proof of contract being given?

It may be that the American rule is in advance of our lines of decision, though it commends itself as a justifiable development. In 29 Cyc. 1611 it is in the text "that where a person supports a child at the parent's request a promise to pay therefor will be implied, unless there was an understanding that the child shall be taken care of without charge."

I would call attention to *Wright* v. *McCabe* (1899), 30 O.R. 390, where there was a written agreement by which the father consigned his children to their grandmother to rear and educate on the condition that no demand was to be made upon him for their support. It was sought to shew by parol evidence that he had agreed to pay, and to have the instrument rectified. The action failed; and in the head-note it is said to be held that the father "could transfer his rights as a parent." That appears to be beyond what was decided. But there is a dictum in the case that seems in accord with the more advanced view. Counsel argues that there must be a contract to enable one who supports another's children to recover; and Meredith, C.J., says, "The Court would imply a contract."

I find it stated in Halsbury's Laws of England, tit. "Infants and Children," vol. 17, p. 116: "The authority" [contract] "may be implied, as, for instance, where he knowingly acquiesces in the child being maintained by a stranger." Eversley on Domestic Relations treats the point as not yet fully decided: 3rd ed., p. 539.

The law appears to be far from being in a settled condition; but in the present case my best judgment, after consideration, is to affirm the opinion expressed at the trial and to direct judgment to be entered for the plaintiff in the sum of $500 and costs on the lower scale without set-off. *Judgment for plaintiff*

[March 21, 1916.—An appeal was heard by Meredith, C.J.O., and Maclaren, Magee and Hodgins, JJ.A.—*Appeal dismissed.*]

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