Dominion Law Reports

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ANNOTATED

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VOL. 44

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CASES REPORTED

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(Alphabetically Arranged)

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BRITISH COLUMBIA EXPRESS Co. v. GRAND TRUNK PACIFIC R. Co. IMP.

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Judicial Committee of the Privy Council, The Lord Chancellor, Lord Buckmaster, and Lord Atkinson. October 15, 1918.

WATERS (§ I C — 52) — OBSTRUCTION OF NAVIGATION — BRIDGE — ACTIONABILITY.

The construction of a low level bridge across a navigable river, without providing necessary facilities for navigation, does not give rise to an action for wrongful obstruction to navigation, if, in fact, the bridge is not the real cause of non-user of the river for navigation.

[*Grand Trunk Pacific R. Co.* v. *B.C. Express Co.* (1916), 38 D.L.R. 29, 55 Can. S.C.R. 328, affirmed.]

Statement

APPEAL from the judgment of the Supreme Court of Canada reversing the judgment of the Court of Appeal for British Columbia, (1916), 27 D.L.R. 497, in an action for damages for unlawfully obstructing navigation by the construction of a low level bridge. Affirmed.

The judgment of the Board was delivered by

Lord Buckmaster.

LORD BUCKMASTER:—In the view their Lordships take of this case, the only question that arises for determination is whether a bridge built by the Grand Trunk Pacific R. Co. (who are respondents on the appeal), over the Fraser River in the Cariboo District of British Columbia, known as Dome Creek Bridge, Mile 142, caused such special and peculiar injury to the appellants as to entitle them to maintain an action for an injunction and recovery of damages against the respondents. The appellants are a company incorporated by special Act of the Legislature of British Columbia, with, among other objects, that of conducting passenger and freight service on the Fraser River. In pursuit of this purpose they constructed, in the year 1912, at a cost of $65,000, a steamer specially designed for traffic on the upper part of the Fraser River between Fort George and Tête Jaune Cache, and built a warehouse for the goods at Tête Jaune Cache. The state of the river only permitted a seasonal use of these upper reaches. In ordinary circumstances the season would commence in May and end towards the latter part of August, and then again, in favourable conditions, would open towards the end of September and continue until the end of October. In 1913 the season opened on

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May 23, and between that date and August 15, ten trips had been made between Fort George and the Upper Point. The eleventh trip was started on August 15, and, on reaching Dome Creek at a point known as the second crossing, the captain of the steamer was informed on behalf of the respondents that, as part of the work of constructing the bridge, the river would be closed by a cable, and the trip was accordingly abandoned. The cable was then put across the river and the construction of the bridge taken in hand, with the result that, first, owing to the existence of the cable, and, secondly, the character of the bridge, further navigation became impossible. The bridge was constructed by the respondents, who are a railway company incorporated under a Dominion Act as part of a trans-continental railway line which they were engaged in making from Tête Jaune Cache to Fort George and further westward. The railway line ran along the southern bank of the river, from Tête Jaune Cache to the second crossing, and it then crossed and proceeded north of the river to the third crossing, when it again crossed the river and continued on the southern bank to Fort George. The erection of the bridge was sanctioned by order of the Board of Railway Commissioners dated April 4, 1912, upon the condition that if at any time it should be found that a passage-way for steamboats was required, the company should provide the same on being directed to do so, either by the Department of Public Works of the Dominion of Canada, or the Board of Railway Commissioners, and by a report of the Privy Council of Canada made on May 8, 1912, the building of the bridge was approved subject to the like condition.

On July 4, 1913, the Secretary of the Department of Public Works informed the solicitor for the respondent company that protests had been received against the construction by the company of the bridge at the second crossing, and one further down the river, and added: "I am directed to state that it will be necessary for the company to provide passage-way for boats in these bridges." This passage-way was never in fact made. The appellants allege that this omission on the part of the railway company caused them damage in their business, and they instituted proceedings to obtain a mandatory injunction to compel the respondents to make openings in the permanent steel bridge, both at the place known as the second crossing and at the third, and also claiming

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damages. The real gist of the plaintiffs' original complaint was in respect of loss occasioned during the year 1914, but this loss they were wholly unable to establish, probably for the reason that the railway being completed from Tête Jaune Cache along the river bank the carriage of goods by the railway was more expeditious and more certain than it could be by river. To use the words of Clement, J., before whom the action was originally heard, "the claim in regard to the possible use of the upper river in the early part of 1914 really collapsed at the trial," and this view was concurred in by all the Judges in the Court of Appeal for British Columbia and in the Supreme Court.

With regard to the claim for the damage during the season of 1913, Clement, J's judgment was equally clear. He said:—

> Since the argument I have read carefully the extended notes of the evidence, with the result that the impression which the testimony had left on my mind has been very much strengthened, and I find myself unable to find as a fact that the construction of the bridge at Mile 142 was the cause of the non-user of the Fraser above that point by the plaintiff company after such construction. In the correspondence the lowness of the water was explicitly given at the time as the reason for withdrawing the B. C. Express to the lower run; not a hint that the defendant company was in any way to blame. And the oral testimony has convinced me that the plaintiff company never intended to resume operations that season above the bridge at Mile 142, and I cannot bring myself to find that they would have done so even in the actual water conditions which afterwards developed.

But this view was not taken in the Court of Appeal, where all the judges held that the obstruction in 1913 had caused the plaintiffs damages which they were entitled to recover. This judgment was reversed in the Supreme Court of Canada by a majority of three judges to two, and from that judgment this appeal has been brought. Their Lordships are in agreement with the view taken by all the judges, who have decided that if special damage could in fact be shewn during the season of 1913 the appellants would be entitled to recover, but they are unable to accept the view that any such damage was established. It is probable that the appellants were quick to realise that, whatever the character of the bridge, river traffic on the upper reaches of the river would be unprofitable as soon as the railway was completed, and believing also that the state of the river would prevent resumption of work above the bridge during the latter part of the season, they had, before the bridge was built, taken down the

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warehouse and shipped it down the river. Further, on August 26, they had written to the freight agent of the respondent company saying that they did not think it advisable for shippers to send any freight for Fort George and district by way of Tête Jaune Cache at this time of the year. They continued:—

> Mile 129 is above the Grand Canyon, and as it is there that the bad conditions of navigation are met with, and as the water is liable to drop any day now, thus closing navigation, we would not care to have any more freight consigned to our steamer this season.

And on September 11, they repeat the statement that owing to the low state of the water they had been compelled to take their steamer off, and concluding "so that navigation on the upper river is over for the remainder of this season." The correspondence continues through September, but there is no letter suggesting that the action of the railway company had stopped their traffic. There is nothing in their Lordships' opinion in the evidence to displace the view established by this correspondence. Mr. West was director-superintendent and secretary-treasurer of the appellant company. He said that he could have got lots of freight at Tête Jaune Cache to be handled in the fall of 1913. He said there was some freight left after the steamer ceased running, and that was brought down by the railway company. The last two trips that he made appeared to have been to a point west of the crossing, but when asked why he did not go right on, he said: "I understand because we had announced that we quit; we had thrown down our business, and we were not looking for any more business at the Cache," and he continues: "We had notified everyone that we had quit up there." There was other evidence given in favour of the appellants, but there is nothing in their Lordships' opinion that leads to the conclusion that Clement, J., was wrong in stating that the oral testimony had convinced him that the plaintiffs never intended to resume operations above Mile 142.

It is not necessary in this view of the case to consider whether the construction of the bridge was in fact lawful or not. In their Lordships' opinion the appellants fail in this appeal as they failed before Clement, J., because they are unable to establish that the building of the bridge did in fact cause them any special damage. Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed with costs. *Appeal dismissed.*

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Judicial Committee of the Privy Council. Lord Buckmaster, Lord Dunedin and Lord Atkinson. November 5, 1918.

1. EVIDENCE (§ XII A—921)—JUDGE—MAY ACCEPT EVIDENCE OF ONE WITNESS. The trial judge before whom a matter is heard is at full liberty, having considered the evidence on both sides, to decide that he will trust and accept *in toto* the evidence given by one witness.

2. APPEAL (§ VIII C—675)—DAMAGES—POINT RAISED ON APPEAL NOT CONSIDERED BY TRIAL JUDGE—REMITTING CASE BACK TO HAVE POINT DETERMINED. Where from the evidence it is impossible for an appellate court to say that the point raised and urged by the appellants was in fact considered by the judge by whom damages were assessed, and if it was omitted from his consideration, there is a flaw in his judgment which requires to be remedied. The only order that should be made is an order to remit the case back so that the point may be determined.

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia (1917), 24 B.C.R. 532, affirming the decision of Morrison, J., in an action for damages for breach of contract. Referred back for further enquiry.

The judgment of the Board was delivered by

Lord Buckmaster.

LORD BUCKMASTER:—In 1913 the Canadian Pacific Railway Co. were in the course of laying a double track railway-line from Glacier to Bear Creek in British Columbia, and on June 30, 1913, they entered into a contract with the appellants, who carry on the business of railway contractors, whereby the appellants undertook the construction of the line. In order to carry out the work it was necessary to bore a tunnel of some 5 miles in length through the Selkirk Mountains near the pass known as Roger's Pass, and the appellants, with the consent and approval of the railway company, entered on December 18, 1913, into an agreement with the respondents, by which the respondents engaged to drive seven or eight-foot pioneer-heading and crosscuts, the centre heading being 8 by 11, for an estimated distance of 25,000 ft.

The terms of the agreement were contained in a letter dated December 18, 1913, written by the appellants, Foley Brothers to McIlwee, the respondents, and accepted by them. It was in the following terms:—

December 18, 1913.

We make you the following proposition for driving seven or eight-foot pioneer heading and crosscuts, and centre heading eight by eleven, for the solid rock portion of Canadian Pacific Railway's Rogers Pass tunnel for an estimated distance of 25,000 ft.; we to have the option of discontinuing the pioneer heading outside of the regular tunnel section and driving it as a centre heading for the last 4,000 ft.

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We will pay your monthly pay rolls, including bonus to men, furnish comfortable and sanitary quarters for your men and good board at $1 per day, your men to conform to our sanitary and camp regulations.

We will furnish small cars and mules for transporting muck from headings to our standard-gauge cars back of shovel and handle at our expense after delivery into our standard-gauge cars. We will furnish air, water, light, ventilating plant, tools, track, and all other material and plant necessary except explosives. Explosives will be furnished you at cost price to us on the work, and you will be given the same concessions as we receive from C.P.R. as to freight and passenger rates.

We will pay you on or before the 15th of each month $20 per lineal foot for pioneer tunnel, $22.50 per lineal foot of crosscut and centre heading, and $30 per lineal foot for headings to dip where cars are handled by cable, driven the previous month, less pay roll, explosives, and other proper charges, and will on the completion of the work pay your bonus of $1,000 per foot as bonus for each foot over 900 ft. that you average per month for the entire pioneer heading. Should the pioneer be discontinued near the finish and centre heading only driven, the centre heading rate of $22.50 and pioneer bonus will then apply, provided, however, that the bonus in no case will exceed $250,000.

We will turn the work over as a going concern with headings on rock at both ends and in case of shortage of power, tools, supplies, or other items will give your work preference. You to furnish foremen when requested, to be paid by us, to get headings started and work organized, and plant installed to conform to your methods, previous to your taking over the work. On taking over the work you are to supply all labour and superintendence in connection with driving these headings, including drill repairers, blacksmiths, track, and pipe work and labour of whatever nature you require.

You are to be governed by our contract and specifications of the Canadian Pacific Railway, and their contract with us is to form part of your agreement with us, except as to payments. You are to assume all of our obligations with respect to the part of the work covered by this proposition, and to be granted all the privileges granted us in our contract. You agree to average 900 ft. or more per month in the pioneer headings and to keep the centre heading as close as practicable behind the pioneer heading, but will be granted the same extension of time as we are entitled to under our contract with the C.P.R.

This proposition and your acceptance will be withdrawn and cancelled on the demand of the Chief Engineer of C.P.R. if your work is not carried out to his satisfaction. In the event of your work being stopped by C.P.R. you are to be paid the bonus of $1,000 per foot for each foot that you average in the pioneer heading over 900 ft. per month from the time of taking over the work until the time of such stoppage.

FOLEY BROS., WELCH & STEWART,
By A. C. DENNIS.

Per J. A. McIlwee.

The actual effect of certain portions of this agreement will need to be considered; but, as far as payment is concerned, it is perfectly clear the amounts to be paid are to be paid monthly on

the actual workings during the preceding month and the amount is at a fixed rate per lineal foot less the pay roll, explosives, and other proper charges, with a bonus under a certain condition of $1,000 a foot.

It follows from this that the lower the pay roll, the higher the monthly payments; and that the bonus was dependent simply upon the average rate of progress.

On April 2, the respondents accordingly began their operations at the east end of the tunnel, but, as the west end was not then ready, this work was not begun until July 24, 1914. On September 24, 1914, the appellants cancelled the agreement and refused to allow the respondents to continue, and on October 24 of the same year the respondents commenced an action against the appellants in the Supreme Court of British Columbia, claiming damages for breach of the agreement.

This action came on for trial in January, 1915, before Clement, J. with two assessors, and on December 18, 1915, he gave judgment, deciding that the appellants had wrongfully repudiated the agreement, and assessed the damages at $31,460. The respondents appealed against this judgment to the Court of Appeal of British Columbia, and the appellants, by cross-appeal, raised once more the contention that the contract was lawfully cancelled and that they were under no liability for damages.

The Court of Appeal, on August 10, 1915, gave judgment in favour of the respondents, and it was then ordered that the respondents were entitled to recover against the appellants for damages the following sums, viz.: (*a*) the difference between the amount payable to the defendants under the terms of the said agreement for the work specified therein and the amount it would have cost the respondents to carry out the work if the agreement had not been cancelled by the appellants; (*b*) the amount of bonus (if any) that the respondents would have earned under the said agreement of December, 1913; and they directed that there should be a new trial limited to the assessment of the damages. From this judgment the appellants appealed to His Majesty in Council, and by an order, dated January 27, 1916, 27 D.L.R. 196, their appeal was dismissed.

The case, therefore, was once more opened at Vancouver before Morrison, J., who, on June 30, 1916, gave judgment for the respond-

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ents for the sum of $325,698 for damages and $250,000 for bonus. From this judgment the appellants again appealed to the Court of Appeal of British Columbia, who, on November 6, 1917, dismissed the appeal, Galliher, J., dissenting. From that judgment the present appeal has been brought. No question is raised as to the bonus of $250,000. The only point argued before their Lordships was as to the general claim for damages. It appears that at the trial before Morrison, J., a number of expert witnesses were called on behalf of the respondents, and that in answer to their evidence the appellants, who had themselves performed and completed the work after the cancellation of the contract, put forward what they alleged to be the actual cost of the work done, and they contended that this and this only should be the basis upon which the damage should be assessed. Morrison, J., however, refused to accept this view and took, without qualification, the evidence of a Mr. Brunton, an engineer of great and admitted experience. The appellants contended before the Court of Appeal and to some extent, but more faintly, before their Lordships, that this was a fatal flaw in the judge's judgment, and that as the honesty of the figures put forward by the appellants was not doubted this formed the only sound basis upon which the damages could be assessed, so that the judge was not at liberty to accept against it the opinion of any expert. This contention is obviously unsound. The judge before whom the matter was heard was at full liberty, having considered the evidence on both sides, to decide that he would trust and accept *in toto* the evidence given by one witness, and had this been the only matter for consideration there would be no ground for this appeal. It is unnecessary to repeat the warnings frequently given by judges, both here and in Canada, against displacing conclusions of disputed fact determined by a tribunal before whom the witnesses have been heard and by whom their testimony has been weighed and judged, and did the question depend solely on the decision between rival evidence the case would be free from difficulty. There is, however, another contention on which the appellants rely which needs more careful consideration. They allege that, in estimating the cost of the work, which it was essential to ascertain in order to determine the profit that was lost, Mr. Brunton had accepted as the basis of his conclusions the actual figures of expense which

the respondents had incurred in the work that they performed. These figures had, from time to time, been sent in to the appellants, and payments had been made by them for the amounts that they disclosed as due, but it is said that none the less they were imperfect, and that in certain particulars, that amounted in all to $12,000, shewn in ex. 89, there were further charges that ought to have been made which would have reduced the profit earned; the omission to include these charges, according to their contention, invalidated the value of Mr. Brunton's evidence. They consequently asked that a further enquiry should be directed, not, indeed, reopening the whole question, but for the purpose of ascertaining whether any, and if so which, of the items which made up the $12,000 ought properly to have been included in the expense for the work originally done, and that if any sum was found to have been omitted under this head a corresponding sum should also be brought into account in fixing the amount to be charged for the work that was unperformed. They also claimed to have an extra sum added to the expense of powder, which had risen in price during the latter part of the work, and a sum for insurance against accidents, both of which had been omitted by Mr. Brunton.

Their Lordships are in agreement with the view that the order of the Court of Appeal of August 10, 1915, does not involve an acceptance as a final and closed account of the different claims for payment that were made by the respondents and accepted by the appellants while the respondents were actually engaged on work. If there were any omissions from these accounts they are capable of being adjusted in determining the final amount of damage. The difficulty lies in knowing whether any such omissions have been made. It will be observed that the contract of December 18, 1913, throws upon the appellants the obligation of paying the respondents' monthly pay-rolls, including bonus, and furnishing proper quarters for the men with board at a fixed rate per day. They also undertook to furnish cars and mules for transporting the broken stone and air, water, light, ventilating plant, tools, track, and all other material and plant except explosives; the respondents on their part undertaking to supply all labour and superintendence in connection with driving the headings, including drill repairers, blacksmiths, track and pipe work,

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and labour of whatever nature should be required. Their Lordships think that the true meaning of this contract is that the appellants were bound to furnish all the materials and equipment that are mentioned so as to turn the work over as a going concern, but that as the work proceeded, while the appellants were bound to furnish all the material except the explosives, it lay upon the respondents to furnish all the necessary labour required either for extension of track or pipe, or for any other purpose connected with the work. The appellants allege that this has not been done, and there were many instances given which are dealt with in detail by Galliher, J., as items said to have been omitted.

It is unfortunate that all these details were not put to Mr. Brunton. He states that in his evidence he has assumed for the purpose of his calculations, that in the work done all the charges that ought to have been made against the respondents' work were in fact made, and that he had no other data than that for the figures that he produced. McIlwee was asked about the matter in detail, and as to some of the items he said that they were included in his expenses, as to others, that they were not required, and as to others, as, for example, the stable foreman, the car repairer, and the electrician, no charges had in fact been made for those in connection with the work that he actually executed, an answer which, by itself, is not conclusive. With the evidence left in this position, their Lordships find it impossible to say that the point raised and urged by the appellants was in fact considered by the judge by whom the damages were assessed, and if it were omitted from his consideration, there is a flaw in his judgment which requires to be remedied. There is, however, no need to have any further investigation into the question relating to the insurance and the powder. With regard to the latter, the respondents had the benefit of a contract which was to continue until September 10, 1915, and, thereafter, from year to year, unless notice was given 60 days prior to September 10, to terminate it. Owing to the war, the price of powder had undoubtedly risen after September, 1915, and the appellants say that it is reasonable to assume that the contract would accordingly have been terminated and the higher price charged, but this is not certain, nor does it exhaust the possibilities of the appellants having been able to obtain powder either from stocks of their own or by making

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further arrangements with the powder merchants to enable the contract to be completed at the same price, and their Lordships are not prepared to say that the judge was wrong when he heard the evidence and decided that the powder should be charged at the same rate throughout.

With regard to insurance, there is no general principle of law involved in determining this question. It is no doubt an expense usually incurred in connection with large and hazardous works of construction, but the respondents say that no accidents in fact occurred while they were engaged upon the work, and it was a question of fact for the judge to decide whether or no any allowance should be made in this respect. Their Lordships regard his judgment as saying that it was unnecessary; the only order, therefore, that should be made is an order which will remit this case, so that it may be determined whether any, and if so which, of the items included in the ex. 89 were omitted in the accounts sent in by the respondents for the work they actually performed, and ought properly to have been charged as expenses in connection with such work, having regard to the construction which their Lordships have placed upon the contract, and if it be found that there are any such items, what is the proper amount that should be added to the expenses of the whole work in connection therewith, and to what extent the damages ought in consequence to be reduced? They do not think that the costs can be properly awarded until the result of the enquiry is known. It may turn out that in the end there will be little or no disturbance of the figures found by the judge who heard the case. They will, therefore, send the case back with this direction and reserve the advice that they will finally give until the result of this enquiry has been known.

Judgment accordingly.

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Re ARNOLD ESTATE.
DOMINION TRUST Co. v. NEW YORK LIFE INSURANCE Co.
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DOMINION TRUST Co. v. SOVEREIGN LIFE ASSURANCE Co. of CANADA.

Judicial Committee of the Privy Council, The Lord Chancellor, Lord Buckmaster, Lord Dunedin, and Lord Atkinson. October 17, 1918.

1. ACTION (§ II B—45)—CONSOLIDATION OF—ORDER 49, R. 1, BRITISH COLUMBIA —RULE ABSOLUTE.

Order 49, rule 1, of the British Columbia rules, by which "causes, matters or appeals may be consolidated by order of the court or judge, in such manner as to the court or judge may seem meet," is absolute and leaves the matter so far as *ultra vires* is concerned entirely in the hands of the judge.

2. APPEAL (§ VII E—323)—QUESTION OF FACT—WEIGHT ATTACHED TO FINDING OF TRIAL TRIBUNAL—INFERENCES TO BE DRAWN FROM TRUTHFUL EVIDENCE—POSITION OF APPELLATE COURT.

Where a question of fact has been decided by a tribunal which has seen and heard the witnesses the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court.

[*Arnold* v. *Dominion Trust Co.* (1916), 32 D.L.R. 33, affirmed in part, the action being dismissed. See also 32 D.L.R. 301, and (1917), 35 D.L.R. 145.]

Statement.

APPEAL from 32 D.L.R. 33. Affirmed in part, the actions being dismissed.

P. O. Lawrence, K. C., *Martin*, K. C., and *J. F. Carr*, for appellants; *E. P. Davis*, K.C., *Sir C. H. Tupper*, K.C., and *Hon. M. Macnaghten*, for respondents.

The judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN:—These actions were raised in the Supreme Court of British Columbia by the Dominion Trust Company in liquidation and its liquidator as executors of the deceased W. R. Arnold against three insurance companies with whom Arnold had effectuated policies on his life. The first action against the New York Life Insurance Co. was in respect of two policies, one term and one life, for $50,000 each, the policies having been taken out in September, 1916, just about a fortnight before the death occurred. The second action was against the Mutual Life Assurance Co. of Canada, in respect of a life policy for $50,000 of date November 27, 1912, and the third against the Sovereign Life Assurance Co. of Canada, in respect of a policy for $10,000 dated October 23, 1912.

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Arnold died on October 12, 1914, from a gunshot wound through the heart in a garage belonging to him in the neighbourhood of Vancouver.

In each of the policies there was a clause exempting from liability if the death was self-inflicted within the period of 2 years from the date of the policy.

The main defence of each of the defendants was the same, viz., an allegation that Arnold's death was self-inflicted, There were other defences which were not common to the 3 actions. They were based on various alleged misrepresentations.

The Chief Justice before whom the actions depended consolidated the three actions in spite of the protests of the various defendants. Evidence was then led in the consolidated actions, and the learned Judge came to the conclusion that none of the defences had been made out, and gave judgment for the amount sued for.

Appeal was taken to the Court of Appeal, and it was argued that the consolidation of the actions was not within the power of the Court, and further, that the conclusions arrived at on the facts were wrong.

In that Court Macdonald, C. J. A., and Galliher, J., held that the consolidation order was within the power of the judge, but that the evidence proved that Arnold committed suicide. Martin, J. A., and McPhillips, J. A., held that the consolidation order was not within the power of the judge, and that consequently the trial was nugatory, and they expressed no opinion on the facts. In this state of opinion a formal judgment was pronounced allowing the appeal with costs, and setting aside the judgment of the Chief Justice, but not further dealing with the actions. Against this judgment an appeal was lodged to this Board, asking for restoration of the judgment of Hunter, C. J. Leave was obtained on a petition by the respondents to raise on the appeal before this Board the contention that judgment ought to have been entered *de plano* for the respondents.

It appears to their Lordships that it is first of all necessary to settle the point as to the consolidation, for if the consolidation was *ultra vires* of the judge, then there is no proper material on which judgment can be given as to the defences on the facts.

On this point their Lordships agree with Macdonald, C. J. A.,

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and Galliher J. A. Consolidation is regulated by order 49, rule 1, which is as follows:—

> Causes, matters, or appeals may be consolidated by order of the court or judge in such manner as to the court or judge may seem meet.

This rule differs essentially from the corresponding rule in the English courts, where the words are added, "to be exercised in the manner in use before the commencement of the principal Act," thereby introducing a reference to the course of previous decisions. The rule of the British Columbia court is absolute, and seems to their Lordships to leave the matter so far as *ultra vires* is concerned entirely in the hands of the judge. Whether consolidation in such cases is expedient is quite another question. Where actions, although having a common feature, have distinctive defences it would seem more than doubtful to take such a course. Nor does it alter the matter to say that in the event no prejudice was suffered. It might have been, and the decision had to be taken at the beginning. But though, perhaps, illjudged, it was not in their Lordships' opinion *ultra vires*. There was, therefore, proper material before the Court on which a judgment on the facts could be given. So far the appellants are right in their contention.

The trial judge gave a very careful and considered opinion, in which he set forth the chief considerations on the one side and on the other. The Judges of the Court of Appeal who disagreed with him on the facts contented themselves with stating that they had come to an opposite conclusion from that reached by the trial judge. Accordingly the counsel for the appellants strongly pressed on their Lordships the consideration that a finding of pure fact arrived at by the judge who had tried the case and seen the witnesses ought not to be interfered with.

Their Lordships are of opinion that there must be discrimination as to what is the class of evidence being dealt with: whether the result arrived at depends on the view taken of conflicting testimony, or depends upon the inferences to be drawn from facts as to which there is no controversy. They may cite the words of Lord Halsbury in the case of *Montgomerie & Co. (Limited)* v. *Wallace-James*, [1904] A. C. 73, at 75:—

> Where a question of fact has been decided by a tribunal which has seen and heard the witnesses the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a

way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court.

Lord Davey in the same case used much the same language.

Now, that this is a case of the latter class there can be no doubt. It cannot be more strongly put than it was by the trial judge himself. He says:—

I feel fortunate in coming to a conclusion that I have not to deal with any question of untruthful testimony . . . in respect of any of the witnesses. . . . I think that the only matter left for the court is to decide as to what is the proper inference to be drawn from the facts, the material portion of which, if not actually the entirety of these facts, not being in serious controversy. The only question is as to what is the true inference to be drawn.

Their Lordships, therefore, feel that they are here dealing with the opinions of one judge who thought that suicide had not been proved, and of two judges who thought that it had; and the question for them is, which of these two opinions is to be preferred?

The evidence to be examined in such a case falls at once into two distinct divisions. There is the evidence which bears on the motive for such an act, and there is the evidence of the facts as to the method of death, which include all actions of the deceased antecedent to, and possibly leading up to, the castastrophe.

Now, as regards the first of these branches, the position was this: Arnold was in a quite hopeless financial position. Enjoying a salary of $14,000 a year, he owed at the time of his death about $1,000,000, which he had not the faintest chance of repaying. But, further, it was not a case of simple indebtedness. He had been guilty of a long course of embezzlement in his position as managing director of the Dominion Trust Co. As he had confessed about a fortnight before to Hodges, the government inspector, who had been sent to investigate the affairs of the company. "he had committed crimes for which he was liable to be sent to the penitentiary." He was on the brink of exposure and disgrace as well as of irretrievable financial ruin. He had made an appointment on the day on which his death occurred to meet Hodges, in order to give explanations and exhibit securities. He knew that the result of such examination would be to confirm what Hodges already knew; and he knew that the presentation of Hodges' report to the government authorities meant the end so

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far as he was concerned. The counsel for the appellants was very anxious to demonstrate that there was no particular disclosure which on that particular day he had to dread—that Hodges knew the worst already. That, however, is not the point. The point is that the end was approaching, and was ever nearer as Hodges' investigation proceeded and the time for sending in his report drew nigh. Further, he was in absolute want of ready money. He owed small sums right and left, and he had no more than a few dollars in his bank account. In the whole circumstances, if ever there can be said to be motive for self-destruction, such motive was present in this case.

Motive, however, can never be of itself sufficient. The utmost that it can do is to destroy or attenuate the inference drawn from the experience of mankind that self-destruction being contrary to human instincts is unlikely to have occurred. The proof of suicide must be sought in the circumstances of the death.

The story can be shortly told. Arnold had a small country ranch. He was not a sportsman, and had no experience of shooting nor any familiarity with the management of guns. On the Saturday, two days before his death, he called at the house of a friend called Gibson, and asked him to come to the ranch in his (Arnold's) motor. They lunched together at the club, and motored to the ranch. At the ranch they met a man called Bladen, who was acting as overseer there, and who was to Arnold's knowledge in possession of a gun, and Arnold asked him to get his gun and bring it along. Arnold had come provided with cartridges, which he had instructed his chauffeur to buy, Gibson suggesting the probable bore to be selected. The cartridges were handed to Bladen, who loaded the gun with the cartridges. The gun was a single-barreled magazine gun, with the magazine arranged to take only two cartridges. The action was what was described as a pump action—*i.e.*, the fore-end is made to slide backwards and forwards, which motion cocks the hammer and inserts the cartridge from the magazine into the breech. After one shot is fired the same action repeated expels the discharged case and repeats the action of cocking, and of inserting the second cartridge. A grouse was sighted, which flew and perched on a tree. Arnold had a shot at it and missed. After the shot he tried to recharge the gun, but the action stuck, and he handed it to Bladen, who

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got it to work and eject the discharged cartridge. Bladen is uncertain whether he put another cartridge into the magazine, but thinks it likely he must have done so. Arnold had never been seen with a gun before that day. No more shots were fired, and Arnold and Gibson returned to town in the motor, taking the gun and cartridges along with them. In the car Arnold began to handle the gun and was so clumsy that Gibson thought it was dangerous, and suggested that the gun had better be discharged. The car was stopped, and one shot was fired into the ditch. Arnold then said it was all right, and Gibson was satisfied. The gun was taken to Arnold's home and put in a cupboard.

On Monday morning Arnold's chauffeur arrived with the car to take his master into town. On one of the children asking Arnold whether he was going to take the gun with him, he said, "Well, probably I had better, or mother won't have any rest," and he then took the gun out of the cupboard. He next told the chauffeur to put the remaining cartridges into the car, which was done. They drove to the garage, which was at a different place from the house, being situate on a small property which was being laid out. The garage had rooms over it occupied by a gardener. Arrived at the garage Arnold took out the gun and leant it up against the wall. He then went out and spoke to the gardener, and walked through the grounds giving orders. Returning to the garage he told the chauffeur to back out the car and get into the road. The gardener coming into the garage found Arnold with the gun in his hand, while a stick which he always carried was standing propped against the wall. The gardener noticed that the breech-block of the gun was open, so that a cartridge was partially visible. He said to Arnold, "The gun is loaded." Arnold took no notice of the remark, but told the man to go outside and clear away a pool of water which had collected. The gardener did so, and Arnold was left in the garage alone with a son of the gardener, aged 8. This boy said that he saw Arnold hang the stick on a hose pipe and take the gun in his hand. He had then looked the other way, so that he did not see what Arnold was doing. A shot was heard. The gardener rushed in and found Arnold lying on his back dead, with the gun on the ground on one side of him and the stick on the other. The wound which caused his death

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was a wound which was through the heart, which was blown into bits. The entrance of it was just beside the nipple of the left breast, the aperture was such that the muzzle of the gun must have been touching the body, the hole went through the waistcoat but not through the coat or overcoat, both of which he was wearing, and the direction of the wound was such that the barrel of the gun must have been at right angles to the plane of the surface of the body.

If death was intentionally self-inflicted the *modus operandi* was simple enough. Having by orders got rid of the chauffeur and the gardener, he either placed the gun with its butt against the wall and its muzzle pressed close up against his heart, and so maintained it by pressure in a horizontal position, or he placed the butt on the ground and leaning over it brought the muzzle at right angles to the line of his body. Then in either case he released the trigger by means of his stick. On the shot taking effect he fell on his back, the gun falling to one side of him, the side of the wound, the stick to the other, the side of the hand which had directed it.

The opposite supposition is that the whole occurrence was accidental. It will be useful to examine each successive step which could have led to such a result.

First as to the fact of the gun being loaded. If the gun being empty when brought to the garage Arnold loaded it there in the absence of the chauffeur and the gardener, it would be almost conclusive in favour of suicide, as for no conceivable reason could he wish to load the gun in the garage. Accordingly the theory of the appellants is that after the shot at the grouse Bladen had put in another cartridge. That would put two cartridges in the gun. One was discharged in the ditch, but through ignorance Arnold thought that that emptied the gun. In reality, however, one remained, and this is borne out by the remark of the gardener that it was loaded. The gardener being gone it is supposed that he tried to get the cartridge out, and in so doing accidentally discharged the gun and shot himself.

Now the character and position of the wound were such that it could not be self-inflicted by anyone holding the gun in the ordinary way and carelessly or unknowingly pulling the trigger. It is impossible for anyone to hold the gun (which their Lordships

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had the advantage of seeing) by the grip and place the muzzle at right angles to his own breast. The appellants are therefore driven to this theory. They suggest that, finding the action stick, he, in order to exert more force, either jammed the butt of the gun against the wall, or put it on the ground, and then leaning against the muzzle with his breast proceeded to apply force to the fore-end, and that while he was doing so the gun went off. There seem to be several quite fatal objections to this theory. In the first place, the hypothesis being that the gun was loaded and that he knew it was loaded; it is almost inconceivable that anyone however inexperienced would prefer to put the muzzle against his chest and the butt to the wall or the ground, rather than to reverse the position and put the butt to his chest and the muzzle to the wall or the ground, a position which would make it just as easy to apply force at the fore-end, if he ever attempted such a position at all, which seems extremely improbable in itself. In the second place, if the jamming of the gun against the wall or ground was resorted to in order to keep it steady so as to exert strength, the natural place against which to jam it would be the middle of the breast-bone and not against the left nipple. In the third place, there would be no reason whatever for having the stick in his hand, where it would only be an incumbrance, and he must have had it in his hand for it was last seen by the gardener propped against the wall, and by the little boy hung on the hose-pipe, neither of which positions would account for its being found on the floor beside the body.

On consideration of the whole circumstances of the case their Lordships are driven to the conclusion that death was self-inflicted by the deliberate intention of the deceased, and they agree with the result at which Macdonald, C.J.A., and Galliher, J., arrived. They are quite unable to attach any weight to the circumstance on which the trial judge placed much reliance, the behaviour of Arnold in reference to the call of nature. Nor is there, in their Lordships' view, any great cogency in the argument that various facts make it unlikely that he would choose of settled purpose that particular morning for the deed. If he had entertained the idea of putting an end to his troubles by suicide the particular moment might be uncertain to the last, and indeed suggested by some circumstance accidental in itself. But the determin-

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ing element in the case is the real evidence afforded by the wound, its position, and its relation to the clothes worn, by the presence of the stick, which all point to the practical impossibility of the injury being caused by any accidental handling of the gun however clumsy.

The case must go back with a declaration that judgment should be entered for the defendants and the action dismissed. The defendants must have their costs in the courts below and before this Board. The costs of the petitions of the respondents for leave to cross-appeal, must, as was settled when leave was granted, be borne by the petitioners. Their Lordships will humbly advise His Majesty accordingly. *Judgment accordingly.*

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(Annotated.)

Ontario Supreme Court, Falconbridge, C.J.K.B. July 31, 1918.

VENDOR AND PURCHASER (§ II—33)—"MORTGAGE"—DEFINITION OF UNDER MORTGAGES ACT—VENDOR'S LIEN—INSURANCE MONEY—APPLICATION.

The definition of "mortgage" in the Mortgages Act, R.S.O. c. 112, is wide enough to cover the charge known as a vendor's lien and the holders of such vendor's lien are entitled as mortgagees to have insurance money on the property applied in accordance with the provisions of s. 6 of that Act. Although they are entitled to the security of the insurance money, they are not entitled to apply the insurance money in payment of purchase instalments not yet due, but such money should be held in trust or invested or paid into court if the parties cannot agree as to its disposal.

[*Corham* v. *Kingston* (1889), 17 O.R. 432; *Edmonds* v. *Hamilton Provident* (1881), 18 A.R. (Ont.) 347, followed.]

Statement.

ACTION by the vendors of an hotel property, against the assignee of the purchasers, for a declaration of the plaintiffs' right to receive the sum of $15,000, payable by insurance companies in respect of a loss by a fire which damaged the hotel, and to compel the defendant to execute a release or to endorse, in favour of the plaintiffs, cheques drawn by the insurance companies payable to the order of the defendant and the plaintiffs.

Sir George Gibbons, K.C., for plaintiffs.

T. G. Meredith, K.C., for defendant.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—By an agreement of sale made between the plaintiffs and T. H. Crinnian and P. C. McGowan, dated the 14th day of May, 1912, the plaintiffs agreed to sell certain premises, in the town of Sarnia, to the said Crinnian and

McGowan. On the said premises was erected a building used as an hotel, known as the Belchamber House.

The price of the property was $21,000, to be paid as follows: $1,000 on the date of the signing of the agreement and the sum of $300 payable on the 7th day of March in each and every year thereafter until the purchase-price is paid, with interest at 5 per cent. payable yearly on the balance of the purchase-money remaining due and unpaid from time to time, with the privilege to the purchasers of increasing the said sum of $300 up to any amount. It will thus be seen that the purchasers are entitled to more than 60 years before completing full payment.

By a clause in the said agreement it was provided: "The purchasers covenant with the vendors to insure and to keep insured the said Belchamber House to its full insurable value, the said insurance to be made out in the name of the purchasers with the loss, thereunder, if any, payable to the vendors as their interest in the said property may appear, and in the event of the purchasers not insuring the said premises as in this paragraph required the vendors shall have the liberty and right to insure said premises to their full insurable value in the manner in this paragraph set out and to charge the premium therefor to the purchasers and add it to the purchase-price of said premises."

The said T. H. Crinnian and P. C. McGowan subsequently transferred their interest in the said agreement to the said defendant, the wife of the said T. H. Crinnian, and the defendant, in pursuance of the said agreement, insured the buildings upon the said premises in various companies.

The said premises were damaged by fire, and the loss was apportioned among 9 insurance companies, and the said companies issued cheques, to the amount of about $15,000, payable to the order of the defendant and the plaintiffs, for their respective amounts.

The plaintiffs now seek an order directing the defendant to execute such release as may be necessary to secure the delivery of the said cheques to the plaintiffs, and that she be ordered to endorse the same so that the plaintiffs may obtain the said proceeds and apply and hold the same in accordance with their legal obligation under the terms of the said agreement.

The defendant, alleging that all past-due instalments of the

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said purchase-money have been paid, but that the portion of the purchase-money which is not yet due is greater than the total amount of the insurance moneys, claims that the insurance moneys are the property of the defendant, subject only to a lien in favour of the plaintiffs, and to the right of the plaintiffs, so often as there shall be arrears of principal or interest payable to the plaintiffs by virtue of the said agreement, to apply so much of the said insurance moneys as may be necessary in payment of the said arrears, and the defendant claims a declaration in such terms.

At the trial various assignments were filed as exhibits, and from these it appeared that the record required to be amended by the addition of various persons now entitled under the original vendors.

I reserved judgment for the purpose of allowing the necessary amendment to be made, as well as pending a suggested settlement. I am now informed that all the parties entitled are before the Court, and I therefore proceed to give judgment.

By sec. 6 of the Mortgages Act, R.S.O. 1914, ch. 112, it is provided:—

"(1) All money payable to a mortgagor on an insurance of the mortgaged property, including effects, whether affixed to the freehold or not, being or forming part thereof, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

"(2) Without prejudice to any obligation to the contrary imposed by law or by special contract a mortgagee may require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage."

By sec. 2, clause (*d*), of the same Act, "'Mortgage' shall include any charge on any property for securing money or money's worth; 'mortgage money' shall mean money or money's worth secured by a mortgage; 'mortgagor' shall include any person deriving title under the original mortgagor or entitled to redeem a mortgage, according to his estate, interest or right in the mortgaged property; and 'mortgagee' shall include any person deriving title under the original mortgagee."

This definition of "mortgage" is wide enough to cover the charge commonly known as a vendor's lien, and I am inclined to

think that the plaintiffs are mortgagees within the meaning of sec. 2, and therefore within that of sec. 6, though I doubt whether the Legislature ever considered very seriously the effect of applying this wide definition to every individual provision of the Mortgages Act.

The statute was much discussed in *Edmonds* v. *Hamilton Provident and Loan Society* (1891), 18 A.R. (Ont.) 347. The present case is to some extent the converse of the *Edmonds* case. There the debtor desired that the insurance money should be applied on the debt, and the creditor objected. Here the creditors desire to have the insurance moneys applied on the debt, and the debtor objects.

It was decided in the *Edmonds* case that the mortgagee is not obliged to apply the money on overdue instalments, although he may do so. It was not necessary in that case to decide whether he would have been entitled to apply it on instalments not yet due; but in *Corham* v. *Kingston* (1889), 17 O.R. 432, it had been decided that a mortgagee is not entitled to accelerate payments, and on this point the judgment in *Corham* v. *Kingston* is not affected by the *Edmonds* case.

There is, therefore, nothing in the judgments of *Corham* v. *Kingston* or in the *Edmonds* case to justify the plaintiffs' contention that they are entitled to apply the insurance moneys in payment of instalments not yet due; but it appears from those cases that, if the plaintiffs are mortgagees, they are entitled to the security of the insurance money, just as, before the fire, they were entitled to the security of the buildings which the money represents.

Even if I am wrong in thinking that the plaintiffs are mortgagees within the statute, it seems to me that the same principles would apply as between vendor and purchaser. The plaintiffs, in my opinion, are not entitled to apply the insurance money in payment of instalments not yet due, but they are entitled to look to the insurance money as part of their security. I do not see how I can direct the moneys to be held in trust and invested for so long a period; and, if the parties cannot agree as to its disposal, I will direct that the moneys be paid into Court.

The parties are fairly seeking the direction of the Court in the ascertainment of their rights, neither of them succeeds completely, and I do not think I ought to penalise either of them with costs. There will therefore be no order as to costs.

Annotation.

INSURANCE ON MORTGAGED PROPERTY.

BY JOHN DELATRE FALCONBRIDGE, M.A., LL.B.

1. Insurable interest.
2. Right or obligation to insure.
3. Insurance in the name of the mortgagor.
4. Mortgage clause in insurance policy.
5. Insurance in the name of the mortgagee.
6. Application of insurance money.

1. Insurable interest.

The mortgagor has by virtue of his equity of redemption an insurable interest in the mortgaged property, and his right to insure is co-extensive with the value of the property (*a*), but if he makes an absolute transfer of his equity of redemption he no longer has an insurable interest, and any insurance then existing in his favour ceases to be effectual unless it be assigned with the consent of the insurers to the transferee of the equity of redemption. The mortgagor's insurable interest does not cease until the mortgage debt has been paid, even although the mortgage has been foreclosed, for the mortgagor may nevertheless continue to be liable for the mortgage debt (*b*).

By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property . . . or if the interest of the assured in the property whether as owner, trustee . . . mortgagee, lessee or otherwise is not truly stated." It was held that a mortgagor was sole and unconditional owner within the terms of said condition. By another condition the policy was to be avoided if the assured should have or obtain other insurance, whether valid or not, on the property. The assured applied for other insurance, but before being notified of the acceptance of his application the premises were destroyed by fire. It was held that there was no breach of said condition (*c*).

A mortgagor who had made a mortgage, under the Short Forms of Mortgages Act, containing a covenant to insure the mortgaged premises against fire, effected an insurance thereon with the defendant company, the loss, by the policy, being payable to the plaintiff, the mortgagee, as his interest might appear under the mortgage. Subsequently the mortgagor conveyed his equity of redemption to the mortgagee without the consent of the company having been obtained therefor. The premises having been afterwards destroyed by fire, it was held that the plaintiff was not entitled to the insurance moneys, for (1) the fact of the conveyance made by the mortgagor to the plaintiff, whereby the former ceased to have any interest at the time of the fire, was a good answer to the claim; and (2) such conveyance constituted a breach of a statutory condition which provides against the insured premises being assigned without the company's consent (*d*).

In order to come within a condition providing against the assignment of the insured premises, an assignment must be an absolute transfer of the sub-

(*a*) *Glover* v. *Black*, 1763, 1 Wm. Bl. 396; 3 Burr. 1394 97 E.R. 891.
(*b*) *Parsons* v. *Queen Insurance Co.*, 1878, 29 U.C.C.P. 188, at p. 211; appeal to Privy Council on another point, 7 App. Cas. 96.
(*c*) *Western Assurance Co.* v. *Temple*, 1901, 31 Can. S.C.R. 373, following *Commercial Union Assurance Co.* v. *Temple*, 1898, 29 Can. S.C.R. 296.
(*d*) *Pinhey* v. *Mercantile Fire Insurance Co.*, 1901, 2 O.L.R. 296.

ject matter. An assignment by way of mortgage (*e*) or an agreement to sell, the vendor retaining the legal estate (*f*), does not constitute a breach of the condition. Annotation.

A mortgagee, unpaid vendor or other person having a limited interest in property, may effect insurance either (1) on his own interest merely, or (2) on his own interest as well as the interests of all other persons in the property. For instance, a mortgagee may effect insurance either (1) on his own interest as mortgagee or (2) on the property as a whole, including the equity of redemption (*g*).

It has been held in New Brunswick that the interest of the mortgagee as such ends on foreclosure absolute, and that if a loss occurs thereafter the mortgagee cannot recover on a policy issued to him as mortgagee (*h*).

2. Right or obligation to insure.

It is usual in Ontario to insert in a mortgage the short form of covenant provided by the Short Forms of Mortgages Act (*i*), as follows:—

> And that the said mortgagor will insure the buildings on the said lands to the amount of not less than of lawful money of Canada.

In the case of a mortgage expressed to be made in pursuance of the statute, the foregoing covenant has the same effect as if it were in the following terms (*j*):—

> And also that the said mortgagor or his heirs, executors, administrators or assigns shall and will forthwith insure unless already insured and during the continuance of this security keep insured against loss or damage by fire, in such proportions upon each building as may be required by the said mortgagee his heirs, executors, administrators or assigns, the messuages and buildings erected on the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, in the sum of of lawful money of Canada, at the least, in some insurance office to be approved of by the said mortgagee, his heirs, executors, administrators or assigns, and pay all premiums and sums of money necessary for such purpose, as the same shall become due, and will on demand assign, transfer and deliver over unto the said mortgagee, his heirs, executors, administrators or assigns the policy or policies of insurance, receipt or receipts thereto appertaining; and if the said mortgagee, his heirs, executors, administrators or assigns, shall pay any premiums or sums of money for insurance of the said premises or any part thereof, the amount of such payment shall be added to the debt hereby secured, and shall bear interest at the same rate from the time of such payments and shall be payable at the time appointed for the then next ensuing payment of interest on the said debt.

Under the Mortgages Act, R.S.O. 1914, c. 112, in the case of a mortgage which contains no power to insure and no declaration excluding the application of Part II. of the statute, there is a power to insure as therein provided (*k*).

(*e*) *Sands* v. *Standard Insurance Co.*, 1879, 26 Gr. 113, 27 Gr. 167; *Sovereign Fire Insurance Co.* v. *Peters*, 1885, 12 Can. S.C.R. 33.
(*f*) *Keefer* v. *Phœniz Insurance Co.*, 1901, 31 Can. S.C.R. 144; *Trotter and Douglas* v. *Calgary Fire Insurance Co.*, 1910, 3 A.L.R. 12.
(*g*) *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, at p. 398; *Keefer* v. *Phœniz Insurance Co.*, 1901, 31 Can. S.C.R. 144, at pp. 148, 149. As to insurance of limited interests, see an article by William Harvey in 10 L.Q.R. 48 (Jan., 1894). As to insurance in the name of the mortgagee, see § 5, *infra*.
(*h*) *Gaskin* v. *Phœniz Insurance Co.*, 1866, 11 N.B. R. (6 Allen) 249.
(*i*) R.S.O. 1914, c. 117, schedule B, clause 12.
(*j*) R.S.O. 1914, c. 117, s. 3.
(*k*) R.S.O. 1914, c. 112, ss. 19, 26.

Annotation.

In England it is provided by the Conveyancing Act, 1881, ss. 19 and 23, as follows:—

19—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

. . . . . .

(ii) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money.

23—(1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act, shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two-third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i) Where there is a declaration in the mortgage deed that no insurance is required;

(ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed;

(iii) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

(3) [*This sub-section relates to the application of the insurance money* (*l*).]

If a mortgage company through its manager undertakes with the mortgagor to keep alive an insurance on the mortgaged property, and takes steps towards carrying out such undertaking, but fails to carry it out, it is guilty of such negligence as to render it liable in damages to the mortgagor, if he is ignorant of such failure, for the amount of such insurance in case the property is burned after the policy lapses (*m*).

3. Insurance in the name of the mortgagor.

Usually, when mortgaged property is insured, the insurance is effected in the name of the mortgagor, and a clause is inserted in the policy that the loss, if any, shall be payable to the mortgagee as his interest may appear. Under such a clause, it would seem that the mortgagee could give a good discharge for money paid to him only to the extent of his claim as mortgagee, and that as to any surplus the receipt of the mortgagor would be necessary, whereas if the words "as his interest may appear" are omitted, the mortgagee could give a good discharge as to the whole sum paid (*n*). In any case the mortgagee has an equitable lien upon the policy and its proceeds. (*o*)

(*l*) Sub-s. 3 is similar in terms to s. 6 of the Mortgages Act, discussed in § 6, *infra*.
(*m*) *Campbell* v. *Canadian Co-operative Investment Co.*, 1906, 16 M.R. 464, following *Skelton* v. *London and North Western Ry. Co.*, 1867, L.R. 2 C.P. 631, at p. 636.
(*n*) *Mitchell* v. *City of London Assurance Co.*, 1888, 15 O.A.R. 262, at p. 279.
(*o*) *Chew* v. *Traders Bank of Canada*, 1909, 19 O.L.R. 74.

Annotation.

Notwithstanding the insertion of the clause mentioned, the mortgagor is the person assured and may sue in his own name upon the policy (*p*). Furthermore, apart from a provision in the policy to the contrary (*q*), a subsequent breach by the mortgagor of any of the conditions of the policy, as, for instance, of a condition avoiding the policy in the event of the assignment of the property without the consent of the insurer, will avoid the policy as against both mortgagor and mortgagee (*r*).

Whether, in the case of a policy purporting to insure the mortgagor and containing a clause that the loss if any shall be payable to the mortgagee as his interest may appear, the mortgagee may sue in his own name without joining the mortgagor is a question which has been much discussed. The weight of authority in Ontario is in favour of the view that the mortgagee may maintain the action. As against the objection that the contract is between the insurer and the mortgagor and that the mortgagee being a stranger to the contract is not entitled to sue upon it, the clause in question being a mere direction and authority to the insurer to pay the mortgagee instead of the mortgagor (*s*), it has been held that the effect of the issue of the policy to the mortgagor with the loss, if any, payable to the mortgagee as his interest may appear is to create the relation of trustee and *cestui que trust* between the mortgagor and the mortgagee. The subject of the trust is the right to receive the money payable under the policy and to sue for it, and this right may be exercised by the mortgagee in his capacity as *cestui que trust*, at least to the extent of his interest (*t*). In some of the cases where the policies were not under seal, emphasis was laid on this fact, but it would seem that the absence of a seal would not assist a third party in an action upon a contract to which he was not a party, and that the presence of a seal would not disentitle the third party from suing if the effect of the contract was to constitute him a *cestui que trust* (*u*).

In a Nova Scotia case a policy not under seal contained the following provision: "Loss, if any, payable to the order of Peter Brush, if claimed within sixty days after proof, his interest therein being as mortgagee," and it appearing that the policy was obtained by the mortgagor in pursuance of a covenant entered into by him with Brush, that he should insure in the name and for the benefit of Brush, it was held that the mortgagee was entitled to sue on the policy in his own name (*v*).

In England it has been held that a covenant on the part of the mortgagor to insure, nothing being said as to the application of the insurance money, does not confer upon the mortgagee any right to the money in the event of the bankruptcy of the mortgagor (*w*), but in Ontario it has been held that a covenant to insure in the form provided by the Short Forms of Mortgages

(*p*) *Caldwell* v. *Stadacona Fire and Life Insurance Co.*, 1883, 11 Can. S.C.R. 212; *cf. McQueen* v. *Phœnix Mutual Fire Insurance Co.*, 1880, 4 Can. S.C.R. 660.

(*q*) As to the effect of a "mortgage clause" in a policy, see § 4, *infra*.

(*r*) *Livingstone* v. *Western Assurance Co.*, 1868, 14 Gr. 461, 16 Gr. 9; *Chisholm* v. *Provincial Insurance Co.*, 1869, 20 U.C.C.P. 11; *Mitchell* v. *City of London Assurance Co.*, 1888, 15 A.R. (Ont.) 262; *Haslem* v. *Equity Fire Insurance Co.*, 1904, 8 O.L.R. 246.

(*s*) See *Mitchell* v. *City of London Assurance Co.*, 1888, 15 A.R. (Ont.) 262, at p. 274.

(*t*) *Mitchell* v. *City of London Assurance Co.*, 1888, 15 A.R. (Ont.) 262, where the earlier authorities are discussed; *Haslem* v. *Equity Fire Insurance Co.*, 1904, 8 O.L.R. 246; *Laidlaw* v. *Hartford Fire Insurance Co.*, 1916, 10 A.L.R. 7, 29 D.L.R. 229.

(*u*) *Mitchell* v. *City of London Assurance Co.* was followed in *Agricultural Savings and Loan Co.* v. *Liverpool, etc., Insurance Co.*, 1901, 3 O.L.R. 127, reversed, without any decision as to the right of the mortgagee to sue in his own name, 33 Can. S.C.R. 94. It is pointed out in 3 O.L.R. at p. 136, that the policy though by deed was not a deed *inter partes* but a deed poll upon which anyone named in it might sue. In this case there was also a "mortgage clause," as to which, see § 4, *infra*.

(*v*) *Brush* v. *Ætna Insurance Co.*, 1864, 1 Old. (N.S.) 459.

(*w*) *Lees* v. *Whiteley*, 1866, L.R. 2 Eq. 143.

Annotation.

Act (*x*) operates as an equitable assignment of the insurance when effected (*y*). If there is neither a covenant to insure nor a provision that the money in case of loss shall be payable to the mortgagee, the mortgagee has no claim to money arising from insurance effected by the mortgagor (*z*).

Where an owner of property effects insurance thereon and subsequently mortgages the property, assigning the policy to the mortgagee, the insurance company cannot by arrangement with the mortgagee without the knowledge or consent of the mortgagor cancel the insurance. The mortgagor notwithstanding the assignment continues to be the person assured within the meaning of the Insurance Act, and the policy cannot be cancelled unless notice in writing is served upon the assured and the unearned portion of the premium is paid to him as required by the statute (*a*).

Where the mortgagor and the mortgagee effect separate insurances on their respective interests with different companies, and the mortgagee upon a loss occurring settles the amount of the loss with the company insuring him, this, even although the mortgagor may assent to such settlement, is not an estoppel against the mortgagor in favour of the other insurance company and the mortgagor may nevertheless claim payment under his policy (*b*).

A statutory condition (in Ontario) provides that if the property insured is assigned without the written permission of the company the policy shall thereby become void. This, however, applies only to an assignment of the property and not to an assignment of the policy unaccompanied by a transfer of ownership of the property (*c*).

If mortgaged property is insured in the name of the mortgagor, with loss, if any, payable to the mortgagee as his interest may appear, and a loss occurs, the surplus insurance money, after payment of the mortgagee's claim, belongs to the mortgagor by virtue of his contract with the insurer, and not by virtue of any obligation of the mortgagee to account in equity to the mortgagor. It follows therefore that the mortgagee is not entitled to invoke the doctrine of consolidation of mortgages so as to enable him to apply the surplus on account of an overdue mortgage held by him upon other property (*d*).

4. Mortgage clause in insurance policy.

In the case of insurance effected by a mortgagor upon mortgaged property it is now a common practice in Canada to insert in or attach to the policy a so-called "mortgage clause," safeguarding the mortgagee against the danger of the policy being avoided by the act or neglect of the mortgagor, and conferring upon the insurer the right to be subrogated (*e*) to the rights and securities of the mortgagee in the event of the insurance company claiming that the policy is avoided as against the mortgagor.

The form of mortgage clause adopted by The Canadian Fire Underwriters' Association is as follows:—

> Policy No. . . . It is hereby provided and agreed that this insurance, as to the interest of the mortgagees only therein, shall not be

(*x*) See § 2, *supra*.
(*y*) *Greet* v. *Citizens Insurance Co.*, 1880, 5 A.R. (Ont.) 596, affirming 27 Gr. 121; *Goldie* v. *Bank of Hamilton*, 1900, 27 A.R. (Ont.) 619.
(*z*) *Miller* v. *Tew*, 1909, 20 O.L.R. 77, at pp. 90, 91.
(*a*) *Morrow* v. *Lancashire Insurance Co.*, 1899, 26 A.R. (Ont.) 173.
(*b*) *Prittie* v. *Connecticut Fire Co.* 1896, 23 A.R. (Ont.) 449.
(*c*) *McPhillips* v. *London Mutual Fire Ins. Co.*, 1896, 23 A.R. (Ont.) 524.
(*d*) *Re Union Assurance Co.*, 1893, 23 O.R. 627.
(*e*) As to the right of subrogation, see also § 5, *infra*.

Annotation.

invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

It is further provided and agreed that the mortgagees shall at once notify said company of non-occupation or vacancy for over thirty days, or of any change of ownership or increased hazard that shall come to their knowledge; and that every increase of hazard, not permitted by the policy to the mortgagor or owner, shall be paid by the mortgagees on reasonable demand from the date such hazard existed, according to the established scale of rates, for the use of such increased hazard during the continuance of this insurance.

It is also further provided and agreed that whenever the company shall pay the mortgagees any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once be legally subrogated to all rights of the mortgagees under all the securities held as collateral to the mortgage debt, to the extent of such payment, or, at its option, the company may pay to the mortgagees the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage, and all other securities held as collateral to the mortgage debt, but no such subrogation shall impair the rights of the mortgagees to recover the full amount of their claim.

It is also further provided and agreed that in the event of the said property being further insured with this or any other office, on behalf of the owner or mortgagees, the company, except such other insurance when made by the mortgagor or owner shall prove invalid, shall only be liable for a ratable proportion of any loss or damage sustained.

At the request of the assured, the loss, if any, under this policy is hereby made payable to ——— as —— interest may appear, subject to the conditions of the above mortgage clause.

Mortgagees applied for a policy of insurance to be issued in the name of the mortgagor. The policy was so issued in the name of the mortgagor, loss, if any, payable to the mortgagees, and subject to a mortgage clause. The premiums were paid by the mortgagor. A fire occurred and the insurance company paid the mortgagees the amount of the policy. The mortgagor claimed to have the mortgage discharged as being satisfied by the insurance money; the insurance company claimed that the mortgagor for certain reasons had forfeited any claim under the policy, that notwithstanding that no liability existed on its part to the mortgagor it had paid the insurance money to the mortgagees upon the condition that it should be subrogated to the rights of the mortgagees as provided by the mortgage clause, and that it was entitled to an assignment of the mortgage. It was held that as the insurance company had failed to shew any good defence as against the mortgagor, it was not entitled to repayment of the money or to be subrogated to the rights of the mortgagee, and that the insurance effected by the mortgagee, was effected for the benefit of the mortgagor, the payment consequently enuring to the benefit of the latter (*f*). In other words, the insurance company's right of subrogation depends upon the validity of its defence as against the mortgagor.

(*f*) *Bull* v. *North British Canadian Investment Co.*, 1888, 15 A.R. (Ont.) 421, affirmed, 1889, 18 Can. S.C.R. 697, Cameron, S.C. Cas. 1. In the Supreme Court of Canada Taschereau and Gwynne, JJ., expressed the opinion that the interest of the mortgagees was the same as if they were assignees of a policy effected with the mortgagor.

Annotation.

An insurer entitled to subrogation may recover from the assured not only the amount of any compensation or the value of any benefit received by the assured in excess of his actual loss, but also the full value of any rights or remedies against third persons which have been renounced by the assured and to which, but for such renunciation, the insurer would have been entitled to be subrogated (*g*).

The mortgage clause does not effect a new insurance in favour of the mortgagee. The insurer thereby agrees with the mortgagee that to the extent of his interest the insurance will not be invalidated by future act or negligence of the mortgagor, but the insurer is not debarred from setting up that the insurance was procured by fraud and therefore void *ab initio* (*h*).

It has been said that the mortgage clause constitutes a contract between the insurance company and the mortgagee, and that consequently the mortgagee's right to sue upon the policy without joining the mortgagor does not rest solely upon the clause providing that the loss, if any, shall be payable to the mortgagee as his interest may appear (*i*). The case in which this opinion was expressed was reversed on appeal on the ground that in any event the mortgage clause did not protect the mortgagee against the consequence of misstatements made by the mortgagor in the application for the insurance. Such misstatements rendered the original insurance void, and a subsequent renewal by way of renewal receipt was likewise a nullity (*j*).

5. Insurance in the name of the mortgagee.

A mortgagee, unpaid vendor or other person having a limited interest in property may effect insurance either (1) on his own interest merely, or (2) on his own interest as well as the interests of all other persons in the property. For instance, a mortgagee may effect insurance either (1) on his interest as mortgagee, or (2) on the property as a whole, including the equity of redemption. In order that the insurance effected by a mortgagee should cover the property as a whole (*a*) the mortgagee must have intended to insure the interest of the mortgagor as well as his own, and (*b*) the policy must not by its terms be limited to the mortgagee's interest in the property. *Primâ facie* the insurance is intended to cover the property as a whole, but the amount of the premium may make it clear that the risk is more limited. If only the mortgagee's interest is insured, the mortgagee is entitled to receive only the amount to which he is damnified, whereas if the property as a whole is insured, he is entitled to receive the whole amount of the damage to the property to the extent of the insurance, holding the surplus over and above his own loss for the mortgagor (*k*).

If a mortgagee insures the mortgaged property out of his own funds without having any right under the mortgage deed or otherwise to recover the premium from the mortgagor, the insurance is for the benefit of the mortgagee alone, and in the event of loss he is entitled to receive the amount of

(*g*) *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q.B. 226.
(*h*) *Omnium Securities Co.* v. *Canada Fire and Mutual Insurance Co.*, 1882, 1 O.R. 494.
(*i*) *Agricultural Savings and Loan Co.* v. *Liverpool, etc., Insurance Co.*, 1901, 3 O.L.R. 127, at p. 141. See § 3, *supra*, as to the effect of the last mentioned clause.
(*j*) *Liverpool and London and Globe Insurance Co.* v. *Agricultural, etc., Co.*, 1903, 33 Can. S.C.R. 94.
(*k*) *Keefer* v. *Phœnix Insurance Co.*, 1901, 31 Can. S.C.R. 144, at pp. 148, 149, quoting from *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, at p. 398, and *Insurance Co.* v. *Updegraff*, 1853, 21 Penn. 513, at p. 520.

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the policy without giving credit therefor upon the mortgage (*l*), that is, he may hold the money as security for payment of the mortgage debt (*m*).

A contract of fire insurance, like a contract of marine insurance, is a contract of indemnity, and of indemnity only, and the assured, in case of a loss against which the policy has been made is entitled to be fully indemnified but is never entitled to be more than fully indemnified. One of the doctrines adopted in favour of the insurer in order to prevent the assured from recovering more than a full indemnity is the doctrine of subrogation. If an unpaid vendor or a mortgagee insures his interest in property and upon a loss occurring receives the insurance money, and if he afterwards receives the purchase price or the mortgage money, as the case may be, without deduction on account of the insurance, he is liable to the insurer for an amount equal to the insurance money received by him, because he is not entitled to be more than fully indemnified (*n*).

So, if a mortgagee, after the occurrence of damage insured against, is paid by the mortgagor, the mortgagee is not entitled to recover from the insurer upon a policy covering his interest only, because he has not been damnified. If, on the other hand, the mortgagee obtains payment of the whole amount of the mortgage debt from the insurer, the insurer is entitled to be subrogated to the rights of the mortgagee and is entitled to a transfer of the mortgagee's securities (*o*). There can, however, be no right of subrogation unless the mortgagee's claim is wholly satisfied (*p*).

The case of two persons effecting, in different insurance companies, insurance of the same property in different rights has been stated thus (*q*):—

> "Where different persons insure the same property in respect of different rights they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainderman. Then if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurance companies the value of their interests, and of course those values added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But then there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of a mortgagor and mortgagee. But wherever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events, for instance, if the other person become insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but yet

(*l*) *Russell* v. *Robertson*, 1859, 1 U.C. Chy. Ch. 72; *Dobson* v. *Land*, 1850, 8 Hare 216; *King* v. *State Mutual Fire Insurance Co.*, 1851, 61 Mass. 1.

(*m*) See also § 6, *infra*.

(*n*) *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, especially at pp. 386 ff.

(*o*) *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380; *Smith* v. *Columbia Insurance Co.*, 1851, 17 Penn. 253; *King* v. *State Mutual Fire Insurance Co.*, 1851, 61 Mass. 1.

(*p*) *National Fire Insurance Co.* v. *McLaren*, 1886, 12 O.R. 682.

(*q*) *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe Insurance Co.*, 1877, 5 Ch. D. 569 at pp. 583, 584, Mellish, L.J.

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it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. I think wherever that is the case the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of subrogation."

6. Application of insurance money.

It is provided by the Mortgages Act, R.S.O. 1914, c. 112, s. 6, as follows:—

6.—(1) All money payable to a mortgagor on an insurance of the mortgaged property, including effects, whether affixed to the freehold or not, being or forming part thereof, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage.

This section was originally passed in 1886 (*r*), and was based on the English Conveyancing Act, 1881 (*s*).

Sub-s. 1 is practically declaratory of the mortgagee's right under the English statute, 14 Geo. III,, c. 78, now cited as the Fires Prevention (Metropolis) Act, 1774 (*t*), s. 83, formerly in force in Ontario (*u*). It gives the mortgagee the right, where insurance is effected by the mortgagor, even where there is no covenant on the part of the mortgagor to insure, or a covenant to insure merely but not to assign the policy, to require the money to be applied in making good the loss or damage (*uu*).

Sub-s. 2 confers on the mortgagee a new right, namely, the right to "require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage." The words "without prejudice to any obligation to the contrary imposed by law" have probably lost their significance since the statute 14 Geo. III. c. 78, s. 83, ceased to be in force. The words "special contract" mean a special contract relating to the insurance (*v*). The sub-section presumably refers to insurance money received by the mortgagor, for no statutory provision was needed as to money received by the mortgagee (*w*).

The mortgagee is not at liberty without the consent of the mortgagor to accelerate the times of payment under the mortgage by applying the insurance money in payment of instalments of principal or interest not yet due, but he may apply it in payment of overdue instalments (*x*). On the other hand,

(*r*) 49 Vict., c. 20, s. 9.

(*s*) 44 & 45 Vict., c. 41. The clause in the English statute is found in connection with various special provisions as to the mortgagee's power to insure, which were substituted for Lord Cranworth's Act (1860), 23 & 24 Vict., c. 145. See § 2, *supra*.

(*t*) See *In re Quicke's Trusts, Poltimore* v. *Quicke*, [1908] 1 Ch. 887; *Sinnott* v. *Bowden*, [1912] 2 Ch. 414.

(*u*) This statute, commonly referred to as the Metropolitan Building Act, was held to be in force in Ontario. *Stinson* v. *Pennock*, 1868, 14 Gr. 604; *Carr* v. *Fire Assurance Association*, 1887, 14 O.R. 487. By the Ontario Insurance Act, 1887, 50 V., c. 26, s. 154, it was provided that the statute should not "be deemed to be in force with regard to property in this Province."

(*uu*) *Edmonds* v. *Hamilton Provident and Loan Society*, 1891, 18 A.R. (Ont.) 347, at pp. 354-355.

(*v*) 18 A.R. (Ont.) at p. 355.

(*w*) 18 A.R. (Ont) at p. 368.

(*x*) *Corham* v. *Kingston*, 1883, 17 O.R. 432.

Annotation.

subject to a provision in the mortgage to the contrary, he still has the right, which he had before the passing of the statute, to hold the money as he held the policy, as collateral or additional security for the mortgage debt, and he is not bound to apply it towards payment of either principal or interest overdue (*y*).

"Now the Act does not profess to interfere with any right the mortgagee had theretofore possessed to deal with the proceeds of the policy when the mortgage money was overdue. He was not compelled to apply it at all, or if he did apply it he might apply it in such a way as to preserve the full benefit of his contract. The new right or option which is given to him must, I think, be considered as one controlling any right which the mortgagor might otherwise have had to direct the disposition of the insurance received by or paid into the hands of the mortgagee before the mortgage debt becomes due. In effect the option given by the section is either to have the money applied in rebuilding or to have it at once applied in reducing the debt secured by the mortgage. If the latter option is not exercised the money remains in the mortgagee's hands (in those cases in which he has had, apart from the statute, the right to receive it) as it would have done before the Act, and subject to whatever rights or interests the parties by law respectively had therein, and *inter alia* to the right of the mortgagee to make such application of it as he might deem proper to the payment either of principal or of interest, or of both, overdue, or to make no application of it if he should deem it more advisable for the security of his contract not to adopt that course, but to require the mortgagor to make his payments in accordance with his covenants" (*z*).

If the mortgagee receives the insurance money before the time appointed for payment of the money secured by the mortgage he is entitled, nevertheless, to the interest without abatement (*a*).

"He may keep the insurance money by him and sue for arrears, or distrain for them, if he has that power, or he may at his option apply the whole or part of the insurance money to the arrears. It is part of his security, and whenever there is default he may resort to it, or he may resort to his personal or other remedies. Of course, as soon as the debt is reduced to an equality with the insurance money in his hands he must apply the latter *pro tanto* from time to time to subsequently maturing payments. It hardly needs to be added that a mortgagee retaining insurance money in his hands as security for future payments is accountable for any profit he makes with it, and that he ought not to leave it lying idle, but ought, if possible, to concur with the mortgagor in some profitable way of laying it out." (*b*)

In view of the definition of "mortgage" in the Mortgages Act as including "any charge on any property for securing money or money's worth" (*c*), it has been held that s. 6 of the statute is applicable to the case of insurance effected by a purchaser of land with loss, if any, payable to the vendors. Therefore, when the buildings on the land are destroyed by fire, the vendors

(*y*) *Edmonds* v. *Hamilton Provident and Loan Society*, 1891, 18 A.R. (Ont.) 347, reversing judgment of the Queen's Bench Division on this point, 19 O.R. 677, and disapproving of *Corkum* v. *Kingston*, 1889, 17 O.R. 432, in so far as it may be supposed to have decided that the mortgagee was bound to apply the insurance money on principal and interest as they matured.

(*z*) *Edmonds* v. *Hamilton Provident and Loan Society*, 1891, 18 A.R. (Ont.) 347, at p. 357, Osler, J.A.

(*a*) 18 A.R. (Ont.) at p. 356; *Austin* v. *Story*, 1863, 10 Gr. 306.

(*b*) 18 A.R. (Ont.) at p. 367, Maclennan, J.A.

(*c*) R.S.O. 1914, c. 112, s. 2.

Annotation. are entitled to the security of the insurance money, just as before the fire they were entitled to the security of the buildings, but they are not entitled to apply the insurance money in payment of instalments of the purchase money not yet due (*d*).

Mortgaged property was insured in the name of the mortgagor with loss payable firstly to the first mortgagee and secondly to the second mortgagee as their interests might appear. The first mortgagee having received insurance money applied it on the first mortgage and subsequently sold the property under power of sale. It was held that the insurance money was properly applied, the effect being to reduce the first mortgage for the benefit of execution creditors intermediate between the two mortgagees, and that there was no case for marshalling of two funds as between the two mortgagees (*e*).

Under a contract with the owner of a mill and machinery which was subject to three mortgages (the second and third in favour of the same mortgagees), each containing a covenant to insure, the plaintiffs took out the machinery, replacing it with new machinery, reserving a lien thereon for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiffs' benefit. Before any further insurance was effected the mill and machinery were destroyed by fire. It was held, upon the evidence, that the second mortgagees had consented to the purchase of the new machinery upon the terms specified, and, as a result of that finding, that the plaintiffs were entitled, subject to the first mortgagee's claim, to payment of the insurance money on the machinery and to be subrogated to the first mortgagee's rights against the land to the extent to which that insurance money was exhausted by him (*f*).

(*d*) *Scott* v. *Crinnian*, *supra*.
(*e*) *Midland Loan and Savings Co.* v. *Genitti*, 1916, 36 O.L.R. 163, 30 D.L.R. 52.
(*f*) *Goldie* v. *Bank of Hamilton*, 1900, 27 A.R. (Ont.) 619.

TOWN OF COBOURG v. CYCLONE WOVEN WIRE FENCE Co.

CAN.
S. C.

Supreme Court of Canada, Davies, Idington, Anglin and Brodeur, JJ., and Falconbridge, C.J., ad hoc. October 8, 1918.

LANDLORD AND TENANT (§ III D—110)—AGREEMENT—LEASE FOR PERIOD—OPTION TO PURCHASE AT END OF LEASE—RENT PAYABLE AT END OF TERM—DISTRESS FOR RENT DURING TERM—ILLEGALITY.

By an agreement between a town corporation and a manufacturing company the corporation gave the company a five years' option to purchase land leased to it for that period for manufacturing purposes—an annual rental was to be paid at the end of the term if the purchase was not completed, or *pro rata* at any earlier period at which the option was relinquished. Before the expiration of the five years, the company sold some of its machinery and was preparing to sell the balance when the corporation distrained for rent due under the agreement, and the contents of the factory were seized and sold:

The court held that as the company had not relinquished the option, there was no rent due and that the distress was illegal.

Statement. APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial by which the action was dismissed.

F. M. Field, K.C., for appellant; *Loftus*, for respondent.

Davies, J. Davies, J.:—I concur in the opinion of Mr. Justice Anglin.

IDINGTON, J.:—The appellant as a municipal corporation entered into an agreement with respondent giving it an option for a term of 5 years to purchase certain property and meantime to lease the property.

The questions raised herein must be determined by the construction to be placed upon two clauses of said agreement which are as follows:—

The corporation offers to sell to the company the building and lands surrounding the same heretofore used as the Model School on the north side of University Ave. in the Town of Cobourg comprising 2 acres of land be the same more or less for $3,500 at any time within 5 years from the day of the date hereof on the company tendering to the mayor of the corporation within said period of 5 years a deed for execution by the corporation in accordance with the Short Form of Conveyances Act.

And the corporation offers to lease to the company the said premises until the completion of the sale thereof to the company according to the terms of the offer hereinabove set forth at an annual rental of $200, to be paid by the company to the corporation at the expiration of the said period of 5 years, in the event of the company not completing the purchase within the said period, and at the same rate for any less period than 5 years, in the event of the company relinquishing this option prior to the withdrawal from the said premises of the plant and machinery of the company.

The respondent entered into possession of said premises and after holding same for 3½ years and about a year and a half before the expiration of said 5 years, without making any election or expressly declaring its intention to relinquish the option of purchase given by the agreement, its goods were distrained by the appellant for an alleged claim of $700 for rent under the said second clause.

The respondent, 6 months later, brought this action, alleging the seizure was illegal and claiming damages therefor.

Appellant attempted to justify its seizure by evidence of the removal by respondent of a great part of its machinery and stock-in-trade thereby tending to demonstrate that it had relinquished its option and hence become liable to pay rent for the time it had been in possession.

I cannot see how the option to purchase can, under any fair or reasonable construction of the instrument, be determined in any such way. It was quite competent for the respondent to have removed every bit of its machinery and other personal property and awaited till the last day of the term of 5 years and then to pay the price named and the rental specified and take a conveyance.

CAN.

S. C.

TOWN OF COBOURG v. CYCLONE WOVEN WIRE FENCE CO.

Idington, J.

Suppose there had been a rapid rise in value of real estate, and this property had become worth double by the end of the term what it was at the making of the agreement, could the option be held to have been relinquished by reason of any such evidence as adduced herein?

There was not a line in the agreement stipulating for occupation of the premises, much less imposing as a term thereof that it should bring goods and machinery to be used by it therein.

The only provisions made binding respondent in relation to the property were to keep it in repair, not to assign without leave, to insure and to pay school taxes on an assessment of $3,500.

It is not what conceivably may have been the understanding between the parties but what the writing expresses that we have to do with herein.

If appellant made an improvident agreement, we cannot help it. If there was, outside of that, material for another case, it should have been fought out otherwise than by distress.

I should not, even if I could get over the impassable barrier I have suggested arising from the construction of the instrument contemplating a 5 years' option to purchase, be able, as a matter of course, to put the construction on the leasing clause standing alone that appellant contends for. There is no time named for the payment of rent except at the expiration of the said period of 5 years. The matter is left so indefinite in that regard that I doubt if any well-founded right to distrain could be held to have arisen at an earlier date than the end of the 5-year term. I need not, however, decide that, in my view of the plain, obvious meaning of the instrument, otherwise.

The real issue in law had, I fear, got beclouded by reason of giving heed to collateral issues and considerations that never could have, in themselves, laid a foundation for the right to distrain, otherwise I imagine this litigation would have terminated long ago.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—After hearing an able and exhaustive argument of this appeal, I am, with deference, utterly at a loss to appreciate the considerations which led the Appellate Division to regard this case as a fit subject for special leave to appeal. The unanimous judgment of that court (the personnel being somewhat

different), reversing that of Britton, J., who had dismissed the action, held that the defendant had made an illegal distress, awarded the plaintiff $23.50 actual, and $5 nominal, damages, declared certain of the distrained goods which the defendant had "bought in," at the bailiff's sale, at prices aggregating $905.35, to be still the property of the plaintiff, and gave it the costs of the action and appeal on the Supreme Court scale.

The defendant now concedes that its purchases at the sale held under its own distress warrant would have been indefensible had the distress itself been unimpeachable. The matter in controversy on this appeal, therefore, apart from costs, is confined to a judgment for $28.50 and the sole question to be determined is whether there was or was not any rent due from the plaintiff to the defendant.

The plaintiff was lessee of premises owned by the defendant, a municipal corporation, with an option to purchase the same at any time within 5 years for $3,500. The rental ($200 a year) was payable on the expiry of the 5 years should the plaintiff not complete the purchase within that period and at the same rate for any less period should the plaintiff relinquish its option to purchase, payment in that event to be made "prior to the withdrawal from the said premises of the plant and machinery of the company."

The circumstances in evidence, in my opinion, fully sustain these findings of the trial judge:

The plaintiff company went into possession pursuant to the agreement but the business carried on was of small character and as if there were not very much in it in Cobourg.

Prior to June 22, the plaintiff set about removing what was in the building, and on June 22 the defendant issued a landlord's warrant to distrain the chattels under a claim for rent to the amount of $700. The bailiff seized and sold part of the chattels so seized and bought in the residue.

I find that the company did form the intention of not purchasing the property and that it intended to remove the goods and chattels from the premises without paying any rent.

The defendant had reasonable ground for believing that the company did not intend to purchase the property or pay rent and upon that belief directed the seizure to be made.

It is true, as alleged by the defendant, that the plaintiff had, to a great extent, discontinued their business at Cobourg. The plaintiff company had been disposing of such of their manufactured goods as they had on hand, and had been stripping the premises of machinery, and had been negotiating with a junk dealer for about a month prior to June 22, 1916, for the sale to him of

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such of the stock, machinery and plant as was left for $800, and, at the very time of the seizure, were concluding a sale thereof to the junk dealer for $625, with a view to abandonment of the property.

All that the defendant did was in good faith, and in the honest belief that the plaintiff company intended to resort to whatever might be necessary to avoid paying rent.

But, does all this warrant the conclusion that the plaintiff had, at or prior to June 22, the date of the distress—*relinquished its option* to purchase? That it had determined not to take advantage of it seems abundantly clear.

The defendant's mayor wrote to the plaintiff on June 15, inquiring whether it intended to vacate the premises and, if so, what were its intentions regarding the option? The plaintiff's manager replied on June 20, explaining that it was removing and disposing of surplus machinery, intending to apply the proceeds on a bank overdraft:—

This will enable the company in all probability to meet the difficulties caused by the war. I will be glad to keep you informed as to the progress the company is making at any time you request.

However evasive or disingenuous this reply, it is not susceptible of being construed as a relinquishment of the option, which was certainly still in force on June 15, as the mayor's letter shews. There was no further communication between the parties prior to the distress.

Under the agreement, during the currency of the 5 years' period only actual relinquishment of the option to purchase would make the *pro rata* rent for the elapsed portion of that period due and payable. An intention to relinquish, however definite and clearly established, would not suffice. Had a tender by the plaintiff on June 22, of a conveyance of the property for execution accompanied by $3,500 been refused, the defendant, in my opinion, would have had no defence to an action for specific performance. With Lennox, J., who delivered the judgment of the Appellate Division,

I am of the opinion that there is no evidence whatever to shew a relinquishment, in fact, but, on the contrary, the letter from the mayor to an officer of the plaintiff company of June 15, shews quite clearly that upon June 15, at all events, there was no relinquishment, and there certainly is nothing to suggest that the parties came together in any way or did anything that would constitute a relinquishment of the option after that date. It is not necessary to determine *a priori* what documents or circumstances would be necessary to constitute a relinquishment as a matter of law of the right of the company to exercise the option within the five-year period limited by the agreement.

It is sufficient to say that no fact or circumstance has been shewn which could be called a relinquishment or from which a relinquishment could be properly inferred.

The appeal fails and must be dismissed with costs.

BRODEUR, J.:—The object of the contract which we have to construe in this case was to assist the respondent company which intended to start an industrial establishment in the town of Cobourg. It was represented to the civic authorities that a certain number of men would be employed and that the town then would profit in the establishment of that new industry.

With that end in view the Town of Cobourg agreed to give a lease of a building which they had at a rent of $200 per year and with the right of option on the part of the company to purchase the property within 5 years. No rent would be paid, however, during those 5 years, unless the company relinquished its option to purchase. The machinery and plant, however, of the company could not be removed prior to the rent being paid. That agreement was made on November, 11, 1912, and the option then would have to be exercised on or before November 11, 1917.

The business of the company, however, was not prosperous. At the beginning, they employed a certain number of men, but there was a decrease in number from time to time until, about the beginning of the year 1916, the number was reduced to one. The company failed to make a return of its affairs as required by the provisions of the provincial statute during the years 1914-1915 and 1916. No price lists were issued after the year 1913. In 1915 it gave to the bank a chattel mortgage covering all operating machinery on the premises. It is in evidence that only 1,110 lbs, of fence wire were bought during the year 1916. Then, in the months of April, May and June, they started to ship machinery and they negotiated with a junk dealer for sale of the balance of the machinery.

It is in evidence also that the total cost of power supplied from January 13, 1913, to June 26, 1916, was $29.96.

The company was evidently not in a position to continue the business, and it was found by the trial judge that it had formed the intention of not purchasing the property, and it intended to remove the goods and chattels from the premises without paying any rent.

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The trial judge found also that

the defendants had reasonable ground for believing that the company did not intend to purchase the property or pay rent and upon that belief directed the seizure to be made.

The Appellate Division reluctantly reversed his decision.

Everything pointed to the fact that the company was in a hopeless condition and could not purchase the property. But can the company be held as having relinquished its option to purchase? I am sorry to have to come to the conclusion that the evidence does not disclose such relinquishment. It is more than possible that the company would not be in such a financial condition that it could exercise its option; but, then, we cannot say that some rent was due when the writ for distress was issued.

The Town of Cobourg seems, however, to have acted all through in a straightforward way and I could not see the same line of conduct followed by the respondent company.

I have come to the conclusion that the appeal should be dismissed with costs.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—I agree with the judgment of Anglin, J.

Appeal dismissed.

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J. J. CASE THRESHING MACHINE Co. v. MITTEN BROS.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 21, 1918.

SALE (§ I D—20)—OF GOODS—RIGHTS LIMITED BY CONTRACT—ARTICLE CONTRACTED FOR NOT DELIVERED—REPRESENTATIONS OF VENDOR'S AGENT—RETAINER AND USER OF ARTICLE—EVIDENCE OF ACCEPTANCE.

Where one person agrees to sell and another to buy an article under an agreement by which the rights or obligations which otherwise would flow from the contract of sale are limited or extinguished, the provisions limiting or extinguishing these rights or obligations have application only where the vendor delivers the article agreed to be purchased, or the purchaser agrees to accept a different article, as the article he was to receive.

The delivery of an engine that will not burn kerosene, where a kerosene engine was ordered, is not a delivery of the engine ordered, and the retention and user of the engine having been induced by representations of the vendor's agents, which were not implemented by such vendor, cannot be invoked as evidence of acceptance by the defendants.

Statement.

APPEAL by plaintiff from the trial judgment in an action to recover the purchase price of a gas engine. Affirmed.

F. L. Bastedo, for appellant; *T. D. Brown*, K.C., for respondents.

Lamont, J.A.

LAMONT, J. A.:—In May, 1915, the defendants ordered from the plaintiffs one 40-h.p. Case gas engine, one 28x50 separator, one stacker, one feeder, one grain register, one tank and one cab,

for $44,100, on which the plaintiffs gave a credit of $750 for an old engine taken as part payment. In pretended compliance with the order, the plaintiffs shipped certain machinery to the defendants. Before it was unloaded, the plaintiffs' representative took in settlement eight promissory notes signed by the defendants; three of these fell due November 1, 1915, three November 1, 1916, and the other two in 1917. The defendants paid the three notes falling due on November 1, 1915, but refused to make further payments. The plaintiffs have brought this action on the five remaining notes.

The defendants admit liability for all machinery ordered except the engine, but they resist payment of the contract price of the engine—which was $2,885—on the following grounds: (1) the engine ordered was never delivered; (2) the plaintiffs are estopped from saying that the engine ordered was delivered or that the defendants accepted delivery thereof, because the plaintiffs' agent induced the defendants to keep it in their possession by representing that the plaintiffs would make it work satisfactorily; (3) that they were induced to receive the engine by reason of fraudulent representations of the plaintiffs' agent that the engine was a kerosene burning engine; (4) that they are entitled to damages for breach of warranty. These defences were set up in the alternative.

At the trial, the judge allowed parol evidence to be given to shew what the parties meant by a "gas engine;" it having been contended by the defendants that there were two kinds of gas engines, one which used gasoline for fuel and the other which used kerosene. In admitting this evidence, the trial judge, in my opinion, was right. On ample evidence the judge found that it was distinctly understood that the engine ordered was to be a kerosene burner. He also found that the engine delivered would not burn kerosene. He, therefore, held that the engine delivered was not the one ordered, that the one delivered was worth only $1,000, and he allowed the defendants, in diminution of the contract price, the difference between $1,000 and the contract-price of the engine ordered, that is, $1,885, as damages for breach of implied condition. In giving his judgment, the trial judge said:—

The pleadings are not aptly framed to raise the defence open to the defendants under the above findings, and counsel for the defendant has

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further complicated the matter by admitting for one defendant that "the machinery referred to in paragraph two of the plaintiffs' statement of claim was received by him from the plaintiff." In the face of the evidence adduced at the trial and the other contentions made by both counsel, it is difficult to understand what was meant by this admission. It must, it seems to me, be intended simply as an admission that machinery described by the plaintiffs as in paragraph two of the statement of claim was received. The defence that the engine was to be a kerosene burning engine is clearly raised, and the plaintiffs assumed the burden of meeting that issue without any objection. . . . Such amendments should be made to the defence as may be necessary.

From the judgment the plaintiffs appeal to this court.

The first contention on behalf of the plaintiffs is, that the pleadings did not raise the issue that the engine ordered was not delivered, and that the trial judge should not have amended the statement of defence to set it up.

This contention, in my opinion, cannot be upheld. Par. 2 of the statement of defence expressly denies that the machinery ordered was delivered. It did not expressly claim damages for breach of implied condition, but, where a defendant raises the issue that the goods ordered were not delivered and establishes that fact, the trial judge is not only entitled but it is his duty to make such amendments to the pleadings as may be necessary to give the defendant the benefit of the issue which he raised and established.

R. 264 provides that all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the pleadings.

In *March Bros. & Wells* v. *Banton* (1911), 45 Can. S.C.R. 338, at p. 344, Idington, J., points out that a trial judge can amend the pleadings if necessary to carry out his judgment.

See also *Gorman* v. *Dixon* (1896), 26 Can. S.C.R. 87.

In *Stitt* v. *C.N.R. Co.* (1913), 10 D.L.R. 544, 23 Man. L.R. 43, Haggart, J. A., at p. 547, says:—

> In any event if the evidence did shew a cause of action, then, if there was no surprise, the judge should amend if he thought an amendment necessary.

In the present case, I cannot see that the plaintiffs were in any way taken by surprise. They knew that the two objections which the defendants had to the engine were (1) that it would not burn kerosene at all; (2) that when burning gasoline it used far more fuel than it should. The trial judge was therefore within his right in making the amendment. I doubt, however, if any

an endorsement was necessary. Although not very accurately worded, I take it that what is meant by paragraphs two and three of the statement of defence is a denial that the plaintiffs delivered the machinery ordered, and an allegation that they are estopped from saying that they did deliver it and from saying that the defendants accepted what they did deliver. These allegations, in my opinion, are sufficient to carry the defendants as far as it is necessary to go.

The next contention is, that the trial judge erred in disregarding the admission of the defendants that the engine referred to in the statement of claim had been delivered to them. The defendants' counsel signed an admission of fact on behalf of the defendant, William Mitten, that the machinery referred to in the statement of claim had been received by him from the plaintiffs, and Henry Mitten, in his examination for discovery, gave the following testimony:

Q. Did you get all the machinery described in the agreement? A. Well, I guess so, if there have not been any changes in it since the signature.

Q. Then you got the . . . 40 h.p. gas engine? A. Yes.

These answers go no further than the statutory declaration made by the defendants on May 21, before the machinery was unloaded. On that occasion, the plaintiffs' representative took from the defendants a statutory declaration that they had received from the J. I. Case Machinery Co. (among other articles): "One Case 20-40 h. p. gas engine." The engine was then on the car. It was a 20-40 h.p. Case engine, and it had the word "kerosene" painted on its fuel tank. To all outward appearance it was the engine ordered. The defendants acknowledge delivery thereof. Then, when it is set up, it is found that it will not burn kerosene at all. Does the fact that the defendants acknowledge receipt of an article which was apparently what they ordered estop them from afterwards claiming that it was not the article at all? I do not think so. In my opinion, the admissions go no farther than this, that machinery, purporting to be the machinery ordered, had been delivered to the defendants. It is idle to suppose that the defendants—after the first trial of the engine—ever intended to admit that the engine received by them was a kerosene burning engine. Had they been admitting that, they would not have been contesting the plaintiffs' claim.

Counsel for the plaintiffs argued that, even if the defendants had ordered a kerosene burning engine and that kind of engine

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had not been delivered, yet the trial judge could not award damages for breach of a condition, either express or implied, because the agreement contained the following words:—

12. The whole contract is set forth herein. There are no representations, warranties or conditions, expressed or implied, other than those herein contained.

This raises the question: Do the provisions of the agreement apply to the engine delivered?

I take it as established law, that, where one person agrees to sell and another to buy an article under an agreement by which the rights or obligations which otherwise would flow from the contract of sale are limited or extinguished, the provisions limiting or extinguishing these rights or obligations have application only where the vendor delivers the article agreed to be purchased, or the purchaser agrees to accept a different article as the article he was to receive.

In *Schofield* v. *Emerson-Brantingham Implement Co.* (1918), 57 Can. S.C.R. 203, 43 D.L.R. 509, Fitzpatrick, C.J., p. 510, said:—

Reading the order with the findings of the jury I come to the conclusion that the respondents did not deliver such an engine as was called for by the order.

This really disposes of the case, for it eliminates the difficulties presented by the conditions of the contract.

In this case the engine ordered was not delivered. Did the defendants accept the one delivered as the engine ordered or in lieu thereof. They kept the engine and used it, but under the following circumstances. When the engine was unloaded, the plaintiffs' expert started it on gasoline, then switched to kerosene. The engine stopped. After ineffectual attempts to make it work on kerosene, the expert advised the defendants to go ahead with gasoline, and he would have another man come out who would make it burn kerosene. The defendants did so. The other expert did not come for a month or so. Henry Mitten says he told him when he came that the engine would not burn kerosene, and that on gasoline it was using too much fuel. He says the agent advised him that they had a man coming from the factory who was an expert in that kind of work and that "if I could just plug along until he got there, they thought he would make it burn kerosene satisfactorily." The expert did not come until on in the fall. He worked a couple of days on the engine, then decided it needed a new carburetter. After he got the carburettor he still could

not make it work, and decided it required a new magneto. As, by this time, the fall was well advanced, he did not come back with the magneto until the next spring, *i.e.*, the spring of 1916. Still it would not work, and he decided it needed some hot air attachments and he said he would wire for these. He did so. They came c.o.d. and the defendants refused to accept them that way. This, however, made no difference, as the expert did not come back. After a time, the plaintiffs cleared the c.o.d. and the defendants put on the attachments. Still the engine would not burn kerosene. In November the defendants notified the plaintiffs that they had either to make the engine burn kerosene, or take it back and refund what they had paid on it. In the fall of 1915, the defendants paid the three notes which fell due on November 1, that year. Why they did so is explained by Henry Mitten in the following words:—

A. Well, a collector came around the first fall when I paid my first payments and I told him I wasn't satisfied. Well, he said, that wouldn't make no difference, the Case Co. would see and make that engine work, go ahead and do your part and make your payments, and he said the Case Co. would see that that engine was working in the spring.

The plaintiffs not being able to make the engine burn kerosene, the defendants refused to pay.

Did the facts that the defendants kept possession of the engine and used it, and that they paid the 1915 notes, establish an acceptance by the defendants of the engine delivered?

In *New Hamburg Mfg. Co.* v. *Weisbrod* (1908), 1 S.L.R. 342, the agreement contained a clause that continued possession and use of the machine should be deemed conclusive evidence that it filled the warranty. The defendant kept the machine at the request of the plaintiffs' agent, who said he was going to fix it all right. It was held that the continued possession and use of the machine, under these circumstances, could not be held to be evidence that it filled the warranty.

In *Schofield* v. *Emerson-Brantingham Implement Co.*, *supra*, the purchaser was induced to make settlement for the engine, although not satisfied with its performance, by the representation of the plaintiffs' agent that the engine would act better with wear, and that, if it was not right, the company would make it right. In reference to this representation, Anglin, J., at p. 522, says:—

What occurred, however, prevents his (the purchaser's) retention and user of the engine being invoked as evidence of acceptance.

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To the same effect is the judgment of Brodeur, J.

I am, therefore, of opinion that the retention and user of the engine in question, and the payment of the notes having been induced by representations of agents of the plaintiffs, which were not implemented by the company, cannot be invoked as evidence of acceptance by the defendants.

The only other evidence which it was contended shewed acceptance, were certain letters written by the defendants in October and November, 1916. These, in my opinion, are no evidence of acceptance, in view of the defendants' letter of November 11, in which they say:—

> Referring to changing ignition on our engine, it seems to us you will have to change it a good many times yet before you can make it burn kerosene, as we think the same as you do, that it will not burn it. However, you will have to make it burn kerosene or take it back and refund what we have paid on it. We might say we know enough about the machine business that if you sell a machine to burn kerosene, it is up to you to make it burn it.

There was, therefore, no acceptance by the defendants. The engine ordered not being delivered, and the one delivered not being accepted, the defendants are not liable for the contract-price.

The contract-price on the remaining machinery included in the agreement was $1,525. On this, the defendants are entitled to a credit of $750, and they paid the first three notes amounting to $1,215, or a total payment of $1,965. The plaintiffs were, therefore, overpaid on the agreement $440. As to the engine, the defendants not having accepted it as the engine ordered, but having kept it as a gasoline burning engine, must pay what it is reasonably worth. The trial judge finds this to be $1,000.

The plaintiffs' action was brought on the notes. In so far as the engine is concerned, their right to recover is on an implied promise to pay what it is worth, but, while the action was brought on the notes, the plaintiffs were, in reality, seeking payment for their goods, and, in order to dispose of the whole matter, I would consider the pleading amended to cover a claim based upon an implied contract to pay what the engine was reasonably worth.

The plaintiffs are entitled to the contract-price of all the machinery and attachments covered by the contract, excepting the engine; in all $2,525, less a credit of $1,965, leaving a balance of $560, coming to the plaintiffs. In addition, they are entitled to $100, and interest on the radiator note.

This is precisely the amount to which they would eventually have become entitled under the findings of the trial judge, although he worked it out on a different basis.

I am, therefore, of opinion that the appeal should be dismissed with costs, but, with a variation of the judgment, if the plaintiffs so desire, to enable them to have judgment for the $560, which represents balance unpaid in respect of the engine. As the mortgage given by Henry Mitten was held as security for the amount due under the contract, and as that amount has already been paid, the mortgage should be discharged.

Lamont, J.A.

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

Haultain, C.J.S.
Elwood, J.A.

NEWLANDS, J. A. (dissenting):—This is an action on certain promissory notes given on account of the purchase-price of farm machinery, including one Case 40-h.p. gas engine. This farm machinery was purchased and delivered in the spring of 1915, was worked all that summer and the notes falling due for the first instalment of the purchase-money were paid by defendants about November 1 of that year. Just before the second yearly instalment fell due, in 1916, the defendants wrote the plaintiffs in reference to commissions they claimed to be due by plaintiffs to them. In this letter—which is dated October 26, 1916—they said:—

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> We have had word from your collector that our notes are due on our outfit and we want you to understand that we don't intend to pay $1 of this money until you straighten out these commissions.

As defendants did not pay, this action was brought to recover amount due.

The principal ground of defence was that the defendants were induced to purchase the engine by the fraud of the plaintiffs; the fraud being a false and fraudulent representation that the engine would work satisfactorily in pulling the defendants' ploughs and running their threshing machine, with kerosene as fuel, and the fraudulently representing and describing the engine as a kerosene burning engine. This defence the trial judge says entirely fails. He further finds that the engine purchased was never delivered to defendants. He says

> I am satisfied that the defendants agreed to purchase one kind of engine, that that kind of engine was never delivered to them, and that the engine actually delivered was worth at least $1,885 less than the engine they should have received,

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and to support this finding he provides that "such amendments should be made to the defence as may be necessary."

Now it is quite true that defendants complained all along that the engine would not run on kerosene, but they never complained that it was not the engine they ordered, nor did they plead it or raise this defence at the trial, and it is only raised by the trial judge in his judgment. In the fall of 1916, the defendants' reason for not paying was not that they had not got the engine they ordered but that plaintiffs owed them commissions that they had not paid them. The keeping and working the engine for two seasons was, in my opinion, an acceptance of it, especially, as I am of the opinion that they got the engine they ordered, although it failed to do what they were promised it would do, that is, run on kerosene. The written contract provides that

there are no representations, warranties, or conditions, expressed or implied, other than those therein contained,

and as there is no warranty that the engine will run on kerosene, there is, therefore, no breach of warranty that defendants can set up as a defence.

Sawyer & Massey v. *Ritchie*, (1910) 43 Can. S.C.R. 614.

I am of the opinion from the evidence that the defendants accepted the engine as the one they ordered. It having been found that there was no fraudulent representation on the part of the plaintiffs that the engine would run on kerosene, and there being no warranty to that effect, I think that the appeal should be allowed with costs. *Appeal dismissed.*

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BRUNELLE v. GRAND TRUNK R. Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Magee, J.A., Clute, Sutherland and Kelly, JJ. June 11, 1918.

RAILWAYS (§ III A—47)—QUESTIONS SUBMITTED TO JURY—FINDINGS—EVIDENCE—INTERPRETATION OF FINDINGS—AUTHORISED ACT—NEGLIGENCE IN PERFORMING.

About 10 o'clock at night a farmer was found on the tracks of the defendant company with both thighs amputated above the knee and one foot caught in a "split-switch"—no one saw the accident and the injured person died shortly after being found. The jury in answer to questions, found that the death was caused by the defendants' negligence in having a split-switch on a public highway and they found against contributory negligence.

The court held that under the circumstances there was evidence to go to the jury on the question of negligence, and in basing their conclusion on a consideration of that evidence, the jury were not usurping the jurisdiction of the Railway Board. The finding was not in the nature of a direction as to what the protection to the public should be, but a finding that from the kind and manner of construction of the switch, it was dangerous to persons using the highway, and that those responsible for its presence on the highway were negligent if it was the cause of injury.

Also that an authorised act must be done not only in a reasonable way and without negligence, but there is the additional obligation upon one exercising a statutory or authorised power not to extend that power. Whatever were the rights which the defendants acquired in respect of the highway they did not extend to or include the erection and maintenance of the split-switch.

[*Southwark and Vauxhall Water Co.* v. *Wandsworth District Board of Works*, [1898] 2 Ch. 603; *Roberts* v. *Charing Cross* (1903), 87 L.T.R. 732, *Moore* v. *Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462, referred to.]

Statement.

APPEAL by the defendants from the judgment of Latchford, J. at the close of a trial with a jury, on a verdict for $6,000 in favour of the plaintiff, who is the administrator of the estate of Telesphore Desrochers.

The facts of the case are as follows:—

On the night of the 6th April, 1915, at about 10 o'clock, Desrochers, who was a farmer, and whose residence was in the township of Tiny, in the county of Simcoe, 6 or 7 miles in a north-westerly direction from the town of Penetanguishene, was found to have met with an accident on the tracks of the defendant company, at their intersection with Queen street in that town, from which his death resulted a few hours afterwards. There is no evidence of any one who saw the accident happen. Dr. Spohn, who was then mayor of the town and local physician of the defendant company, says, speaking of the night of the occurrence: "I was telephoned from the Grand Trunk and told there was an accident on Queen street and to go there immediately;" that, on going there about 10.20 or 10.25 p.m., he found Desrochers "lying beside the tracks with practically both thighs amputated above the knee and one foot tightly caught in the frog or switch" of the defendants' tracks, and that he endeavoured unsuccessfully to disengage from the switch Desrochers' foot, which was so severed that it was merely hanging by the tendons. There were no bruises or injuries of any kind except to the legs.

The switch was one known and referred to in the evidence as a "split-switch." The allegations are that the defendants' tracks and the switch were negligently and dangerously constructed, and in consequence the deceased was unable to extricate his foot; that the defendants' servants in charge of their engine and train were negligent in the running of it, and that the defendants were negligent also in not providing proper protection for persons crossing their tracks at the place of the accident and in not giving proper warning of the approach of the train.

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The jury, in answer to questions, found that the death was caused by the defendants' negligence, which, they said, consisted in having a split-switch on the public highway; and they found against contributory negligence.

The grounds of appeal are:—

1. That there was no evidence proper to be submitted to the jury of any negligence by the company.

2. That the plaintiff failed to connect the accident to the deceased with any negligent act of the defendants which caused the accident.

3. That, the defendants having constructed their railway under the provisions of the Railway Act and in accordance with the order of the Railway Board, there can be no liability for any injury.

4. That there had been no order by the Dominion Railway Board for the protection of this crossing, and the findings of the jury cannot render the defendant company liable; and that the action should be dismissed on the jury's findings:

5. That, the defendants not being responsible for the lighting of the crossing, the jury's finding in regard to contributory negligence is tantamount to a finding against the deceased:

6. That, as the finding of the jury amounts to a finding that the accident happened through the defendants maintaining a nuisance on the highway, the proper authorities are not before the Court, and the action against the company should fail.

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

H. J. Scott, K.C., for respondent.

The judgment of the Court was read by

KELLY, J. (after setting out the facts):—Queen street, which the tracks intersect, runs in a north-westerly direction, ending at the water's edge of Penetanguishene Bay, a short distance from the tracks. Running in a north-easterly direction across Queen street, the tracks lead to their terminus at or near the present station. The location of the station, as will be explained later on, was moved in 1913 from a place much nearer to Queen street than it occupied at the time of the accident, and now occupies.

On the argument the question was raised, whether Queen street at that point or the railway right of way was first established; or, in other words, whether the right of way was carried over Queen street, or a street then existing, or whether Queen

street was laid out across the right of way already existing. This suggested the further question whether Queen street is a public highway.

At the trial the plaintiff put in a plan (exhibit 3) of Queen street, verified by the evidence of Mr. Lumsden, the surveyor who prepared it, and who swore to the measurements thereon which he had personally made. This shews Queen street, at its intersection with the railway tracks, to have a width of 98 or 100 feet.

A blue print copy (exhibit 8) of a plan, apparently prepared in 1914 for the purpose of obtaining the approval of the Board of Railway Commissioners of the change of the location of the defendants' station, was put in by the defendants; this shews Queen street to have at that point a width of about 65 or 66 feet; but, as will be pointed out later on, that is inaccurate. Exhibit 3 shows the switch where Desrochers was injured to be wholly upon the land comprised within the boundaries of Queen street, and several feet distant from its easterly limit. As shewn on exhibit 8, the switch is not within the limits of Queen street, but to the east of its easterly limit. It is of some significance that exhibit 3 was prepared with special reference to the conditions prevailing at Queen street and adjacent to it at the time of the accident, while the particular purpose of the plan of which exhibit 8 purports to be a copy was to designate the new location of the defendants' station many hundreds of feet north-easterly from Queen street.

During the argument it was urged that the approval by the Board of Railway Commissioners of the plan for the removal of the station was an approval as well of the location of the tracks, switches, etc., upon and adjoining Queen street. A knowledge of the form of and the material used upon the application to the Railway Board, therefore, became of importance; and, on the suggestion of the Court, counsel for the defendants undertook to procure and submit such of that material as was obtainable It has now been submitted, as well as copies of other and earlier plans, all of which are of importance, inasmuch as the findings of the jury are apparently on the assumption that Queen street, at the place of the accident, is a public highway, and that the accident happened on that highway. The history of the street, as shewn by the evidence and the material recently submitted, is, that as early as 1846, the "town-plot" of Penetanguishene was laid out.

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Amongst this material is what purports to be a copy (taken recently from the registry office at Barrie, the county-town of the county of Simcoe, in which Penetanguishene is situated) of a plan from the Crown Lands Department bearing date, December, 1846. The town-plot is there referred to as "town-reserve." That plan shews many of the streets found upon the later plans, including Queen street (though it is unnamed on that plan), and their present location with reference to other established boundaries and points. Thus the location of one of the streets on the town-plot is readily identified with the present Queen street.

On the 29th January, 1875, by-law No. 248 of the County of Simcoe was passed, erecting and constituting the Village of Penetanguishene into an incorporated village, and defining its limits as being "the town-plot of the unincorporated village of Penetanguishene, in the townships of Tiny and Tay, as laid out under the direction and by the Crown Lands Department, and as now recorded in the Crown Lands Department of Ontario," evidently referring to the plan of December, 1846, already mentioned.

In 1882 (by 45 Vict. ch. 40) Penetanguishene was incorporated as a town, the Act of incorporation declaring that the town should comprise and consist of "the present village of Penetanguishene," and of other lands therein described.

The North Simcoe Railway Company was incorporated in 1874 (Ontario Act 37 Vict. ch. 54). It appears from the statement of the defendants' counsel that construction work was commenced soon afterwards; that the road was leased to the Northern Railway Company in 1888; and that it was subsequently taken over by the defendant company.

There has also been submitted by the defendants' counsel what purports to be a copy of a surveyor's plan made on the 15th September, 1875, of the right of way of the North Simcoe Railway through the village of Penetanguishene, the plan being signed by the superintendent and the chief engineer of the railway company. This definitely shews Queen street running to the water's edge and intersecting the company's right of way. The indications are all in the direction that Queen street was laid out, existed upon the ground, and was acknowledged as a street or public highway long before the location and construction of the railway. There is no

evidence to the contrary, nor evidence that the defendants own or have title to that part of the right of way which falls within the limits of Queen street, other than a right to use it as a part of their railway line.

The plan of December, 1846, shews a street on the present location of Queen street with a width of approximately 100 feet; the railway company's plan of the 15th September, 1875, shews Queen street in its present location, with a similar width at the place of its intersection with the company's right of way.

The plan submitted in 1914 to the Board of Railway Commissioners, when approval of the removal of the station was sought, also recognises Queen street, but gives its width, by scale, at approximately 65 or 66 feet. If the measurements on the earlier plans and those on plan exhibit 3 are correct—and I think they must be so accepted—then the width of Queen street as given on the plan of 1914 is misleading.

That circumstance tends to emphasise that what was submitted for the consideration of the Railway Board in 1914 was simply and solely the new location of the station, and that the application had no reference to the width of Queen street or the location of the tracks or switches upon or crossing it.

What happened in connection with the application for removal of the station (I speak from the copy of the material now submitted, including the record of the Railway Board's action thereon) was, that the defendants in 1913 moved the station from its former location, which was about 1,100 feet north-easterly, measured along the defendants' tracks, from the north-easterly side of Queen street to its present location, about 600 feet still further from Queen street. I take the measurements and distances from scaling on the copy of the plan submitted to the Board. This action on the defendants' part followed upon a resolution of the Municipal Council of the Town of Penetanguishene, passed on the 31st March, 1913, that the defendant company be given permission to move the station to the proposed new site, etc. The company had overlooked getting the Board's approval until after the removal had taken place, and so in May, 1914, an application was made for an order "under section 258 of the Railway Act, approving of the new location of the company's station at Penetanguishene, as shewn on the plan" which accom-

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panied the application. A copy of the resolution also accompanied the application.

The order of the Board of the 16th May, 1914, styled in the matter of the application of the company "for approval of the location of the station at Penetanguishene," etc., was, "that the location of the applicant company's station at Penetanguishene, in the Province of Ontario, as shewn upon the plan on file with the Board . . . be and it is hereby approved."

It is manifest, therefore, that what was before the Board was solely the removal of the station, and that the application had no reference to the location or disposal of the tracks or switches at Queen street. To be convinced that the Board did not have these under consideration, one has but to look at the material on which the application was made, and the order granted. Had that material been prepared with the object of expressly, or as an incident to the removal of the station, dealing with the conditions at Queen street, it is, I think, safe to say that, in view of what is shewn by the earlier plans and by the Lumsden plan (exhibit 3), it would have come to the attention of those who prepared the plan of 1914 that the width of Queen street is much greater than it appears on that plan.

Assuming that the order of the Board operated as an approval of the location of the tracks and switches as they appeared on the plan before the Board, then there was no approval of the switch on the highway; for that plan, as already pointed out, places the switch not on the highway as it is shewn on that plan, but on lands not comprised in or forming part of Queen street. If there was an approval at all, it was an approval of a switch, not on Queen street, but outside of it. Had the plan given Queen street at its actual width of 100 feet or thereabouts, it might have been open to argument, other adverse circumstances not intervening, that the Board had given approval to the switch being maintained in the location it occupied at the time of the accident; but whatever weight might have been given to that argument under such circumstances, completely fails when it is kept in mind that the switch as shewn upon that plan is not upon the street.

Approval of its existence on the street was not obtained. There is no positive evidence as to when it was first placed upon the street; but, assuming that it was there prior to the coming

into force of the present sec. 238* of the Railway Act (enacted by 8 & 9 Edw. VII. ch. 32, sec. 5, which also repealed sec. 238 of R.S.C. 1906, ch. 37), or of the section for which it was substituted, the defendants are not relieved from liability or otherwise assisted —as has been suggested—by the provisions of that section, merely because no complaint or application has been made to the Railway Board under that section, or because the Board had not on such complaint or application, or of its own motion, made the order contemplated by that section. It should not be held that, because the Board has not been put in motion, approval of the switch upon the highway must be presumed to have been given.

There is also to be further considered the question whether Queen street is a public highway. It is unnecessary to say that no conclusion here arrived at can bind the municipality, which is not a party to the action; but, from the evidence of user of the street by the public, the presumption is not unreasonable that it was regarded as a public way, and that such user amounted to an acceptance of it as a highway, if indeed it were necessary that there should be an acceptance, in view of the street appearing on the Crown Lands Department plan of 1846, followed by recognition of it on the occasion of the incorporation of the village, and later in the incorporation of the town. There is the uncontradicted evidence of several witnesses that Queen street has been used as a public highway leading to the water's edge for purposes which they mention, and particularly that in winter and spring it was used by residents on the opposite side of the bay, who made use of that means of reaching the town, travelling over the bay upon the ice, and landing at the foot of and travelling over Queen street, thus materially reducing the distance from their places of residence to the town as compared with following the longer and more circuitous way around the bay. Residents of the town also used it as a means of reaching the bay and for other purposes,

*238. Where a railway is already constructed upon, along or across any highway, the Board may, upon its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan or profile of such portion of the railway, and may cause inspection of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient
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and, so far as it appears, that was the recognised and unquestioned condition of things at and long prior to the accident. Desrocher's farm was "across the bay" from the town.

There is the further uncontradicted evidence that in April, 1915, there was ice on the bay, and persons were travelling upon it.

The defendants and their predecessors undoubtedly believed that Queen street was public, when, in 1875, they prepared their plan of their proposed right of way, as well as in 1914, when they made application to the Railway Board in respect of the removal of the station; these were both affirmative acts in relation to this street. That they so regarded it, and that they expected it to be used and travelled upon as a public street, is further indicated by their erecting and maintaining upon it at this crossing, as shewn by exhibits 4, 5, and 6 (photographic views), a sign-board having thereon the words "Railway Crossing"—evidently in compliance with sec. 243 of the Railway Act, which requires that at every highway crossed at rail-level by any railway, such a sign shall be erected and maintained.

With the knowledge they are thus shewn to have had that the street was deemed to be and was used as a public highway, the crossing over which should be protected as a highway crossing in the interest of those having the right to pass over it, they erected and maintained thereon the split-switch in which Desrochers was caught on the night of the 6th April, 1915, with fatal consequences to him.

Assuming then that for present purposes Queen street must be regarded as a public highway, and it being established that the switch is upon it, and that approval of the Board of Railway Commissioners had not been given in respect of it, could the inference properly be drawn that its construction and maintenance on the highway were a source of danger to those having the right to pass over the street, and was there thus negligence on the part of those who so constructed and maintained it? The jury so regarded it; that is the effect of their finding. It was described by witnesses called by the defence as a standard split-switch in use on different railways. The inference can readily be drawn from the evidence that it is in fairly general use; that does not necessarily imply that it is such a structure as may be placed or used upon a highway without danger to the public, even though from an operating standpoint it works satisfactorily.

Two disinterested witnesses—civil engineers who also had much experience in railway construction—spoke of the character of the switch. Their evidence was not contradicted. One of them said that placing a switch such as the one in question on a public highway is objectionable as constituting a danger to the travelling public; that he never knew it done where it could be avoided; and that in this instance he saw no reason why it could not have been placed 20 or 30 feet further to the east, thus removing it beyond the highway

The other witness, Mr. Czowski, characterised the placing of a split-switch on a road allowance as dangerous practice, "endangering pedestrians as well as animals crossing on a highway." Then followed these further answers of his:—

"Q. In what way now is a split-switch dangerous; just explain to the jury? A. The portion of the point from necessity on one side or the other is always open. There is no possibility of blocking or packing it. The result is that you have an open portion.

"Q. What do you mean by blocking or packing? A. Either wood or metal fillers that are put in at the various parts of the switch that are not movable, to prevent a man's foot from getting caught underneath and between the balls of the rail, where the two rails come together, at any part of a frog or a switch and in a switch, and particularly a split-switch, there is this portion at one side that is always open, and on account of having to move it from side to side and close it, when you want to change the switch, it is impossible to pack it, and therefore you have this open portion that is liable to entangle a man's foot, or cattle or any animals that may be crossing. That is why I say it is dangerous practice. It is recognised as dangerous practice wherever it is, and it is particularly, of course, dangerous on a highway, because the public have a right to cross the highway; and therefore the railway companies, as a rule, make it a practice not to put that, what is really a man-trap, where the public are entitled to go. It is bad enough in a yard and on sidings where their own employees have to traverse a switch, and it is very bad practice to put it where the public are entitled to travel."

And on cross-examination:—

"Q. And it depends very much on the character of the crossing doesn't it? Have you seen this crossing? A. No, I haven't seen

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it. I don't think it depends on the character of a crossing. I have yet to see a crossing that one could not be avoided.

. . . . . .

"Q. Have you observed split-switches in close proximity to the planking on either side? A. Yes, a very bad practice.

"Q. But it is done? A. I didn't say it wasn't done; I said that it was very bad practice.

"Q. That is your opinion? A. Yes.

"Q. But it is universally practised? A. I do not think it is universally practised.

"Q. Why not? A. You are reciting a few exceptional cases where they have used bad practice."

Under all the circumstances, I am of opinion that there was evidence to go to the jury on the question of the defendants' negligence; and, in basing their conclusion on a consideration of that evidence, the jury were not, as was contended by the defendants' counsel, usurping the jurisdiction of the Railway Board. The finding was not in the nature of a direction as to what the protection to the public should be, but a finding that, from the kind and manner of construction of the switch, it was dangerous to persons using the highway, and that those responsible for its presence on the highway were negligent if it was the cause of injury.

The principle has often been stated in respect to the obligation of persons exercising rights conferred by statutory authority that the grantee of such powers is not in general responsible for injury resulting from that which the Legislature has authorised, provided it is done in the manner authorised and without negligence; but that an obligation rests upon persons exercising such powers not only to exercise them with reasonable care, but in such manner as to avoid unnecessary harm to others.

In his reasons for judgment in *Southwark and Vauxhall Water Co.* v. *Wandsworth District Board of Works*, [1898] 2 Ch. 603, Collins, L.J., at p. 611, asserts the proposition, which he says is so frequently affirmed, "that, where statutory rights infringe upon what but for the statute would be the rights of other persons, they must be exercised reasonably, so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers."

In *Roberts* v. *Charing Cross Euston and Hampstead R. Co.* (1903), 87 L.T.R. 732, Farwell, J., at p. 734, says: "If the Legislature has given powers and those powers are being used for the purpose of carrying out the work authorised and it is admitted that the mode in which they are being used is unreasonable, that is an abuse of the power so given and is therefore *ultra vires*." And at p. 733: "A company acting under statutory powers is treated as a private individual acting within his own rights. If a private individual acting within his own rights acts negligently, he is liable; although the act is perfectly lawful, if he does it negligently he is liable, and so it is with a company having these powers."

Lord Esher, M.R., in *Moore* v. *Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462, at p. 465, says: "If something is put without authority in the highway, that of itself does not make the person putting it there liable at the hands of an individual; an obstruction in the highway will not entitle an individual to bring an action. But if something is put in a highway without authority and is left there, so that it becomes that which is generally called a nuisance, but which is really an obstruction, and if a person, lawfully using the highway, falls over it, or is otherwise injured by it, the person putting it in the highway must make compensation."

Not only must an authorised act be done in a reasonable way and without negligence, but there is the additional obligation upon one exercising a statutory or authorised power, not to exceed that power. Whatever were the rights which the defendants acquired in respect of this highway, they did not extend to or include the erection and maintenance thereon of the switch in question, and their liability must be determined with that in mind.

The objection cannot prevail that, in the absence of evidence of any one who saw the accident happen, negligence of the defendants should not have been found. The injury to Desrochers which resulted in his death could have happened only from the engine or train passing over him. The conditions sworn to by Dr. Spohn as to what he observed on reaching the place of the accident speak for themselves. They left little doubt about what occurred: in any event it was open to the jury to draw the conclusion they did.

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There was no evidence that Desrochers was negligent. From the evidence it does not appear that he was a man of reckless inclination or disposed to be negligent.

On the afternoon of the day of the accident he had been seen in the town, having returned from a business trip to Toronto, and it may be that when he met with the accident he was on his way homewards following the course that others, and perhaps he as well at other times, had followed. The night was dark, and even with the greatest of care he might not have been able to see the danger. He was within his rights when travelling upon the street, and the inference of want of care did not necessarily follow from the evidence.

The judgment appealed from should, in my opinion, be affirmed and the appeal dismissed with costs.

Appeal dismissed.

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Manitoba King's Bench, Galt, J. December 9, 1918.

DAMAGES (§ III L—260)—COMPENSATION FOR INJURIES TO PROPERTY—PUBLIC LAVATORIES—AWARD OF ARBITRATORS—REVIEW.

The award of arbitrators fixing the amount of compensation to which an owner of land abutting on a highway is entitled, owing to the construction and maintenance of a public lavatory on the highway opposite his property, must be based on the actual depreciation in the value of the property according to the evidence submitted.

[*City of Toronto* v. *Brown* (1917), 37 D.L.R. 532, referred to.]

Statement.

REVIEW of an award made by a majority of the arbitrators appointed under the Winnipeg charter to ascertain the compensation for damages, for property injuriously affected by the erection of a public lavatory. Award increased.

R. W. Craig, K.C., and *J. W. E. Armstrong*, for plaintiff; *Theo. A. Hunt*, K.C., and *Jules Preudhomme*, for defendants.

Galt, J.

GALT, J.:—This is a review of an award made by a majority of the arbitrators appointed under the Winnipeg charter to ascertain the compensation for damages claimed by David Ripstein in respect of certain lands situate at the southeast corner of Main St. and Logan Ave., alleged to have been injuriously affected by the erection and maintenance of a so-called "comfort station" or public lavatory, built by the city on Logan Ave.

The following provisions of the Winnipeg charter explain the basis of the motion and the powers of the court, which may be exercised in connection with it:

826. Every award made under this Act shall be in writing under the hands of all or two of the arbitrators, and shall be subject to the jurisdiction of the Court of King's Bench, as if made on a submission by a bond or otherwise containing an agreement for making the submission a rule or order of such court; and, in the cases provided for by s. 804 of this Act, the court shall consider not only the legality of the award, but also the merits as they appear from the proceedings so filed as aforesaid, and may call for additional evidence to be taken in any manner the court directs, and may, either without taking such evidence or after taking such evidence, set aside the award, or remit the matters referred, or any of them, from time to time, to the consideration and determination of the same arbitrators, or to any other persons whom the court may appoint, and fix the time within which such further or new award shall be made; or the court may itself increase or diminish the amount awarded or otherwise modify the award, as the justice of the case may seem to require.

(a) No award shall be invalidated by reason of any want of form or other technical objection, if the requirements of this Act have been substantially complied with, and if the award states clearly the sum awarded.

827. In case of an award under this Act, which does not require adoption by the council, or in case of an award to which the city is a party and which is to be made in pursuance of a submission containing an agreement that this section of this Act should apply thereto, the arbitrator or arbitrators shall take, and immediately after the making of the award shall file, with the clerk, for the inspection of all parties interested, full notes of the oral evidence given on the reference, and also all documentary evidence or a copy thereof; and in case they proceed partly on a view, or any knowledge or skill possessed by themselves or any of them, they shall also put in writing a statement thereof, sufficiently full to allow the court to form a judgment of the weight which should be attached thereto.

The claimant Ripstein appointed James Scott as his arbitrator; the city council appointed William J. Christie, and His Honour Judge Myers appointed Paterson, J., as third arbitrator.

The lands in question may be described as having 66 ft. frontage on Main St., with a depth along Logan Ave. of 271 feet to Martha St. The buildings upon the said lands are continuous, but may be roughly divided as follows: Upon the westerly 78 ft. stands the Occidental Hotel, a 2-storey structure built some 26 years ago. About 1911, a building was erected as an annex in connection with the hotel, 3 storeys high and covering about 42 ft. on Logan Ave. Finally, in or about the year 1906, an apartment block, a 3-storey building, was built by Ripstein, extending about 150 ft. to Martha St. The Occidental Hotel and annex are built almost wholly on lot 5, while the apartment block is built on lot 16.

The main entrance to the hotel is on Main St. To the south of the entrance, the front portion was used as a cigar store, and

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the northerly portion as the hotel office. Behind and to the eastward of the office was the hotel dining room. The upper flat was used for bedrooms. The building which had been erected in 1911 was used largely for the accommodation of guests of the hotel, and the apartment block to the east was let out in suites, with the exception of the ground floor which was utilized for stores along Logan Ave. The premises are within two blocks of the Royal Alexandra Hotel and the C.P.R. station, and I gather from the evidence that the suites of rooms and the stores were all rented and occupied during the period covered by these proceedings. The apartment block has one entrance on Logan Ave. very near the lavatory, and another on Martha St.

In the year 1916, the council of the City of Winnipeg decided to erect a comfort station or public lavatory on Logan Ave. The lavatory above ground consists of a brick building 23 ft. long, 13 ft. wide and 12 ft. high, the westerly wall of which is 58 ft. from the east side of Main St. The photographs put in evidence shew very clearly the nature of the structure with a large sign "Public Lavatory" and two signs of "Men" at one corner and "Women" at the other corner to indicate the separate entrances to it. The building is not unsightly in itself, but it encroaches on the sidewalk along the southerly side of Logan Ave., a space of 2 ft, leaving only 7 ft. between it and the dining-room wall of the hotel. The dining-room had 4 windows and the lavatory has been erected directly in front of two windows and partly in front of a third.

After the lavatory had been completed in 1917, the claimant demanded $50,000 damages from the city on account of his lands being injuriously affected by the structure. Under s. 783 of the Winnipeg charter the city might have made an offer on their part of any damages they were willing to recognize and pay, but they made no offer.

Both parties based their case largely on so-called expert evidence.

In Broom's Legal Maxims, 7th ed., 711, under the maxim *Cuilibet in sua arte perito est credendum*, the editor says:—

> Almost all the injuries, it has been observed, which one individual may receive from another, and which lay the foundation of numberless actions, involve in them questions peculiar to the trades and conditions of the parties;

and in these cases the just must, according to the above maxim, attend to the witnesses, and decide according to their number, professional skill, and means of knowledge.

Speaking generally in regard to expert witnesses, one often finds that their evidence is largely tinctured in favour of the party who has employed and called them. This does not mean that they are necessarily unfair or dishonest in their statements, but it necessitates caution and discrimination in dealing with their opinions. The same observation is applicable to arbitrators appointed by the parties. It may be unfortunate that such a practice has arisen in the case of arbitrators, who are supposed to exercise their functions with fairness and judgment, but human nature is a difficult thing to counteract, and one must deal with such cases in the light of current practice. Indeed, there is some authority to justify the practice. In an arbitration between one *Enoch and others*, [1910] 1 K.B. 327, Farwell, L.J., says, at p. 334:

> Where a case is referred to two arbitrators and an umpire, it is well understood that the arbitrators act as counsel who try and settle the case without going into court; but the umpire or a single arbitrator occupies a judicial position and exercises judicial powers, and is bound, as far as practicable, to follow legal rules.

The legislature has taken occasion, in the Winnipeg charter, to make a provision in regard to arbitrators, which relieves the court, when reviewing an award, from any discussion as to the individual qualifications of the arbitrators. I refer to s. 827, above quoted, where it says,

> And in case they (the arbitrators) proceed partly on a view, or any knowledge or skill possessed by themselves or any of them, they shall also put in writing a statement thereof, sufficiently full to allow the court to form a judgment of the weight which should be attached thereto.

In the present case, Paterson, J., and Mr. Christie came to the conclusion that the claimant was entitled to compensation in respect of the hotel property situate upon lot 5, amounting to $6,000, but that he had suffered no damage to the apartment block situate upon lot 16. Mr. Scott, on the other hand, signed a minority award finding the claimant entitled to compensation in respect of the whole property on lots 5 and 16 to the extent of $25,000. But none of the arbitrators thought fit to put in writing any statement such as that provided for in s. 827.

Coming now to the opinions expressed by the experts and the grounds upon which they based them, I extract the following

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from the evidence of Mr. Haffner at p. 67. Mr. Haffner, explained the method he adopted in arriving at his total estimate of damage, namely, $33,055:

Q. In arriving at that, you have taken the city assessment as your basis of valuation, Mr. Haffner. Do you approve of the city valuation of that property? A. At that time, yes. Q. If you were really valuing that property that is really your own valuation? A. Yes, I agree with the City of Winnipeg as to that. Q. As you know, Mr. Haffner, the City of Winnipeg valuation on buildings is based on two-thirds of the cost? A. Yes, I understand that, but I took that simply at the assessed value. Q. If you were taking your percentages on three-thirds, that is the total value of the building, your estimate of damage would be correspondingly increased? A. Yes, by a third on the buildings, the value of the buildings.

Mr. Haffner then shewed that by adding one-third to the value, his total would be $33,823.

Q. Now, can you state to the Board how you arrived at that estimate, Mr. Haffner, what elements of damage entered into your consideration in the matter, and how you arrived at it? A. The selling value of the property before that obstruction was put there, and what it would be to-day. That is the way I figured it, because if a man was looking for a store property, he wouldn't pay the same price for that property with that obstruction there as he would with a clean street. For instance, if he has a store—and the modern stores nowadays have large panes of glass all around in order to display their goods—you couldn't get anyone to stand in front of the window in a place like this, besides the sidewalk is so narrow. People going along there they are bound to bump into each other, and then it shuts off the light of three windows in the dining room, and the building is altogether too massive for a building of that kind, entirely unnecessary, because you take Fort St., and the place there is not half the size, and they are neat, and there is very little objection to it, only the general objection to a place of that kind. Now you take the Fort St. one, it is only about 6 ft. wide, by about 15 ft. long, and has got no big roof to project, and it is 10 inches clear of the sidewalk. This one takes up the sidewalk. Now that is as to the front, and as to the back the same thing, you cannot see the rear of the lot from Main St. unless you get close to the hotel, which damages this place to a lesser degree, but still the damage is there. I am taking the selling value. If I took a man there to sell that property for business purposes, that would be the objection, and I am satisfied 20% is not an over-estimate of the reduction of the value. Q. Do you think there is a sentimental damage by reason of the building being used as a comfort station? A. I look upon it as actual damage, because it detracts from the selling value, and I am satisfied that property couldn't be sold for the price that it could have been for business purposes.

Messrs. Shepard and McGregor gave very much the same evidence as Haffner with regard to the reasons on which they based their opinions. The evidence shews that these three gentlemen all adopted different methods of arriving at their conclusions. Shepard divided the property into four different sections and

fixed his total estimate of damage at $27,620. McGregor divided the property into three sections, and fixed $24,988.70 as his total. Haffner divided the property into only two sections, and fixed his estimate as above mentioned, at $33,055. It would seem from these divergent methods and figures that these three witnesses made careful and personal estimates unaffected by each other.

Watts, the first witness as to value called on behalf of the city, has acted for some years as city assessor. The system adopted by the city in its assessment department is such that any newcomer to the office finds all the requisite data on hand for ascertaining the assessed values of property for many previous years, and the final values fixed do not depend upon the assessor alone but upon a board of officials well acquainted with the subject matter. It must be put to Watts' credit that his assessment was accepted by both parties as reasonable. But Watts had had no experience whatever with the business of buying or selling real estate in Winnipeg, his only transaction having been the purchase of a house for his own use on Parkview St., St. James, and selling it again. He expressed the opinion that the public lavatory had occasioned practically no damage whatever to any of the plaintiff's property. He had informed himself that the light entering the dining-room windows of the hotel depended upon the angle of light coming from the clear sky, and indeed he had a plan prepared shewing this angle of light. He says (p. 294):

Section AA has been prepared in order that it can be clearly demonstrated that the comfort station does not affect the light in Ripstein's dining-room. The sky line is the angle from which you always draw your light angle. As you see there the main roof of the comfort station at the present time is clear of that line which gives you the angle of light.

The following answers were elicited on cross-examination, p. 318:—

Q. Do you consider that the property is as good property to-day as it was before this building encroached upon the sidewalk adjoining it 3 feet? A. Yes, I consider it just as good. Q. How far over yet might it come before the property would be injuriously affected? A. Until it came within the angle of light. Q. How far would that be? A. You would have to measure that off from the plan, it would come another 3½ ft. Q. You say that building can be built within 3½ ft. of the Ripstein building before it would be injuriously affected? A. Well, so far as light, I think then the question of ingress would come in, but so far as light is concerned, it would not be damaged.

Further questions brought Watts to the statement that this

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lavatory or comfort station, 23 ft. long, 13 ft. wide and 12 ft. high, could stand within 3 ft. of the Ripstein windows without affecting the light. The cutting-off of light reflected from the road and pavements and from the walls of the Bon Accord Block, on the opposite side of the street, did not enter into Watts' consideration at all; nor did the obstruction of view from the dining-room windows.

Rannard is the second witness as to values called by the city. His business is wholly that of a boot and shoe dealer. He says, (p. 381):

> I am not a real estate dealer myself;

and at page 382, he says:

> Of course I think myself that if I had a building, or owned a building, I don't think that I would like one of those comfort stations against my building; I cannot tell you particularly why I would not, of course there are certain things in this city that somebody has got to be the goat for.

Rannard gave no estimate whatever of what he would consider a fair compensation to be allowed in respect of the lavatory in question.

The third witness as to value for the city was T. D. Whiting. He has been in the real estate business in Winnipeg since 1904, and has had experience in the renting of stores and office premises. Whiting's evidence was largely directed to shewing that the Ripstein property might be re-constructed in such a manner as to minimise the effect of the lavatory building. Commencing at p. 366, he gives the following evidence regarding the damage:—

> Q. I suppose you would agree with me if I were to say, Mr. Whiting, the property has been damaged to some extent by the erection of the comfort station? A. Certainly. Q. Have you considered at all the extent of the injury which has been done? A. I think that is a question for somebody else to decide. I was not asked to consider that. I don't think that is a question that I would care to consider.

In my opinion, Watts shewed such bias in favour of his employers that his evidence is unworthy of credit. Rannard failed to shew any qualifications as an expert. Mr. Whiting's qualifications were quite satisfactory, and his evidence straightforward. He candidly admitted that the lavatory was a detriment to Ripstein's premises; but he stated that he was not asked to consider the extent of the injury.

Lloyd Warren, professor of mathematics and astronomy in Manitoba University, was called by the claimant to give expert

evidence regarding the diminution of light caused by the lavatory.

On p. 415 of the evidence he shews that the loss of light to the two western windows of the dining-room amounts to from 40 to 45% of the whole light they should receive; that the third window loses 20%, and the fourth window 5%. Also that for the whole year the dining room loses 25% of its light.

Dealing next with the award signed by Paterson, J., the chairman, and Mr. Christie, I have already explained why it would not be proper to make any remarks on the qualifications of the three arbitrators, but the evidence itself discloses certain views expressed by these two arbitrators which, to some extent, doubtless, influenced their judgment in awarding a sum so greatly below the estimate arrived at by any of the claimant's expert witnesses.

During the examination of McGregor, the following evidence appears on p. 107:—

Chairman: Do you find that stores are using their windows along the side streets? A. I would be inclined to put windows there.

Chairman: Are the rest of the stores that way? A. Oh, yes.

Chairman: More than one window back? A. Oh, yes, I think it is a very natural thing.

Chairman: Why wouldn't people go down there; if you were walking down there and saw goods? A. I don't think if I was walking down with my wife that I would take her down there, and take her to look at that window.

Mr. Christie: I think that the building is a fine building, better than the one adjoining? A. I think that the natural feeling is against it.

Mr. Christie: Would that comfort station bring any people past there? A. It would bring people past there, yes.

Mr. Christie: How do you estimate the value of store property—by the number of people who pass? A. Yes.

Mr. Christie: If it increases the number of people passing, an inducement for people to go down that street, I would think it would increase the value.

I am wholly unable to follow the view apparently shared by both Paterson, J., and Mr. Christie, as the object which transient people have in visiting the lavatory is perfectly definite, and it is not to buy goods.

In awarding costs, the arbitrators directed that each party should pay their own witnesses, and that the City of Winnipeg should pay the arbitrators' fees and the stenographer's fees. The result of this direction is that, although the claimant has been awarded $6,000, he has to bear all the costs of his own witnesses and counsel. The arbitration proceedings lasted many days, so

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that the effect of the award is to impose upon the claimant a reduction of many hundreds of dollars from the amount of the award.

The fact that a litigant recovers less than the full amount of his claim does not disentitle him to full costs of suit, and I see no good reason for applying a different rule to arbitrations.

No attempt was made by counsel for the City of Winnipeg to shew that the award in question should be reduced, the only question is whether it should be increased.

Prior to the construction of the lavatory, the claimant had buildings upon his property with a frontage on Main St. of 66 ft. by a depth on Logan Ave. of 271 ft. There were several stores along Logan Ave. and the claimant had a right to the unobstructed view from the dining room of his hotel and an unobstructed sidewalk along Logan Ave. The lavatory, as constructed, encroaches 2 ft. on the sidewalk and the view from the windows of the dining-room is wholly obstructed in the case of two windows and partially the third. But, to my mind, the most serious feature of the lavatory is the necessary use to which it is put. The sensibilities of people naturally become more acute with the progress of civilization, and many things are highly objectionable to-day which would have passed without notice in the memory of living men. For instance, many of us can well remember a time when indoor lavatories such as prevail now were practically unknown in the city of Toronto, and when every house had its outhouse. But even in those days people would try to conceal these outhouses from public view as much as possible, and certainly no one would think of having such a building placed in front of his premises. Nevertheless, in a large city, public conveniences are a real necessity; but it is only fair that persons whose property is injuriously affected by them should have a right of compensation for the damage sustained.

It is generally possible to either aggravate or mitigate such damage by taking precautions with regard to the construction of these conveniences. Why it was that the city thought fit to erect such a conspicuous building for the purpose on Logan Ave. is not apparent.

A very similar claim for compensation arose recently in Toronto in the case of *City of Toronto* v. *J. F. Brown Co.* (1917), 37 D.L.R.

532, 55 Can. S.C.R. 153. There, the respondent owned a parcel of land on the southwest corner of Queen and Parliament Streets, having a frontage of 104 ft. on Queen St. by a depth of 125 ft. on Parliament St. On the easterly 40 ft. of the parcel was erected a large 3-storey brick store 40 ft. by 100 ft. The store's only business entrance was on Queen St. In the year 1912 the City of Toronto constructed a public lavatory for men and women at the corner on Parliament St., but it was constructed underground, and about 50 ft. apart were stairs leading to the same with metal hoods over them similar to those over a subway entrance in a large city. These entrances were distant 8 ft. from the building of the respondent, being midway between the curbing and the street line, which space was completely concreted so as to form an extended sidewalk, and half way between the entrances was a small structure of inconspicuous appearance used as a ventilator. It was stated by counsel before me that there was practically no structure above ground at all in the *Toronto* case, so that there was no question of diminution of light or air, or of impeding traffic on the sidewalk. The arbitrator found that the mere presence of a structure used as a lavatory in the vicinity of the respondent's property was sufficient to depreciate it in value, and that the appellant was legally responsible therefor and awarded the respondent $9,000 in respect of such diminution in value. He found that such damage was confined to the property occupied by the building upon the lands and did not extend south or west thereof. He also accepted the respondents' theory of seepage into the cellar of the building in question and awarded them $1,200 in respect of the same. The Appellate Division of the Supreme Court of Ontario affirmed the award.

The case then came before the Supreme Court of Canada and several questions of law were discussed and settled favourably to the respondents' contention, and in the result the city's appeal was dismissed. I quote the following extracts from the case in order to shew how their lordships regard these compensation cases:

Idington, J. says, at p. 544:

> But here the proprietor, not only for the present uses he is putting his property to, but the evident possible use he might find it advantageous to put his property to by making an entrance thereto from Parliament St., does suffer loss and injury beyond the rest of the public. In short, as one of

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the appellant's own witnesses puts it, he is deprived of the value inherent in a corner lot.

In the present case Ripstein's witnesses emphasize this feature also.

Duff, J. says at p. 555:

The depreciation in value for which compensation is awarded is occasioned by the fact that the presence of such conveniences makes the property less desirable from the point of view of possible purchasers and lessees and therefore diminishes its selling and letting value.

Anglin, J., says, at p. 563:

But the construction and maintenance of a lavatory, with all proper precautions to avoid unnecessary injury, is authorized by the statute, even though it should entail conditions which would, if not so authorized, amount to an indictable or actionable nuisance. The statute substitutes money compensation for some of the benefits and advantages of or incidental to ownership of property, in so far as it is injuriously affected by the exercise of the corporate powers.

The amount of compensation awarded in the *Brown* case was stated by counsel before me to have amounted to 20% of the value of the property in respect of which it was allowed. If the same rate were applied in the present case the claimant would be entitled to between $40,000 and $50,000. But, having regard to the evidence given by such experienced experts in land values as Messrs. Shepard, Haffner and McGregor, I do not think that the arbitrators or the court would be justified in applying so high a rate here. Looking at the estimates given by each of these witnesses, it is surprising to find only the sum of $6,000 allowed. Arbitrators, like ordinary courts, are not at liberty to be capricious in their findings, but must form their judgment on the evidence submitted to them.

If there is nothing in the demeanour of a witness, or in the story he tells, to impeach his credit, and he is not contradicted by testimony on the other side, it is not a case for a jury to deliberate upon. If the case had been submitted to the jury, and they had disbelieved this witness, I think that we should have been bound to send the case down to a new trial. Per Bayley, J. in *Davis* v. *Hardy* (1827), 6 B. & C. 224, at 231, 108 E.R. 436.

Now, there was no evidence pointing to the sum of $6,000 as being reasonable compensation in the present case. It is true that the city's witnesses, Watts and Rannard, were willing to pledge their oaths that practically no damage whatever had been sustained; but for reasons already given I attach no weight to their evidence; and the third witness, Whiting, while admitting that damage had been done, said that he had not been asked to

estimate the extent of it. On the other hand,the claimant's witnesses, whose qualifications and integrity were not impugned in any way, found that the claimant had sustained damage from $25,000 up to over $33,000.

My own view of the evidence, and of the claimant's rights thereunder, is shortly this: The construction and maintenance of the lavatory may not unfairly be said to be a convenience to everybody in Winnipeg except the claimant and his tenants. When they arrive at the neighbourhood they are at home. The structure of the building blocks the light of the dining-room of the hotel which has been rendered useless for that reason. The structure is permanent and is a manifest deterrent to people, especially ladies, who might otherwise be minded to visit the stores along Logan Ave. or to take suites of rooms in the apartment block. I do not overlook the fact that during the last year or two the rooms and the stores have apparently been rented so that, with the exception of a few vacancies which occurred, Ripstein has not suffered any material loss as yet from his rents. Some of the tenants (George E. Brown, Samuel Lenoff and Joseph Hall) shewed that their business had suffered greatly by reason of the lavatory, and one of them gave up his tenancy on account of it. I cannot but believe that the detriment in this respect is permanent, and is much more likely to increase than diminish. Ripstein must be the sufferer; but, as Rannard put it, with perhaps more force than elegance, "somebody has got to be the goat."

Even upon the assumption which the majority of the arbitrators made that the apartment block had not been injured at all, the claimant's witnesses shewed that the damage to the westerly portion of the building was as follows: Mr. McGregor says $19,166; Mr. Shepard says $22,364 and Mr. Haffner says $23,308.

In my opinion, the whole property was, and is injuriously affected by the lavatory. It is true that Ripstein has suffered much loss in the revenue of his hotel by reason of the recent liquor legislation, but it is impossible to imagine any kind of re-arrangement or re-construction of that portion of the building, whether as stores or otherwise, which would not be injuriously affected by the near presence of this public lavatory.

The difference between the estimates arrived at by the claim-

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ant's expert witnesses may perhaps be accounted for by the methods they applied respectively to their computations.

I think justice will be done in the present case by accepting the estimate of John McGregor, the lowest of the three, which happens to coincide with the amount awarded by James Scott in his minority award.

I, therefore, increase the amount of the award from $6,000 to $25,000. The claimant will be entitled to interest on the above sum since June 20, 1918, the date of the two awards, and the claimant will also be entitled to full costs of the arbitration proceedings and of this review on the scale of the tariff applicable to King's Bench costs. *Award increased.*

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DOMINION RADIATOR Co. v. STEEL Co. of CANADA.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins, and Ferguson, JJ.A. July 15, 1918.

CONTRACTS (§ II D—150)—SALE OF GOODS—SPECIFICATIONS—TIME FOR DELIVERY — "CURRENT CONTRACT" — BREACH — REPUDIATION — RIGHT TO RESCIND.

Two contracts were made for the sale of pig-iron. A term of both contracts was that "all specifications are to be sent by buyer at least 15 days before time fixed for shipment." In the earlier one, which was dated Dec. 23, 1915, the time for delivery was to be "between date of completion of current contract and June 30, 1916, in equal monthly instalments"; in the later contract which was dated Sept. 25, 1916, delivery was to be "in about equal monthly instalments between Jan. 1 and June 30, 1917." In answer to a claim for damages for breach of the first contract the defence set up was that the plaintiff had lost its right to have the iron delivered through failure to send specifications in time.

The court held that what was meant by "current contract" might be shewn by parol evidence, and that it was established that the reference was to a contract of 1914, which was the only one under which deliveries were then being made; that the respondent had supplied specifications for all the iron it had bought from the appellant and that it was well understood by both parties that the specifications which had been supplied were to govern as to all the iron, unless the respondent should desire to vary them and send other specifications; this finding was sufficient to dispose of the contention of the appellant adversely to it.

As to the second contract, the defence was that the action was prematurely brought as the time for commencing deliveries had not arrived when it was brought, the evidence shewed that the position taken by the appellant was that unless the respondent would formally abandon its contention with regard to the earlier contract, no deliveries would be made under the later one, or that it would make no deliveries under the later contract until the dispute as to the earlier one was settled. This was such a repudiation of the appellants' obligation under the later contract as warranted the respondent in rescinding.

[*Re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315; *Metropolitan Water Board* v. *Dick, Kerr and Co.*, [1918] A.C. 119, applied.]

Statement.

APPEAL from a judgment of Middleton, J. in an action by the buyer against the seller for damages for failure to deliver pig-iron under two separate written contracts.

The judgment appealed from was as follows:—

The defendant company manufactures pig-iron at Hamilton. The plaintiff company manufactures steam and hot water radiators at Toronto, and in the course of its business requires large quantities of pig-iron.

For many years the plaintiff has purchased from the defendant and from its predecessor, the Hamilton Steel and Iron Company Limited, a large portion of the iron required—the course of dealing being that a series of contracts were entered into calling for the delivery of a given quantity of iron at a specified price within a named time. I shall not need to refer to more than four of these in any detail.

First, a contract of the 14th January, 1914, which called for 2,000 tons to be delivered between its date and the 30th June, 1914.

The deliveries under this contract were made between the 5th December, 1914, and the 12th January, 1916.

Second, a contract of the 14th October, 1915, which called for 1,000 tons "in about equal monthly instalments between date of completion of current contract and June 30th, 1916."

The current contract referred to is that of January, 1914, under which delivery was completed on the 12th January, 1916. Delivery under this contract began on the 12th January, 1916, and ended on the 1st December, 1916.

It should be mentioned that the course followed was to make delivery of lots consisting of one or more car-loads (some 30 tons per car) and to send invoices attributing the shipment to a particular contract. When there only remained a small quantity upon any particular contract, a full car was sent, but two invoices—one to complete the earlier contract and another to begin the new: e.g., on the 12th January, 1916, a car contained 7 tons 1,110 lbs. to complete the January, 1914, contract, and 23 tons 590 lbs. on account of the contract of October, 1915.

Third, a contract of the 23rd December, 1915, which called for 1,000 tons "to be delivered between date of completion of current contract and June 30th, 1916, in equal monthly instalments."

This is the first contract sued upon.

Upon the argument before me it was assumed that the "current contract" referred to was the contract of October, 1915, and much ingenuity was displayed in attempting to give meaning to the words quoted.

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The "current contract" was, in my view, the contract of January, 1914, under which about 150 tons then remained to be delivered, and which was not completed until the 12th January, 1916.

The interpretation I give makes the situation easily understood. A contract made in January, 1914, for 2,000 tons was nearing completion, and a new contract was made in October, 1915, for 1,000 tons. In December, while the 1914 contract was still current, the plaintiff decided to take another 1,000 tons, and made the contract of the 23rd December. The October and December contracts both called for delivery between the completion of the 1914 contract and the 30th June, 1916. So what was done was to provide for the delivery of 2,000 tons in this period, 1,000 under the October contract, being at $19.63 per ton; 1,000 under the December contract, being at $22.88 per ton.

Fourth, the last contract was on the 25th September, 1916, and called for the delivery of 1,200 tons between the 1st January and the 30th June, 1917, at $23.88 per ton.

Between the making of this contract and the 1st January, 1917, the price of pig-iron advanced with great rapidity, and the demand exceeded the supply—"Hamilton Pig," i.e., the iron of the defendant's manufacture, selling, as admitted by its counsel, at $39 and upwards.

All the contracts are upon forms prepared by the vendor; and, though orders were solicited and sent in by the purchaser, these were not accepted but used as the basis for preparing formal contracts signed by the parties.

Under these contracts, the vendor is to be excused from delay due or partly due to accidents to machinery, etc., and contingencies beyond its control. If the delay extends beyond one month, the purchaser may give notice, within 10 days after the 30 days, of its desire to cancel, and if delivery is not then made it may then cancel that month's shipment. If the purchaser does not exercise this right the vendor may deliver in a reasonable time after the cause of delay has been removed.

As will be very apparent from the details already given, delivery was, in the case of the contracts referred to of January, 1914, and October, 1915, far behind the dates named. There may or may not have been valid excuses entitling the vendor to this delay, but the attitude of the parties was one of good-natured accom-

modation—the purchaser generally seeking for delivery more rapidly than the vendor was able to ship.

Under the earlier contracts the same situation existed.

A statement put in by the defendant (as exhibit 56) shews the dates during which its furnaces were shut down; and this, no doubt, to some extent, if not entirely, justifies its delay.

The situation then was that under the two contracts similar in their terms (save only as to price) the defendant was bound to deliver and the plaintiff to accept 2,200 tons between the completion of the January, 1914, contract, in January, 1916, and the 30th June, 1916—less than 6 months.

As already pointed out, the January, 1914, contract called for the delivery of 2,000 tons between January and June, 1914; but, by reason of former contracts not having been completed, delivery under it was not begun until December, 1914, and was not then completed in 6 months but in over 13.

When delivery began in January, 1916, the vendor sent invoices attributing the iron to the earlier and lower-priced contract, and the purchaser did not object. Delivery was not made as promptly as it should have been, even if the contracts had only called for 1,000 tons, as this quantity was delivered from time to time over the year 1916.

When delivery under this contract was nearing completion, an invoice was sent, on the 14th November, for a car containing 28 tons 300 lbs., charged at the price of the December, 1915, contract. This is said to have been a clerical error, and a corrected invoice was sent by which the charge is changed to the price of the October contract. I do not attach any importance to this occurrence.

On the 1st December, 1916, three car-loads were forwarded; and as, at this time, only 7 tons 1,530 lbs. remained undelivered on the contract of the 14th October, 1915, the invoices charged this amount to that contract, and the balance was charged to the contract of the 25th September, 1916. On the 5th December, 1916, three further car-loads were sent and charged to the same contract.

The delivery under this contract was not to start until January, and the plaintiff assumed that the charging of this iron to this particular contract and the ignoring of the contract of December, 1915, which had never been mentioned in the meantime, was a clerical error.

Acting on this theory, a letter was written on the 12th Decem-

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ber, pointing out the assumed error and asking that the iron be applied upon the contract of December, 1915, and that corrected invoices be sent.

On the 18th December, 1916, a letter was sent by the defendant saying that the invoices "are correct, as the contract they were applied against is the only pig-iron contract we have with you at this date. The contract you refer to was never in force, it having been automatically cancelled through your failure to recognise its conditions by exercising the privileges contained therein to which you were entitled prior to its expiration date, viz., June 30th, 1916."

Other correspondence followed, which must be reviewed in connection with the alleged breach of the September, 1916, contract, but it throws no light upon the question now under consideration. It is enough to say that this position was adhered to, despite the protests of the plaintiff.

To understand the position taken by the defendant, it is necessary to refer to certain terms of the contract not yet mentioned, and also to explain their significance.

In the form of contract there are blank spaces for "Material," "Quantity," "Specification," "Time of delivery," "Place of delivery," "Price," and "Terms."

All of these are filled in by the vendor when the contract is sent forward for signature by the purchaser.

"Specification," as applied to pig-iron, refers to the chemical analysis of the iron. The important elements of the analysis are the percentage of silicon, sulphur, phosphorus, and manganese present. The quantity of these elements affects the quality of the iron, and renders it more or less suited for the particular purpose for which it is to be used.

In the manufacture of pig-iron the different runs from the furnace are analysed, and an endeavour is made to distribute the iron so that each customer will receive that suited to his need. The exact analysis of any particular run depends, of course, upon the ingredients put into the furnace, but it is not possible to determine in advance with absolute precision what the analysis will be. This shews the importance to the vendor of having the specifications of the purchaser in his hands—without these he does not know what the purchaser desires.

On the other hand, the purchaser finds some variation in his needs. He may require iron with more than the usual silicon to mix with soft iron and so give to his mixture the requisite hardness.

So the contract provides, in the written portion, "Specification to follow," and in the printed clauses there is found the provision, "All specifications are to be sent by buyer at least 15 days before time fixed for shipment." It is because no specifications were sent in, expressly referring to this contract, that the vendor now contends that it came to an end automatically.

In the course of dealing between these two companies, there had been established a standard specification which fixed the maximum and minimum of the named elements, and only occasionally was there any departure from this. This was generally when the vendor delivered pig-iron with a low silicon content at times much below the minimum of the specification, when a demand would be made for some with a high silicon content to restore the average;, but there was not, under any of the contracts, a new start made and a formal sending on of specifications; nearly all the communications of late were by telephone, and it was well understood what was required, and each invoice stated what was sent, and any change desired was intimated over the telephone. The supply was continued after the termination of what I call the current contract, and the information on hand and given in this way was accepted as a specification, and during the whole year in which iron was sent forward there was nothing to indicate that there was any desire for further specification. The vendor did not deliver by the time limited even the first 1,000 tons, and the purchaser was pressing; the delay was possibly not the vendor's fault, and probably the elastic terms of the contract would excuse the delay; but no good purpose would have been served by sending any specification before the 30th June under the second of these contracts, when the vendor could not meet the demands under the first.

On this branch of the case, I think I ought to find that the parties by their conduct acquiesced in the postponement of the contract in question until the vendor had completed delivery under the contract of October, 1915.

And, secondly, that the parties waived the delivery of any specification, and agreed that the iron should be according to the

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standard specification established between them, save when varied by special instructions given from time to time by the purchaser.

And, thirdly, that the vendor repudiated and so rendered itself liable to an action for refusal to deliver before the time of specification had arrived, having regard to my first finding.

And, fourthly, that time was not originally of the essence of the contract, and, even if it was, the parties by their conduct waived this.

Whatever the rights of the parties were as to the contract just considered, there does not seem to have been any room for question as to the position under the contract of the 25th September, 1916, calling for delivery in January, 1917—a dispute, *bonâ fide* or otherwise, as to the contract of December, 1915, could not justify a breach of the later agreement.

The defendant contended that the cars delivered in December ought to be treated as a delivery upon the 1916 contract; the plaintiff contended that they must be treated as a delivery on the earlier contract; but neither side denied the plaintiff's right to the balance of the 1,200 tons called for in the September contract, at the stipulated price.

The defendant then took an altogether unjustifiable position and refused to carry out the September, 1916, contract unless the plaintiff would abandon its position with reference to the December, 1915, contract. On the 30th December, 1916, the defendant writes, after referring to the dispute and its claim that there was only one contract in force, and the plaintiff's letter of the 28th December, asserting that the contract of December, 1915, was in force: "Inasmuch as you have raised this question, it must be settled one way or the other before we make any more shipments to apply against the contract for the first half of 1917." The letter continues by stating that the question as to the liability under the earlier contract is in the hands of its solicitor.

On the same day, its solicitor writes stating that his client denies any liability under that contract.

There was some conversation about the 1916 contract; and on the 15th January, 1917, the plaintiff writes referring to this, and adding: "In the meantime we refer you to our contract of September 25th, 1916, covering our order No. 6398. In respect to shipment of this contract you will kindly arrange shipment at the rate of 200 to 300 tons per month until the contract is completed."

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On the 18th, the defendant replied that the matter had been referred to its counsel, and nothing more was done until, on the 13th February, the plaintiff wrote: "We are completely out of Hamilton pig-iron. What position are you in to make shipments under our contract? We sincerely trust you will be able to arrange shipment immediately."

On the 20th February, the defendant replied, referring to the letter of the 30th December, to which no answer had been received, in accordance with which, "together with the fact that the position taken by us at that date has not in any wise changed, we must insist before making any further shipments on this contract that the question raised by you be definitely settled one way or the other as outlined in our comunication of December 30th."

This makes it abundantly plain that the defendant broke its contract and refused to deliver unless the plaintiff would formally abandon its contention with reference to the earlier contract. Even if the defendant were right in its contention as to this contract being at an end, it had not the right to exact an admission as to this as the price of its performance of its obligation under the later contract.

The contract being broken in this way, of course the pretended forfeiture pending the action makes the situation no better.

At this time the price of pig-iron had advanced to $39 per ton, and the demand was greater then the supply. This affords the key to the situation.

There remains the question of the measure of damages. It is the difference between the contract price and the market price at the date of the breach: *Jamal* v. *Moolla Dawood Sons & Co.*, [1916] 1 A.C. 175.

It is contended that, because the plaintiff could buy other iron which might answer its purposes well enough, the price of such iron would give the measure. I can see no justification for this. Why should the defendant retain its product which it had contracted to sell to the plaintiff and realise $39 per ton and limit the recovery against it to $34 on any such theory? Here there is no question as to the market price of the very thing sold, and I am not concerned with the price of some other thing suggested as an equivalent.

I am not prepared on the evidence to find that the iron selling

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upon the market at $34 was equivalent in all respects to Hamilton pig-iron at $39.

The result is, that there must be judgment for the difference between the price upon the first contract sued on, $22.88, and $39—$16.12.

For 1,000 tons 16,120.00

And between the price on the second contract sued on, for the difference between its price, $23.88, and $39—$15.12.

For 1,200 tons less 160 tons 1,740 lbs., say 1,039 tons 15,712.65

Or in all $31,832.65

And from this should be deducted the price of the 160 tons 1,740 lbs. delivered 3,837.59

Leaving a net sum payable to the plaintiff of $27,995.06

And on this footing the money in Court should be repaid to the plaintiff.

At the trial I gave the plaintiff leave to amend so as to claim an adequate sum. This amendment should be made. The plaintiff should have costs throughout.

George Lynch-Staunton, K.C., and *J. G. Farmer*, K.C., for the appellant company.

R. S. Robertson and *G. H. Sedgewick*, for plaintiff company, respondent.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of Middleton, J., dated the 26th October, 1917, which was directed to be entered after the trial of the action before him sitting without a jury at Toronto on the 12th day of that month.

The action is brought to recover damages for alleged breaches of two contracts for the sale and delivery by the appellant to the respondent of pig-iron, one dated the 23rd December, 1915, for 1,000 tons, and the other dated the 25th September, 1916, for 1,200 tons.

The contracts are both on printed forms, and it is a term of them that "all specifications are to be sent by buyer at least 15 days before time fixed for shipment."

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There is in the form a space for the statement of the specifications, which refers to the chemical analysis of the iron.

By the earlier contract the time for delivery is stated to be "between date of completion of current contract and June 30th, 1916, in equal monthly instalments;" the blank opposite to the word "specifications" is filled in with the words "to follow," and opposite to the word "remarks" are the words and figures "Order No. 5555."

By the later contract the time for delivery is stated to be "in about equal monthly instalments between January 1 and June 30, 1917;" the blank opposite to the word "specifications" is filled in with the words "to follow," and opposite to the word "remarks" are the words and figures "Order 6398."

At the time when these two contracts were made, there were two existing contracts between the parties, one dated the 14th January, 1914, for 2,000 tons, to be delivered "as required from time to time and as nearly as possible in equal monthly instalments between above date and June 30, 1914," and the other dated the 14th October, 1915, for 1,000 tons, to be delivered "in about equal monthly instalments between date of current contract and June 30, 1916."

Deliveries under the contract of the 14th January, 1914, were not completed until the 12th January, 1916, and the deliveries under the contract of the 14th October, 1915, according to its terms, were to begin at the date of completion of "current contract"—the contract of the 14th January, 1914; deliveries under this October contract began on the 12th January, 1916, and were completed the 1st December, 1916; so that, when the contract of the 23rd December, 1915, was entered into, there was no existing contract under which the respondent was then entitled to have deliveries made, but the contract of the 14th January, 1914.

None of the iron, the subject of the contract of the 23rd December, 1915, has been delivered, and the ground taken by the appellant with respect to it is that the respondent has lost its right to have it delivered because of its failure to send specifications as to it in due time.

The appellant also contends that this contract is not evidenced as required by the Statute of Frauds. The statute is not pleaded; but an application for leave to plead it was made, and should, I

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think, be granted. The statement of claim alleges that the contract was for the sale and delivery of the iron "at Toronto as ordered from time to time by the plaintiffs;" that is not a correct statement, and the pleading must be amended so as to conform with the terms of the contract as stated in it. As a new case is thus made by the respondent, the appellant is entitled to set up in answer to it the Statute of Frauds.

It was not, I think, seriously contended that the contract itself is not a sufficient note or memorandum to satisfy the provisions of the statute, but the statute is relied on to meet the case of a parol variation of the contract as to the time for delivery.

It is, I think, clear that what was meant by the term "current contract" may be shewn by parol evidence, and I agree with the trial Judge that it was established that the reference is to the contract of the 14th January, 1914; that, as I have said, was the only contract under which deliveries were then being made or under which the respondent was then entitled to have deliveries made; and, having regard to this, the parties must, I think, have meant to refer to that contract.

The learned trial Judge has found that the respondent had supplied specifications for all the iron it had bought from the appellant, and that it was well understood by both parties that the specifications which had been supplied were to govern as to all the iron, unless the respondent should desire to vary them and send other specifications. That finding is warranted by the evidence, and is sufficient to dispose of the contention of the appellant adversely to it.

In addition to the reasons assigned by the learned trial Judge for his finding, I may point out that the reference in the contract of the 23rd December, 1915, to order 5555, is to the number which the respondent gave to the order for the iron, which is exhibit 3, and in it it is stated that the analysis, i.e., the specification, is to be the same as former contract; and that the order referred to in the other contract as order 6398 is exhibit 5, and in it it is stated that the analyses are "same as last;" and it is clear therefore that the finding is right, and that in both cases the provisions of the contracts as to sending specifications were strictly complied with.

The position taken by the appellant as to the contract of the 25th September, 1916, is that the action was brought prematurely;

that, when it was begun, the time for commencing deliveries had not arrived. It is answered by the respondent that, although the time for commencing deliveries had not arrived, it was entitled to treat the contract as rescinded, owing to the appellant having, before the action was begun, repudiated the contract.

The dispute as to this contract arose out of the controversy between the parties as to the contract of the 23rd December, 1915, the respondent insisting on deliveries being made under it, and the appellant taking the position that it had ceased to exist, for the reason I have already mentioned. The appellant took the position that it would make no deliveries under the contract of the 25th September, 1916, until that question was settled, and the result of the correspondence between the parties was that on the 20th February, 1917, the appellant wrote to the respondent saying that it "must insist before making any further shipments on this contract" (i.e., the contract of the 25th September, 1916) "that the question raised by you" (i.e., as to the earlier contract being still on foot) "be definitely settled one way or other as outlined in our communication of December 30th."

In the communication of the 30th December, the appellant had said: "Inasmuch as you have raised this question, it must be settled one way or other before we make any more shipments against the contract for the first half of 1917."

The learned trial Judge treated the position taken by the appellant as being that, unless the respondent would formally abandon its contention with regard to the earlier contract, no deliveries would be made under the later one.

I am unable to say that, in so treating it, the learned trial Judge erred; and, so treating it, the respondent was entitled to rescind and to sue for damages in respect of the breach of the contract.

But, if that is not the right view of the position taken by the appellant—and what it really was, was that it would make no deliveries under the later contract until the dispute as to the earlier one was settled—I am of opinion that that was such a repudiation of the appellant's obligation under the later contract as warranted the respondent in rescinding.

The question of what is a repudiation was discussed by McCardie, J., in the recent case of *In re Rubel Bronze and Metal Co. Limited and Vos*, [1918] 1 K.B. 315. He there says (p. 322):—

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"In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and on the general circumstances of the case."

What, then, was the effect of the position taken by the appellant? It was bound by its contract of the 25th September, 1916, to deliver the iron it had contracted to sell to the respondent; there was no question as to its liability under the contract, and it definitely and deliberately refused to perform its undeniable obligation until the dispute as to its liability under the earlier contract was settled. Settled how? If not, as the trial Judge thought, by the formal abandonment by the respondent of its claims under it, then by litigation which might drag along for many months. Surely the taking of such a position is in substance and in effect such a repudiation of the contract as entitled the respondent to rescind.

The reasoning which led the House of Lords to its conclusion in *Metropolitan Water Board* v. *Dick Kerr and Co. Limited*, [1918] A.C. 119, is applicable. In that case a contract had been entered into for the construction of a reservoir for the Water Board, to be completed within 6 years. The contract provided, in very general terms, that if, by difficulties, impediments, or obstructions, the contractors, in the opinion of the engineer, should be unduly delayed or impeded in the prosecution of the work, the engineer might extend the time for the completion of the works. The Minister of Munitions, while the works were in progress, in exercise of the powers conferred by the Defence of the Realm Act and Regulations, required the contractors to cease work on their contract, and they ceased work accordingly. The contractors contended that the effect of this was to put an end to the contract, and the Water Board that it was only a case for an extension under the terms of the contract of the time for the completion of the works. The contention of the contractors prevailed, and it was pointed out (p. 127) that the result of giving effect to the Water Board's contention would be "not to maintain the original contract, but to substitute a different contract for it."

Reference may also be made to the observations of the Law Lords as to the unfairness of holding the contractors to the per-

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formance of their contract for an indefinite period, and the reasons why it would be unfair.

The application I would make of that case and the reasoning in it, is that what the appellant proposes is to substitute for its obligation under the contract an entirely different obligation, and one which would enable the appellant to delay for an indefinite period the delivery of the iron, all of which it had contracted to deliver before the 30th June, 1917.

I have no hesitation in coming to the conclusion that the position taken by the appellant was, in the circumstances, such a repudiation of its obligation as to warrant the respondent in rescinding.

There remains to be considered the question of damages. It is contended that the respondent could have obtained and did in some cases obtain other iron similar to or as good as that which the appellant should have supplied at a price of $5 less than that which the trial Judge treated as the market price. The view of the learned trial Judge was that he could not find on the evidence that the iron which the respondent could have bought upon the market at $34 was equivalent in all respects to Hamilton pig-iron at $39, which was the market price of that iron.

I see no reason to differ from the learned Judge as to this; and I am inclined to think that, as what the appellant had agreed to sell was Hamilton pig-iron, and the market price of it was $39, the respondent was entitled to recover the difference between that price and the selling price, even if other iron which would answer the same purpose could be bought at $34.

Upon the whole, I am of opinion that the appeal should be dismissed with costs. *Appeal dismissed.*

Re TUPPER.

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Nova Scotia Supreme Court, Harris, C.J., Russell, Longley, and Drysdale, JJ. and Ritchie, E.J. December 14. 1918.

INCOMPETENT PERSONS (§ VI—31)—AGED PERSON—UNABLE TO CARE FOR HIMSELF—DEEMED INSANE—APPOINTMENT OF GUARDIAN UNDER LUNACY ACT.

A person who by reason of mental impairment due to old age is unable to take care of himself or his property, is an insane person within the meaning of s. 2 of the Lunacy Act (R.S.N.S. 1900, c. 125).

Statement.

APPEAL from the judgment of Mellish, J., appointing a guardian of the person and estate of an aged person, under the provisions of

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the Custody and Estates of Lunatics Act, R.S.N.S. 1900, c. 125. Affirmed.

Alfred Whitman, K.C., in support of appeal.

J. M. Davison, K.C., and *L. A. Forsyth*, *contra*.

HARRIS, C.J.:—Upon an application for the appointment of a guardian for Mrs. Jerusha Tupper, a lady of the age of 82 or 83 years, Mellish, J., found that, by reason of mental impairment, she was unable to take care of herself or her property; that her impaired mental condition was apparently not caused by mental disease but by old age; and he made an order appointing a guardian, holding that c. 125 of the R.S.N.S., s. 2, applied.

The facts as found by him are questioned on this appeal, but they are amply supported by the evidence.

S. 2 of c. 125 reads as follows:—

> The relatives or friends of any insane person or the overseers of the poor of the poor district of which he is an inhabitant, may apply by petition to the Supreme Court or a judge thereof to have a guardian appointed for him. Notice of such application shall be given to such insane person if at large, or if he is under restraint to those having charge of him, of the time and place appointed for hearing such application, not less than 14 days before the time so appointed; and, if after a full hearing it appears to the court or judge that the person in question is incapable of taking care of himself, such court or judge shall appoint a guardian of his person and estate with the powers and duties hereinafter specified. Every guardian so appointed shall have the care and custody of such insane person and the management of his estate until legally discharged.

The contention of Mr. Whitman is that a guardian cannot be appointed in any case unless the person is both a lunatic and incapable of taking care of himself. His argument is that insane person means lunatic in this statute because of the heading of the chapter: "Of the custody and estates of lunatics."

This statute has existed in Nova Scotia in exactly the same words since 1851, and, so far as I am aware, this is the first time any such startling contention has been made and in the interval many—perhaps hundreds of—orders must have been made for the appointment of guardians where the person was not a lunatic but was simply found incapable of taking care of himself by reason of old age or other infirmity.

It is obvious that a construction such as is contended for is not one which should be adopted unless it is the plain and obvious meaning of the legislature.

In the first place, I find that the Act itself deals in the first

14 sections with the appointment of guardians of insane persons and in s. 15 and following sections deals with the custody of lunatics and the word used in these later sections is "lunatics" and not "insane persons"—the words used in the first 14 sections. This, no doubt, explains the heading or title of the chapter and robs it of any significance.

If one reads s. 2, even without any knowledge of the history of the subject, I do not see how it is possible to construe it otherwise than as I understand it has always been construed; that is, as meaning that if a person is alleged to be insane an inquiry is held by the judge, and if it is found by him that the person in question is incapable of taking care of himself he is to be deemed insane within the meaning of the statute, and a guardian is appointed. In other words, the legislature has given a definition of what is to be considered as bringing a case within the meaning of the words "insane person." That is the plain and obvious meaning and the one which I adopt. That is what I should have held quite apart from the history of the subject, but when that is considered the meaning is made if possible still more obvious. Under an old statute of 17 Edw. II., the words used in the Act were "lunatic" and "idiot," and Lord Hardwicke disclaimed any jurisdiction over the case of mere weakness of mind. By the time of Lord Eldon the subject was better understood and it had been found that a person who was neither a lunatic nor an idiot, but who had become mentally disabled by sickness, accident or old age, was just as fit and proper a subject for guardianship and protection as if he came within the definition of the terms "lunatic" or "idiot." We find Lord Eldon, in *Gibson* v. *Jeyes* (1801), 6 Ves. Jr. 266, at 273, 31 E.R. 1044, saying:—

> It must be remembered it is not necessary to establish lunacy, but it is sufficient that the party is incapable of managing his own affairs.

And again, in *Ridgeway* v. *Darwin* (1802), 8 Ves. Jr. 65, 32 E.R. 275, the same learned Chancellor says:—

> I have reason to believe the court did not in Lord Hardwicke's time grant a commission of lunacy in cases in which it has been since granted. Of late, the question has not been whether the party is absolutely insane, but the court has thought itself authorized (though certainly many difficult and delicate cases with regard to the liberty of the subject occur upon that) to issue the commission provided it is made out that the party is unable to act with any proper and provident management; liable to be robbed by any one; under that imbecility of mind not strictly insanity, but as to the mischief calling for as much protection as actual insanity.

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In 1806 Lord Chancellor Erskine held a finding that a person was "of unsound mind so that he is not sufficient for the government of himself, his manors, etc.," to be sufficient. (See *Ex parte Cranmer*, 12 Ves. Jr. 444, at p. 455, 33 E.R. 168.)

Chancellor Kent, in 1866, *In the matter of James Barker*, 2 Johns Chancery 232, after reviewing many of the English authorities, says, at page 236:—

> I am satisfied that these later decisions are not only founded in good sense and the necessity of the case, but are a sound exposition of the common law which gave to the King as *parens patriæ* the care and custody of all persons who had lost their intellects and become *non compos* or incompetent to take care of themselves. . . . All the cases agree that the statute of 17 Edw. II., committing to the King the care of the persons and estates of idiots and lunatics, was not introductory of a new right, but only went to regulate a right pre-existing in the Crown. I should feel that I had but very imperfectly discharged my trust if I was the means of crippling the jurisdiction of this court by confining it to the strict common law writ of lunacy. A numerous class of persons whose minds have sunk under the power of disease or the weight of age would in that case be left without protection and liable to become the victims of folly or fraud. This would be a blemish in the jurisprudence of the country. I shall therefore award a commission in the nature of a writ of lunacy to enquire whether James Barker be of unsound mind or mentally incapable of managing his affairs.

It will be seen that the interpretation put upon the old English statute by Lord Eldon had become well settled and that it had the support of Kent, C., in New York, and we later find it adopted in most of the State courts in the United States.

Both Lord Eldon and Lord Erskine, while recommending a change in the wording of the statute, so construed the Act to meet the conditions which arose. The statutes were subsequently changed in England to make the matter perfectly clear and when our legislature came to deal with the subject the words of the old English statutes "lunacy" and "idiot" were omitted and the words "insane person" adopted, and then, to make the matter plain and beyond question, the legislature proceeded to say that if the judge found a person incapable of taking care of himself he was to be deemed within the rule entitling him to have a guardian appointed.

Etymologically, the word "insanity" signifies unsoundness, and in *Johnson* v. *Maine and New Brunswick Ins. Co.* (1891), 83 Me. 182, Emery, J., at p. 186, said:—

> In law, every mind is sound that can reason and will intelligently in the particular transaction being considered; and every mind is unsound or insane

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that can not so reason or will. The law investigates no further, whether this last-named mental condition be congenital or the result of arrested mental development or of religious excitement, or of physical disease or of dissipation, or of old age, or of unknown causes; whether it be casual, temporary or permanent; whether it be personal or hereditary; whether it be manifested in the mildest dementia or the wildest mania, it is expressed in law by the same word "insanity." When this word occurs unexplained or unlimited in any statute, contract or other legal literature it signifies any derangement of the mind that deprives it of the power to reason or will intelligently.

Here, if the legislature had not introduced the provisions regarding the enquiry to be held I should have felt bound, in view of the history of the legislation, to construe the statute as covering this case, but, to my mind, the legislature has settled the question beyond doubt by expressly providing for an enquiry by the judge upon the question as to the capacity of the person to take care of himself and by providing that, if he is found incapable of taking care of himself, a guardian shall be appointed.

I am absolutely unable to see any doubt whatever as to the meaning of the statute.

The appeal should be dismissed with costs.

Longley, J. Drysdale, J.

LONGLEY and DRYSDALE, JJ., agreed with Harris, C.J.

Ritchie, E.J.

RITCHIE, E.J.:—In deciding this case I do not think I am called on to go further than our own statute. In my opinion, under s. 2 of c. 125 of R.S.N.S., an insane person within the meaning of the statute is a person incapable of taking care of himself. That section provides that:—

> If, after a full hearing, it appears to the court or a judge that the person in question is incapable of taking care of himself, such court or a judge shall appoint a guardian of his person and estate with the powers and duties hereinafter specified.

The judge at chambers has had a full hearing before him and he has found, upon amply sufficient evidence, that Mrs. Tupper is incapable of taking care of herself. This finding on the facts being correct, Mrs. Tupper is brought within the express terms of the statute; therefore, her appeal should be dismissed with costs.

Appeal dismissed.

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SEATTLE CONSTRUCTION Co. v. GRANT SMITH.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips and Eberts, JJ.A. November 5, 1918.

INSURANCE (§ VI C—357)—DRY DOCK—LEASE OF—COVENANT TO INSURE—INSURANCE NOT OBTAINED BECAUSE OF METHOD OF USER—DESTRUCTION—MEASURE OF COMPENSATION.

By the terms of lease of a dry dock the lessee agreed to use it in its construction work on caissons and other similar work; and also to have it insured for the benefit of the lessor in some company or companies satisfactory to the lessor, against both marine and fire risks and to deliver it in good condition at the end of the term.

The dry dock was used in connection with the construction of a breakwater and ocean pier, and such use was largely one of experiment, and owing to the method of user no insurance could be obtained although its seaworthiness was demonstrated by its weathering a gale while being taken to the place where it was to be used. The dock, during the work, collapsed and became a total wreck. The court held that the proper construction to be placed upon the covenant to insure was that it was a covenant to indemnify against loss with the medium of an insurance against loss as a security, and whatever the amount of insurance agreed on, the lessee was only liable for actual loss.

Statement.

APPEAL by defendant from judgment of Clement, J.

Reversed in part; damages reduced to $34,500.

S. S. Taylor, K.C., and *Ernest Miller*, for appellant; *E. P. Davis*, K.C., and *Douglas Armour*, for respondent.

Macdonald C.J.A.

MACDONALD, C.J.A.:—I concur in the judgment of Galliher, J. A.

Martin, J.A.

MARTIN, J. A. allowed the appeal in part.

Galliher, J.A.

GALLIHER, J. A.:—After a complete review of the evidence and eliminating the evidence of Rogers (which I think I must in view of what has been stated by the trial judge), I am unable to find fraud. I wish to add, however, that there must have been something apparent to the trial judge who saw Rogers and heard his testimony other than what one gathers by reading it, which led to his being "entirely discredited."

The evidence to establish fraud should be clear and convincing and I cannot say that this is so.

What I think must be deduced from the evidence is that, apart from the survey reports upon the dry dock by Logan, Gibbs, Fowler and Walker, and the report by the dockmaster Hollywood, and the plan prepared by Jaynes when it was proposed to change from steam to electricity in operating, Paterson's knowledge of the structure must be taken to be that of one who had from time to time seen the dock in operation and who knew in a general way of the nature of the work being performed by it and the ships

that were being handled thereon and their approximate tonnage, but who had made no inspection of the structure and was not in a position apart from what I have stated to more than, in a general way, express his opinion as to its fitness.

It is complained of that, at the time the lease was entered into, Paterson did not disclose the nature of the reports I have above referred to to Bassett, who was acting for the defendants in the negotiations.

Speaking of Logan's report, and that of Fowler, Gibbs, and Walker, I do not think the production of those reports would have influenced Bassett against the entering into the lease on behalf of his company, perhaps the contrary, and as to the report of Hollywood, its significance is in the fact that the dock when it broke away from its moorings just previous to its being taken over to the plaintiffs' quarters from the Heffernan works, was badly strained and leaking, and were it not for the fact that in my view of the evidence the damage suffered in the accident by straining (and taking into consideration the false bottom that was put in by Bassett himself and which remained intact after the sinking), was not the cause of the dock sinking, more stress might be laid upon the non-disclosure of that fact than we would be warranted under the circumstances in doing.

It is true that in the survey reports, the dock was ordered into dry dock for the purpose of ascertaining the extent of the damages and for overhauling and repairing and in this connection Mr. Taylor made the contention that Paterson never really intended that it should go into dry dock.

I think that contention is not for a moment maintainable when one reads the correspondence which passed between Paterson, the commandant of the navy yard, and the defendants, and if Paterson's efforts to have the dock dry docked were genuine, there could be no sinister object in his withholding the Hollywood report, as in the dry dock the defendants would have an opportunity of examining and ascertaining the exact nature of the damage suffered (and were to be informed and were from time to time kept in touch with the efforts made to dry dock the structure).

After repeated postponements, it became apparent that the dock could not be handled by the naval authorities for some considerable time, and Paterson suggested that if the defendants

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could not wait that by making repairs such as Bassett afterwards did, the dock could be operated safely in his opinion for 2 years.

In his evidence, Paterson says that was his honest opinion then, and still is.

I do not regard this as a warranty, but as an opinion based on his general knowledge of the dry dock before referred to by me, moreover, the lease is in writing and contains no warranty and this is merely a subsequent verbal statement.

This is not that clear class of evidence upon which fraud or misrepresentation can be based, or the withholding of facts can be said to be material, especially in the light of the subsequent events which happened.

I think when it was found that the structure could not be dry-docked Paterson honestly believed that with the repairs suggested the dock would be found capable of handling the work for which it was required, and so gave his opinion.

It is, I think, also worthy of note that Bassett did not, at any time after the wreck, and up till action brought, and after he had acquired knowledge of the breaking adrift in Seattle, lay any claim to that in any way bringing about the accident in sinking, although he had in the meantime had an examination made of the wreck.

Such being my view, I think we may now come to the covenant to insure contained in the lease, and with regard to that it is objected that it is not a marine risk.

I am inclined to the view that this is not in the strict sense in its entirety a marine risk (although I have not fully considered and do not decide the point, not thinking it necessary).

While the parties call it in the lease a marine risk, it is abundantly clear that their minds met as to the nature of the risk that would be incurred and would be insured against, viz: the risk incurred in erecting the caissons upon the dock and lowering the dock so as to float those caissons off, coupled with other risks incidental to a marine risk such as the action of wind and waves.

That is what the parties were dealing with, and if they chose to call that a marine risk, that is a form of words only.

Now as to how that would affect the insurance companies, it is equally clear that the applications to them were understood by them to be for a risk such as I have before described, and there

is no suggestion throughout that it would be refused on account of the nature of the work, and apparently all the agents desired to be assured of was that the dock was capable of performing the functions which they knew it was intended to perform.

The defendants covenanted to insure the dry dock and I am unable to find that they could not have obtained that insurance.

That they made honest efforts to obtain same is beyond dispute, but up to the time of the wreck although negotiations were still pending they had been unable to do so due chiefly to the attitude of Logan, I think, who, to use his own expression, "threw the monkey wrench into the machinery," upon a view, which I must say in the light of the expert evidence, was based upon wrong premises.

I am inclined to think, however, that whether it was impossible or not to secure this insurance, that feature does not really enter into the question so as to be of moment.

When one looks at the covenant to insure which is as follows:—

> The lessee agrees to have said dry dock insured for the benefit of said lessor in some company or companies satisfactory to the lessor, in the sum of not less than seventy-five thousand ($75,000) dollars, against both marine and fire risks, and to pay the premiums on such insurance and keep the same in full force during the term of this lease or of any extension thereof.

I think the proper construction to be placed thereon is that it was a covenant to indemnify against loss with the medium of an insurance against loss as security; and if this view be a correct one, then it is not a question of a valued policy (whatever effect that might have) but of indemnity for actual loss.

This brings us to a consideration of the value of the dry dock itself.

The appraisers in stock-taking valued it at $34,500, and while I quite admit that in such circumstances depreciations are allowed for and the real value might be more than that fixed in this case, we have much other evidence on the point.

Paterson himself swears in his sworn statement for Customs purposes that the value is $34,500, and his attempted explanation of that, to say the least, is far from convincing.

Upon the evidence, I doubt very much if the dock was worth this figure. It was a dock some 23 years old, and was, before the improvements made upon it by Bassett as to its bottom, in a partially rotten and leaky condition.

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I certainly would not go beyond the valuation placed upon it by Paterson himself, and had the evidence not been so contradictory on the point of value, I should be inclined to value it at considerably less.

Paterson cannot complain if he recovers his own valuation. I agree with the trial judge as to the amounts of rents allowed for.

The appeal should be allowed with costs, and the judgment below reduced by $40,500.

McPhillips, J.A.

McPHILLIPS, J.A.:—This appeal was argued at great length and the evidence is certainly most voluminous—yet I do not view the case as one that is at all complicated or intricate when viewed, as I venture to think it should be viewed. The action has reference to the hire of a chattel, the instrument shewing the contract of hiring being in the form of a lease and was in the following terms:—

This indenture of lease entered into the 20th day of May, 1914, by and between Seattle Construction and Dry Dock Co., a corporation of Seattle, Washington, hereinafter called the lessor, party of the first part, and Grant Smith & Co. & McDonnell, a partnership, party of the second part, hereinafter called the lessees.

Witnesseth:—That the lessor does hereby lease to the lessee that certain dry dock of the lessor known as dry dock No. 4, for a term of two (2) years, beginning with the date hereof, at and for a rental of $15,000 per annum, payable monthly in advance by the lessee to the lessor, and upon the terms and conditions hereinafter stated:

1. The lessee agrees to pay to the lessor the rental herein reserved, at the rate of $1,250, upon the first day of each and every month during said term, or any extension thereof.

2. The lessee will take a delivery of said dry dock at the plant of said lessor in Seattle, Wash., and for the purpose of this lease, the seaworthiness of said dry dock, and its fitness for the work contemplated by said lessee are hereby admitted by the lessee.

3. The lessee agrees to have said dry dock insured for the benefit of said lessor in some company or companies satisfactory to the lessor, in the sum of not less than $75,000, against both marine and fire risks, and to pay the premiums on such insurance and keep the same in full force during the term of this lease or of any extension thereof.

4. Said dry dock shall be used by the lessee in its construction work on caissons and other similar work, at or near Victoria, B.C. Said dry dock shall not be used by said lessee, nor shall such use be permitted by it, in dry docking for ship repair work or other similar work in competition to the business of the lessor or other companies engaged in similar business.

5. The term of this lease may be extended at the option of the lessee, for an additional period of not exceeding 12 months from the expiration of said original term, provided said lessee shall have kept and fully performed all of the terms and covenants of this lease during said original term, and shall have

given the lessor not less than 60 days' written notice of its desire to extend said lease for said additional period. In the event of such extension, the rental hereby reserved and all other terms and conditions of this lease, except the obligation to grant an extension, shall apply and be in full force during the term of such extension.

6. The lessee further covenants to re-deliver said dry dock to said lessor at its plant in Seattle, Wash., upon the termination of this lease, in as good condition as the same was in at the time of its delivery to said lessee hereunder, except for natural wear and tear.

7. In the event said lessee makes default in the payment of said rent, or any part thereof, as the same becomes due and payable under the terms hereof, or makes default in any of the other covenants or obligations of the lessee hereunder, then said lessor shall have the right to retake possession of said dry dock and terminate this lease, but without prejudice to its right to recover from said lessee rentals for the entire term, and all damages sustained by the lessor by such breach or breaches of the covenants of the lessee herein.

In witness whereof the parties hereto have caused this instrument to be executed by their proper officers, in duplicate, on the day and date hereinbefore written.

The dry dock was not a registered ship. The dry dock as the lease shews was not to be used "in dry docking for ship repair work etc." (see clause 4 of lease). The appellant leased the dry dock for use in carrying on certain contract work with the Government of Canada—in the outer harbour of the City of Victoria—in connection with large improvements there being carried out by the Government of Canada—consisting of a breakwater and a series of ocean piers, the immediate work to be done and with which work the dry dock was to be used was "construction work on caissons" (see clause 4). It will, therefore, be seen that the usual and customary work for which the dry dock was constructed was departed from, and the evidence shews that the proposed use to which the dry dock was to be put was a scheme of use worked out by Bassett, the manager for the appellant in the construction of the piers. It was, it would appear, a novel scheme, and one of Bassett's own devising. In his evidence upon this point we find him saying, in answer to questions put to him by counsel for the respondent, as follows:—

Q. Whose scheme was it to build these pontoons, or casings or cribs, whatever you call them, on the dry docks? A. It was mine. Q. Had you had any experience of that before? A. No, sir, these cribs, I think this is the first ones that were ever built—pioneer. Q. Whose scheme was it to build these pontoons or caissons or cribs, or whatever you call them, in the dry dock? A. It was mine. Q. Had you had any experience of that before? A. No, sir; these cribs, I think it is the first ones that were ever built—pioneer.

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Therefore, it is at once apparent that the use to which the dry dock was to be put was not the normal or customary work for which it was constructed and used, and it would be, unquestionably, largely one of experiment. It is true that the respondent knew generally, but only generally—not specifically—the use to which the dry dock was to be put, *i.e.*, the respondent was unaware of the specific manner of use. The dry dock was brought from Seattle to Esquimalt Harbour, and through a gale, a voyage of some 80 miles up Puget Sound into the Straits and into the Royal Roads, and from there into Esquimalt Harbour. In transit, it was insured against marine risk, but no insurance was ever placed in compliance with clause 3 of the lease, either marine or fire insurance. The evidence shews, I think conclusively, that no insurance could be obtained owing to the method of user of the dry dock. Captain Logan, a salvage association surveyor, and Lloyd's representative for the entire Pacific Coast (London Salvage Association), a gentleman of undoubted standing and high professional knowledge and experience, having made an adverse report, it was impossible to effect the insurance. The respondent became aware of this, and it was tentatively suggested by the respondent that a bond be procured instead, but it was never procured. It will be seen that delivery of the dry dock was to be taken at Seattle, and "for the purpose" of the lease (see clause 2). The "seaworthiness" of the dry dock, and "its fitness for the work contemplated" by the appellant was "admitted" by the appellant. This fitness must, in an especial manner, be said to be more in the knowledge of the appellant than it could be in the respondent unacquainted as it would be with the detail of the manner of use. The "seaworthiness" was demonstrated in the "dry dock" weathering the gale, and its arrival, in apparent good order, at Esquimalt Harbour. The dry dock was known to be not a new or modern dry dock, it was in fact 25 years old, and had for years been used successfully in the docking of ships. The appellant did a certain amount of work on the dry dock, *replanked* it, and there was overhead construction placed on it with a travelling crane; in fact, it is in evidence that a very considerable weight was put on the dry dock which would, reasonably, affect its stability, and submit it to a great strain, different from that use for which it was originally constructed. The caissons were built upon the

dock and were completed some 2 weeks before the accident took place, and considerable leakage took place. Yet it cannot be gainsaid that there is evidence which goes to shew that the manner of use of the dock could not be said to be negligent, still it was a novel use, and its effect could not be said to be other than problematical, nor can it be said to be a matter of wonderment that the dry dock, put to such different use to what it was originally constructed for, that that happened which did happen, namely, the dry dock, in the end, listed to port, and collapsed and became a total loss, breaking up to such an extent that, apparently, it was out of the question to attempt salvage. The appellant laid fraud in the case, and evidence was led to support this, but it was not found by the trial judge, and I entirely agree with the judge. The attempted case of fraud was built upon many points of evidence. It was said that the respondent knew through its officers that the dry dock was not well and sufficiently constructed, that the plans shewed this, that this was unknown to the appellant. Yet we have inspection and work done on the dry dock by the appellant, its standing a gale and apparently delivered in good order. Further, it had done its work for long years, but necessarily, the years of user must have had the natural effect, also being subject in these waters to the toredo. It cannot be said that the samples exhibited in court, though taken from out of the water long after the accident, could be said to be authentic evidence of its condition at the time of the accident, it cannot be said, upon the evidence, in my opinion, that the proximate cause of the accident was because of any defect or withheld information as to the known condition of the dry dock, present to the minds of officers of the respondent. Rather, in my opinion, the accident was due to the unusual use to which the dry dock was subjected, and the undue strain put upon it, strain not in navigation, but in the peculiar manner of use. Some stress was laid upon the fact that the dry dock had been subjected to some strain before it was leased to the appellant, a fact not made known to the appellant, and that it had been ordered into dry dock by the underwriters then holding the marine risk thereon, but owing to difficulties, in getting docking facilities, this was never done. Viewing all the evidence upon this point, I cannot see that it has any

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relevancy in the way I look at the whole case; seaworthiness and fitness for the work was admitted, and this, in the absence of fraud, is, in my opinion, conclusive. The dry dock established "seaworthiness" after its delivery to the appellant, and its fitness for the work, as well as the seaworthiness, were risks the appellant took, and contracted themselves out of any right of action in respect thereof.

The trial judge entered judgment for the respondent upon the failure to place the insurance covenanted to be placed in pursuance of clause 3 of the lease, viz: "$75,000, against both marine and fire risks." I am of the opinion that the loss of the dry dock was not a loss which could be characterized as a "marine risk" (of course "fire risk" does not enter into the question), and, therefore, the proximate cause of the loss not being a marine risk, there could not be damages for this default. As to what constitutes a marine risk, there has been much variance of authority, but the point can be said to be now fairly well settled, as the following cases shew:—*The "Xantho"* (1887), 12 App. Cas. 503, at p. 509; *Sassoon* v. *Western Ass'ce Co.*, [1912] A.C. 561; *Koebel* v. *Saunders* (1864), 17 C.B. (N.S.) 71, 144 E.R. 29; *Greenshields* v. *Stephens*, [1908] A.C. 431, at 435; *Hamilton* v. *Pandorf* (1887), 12 App. Cas. 518; *Thames & Mersey Mar. Ins. Co.* v. *Hamilton* (1887), 12 App. Cas. 484; and see *Creedon* v. *North China Ins. Co.* (1917), 36 D.L.R. 359, at pp. 360 to 366, 24 B.C.R. 335, where my brother Martin and myself collected and discussed the cases.

It is a matter for remark that the appellant, failing in getting insurance, it was then, if at all, that it might have been open for the appellant to have taken the stand and to have elected to rescind the lease, upon the ground that it had been imposed upon and induced to enter into the lease by fraud, *i.e.*, that the failure to place insurance was because of unseaworthiness and unfitness for the work, to which the dry dock was being put but this course was not adopted, and it is too late now to ask for rescission—*Glasgow & S. W. R. Co.* v. *Boyd*, [1915] A.C. 526. With impossibility to place the insurance, that in my opinion, would not relieve the appellant from liability, if the loss was a loss that the insurance would, if placed, have covered. This point of law has been much canvassed of late, following upon the principle

laid down in the well-known case of *Taylor* v. *Caldwell* (1863), 3 B & S. 826, 122 E.R. 309. I would content myself in referring only to the very recent case of *Blackburn Bobbin Co.* v. *Allen*, [1918] 1 K.B. 540; and I am clear—upon it—that if it was pertinent to the present case, and the loss could be said to be one that would have been covered by the requirement for insurance as contained in the lease, then the appellant would have been liable for its failure to place the insurance and could not be excused upon the ground of impossibility.

The reports which are in evidence as to the condition of the dry dock have not been displaced, in my opinion, and the reports were made by men of capacity and long experience, and there is no warrant for the contention that the statements were not honestly believed in. The dry dock was not built by nor for the respondent, but was built for other well-known people who had successful experience with it, and there was nothing to lead to the belief that there was as alleged on the part of the appellant any "inherent vice" in construction.

I therefore arrive at the conclusion, with great respect, that the trial judge erred in entering judgment for the respondent upon the ground that because of the failure to place the insurance, the respondent was entitled to judgment for damages to the extent of the insurance covenanted to be placed, viz: $75,000, in that the loss would not have been within the category of a marine risk if placed, and no recovery could have been had under a policy insuring against marine risk. But I am of the opinion that there is a good cause of action established upon the evidence, as adduced at the trial, and within the statement of claim for the total loss of the dry dock and the inability upon the part of the appellant to return the dry dock in pursuance of the terms of the lease. As to the rent, it cannot be allowed for a longer period than up to the time of the commencement of action, the respondent then electing to have the damages assessed as of that date (the action was brought before the expiry of the devise). Two cases in Ontario treat of the principle of law applicable to the present case and may be usefully referred to—*Reynolds* v. *Roxburgh* (1886), 10 O. R. 649; and *Grant* v. *Armour* (1894), 25 O.R. 7. The head note of the latter case reads as follows:—

Where there is a positive contract to do a thing not in itself unlawful, the

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contractor must perform it or pay damages for non-performance, although, in consequence of unforeseen causes, the performance has become unexpectedly burdensome or even impossible.

The defendants hired the plaintiff's scow and pile driver at a named price per day, they to be responsible for damage thereto, except to the engine, and ordinary wear and tear, until returned to the plaintiff. While in the defendants' custody, by reason of a storm of unusual force, the scow and pile driver were driven from their moorings and damaged:—

Held, that the defendants were liable for the damages thus sustained and for the rent during the period of repair. *Taylor* v. *Caldwell*, 3 B. & S. 826, 122 E.R. 309, followed; *Harvey* v. *Murray* (1884), 136 Mass. 377 approved.

Even were the action maintainable upon the ground that the breach was the failure to place the insurance, the damages could have only been, apart from the rent, the value of the dry dock, now a total loss. There was no contract for a valued policy, and the value, upon all the facts and surrounding circumstances, in my opinion, could not, reasonably, upon the evidence as adduced at the trial, be placed higher than the value sworn to by Mr. Paterson, the president of the Seattle Construction and Dry Dock Co., the respondent, and that was $34,500 (see *Carreras* v. *Cunard*, [1918] 1 K.B., 118, and note that that case was a case of "the value shewn in the Customs entries"), to that amount would be added the rent as allowed by the trial judge. Fry, L.J. in *Joyner* v. *Weeks*, [1891] 2 Q.B. 31, at p. 48:—

> As a general rule I conceive that, where a cause of action exists, the damages must be estimated with regard to the time when the cause of action comes into existence.

I would, therefore, allow the appeal to the extent indicated. It follows that the appellant would recover nothing upon the counterclaim. *Judgment varied.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. December 11, 1918.

ESTOPPEL (§ III E—70)—APPARENT AUTHORITY TO AGENT—AGREEMENT BETWEEN AGENT AND DEBTOR—RATIFICATION BY CONDUCT.

Where an agent of a company has apparently been given authority by the company to make a settlement with a debtor, and agrees with the debtor to take a part of the debtor's goods in full settlement of the debt, the goods being shipped to the company's office and retained for a long period under circumstances which justified the debtor in believing that the agreement had been accepted by the company, the company is estopped on the ground of ratification or adoption from denying such agent's authority or the agreement.

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APPEAL by defendant company from a judgment of Simmons, J. Affirmed.

A. L. Smith, for appellant; *G. H. Ross*, K.C., for respondent.

HARVEY, C.J.:—I agree in the main with the views expressed by my brother Beck, but I think that perhaps the verdict can be sustained without reference to the principle of estoppel.

Harvey, C.J

Davis swore that a certain agreement was made with Folden, who, he supposed, had the defendant's authority to bind the defendant. Roe, defendant's manager, swore that Folden had no such authority. The jury may have declined to believe Roe and, if there was any evidence from which it could be inferred that Folden had such authority, the jury would be entitled to so find.

There is no doubt that some arrangement was made with Folden, for he took the goods back and the defendant accepted and kept them. If the arrangement was as Roe says that credit was to be given for them at a valuation to be placed on them by the company, the jury might reasonably suppose that when such valuation was made Davis or McKay Bros., or both, would be notified, and that the failure to do this for the long period of time which elapsed was sufficient ground for inferring not merely that the agreement was not as Roe states he considered it, but that the defendant did not, in fact, so consider it, and that he knew, in fact, that the goods were taken in satisfaction of the purchase-price which would be consistent with either the theory that Folden had authority or the theory that his act was ratified.

We have not to consider what view we would take on the evidence before us, but merely what view the jury would be entitled to take on the evidence as presented at the trial, and I am of opinion, as I have indicated, that reasonable men might have inferred from the evidence that the agreement Davis swears to was made with Folden, and that either the latter had authority, or his act was ratified.

It would be unimportant which would be the fact, and it would be unnecessary for the jury to decide as between the two.

I would therefore dismiss the appeal with costs.

STUART, J., concurred with Beck, J.

Stuart, J.

BECK, J.:—This is an appeal by the defendant company from the judgment of Simmons, J., upon the verdict of a jury.

Beck, J

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The plaintiff and his brother had been carrying on an implement business together in partnership under the name of McKay Brothers, at Crossfield. In March, 1911, they bought from the defendant company a quantity of farm implements under the usual conditional agreement whereby, amongst other things, the property in the goods remained in the company. In May, 1911, McKay Brothers sold out to one Davis. It was the arrangement between Davis and McKay Brothers that the former should assume the latter's liability to the company, and to others to whom they were indebted for goods.

McKay Brothers notified the company of their intention to make the sale, and a man named Wolff came as the company's representative and took part in closing the arrangement. In the result, McKay Brothers signed notes in favour of the defendant company for the amount they owed, about $1,000, and Davis signed notes for the same sum, which were handed over to the company. So that for the indebtedness of McKay Brothers, the company held their "lien" on the goods and the notes both of McKay Brothers and of Davis.

In May, 1912, the company sued McKay Brothers, who defended the action and who brought in Davis as a third party. The company obtained judgment against McKay Brothers and McKay Brothers against Davis for $1,031.11.

In July, 1912, the company obtained judgment against Davis in respect of goods sold to him directly for $103. Executions were apparently issued on these several judgments. In May, 1913, the defendant company took steps to enforce its execution for $103 against Davis. The sheriff's bailiff seems to have had some difficulty in making a seizure. In consequence of this, another bailiff was nominated and he was accompanied by one Folden. Folden was a collector, an office employee of the defendant company at Calgary. One Roe was the manager of the defendant company at Calgary. One Gorlan was collection manager at Calgary under Roe as manager. Folden was sent by Gorlan. The purpose for which Folden was sent was, the defendant company claims, only to assist the bailiff in picking out from the variety of farm implements in Davis' possession those which really belonged to him. There is, however, no evidence as to what instructions were given him. Folden himself was not called;

neither was Gorlan his immediate superior, who appears to have sent him. Roe only says that he would likely know of his being sent and that he did not give him authority to make the arrangements which Davis says Folden made with him. Roe says he himself would not have authority, but only the head office at Winnipeg to convey such authority; a proposition which, so far as regards third parties, I should be ready to deny, especially in view of the provisions of the Companies Act regarding officers and officials. In the result, however, it appears that no seizure under the execution was made, but that an arrangement was made between Folden, acting in the name, and ostensibly on behalf of the company and Davis. It is here that there arises a most material question of fact. Davis' account of what took place is as follows—I quote his evidence omitting the question and making the necessary verbal changes:—"Folden came to Crossfield and said he had been sent up there to represent the Tudhope Anderson Co. to get a settlement out of me for these goods and if he could not make a settlement with me the bailiff, I believe he said, was in town and he had instructions to have the bailiff seize the goods and so he (Folden) agreed to take all the goods back at invoice prices provided I would turn enough of the other stuff of my own goods back, that is goods that I had already paid for, to clear the balance on the bill against McKay and myself, and another bill of my own—about $103. So I told them that would be satisfactory with me and so he went and saw the bailiff and told him we had come to an agreement and he loaded up the goods, the Tudhope Anderson goods, and he took a quantity of oil and some plough packers and different articles so that he was satisfied the account was paid in full—that is, the Tudhope Anderson account against McKay Brothers and myself and my own personal account. The former account was about $1,000, the latter $103." Then speaking of particular goods taken he said:—"There was quite a lot of repairs for these ploughs (seven). We figured up at the time what they would come to. The pulverizers or packers, the gang ploughs and sulkies were in good condition. The iron work of the pulverizers was outside, but all the woodwork was under cover—inside. The gang ploughs were both inside, one not set up, the other set up, all in good condition. The pulverizers were salable in dry seasons, but not in wet seasons."

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In cross-examination, Davis says he was to be charged with the freight charges and the expense of loading (p. 188). Folden, as I have said, was not called. The bailiff, Johnson, said that the affair, having occurred five years before, his recollection of the conversation between Davis and Folden was not distinct, and furthermore that he was not present during all their conversation, but that all he remembered was that the goods taken by Folden were to be sold for the benefit of Davis and he says, "I suppose they would be applied to his credit; that is what one would understand." He had no recollection of its being agreed that the goods were to be taken in satisfaction of Davis' indebtedness. As to the state of the goods the bailiff said: "They were not in first-class condition. They might work all right; I think possibly as well as new goods, but they would not sell as well."

The trial judge charged the jury as follows:—

The plaintiff must furnish evidence which will satisfy you by way of preponderance over the defendants' evidence that there was a binding agreement, enforceable by the plaintiff, made that day between the Tudhope Anderson people's representative—by Folden and this man Davis, who was jointly liable with McKay, and that the result of that bargain was that this machinery and supplies which were taken over should be taken in satisfaction of the debt. If there was such a bargain and this man had authority to make it, then the plaintiff should succeed. Since the defendant company is an incorporated company and acted only through their agent, there is involved the side issue whether or not Folden had authority to make such a bargain which would bind his principal the Tudhope Anderson Co. Ltd. If he did not have the authority, even though he said he had the authority, that would not make a binding agreement unless the Tudhope Anderson Co. subsequently did such an act as would constitute a ratification of what he did or an adoption of his acts.

He discussed the evidence bearing upon these questions at considerable length and very comprehensively. Counsel were heard in the presence of the jury as to whether or not questions should be put to the jury, and counsel for the plaintiff, in the course of the somewhat lengthy discussion, urged the aspect of estoppel of the company by reason of their sending Folden to Crossfield in connection with their claim against Davis in some capacity, of their receiving the goods in pursuance of Folden's action and holding them, etc. The judge had already said to the jury:—

Now I cannot observe very much in the evidence which would indicate an adoption or ratification of that agreement, other than this circumstance, namely, that the articles themselves were actually taken over; they were shipped back to the Tudhope Anderson people, to their warehouse in Calgary,

and they have produced evidence that they did value them and that it was always their intention to give credit for them on the basis indicated by Mr. Roe, which was approximately $370, I believe. There is the other fact, however, that they failed to notify either Davis or McKay that they had given them credit for this amount or for any amount.

The judge expressed the view that the aspect of estoppel, by subsequent conduct, was comprised in the question of ratification or adoption.

In the result, the judge put three questions to the jury, telling them, however, that they were at liberty to bring in a general verdict. The questions put were:—

1. Was there or was there not the agreement made by Folden which the plaintiff alleges? 2. Were there any acts of the company which can be construed as adopting or ratifying what he did? 3. If so, what were those acts?

The jury returned a verdict as follows:—"The finding of the jury is that there was an agreement binding on the company and that the debt was extinguished."

After some discussion, the judge entered judgment for the plaintiff, declaring the judgment of the company against the plaintiff satisfied. It was apparently assumed, both by the judge and counsel, if one may judge by the reported discussion, that the jury's verdict must have been founded upon the ground of adoption or ratification by estoppel.

In addition to the facts and circumstances to which I have already adverted, there were others brought out in the evidence which the jury may have thought had some bearing upon the question of ratification or adoption by estoppel, though some of them were doubtless brought out primarily in connection with a cause of action included in the statement of claim which the plaintiff abandoned during the course of the trial. The goods returned by Davis to Folden and by him shipped to the defendant company's Calgary house—its chief place of business in the province—were received at Calgary and stored in the company's warehouse there on August 19, 1913. It seems to me that if, as the defendant company suggests, Folden went out instructed to do one thing and did another thing quite different, which they say he had no authority to do, and they accepted goods which he obtained necessarily under some agreement, they might not, unreasonably, be expected to inform Davis by letter promptly of the terms on which they accepted the goods. Nothing further

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was done relating to the goods until December 24, 1913, when the company's auditor, coming from Winnipeg, fixed $379.90 as the value of goods returned, and as the amount for which credit should be given to McKay Brothers. In addition to the goods on which the above value was placed there were some which Davis had received from McKay Brothers as goods originally bought by them from the defendant company. These goods, though on the valuation of the defendant company's auditors, insufficient to satisfy the judgment of the company against Davis for $103, were accepted in full satisfaction of that judgment. This information is more clearly to be ascertained from an affidavit upon the files of the court to which Roe makes reference in his evidence at the trial. No notice appears to have been given by the company either to Davis or McKay of the receipt of the goods, or of the terms on which they were receiving them, or of the value placed upon them, nor was the sheriff notified to give credit upon the execution. The first time the plaintiff knew of any of these things and then apparently not all was some time after November 15, 1915, 2 years and some months after the arrangement between Davis and Folden—and this was owing to the sheriff's bailiff making a seizure under this and other executions of the crop of J. D. McKay, one of the plaintiffs.

It seems to me that, in the absence of the evidence of Folden, the jury were fully justified in believing that the arrangement in fact made between him and Davis, namely, that the goods returned were to be taken in satisfaction of the judgment against Davis and the plaintiffs, was in fact made, and that there was sufficient evidence also to justify the jury in finding that Folden's act was binding upon the defendant company on the ground of ratification or adoption by estoppel, which, in view of the trial judge's charge, it seems evident must have been the ground of their verdict. The conditions of a ratification are very commonly stated as they are stated with a reference to decisions in Bowstead's Law of Agency, 5th ed., p. 57:—

> In order that a person may be deemed to ratify an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances under which the act was done, unless he intends to ratify the act and take the risk, whatever the circumstances may have been. But it is not necessary that he should have knowledge of the legal effect of the act or of collateral circumstances affecting the nature thereof.

Then it is pointed out that ratification of part of an act ordinarily ratifies the whole and that ratification may be either express or implied, that is, from conduct from which it may be implied that the principal *intended* to ratify.

All this, however, leaves out of consideration the question of estoppel, that is, that without a conscious intention to ratify the so-called principal may be estopped from denying that his conduct must be treated as a ratification. The voluminous law relating to ostensible agents is based on the doctrine of estoppel. There seems not to be much in the way of decisions of ratification or adoption by estoppel or what may perhaps be more accurately called estoppel to deny ratification. The distinction in cases of principal and agent is discussed in 31 Cyc., pp. 1247, 1234 *et seq.* This distinction, namely, between ratification to be implied from conduct shewing an intention and ratification or adoption without intention but in consequence of conduct which makes it inequitable to deny ratification, is evident in theory but is not always observed in the decisions. Bramwell, B., in *Keen* v. *Priest* (1858), 1 F. and F. 314, said, "Silence is sometimes conduct." Willes, J., in *Richards* v. *Gallatley* (1872), L.R. 7 C.P. 127, at p. 131, said:—

> It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded, and the absurdity of acting upon it demonstrated. *It may be otherwise where the relation between the parties is such that a reply might be properly expected.*

See also *Wiedemann* v. *Walpole*, [1891] 2 Q.B. 534.

In *Maple Leaf P.C. Co.* v. *Owen Sound I. W. Co.* (1913), 10 D.L.R. 33; affirmed 4 O.W.N. 1189, the court held on evidence of silence—omission to notify—and conduct, that the defendants were bound by a contract made by one professing to be agent but being without authority.

The facts which went to the jury in the present case, though perhaps presenting a weak case, constituted, in my opinion, some evidence of a ratification or adoption by estoppel, evidence sufficient to justify a jury in coming to the conclusion they did. They might well, I think, infer prejudice to the plaintiffs in the course of a period of over 2 years, both in consequence of depreciation in

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the value of the goods in the meantime and loss of opportunity of sales, and, in consequence, of changes in their avocations.

I would, therefore, dismiss the appeal with costs.

HYNDMAN, J., concurred with Harvey, C.J.

Appeal dismissed.

SASK.
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OGLOFF v. RUR. MUN. OF SLIDING HILLS.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Lamont and Elwood, JJ.A. December 21, 1918.

HIGHWAYS (§ IV.—115)—UNGRADED ROAD—UNKNOWN BODY OF WATER—DRIVING INTO—INJURY—NEGLIGENCE.

Where the effect of a statutory amendment is to cast upon a municipality the necessity of immediately constructing roads throughout the whole municipality, it is entitled to a reasonable time to construct the roads before it will be held liable for nonfeasance.

A person who drives into an unknown body of water 100 feet wide and across which there is no indication of any one having travelled, in the centre of an ungraded road allowance, unless he has first ascertained the depth of the water and the character of the bottom of the slough, does not exercise that degree of care and prudence which he should exercise and cannot recover damages for injuries sustained in consequence.

Statement.

APPEAL by defendant from the judgment at the trial in an action for damages for injuries caused by driving into a bog on a public road. Reversed.

J. F. Frame, K.C., for appellant; *J. A. Allan*, K.C., for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—I am inclined to agree with my brother Elwood that the facts of this case do not establish a case of negligence against the defendant municipality.

If there was negligence, I would allow the appeal on the ground of contributory negligence on the part of the plaintiff which was the direct and effective cause of the accident. As soon as the plaintiff passed the point where the travelled trail turned off the road allowance, he found himself on a part of the road allowance which had never been graded and had not been used as a road. He must have seen that the ordinary travel along the road had always made a detour at that point. There was apparently no beaten track leading up to the bog or marsh, which extended along the road from fence to fence about 100 ft. The water in this bog was at some places 2 or 3 ft. deep. There was no beaten track leading into the bog which might have indicated to the plaintiff that the public had been in the habit of driving through it.

Under these circumstances, I would hold that the plaintiff, by the exercise of ordinary care and prudence, could have avoided

the accident, which was entirely caused by his deliberately undertaking an obvious risk.

The appeal should be allowed with costs, and the plaintiff's action dismissed with costs.

Lamont, J.A.

LAMONT, J.A.:—I concur. I cannot think that any man familiar with the conditions of this country, as the plaintiff was, is exercising that degree of care and prudence which he should exercise, when he drives into an unknown body of water 100 ft. wide, and across which there is no indication of any one having travelled in the centre of the road allowance, where the plaintiff attempted to travel, unless he has first ascertained the depth of the water and the character of the bottom of the slough.

Elwood, J.A.

ELWOOD, J.A.:—The statement of claim alleges that on June 6, 1917, the plaintiff was driving west along a country road constructed or provided by the defendant, or which having been constructed or provided by the Province of Saskatchewan had been transferred to the control of the defendant; that on the said road was a dangerous bog or mud hole covering the road between the fences enclosing the road; that one of the plaintiff's horses became mired in the said bog or mud hole and, by reason thereof, received injuries from which it died; that the defendant was negligent (a): in not establishing and maintaining a grade or fill through the said mud hole or bog, (b) in not warning the public of the dangerous condition of the said road, (c) in not fencing the said road so that the plaintiff might know of its dangerous condition.

It appears from the evidence that the road in question is one running east and west; that for half a mile east of and including the bog hole in question no work had ever been done on the road by defendant, but that west of the bog the road was grade l and a good road. Right up to the day of the accident in question, the public, when travelling the road, had been in the habit, when they came to the bog in question, of making a detour on to some adjacent land; that this land had been fenced in a temporary way from time to time, but that the public had been in the habit of taking down the fences and going around the bog in that way, and that a well-defined road around the bog indicated the course to be taken; that, on the day in question, 2 or 3 hours before the accident, a permanent fence had been put up which prevented any person travelling along this detour. The mud hole or bog was covered with water for about 100 ft. of the road from east to west,

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and this water at the deepest place was 2 or 3 ft. deep. Judgment was given for the plaintiff at the trial, and from that judgment this appeal has been taken.

The obligation of the defendant to keep in repair all public roads is contained in s. 188 c. 14, of the statutes of 1917, 1st sess. That Act was assented to on March 10, 1917, and came into force on May 1, 1917. Prior to the passing of that Act, it was conceded, on the argument before us, that the liability of the municipality, at the most, was for misfeasance, and not for nonfeasance.

Under the circumstances, was there negligence on the part of the municipality?

It may be observed that the Act in question only came into force about 5 weeks prior to the accident. It is quite true it was assented to on March 10, but I think I am justified in taking judicial notice of the general climatic conditions in this country, and, taking such judicial notice, I know that, for some considerable time after March 10, it would be impossible to do any road work in this country.

Is the effect of the amendment to cast upon the municipality the necessity of immediately constructing roads throughout the whole municipality? I do not think that that was ever the intention of the legislature, and I think that before the municipality would be liable for nonfeasance it would be entitled to a reasonable time to construct the roads, and that consideration would be given to the means of the municipality.

The road in question having been travelled in the condition in which it was on the day of the accident, for many years, by making a detour around the mud hole, was apparently quite safe, and, up to the day of the accident, the knowledge of the municipality would be, I think, presumed to be that the public were in the habit of travelling this road by making the detour in question. There is no evidence that the municipality knew or had reason to suspect that this detour was going to be fenced off, and up to the moment of the accident, so far as the municipality knew, the detour was still available to any person who wished to travel the road. The accident took place in broad daylight.

Under these circumstances, I am of the opinion that there was no negligence on the part of the defendant municipality, and that, therefore, this appeal should be allowed with costs and the plaintiff's action dismissed with costs. *Appeal allowed.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. December 5, 1918.

PRINCIPAL AND AGENT (§ II A—8)—PROPERTY LISTED WITH AGENT FOR SALE —AGREEMENT—INTERPRETATION.

Where an owner, with a view of selling his property, lists it with an agent, it is a question of interpretation whether the mention of the suggested terms of the proposed sale in the agency agreement was intended merely as a basis upon which the agent should negotiate, and therefore subject to modification during the negotiations without in any way varying or destroying the agency agreement, or was intended to bind the agent strictly to a sale on the named terms before he can claim his commission.

[See annotation, 4 D.L.R. 531.]

Statement.

APPEAL by plaintiff from the judgment of Jackson, D.C.J., dismissing an action for commission for land sold. Reversed.

Cameron, for plaintiff; *H. P. O. Savary*, for defendant.

Stuart, J.

STUART, J.:—I agree with all that is said in the judgment of Hyndman, J., in this case and with the result at which he has arrived. But I desire to take this opportunity to make one or two observations in regard to the statute in question. Its purpose, as disclosed in the title, was, not to prevent litigation, but to prevent frauds and perjuries. When what two parties agree upon must be evidenced by writing before an action can be based upon it, this certainly is calculated to prevent perjuries in the evidence given as to what was agreed upon.

In the next place, I think there is a tendency to forget that it is merely the terms of the agency agreement, whether these be meagre or very detailed, that must be in writing. Once these are evidenced by a writing, then the meaning thereof is subject to interpretation as much as if they had been spoken orally and evidenced only by oral testimony. The price at which the property is to be sold, and the other terms of the proposed sale, may be mentioned or they may not. If they were in the circumstances an essential part of the agency agreement they ought to be in writing. But, both before the statute and now, that is, both when oral testimony was sufficient and when written evidence is necessary, just as well in the one case as in the other, it is a question of interpretation whether the mention of the suggested terms of the proposed sale was intended merely as a basis upon which the agent should negotiate and, therefore, subject to modification during the negotiations without in any way varying or destroying the agency agreement, or was intended to bind the agent strictly

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to a sale on the named terms before he could claim his commission. I think the present agency agreement comes clearly within the former category.

The agency agreement may be extremely meagre, but if it would have been sufficient before the statute, though not in writing, to give in the circumstances legal rights to the agent, then, since the statute, the same agreement, even though just as meagre, will give the same rights, provided it is evidenced by a writing. Any implied obligations under it will arise just as much in the latter case as in the former. It will lead us absolutely astray if we attempt to apply to the written agency agreement the well-known rules applicable under the Statute of Frauds to an agreement for the sale of land, viz., that it must indicate the parties to the sale, the land and the terms of sale. These matters are not, necessarily, part of an agency agreement at all.

Harvey, C.J.
Beck, J.

HARVEY, C.J., and BECK, J., concurred with Stuart, J.

Hyndman, J.

HYNDMAN, J.:—This is an appeal from the judgment of Jackson, D.C.J., who dismissed the plaintiff's action.

The defendant, in the month of February, 1918, signed the following memo:—

Grassy Lake, Alta., 1918.

In consideration of D. E. King effecting a sale or introducing me to any party with whom I am able to effect a sale of the following described property: S.W. ¼ of 6-10-12 and S. E. ¼ of 24 and N. E. ¼ of 13-9-13, as per conditions on the reverse side of this card, I agree to pay said agent at the time of sale a commission of one dollar ($1.00) per acre.

(Signed) L. D. SCHON.

(Reverse side of card above referred to)

No.....Tp. 9 R. 13.

North					
31	32	33	34	35	36
30	29	28	27	26	25
19	20	21	22	23	24
18	17	16	15	14	13
7	8	9	10	11	12
6	5	4	3	2	1

T. 10. B. 12.

Nearest railroad station, 7½.

Grassy Lake.

Improvements, 3 granary, 12 x 14.

House 14 x 18, barn, 16 x 24.

¼ mile water.

One $1,000 cash on. Summer fallow 23, plough, grass land 90, bal. stubble. $20 per acre. $10,000 cash, bal. 5 years, arrange payments to suit purchaser. Terms: to suit, also equipment goes if wanted.

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In the following month the plaintiff met one Reber, who was looking for land in the locality and interested him in the purchase of the property in question. The plaintiff first met Reber in a pool room and invited him to call at his office. About 2 days afterwards, Reber, in company with his son and one Ernest Beers, called at plaintiff's office. The plaintiff read over various listings and Beers enquired if he had any land in the vicinity of his place, and it was then that the defendant's land was referred to. Beers asked about the price and plaintiff produced the listing card and handed it to them for perusal. Reber questioned plaintiff as to the quality of the land and was told that he thought it the best land in the district for the price. Reber asked when he could see it and was told that he might see it that afternoon, that Schon was in town every day and if he came in he could go out with him (Schon) and that if Schon was not in town by 2 o'clock the plaintiff would take him out immediately after dinner. Schon did come to town and was introduced to Reber by Beers, who told defendant that they were going out to see his land. Later the plaintiff met them and gave Reber a letter "introducing" him to Schon. Reber and Schon then left together for the country and, without any further reference to the plaintiff, a bargain was made and closed for the purchase of the land and chattels, the price being $24,000, $8,000, not $10,000, in cash, the balance on crop payments. It would appear that in arranging the price, no particular amount was fixed for the land as distinguished from the chattels. The commission agreed upon, however, was not a percentage on the contract price but "$1 per acre," consequently I do not think it of any importance that the value of the land and chattels was not divided, the whole of the land having been disposed of.

It might be proper to remark that the defendant met Reber prior to the time above related, but it is clear that nothing whatever was proposed or thought of in connection with a sale of the land in question.

The defendant resists payment on the ground that the arrangement, as carried out, was different from the one contemplated by the agreement sued on, and that the case falls within the principle of *Como* v. *Herron* (1913), 16 D.L.R. 234, 49 Can. S.C.R. 1.

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The trial judge took this view at the time and feeling bound by it, reluctantly dismissed the action.

In my opinion, the facts of this case are easily distinguishable from *Como* v. *Herron*, for there not only were the terms of sale very substantially altered, but the quantity of land was very much less than that contemplated. Furthermore, there the parties were brought together by the agent and the intending purchaser definitely decided not to buy, but afterwards wrote a direct offer to Como to acquire in exchange for another property a portion of the land at a valuation per acre different from that in the listing contract. It was held by a majority of the court that this was an entirely new contract, not in any way referable to the one declared upon, and could not be enforced unless evidenced by a document in writing. (See remarks of Fitzpatrick, C.J., 16 D.L.R. 234.)

In the case before us no substantial change was made except in that the cash payment was reduced from $10,000 to $8,000. The reduction was made by the vendor without the knowledge of the plaintiff, and it is not at all clear that the purchaser would not have paid more had he been pressed to do so. The case, to my mind, falls within the principle of *George* v. *Howard* (decided in the Supreme Court of Canada) (1913), 16 D.L.R. 468, 49 Can. S.C.R. 75. Brodeur, J., cites *Toulmin* v. *Millar* (1887), 12 App. Cas. 746, 58 L.T. 96, in which Lord Watson said, p. 97:—

> When a proprietor with a view of selling his estate goes to an agent and requests him to find a purchaser, naming, at the same time, the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of those negotiations.

In the case at bar, I think the true agreement was that, in the event of the defendant selling his property as a result of the relationship between him and the plaintiff, that he should be entitled to the stipulated remuneration notwithstanding the terms were not strictly in accordance with those inserted in the reverse side of the listing agreement, especially so where the vendor, without any intimation to the agent, voluntarily alters the terms. If

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such were not the case any vendor might, if he so desired, defeat the honest claims of his agent by simply altering some term in the agreement and in most cases without any inconvenience to himself.

I would allow the appeal with costs, and enter judgment for the plaintiff for the amount of his claim, viz., $476, with costs in the proper column.

I have since read the remarks of Stuart, J., with which I concur. *Appeal allowed.*

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MUTUAL LIFE ASSURANCE Co. v. DOUGLAS.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin, and Brodeur, JJ. October 8, 1918.

MORTGAGE (§ VI A—70)—FORECLOSURE—COVENANT—EXTINGUISHMENT OF DEBT—LAND TITLES ACT.

An order under s. 62 (*a*) of the Land Titles Act (Alta.), for foreclosure of a mortgagor's interest in mortgaged land, does not extinguish the mortgage debt, and the mortgagee may still proceed against the mortgagor upon the covenant or upon collateral security.

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1918), 39 D.L.R. 601; 13 A.L.R. 18, at p. 29, reversing the judgment of Simmons, J., at the trial, 38 D.L.R. 459, 13 A.L.R. 18, by which the plaintiff's action was dismissed.

This is an action brought by the respondent as beneficiary under a life insurance policy assuring the life of her husband in the sum of $5,000. One of the conditions contained in the policy was:

Before payment of this policy as a claim, any loan or other indebtedness thereon to the company by the assured, or by the beneficiary, and the balance of the year's premium, if any, will be deducted from the amount payable.

The respondent mortgaged to the appellant lots of land to secure an advance to her of $12,500, and she and the assured assigned the policy to the appellant as collateral security for the payment of the mortgage moneys. The mortgage having become in arrear, the appellant commenced foreclosure proceedings pursuant to the provisions of s. 62*a* of the Land Titles Act; and after an abortive sale, a final order for foreclosure was made. The assured died a month after, and the appellant applied the net amount of the policy against the respondent's indebtedness. The respondent claimed that by reason of the final order of foreclosure, the mortgage debt became extinguished.

A. H. Clarke, K.C., and *M. McLeod*, for appellant.

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Fitzpatrick, C.J.

FITZPATRICK, C.J.:—Speaking generally, I see very little practical difference at the present time between the mortgage of the English law and the hypothec of the civil law; both are *jura in re aliena*, and the terms in which certain sections of the Alberta Act are couched suggest an intention on the part of its framers to adopt, in part at least, the principles of the civil law of hypothecs. Both the mortgage and the hypothec are rights *in rem* conferred by a debtor upon a creditor as a security for a right *in personam*. The mortgage debtor transfers the title to the *res* to his creditor, retaining usually the possession and a right of redemption. The hypothecary debtor retains the title and possession, but gives a right *in rem*. The mortgagee may by foreclosure bar the mortgagor's right of redemption and thus secure a title absolute to the *res*. The hypothecary creditor has the right on default to bring the land to sale by the sheriff, and the proceeds are applied to the discharge of encumbrances according to their priority; and the personal obligation is discharged only in so far as the amount realised out of those proceeds is sufficient to satisfy the hypothecary claim. It is now generally recognised under the English system, although old forms are still used, that the real owner of the land is the mortgagor; and the mortgage is a mere security for the debt or obligation. In courts of law the mortgage is recognised as conveying an estate, while equity merely creates a lien, and the Judicature Act provides that where there is any conflict between the rules of equity and the rules of common law, the rules of equity shall prevail.

In chancery, foreclosure was adopted as a proceeding by which the mortgagor's right of redemption of the premises was barred.

Unless there is something very clear in the Alberta Land Act, I should hesitate to say that, notwithstanding all the safeguards with which the rights of the mortgagor are surrounded, the mortgagee is to be treated as a usurer and to be deprived of his right to recover *in personam* on the covenant, merely because he exercises his right to foreclose the mortgagor's right of redemption. I cannot see why, if the mortgage is a mere security for the debt, the right *in personam* should not continue to exist after the debtor, by foreclosure proceedings, has lost his right of redemption for ever.

Assuming that the title to the land under the Alberta Act remains in the mortgagor, and the forms used would seem, as I

have already said, to convey the impression that the intention of the framers of the Act was to adopt that principle of the civil law, while using the old terms of the English law, and that the foreclosure order does not vest the land in the mortgagee, but that the title passes under the statutory provision as in the civil law under the sheriff's title—and the vesting order coupled with it—*non constat* that the personal obligation to pay has been satisfied.

The two things are distinct and separate, and in the absence of express language in the statute I decline to accept the suggestion that, if the lender of the money endeavours to realise on his security, he is assumed to have released the debtor from his obligation to pay under the covenant. It may be that the foreclosure order is granted under the Act for the purpose of realising the debt; but the fact is that the principal obligation to pay the debt is not satisfied even if the security is realised upon, unless the amount realised is sufficient to liquidate the obligation.

There is no evidence here of any intention, on the part of the mortgagee, to take the property in satisfaction of his debt.

It would seem to me, and I speak with great deference, that on the true construction of the Act the parties remain, as Idington, J., says, as they were under the old system. The mortgagee is entitled to sue on his covenant though, if he does, the mortgagor, on payment of the debt, is entitled to redeem his property; and the mortgagee must be in a position, therefore, to restore the property. Ss. 62 and 63 (*a*) seem to provide for a twofold remedy, and for the postponement of the remedy upon the covenant until the foreclosure proceedings are exhausted.

I have read the case in the Supreme Court of Australia of *Fink* v. *Robertson* (1907), 4 C.L.R. 864, with great care, and with respect must say that the dissenting judgment of Higgins, J., to the effect that foreclosure under the Australian Act does not in involve the release of the debt, and that the right to recover under the personal covenant still continues to exist, has led me to the conclusion that, applying the same principles to the Alberta Act, this appeal must be allowed.

Davies, J.

DAVIES, J.:—In this appeal from the judgment of the Appellate Division of the Supreme Court of Alberta, to which I have given much consideration, I concur with the reasons stated by my

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brother Anglin in allowing the appeal and restoring the judgment of the trial judge.

I would simply add that if the legislature intended to make such a radical change in the relations and obligations of the mortgagor and mortgagee towards each other as held by the Appellate Division, namely, that the obtaining of a final order for foreclosure and its registration *ipso facto* extinguished the debt due to the mortgagor and estopped him from proceeding on the mortgagee's covenant to pay or from realising on any collateral securities he may have taken to secure payment of his debt they would have said so clearly and distinctly.

Under the law of England such a foreclosure on a common law mortgage admittedly did not extinguish the debt or prejudice the right of the mortgagee to recover on his collateral securities. Of course, the mortgagee could not after foreclosure claim to hold the land and at the same time sue on a covenant for the debt or recover it under his collateral securities. He could not have both land and the money secured upon it. If he chose to foreclose and then sell the land or part of it, he would be taken to have elected to take the land for his debt.

But in a case such as the present, where the mortgagee, though he has foreclosed, stands ready to reopen the foreclosure and able on being paid his debt to restore the land to the mortgagor, it does seem to me the inference drawn by the court below that under the Land Titles Act the foreclosure operated to extinguish the debt and so deprive the mortgagee of his other remedies was a forced and improper one.

If that inference was the proper one and established as the law, investors would be very shy of loaning their money on mortgage security. At any rate, it is not an inference which I would draw from the Act under consideration; and if the legislature intended such a result, they would have used language expressive of their intention.

The foreclosure order, when registered, bars, it is true, all further right of redemption on the part of the mortgagor; but so did the order for foreclosure under the old common law mortgage. But why should it be inferred under the statutory mortgage that such a foreclosure also extinguishes the unpaid debt secured and destroys all right in the mortgagee to realise on his collaterals

under circumstances such as those under consideration where the mortgagee avows itself ready to open the foreclosure, receive payment of its debt and restore the land to the mortgagor?

I am not able to draw such an inference.

IDINGTON, J.:—The appellant, by its policy of insurance dated January 4, 1911, insured the life of D. F. Douglas in the sum of $5,000 subject to conditions printed or written on the succeeding pages thereof, which were made part of the contract.

Amongst other alternatives of payment so undertaken was one to pay the said sum on his death to the respondent, who was his wife, if she survived him.

Amongst the conditions so printed were the following:—

Before payment of this policy as a claim, any loan or other indebtedness thereon to the company, by the assured or by the beneficiary, and the balance of the year's premium (if any), will be deducted from the amount payable. No action or proceedings against the company shall be brought or taken upon this policy unless commenced within one year from the date at which the policy becomes a claim, and in any such action or proceedings the policy shall in all respects be construed according to the laws of the Province of Ontario.

On January 10, 1911, she, in consideration of $12,500 lent by appellant to her, gave a mortgage on land in Calgary and therein covenanted to pay said sum with interest at 7% per annum, and further covenanted to pay all the premiums upon the policy aforesaid during its currency, and that upon default of payment of any of said premiums, the company might pay the same and add the amount thereof to the principal money thereby received, and such payments should bear interest at 7% per annum, and for the better securing the payment thereof she mortgaged her estate and interest in said land to said company.

The husband joined in said mortgage, as a covenantor with the company that she would pay the mortgage money and interest and said premiums, and abide by and perform all the covenants, provisos and conditions in the said mortgage.

The mortgage was registered on January 12, 1911, in the land registration district at Calgary.

They both, on January 10, 1911, assigned the insurance policy and all benefits thereunder to the said company and thereby it was declared that the assignment was made as a collateral security for the repayment of the said $12,500 and interest and for any further advances.

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They never paid anything either on account of principal or interest or premiums save the cash premiums.

The appellant, on August 26, 1915, took proceedings under s. 62 (*a*) of the Land Titles Act of Alberta, for sale of said lands and, failing that, foreclousre, which proceedings terminated by a final order of foreclosure on November 20, 1916, made by the deputy registrar which, in the operative part, reads as follows:—

It is ordered that the mortgagor and all persons claiming through or under him subsequently to said mortgage do stand absolutely debarred and foreclosed of and from all rights to redeem the mortgaged premises mentioned in the application herein.

And then follows a description of the land.

The usual affidavit, required by the Act to procure registration of the appellant as owner, was made, and the usual form of certificate issued that the appellant was then the owner of said lands subject to the encumbrances, liens and interests notified by memorandum underwritten or endorsed hereon, or which may hereafter be made in the register.

There does not appear to be any reference therein to any encumbrances; much less note of the mortgage in question.

I may remark in passing that the argument founded upon the assumption that vendors or transferors under the Act were, by virtue thereof, bound to pay prior encumbrances and hence a mortgagee getting a final order of foreclosure must be presumed to have assumed the burden of his own mortgage so foreclosed does not seem to get much support from this certificate.

The respondent's husband died on February 1, 1917. On April 2, 1917, the appellant applied the net amount of $4,460.53, which, if nothing else had to be considered, would have been the amount payable by virtue of the policy upon the mortgage debt, claiming the right to do so by virtue of the assignment of the policy.

The respondent, on May 9, 1917, began this action to recover the amount accrued due under said policy and claimed to be entitled to recover same. Notwithstanding the assignment thereof, to the appellant, the declaration of the respondent proceeds as if no such assignment had ever existed, and in truth, without saying anything as to it, impliedly assumes, as if in fact duly established, the rather startling propositions of law that a final order of foreclosure and the mere registration thereof and issue of a certificate

thereof obliterates all prior legal relations and obligations and the rights springing therefrom, as if they had never existed, so far as anything relative to the conduct and acts of the mortgagor and possible rights in favour of the mortgagee springing therefrom; but preserving sacredly everything possibly springing from the acts of any one else which might, by any possibility, enure to the benefit of the mortgagor. Nay, more, it presumes all such latter rights to have duly transferred, *ipso facto*; as it were, to the mortgagor without any formal conveyance of any kind such as would formerly have been required in law to enable the mortgagor to assert his right thereto in any legal proceedings.

The possible rights, duties and obligations of trustees or sureties and others which might, in manifold ways needless to dwell upon, have arisen meanwhile from some of the many complications of such inter-relations as our modern commercial activities often produce, are presumably swept away for the benefit of the defaulting mortgagor by what may have been a mere thoughtless act on the part of the mortgagee so long as he has not been involved in fraud in procuring such registration.

Accident or mistake cannot be rectified, for in effect the court, by its ruling, has said the result (unless possibly tainted with fraud involving him who has become such registered owner) obliterates all else standing—for the protection of no matter whom or what—in the way of the defaulter whose name has been deleted from the record, and the mortgagee's name substituted therefor.

Such would seem to be some few of the results of upholding the judgment appealed from and the mode of thought directly or impliedly approved as that to be used in the interpretation and construction of an Act designed to improve and simplify the mode of dealing with and determining the rights and obligations of men in what is part of the daily intercourse of some one or more of them.

Another very obvious result of the maintenance thereof would be the impossibility of opening a foreclosure to relieve from oppression, free men from injustice, and rectify that which, in such like cases, has often been found to be the result of some trivial accidental oversight on the part of someone.

Let us test the validity of such reasoning as would lead to such results by adverting to the relevant law which governed the

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rights and obligations of mortgagor and mortgagee up to, and at the time when the statute now relied upon for the production of such results was enacted, and see if that law has been repealed thereby, or in the least invaded.

I need not dwell upon the introduction of the English law into the North-West Territories.

I am spared that trouble by the reiteration of so much thereof as we are concerned with herein, by the re-enactment, so late as 1907, of the ss. 10 and 11 of the Supreme Court Act, statutes of Alberta, 1907, ch. 3, reading as follows:—

10. For the purpose of removing doubts and ambiguity but not so as to restrict the generality of the next preceding section, it is declared and enacted that the court shall have the like jurisdiction and powers as by the laws of England were, on the 15th July in the year one thousand eight hundred and seventy, possessed and exercised by the Court of Chancery in England in respect of the matters hereinafter enumerated or referred to, that is to say:

. . . . . .

(*b*) In all matters relating to trusts, executors and administrators, co-partnerships and accounts, mortgages and awards, or to infants, idiots or lunatics and their estates;

. . . . . .

(*i*) The administration of justice in all cases in which there exists no adequate remedy at law.

11. The rules of decision in the said matters in the last preceding section mentioned shall, except where otherwise provided, be the same as governed the Court of Chancery in England in like cases on the 15th July, one thousand eight hundred and seventy.

If there can be said to have been finally settled anything in regard to the jurisdiction and power of the Court of Chancery in England at the date named, it was the power of reopening a foreclosure and further imposing upon him who had foreclosed and sought to enforce thereafter his common law right which was otherwise undoubted such terms of procedure as would have the effect of doing justice between those concerned.

It was settled that he, seeking to impose his common law right of suing upon a covenant for the debt, must be ready to reopen the foreclosure and ready to restore that property which had become his as absolutely as the English language could express it and further that if he had sold and conveyed away the property he had so acquired he should be restrained from proceeding to enforce that common law right whether by suing upon the covenant or in way of asserting a proprietory right over any property he had held by way of collateral security to his mortgage.

The long line of cases, from the times of Lord Hardwicke down to the year 1870, need not be dwelt upon. However unsatisfactorily some of the earlier cases may have been dealt with, or reported, the case of *Lockhart* v. *Hardy* (1846), 9 Beav. 349, 50 E.R. 378, decided, by an able judge, well conversant with equity jurisprudence, in a considered judgment, expresses the law as it existed and maintains what I have just stated.

Merely to shew that such law continued as late as July, 1870, I may refer to the case of *Kinnaird* v. *Trollope* (1888), 39 Ch. D. 636, wherein, at p. 642, Mr. Justice Stirling reaffirms the law so laid down, citing also *Palmer* v. *Hendrie*, 27 Beav. 349, 54 E.R. 136, 28 Beav. 341, 54 E.R. 397, decided by Sir John Romilly in 1860, and presenting another aspect of the application of the principles involved and adopted. That was when the mortgagee and the mortgagor had united in disposing of the estate.

Such being the undoubted state of the law which the Supreme Court of Alberta was in 1907 required to observe, how can we find any substantive amendment altering the rights of the parties in that regard or a repeal thereof in the language of s. 62 (*a*) of the Land Titles Act of Alberta?

It is certainly not so expressed therein. Nor does such result seem to have been in the faintest degree part of the purpose of the enactment. It seems to me clear that the sole purposes of the enactment were to simplify and thus improve the procedure in simple cases of foreclosure and cheapen the law, and as sub-section 15 seems to indicate, to safeguard the interest of mortgagors by requiring an attempt at sale before issuing an order of foreclosure.

The net result is stated in sub-s. 16 as follows:—

> Every order of foreclosure under the hand of the registrar when entered in the register shall have the effect of vesting in the mortgagee or encumbrancee the land mentioned in such order free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under him subsequently to the mortgage or encumbrance; and such mortgagee or encumbrancee shall, upon such entry being made, be deemed a transferee of the land and become the owner thereof and be entitled to receive a certificate of title for the same.

There is nothing in the legal result which I can see differentiating the result of a foreclosure under and by means of s. 62 (*a*) from that by way of s. 62 which stands effective—same test must apply to foreclosure in either case.

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What is there in this language but an expression of just such results as flowed from a foreclosure in all past history in the obtaining of same in the Court of Chancery?

The effect of that always had been to vest the mortgaged estate or interest in the land if not already vested in the mortgagee as in some such cases it might not have been.

It was not always the effect of a mortgage which came to be foreclosed to have conveyed an estate in the land though frequently it so happened to be the case.

A mortgage that fell short of doing so might, if the necessities of the case so demanded, or if the parties so desired have been created by them in some one of many ways, and even I suspect in the terms of the Land Titles Act, if such a method chosen, and if for the purpose of the enforcement thereof by way of foreclosure it fell within the necessities of the execution of justice between the parties to make a vesting order part of the foreclosure, I imagine the Court of Chancery would have been equal to the emergency a good many years before July, 1870.

But, after all, by the Land Titles Act it is not absolute ownership of the estate but only that subject to prior encumbrances and claims created by the mortgagor or his predecessors that is in truth vested; cleared, however, of all subsequent encumbrances or conveyances by or through the mortgagor.

Then there is given as to that so vested nothing more than has been stated by so eminent an authority as Lord Selborne in the case of *Heath* v. *Pugh* (1881), 6 Q.B.D. 345, at p. 360 *et seq.*, as follows:—

> This being the position of the title, as long as the mortgage is redeemable, the effect of an order of foreclosure absolute is to vest the ownership of and the beneficial title to the land, for the first time, in a person who previously was a mere encumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released. "A foreclosure" (said Lord Hardwicke) "is considered as a new purchase of the land." "The mortgage being foreclosed" (said Sir William Grant) "the estate became absolutely his." "By the order made in the foreclosure suit" (said Sir Lancelot Shadwell) "he became the absolute owner." *Casborne* v. *Scarfe* (1737), 1 Atk. 603, 26 E.R. 377; 2 Tu. L.C. 1055, 5th ed.; *Silberschildt* v. *Schiott* (1814), 2 V. & B. 49, 35 E.R. 396; *Le Gros* v. *Cockerell* (1832), 5 Sim. 384, 58 E.R. 380. The title obtained by such "new purchase" did not, before the "Wills Act" of 1838, pass by general words in a will, duly attested to pass real estate, made before the foreclosure and not afterwards republished; it did pass, if such will were

republished after foreclosure, or if a new will in like general terms were then made.

It follows from this state of the law, that when the owner of land under an ordinary decree of foreclosure absolute takes proceedings to recover possession of that land, he seeks possession of that which, by a title newly accrued, has for the first time become his own property; and that it can make no difference whether the title which he previously had as a mere incumbrancer was, or was not, protected by a legal estate. The possession which he now claims, and the right by virtue of which he seeks to recover it, are substantially different from the possession which he might before have claimed, and from the right by virtue of which he might have claimed it. "There can be no two things" (said Lord Manners in *Blake* v. *Foster*) (1813), 2 Ball & B. 387,at p. 403) "more distinct or opposite, than possession as mortgagee, and possession as owner of the estate; nor anything be more hazardous or inconvenient, than the possession of a mortgagee, the manner in which he is called to account is most rigorous and severe." One consequence of the decision, that a mortgagee who obtains a foreclosure absolute is not safe against the Statute of Limitations under circumstances like those of the present case, would be to make it necessary for him (under such circumstances) to take possession while still mortgagee, or, if it were resisted, to bring ejectment for that purpose, on pain of forfeiting his title and of becoming liable, if a trustee (as the present plaintiffs are), for a loss by breach of trust of the whole value of the estate.

These are expressions by masters of the law and of the English language as to the effect of a final order of foreclosure.

I do not think the Alberta legislature can have meant more in their language which I have just quoted.

To suggest that the court cannot interfere with the registrar seems, I respectfully submit, like playing upon words. All the court does is to operate upon the parties who must obey or be enjoined by the Supreme Court to do that which that statute above quoted enabled to be done.

No case I have seen goes so far as to carry such power as the Court of Chancery had into operation by vesting or divesting any estate. I am not assuming, however, that the court in a proper case is powerless to deal with the register. I am merely dealing with the only argument on this head that the respondent presents as derivable from the nature of the order and the language of the Act relative thereto. The necessities of this case do not involve more than a recognition of the power in the court to enjoin him seeking to assert a right to desist therefrom unless and until he retransfers, or is ready to do so, all that he got by his foreclosure.

There is another argument presented in which the doctrine of merger is made to do duty.

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There is nothing in the common law doctrine of merger relative to the meeting of greater and less estates in the same person, or other common law mergers which can be found here to apply and support the argument; or that the contract of the parties, as a whole, merged in the order for foreclosure. Nor can I see how the doctrine of merger as founded upon intention of the parties can be made to operate, unless we discard all judicial opinion and assume that those who developed the law we are asked to apply to determine what is in question between the parties herein were too stupid to have seen the point till the present day.

The law invoked by appellant herein has been often applied under circumstances which, far more forcibly than anything in this simple case suggests, presented the probability of an intention to abide by the foreclosure and abandon all other rights, yet such was not the conclusion drawn by the many eminent judges who have had to solve the problem, and all the while the doctrines of merger were recognised as in force where properly applicable. I prefer abiding by the law they made. Because the machinery by which the law may have been administered has been changed that furnishes no reason for changing or presuming to change the substantial and well-known principles of the law; especially so when we find it emphasised by such recent enactment as I have quoted from the Supreme Court Act, of Alberta, 1907, in s. 11, where the duty to observe it is enjoined "except where otherwise provided" and no such otherwise provision is or can be referred to bearing upon the duty so prescribed for us to follow.

The case of *Fink* v. *Robertson*, 4 C.L.R. 864, relied upon below, does not bind us, and is not of any value save for the reasoning it may furnish. Having read it, I may say respectfully that I prefer the reasoning of Higgins, J., the dissenting judge, to that of the Chief Justice.

But there are many other considerations than those presented therein which enter into what binds us here, which may not have existed in Australia and bound that court; many others such as the legislation which assigns and defines the jurisdiction of the courts there should have to be entered into or brought forward to enable us to intelligently deal with the conclusion therein before we could make the decision applicable to the law governing the Alberta courts and us herein. The absence of many statutes

even of that country, from our reach, render it an impossibility to accept it as our guide unless we go it blind. I prefer trying to see where I am going. Hence I shall not labour with that decision. I cannot deprive appellant of its clear right unless upon an express legislative declaration of the law. And if I had to draw an inference of the intention I should want something much more clear and explicit than exists herein pointing the way to go.

Above all, in attributing to any one an election I cannot try to impose upon those concerned in any such relation the absolute renunciation of the law and language relative to what a foreclosure means in the minds of those accustomed thereto unless they have given them clear and explicit legislative declarations as a guide. Speculative inferences of what might be done under a new system are no ground for attributing to others the implication of an election or the duty to make it. The inference of fact I should draw is that nobody concerned on behalf of appellant ever paid the slightest attention to those remains of a wreckage. If they did, they probably concluded the policy was worthless and would never be maintained.

I incline to infer it was only part of the one scheme the parties had in question, namely, the loan and its security.

Nothing was ever paid nor was, I suspect, likely to be paid, but the first cash premium.

The unexpected death of Mr. Douglas, after the foreclosure, suggested to someone the possibilities of that confusion of thought which sometimes succeeds though in justice presenting no merits, for not only had the claim been assigned to appellant and was as much out of the respondent's power as if she had assigned it to someone else, but also by a condition written in the policy itself it had been made subject to any debt due appellant.

I fail to see how she can recover unless and until she has redeemed her promise in that assignment and that suggests to me that the law of Ontario which was to have been, by the policy, the limit of the right to recover might well have been held as determining that right.

Nothing was made of that and I do not rely upon if for any purpose but to illustrate how many things remain untouched but yet might fall within the range of a judgment maintaining that appealed from.

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The adoption by the framers of the Land Titles Act of a principle or form of mortgage drawn from the civil law yet grafting thereon rights defined by language using terms of foreclosure, etc., found in our equity jurisprudence, unknown to the development of that law elsewhere, suggests curious reflections and considerations; especially when reminded of how much of that jurisprudence has been drawn from the civil law.

I can conceive of a case where the beneficiary had gone on paying premiums for years after the foreclosure and then entirely different consideration would arise and possibly in law an entirely different result might be reached.

The appeal should be allowed with costs here and in the appellate court below, and the judgment of the trial judge be restored and, if desired, notwithstanding her renunciation of such right, provision be made for her redeeming within the usual time, after taking an account of what is the right sum due, the said lands upon the footing of the said insurance money being deducted from the sum found due on the mortgage.

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ANGLIN, J.:—The plaintiff sues to recover the proceeds of an insurance policy on the life of her deceased husband held by the defendant company as collateral security to a mortgage made by him to secure a loan from the company. This mortgage, given under the Alberta Land Titles Act, was foreclosed by an order of the registrar made under sub-s. 16 of s. 62 (*a*) of that statute. The company still holds the land foreclosed. It applied the proceeds of the policy on its mortgage debt, offering to allow the plaintiff, as her deceased husband's representative, to redeem on payment of the balance of its claim. The plaintiff, however, insists that the effect of the foreclosure under sub-s. 16 of s. 62 (*a*) was to release or extinguish the mortgage debt and to discharge all securities held as collateral therefor, because the mortgagee thereby became vested with an irredeemable title to the land and the courts, thereafter, could not compel it to open the foreclosure as a condition of attempting to realise the mortgage debt. This is the issue presented by the defendant's appeal from the judgment of the Appellate Division of the Supreme Court of Alberta, which, reversing the trial judge (Simmons, J.), upheld the plaintiff's contention, 38 D.L.R. 459.

For the reasons stated by Higgins, J., in his dissenting judgment

in *Fink* v. *Robertson*, 4 C.L.R. 864, 884, I incline to think I should have been of the opinion that, as the Alberta Land Titles Act stood after the introduction of s. 62 (*a*) in 1915 (c. 3, s. 2), an order of foreclosure made by the registrar under that section had no effect upon the mortgagors' covenant for payment and the mortgagee's rights in respect thereof other than or different from that which a final order of foreclosure granted by the court under s. 62 would have had. The operation and the consequences of an absolute order of foreclosure obtained under the ordinary jurisdiction of a court of equity—those of an order made under s. 62 must be the same—as well as its history are stated in the *Fink* case, *supra*. See, too, *Campbell* v. *Holyland* (1877), 7 Ch. D. 166, 171; *Platt* v. *Ashbridge* (1865), 12 Gr. 105, 106; *Trinity College* v. *Hill* (1884), 10 A.R. (Ont.) 99, 109.

As pointed out by Higgins, J., in dealing with s. 130 of the Victoria Transfer Land Act, 1890, which corresponds with sub-s. 16 of s. 62 (*a*) of the Alberta Land Titles Act, the term "foreclosure" used in each is a technical term, descriptive of a well-established equitable remedy to which well-known rights and incidents are attached. It may be somewhat inappropriate in a system under which a mortgage is merely a security and transfers no estate to the mortgagee. But there is nothing to warrant the assumption that the legislature meant that the "foreclosure" order which it empowered the registrar of titles to grant should have an effect upon the relations between the mortgagor and the mortgagee and their respective rights in regard to the mortgage debt and the securities held for it, including the foreclosed property, greater than and essentially different from that which courts of equity had for many years given to their foreclosure decrees. That its operation was intended to be similar is further indicated, if indeed not conclusively established, by the fact that the language in which its effect upon the title to the land and the mortgagor's interest therein is stated in the statute, viz., that the land shall be vested in the mortgagee or encumbrancee

free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer, or any person claiming, through or under him, subsequently to the mortgagee or incumbrancee

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is, as Higgins, J., points out at p. 885, substantially that of the foreclosure orders absolute issued by courts of equity (Seton on Decrees, 3rd. ed., p. 1393). The provision for the vesting of the land and declaring that the mortgagee or incumbrancee obtaining the order shall be deemed a transferee and become the owner thereof were necessary, as that judge says, because a mortgage under the Act does not operate as a transfer but only as a security and is analogous to the direction inserted in an equity decree for the foreclosure of an equitable mortgage—that the mortgagor shall execute a conveyance of the land.

I do not find in the provisions that a mortgagee foreclosing under sub-s. 16 is to be deemed a transferee of the land and that a transferee of land subject to a mortgage or encumbrance impliedly covenants to indemnify the transferor against the same (s. 52) anything to warrant the conclusion sought to be drawn from them—that it was intended that an order of foreclosure under s. 62 (*a*) (16) should have the effect of releasing or extinguishing the mortgagor's covenant. In the first place, the mortgagee does not become a transferee from the mortgagor—the mortgagor is not his transferor. There is no "instrument transferring land subject to a mortgage or encumbrance," and it is only in such an instrument that section 52 imports the covenant of indemnity by the transferee. The land is vested in the mortgagee free from the mortgage or encumbrance. S. 52, in my opinion, has no application to the statutory transfer effected by a foreclosure order made under sub-s. 16.

I should require much more explicit language than anything found elsewhere in the Alberta Land Titles Act to justify the inference that "foreclosure" under s. 62 (*a*) (16) was meant to be something so essentially different from any other foreclosure that it has the effect of extinguishing the mortgage debt, thus releasing all collateral securities, rendering it impossible for the mortgagee to proceed on his covenant and depriving the court of jurisdiction, however exceptional the circumstances (short of fraud), upon proper terms to relieve the mortgagor from the loss of his property.

Reference may also be made to *Premier Permanent Land & Investment Association*; *Ex parte Lyell* (1899), 25 Vict. L.R. 77, and *Noble* v. *Campbell* (1911), 21 Man. L.R. 597; *Orser* v. *Colonial*

Investment & Loan Co. (1917), 37 D.L.R. 47, 10 S.L.R. 349; *Bernard* v. *Faulkner* (1914), 18 D.L.R. 174, 7 A.L.R. 439; and *Richards* v. *Thompson* (1911), 4 S.L.R. 213, cited in argument, do not really help much in the determination of the case at bar. As far as they go they assist the appellant. All three, however, were cases of proceedings for foreclosure taken in court. In the first the order of foreclosure itself contained a judgment for personal payment making it impossible to maintain successfully that the personal liability of the mortgagor was extinguished. In the second the court, on an application heard *ex parte*, allowed a reservation of the mortgagor's personal liability to be expressed in its foreclosure order. In the third the mortgagee had transferred the land to a *bonâ fide* purchaser for value and there after neither he nor the mortgagor could have had any right in equity to have the foreclosure opened.

Nor do the decisions in *Williams* v. *Box* (1910), 44 Can. S.C.R. 1, and *Smith* v. *National Trust Co.* (1912), 1 D.L.R. 698, 45 Can. S.C.R. 618, materially aid either party. The former rests on an amendment to section 126 of the Manitoba Real Property Act held to have restored to the court (if it was ever taken away) the jurisdiction over mortgages which it had before the Real Property Act was passed. A somewhat similar provision in s. 10 of the Alberta Supreme Court Act of 1907, c. 3, long antedates s. 62 (*a*) of the Alberta Land Titles Act, whereas the amendment to s. 126 of the Manitoba Real Property Act was passed subsequently to the enactment of sub-ss. 113 and 114 of that statute under which the foreclosure in *Williams* v. *Box* was had. It must always be remembered, however, that a certificate of title is, under s. 44 of the Alberta Act, as under s. 71 of the Manitoba statute, conclusive evidence at law and in equity only "so long as it remains in force." Idington, J., emphasises the fact in *Williams* v. *Box*, at p. 12.

All that was decided in *Smith* v. *National Trust Co.*, *supra*, was that in a mortgage of property under the Manitoba Real Property Act (R.S.M. 1907, c. 148), an express power of sale, at all events if it do not explicitly otherwise provide, must be exercised under and in accordance with the requirements of the sections of that Act governing the exercise of the statutory power of sale which it confers. (Sub-ss. 109 *et seq.*) While

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Duff, J., who wrote the majority judgment, says of the mortgagee, at p. 713, that "his rights and powers must consequently rest directly upon the provisions of the statute itself," he significantly adds:—

This view, of course, does not involve the consequence that the mortgagee's rights are those only which the statute expressly gives him. It is obvious that many things are left to implication; and where, in any particular case, it appears that the rules governing reciprocal rights of the mortgagor and mortgagee under the mortgage contract in relation to the mortgaged property are left to implication then it is a question to be determined upon an examination of the statute as a whole how far the rights of the parties are to be governed by the rules of law which, apart from the statute, are applicable as between mortgagor and mortgagee.

My learned brother had already said:—

There is much in the Act to indicate an intention on the part of its authors that, under the statutory mortgage, the powers and rights of the mortgagee should, in substance, be economically equivalent to those possessed by a mortgagee under a common law mortgage—an observation which applies with equal force to the Land Titles Act of Alberta.

But whatever might have been the effect of s. 62 (*a*) as originally enacted, the adoption of the proviso to s. 62 contained in s. 4 of the Statute Law Amendment Act of 1916, c. 3, in my opinion, leaves no room for doubt as to its proper construction. That proviso reads:—

Provided, however, that where proceedings in respect of any mortgage or incumbrance have already been, or hereafter shall have been, commenced under the provisions of the next following section, no proceedings under this section for the enforcement of the covenant for payment shall be commenced, or, if commenced shall be continued until the remedies provided by the next following section are exhausted.

Where proceedings have been begun under s. 62 (*a*) this proviso expressly stays all curial proceedings to enforce payment until nothing more can be done under that section, *i.e.*, until an order for foreclosure under sub-s. 16 has been made and registered and a certificate of title issued to the mortgagee. Only then are the remedies provided by s 62 (*a*) "exhausted." It would be difficult to conceive of a more distinct legislative recognition of the fact that the taking of any or all the remedies under s. 62 (*a*) does not release the mortgage debt or extinguish the right of the mortgagee to proceed to enforce payment on his mortgagor's covenant. In the enactment that if the mortgagee has begun proceedings under s. 62 (*a*) he cannot proceed upon his mortgagor's covenant until he has obtained the order of foreclosure—the ultimate remedy

for which sub-s. 16 of that section provides—the implication that he may then do so is irresistible.

A somewhat similar provision for the case of foreclosure proceedings in court under s. 62 was made at the same time by clause (*b*) of s. 4 of the Act of 1916, c. 3. In connection with this latter provision it may be observed in passing that where foreclosure has been obtained it may be a little difficult to determine "the amount of the judgment or mortgage debt remaining unsatisfied." But with that difficulty we are not now concerned.

I am for the foregoing reasons, with respect, of the opinion that the judgment of the learned trial judge was right and should be restored. The appellant should have its costs in this court and in the Appellate Division.

Brodeur, J.

BRODEUR, J.:—I concur in the result.

Appeal allowed.

CALGARY & EDMONTON R. Co. v. SASK. LAND & HOMESTEAD Co.

Alberta Supreme Court, Ives, J. December 13, 1918.

ARBITRATION (§ IV—46)—RAILWAY ACT—COSTS—COMPANY ENTITLED TO—AMOUNT—COSTS EXCEEDING AWARD.

Under s. 199 of the Railway Act (R.S.C. 1906, c. 37), where the company is entitled to the costs of an arbitration, it is entitled to the full amount of such costs as taxed although they exceed the amount of the award. If by statute a party is entitled to costs it is implied that there is a right to recover even though not so stated in express terms.

Statement.

ACTION to recover the costs of an arbitration which had been taxed and allowed by a judge, as provided by s. 199 (2) of the Railway Act. Judgment for plaintiff.

George A. Walker, for plaintiff; *Frank Ford*, K.C., for defendants.

Ives, J.

IVES, J.:—In 1908, the plaintiff, under the provisions of the Railway Act (Can.) took certain lands, the property of the defendant, offering to pay therefor the sum of $733, and depositing in court the sum of $1,150 to cover such compensation and probable costs of the arbitration.

In 1912, an arbitration took place, pursuant to the provisions of the Railway Act, and an award was made whereby the compensation was fixed at the sum offered, $733. The costs of the arbitration were taxed in due course by Simmons, J., and allowed at $5,116.20. This action is brought to recover these costs.

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The main ground of the defence is that s. 199 of the Railway Act is the only provision of the statute dealing with costs of an arbitration; that this section gives no right of action to recover costs, and that if by the result of an arbitration the costs "shall be borne by the opposite party and be deducted from the compensation" (in the words of the section) then the railway company is limited to the amount of the compensation in its right to recover the costs. Or, as in the present case, where the costs exceed the compensation awarded, the railway company has no remedy to recover the excess.

The section of the Act in question reads as follows:—

199. If, by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation. 2. The amount of the costs, if not agreed upon, may be taxed by the judge.

I am unable to find any Canadian case where the question here arising on the interpretation of this section has been argued or decided. In *Ontario & Quebec R. Co.* v. *Philbrick* (1886), 12 Can. S.C.R. 288, the question was as to who was entitled to costs of the arbitration, and s. 9 (19) of the Consolidated Railway Act, 1879—practically the same as 199 of the present Act—was discussed. While the remedy, in event that the costs exceeded the amount of compensation awarded, was not in point and not argued or decided, I find it assumed by the learned judges of the Supreme Court that the party entitled could recover as a debt on the statute. In the second paragraph of the judgment of Ritchie, C.J., the following sentence occurs:—

he can only recover them (costs) *by action* and it is clear that if he is not entitled to them the mere taxation cannot establish a liability on the company to pay them,

and Henry, J., on p. 297, expresses the sub-sec. (19) in narrative form thus:—

Where the amount tendered is found to be insufficient, the railway company is liable to *pay* the costs of the arbitration, otherwise the costs are to be *paid* by the owner of the land.

Without the precise point being raised it would seem to have been unquestioned in the minds of these judges that, where the statute declares the costs "shall be borne," there was a right of action on the statute to recover, even though the statute used the word "borne" instead of the word "paid."

Atwood v. *Kettle River Valley R. Co.* (1910), 15 B.C.R. 330, was an action brought to recover costs under ss. 199 and 207, but was dismissed on grounds other than the one here at issue. But plaintiff's counsel in that case urged that the proper remedy was to sue and it does not seem to have occurred to opposing counsel or any of the justices of appeal to object to his statement of the law.

There are, however, a line of cases in England upon the Lands Clauses Act, 1845, which I think may be properly and authoritatively applied to analogous sections of the Railway Act because the legislation is of similar character, providing for the exercise of compulsory powers against the owners of property where the public benefit is deemed to justify it. In such cases it is the universal principle of the legislature to provide for costs so that the owner of property against whom the compulsory rights are exercised may be indemnified. S. 34 of the Lands Clauses Act, 1845 (Imp.), reads thus:—

> All costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrator shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration and the costs of the arbitrators shall be borne by the parties in equal proportions.

It will be noticed here that the word "borne" is used as in s. 199 of the Railway Act, and the English cases arising upon s. 34 above quoted adopt the principle that, if by statute a party is entitled to costs, it is implied that there is a right to recover, even though not so stated in express terms. See *Metropolitan District R. Co.* v. *Sharpe* (1880), 5 App. Cas. 425.

Parliament cannot have intended that the party whom it has declared shall bear the costs of the arbitration would not be compellable to pay them, nor can I see any reason, after a perusal of the whole Act, to limit the costs, where the company is entitled to them, by the amount of the compensation, which is declared to stand in the place of the land.

The provision for deducting the costs of the company from the compensation simply gives to the company a preference for its costs to the extent of the compensation over creditors of the owner who may be secured for their claim on the land and therefore on the compensation which is substituted for it.

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The plaintiff's costs here have been settled by having been taxed and allowed by a judge as s. 199 (2) of the Act provides, and I have no jurisdiction to review that taxation.

There should be judgment for the plaintiff for the amount claimed and costs. *Judgment for plaintiff.*

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THE KING v. KEEPER OF HALIFAX JAIL. Ex parte SIMPSON. (Annotated).

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley, and Drysdale, JJ., Ritchie, E.J., and Mellish, J. November 30, 1918.

HABEAS CORPUS (§ I C—12a)—NOVA SCOTIA TEMPERANCE ACT—INFORMATION CHARGING MORE THAN ONE OFFENCE—POWER TO AMEND.

An information under s. 16 (4) of the N.S. Temperance Act charging more than one offence is bad, and the magistrate, at the commencement of the trial, refusing to amend, and then hearing the evidence to all the charges, has no power to make a conviction disclosing one offence only.

[S. 724 Criminal Code, *R.* v. *Alward* (1894), 25 O.R. 519, 522, applied.]

Statement.

MOTION for the discharge of the prisoner on a writ of *habeas corpus*, referred to the court by Russell, J.

Defendant, a physician residing and practising in the town of Dartmouth, was brought before the stipendiary magistrate of the town on an information laid by an inspector under the N. S. Temperance Act charging him with having between certain dates mentioned "for other than strictly medicinal purposes" given "prescriptions calling for liquor contrary to and in violation of the provisions of the N. S. Temperance Act."

Objection was taken to the form of the information by counsel for defendant on the ground that it charged more than one offence. The magistrate, without making any amendment, proceeded with the trial and heard evidence and convicted defendant for having given "a prescription calling for intoxicating liquor contrary to and in violation of the provisions of the Act," and adjudged defendant, for such offence, to pay a fine of $100, and in default to be imprisoned in the county jail for the county of Halifax for the term of 2 months.

On July 8, 1918, an *ex parte* application, on behalf of defendant, who had been committed to jail in default of payment of the fine imposed, was made to Chisholm, J., who granted an order calling upon the jailer to return forthwith the cause of detention of defendant and in the event of such return disclosing no other

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cause of detention than that stated in the warrant of commitment that defendant be bailed to appear before the judge at chambers on July 16, on the hearing of a motion for his discharge from custody.

On July 16, defendant appeared and surrendered himself into the custody of the keeper of the jail. Russell, J., the presiding judge at chambers, after hearing counsel for the prosecutor and for defendant, was of the opinion that the information and conviction were bad for the reason stated before the magistrate, and would have discharged the prisoner, but referred to the full court the preliminary objection that the prisoner having secured his liberty without notice and without any return having been made was not entitled to the benefits of a writ of *habeas corpus* or any statutory substitute in lieu thereof. In the meantime the prisoner was bailed to appear and surrender himself on the first day of the term, viz., Nov. 19, 1918.

The court having heard counsel and reserved judgment (November 20, 1918), Mr. O'Hearn, for the prisoner, applied for his release on bail pending the decision on the motion to discharge.

On the adjournment of the court, judgment was reserved until 2 p.m., when Harris, C.J., gave judgment as follows:—

In the case of Simpson before us this morning, the majority of the court think the prisoner should be admitted to bail, himself and one surety in the sum of $400, to appear on Saturday, November 30, at 10 a.m., to abide the judgment of the court. Drysdale, J., and Ritchie, E.J., dissent.

W. J. O'Hearn, K.C., for prisoner; *J. J. Power*, K.C., for prosecutor.

Harris, C.J.

HARRIS, C.J.:—S. 10 (4) of the N. S. Temperance Act (8-9 Geo. V., c. 8) provides that any physician

> who for other than strictly medicinal purposes gives any . . . prescription calling for liquor . . . shall be liable to a penalty for the first offence of one hundred dollars, and in default of payment forthwith upon conviction to imprisonment for a period of two months.

An information was laid before the deputy stipendiary magistrate against the defendant for that he did "for other than strictly medicinal purposes give prescriptions calling for liquor," etc.

He was convicted for that he did "for other than medicinal purposes give a prescription," etc. A fine of $100 was imposed—

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it was not paid—and defendant was arrested and, thereupon, an application was made to Chisholm, J., for an order under the provisions of c. 181 of the Revised Statutes requiring and directing the keeper of the jail to return to the court or to a judge whether or not the said defendant was detained in such jail together with the day and cause of his having been taken and detained—the object being to test the legality of his imprisonment.

S. 5 of c. 181, R.S.N.S., provides:—

(1) Upon return to such order the court or judge may proceed to examine into and decide upon the legality of the imprisonment and make such order, require such verification and direct such notices or further returns in respect thereto as are deemed necessary or proper for the purposes of justice.

(2) The court by order or the judge by order in writing signed as aforesaid may require the immediate discharge of the prisoner or may direct his bailment in such manner and for such purpose and with the like effect and proceeding as is allowed upon *habeas corpus*.

The order made by Chisholm, J., in the first instance contained a provision:—

That upon said return disclosing no other cause of detention than the warrant of commitment referred to that the said Henry O. Simpson be bailed in the sum of $400 in one surety for his appearance on a motion to discharge him from custody on the commitment herein referred to and to receive judgment on said motion.

It appears that, later, the return of the warrant was filed in the prothonotary's office, and, thereupon, the prothonotary without any other order of a judge admitted the accused to bail and he was released.

On the day fixed for the hearing of the motion by the order of Chisholm, J., the prisoner's counsel took the defendant to the sheriff's office about 9.30 a.m. and said to the keeper of the jail that

Dr. Simpson desires to surrender himself into your custody as keeper of the Halifax gaol in connection with the *habeas corpus* proceedings pending this morning,

or words to the like effect, and the jailer says that, thereupon, Dr. Simpson surrendered himself into his custody. At 10 a.m. he says he took the defendant up to the Supreme Court room before Russell, J., when the motion was proceeded with and argued. The jailer says that in the interval between the surrender and the hearing of the motion the defendant was in his custody as jailer.

On the motion before Russell, J., an objection was taken on behalf of the prosecutor that the judge had no jurisdiction to deal

with the matter because it was urged the defendant was not then in custody. The judge heard the motion on the merits and thought the objections urged against the conviction and warrant for arrest were fatal, and that the defendant ought to be discharged, but he referred the whole matter to the full court and ordered that the bail allowed by the order of Chisholm, J., be continued for the appearance of the defendant before the full court. He was, thereupon, released and when the matter was heard by the full court he again appeared in the custody of the jailer, having, it is alleged, surrendered himself on the day of the hearing.

The counsel for the prosecutor contends, by way of preliminary objection, that the defendant has disentitled himself to an order for his discharge because, as he contends, he was illegally bailed.

First, he contends that bail cannot be taken on a writ of *habeas corpus* examining a commitment in execution, and, second, if the judge could take bail in such a case, that he cannot do so *ex parte* and without passing on the return.

I think an order for bail should never be made before the return of the jailer has been examined by the judge. It is quite unnecessary to go into the many objections to the course taken in this case.

It is unnecessary in my opinion to decide the preliminary objection urged by Mr. Power, K.C., because, assuming the bail to have been unauthorized and void, I am unable to see how it defeats the application. The defendant was in custody when the order was granted by Chisholm, J., and when the application was heard he was in custody, and that is the condition of affairs which exists in every case where a judge after examining the return admits a prisoner to bail pending the hearing of a motion for his discharge. The only difference is that in the latter case he would be at large in the meantime on a lawful order, whereas in the former his being at large was unauthorized. His being at large in this case at most amounted only to a negligent escape and he clearly could not be punished for an escape under s. 185 of the Code. (See *R.* v. *O'Hearon* (No. 2) (1901), 5 Can. Cr. Cas. 531.)

The test is, I think, whether he was in custody when the order of Chisholm, J., was made and when the case was heard by Russell, J.

There is no doubt that he was in custody on both occasions.

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Harris, C.J.

Previous to the hearing before Russell, J., he had surrendered himself to the jailer and during the hearing he was in the custody of the court (Hurd on Habeas Corpus, 319; Church on Habeas Corpus, 260) and Russell, J., so treated the case because he admitted him to bail until the motion could be heard by this court.

The case of *Re Bartels* (1907), 13 Can. Cr. Cas. 59, relied upon by Mr. Power, K.C., differs from this inasmuch as there the defendant was not in custody when the application was heard. In none of the cases cited were the facts similar to this, and they are all distinguishable. I think the preliminary objection fails.

It, therefore, becomes necessary to examine the grounds urged against the conviction, and I have reached the conclusion that under the circumstances the prisoner must be discharged. The information charged the giving of prescriptions. The counsel for the accused on the trial objected to the information on this ground and asked for particulars and to be told the particular prescription for the issuing of which he was to be tried and this information was refused. The case seems to be on all fours with *R.* v. *Alward*, 25 O.R. 519, at 522, where Armour, C.J., said:—

> In this case there can be no doubt that more offences than one were charged in the information; that the justices, notwithstanding that the defendant's counsel objected to the information on this ground, proceeded and heard evidence in respect of all the offences originally charged in the information; that they then amended the information by substituting August 8 for July 8 therein and thereupon proceeded and heard evidence in respect of the substituted charge and, thereupon, dismissed that charge and made the conviction returned to this court. I think, therefore, that the principle of law I applied to the facts as I viewed them in *Reg.* v. *Hazen* (1893), 23 O.R. 387, is entirely applicable to the facts of this case however they may be viewed and that the conviction must be quashed.

Street, J., after stating the facts and distinguishing *Reg.* v. *Hazen* (1893), 20 A.R. (Ont.) 633, said, at p. 523:—

> It was, I think, the duty of the magistrates when the objection was taken to have amended the information by striking out one or other of the charges and to have heard the evidence applicable to the remaining charge only. . . . I agree, therefore, that the conviction should be quashed.

This was followed in *Rex* v. *Austin* (1905), 10 Can. Cr. Cas. 34, by Scott, J.

On the argument, I was inclined to think that if the information could not be read as including only one offence, yet the difficulty might be regarded as cured by s. 724 of the Code, but a

careful consideration of the authorities has convinced me that this view is erroneous.

The prisoner should, in my opinion, be discharged. There will be the usual order that no action is to be brought.

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Russell, J.

RUSSELL, J.:—The prisoner was committed to jail for an offence under the Liquor License Act, and was allowed to go at large having given his recognizance with sureties for his appearance at the time the motion for discharge under *habeas corpus* should come before the judge at chambers. The matter having been argued before the judge at chambers, he referred it to the court *in banco* and a recognizance was given, as before, for the appearance of the defendant on the first day of court. On that day, the prisoner surrendered himself under the terms of the recognizance and is now in jail.

For the reasons given in the opinion pursuant to which the case has been argued during the present term, I think the detention of the prisoner was illegal and that he should be discharged.

It is argued that if the admission of the prisoner to bail was irregular and without authority the court cannot now discharge the prisoner even if the imprisonment was illegal. I see no reason for that contention. After the return to the *habeas corpus* the prisoner was, as he is now, "under the control and direction of the court." If the application for his discharge is now dismissed, as counsel for the prosecution contends it should be, the prisoner must remain in custody indefinitely under an illegal commitment because he has honourably fulfilled the conditions of his recognizance by surrendering himself according to its terms.

I do not find it necessary to answer the question which has been very fully argued whether the judge who granted the writ of *habeas corpus* or the judge at chambers who referred the matter to the court had or had not power to admit the prisoner to bail.

Drysdale, J

DRYSDALE, J.:—This man was convicted by a magistrate under the N. S. Temperance Act and was committed to jail. The conviction was good on its face and the warrant of commitment good. Whilst he was in jail under execution, he applied for a writ of *habeas corpus* and by an *ex parte* order obtained bail improperly before any return was made. I am sure the order admitting him to bail before any return was made must have been improperly obtained. At any rate, it is without precedent and should not

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have been obtained. I think, in the result, it was an effort to defeat execution under conviction even if *bonâ fide* made, and I regard the release of Simpson under such order as an abuse of the writ of *habeas corpus*. His release under such order, and the bail thereby directed, was nothing short of an escape. I think he has been at large ever since. I find no commitment or legal custody of the man since. He says he surrendered himself to the chambers judge on the return of the writ. The record shews me only that the bail was continued and, in my view, continuation of bail taken under a void order is no valid bail. He cannot walk into the court and sit beside the deputy sheriff at his will and say he is under legal arrest. But if he is in custody, what is his ground for discharge? He says, first, that the information is bad in that it charged more than one offence, the information being for issuing prescriptions instead of one definite prescription. The Code is applicable, and by express language any defect in the information is cured. The conviction by the magistrate was for one offence only, and is good on its face.

I think we cannot go behind the conviction, unless we are a court of appeal to revise the magistrate on the merits. This we are not expressly by the Temperance Act. In the magistrate rests all opinions on the merits as well as incidental rulings on procedure.

The information gave fair notice of the charge. The plural covers the singular. I do not doubt that the accused had fair notice of what he had to meet. The magistrate's rulings as to procedure do not go to the jurisdiction and with his rulings I am not concerned. I do notice that he convicted for one definite offence, that it was covered by the information, and that the subject-matter and person were within the magistrate's jurisdiction. With such a good conviction and good warrant thereon, in execution under such conviction, I decline to lend myself to any effort to defeat such execution.

I regret I am in a minority, but I must say I find no authority to justify this court in exercising the functions of an appeal tribunal where the legislature has expressly said there shall be no appeal from the magistrate.

I would dismiss the accused's application.

Longley, J.

LONGLEY, J., concurred with Drysdale, J.

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Ritchie, E.J.

RITCHIE, E.J.:—So far as the preliminary objection is concerned, Simpson was in custody when the application for his discharge was made. Assuming that he was, as Mr. Power contends, illegally admitted to bail, then he was in the position of an escaped prisoner, liable to recapture, and as to detention under the original warrant of commitment. He was not recaptured, but he surrendered himself into custody; the moment he did so I think he was caught by the warrant referred to in the return which was in the hands of the keeper of the jail. Under that warrant he is now, and was at the time of the hearings, in custody. The information is absolutely bad because it is in direct violation of the statute in that regard. The conviction referred to in the warrant is good on its face, being for one offence only, and the question is whether the defect in the information is cured by the curative sections of the statute. Charging more than one offence is absolutely prohibited by the statute. I cannot follow the logic which leads one to the conclusion that parliament intended that, if the specific prohibition was violated, no objection could be taken. Before I can come to this conclusion, I must have something more than the general words in the curative sections. I think specific language is required. I am not unaware that there is authority against this view, but not authority which is binding upon this court. Every man, no matter how guilty he may be, is entitled to a fair trial, and it is an elementary principle of criminal law that a man on trial should have fair information and reasonable particularity as to the offence charged against him. Such information and particularity were denied to Simpson on his trial.

In my opinion, the application for discharge should be granted.

Mellish, J

MELLISH, J.:—I have come to the conclusion that no proper charge was made against the accused which would justify the magistrate in proceeding thereon and making the conviction complained of. The prescribing of liquor for purposes not strictly medicinal is not made a generic offence under the Act like selling or keeping liquor for sale. The latter offences may, in their nature, be continuous and may be proven by definite specific acts. But the Act makes it an offence to grant "any prescription" calling for liquor for purposes not medicinal, and I think before any one can be convicted of such an offence, such a charge must be made against him to give the magistrate jurisdiction.

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Mellish, J.

The charge in this case is for granting "prescriptions," illegally, between specified dates. This must mean that the accused had committed more than one specific offence against the Act. I think the accused was entitled to know specifically what one offence he was charged with before the magistrate could proceed to try him. I think the accused was improperly admitted to bail after the return was made to the order of Chisholm, J. Russell, J., was of the opinion, however, that this did not preclude him from dealing with the legality of the prisoner's detention as disclosed in the return. With this view I am not prepared to disagree. The accused was only admitted to bail apparently pending the hearing before Russell, J., who enlarged the bail pending the hearing before this court to which the application was referred by him.

With some hesitation, I have come to the conclusion that the question whether or not the accused was entitled to bail either upon the order of Russell or Chisholm, JJ., is not a matter which really affects the merits of this application. If the application be refused, I think the accused will have to serve out his term of imprisonment or pay his fine. If his detention under the commitment is illegal, however (and he is, I think, so detained notwithstanding the bail which really presupposes such detention) he is entitled to his discharge.

Whether such detention be illegal is, I think, really the only question before us. I resolve any doubts I may have in favour of liberty and think the accused entitled to his discharge.

Prisoner discharged.

Annotation.

ANNOTATION.

Bail-Pending Decision on Writ of Habeas Corpus.

BY W. J. O'HEARN, K.C.

Ex parte Simpson is authority for the proposition that, pending the decision on a writ of *habeas corpus* and after a return made, the prisoner may be bailed even when *in execution*. Some confusion has arisen in consequence of the opinions of different text writers. Archbold, in his Crown Office Practice (1844), pages 330, 338 and 339, in discussing the question of bail, states that the prisoner will never be bailed while *in execution*. He evidently is discussing the Statute of Charles (1789), which, on the face of it, excludes the operation in cases where the warrant of commitment discloses felony or treason, or where the party is *in execution*. See s. 3, 31 Car. II.

The Statute of Charles is a bail statute and never applied in any case where a prisoner was in custody under sentence. It was a statute passed to

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secure the more expeditious bailing of misdemeanants. A prisoner in custody committed for trial for felony could not get bail under it; but, was obliged to seek recourse under the common law writ of *habeas corpus*. In all cases, where the party is under sentence, the application is made at Common Law. See Hurd, pages 86, 398: *R.* v. *Johnson* (1912), 1 D.L.R. 548, 19 Can. Cr. Cas. 203.

After a return is made to the writ of *habeas corpus* the officer of the court issuing the writ has power to bail, pending the decision. See Hurd on Habeas Corpus, p. 319; Church, p. 260; *Barth* v. *Clise* (1870), 12 Wallace (U.S. Sup. Ct.), p. 402; and bail may be granted even when the applicant or relator is *in execution*. See *Rex* v. *Reader* (1795), 1 Strange 531, 93 E.R. 681; *Re Bailey* (1854), 3 El. & Bl. 607, at 609-611, 118 E.R. 1269; *Re McKinnon* (1866), 2 U.C.L.J., N.S., 324, at p. 329; *R.* v. *Iwanachuk* (1918), 13 A.L.R. 549.

Bail is granted on the theory that, once the writ is issued and a return is made, the detention on the original warrant of commitment is superseded and its effect temporarily suspended and the prisoner is detained pending the decision of the writ, *not* on the commitment, *but* under and by virtue of the writ of *habeas corpus* itself. The remedy by *habeas corpus* to test the validity of a conviction against the defendant antedates the statute of Charles and, perhaps, Magna Carta itself. See Hurd, p. 132.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. December 5, 1918.

1. CONTRACTS (§ VI A—413)—VENDOR'S REPUDIATION—ACTION BY PURCHASER TO ESTABLISH—TIME FOR DELIVERY NOT ARRIVED.
Upon a vendor's repudiation of an agreement for sale of goods, the purchaser is entitled to bring an action to have the agreement established, although the time for delivery of the goods sold has not arrived.

2. RECEIVERS (§ I A—10)—COURT JUSTIFIED IN GRANTING INJUNCTION—INJUNCTION INEFFECTIVE—MAY APPOINT RECEIVER.
Where the circumstances are such as to justify the court in granting an injunction against the disposition of goods, and where it is made to appear that an injunction is likely to be ineffective, the court may appoint a receiver to take actual possession of the goods.

Statement.

APPEAL from the judgment of His Honour Judge Winter, who gave judgment dismissing the plaintiff's action on the ground that it was brought too soon in any case, and giving judgment for the defendant on his counterclaim for $50. Reversed.

E. Coleman, for appellant; *S. H. Adams*, for respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—The facts, as I find them to be, are as follows:—Ratz, the defendant, was living in a rented house in Calgary with his wife and a young woman relative. He was proposing to leave town, and, consequently, to sell his household furniture. Kay,

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the plaintiff, heard of this in some way and went to Ratz's house. There, on Wednesday, March 20, 1918, they made a bargain Ratz signing a memorandum drawn up by Kay in the following terms:—

Mar. 20, 1918.

Sold to Mr. C. Kay the following goods
(The furniture was then listed)
to be called for Monday afternoon. Address:
651 Center Ave., Brigeland.
The above goods sold for $116.00
Deposit 5.00

Balance $111.00
(Sgd.) ANDREW RATZ.

It appears that the defendant wanted $133.50 for the goods, but, after some negotiating, agreed to accept $116. The defendant sent for the plaintiff the next day, Thursday, and said he had made a mistake of $26, and that, if the plaintiff wanted the goods, he must pay $26 more, offering, if the plaintiff did not take them, to return the $5 deposit. The plaintiff replied that he did not consider the goods worth more than he had agreed to pay for them, and insisted upon the bargain being carried out, and threatened suit if necessary. The defendant said he would keep the goods. The plaintiff was ready to pay the balance of $111 in exchange for the goods.

If there was a mistake, there was none on the plaintiff's part.

The plaintiff commenced his action on Friday, March 22, setting up the agreement, and the defendant's repudiation of it, and claiming the goods or their value, damages, a replevin order, specific performance and an injunction against the selling of the goods. On Saturday, March 23, the plaintiff obtained an interim order from the District Court Judge. It contained an undertaking on the part of the plaintiff:—

The plaintiff, by his counsel, undertaking to abide by any orders as to damages which this court may make in case it should hereafter be of the opinion that the defendant shall have sustained any by reason of this order and injunction which the plaintiff ought to pay.

It restrained the defendant from making any disposition of the goods; it authorized the plaintiff to pay into Court the $111 in substitution for the bond required upon the issue of a replevin order (and this was done) and, this being done, directed the sheriff to take the goods and hold them until the issues in the action were determined.

Such an order, so far as it went beyond a mere injunction, was quite justified by our rules of procedure relating to replevin (rules 467-476) which, like our earlier rules, made replevin proceedings merely collateral and subsidiary to an action respecting the goods and which, going beyond the earlier rules, more nearly assimilate them to proceedings for a receiver order. It was found by the trial judge, I think rightly, that the plaintiff was not entitled to the actual possession of the goods until Monday, March 25. Nevertheless, where the circumstances are such as to justify the court in granting an injunction against the disposition of goods, I am of opinion it may go the further step, where it is made to appear that an injunction is likely to be ineffective, of appointing a receiver to take actual possession of the goods. Such a case was made here, upon the affidavit filed upon the application for the order and was fully confirmed by the evidence at the trial.

The only reported case nearly like the present, that I have found is *Taylor* v. *Eckersley* (1876), 2 Ch. D. 302, (1877), 5 Ch. D. 740. See also 34 Cyc. tit. Receivers, p. 68.

The order made in the present case was, in effect, a receiver order; had it been one which gave the actual custody of the goods to the plaintiff instead of the sheriff, as is usual in replevin, I see no reason at the moment for looking at it differently. The question of security or indemnity to the defendant being carefully considered. In this view the plaintiff was justified in bringing his action before the time at which he was entitled to possession had arrived, the action being one for an injunction and, in effect, a declaration of a right to specific performance. The additions of claims for other relief, to which, at the moment he was perhaps not strictly entitled, in no way invalidated his proceedings, nor did it increase the costs.

The action, therefore, was, in my opinion, not prematurely commenced and in the evidence I think the plaintiff was entitled to have the agreement established. The order for an injunction and, under the circumstances for a receiver, being, as I find, justified, the defendant was not in my opinion entitled to any damages by reason of being deprived during a part of Saturday, Sunday and the early hours of Monday, of the use of the goods. Had he been so entitled as under different circumstances, a purchaser against whom a similar order should be made, might be

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entitled—he would, I think, be entitled to recover them—not upon a counterclaim but upon the plaintiff's undertaking contained in the order. See *Albertson* v. *Secord* (1912), 1 D.L.R. 804, 4 A.L.R. 90.

I would, therefore, allow the appeal with costs and direct judgment to be entered in the Court below for the plaintiff declaring the validity of the agreement and declaring the plaintiff entitled to the possession of the goods. The plaintiff should have his costs of the action. The counterclaim should be dismissed without costs. The moneys in court should be charged with the costs to which the plaintiff has been declared entitled.

Appeal allowed.

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JOHNSON AND MACKAY v. S.S. "CHARLES S. NEFF."

Exchequer Court of Canada, Hodgins, L.J. in Adm. April 27, 1918.

SALVAGE (§ I—4)—MODE OF ESTIMATING AMOUNT—COSTS—DISTRIBUTION.

In finding the value of salvage services, amongst other circumstances the court must consider the degree of danger to which the salved vessel was exposed, and from which she was rescued by the salvors, and the risk incurred by the salvors in rendering their services and the mode in which the services were rendered. The value of the vessel salved, while important, is not decisive. There is a difference owing to conditions rendering disaster less probable in the amount to be allowed for salvage services on the Great Lakes and on the high seas.

Statement

CONSOLIDATED actions for salvage.

J. A. H. Cameron, K.C., and *R. S. Cassels*, K.C., for plaintiff Johnson and the crew of the ship "Sarnor"; *C. V. Langs*, for plaintiff Mackay; *M. J. O'Reilly*, K.C., and *W. B. Scott*, for ship "C. S. Neff" and the underwriters.

Hodgins, L.J. in Adm.

HODGINS, L.J. in ADM.:—Consolidated action for salvage tried before me at Toronto on the 27th and 28th days of March, 1918. The ship "Sarnor," on Nov. 29, 1916, about 10.15 a.m., went to the assistance of the ship "Neff," then at anchor 6 miles off the south shore of Lake Erie, near Dunkirk, N.Y. The ship had lost her propeller about 6 a.m., through striking some submerged obstacle. The "Neff" was taken in tow, and brought safely to Port Colborne. Just outside the harbour, the "Sarnor" cast off the tow line and tied up to the "Neff" in order to better make the harbour. The operation took about 5 hours and was performed without any untoward incident.

I have come to the conclusion that the plaintiffs are entitled to

salvage. The "Neff" is a steel steamer, canal size, 225 ft. long by 40 ft. beam, the value which I find to be $90,000 in her damaged condition when found by the salvors. She had a cargo of 1,293 tons of pig iron, worth about $32,000, and the freight being earned thereon from East Jordon, Mich., to Buffalo, was stated to be $2,000. The loss of her propeller had injured the low pressure port column and the pump bracket was fractured. These injuries reduced her pumping capacity. She was off a shore said to be strewed with boulders and likely to become a lee shore if the wind should shift, as it did at 3 p.m. that day. Her mate, Lindeman, said that the weather glass shewed that something might develop, and that if the sea got up there would be danger. Her captain, Doak, agrees as to the warning given by the barometer, which began to drop on the morning of November 28, and says that he went over to the south shore of Lake Erie to avoid a sea if the wind shifted and increased, as was indicated. He says that with her wheel gone there would be danger, but not otherwise. He, in fact, sounded distress signals to attract the attention of several ships which passed. His ship was, of course, helpless and had to depend on her anchors holding, if it came to blow. It was shewn by the weather bureau records that on the morning of November 29 there was a fresh to strong westerly wind, cloudy at Port Colborne, and possibly raining on the south coast of Lake Erie, and that in the evening the wind shifted to the southwest. Its velocity near Dunkirk was between 20 and 32 miles an hour. Its effect may be deduced from the fact that after the ship "Neff" was in Port Colborne she had to be shifted by two tugs to the inner harbour on account of the freshening of the wind, which Capt. Doak describes as "strong wind, squally," and that the "Sarnor," after leaving next morning, laid up all that day behind Long Point. On the other hand, the "Neff's" captain says he was in the usual line of travel to Buffalo. This is denied by Johnson, who puts the "Neff" eight or ten miles off the beaten track. But it appears that between 6 a.m. and 10 a.m. three vessels, at least, passed, but without responding to the signals. The probability of other assistance is an element in lessening the amount allowed for salvage. The *Werra* (1886), 12 P.D. 52.

As events turned out, the weather did not become heavy until Port Colborne had been reached. But there was apprehension of

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danger, and, as I view it, some real danger if the "Neff" had been left where she was without any means of propulsion, depending wholly upon the anchors or other passing assistance and with a glass which had been falling for over 24 hours.

I am not impressed with the argument that the operation of salving was attended with any great danger or difficulty. The "Sarnor" is a single-screw wooden vessel of 1,152 tons, 237 ft. long and 38 ft. beam, with a carrying capacity of 1,000 to 1,100 tons. She was steaming light, going to Erie, Pa., for a cargo of coal. Her captain, Johnson, says he saw the "Neff" 2 miles off, the sea was not rough, the vessels came within 10 to 15 ft. of one another and the tow line was passed without trouble, while the voyage across was uneventful. There is, however, always danger in the manœuvring of a wooden vessel when near a steel ship, both in getting the line, straightening up to tow and in going alongside to tie together, and there is some risk to the crew from the unusual operation.

While, therefore, I hold it to be a true salvage case within the authorities, I am unable to find that the element of danger or risk to the salving vessel was important enough to call for any exceptional compensation. The proper rule in fixing the amount is stated in *The Chetah* (1868), L.R. 2 P.C. 205, that in estimating the value of salvage services the circumstances, among others, to be considered by the court are the degree of danger to which the vessel was exposed and from which she was rescued by the salvors, the mode in which the services of the salvors were applied and the risk incurred by the salvors in rendering the services.

I think the excessive emphasis placed on the value of the salved vessel as an element is due to an imperfect appreciation of the various considerations to be weighed in fixing the amount of salvage; *The Amérique* (1874), L.R. 6 P.C. 468. Reference may also be made to 26 Halsbury's Laws of England, secs. 880-883, and to the case of *The Berwindmoor* (1911), 14 Can. Ex. 23, which is helpful in determining the quantum.

There is always to be borne in mind the difference between salvage on our Great Lakes and that at sea. While often the peril is as great and the skill as manifest, there are conditions that frequently render disaster less probable.

In a case which bears much resemblance to this in its details, this element is thus very lucidly stated.

In *The Spokane* (1895), 67 Fed. Rep. 254, at 257, a case decided in Wisconsin by a judge appropriately named Seaman, J., he observes:—

> The "Spokane" was found in the open waters of Lake Michigan, entirely disabled in her motive power, and helpless to reach any port for refuge or repair, at the close of the season, when serious storms were to be apprehended, and when a falling barometer indicated a storm pending, she was flying the signal and sounding the whistle of distress. . . . The delicate and difficult question remains to determine an amount for this salvage which shall not only recompense the service, but shall be a just reward for it, and shall also serve as an encouragement of others to like action. At the same time, the court ought not to impose more than should be justly paid by the respondents in view of the extent of peril from which the vessel and cargo were rescued, or an amount that would constitute a precedent discouraging vessels in distress or peril from invoking and accepting necessary aid. . . . Upon these lakes commerce has assumed vast proportions; vessels up and down pursue a regular and well-defined course, often within sight of shore, and, in case of distress, are not liable to remain long out of sight of other vessels; the newspapers publish the fact of passing Detroit and other points, so that the progress and position of all vessels are approximately known; good harbours are frequent; the towage of large vessels, barges and rafts has become a feature of this navigation, and only storms of the utmost severity are regarded as dangerous to such undertaking. The allowance for salvage must be made in conformity with these modified conditions. There are few reported decisions in reference to salvage service on the lakes; none has been cited justifying the allowance claimed by the libelant. I am satisfied that it would not subserve the public interest, and would not be just between the parties to allow so large an amount for salvage under the circumstances shewn.

The amount finally awarded was $3,600, and the value of the salved vessel and cargo was $320,000, and that of the salvor $125,000.

The salving of the "Neff" delayed the business of the "Sarnor" some five days at a period of the year when maritime risks are greatest. The chance of being frozen in between Montreal and Lake Erie is not inconsiderable. She was uninsured. The plaintiff Mackay claims 50 hours detention. The daily expenditure is put at $108.10 by the plaintiff Bonham, who says that he was delayed 4 or 5 days. At the utmost, then, the extra expense would be $540, and at the least, 50 hours, about $250. Towage, which according to the contention of the captain of the "Neff," is the correct description of what was done, would have cost, according to him, an amount which, having regard to the number of hours occupied in going and coming while towing, I should estimate at $250.

I come to the conclusion that, having regard to all the circumstances in evidence, the proper amount to allow as the value of

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the salvage service would be $2,600, to be distributed between the ship, the cargo and the freight. As the cargo has been discharged and is not before the court, this will mean judgment in this action for £1,800 against the ship, distributable $1,350 to the owners and $450 to the master and crew. To the master I apportion $150, to the engineer $150, and to the remainder of the crew $150. See *Cox* v. *May* (1815), 4 M. & S. 152; 105 E.R. 791; Kennedy on the Law of Civil Salvage, pp. 180, 186. *The Raisby* (1885), 10 P.D. 114. *The Stephie* (1914), 15 Can. Ex. 124.

Of this the sum of $1,650 will be paid into or left in court pending further order. This is owing to the litigation arising out of the relations between the parties plaintiff. The amount allowed to the crew will be divided equally among its members.

The plaintiffs should have the costs of the action brought by Mackay throughout and of the action after the consolidated order, to be paid by the ship. As to the Johnson action it was advisable, and in one sense necessary, in that it resulted in the arrest of the ship and the giving of security on her release. But as it was brought without leave (see rule 18, sub-s. 2), and was without doubt a most oppressive one so far as the amount claimed was concerned, I will only give the plaintiffs in it the costs of the action up to the consolidation order, but not including therein any costs of or concerning the bail or the release of the vessel or consequent upon the order made therefor other than what would have been incurred if the claim had been stated at a more reasonable sum, say $5,000. I follow in this the precedent set by Drysdale, J., in *The Uranium* (1913), 15 Can. Ex. 102, and am not adopting the severe action of Butt, J., in *The Agamemnon*, 5 Asp. 92, although there would be some justification if I did so. I do not, however, intend, in disposing of the costs, to interfere in any way with any orders made by Maclennan, J., in so far as they award costs to either party unless by the terms of any order or orders they properly fall within my jurisdiction to dispose of. The counsel fees at the trial in the consolidated action will be divided by the registrar when taxing costs, having regard to the fact that there turned out to be no real reason for separate representation of the master and crew, which I permitted because of the strained relations between Mackay and Johnson and Bonham. I do not see that I can do anything towards reimbursing the ship or the underwriters for their expenditure of $1,050 when giving bail to obtain the release

of the vessel. The fixing of the amount was done in Montreal, where that matter could have been dealt with if proper evidence had been adduced before Maclennan, J.

I should perhaps call attention to the extraordinary method adopted in keeping the log on the "Sarnor." There are two logs produced, the official one having been written first and the scrap log last; and to the interpolation of the word "west" in the latter. The evidence of the mate of the "Sarnor" was very unsatisfactory on this point.

The testimony given on behalf of the plaintiffs, as to the value of the services, was quite worthless, and may be measured by the difference between the original amount stated in Port Colborne to Mackay, *i.e.*, $10,000 to $15,000, and the amount for which the second writ was issued, viz., $117,000.

Re RURAL MUNICIPALITY OF SPRUCE GROVE.

Alberta Supreme Court, Walsh, J. December 21, 1918.

SCHOOLS (§ IV—74)—SCHOOL TAXES—REQUISITION BY TRUSTEES—LEVY BY MUNICIPALITY—LEVY ILLEGAL IF SUFFICIENT FUNDS IN HAND TO MEET REQUISITION.

Under s. 24 (a) of the School Assessment Ordinance (Alta.) and s. 295 of the Municipal District Act (formerly the Rural Municipality Act) it is the duty of the municipality to levy and collect the taxes requisitioned by the school trustees and pay the proceeds thereof to the treasurer of the school district. Under s. 308 of the Act the amount so requisitioned becomes a debt due and owing by the municipality to the district. If at any time after paying the amount requisitioned there is a balance to the credit of the municipality it should be utilized in meeting the next requisition, but if the municipality has funds on hand sufficient to meet the requisition it is illegal for it to make a new levy and retain such funds. The school rate struck in a district should not be more than reasonably required to meet the amount of the requisition.

SPECIAL CASE stated by leave of Walsh, J., under r. 218, before any proceedings have been instituted, to determine the legality of certain school tax levys by rural municipalities. Statement.

P. G. Thompson, for municipality; *H. C. Macdonald*, for school districts and ratepayers.

WALSH, J.:—The facts are set out with great fullness in the case but for my purposes may be stated very briefly. Huron School District No. 525 and Splan School District No. 475 are rural School Districts which are included wholly within the limits of the Rural Municipality of Spruce Grove No. 519. In the spring of 1918 the trustees of the Huron School District requisitioned the municipality to levy and collect $1,300 in taxes, and Walsh, J.

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the trustees of the Splan District similarly requistioned it to levy and collect in taxes $1,500. At the time when these requisitions were made, the municipality had in hand for the Huron District $1,419.08 and for the Splan District $2,244.77, as the result of tax collections made in the years 1916 and 1917, which exceeded in the aggregate, by these sums, the aggregate of the amounts requisitioned by the trustees of the respective districts for those years. In other words, the municipality collected in 1916 and 1917, in school taxes, $1,419.08 more than the trustees of the Huron District and $2,244.77 more than the trustees of the Splan District had asked them to. There was, therefore, in the hands of the municipality, when these 1918 requisitions came in, more money than was needed to meet them. At that time, the municipality was engaged in litigation with one of its ratepayers, in which the legality of the assessments of the preceding years was questioned and being fearful that the same might be held to be invalid and that a refund of the taxes realized thereunder might be ordered, determined to proceed to the levy of the amounts thus requisitioned, rather than utilize, for that purpose, the money so in their hands. The litigation, above referred to, resulted in favor of the municipality, so far as the question of the legality of the assessment and the collection of taxes thereunder were concerned. It has proceeded, however, with the levy and collection of the 1918 school taxes, and the surplus for each district above referred to is still in its hands. Upon these facts, the municipality and the school districts and certain ratepayers have concurred in submitting the following questions:— 1. What disposition should be made of the surplus funds in the hands of the municipality to the credit of the Splan and Huron School Districts respectively as of January 1, 1918? 2. Is the assessment and levy for school taxes for the year 1918 good in law? 3. If the assessment and levy for school taxes for the year 1918 be bad in law, what disposition should be made of the taxes already collected under such assessment and levy? 4. What other directions or declarations does this honourable court deem proper to be made in the premises?

These districts have, in themselves, no taxing powers. Under s. 24a of the School Assessment Ordinance and s. 295 of what was the Rural Municipality Act, but is now known as the Municipal District Act, it is the duty of the municipality to levy and collect the taxes requisitioned by the trustees and pay the pro-

ceeds thereof to the treasurer of the school district. Under s. 308 of the Act, the amount so requisitioned becomes a debt due and owing by the municipality to the district. My conception of the situation created by the ordinance and the Act, as between the municipality and the district, is this, that the municipality is liable for the payment to the trustees of the amount covered by their requisition, but that to indemnify itself against that liability it can and it must collect from the ratepayers of the district the amount of the same, by levying a rate which will produce the amount, making, under s. 293 of the Act, due allowance for non-payment of the taxes. Now, it is never possible to realize in taxes in any given year the exact amount of the requisition. It always happens that some of the current year's taxes are unpaid and that some of the arrears of former years come in. But whether or not the taxes come in, the municipality is bound, under s. 308 of the Act, to pay the amount of the board's estimate in quarterly instalments, and when payments of the taxes are made they are placed to the credit of the board. I think that the accounts between the two bodies are practically open, running accounts, which are never closed. On the one side are the payments made to the board, on the other side are the credits realized by tax collections. If, at any time, there is a balance to the credit of the board it should be utilized in meeting the next requisition. The request of the board to the municipality is to provide it with certain funds. If it has money on hand with which the same can be met, either in whole or in part, it is, I think, the duty of the municipality to so apply the same and make the levy for the balance. This is, I think, the spirit of the legislation. At any rate it is, in my opinion, the only way of working it out in practice with perfect fairness.

I would answer question 1 by saying that these surplus funds should be utilized to pay the 1918 requisitions of the districts to the extent of those requisitions and that the balance should be retained by the municipality and applied *pro tanto* upon future requisitions of the districts.

I would answer question 2 by saying that, in my opinion, the school tax levy of 1918 is illegal, because it was unauthorized in view of the fact that the municipality had in hand, when it was made, funds more than ample with which to meet the requisitions.

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It was objected, in argument, that this disposition of the matter will result in injustice to the ratepayers of the preceding years, as the surpluses now in hand, are the result of excessive levies in those years, while the 1918 ratepayers will be entirely relieved from taxation for school purposes this year. That is true, but it seems to me to be unavoidable. The proper theory of taxation, I suppose, is that each year's burden shall be borne by that year's taxpayers, but in practice that is impossible. Arrears from former years always come in and are utilized for payment of current liabilities, and, to that extent, the ratepayers of those years are contributing to the current year's expenses. Some current year's taxes are always unpaid and to that extent the ratepayers of the current year are avoiding their contribution to the expenditures of that year and are rendering their taxes an asset for the future. The present trouble is but an aggravation of these ever-recurring experiences. The only way to treat the question is, I think, to regard the district as an entity and to disregard entirely the individuals who constitute its tax-paying population.

Referring to question 3, I would say that, as a matter of law, this must depend upon the circumstances under which each particular payment of taxes was made and, without knowledge of them, I am not able to answer this question. As a matter of equity, however, they should be returned to the ratepayers from whom they were received. I would advise that they be transferred to a suspense account, so as not to be mingled with the funds of the districts arising from former levies and so made more easily distributable amongst those entitled to them, if refunds are to be made to the ratepayers.

Referring to question 4 I have only one remark to make, and that is that the school rate struck in both districts in the year 1916 and in the Splan District in 1918 is so outrageously high as to be, in my opinion, illegal. The limit of the power of the municipality to impose a rate is the amount of the Board's requisition, with a due allowance for non-payment of the taxes. A levy in excess of that is unauthorized and, therefore, illegal. In 1916, the municipality imposed a rate in the Splan District which would have realized two and a half times the amount of the Board's requisition and in the Huron District one which would have yielded more than half as much again as the requisition if all the

taxes had been paid. This year in the Splan District the requisition is for $1,500 and, yet with $4,025.56 arrears on the roll and $2,244.77 cash in hand, the municipality imposed a rate which would yield $4,107.45, if full collection of the current year's school rate is made. This is, upon the face of it, at least so monstrous as to be absolutely unsupportable and I would advise the council of the municipality to exercise more care in this respect in the future. *Judgment accordingly.*

PRATTE v. VOISARD.
(Annotated.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. October 8, 1918.

EVIDENCE (§ VI M — 660) — HANDWRITING — PROOF OF — TESTIMONY OF EXPERTS—COMPARISON.

Under the law governing proof in the Province of Quebec, the testimony of experts in handwriting by comparison is admissible.

[See annotation following; see also annotation, 13 D.L.R. 565.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, Drouin, J., District of Three Rivers, which maintained the plaintiffs' action with costs. Reversed.

Alex. Taschereau, K.C., and *E. Fabre Surveyer*, K.C., for appellants; *Belcourt*, K.C., and *St. Laurent*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is an action to set aside a will as fraudulent.

The testator, Edouard Voisard, was a farmer and a bachelor. He died on September 11, 1915, at the age of 76, shortly after meeting with a serious accident. He left an estate valued at about $40,000.

At the time of his death, he had, living with him, his nephew, Narcisse Voisard, and two old women named Louise and Olivine Lescadre. These women, who were sisters, had kept house for him, and his father before him, for many years.

In answer to the inquiries of the relatives who attended the funeral, Louise Lescadre said that she knew of no will made by the deceased. But four days later she produced a holograph will dated August 15, 1915, which she said she had found under the mattress of the deceased's bed. This will, which was proved on September 29, 1915, is the one now sought to be set aside.

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At the trial, documents, admittedly in the handwriting of the testator and of Louise Lescadre, respectively, were put in for the purpose of comparison. Drouin, J., by whom the case was tried, observes that the writings of the testator shew him to have been a man of education, capable of expressing himself correctly, whilst in the will we find:—

une ignare manière de dire, une orthographe pleine d'incorrections et une écriture bien inférieure à la sienne.

And, comparing the writing of Louise Lescadre with that of the will, he says:—

La similitude est tellement frappante et probante qu'elle saute aux yeux des moins experts;

and further:—

la physionomie générale de l'écriture est aussi parfaitement la même que différente de celle des écrits prouvés avoir été faits par Edouard Voisard.

The judge also says that, as a witness, Louise Lescadre shewed herself unworthy of credit, and he concludes that the will in its entirety was composed and written by her.

The Court of King's Bench reversed the judgment, Cross and Carroll, JJ., dissenting.

Pelletier, J., who delivered the judgment of the majority of the court, admits, as every one necessarily must, that at first sight, a comparison of the handwritings is most convincing in favour of the appellant's theory. But, he says:—

Si le procédé de la comparaison des écritures n'est pas infaillible, y a-t-il au dossier, dans l'ensemble, la preuve suffisante pour maintenir l'action.

It must, indeed, be admitted that proof by comparison of handwriting is not infallible. But, where it is so certain, as the trial judge has found, it must have great weight. For, in many cases, what other evidence of forgery could be made? Evidence in support of or against it can, however, of course, be offered.

Counsel for the respondents strenuously argued that "under the law governing proof in the Province of Quebec, the testimony of experts in handwriting by comparison is not recognized or admitted." And in support of this general proposition, reference was made to *Paige* v. *Ponton* (1877), 26 L.C.J. 155, at p. 157; *Deschènes* v. *Langlois*, (1906) 15 Que. K.B. 388; *Banque Nationale* v. *Tremblay* (1913), 46 Que. S.C. 304. The same objection must exist to all opinion evidence, whether it be medical testimony or that of a chemist, engineer or other scientist, and the disastrous results that would necessarily follow from the adoption of such a

principle must be obvious to all who are concerned with the administration of justice. This objection cannot, in my opinion, be maintained in view of the provisions of arts. 1204, 1205 and 1224 of the Civil Code. The language of art. 1205 seems wide enough to include evidence of handwriting experts. True, it is merely opinion evidence, but if given by honest and competent persons, it must be of assistance to the court. And, in a case of this sort, it is difficult to see how the alleged forgery could be exposed except by experts and competent opinion evidence. The rule contended for by the respondent would, I repeat, frequently be a serious obstacle in the administration of justice, and, as was recently said:—

it would, if adopted, create unlimited opportunities for designing persons to forge the name of deceased persons to important documents and then swear it through.

If the cases relied upon at the argument are carefully examined, it will be seen that they afford no support for the respondent's somewhat startling proposition. The judges who sat in these cases merely say that the evidence of an expert will be given weight according to the reasons given in support of it. In *Paige* v. *Ponton* (*supra*), Sanborn, J., says, at p. 158:—

There is, undoubtedly, great uncertainty in the proof of writing whether general knowledge of handwriting or by experts; but it is difficult to see why proof from comparison is less objectionable in principle than proof from having acquired a knowledge of a person's writing, by forming a standard in the mind from having frequently seen the person write.

This is not very illuminating. Then, the judge concludes by saying:—

I find nothing in the expression of opinion by judges who have dissented from the rule of the old law indicating that a writing could be solely proved by comparison of a disputed writing with a genuine by experts. It has been urged merely that it might supplement weak proof of the writing by strictly legitimate means; I do not think that alone it is plenary.

The headnote of that case is:—

The signature to a writing which is denied cannot be proved solely by comparison of the disputed signature with other signatures which are admitted or proved to be genuine,

and in *Deschènes* v. *Langlois* (*supra*), Bossé, J., said (p. 390):—

Les raisons que les hommes de l'art donnent pour soutenir leurs opinions peuvent être d'un grand secours et aider puissamment l'avocat comme le juge à fournir son ministère; mais, il ne faudrait pas aller au-delà et adopter une théorie scientifique contrairement aux règles ordinaires de la raison.

I am of the opinion that the trial judge was guided by this principle in the appreciation of the evidence in this case.

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It is quite true that expert evidence, under modern practice, is rapidly becoming of little value for any judicial purpose, because even men of the highest character and integrity are apt to be prejudiced in favour of the party by whom they are employed, and that the better procedure is that prescribed by the ordinance of 1667 and still followed in France. The court should, whenever necessary, appoint upon application of either party or of its own motion disinterested experts, to be procured and paid in such a way as to secure their freedom from bias as in the case provided for in arts. 392 *et seq.* of the Code of Civil Procedure. But those articles do not apply to a case like this: no such application was made, and here the evidence was taken without objection. I would add that the difference between the admittedly genuine signature of the deceased and the signature to the will is so obvious that any one at all familiar with handwriting could readily discover it, and we can make the comparison for ourselves.

The handwriting of the will, the language in which the testator's intentions are expressed, together with the suspicious circumstances connected with the production of the will by Louise Lescadre, lead me to the same conclusion as Drouin, J. And, as he had the inestimable advantage of hearing and seeing the witnesses, I have no hesitation in saying that we are practically bound to accept his finding.

There seem to be two main reasons for the judgment now under appeal. First, the improbability of dishonesty in this old servant of the deceased; and second, the comparative smallness of the benefit which she takes under the will.

As to the first, it must be noted that it was not a question in any event of dishonesty towards her late master personally, whose wishes she might indeed have thought she was furthering if she did write the will. Towards his relatives other than his nephew and legatee, Narcisse Voisard, it is certain that she entertained no friendly feelings.

As regards the second reason, it must have been obvious to Louise Lescadre that to have appropriated the whole or great part of the property would have afforded grounds of suspicion against the will. The testator had years before brought his nephew, the respondent, from California to live with him, and the respondent was still residing with and helping him to work his farm at the

time of his death. It may be well supposed that, in view of their long service, the testator would have desired to make some provision for Louise Lescadre and her sister after his own death; but there was certainly no reason why he should do more than make a reasonable provision, such indeed it might well be as is made by the will. It would have been highly improbable that he would have left to them the bulk of his estate to the exclusion of his nephew and other relatives, with all of whom he appears to have been on good if not intimate terms.

I think, moreover, one requires to consider the point of view of such a person as Louise Lescadre, placed in the position in which she was. Obviously, the case would be entirely different from that of the common criminal and professional forger. She would never have thought of or desired fortune. She is one of those of whom it is said: "Their wants but few, their wishes all confined." Would she not have been most likely to put into the will what she had hoped her master would have done himself? She and her sister had lived 30 years in the house, and would wish to remain there with the succeeding member of the family to the end of their lives. She already had a little money of her own, and with the legacy of $1,200 probably she would have all she required. In giving the property to the member of the family best entitled to it, and in making such provision for herself and her sister as she doubtless considered herself entitled to, she might not unlikely persuade herself that she was merely giving effect to the testator's intentions. This, I think, is the most probable explanation of her action.

Pelletier, J., states that he has given the case much time and attention, as is indeed apparent from the elaborate judgment in which he has set forth the reasons for the conclusion at which he has arrived. Certainly I have not come to an opposite conclusion, without devoting to the matter most careful consideration, realizing as I do its importance, not merely on account of the value of the property at stake, but because of the serious reflections on the respondent which my judgment necessarily involves.

I would allow the appeal.

DAVIES, J. (dissenting):—The question to be determined in this appeal is the validity or otherwise of the holograph will of the late Edouard Voisard, a farmer residing in the Province of Quebec,

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dated August 3, 1915. The will was duly probated on September 29, 1915; and these facts, which are important for our decision with regard to the deceased, namely, his relations towards Louise Lescadre, the alleged forger, his fortune, his relatives and his condition of life, etc., stated herein, are either admitted or not denied. His death took place on September 11, 1915. At the time of his death, Voisard was 76 years old and a bachelor. Some short time before he had been gored by his bull, which, it is alleged, had seriously injured him and had probably hastened his death. He had been all his lifetime a farmer and lived on and cultivated the land devised in the will in question here. Louise Lescadre and Olivine Lescadre had been in his service and that of his father before hime, one for 30 years and the other for 40 years, receiving no salary beyond board, lodging and clothing. Narcisse Voisard, the respondent, universal legatee under the will in question, was testator's favourite nephew and had been brought back from California by the testator some 6 or 7 years prior to his death to live with him and to look after the cultivation of the land, with the understanding that he was to be the testator's universal legatee. The testator had no relatives other than Narcisse Voisard except a number of nephews and nieces, all of whom lived in the United States or other distant places and with whom the testator had little or no communication and in whom he took little or no interest. The trial judge declared that the will in question was false in its entirety and consequently null; but on appeal to the Court of King's Bench this judgment was reversed and the action dismissed with costs.

At the conclusion of the argument before us, I confess I entertained grave doubts. That the testator made a will and made it upon blue paper just as that now produced before us as his genuine will, I have no doubt whatever. The evidence of Pageau and François Beland satisfies me upon that point.

The former states that he went to testator's house some time before his death, in the evening, about 8 o'clock, and found him at his table writing; and asking him what he was writing was told he was making his will.

The other witness, Beland, speaks of a conversation he had with the deceased on August 11, which would be 6 days after the date of the will produced and 3 weeks before the testator's death.

in which the deceased Voisard told him that he had made a will and shewed the witness a blue sheet of paper which he said contained his will. Upon being shewn the will in dispute he said that the paper which Voisard shewed him was a paper similar in colour to that on which the will now before us was written.

Then, again, there is the evidence that some time before his death he went to his notary and asked him whether he could make or write his will himself and was told he could.

The fact that he was carrying about his will with him in his pocket supports the contention that he did not put it with his other papers in his box, presumably because he did not want others to read it or know its contents, and, for the same reason that in his last sickness he placed it under one of the mattresses of his bed, where he knew it would be found, and where Louise Lescadre, the alleged forger, says she found it when making up his bed after the death or funeral.

These facts, coupled with the admission on all sides that in the circumstances under which the deceased lived, he possessed a fortune of about $40,000, his will was not an unreasonable or unnatural one in any respect, assist partly in convincing me that the document produced as his will and found, as she says, by Louise Lescadre under the mattress after the funeral, is the genuine will of the testator and not a forged document, as contended. The majority of the Court of King's Bench, consisting of the Chief Justice and of Lavergne and Pelletier, JJ., have so found; and in my present state of mind I do not feel justified in finding Louise Lescadre guilty of the crimes of forgery, perjury and destroying a genuine will.

The only benefit she takes under the will is the sum of $1,200; and it was not contended that that sum was excessive, or more than she reasonably might have expected him to leave her for the care she had taken of him in his lifetime and of his father before him. The only possible motive which counsel could suggest for the forgery charged was this bequest of $1,200 to Louise Lescadre, the alleged forger. In view of the value of testator's estate and of the services she had rendered him for a period of over 30 years, this legacy cannot be held to be unreasonable. It is, on the contrary, such a legacy as an honourable man possessing the estate he had at his death would, under the circumstances, make.

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I admit there are some strong arguments in favour of reaching the conclusion that the will was a forgery. The trial judge so found, and Cross and Carroll, JJ., dissented from the judgment of the majority of the Court of King's Bench and agreed with the conclusions of the trial judge.

I was strongly impressed during the argument with the contention that the signature of the witness to the will produced was the genuine signature of Louise Lescadre and her statement that it was not and that her signature had been written there by the deceased, who told her that he was making his will and that he would put her name as a witness, was untrue. The photograph of the will, which the appellant produced, rather confirmed that contention; but an examination of the will itself convinces me that the photograph copy was greatly misleading and shewed a different colour in the ink used in the witness' name and that used in the deceased's own name, which difference was not apparent at all in the will itself, and was greatly calculated to mislead and did for a time mislead me.

The two expert witnesses called by the appellant gave what seemed to me plausible reasons for their conclusion that the signature to the will in dispute was not the same as the genuine signature produced on the documents produced in the evidence. I confess that at one time I shared their opinion; but it must be remembered that such expert evidence as was given at the trial was not evidence which, as a rule, should have very great weight attached to it and none at all if at variance with controlling the facts proved. The admissibility of this evidence was challenged by Mr. Belcourt; but I do not consider it necessary to give any opinion on his objection and treat the evidence as properly admitted. It must be remembered, however, in weighing the opinions of these experts and the reasons for them, that Voisard, who at the time of the making of the disputed will was about 76 years of age, had a few weeks before been gored by his bull and had suffered in consequence somewhat in health. It was not unfairly urged that this would account for some slight want of firmness in the writing of the signature to the disputed will. The signatures to the genuine documents appear certainly more firm and in the formation of a few of the letters a difference appears between the genuine signatures and the disputed one; but making every

proper allowance for these slight differences, after examining for myself the several admitted genuine signatures most carefully and comparing them with the disputed signature to the will, I find myself unable to conclude that this signature to the disputed will is not a genuine one.

Davies, J.

Weighing all the evidence most carefully, I am not satisfied that the findings of fact of the appeal court are wrong and am glad to find myself able to dismiss the appeal, and so amongst other things preserve to Narcisse Voisard, the absolutely innocent universal legatee, the just fruits of the property devised to him.

Idington, J.

IDINGTON, J.:—This appeal should be allowed with costs throughout and the judgment of the trial judge restored.

I agree with the reasons he assigned therefor as well as in the main with those respectively assigned by the judges dissenting in the court of appeal. What seems to me above all else should be held as an insuperable barrier in the respondent's way of maintaining the judgment in appeal is her repeated denials of the existence of such a will when interrogated on the subject of the existence of any will after the death of the alleged testator when the circumstances confronting her constituted an imperative demand to assert the truth. If what she now says was the truth, she could have no just reason for withholding it from somebody. She is not, like some persons who may accidentally have found a testator's will in a most unexpected place and thus discovered it for the the first time.

She professes to have seen it written and signed and to have known all about it.

The trial judge was not impressed with her veracity at the trial. He had, in seeing her and hearing her story in the witness-box, an advantage over any appellate court, and his judgment should not, I most respectfully submit, have been disturbed to give effect to such a marvellous, and, I submit, an incredible tale.

Anglin, J.

ANGLIN, J.:—After full consideration of all the evidence and the most critical examination of the handwriting of the alleged will and the most careful comparison of it with the many admittedly genuine samples of the writing of the deceased in the record of which I am capable, I am very clearly of the opinion that the alleged will propounded is not in the handwriting of the late Edouard Voisard. The question is purely one of fact. To detail

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the grounds on which my conclusion rests would serve no good purpose.

I may add, however, that I entertain no doubt as to the admissibility of the evidence of the witnesses called as experts in handwriting challenged by Mr. Belcourt.

I would allow the appeal in this court and in the Court of King's Bench and would restore the judgment of the trial judge.

Brodeur, J.

BRODEUR, J.:—We have to decide in this case if the will of Edouard Voisard is a true or false one. In order to determine this point, it is well to recall the situation of the parties and the circumstances in which this will was made.

Edouard Voisard, the testator, was a rich farmer of the parish of Rivière du Loup. He was very old, having reached nearly eighty years. There lived with him, for more than thirty years, two housekeepers, two sisters named Lescadre. The one named Louise had been a schoolmistress, and consequently had a certain amount of education. They were both considered as members of the family, seeing that they did not receive any salary.

Edouard Voisard had some nephews and nieces; he does not appear to have any sisters or brothers living. These nephews and nieces were rather indifferent to him. On the other hand, he had a nephew by the name of Narcisse Voisard, the defendant in this case, whom he appeared to be fond of, seeing that he made him return from California in order to remain with him and work his farms. Narcisse Voisard is a man well advanced in years, being over sixty and appears to be an extremely quiet man and enjoying an excellent character. The reputation of Narcisse Voisard and of the housekeepers was excellent in every respect.

During the summer of 1915 Edouard Voisard had an accident which prevented him for some time from working. However, he continued to go out and to attend to his business. But, after some hours only of severe illness he died on September 11th, 1915. The nephews and nieces came to his funeral and the same day they sent one of their members to ask if there was a will. It appears to me to be evident that Narcisse Voisard did not know that there was a will, for we see him going to make enquiries at the notary's in order to ascertain if his uncle had written his last wishes.

On the other hand, Louise Lescadre, one of the housekeepers, knew that there was a will, and when the representative of the

family went to ask her if there was one she answered, according to her evidence, that there was no will in her favour.

She was somewhat disturbed at seeing that the nephews and nieces, who had never taken any interest in their uncle, whom they only visited at rare intervals, hastened in a swarm some days later to take possession of documents, pieces of anything, etc., which were found in the house and she explains that it is this behaviour of theirs, which tempted her not to tell them the whole truth. At any rate she claims that on the Saturday after the funeral of Edouard Voisard she found the will produced in this case under the straw of the bed in the deceased's room.

By this will, Edouard Voisard left his property to his nephew, Narcisse Voisard, and at the same time gave a sum of $1,200 to Louise Lescadre and expressed the desire to see her remain always with his nephew. At the same time he charged his nephew to give a good pension to the other housekeeper, Olivine, as long as she should live, and he made a further legacy of $200 to a niece, Emma Lambert, and gave a house to Edouardina Voisard, another niece, and further declared in the will that he owed a sum of money to Louise Lescadre, which was entered in his book.

The provisions of this will are extremely reasonable and extremely just. It is not surprising that the testator had appointed universal legatee of his property this nephew whom he liked so very specially, and whom he had caused to return from the United States six or seven years before in order to live with him. Neither is it surprising that he had given something, and indeed it is not much, to his old housekeepers, who had spent all their life with him, and who had not only served him but also his father; neither is it surprising that he had not provided specially for his numerous nephews and nieces, when the fact was that the latter had appeared indifferent enough on their part.

At the same time, I must also say that there appears to me very certain proof that there had actually been a will. In the month of August, 1915, that is to say, at the time when this will was written, one of his great friends, a neighbour, having gone to see him one evening, found him writing something. His housekeeper, Louise Lescadre, was then at his side, and Edouard Voisard announced that he was making his will. This evidence appears to me irrefutable, and has been given by a person of whose respectability and honorableness there is no doubt.

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But there is more. About the same time Voisard goes to the village, to the house of an acquaintance and the latter said to him, jokingly, that he hoped he would not forget him in his will: and then the other said, "My will is made": and he took out of his pocket a bluish paper, saying to him, "Here it is." The colour of this paper corresponds absolutely with that of the paper upon which the will in question is written. He said the same thing also to Arthur Lacerte.

There is, therefore, no doubt, in my opinion, that there was in fact a will. Now, is it that one which we have before us?

Several witnesses have been heard in this case; and some of them, who know well the signature of Edouard Voisard, say that this will was not signed by him.

At the same time, the plaintiff has produced in the record a letter of Louise Lescadre and a letter written by Edouard Voisard. Several receipts which had been given by Edouard Voisard were likewise produced, but the most important documents to establish the comparison of writings are certainly the letter of Louise Lescadre and that of Edouard Voisard.

The claim of the plaintiffs, appellants, is that the will is entirely in the handwriting of Louise Lescadre, and I am brought to believe, after having carefully examined these documents and read the evidence with very particular attention, that their claim is well founded.

Upon the will the name of Louise Lescadre appears as witness. She claimed that it was not her signature, however, but that the testator, Edouard Voisard, on completing the writing of his will, asked her if she had any objection to being a witness to the will, and had simply put down her name.

I, myself, have no doubt that the signature on the will and the signature on the letter of Louise Lescadre are by the same person, consequently, having admitted that she had signed the letter in question she could not have told the truth when she said that it was not her signature which appeared on the will.

Why did she hide from Narcisse Voisard himself the existence of this will? She admits that the will was written in her presence about a month before the death of Edouard Voisard. It is the more surprising that she did not tell Narcisse Voisard, with whom she appeared to be on good terms, that a will had been made.

The heirs question it. It is true that she might have been annoyed at the way they addressed her, but there was no harm in her saying that he had made a will and that she had known of it.

The judge who presided at the trial, who saw the witnesses, particularly Louise Lescadre, in the box, states formally in his judgment that her attitude before the Court indicated an undeniable want of sincerity. Then, in the face of such a formal statement of the judge, it seems to me that it is very difficult to accept the evidence of this person, so much the more if we compare the will with a letter written by Edouard Voisard. We see successively that there is a considerable difference in the writing and that the will does not appear to have been written by the one who wrote the letter signed "Edouard Voisard," and it is incontrovertible that this letter has been written and signed by him.

Experts in handwriting were brought forward to express their opinion on these documents. No objection was made to this evidence; on the contrary, I find among the papers filed, at certain places, that the counsel for the defence objected to certain witnesses expressing an opinion on the writings because they had not at first stated whether they were or were not handwriting experts. The evidence of these experts, Cartier and Bellinge, was admitted without any objection on the part of the defence. Now, before this court, they claim that this very evidence should be rejected because our Code of Civil Procedure does not authorize the admissibility of such evidence.

The ordinance of 1667 had a formal provision for hearing experts on handwriting. This provision of the ordinance does not appear to have been followed before the Code of Civil Procedure.

Mr. Belcourt claims that the only way to examine the writings is in pursuance of the provisions of art. 392 of the Code of Civil Procedure.

By the provisions of this article, the judge, if he finds it necessary, may appoint experts in order to get information upon certain points in the case. There is no doubt that in the present case the judge had a perfect right to appoint experts in handwriting, but was he obliged to do so? and should the evidence of experts, which has been admitted without objection, be rejected?

It has been settled by this court in the case of *Schwersenski* v. *Vineberg*, (1891) 19 Can. S.C.R. 243, that if in a case where evidence

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has been admitted without objection to disprove a writing such evidence cannot be subsequently put aside by appellate courts.

I am of opinion, following the law laid down in the case I have just mentioned, that in the present case if the defendant wished to prevent such evidence being given he ought to have formally objected to it. He has not done so, and I do not see any reason why we should now put it aside.

As I said just now, I am convinced that there really was a will. But what has become of it? I do not know. Was it destroyed by Louise Lescadre and is she benefited by writing the one that is now before us? I am equally ignorant. But, in any case, I am convinced that the one we have before us was not written by Voisard.

Upon the whole, I have come to the conclusion that the will which was produced in this case was not written or signed by Edouard Voisard and consequently the plaintiffs' action must be maintained. Their appeal before this court should, therefore, be allowed with the costs of this court and of the court of appeal and the judgment of the Superior Court restored.

Appeal allowed.

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ANNOTATION.

Proof of Handwriting and Documents.

By ALBERT S. OSBORN, New York.

Author of "Questioned Documents"—The Leading American Authority on the Subject.

The following annotation is a reflection of the latest and most progressive American view on the subject of handwriting evidence.

The constant but slow tendency of the new precedents in the law in relation to the proof of handwriting and documents is unmistakably in the direction of that procedure that gives aid in promoting justice. Progress is especially shown by the removal of certain ancient restrictions which made it difficult if not actually impossible to prove the facts. The most important step in this direction, in what might be called modern times, was the admitting of standards of comparison, beginning especially with the English statute of 1854. There had been some progress, however, before that time because originally no comparison of any kind was allowed even if there was genuine handwriting in the case.

The statute in the federal courts of the United States, allowing standards of comparison, was not enacted until fifty-nine years after the enactment of the English statute, a measure of progress in this country not to be proud of. Following the enactment of the federal statute a number of the belated States

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passed a similar statute allowing standards of comparison, but in some States the strange law is still in force that no genuine writing can be admitted for comparison either to prove genuineness or forgery. The U.S. federal statute was approved and became a law, February 26, 1913. The same year North Carolina and Indiana passed substantially the same statute, and in 1915 Alabama, Michigan and Illinois adopted the new practice. Most American States, the large majority of which had followed the English restrictive practice, continued to follow the old practice long after 1854. The change was not made in New York till 1880 and Pennsylvania courts continued the old practice till 1895.

A few American States, to their credit let it be said, never followed the old English practice at any time but adopted the sensible rule that recollection of a thing was not more reliable than the direct, sustained examination and comparison of a thing. A judge in an early Connecticut case, *Lyon* v. *Lyman*, (1831) 9 Conn. 54, 55, where it was sought to exclude standards, says of witnesses who had testified, "A fair paraphrase of their testimony is, that they *believed* (italics by judge) it to be his handwriting from having seen him write. This, according to the second position would render the testimony admissible. But they *knew* it to be his, by comparing it with his other writings. . . . But I forbear. It has always appeared to be a very feeble objection; and I rejoice to see it overruled."

The early violent prejudice against "the comparison of hands" in large measure grew out of the *Sidney* case in England in 1683 (9 State Tr. 817, 896) and the subject became in some degree a political question and for a long time this case had an unfortunate effect on handwriting testimony, which in some degree continues even to this day. For many years no comparison of any kind was permitted and then finally when it was permitted no standards for the purpose of comparison were admitted. Then for a long time many other restrictions prevailed, reasons could not be given and only a bare opinion could be expressed.

During much of the period of this gradual change there also was a continuous controversy over the question as to whether even a magnifying glass could be used, and the same controversy arose over enlarged photographs, illustrations on a chart, or anything in connection with such evidence by which it was made more effective and in which it differed from the old practice. Naturally the old decisions are full of criticisms of the weak and inconclusive evidence which naturally grew out of these various restrictions and exclusions. Many of these old opinions, defending and justifying the old practice, contained inaccurate and unscientific ideas which have trickled down through the decisions for more than a hundred years and mudded the stream of justice.

In justifying the exclusion of standards of comparison, Coleridge, J., in an old opinion advanced the view that standards of comparison were not necessary because the most reliable means of identifying handwriting was from a recollection, or memory, or impression of the "general character" of the writing, undoubtedly meaning its general appearance. This idea tended to make the evidence of the opinion witness who had simply seen the person write, or casually observed the writing, more valuable than any opinion that could be obtained from study or comparison *even by the same witness*. This ancient idea, although utterly unscientific and refuted numberless times, has continued down to the present day. It has been appealed to time and time again for the purpose of discrediting scientific handwriting

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evidence. It has been necessary in many modern decisions to refute the old idea. In the case of *Green* v. *Terwilliger*, 56 U.S. Fed. 384, as late as 1892 the writer of the opinion felt obliged to say, in combating the old error, "In many cases it is more satisfactory to allow a witness to compare the writing in issue with other writings of unquestioned authority as to genuineness, than to compare it with the standard which he may have formed or retained in his mind from a knowledge of the party's handwriting."

Another erroneous old idea formulated long ago in one of these old opinions has for years been quoted as a defense of forgery. The contention was solemnly presented in the old language, that "similitude had more significance as indicating genuineness than dissimilitude had in indicating forgery." The argument thus was that genuine writings for various reasons necessarily differed somewhat from each other, therefore difference in a questioned writing as compared with a standard had little significance. No consideration whatever was given to the opposite reasonable contention that an imitation of a writing would, according to the skill exercised, necessarily be like the original in certain particulars, and especially in general appearance, and therefore mere resemblance alone ought not to be conclusive as indicating genuineness. It would thus be just as accurate to state the opposite of the old formula for it is not simply "similitude" or "dissimilitude" but their character and extent that is significant.

It can easily be understood how if an investigation was taken up with the idea that any resemblance would indicate genuineness and no kind or amount of difference would indicate forgery, that there would be no question as to what the final conclusion would be. This ridiculous contention about the force of similitude naturally permitted the forger to succeed. In an introduction to a book treating of forgery, Professor John H. Wigmore expresses the thought in a sententious way, "Amidst these new conditions, the falsifier again outstrips society for a while. A Chatterton and a Junius can baffle a community. Well down into the 1800's the most daring impositions remained possible, but society at last seems to have overtaken the falsifier once more. Science and art, in the mass, are more than a match for the isolated individual."

Soon after the invention of photography, when perhaps the science was in a somewhat experimental stage, some legal opinions outlined the dangers surrounding the use of photographs, and these old opinions are still quoted at length even though photography has been carried to a very high point of accuracy. A few decisions have said that enlarged photographs have "greatly assisted" the court, but the restrictive opinions seem to have a longer lease of life and are more frequently quoted. There are numerous States where the question actually is still undecided whether enlarged, illustrative, helpful photographs are actually admissible and in some courts they are still excluded.

The new precedents, however, have gradually tended toward that condition surrounding a disputed document trial which makes it a legally supervised, scientific investigation, in which all of the old unscientific discussions are swept aside and the question is attacked in a modern way with instruments and illustrations and everything that will throw light upon the inquiry, including the opportunity of giving detailed reasons for the opinion expressed.

Those arrayed against the facts are greatly aided in many kinds of cases by certain of these old outgrown decisions, carefully combed out of the

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books by diligent advocates, and cited without dates. It would be in the interest of justice if the custom was universal of including the date with every legal reference, for, next to the indestructibility of matter, seems to stand a legal precedent after it is once distinctly stated in an opinion.

Let us suppose that somewhere in seventeen hundred, or eighteen hundred and something, some unscientific man compelled to discuss a scientific subject, hurried perhaps, and, because of possible unfortunate individual experience, it may be somewhat prejudiced, also over-burdened with work or possibly with a liver somewhat out of order, writes out in an opinion some unjustified positive statement, comment, or inference, not necessarily on a strictly law question but on some phase of legal proof. In spite of the progress of science, or the progress of anything, that statement seems to stand fixed for use forevermore; it is one with tables of stone and tablets of brass.

If the statement in this old opinion is actually erroneous, unwarranted or even exaggerated, its immortality is all the more positively assured, as it becomes a beacon of hope, a floating spar, for the zealous advocate who is struggling in deep water. By its aid he cannot perhaps shew that black is white, but that it is at least streaked with gray. The statement will be quoted against other opinions, against technical experience, against scientific investigations, against logical testimony, against reasonable argument, until perhaps some great calamity, some Alexandrian catastrophe, has destroyed all of the libraries. There come trickling down through opinion law these erroneous ideas that have been used over and over again in the effort to befog, to delay and to defeat justice, and in some way they should be properly characterized and discredited in later opinions until they are effectively disposed of or rendered harmless.

The law books contain discussions of phases of a great variety of subjects connected with litigation; there is in fact no limit to the number. When the lawyer sets about preparing a brief on one of these subjects, incidental to the law, the usual practice is not to make an intensive study of the question itself, but rather simply to find in the books what has been said about it. This is not the method of science.

When scientific subjects are investigated and discussed in the law the discussion and investigation should be conducted in accordance with scientific principles and methods. The method of the law, if directed primarily to finding what has been said by someone, and strictly followed, makes no new contributions and corrects no errors. The method of science is directed to finding the fact and incidentally to determining whether what has been said on the subject is true. The law assumes that the question has been investigated, discussed and settled, while science begins with no assumption except, perhaps, that ancient pronouncements are probably wrong.

The treatment of the question of the desirability of admitting genuine writing as a standard of comparison illustrates the unfortunate method of the law. It was contended that this admission of standards would introduce interminable and confusing collateral issues and also it was argued that unfair standards might be selected. England, as we have seen, settled the question in 1854, while Connecticut and a few other American States always followed the enlightened practice now almost universal. When, however, the question was under discussion in other States, as it was for years, the

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question was never investigated as to how the practice worked in England and Connecticut. As late as in 1911 one of the U.S. State courts refused to adopt the new practice and cited an old English opinion before 1854, instead of discovering how successful the new rule was across the border in the State of Ohio, a few miles away, where it had been followed for more than forty years.

In law the question may arise as to whether enlarged photographs should be used. A scientific investigation would endeavor to answer the following questions: What are their purpose and what is the argument for their use? Will they aid in shewing the facts? How will they aid? May they mislead or deceive and are they objectionable in any way? Finally, have they been used before and what has been the result of the experience in other cases?

There is no good reason why scientific methods cannot be applied in greater measure at least, in connection with these general subjects. The vital question in law as in science is to discover and prove what is true. The investigation ought to be unhampered and free, in which everything is considered that may throw light on the question and what has before been said should be used for what it is worth and only for what it is worth, and should be tested as all else is tested. There is no doubt that this too rigid dependence upon precedent has tended to retard progress by making legal discussions unscientific and perhaps making legal investigators lazy. There is, however, an awakening on the question, stimulated in large measure by able legal authors who have the courage to put into the law the methods of science, and who argue and prove that the science of the law is alive and growing.

Under the ancient restrictions regarding the introduction of evidence, cases relating to handwriting and documents were surrounded by a violent prejudice that weakened all technical evidence on the subject involved. Then the decisions rendered in these cases under the restrictions that made the evidence weak if not valueless perpetuated and intensified the criticisms and prejudice that actually grew out of the procedure imposed. Numerous of the old text books, reflecting the past, also contained violent and undiscriminating criticisms of technical evidence of this class.

This retention of these ancient ideas is discussed in an illuminating manner by Professor Roscoe Pound, Story Professor of Law and Dean of Harvard University Law School, in a book review in *Harvard Law Review*, March, 1911, in these words:—

"The dogmatism of many really competent experts, the obvious limitations of the crude empiricism of bank tellers, the extravagances of graphologists, and the unhappy operation of over-technical rules of evidence in many jurisdictions, which preclude the use of sufficient data on which to base a sound conclusion, have given rise to a distrust of expert evidence as to writings which to-day is not justified. Mr. Harris's account of the expert in handwriting, written, it is fair to say, over thirty years ago, but unaltered in the current edition of 'Hints on Advocacy,' has no application to the fair, temperate and reasoned statements of what may and what may not be discovered and determined with respect to the authorship and authenticity of documents which is given us in this book. Modern experimental psychology has furnished a sure foundation, confirmed in its application to handwriting by abundant experimentation and experience, and the ingenuity of the optician has provided standard instruments, giving results that speak for themselves to the layman as well as to the expert."

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The striking contrast of the new legal precedents with some of the ancient practice in the proof of documents is conclusively shewn in numerous recent American opinions. Two notable opinions in the courts of the State of New York shew this change in a striking manner. In *Venuto* v. *Lizzo* (1911), 130 N.Y. Supp. 1066, the opinion says:—

"While the testimony of expert witnesses is carefully weighed and accepted with caution, the law allows such evidence. The conclusion of a handwriting expert as to the genuineness of a signature, standing alone, would be of little or no value, but supported by sufficiently cogent reasons, his testimony might amount almost to a demonstration. While the court in this case did not directly refuse to allow the experts to state their reasons, as was done in the case of *Johnson Service Co.* v. *MacLernon*, 142 App. Div. 677; 127 N.Y. Supp. 431, the effect of allowing constant trivial objections and of the erroneous rulings was virtually equivalent to such a denial . . . We might not reverse this judgment for a particular ruling, standing alone; but the cumulative effect of all the rulings and of the constant interruptions of counsel on trivial grounds is such as to induce the belief that the defendant has not had a fair trial, and that, in the interests of justice, she should be permitted another opportunity to present her defence. The order should be reversed and a new trial granted, with costs to appellant to abide the event. All concur."

In the opinion referred to in the foregoing opinion, *Johnson Service Co.* v. *MacLernon*, the court says:—

"The witness was then asked to state the reasons for his opinion. An objection to this question was sustained, and the plaintiff duly excepted. This was error. It is a rule of general acceptance that an expert may always, if called upon, give the reasons for his opinion."

" 'Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant:' Chase's Stephen's Digest (2nd ed.), 156.

" 'On direct examination, the witness may, and, if required, must point out his grounds for belief in the identity of the handwriting on the principle already considered. Without such a reinforcement of testimony, the opinion of experts would usually involve little more than a counting of the numbers on either side.' 3 Wigmore on Ev. 2014.

"In this State the practice of permitting handwriting experts to give the reasons for his opinion, and even to illustrate upon a blackboard, has been distinctly approved; *McKay* v. *Lasher*, (1890) 121 N.Y. 477, 483; 24 N. E. 711. The reasons for the expert's opinion, if he had been permitted to give them might, and probably would, have added great force to his testimony; for the mere expression of opinion, standing alone, has little probative force. For these errors, the judgment and order appealed from must be reversed and a new trial granted with costs to appellant to abide the event. All concur. *Johnson Service Co.* v. *MacLernon* (1911), 127 N.Y. Supp. 431."

The words ". . . even to illustrate upon a blackboard" in the foregoing opinion is an unqualified expression of the fact that evidence of this class may now be presented in the most effective and convincing manner. It is, of course, understood that the making of such illustrations would accompany a detailed exposition of the reasons for the opinion expressed. This is certainly a long way from mere opinion evidence of the old days.

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expressed the Court of Appeals of New York has said very clearly in *People* v. *Faber* (1910), 199 N.Y. 256 at 268:—

"As has already been expressed by others, from which expressions we have quoted, it is competent for a person offering an expert as a witness for the purpose of shewing the strength of the opinion which he is about to express to specify in detail the observations upon which the opinion is based."

When these new revolutionary precedents, established, as it will be seen by unanimous courts, are compared with the old rulings on these subjects it can be understood what progress has been made, and the result of this progress is shewn by numerous surprising verdicts in cases of this class. Two recent New York cases will serve as conspicuous examples. In the first, six witnesses testified that they saw a certain contract signed, and a jury decided that the document was a forgery, and, in the second, a jury convicted a distinguished member of the bar of a forgery of two words in typewriting that by comparison were connected with his own typewriter.

With the use of the microscope and enlarged photographs (*Frank* v. *Chemical National Bank* (1874), 5 J. & S. 26, 34; affirmed 84 N.Y. 209); the assistance of the chart or blackboard (*McKay* v. *Lasher*, 121 N.Y. 477; and with the help of these new precedents, quoted above, an intelligent counsel and a competent witness are able, in most cases, to prove the facts, and the truth will often prevail against what may at first seem to be great odds.

Numerous lawyers and judges know that important cases of this class have been discontinued and hastily taken from court calendars before trial, but not till after the documents had been photographed and the physical evidence had been arranged in a formidable and conclusive manner for presentation in court. A few years ago many of these cases would have been won against the facts and in favour of fraudulent claimants.

As in all classes of cases, there of course continue to be decisions against the facts, and there are still cases in which it is impossible to prove with sufficient force, against sympathy and prejudice, what is undoubtedly true, but in very many cases involving disputed documents the old despair has passed away. With the new precedents and the practices a practically new profession has arisen, devoted to the investigation of documents and the photographic illustration and scientific proof of such cases in court.

Another definite forward step taken by the courts is in connection with the proof of disputed typewriting. The New York Court of Appeals in a recent case has definitely settled the question as to the admissibility of other typewriting merely for comparison. The court says:—

"I think it may well be doubted whether typewriting can be deemed handwriting within the meaning of the existing statute. Nevertheless, I think the law sanctions the reception of the evidence in question, substantially on the theory adopted by the trial judge. If the impression of a seal were in controversy, it would surely be competent to shew by other impressions from the same sealing instrument that the impression was invariably characterized by a particular mark or defect . . ."

"These several cases base the rulings which have been mentioned upon the assumption or proof that a typewriting machine may possess an individuality which differentiates it from other typewriters and which is recognizable through the character of the work which it produces. Inasmuch as its work affords the readiest means of identification, no valid reason is perceived why

admitted or established samples of that work should not be received in evidence for purposes of comparison with other typewritten matter alleged to have been produced upon the same machine." *People* v. *Storrs*, N.Y. (1911), 100 N. E. 731, 732.

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There are courts, however, that are still strangers to all these modern methods of presenting disputed document cases, but there is progress all along the line, and it is now coming to be recognized, as is said in the American and English Encyclopedia of Law, that "This kind of evidence, like all other probable evidence, admits of every degree of certainty, from the lowest presumption, to the highest moral certainty," or, as one of the opinions quoted above says, ". . . might amount almost to a demonstration." All the honest claimant, the reputable lawyer, asks is that the evidence be taken for what it is worth and without prejudice. More than one "demonstration" during these latter years has dazed old practitioners who in the past have won cases, not by evidence but by tactics and by objections. In more than one recent case, those against the facts, when confronted with the evidence and especially the illustrative photographs, have actually surrendered before or during trial, paid all expenses, and discontinued the case.

The variation of degree of force in evidence as to handwriting and documents has long been recognized in a general way, but it too long has been impossible for those in the right to prove their case, especially in those jurisdictions where they still continue actually to listen to long arguments as to whether reasons can be given, or illustrations can be made, or even a magnifying glass can be used in court, or enlarged photographs, or a microscope, or any of the modern approved scientific aids to investigation that are welcomed everywhere except in a court of law. The old "objector," when sustained, either excluded or made harmless the evidence necessary to prove the case, but his day is ended in most courts. One would be inclined to think, however, in going into a few courts, even in these days, happily growing less each year, that the date was sixteen hundred and something, instead of the twentieth century, and that a witchcraft case might actually be on trial.

There are still abuses to be corrected, and unfortunately, there continue to be frauds and charlatans among the specialists who testify on these technical subjects, who, let it be plainly said, ought to be in jail with the lawyers who exploit them and keep them in business, but there need no longer be despair about cases of this class. With the enlightened procedure now almost universal, adequate preparation by the counsel on the right side, and the use of the information on the subject now available, the errors of the ignorant witness and the vicious pretensions of the corrupt witness can usually be exposed. This cannot be done, however, when it is assumed, as was usual a few years ago, that any "conflict" of such testimony of any kind discredits the good as well as the bad.

When this prejudice was more common it is easy to understand how a "conflict" would usually be brought about by the lawyer against the facts in order that he might argue that none of the testimony on the subject ought to be considered. "Conflicts" of this kind are still secured, and may accomplish their evil purpose, if prejudice prevails and it is erroneously assumed that all testimony of the kind is of equal force and value. This is just what those against the facts want court and public and press to assume. Too often a portion of the press snatches at and magnifies the news value of such incidents, and thus unintentionally may help promote injustice.

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Those who are not informed may say, "Of what use is such evidence when witnesses always disagree," not knowing that the "conflict" is actually brought about, not to prove the point at issue but solely for the purpose of appealing in argument to this erroneous notion on the subject. The legal precedents as quoted and the general press in many cases and numerous technical articles on the subject, shew a decidedly changing point of view and a correct understanding of the facts.

The modern court conducted under enlightened rules asks that the evidence be carefully weighed and that all prejudice be eliminated and promptly accepts every proper help that will throw light on the inquiry. Objections to accepted scientific aids are promptly overruled and argument on the subject is hardly tolerated. Not now once in fifty times are photographs, microscopes and charts excluded, and in some jurisdictions such exclusion, like the exclusion of reasons for the opinion given is actual reversible error.

Blackstone said many years ago that the law is the most progressive of all the sciences because it goes out and enlists the services of all the other professions, but in certain fields it has done this with such caution that there are many who would resort almost to revolution in order to bring about what should be accomplished in an orderly way.

In the law, as elsewhere, those interested in true progress must see to it that the best of the past is preserved and must always adopt with caution the new thing. As with every department of human affairs there are two parties in the law, those who on principle hark back to the past and are opposed to changes of any kind. Opposed to them there is another party interested in progress who all the time are looking forward to better things as time goes by. Hasty and unwise adherence to one of these opposed policies leads to danger, disorder and revolution, while strict adherence to the other is stagnation and death.

HANDWRITING EVIDENCE BY LAY WITNESSES.

About the weakest and most inconclusive evidence ever presented in a court of law is the opinion evidence of lay witnesses regarding the genuineness of handwriting. It is an unwarranted assumption of the law, established by long practice and recorded in many opinions, that a knowledge of handwriting can be gained by the most superficial observation of the act of writing. The legal precedents even go to the ridiculous extent of assuming that an observer actually may be qualified to give an opinion under oath as to a disputed signature in a controversy of great importance who has seen the alleged writer sign his name only once more than twenty years before. It is difficult to imagine anything more unscientific than this.

The law thus takes it for granted that a mere casual glance at the act of writing many years before gives, or may give, to an observer, in some mysterious, unknown way, what the law calls "a knowledge of a handwriting." From a scientific standpoint, and also from a common sense standpoint, the assumption is utterly ridiculous and would be so considered had it not been dignified by long use. Knowledge that rises to the point that qualifies a witness to give formal evidence in a court of law on such a question is not gained in any such manner.

It is said in some opinions, seemingly in an apologetic way, that objection "goes to the weight of the evidence rather than to its competency" and the court does not undertake to say how much observation is necessary in order

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to qualify a witness to testify. The court should undertake to say this very thing, and it is utterly unscientific not to say it. Any reasonable man ought to be able to say that no such cursory observation, without any specific attention, or interest in the question, qualifies a witness to give formal testimony under oath in a court of law, any more than walking through a law library would qualify a man to give an opinion on a legal subject.

It is possible to become familiar with a handwriting by seeing it often and seeing it written many times, but such a knowledge is usually very superficial and unreliable and in any event is not gained when no particular attention is given to the act and that act is performed only a few times many years before.

A witness called upon to testify on the question of disputed handwriting should always be examined in advance by counsel and by the court and if he is asked whether he would risk his own property, to the extent perhaps of thousands of dollars, upon his own knowledge of the particular handwriting in dispute, the honest witness will be likely to say that he would not dignify his opinion on the question in any such important manner.

The identification of handwriting many times beomes a difficult scientific problem and in any important matter should not be undertaken by the uninformed and the untrained. One of the common fallacies in connection with the subject is the assumption that handwriting can be positively recognized by anyone as a face is recognized, by a sort of intuition. Some of the discussions even go to the point of contending that evidence based on this kind of recognition is particularly reliable. The exact opposite is the fact.

One of the most uncertain and unreliable kinds of evidence that ever appears in a court of law is evidence upon the recognition of a person, seen infrequently, or long before, or perhaps only once, from his features and general appearance alone. Thousands of errors have thus been committed and the liability of error is so great that such evidence has very little weight, and should have even less than is given to it.

The same danger of error arises when it is assumed that the recognition of a handwriting is a very simple and easy task. There are certain great classes or schools of handwriting in which there are certain general similarities, like the similarities in race or complexion, or general appearance in persons, and error is liable to follow in depending upon recognition from mere general appearance in identifying a handwriting as in identifying a person.

If a handwriting is clumsily imitated only in a general way, including only its conspicuous features, it at once takes on, in some degree, the general appearance of the writing imitated and is immediately identified as the writing of a suspected party, or as genuine writing, by one who depends only upon this general appearance. The whole subject of handwriting identification is pervaded by a certain intangible notion that there is a sort of occult ability developed even by an unskilled, unscientific observer, which can be depended upon in this recognition of a handwriting.

This practice of calling on the unskilled has no doubt grown out of necessity, but it has been given a dignity and importance which it does not deserve. Stupid, half blind, unskilled persons are asked to give evidence on this subject of handwriting identification who are no more qualified than they would be to make a chemical analysis, or determine whether a law is unconstitutional, or whether a patent specification covers a principle already incorporated in another patent.

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In proving uncontested documents witnesses are called to prove the signatures who are assumed by the law to "know the handwriting." This proof, as a rule, is of the most perfunctory character and is not assumed to have much really technical evidential value. The same character of proof has however been carried over into most important cases in which handwriting is seriously disputed, and may be skilfully forged. This character of handwriting evidence, that may answer the purpose of the law and not imperil the interests of justice in cases where no dispute has arisen, may be very dangerous unless the evidence is presented in a way that makes it possible to estimate its true value.

It also should be plainly said that the real purpose of this evidence by lay witnesses often is not what it purports to be. It is supposed to give help in solving a technical scientific question, but in most cases is in fact an opinion by the witness as to his judgment on the case as a whole. Especially in a community where all the various citizens are known in a general way to each other, at least by reputation, such evidence may be of considerable force in a disputed handwriting case. A prominent citizen who consents to testify really gives his opinion on the merits of the whole controversy rather than primarily on the technical subject presented to him. This certainly is the fact in many cases of this kind. Untrained witnesses who have not studied the subject of disputed handwriting will err in either direction in such a case by inferring that the slightest resemblance indicates genuineness, or, on the contrary, that the most trivial variation indicates forgery.

Witnesses of this character can sometimes be cross-examined very effectively if proper preparation for cross-examination is made. If such witnesses merely give opinions without any reasons whatever, the evidence may be unassailable from a technical standpoint and its only real value is that it indicates the opinion of the witness regarding the general merits of the case. It is often possible to secure a number of such witnesses, often perfectly reputable and honourable men, but totally unqualified technically, who will readily testify that the most glaring forgery is genuine if their friendship or their prejudice incline that way, or will testify that an undoubtedly genuine signature is a forgery if it contains the slightest variation from ordinary genuine signatures and they think the case should be so decided. They are not in fact qualified to give any opinion but are skillfully led to see the problem as is suggested to them. They are not dishonest but technically uninformed, and often, if not usually, consciously or unconsciously, prejudiced.

As has been well pointed out in numerous modern decisions and many discussions of handwriting expert evidence by scientific law writers, the value of document expert evidence, unlike most expert evidence, arises, not from the mere opinion itself but from the reasons for the opinion. This sensible test in a disputed handwriting case greatly minimizes, if it does not actually destroy, the value of the testimony of untrained witnesses who presume to give only mere opinions on the subject.

The careful trial lawyer cannot, of course, wholly ignore such evidence which may be marshalled on either side against the interests of justice, but will endeavour to use it to support and confirm correct technical testimony given with reasons and illustrations. Some witnesses of this class are conceited and have been led to think they have a peculiar ability and they will undertake to go into details and, without technical qualifications, will attempt to give definite reasons for their opinions. Detailed evidence by such a wit-

ness is almost certain to be full of errors and, as a rule, such a witness can be successfully attacked by a qualified counsel. **Annotation.**

Proof of handwriting by lay witnesses would be less dangerous if given in response to a question something like this, "From what knowledge of this handwriting you have and from the circumstances of the case and the conditions surrounding the production of the writing, is it your opinion that this handwriting is genuine or not?" Whether the question is propounded in this way or not, this is exactly the way in which it is usually answered. On the pretense of giving technical evidence a witness is in fact allowed to give his opinion on the general merits of the case as affected perhaps by his prejudice or his actual interest.

In disputed will cases one collection of relatives, more or less distant, and friends more or less friendly, on one side give evidence that a signature is genuine, and a similar group, wholly untrained, without scientific knowledge, and perhaps unconsciously acting under suggestion, give exactly opposing evidence. It may be practically impossible to dispense with such evidence entirely but it should be received with caution and should not be dignified in legal opinions or in legal literature more than it deserves and it certainly does not deserve much.

BOKOVOY v. TANGYE. ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. December 20, 1918.

WATERS (§ II C—83)—IRRIGATION ACT—DIVERSION OF—WHAT IS—LIABILITY.

The words of s. 60 of the Irrigation Act (R.S.C. 1906, c. 61), "every person who wilfuly without authority takes or diverts any water . . . from any works authorized under this Act . . . . is guilty of an offence etc.," are applicable to a person who wrongfully diverts water from works which are constructed for the purpose of carrying the water from the main canal to the boundary of the lands of individuals, who desire the water for the irrigation of their lands, such works being works authorized by the Act.

CASE stated by a magistrate which involves questions of the construction of part of the Irrigation Act—R.S.C., c. 61, amended by c. 38 of 1908, c. 34 of 1910, and c. 37 of 1914. Statement.

Dunham, for applicant; no one *contra*.

The judgment of the court was delivered by

BECK, J.:—It appears that the Alberta Railway and Irrigation Co. is a "company" within the definition of that word (s. 2 (*f*)) which became a licensee (s. 2 (*g*)) under the Act and in pursuance of its license constructed "works" (s. 2 (*g*)). Beck, J.

It also appears that the company was, by contract, under obligation to furnish water from its works for irrigation purposes to the owners of a large number of tracts of land in the vicinity of its works—land which probably the company had, as a land-

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owning company, sold as irrigable lands and placed itself under obligation to irrigate at the time of sale.

There is nothing to indicate the precise terms of these contracts or of the arrangement with the company under which the lateral ditch, about to be mentioned, was constructed, but it appears that the owners of a number of these lands associated themselves together under the name of the Pawson Lateral Association and constructed a lateral ditch from the company's irrigation canal over lands owned by the company and leased by the company to this association. It further appears that the point at which the lateral ditch left the company's canal was the point at which the land-owners were entitled by their contracts with the company to delivery of water by the company and the lateral ditch was constructed for the purpose of conveying the water to the boundaries of the lands of the owners who were entitled to water from the company for irrigation purposes. For the purpose of distributing the water from this main lateral ditch to the different parcels of land, the association constructed smaller lateral ditches over the lands of individual owners with their consent. The defendant was the owner (*i.e.*, lessee) of a parcel of land lying near the company's irrigation canal. The association's main lateral ditch ran through his land, but the land occupied by the ditch was excepted or reserved in the lease to him.

The charge against the defendant was, in effect, that, contrary to the provisions of s. 60 of the Irrigation Act, he wilfully, without authority, diverted water from the association's main lateral ditch, or more water therefrom than he was entitled to divert. We are not concerned with the proof of the facts, but are called upon only to say whether, assuming the charge in either form is proved, the defendant is liable to conviction under s. 60.

S. 60 says that:—

> Every person who wilfully, without authority, takes or diverts any water from any river, stream, lake or other waters or from any works authorised under this Act, and every licensee or other person who takes or diverts therefrom any greater quantity of water than he is entitled to, is guilty of an offence and liable upon conviction, either summarily or upon indictment, to a fine not exceeding $5 per day or fraction of a day for each unit (s. 3) or fraction of a unit of water improperly diverted or to imprisonment for a term not exceeding 30 days or to both.

I think the words "any water from any river, stream, lake or other waters" are equivalent to the words "water at any time in

any river, stream, watercourse, lake, creek, ravine, canyon, lagoon, swamp, marsh or other body of water" occurring (twice) in s. 6, which vests the title to the waters in the Crown; and that these words refer to waters before they have passed into "works authorized" by the Act. Then what is the meaning or the extent of the meaning of the words in s. 60, "any works authorized under this Act"?

The word "works" is interpreted by s. 2, clause (*g*) as meaning and including

any dykes, dams, weirs, flood-gates, breakwaters, *drains, ditches*, basins, reservoirs, canals, tunnels, bridges, culverts, cribs, embankments, head works, *flumes, aquducts, pipes*, pumps and *any contrivance* for carrying or conducting water or other works, which are authorised to be constructed under the provisions of this Act.

There can be no doubt whatever but that the association's main lateral ditch is a work within this definition; but the question remains, is it a work "authorized under the Act"?

S. 6 vests water generally in the Crown

unless and until and except only so far as some right therein or to the use thereof, inconsistent with the right of the Crown, and which is not a public right or a right common to the public, is established.

Water, therefore, does not become absolutely the property of the licensee; both the Crown and the licensee have a special property in it; that of the licensee being restricted to its use for irrigation purposes and that within a limited area; for the applicant must (s. 15 (2), clause (*d*)) state "the tract of land to be irrigated" and (clause (*e*)) "the name of the owner of each parcel of land . . . to be irrigated," subject to this (s. 38) that the licensee is obliged to dispose of any surplus water flowing in his works which is not being utilized for the *purposes* authorized to any person applying therefor for irrigation purposes, and sub-s. 2 of the same section provides that the delivery of such surplus water need not be made until the persons so applying pay or tender an amount equal to the cost and expenses of the works required to convey the surplus water to them or until they shall themselves construct such works. Such subsidiary works are then not like merely private works which may be erected for any lawful purpose, but are works for the conveyance under regulation of water in which the Crown still retains a special property.

These provisions seem to make it reasonably clear that the works necessary to convey the water from the main canal are

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intended to be covered by the expression "works authorized" either as directly authorized, because part of the scheme placed before the Department on application for a license, or as indirectly authorized by the provisions of sub-s. 2 just quoted, that is, works which are to be constructed at the cost of new applicants for water for irrigation purposes either by the licensee or the applicants. It seems to me that the expression "works authorized" is not to be limited to the works in the stage in which they would be before the necessary means to enable individuals to make use of the water are constructed. The same expression may have different meaning in different parts of the Act, if the context so requires (s. 2).

I, therefore, hold that the words of s. 60, "every person who wilfully without authority takes or diverts any water . . . from any works authorized under this Act . . . is guilty of an offence etc.," are applicable to a person who wrongfully diverts water from works which are constructed for the purpose of carrying the water from the main canal to the boundary of the lands of individuals who desire the water for the irrigation of their lands, such works being, in my opinion, "works authorized" by the Act.

It seems to me to be some confirmation of this view that a person taking water "wilfully without authority" would, apart from the provisions of s. 60, be liable on indictment for theft. *Rex* v. *Hutton* (1911), 19 W.L.R. 907, and the cases therein cited.

It seems unlikely that the section was intended to meet the case of the wrongfully diverting of water from bodies of water vested in the Crown and from the main works of licensees, but to exclude the case of water lying in the conduits carrying the water to the consumers' lands. What I have said answers the question stated.

STUART, J., being absent, took no part in the judgment.

Judgment accordingly.

ROBB v. MERCHANTS CASUALTY Co.
(Annotated.)

MAN.
C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Fullerton, JJ.A.
October 7, 1918.

INSURANCE (§ III D—71)—ACCIDENT POLICY—CONSTRUCTION.

A clause in an accident insurance policy, insuring against loss sustained while "riding as a passenger within the enclosed part of *any public passenger conveyance* provided for the exclusive use of passengers and propelled by steam, compressed air, gasoline, cable or electricity, or while riding as a passenger on board a steam or gasoline vessel licensed for the regular transportation of passengers, and such injuries shall be due directly to or in consequence of the wrecking of such car or vessel," does not include an accident while attempting to leave a passenger elevator in a privately owned building. It is from the words and the context not from the punctuation that the sense must be collected.

Statement.

APPEAL by defendant from a judgment of Curran, J., 41 D.L.R. 21, in an action for damages, under an accident insurance policy. Reversed.

A. C. Campbell, for appellant; *D. Campbell* and *H. F. Tench*, for respondent.

The judgment of the Court was delivered by

Perdue, C.J.M.

PERDUE, C.J.M.:—The plaintiff claims under an accident insurance policy issued by the defendants to him in which his deceased brother, Edward Robb, is named as beneficiary. The policy protects the beneficiary under certain conditions and in case of the death of the beneficiary under such conditions the payment for loss of his life goes to the insured, the plaintiff. A case was stated by the parties upon which they went to trial. The trial judge gave judgment for the plaintiff and the defendant appeals to this Court.

The whole question in this case turns upon the interpretation of clause headed Part R in the policy. This clause, or as much of it as is of importance, is set out in the judgment of the judge. The insured was killed while attempting to leave a passenger elevator in the Marshall Field Annex building in Chicago. The plaintiff's claim rests upon the contention that this passenger elevator was a "public passenger conveyance" within the meaning of the clause in question.

Part E of the policy provides for payment of double indemnity to the insured (the plaintiff) in case he sustains injury while riding as a passenger in any *railway passenger car*, or as a passenger on board a steam vessel licensed for the regular transportation of passengers, provided that the injuries shall be due directly to or in

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consequence of the wrecking of such car or vessel. Comparing these two clauses, it appears to me that the intention was that if the insured should be injured while travelling in a railway passenger car or on a steam passenger vessel, he should receive double indemnity; and if the beneficiary should be injured while travelling in similar manner, and the injury should be fatal, the insured should receive the sum mentioned in Part R. With respect, I cannot come to the conclusion that the words in the policy were intended to include a passenger elevator in a building such as the one in which the accident took place. There is a further condition in the clause which, unless explained away, is fatal to the plaintiff's contention. This condition is in the following words: "And such injuries shall be due directly to or in consequence of the wrecking of such *car or vessel.*" The same restriction is found in Part E. The elevator car in question was not wrecked, and the accident was not due to any such cause. The plaintiff argues that because of the punctuation, the above condition does not apply to "public passenger conveyance." The words "car or vessel" are clearly intended to cover both land and water conveyance. Part E again gives assistance as to the meaning of Part R. "It is from the words, and from the context, not from the punctuation, that the sense must be collected:" *per* Sir W. Grant in *Sanford* v. *Raikes* (1871), 1 Mer. 646, 651, 35 E.R. 808; approved by Lord Westbury in *Gordon* v. *Gordon* (1871), L.R. 5 H.L. 254, at 276. Clearly, I think, the condition, that the injuries must be due to the wrecking of the car or vessel, applies in this case.

With great respect, I would reverse the trial judge's findings and answer the second question in the negative. It is not, therefore, necessary to answer the first question. Judgment must, therefore, be entered for the defendant with costs of suit both in the Court of King's Bench and in this court.

Appeal allowed.

Annotation.

ANNOTATION.

Insurance—Polices Protecting While "Passengers in or on Public and Private Conveyances."

By F. J. LAVERTY, K.C., Montreal. Author of "*Insurance Law of Canada.*"

The liability of insurers under policies protecting insured while "passengers in or on public or private conveyances" has been the subject of frequent judicial consideration.

Annotation.

Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers; private conveyance suggests a vehicle belonging to a private individual: *Ripley* v. *Hartford Passenger Assurance Co.*, (1872), 16 Wall (U.S.) 336, 479.

In *Oswego* v. *Collins*, (1885), 38 Hun (N.Y.) 171, an omnibus was declared not to be a public conveyance.

In *Ripley* v. *Railway Passenger Assurance Co.*, 20 Federal Cases, No. 11854, it was held that "travelling by private conveyance" includes self-locomotion; it would have been different if the clause had read "travelling in"; see 9 Cyc. p. 863, Vo. Conveyance.

The paymaster of a railroad company travelling from station to station, and stopping between them to pay the employees, is not while doing so a passenger in a conveyance: *Travellers Assurance Co.* v. *Austin*, (1902), 94 Am. St. Rep. 125.

One injured while attempting to alight from a moving electric street car is to be regarded as having been injured "while riding as a passenger" in the car: *King* v. *Travellers' Assurance Co.*, (1897), 65 Am. St. Rep. 288.

Where the terms of the policy read "riding as a passenger in a passenger conveyance" an injury received while riding on the platform of a car is not within the condition: *Ætna Life* v. *Vandecar*, (1898), 86 Fed. 282; *Van Bokkelen* v. *Travellers Assurance Co.*, (1901), 167 N.Y. 590.

Where a passenger on invitation of the railroad superintendent left a coach to ride on the engine, and while so riding was killed, he did not thereby lose the character of a passenger, and the engine was part of the conveyance: *Berliner* v. *Travellers Assurance Co.*, (1898), 66 Am. St. Rep. 49.

Where the clause read that the insured was protected while riding as a passenger "in or on a public conveyance" and the insured was killed by being thrown from the platform of the car, the company was condemned: *Preferred Accident Insurance Co.* v. *Muir*, (1904), 126 Fed. 926.

A passenger elevator is one used for passengers, although also used for freight: *Wilmarth* v. *Pacific Mutual*, 168 Cal. 536 (1914). It was here held that the words "passenger elevator" are to be construed in their ordinary and popular sense, hence the evidence that among manufacturers of elevators, the term had a definite meaning and that an elevator used for the carriage of both passengers and freight was not a "passenger elevator" was properly excluded.

Where the body of the insured when injured was not wholly within the elevator, and the policy covered injuries "while riding in an elevator," it was still held to apply: *Ætna Life Assurance Co.* v. *Davis*, (1911), 191 Fed. 343.

A similar decision was rendered in *Depue* v. *Travellers Assurance Co.*, (1909), 166 Fed. 183, where the policy covered loss of life as a result of "bodily injuries effected while in a passenger elevator"; no one saw the accident; the body of the insured was found hanging head downward in the elevator, having been caught between the roof of the elevator and the floor of the building.

Where a policy insured against death or injuries resulting "while riding as a passenger in a place regularly provided for the transportation of passengers within a public conveyance," and the insured was injured while attempting to board a moving street car, but before he had entered the same, the company was released from liability: *Mitchell* v. *German Commercial Accident Co.* (1913), 161 South Western Reporter 362.

A transfer company renting picnic waggons was held not to be a common

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carrier; a common carrier being one who undertakes for a consideration to carry indiscriminately passengers as long as there is room in the conveyance, nor is a livery man a common carrier within the meaning of a clause in a policy covering insured while riding "as a passenger in a public conveyance, provided by a common carrier for passenger service:" *Georgia Life Insurance Co.* v. *Easter*, 66 Southern Reporter 514 (1915).

A similar decision was rendered in a case where the policy covered the insured "while a passenger in or on a public conveyance" and he was pushed by persons getting off an express train and fell between the platform and the train: *Rosenfeld* v. *Travellers Assurance Co.*, 161 N.Y. Supplement 12 (1916).

Where the clause read "while riding as a passenger in a railway passenger car" it was held that this provision was broad enough to cover death by being thrown from the platform of a passenger train, while passing from one car to another, the word "in" being interchangeable with "on": *Schmohl* v. *Travellers Assurance Co.* 189 South Western Reporter 597 (1916).

Where a policy read that no benefit would be paid for injuries received "while the insured was on a locomotive, freight car or caboose used for passenger service," and it was proved that the caboose, in which he was riding at the time of his death was used solely for railway employees and drovers in charge of live stock shipments, it was held that it was not "used for passenger service," in the common and ordinary meaning of the term: *Standard Accident Assurance Co.* v. *Hile*, 132 Pacific Reporter 333 (1913).

A taxicab has been held to be a public conveyance: *Primrose* v. *Casualty Co. of America*, 81 Atlantic Reporter 212 (1911).

Under this last case an annotation will be found in 37 L.R.A. (n.s.) 618, dealing with the scope and construction of a provision for indemnity in case of injury while riding in or on a public conveyance; also in 55 L.R.A. (1915C) 456, under the report of the decision in *Georgia Life Assurance Co.* v. *Easter*, *supra*.

Some policies make an exception of the risk involved in standing, riding or being on the platform of a railway car or entering or attempting to enter, leaving or attempting to leave any public conveyance while the same is in motion. Provided the car was in actual motion at the time the insured has his hand on it, at the moment of attempting to enter, no excuse will defeat the company's right to set up this exception in defence: *Huston* v. *Travellers Assurance Co.*, (1902), 66 Ohio St. 246.

In Canada, we find a decision of *Powis* v. *Ontario Accident Assurance Co.*, (1900), 1 O.L.R. 54, holding that a person was "riding as a passenger on a public conveyance" when he had his foot on the step before the vehicle had begun to move. This judgment was based on an English case, *Theobold* v. *Railway Passengers Assurance Co.* (1854), 23 L.J. Ex. 249: also *Northup* v. *Railway Passengers Assurance Co.* (1869), 2 Lans. 168, and a very similar case of *Champlin* v. *Railway Passengers Assurance Co.*, (1872), 6 Lans. 71.

In another Ontario case, the plaintiff had stepped off a tramcar into the path of an approaching motor car; he stepped back on the tramcar, which at that moment caught and injured him; it was held, reversing Meredith C.J.C.P., that he was not at the time of the accident a passenger in the tramcar; see *Wallace* v. *Employers Liability Assurance Co.* (1912), 2 D.L.R. 854.

A person riding a bicycle "is not travelling as an ordinary passenger" in a vehicle: *McMillan* v. *Sun Life Assurance Co.*, (1896), 4 S.L.T. 66 (Scotland).

A number of pertinent decisions will be found in MacGillivray's Insurance Law (1912), page 925 *et seq.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin, and Brodeur, JJ. October 8, 1918.

MASTER AND SERVANT (§ III A—285)—INJURY—FINDING OF JURY—NEGLIGENCE OF EMPLOYEES OF TWO DIFFERENT COMPANIES—JOINT AND SEVERAL LIABILITY.

The jury having found on sufficient evidence that an accident resulted from the common negligence of the employees of two different companies, such companies are in law jointly and severally liable for the damage.

[*Jeannotte* v. *Couillard* (1894), 3 Que. Q.B. 461, distinguished.]

Statement.

APPEAL from a decision of the Superior Court of the Province of Quebec (1918), 40 D.L.R. 749, sitting in review at Montreal, affirming the judgment of Guerin, J., with a jury and condemning the defendants jointly and severally to pay $6,000 and costs. Affirmed.

Lafleur, K.C., and *A. E. Beckett, K.C.*, for appellant, Grand Trunk Railway Co. of Canada; *Atwater, K.C.*, and *A. St. Pierre*, for appellant, City of Montreal; *Ernest Pélissier, K.C.*, and *Thomas Walsh, K.C.*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is an appeal from the judgment of the Court of Review, Montreal, which confirmed a judgment of the Superior Court in an action of damages for negligence. The issues of fact were tried by a jury. From the facts proved, the inference of negligence was drawn by the jury with the concurrence of the trial judge and, on appeal, the verdict was confirmed.

The respondents, plaintiffs below, are the mother and daughter of one Scarff, in his lifetime an employee of the railway company, who was killed in the course of that employment.

Three questions are raised on this appeal: (1) From the facts proved might negligence be legitimately inferred by the jury against both defendants? (2) Was the deceased's death caused by his own fault? (3) Are both appellants, as joint authors of the wrong, jointly and severally liable for the whole damage, or, in other words, are both appellants jointly and severally liable for the consequences of an accident caused by independent acts of negligence committed by the servants of both on the same occasion, or in connection with the same occurrence, and contributing directly to that accident? In my opinion, the first and third questions should be answered in the affirmative.

To dispose of the third question, which is purely one of law, I

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adopt the opinion expressed by a learned writer in the "Revue Trimestrielle de Droit Civil," 4 (1905), p. 341, who puts the question and answer in these words:—

Quand y a-t-il solidarité entre les auteurs d'un délit civil?

La Cour de Cassation, dans son arrêt du 3 juin, 1902 (Pand. fr. 1905, 1, 104) s'est-elle écartée de sa jurisprudence antérieure quant aux conditions nécessaires pour que la solidarité soit prononcée entre les auteurs d'un quasi-délit? Il ne suffit pas, disait-elle, il y a peu d'années (Cass. civ. 13 juin, 1895, D. 96, 1. 31), pour que la solidarité soit prononcée en matière de responsabilité provenant d'un quasi-délit, que la faute declarée soit commune à un certain nombre de défendeurs; il faut de plus qu'il soit constaté que cette faute est dans de telles conditions d'indivisibilité que toute répartition est impossible entre ceux qui l'ont commise. (V. de même Cass. 12 Feb. 1899, D. 79, 1. 281).

Or dans l'arrêt de 1902, la Chambre civile, après avoir constaté que ce dommage est implicable à la faute commune de plusieurs, ajoute "que cette faute a concouru à produire l'entier dommage subi par la partie lésée, que dès lors la condamnation a pu être mise solidairement à leur charge." Il ne nous semble pas que cette diversité d'expression cache une idée différente; car si on a pu causer l'entier dommage la faute a été indivisible.

The jury having found, on sufficient evidence, that the accident resulted from the common negligence of the employees of the city and the railway, they are both in law, jointly and severally, liable for the damage—1106 C.C. *Vide Piper v. Winnifrith* [1917] W.N. 358.

Dealing now with the first question, I am satisfied that from the facts proved, and I have read the evidence with great care, the jury might legitimately draw the inference of negligence against both the defendants.

The circumstances of the accident are not very fully given by the witnesses. Although referred to, no plan of the locality was filed at the trial, probably for the reason given by Mr. Lafleur at the argument here. The place was so well known to the jurors that each of them was presumed to have a photograph of it in his mind. The deceased, who was the chief actor, was not present to speak for his wife and children, and the jury was obliged to rely for the details of the occurrence almost exclusively on the version of those to whose fault the accident was attributed; interested as they were to exculpate themselves and their employers. All of which tends to give additional weight to the verdict.

The accident occurred at the intersection of the railway, at rail level, by the street formerly known as Ste. Elizabeth, now De Courcelles St., a very busy thoroughfare in the city of

Montreal. When the crossing was made originally (1900) the city assumed the obligation to put up gates and keep a watchman constantly in attendance. By reason of the increased traffic, in 1911, the Railway Board ordered the city to put up modern gates. The railway had the right of way, and the municipality assumed the obligation to protect the traffic using the crossing.

At the time of the occurrence, a number of empty passenger cars were being moved from the railway station to a place immediately beyond and westward of the DeCourcelles St. crossing. The train consisting of 14 empty cars was moving reversely, the engine pushing the cars. Brunet, the company's foreman, was in charge, and it was his duty to direct the whole operation, having special regard to the protection of the public using the street crossing. To do this effectively, Brunet required to be in touch with the enginedriver who controlled the motive power, and Scarff, who was at the end of the train as it approached the crossing. There was a curve in the line which made it necessary for Brunet to place himself in the middle of the train so as to be in communication with both ends. It was, obviously, necessary for him, before giving instructions to the enginedriver, to know the conditions at the crossing.

Scarff's duties are thus defined in the company's plea:

> The said late Charles J. Scarff, under special instruction from his foreman, was sent to the said DeCourcelles St. crossing for the sole purpose of safeguarding public traffic over said crossing during the shunting operations upon which the crew in charge of said train was engaged at the time.

The traffic at DeCourcelles St. crossing was controlled by the city, under the order of the Railway Board, by gates which were opened only when the man in charge, Racicot, saw that there was no train in the vicinity. His instructions were verbal and, when examined as a witness, he says:—

> On m'a dit que j'aurais à "watcher" les trains et fermer les barrières.

He had no time table or other means of knowing when the trains reached the crossing; he was dependent on his own judgment as to his action with respect to the gates.

In answer to a question from the bench, Mr. Lafleur admitted that the shunting operations continued until the cars were stowed away, *i.e.*, had reached their destination west of DeCourcelles St.

The jury found that the accident was attributable to two distinct acts, both of which contributed directly to the death of Scarff. In the course of the shunting operations, it was necessary

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to pick up a car which was on a track alongside the main line on which the train was being moved from the station, and for that purpose the whole train was backed up till within 40 or 50 ft. of the crossing and there brought to a standstill. The train was then broken in two, *i.e.*, a certain number of the cars nearest the engine were detached and run on to the siding to pick up the car that was there, and all were then moved back to the main track where the other cars had been left. When all the cars were coupled, on a signal from the foreman Brunet, the train in the process of shunting was moved towards the crossing, and Brunet then left his post on the outside and stood on the steps of one of the cars, where he was no longer in touch with the enginedriver or Scarff, as found by the jury. In the meantime, Racicot, seeing the cars nearest the crossing stopped, assumed that he might safely open the gate, which he did, thus permitting a large number of people to get on the track. Seeing the imminent danger in which these people were placed, as the train was approaching the crossing running reversely, and unable to signal the engineer through Brunet, who had left his post, Scarff rushed forward to reach the signal cock so as to notify the enginedriver of the danger, and in the attempt lost his life. It is said that he was negligent in what he did. Scarff may have assumed very heavy risks and even acted imprudently, but it must be borne in mind that he was dealing with a state of things due to the defendants' negligence. And, having read the evidence, I am satisfied that the finding of the jury, that in the circumstances he was free from fault, is fully justified. In a most trying emergency, he did his best (Laurent 20, p. 520, No. 489), and the jury evidently did not believe Menard's story about the removal of the signal whistle. So that, on the whole, I am fully satisfied that the finding of the jury to the effect that the accident was attributable exclusively to the acts of both Brunet and Racicot is borne out by the evidence.

Some questions were raised as to prescription and insufficiency of the notice. The acts of the employees of both the city and the company contributed to the death of Scarff, and the notice to the city was sufficient. The action was taken *en temps utile* against the company, and that was sufficient to interrupt prescription against the city (Laurent, vol. 17, Nos. 304 & 294; Arts. 1106 & 2231 C.C.).

On the whole, this appeal should be dismissed with costs.

DAVIES, J.:—I concur in dismissing these appeals; but I do so with much doubt; which, however, has not ripened into a conviction that the judgment appealed from was erroneous. My duty, as I conceive it, therefore, is to dismiss the appeal.

IDINGTON, J.:—I am of opinion that the evidence herein was such that the trial judge was right in submitting it to the jury and that their findings of fact bind us to apply such relevant law thereto as may be applicable.

In all its essential features I agree with the lucid statement of the case as presented by the judgment of Lane, J., on behalf of the Court of Review in support of the judgment appealed from.

I need not repeat, however, but may add what the argument here has suggested.

A perusal of the entire evidence in the case, except part of Menard's, which calls for little attention, convinces me clearly of one thing. It is that the stories of Racicot and of Benoit are in absolute conflict, in regard to the essential facts which furnish a crucial test of the weight to be given Racicot's version relative to his opening and shutting the gates.

He tells of a rush as it were of 5 or 6 vehicles from each side, when he opened the gates and that they all disappeared before the accident in question except a waggon loaded with brick which had not quite reached but was approaching the track on which the accident took place.

That story of their complete disappearance as the result of successful crossing by so many vehicles at one opening of the gates, before Benoit had been able during same opening to travel the short space he did to get where he saw deceased gesticulating in despair, is quite untrue if Benoit's story is even only approximately correct.

I can see no reason for disbelieving a word Benoit has said.

He was not a stranger to the crossing nor an idler, but knew well he had at such an hour to be prompt in entering when the gate, for the raising of which he had waited and watched, should permit him doing so.

The suggestion of the appellant's counsel in answer to my questions for explanation of this feature of the case that Benoit had wasted time watching some leak in an auto does not seem warranted by anything in the evidence. If counsel at the trial

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had imagined that Benoit had loitered behind others, pushing onward, he certainly should, and doubtless would, have pressed him on the point in a way that is not apparent.

Again Benoit swears to a delivery waggon approaching as he did and thus unintentionally demonstrates that Racicot's story is incorrect.

But more marvellous than all this is that neither the man who had the load of brick is forthcoming as a witness, nor a single other one of the ten to a dozen like witnesses seemingly available to corroborate Racicot by shewing that they had crossed as he says.

The accident was far too important for either appellant interested in demonstrating that it had discharged its duty to the public to say nothing of what is involved in this action, to accept such a remarkable conflict of evidence as not requiring further enquiry and production of the testimony if Racicot's story is true.

There was a coroner's inquest at which both these witnesses testified.

The jury herein evidently disbelieved Racicot and accepted Benoit's story.

There are a number of minor things in Racicot's story which I need not dwell upon but which doubtlessly helped the jury to reach the conclusion they did. I must not, however, pass thus what he tells of the number of times that these gates would be opened in the course of a day. Perhaps four or five hundred times a day was his reply when questioned there anent, adding he had never counted. There were three men, as I understand him, each taking his turn on such duty in the course of the 24 hours.

No doubt the jury knew without being told that of the needed raising and lowering of gates thus spoken of by far the greater part would fall within a comparatively few hours. A man loaded with such a task at the noon hour with three gates to keep an eye upon and the possibilities of sixteen tracks to be watched without the aid of any system but his own eyes can hardly be charged with wilful false swearing if he happen to get confused and shrinking from blame for the life of another persuades himself that there was only one raising and lowering of the gates in question within a given time which he had no accurate means of measuring.

I think the jury was quite right in accepting Benoit's story in preference to that given by a single witness under such circumstances, and especially so when the latter's story was left uncorroborated and could have been corroborated if true and a proper effort made to procure testimony from such a stream of travel as indicated.

This is not the defence of a poor helpless creature for whom a semblance of excuse might be found, but of a city armed with the necessary equipment for tracing and bringing forward these missing witnesses.

Evidently Racicot confuses the occasion of his opening and shutting of gates and forgets the one testified to by Benoit and which is the one we have to deal with.

The case rests upon inferences to be drawn by the jury from the established facts, and I cannot say that any single one of their findings must be held such as twelve or nine out of twelve reasonable men could not properly arrive at on the evidence presented.

The findings of fact are quite sufficient in law to maintain the judgment appealed from.

The city appellant claims that it has no responsibility for the failure to protect the public using the crossing and tries to get some support for such contention in the wording of the order made by the Board of Railway Commissioners. That order is not the sole basis of its responsibility and indeed has very little to do with it.

The agreement entered into between the two appellants must be looked at as well as the order of the Board and back of both the law upon which they were founded.

That agreement was entered into on November 8, 1900. It sets forth that the crossing of the railway company's yards by an extension of Ste. Elizabeth St. is to be permitted by the railway company, that the city will place crossing gates and watchmen to operate said gates, at its own expense, and then, by clause 3, agrees as follows:—

> The said corporation further agree to hold the said company free and harmless from any expense in connection with such temporary arrangement and protect them from all claims, costs, proceedings and expense for accidents occurring during its continuance.

The law upon which this rested is the Railway Act of 1888, as amended and interpreted and construed by the judgments in

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several cases. This court, in *City of Toronto* v. *Grand Trunk R. Co.* (1906), 37 Can. S.C.R. 232, held that a municipality in which a highway crossed a railway was a person interested within the meaning of ss. 187 and 188 of said Act, and that the Railway Committee of the Privy Council had jurisdiction to make the order it had made, and which was there in question imposing the obligation upon the municipality to bear a share of the expenses of guarding and protecting the crossings such as there in question.

Leave to appeal to the Judicial Committee of the Privy Council was refused.

The story of the struggle between railway companies and municipalities, up to that time, relative to possible responsibility of the municipality appears in the several cases cited in the report of the argument in said case.

The powers formally exercised by the Committee of the Privy Council in this regard became, by the legislation creating the Board of Railway Commissioners, vested in that Board. And the effect thereof was exemplified by an appeal to this court in the case of *Ottawa Electric R. Co.* v. *City of Ottawa and Canada Atlantic R. Co.* (1906), 37 Can. S.C.R. 354, to test the power of the Board in that regard. The power was maintained by the judgment of this court.

That establishes the principle of law upon which, by anticipation of its affirmation as it were, no doubt the parties concerned as appellants here had acted in entering into the agreement I have referred to and in which they, by a clause thereof, shew that the expedient of gates and watchmen was only temporary, for they evidently, as the agreement shews, expected a bridge over the railway as a substitute therefor to be constructed at their joint expense some day.

The city appellant is clearly liable by virtue of its agreement to indemnify the railway company.

The later order of the Board was, no doubt, made by reason of some one complaining of the inefficient protection given up to that time but it does not affect this case one way or another any more than if the order had been to paint the gates red or white.

But for the supervision of that Board, experience teaches that neither of such like parties will always maintain in a high state of

efficiency such like expedients for accommodating and protecting the travelling public.

The city sets up that this action was barred as to it by the special Statute of Limitations in its charter. I do not think so. I hold they were jointly liable to respondent.

The appeal does not raise any question for us to decide as between them who ultimately may have to bear the burden of their neglect.

Whatever might have been said at one time as to the right of a railway company to shift its own legitimate burden on to municipalities, there is none of that here in question. The creation of the crossing in question and its operation was a joint enterprise no matter how they divided the necessary labour attendant thereon, and the results following therefrom and incidental thereto must be borne jointly, even though in part there is involved the duty by the company towards its servants, in that, as well as in other respects. Each contributed more than its due share to the result that is before us. As between them and others, the obligation was jointly within the meaning of the Code.

The appeal should be dismissed with costs.

ANGLIN, J.:—For the reasons stated by my Lord the Chief Justice and my brother Brodeur, I agree in their opinion that if both the defendants were responsible for the death of the plaintiff's husband, their liability is joint and several. It follows that the plea of prescription made by the City of Montreal fails.

Anglin, J.

We should also decline to disturb the ruling of the trial judge that the plaintiff's failure to give notice of her claim to the city corporation within 30 days after her husband was killed was excused by her ignorance of the fact that the city controlled the gates at the DeCourcelles St. crossing. She believed, not unreasonably, that they were operated by the Grand Trunk R. Co.

While I might have taken another view as to the proper conclusion to be drawn from the evidence if dealing with it as a trial judge, I agree with Lane, J., who delivered the judgment of the Court of Review, that the jury may not improperly have preferred to rely upon Benoit's evidence rather than on that of Racicot, and may not unreasonably have drawn the inference that the latter had carelessly opened the crossing gates after the Grand Trunk

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train had started to move towards the crossing. This inference would negative any neglect of duty on the part of the deceased Scarff in giving the signal on which that train moved, which, of course, should not be presumed.

I have not been convinced that the jury was not warranted in holding that Scarff's attempt to stop the train by opening the angle-cock under the foremost car coming towards him—which undoubtedly cost him his life—did not amount to fault or contributory negligence. Unless he was responsible for the air whistle not being in place and available for use, he was not to blame for the existence of a situation which left him no other means of attempting to save the lives put in jeopardy by Racicot's negligent opening of the gates. In an emergency, he imperilled his life in an effort to save others, praiseworthy not merely because of its heroism, but also because it evidenced zeal in the discharge of duty and in safeguarding the interests of his employers. An act done upon such an impulse, although under other circumstances inexcusably rash, may well be held not to have been a fault.

The jury evidently did not believe Menard, the chief witness whose testimony would establish that Scarff was himself responsible for the air whistle not having been in its place, and it is impossible to say that in doing so they were clearly influenced by any improper motive or were manifestly wrong. Yet I cannot help thinking that, even rejecting this testimony, had the jury found that Scarff had failed to place or to keep the air whistle where it should have been and could have been used by him without danger, such an inference from the proven facts would have been warranted and could not have been disturbed. Indeed, I am not entirely satisfied that it is not the most reasonable inference from the rest of the evidence, omitting entirely that given by Menard. But the jury has found otherwise and I am not prepared to say that their finding is so clearly against all the evidence that is should be set aside.

Upon the argument I also entertain grave doubt whether the action of Brunet in entering the train where he was unable to see Scarff after transmitting his signal to start, instead of remaining on the platform about 10 ft. from the side of the train, where he could have seen Scarff in order to take any further signals that the latter might find it necessary to give, imputed by the jury as a fault attributable to the railway company, should properly be so

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regarded. I understand, however, that a majority of my learned brothers are of the opinion that it should. Although further consideration of the evidence has not dispelled my doubt, since it has not ripened into a clear conviction of error on the part of the Court of Review as well as the jury, it does not justify a dissent.

BRODEUR, J.:—This is a case of a railway accident where the husband of the plaintiff, respondent, lost his life. The Grand Trunk Company owned, within the limits of the town of St. Henri, a large yard where passenger trains, after their ordinary run, are washed and cleaned. This yard is crossed, on the level, by DeCourcelles St. for a distance of about 300 ft. As there is a good deal of traffic at this spot, and in view of the large number of trains which are continually moving, the Railway Commission decided, in 1911, that modern gates should be put up, and that they should be maintained, kept in repair and operated by the City of Montreal until the Grand Trunk company raised its track.

The day of the accident, August 24, 1915, a train composed of 14 cars was pushed into this yard by a locomotive. The car which was in front was a baggage car. Three persons, besides the engineer and the fireman, were in charge of this train, namely, Brunet, the foreman; Scarff, the victim; and a man named Marcotte.

Having come nearly to DeCourcelles St., upon track No. 4, the train was stopped in order that the locomotive could get a car which was on a track near by. Scarff received instructions from his foreman, Brunet, to place himself at the DeCourcelles St. crossing, in order to see that there should be no accident while the train was being made up, and to give the necessary signals when the street should be clear. For this purpose Scarff stood on the footpath beside the baggage car, and when the train was made up he gave a signal to Brunet that the train might start and cross the street and the engineer, accordingly, upon Brunet's signal, started the train.

From the moment that the train started Scarff should have perceived that there was danger to certain vehicles or pedestrians who were crossing the street, and he should have then given the signal to stop; but Brunet who, in the interval, had got on the car, towards the middle of the train, did not see this signal, and then Scarff, in a moment of self-sacrifice which is entirely to his

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credit, darted to the rear of the train in order to stop it by means of the angle-cock.

It was an extremely dangerous proceeding that he undertook, but he believed, I suppose, it was his duty to have recourse to it in the hope that he might save the lives of those who were going to be struck upon the street, and counting, probably, also upon his own agility; but, unhappily, he was dragged under the car and was crushed.

The suit was originally commenced against the Grand Trunk Company, but during the course of the trial it was discovered that the gate at this street was under the charge of an employee of the City of Montreal, and then, more than a year after the accident, the City of Montreal was sued and added as a party in order to make it jointly and jointly and severally liable with the Grand Trunk Company for this accident.

The Grand Trunk Company and the City of Montreal have pleaded that the accident was not due to their fault but to that of the victim himself. The City of Montreal has, in addition, pleaded prescription of a year under the provisions of art. 2262 C.C. (Que.).

The trial took place before a jury, who found the City of Montreal as well as the Grand Trunk Company guilty of negligence. They exonerated Scarff of any blame. The Grand Trunk Company was found guilty because its foreman was not in a position to be able to receive the signal which had been given him to stop the train, and the City of Montreal was found in fault for having, through the medium of its employee, raised the gates when the train was moving.

This verdict was unanimously confirmed by the Court of Revision.

The question which presents itself is to know if there was sufficient proof to justify the verdict. The appellants claim that no evidence of negligence on their part has been given. The evidence is very lengthy and voluminous, and shews the care that has been taken to put before the jury all the facts which might affect the liability of the appellants.

The responsibility placed by the jurors on the Grand Trunk Company appeared to me at first, I admit, to have little foundation, and the evidence did not appear to me to justify it. But after

reading and re-reading, with much attention, this evidence, I see that the jury really had a right to blame the company.

The company attempted to introduce a certain witness to prove that Scarff was in fault, seeing that he had, at his disposal, a whistle which would have enabled him to stop the train, and that he had left this whistle upon the footpath.

We have not had the opportunity of seeing this witness, but, if I may judge him by the answers he gave, it is not surprising that the jury did not believe him, and the Court of Revision came to the same conclusion.

It seems to me that the foreman Brunet (and it is the conclusion the jury appears to have come to) ought to have remained in a position to receive any signal which might be given to him by Scarff. Scarff was well placed upon the footpath, beside the train; why did not he himself remain there? The train could be followed by a man on foot as it had only a few feet to reach its destination; and in that case Brunet appears to me to have been guilty of negligence in getting on the train and so losing sight of Scarff, who had been sent to give the necessary signals.

It is true that Scarff had given the signal to start, but, in view of the considerable width of the yard, it might happen that at any moment a signal to stop might be given by Scarff, and so Brunet should have remained in a position to receive such signals. Unhappily, he did not do so, and when the danger became very imminent, Scarff was obliged, seeing that his signals could not be received, to go and place himself in front of the train in order to try and stop it otherwise and avoid the fatal accidents which were inevitably going to happen. Brunet, who had got on a car about the middle of the train, suddenly saw signals of distress made by a man who was on the street, and he then tried to stop the train, but, unhappily, he was too late; poor Scarff was crushed.

As to the City of Montreal, the jury found that it was the duty of Racicot, who was in charge of the gates, to raise them after the departure of the train. He swore to the contrary, but he is contradicted in this respect by the circumstances which have been proved in the action. I think, therefore, that the jury was justified in not accepting his story.

I find, therefore, that the verdict of the jury is equally justified against the City of Montreal and the Grand Trunk Company, and that there is no reason for setting it aside.

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There remains the question of prescription raised by the City of Montreal. The question is to ascertain if there was joint and several liability between the Grand Trunk Company and the City of Montreal, and if prescription was interrupted by the suit entered against the Grand Trunk Company before prescription was acquired. Art. 2262 C.C. (Que.) says that actions are prescribed by 1 year for bodily injuries. In the present case there was interruption of prescription as far as the Grand Trunk Co. is concerned because action had been taken against it before the expiration of the year which followed the accident (art. 2224 C.C.). Art. 2231 C.C. tells us that every act which interrupts prescription by one of joint and several debtors interrupts it with regard to all.

Now art. 1106 C.C. (Que.) states that the obligation arising from an offence or quasi-offence committed by two or more persons is joint and several.

The City of Montreal tells us that there is no joint and several liability in the present case because the offence of which it has been found guilty by the jury is not the same as that which is imputed to the Grand Trunk Company. There would have been, according to it, two offences, and consequently joint and several liability could not exist, and it cites, on this point, the case of *Jeannotte* v. *Couillard*, (1894), 3 Que. Q.B. 461, where it was decided as follows:—

Although under art. 1106 C.C. there may be solidarity (joint and several liability) in the responsibility established under art. 1053 C.C. yet such solidarity only exists from the same act and not from an independent act on the part of each defendant.

In this case of *Jeannotte* v. *Couillard* the point arose in an action against a physician and a druggist; the former for having made an error in writing a prescription for an illness and the latter for not having filled the prescription just as it was written. The two mistakes charged against the druggist and the physician were quite different. It is true that they both contributed to the death of the person who took the remedies, but the Superior Court and the Court of Appeal did not consider it proper to call the liability joint and several.

In the present case, the facts are different. First, the offences occurred at the same time. On general principles the co-authors of an offence or quasi-offence are jointly and severally liable for damage caused to the victim of the offence, and when it is proposed to determine the extent of the liability of the co-authors of an

offence, the influence that the mistakes of the different agents might have had upon such quasi-offence should alone be considered. And, if it is appreciable, each is restricted to reparation of the injury in proportion as he has co-operated in it, and if it is not appreciable we may consider each mistake as having caused the whole damage, and accordingly, without being specially concerned with the equality or inequality of the imprudent or negligent acts committed on both sides, we may place on the various co-authors the entire blame.

This question arose in France, and I find a decision of the Court of Cassation reported in Dalloz, 1894-1-561, where it was decided that the reparation of an injurious act attributable to two or more persons should be ordered for the whole injury against each person for the benefit of the person injured when there is a direct and conclusive relation between each fault and the total amount of the damage. There would be, then, according to this decision, joint and several liability even in the case where each co-author should be pronounced guilty of negligence by a distinct act.

The Court of Cassation, in a case reported in Sirey, 1827-1-236, also decided that there was ground for holding jointly and severally liable for reparation of damage caused to a neighbouring proprietor several proprietors of industrial establishments without it being possible to determine the share which each establishment had contributed to it. Larombière, commenting upon this judgment, says:—

> But on account of the indivisible manner in which the damage was effected, and by the result of a particular and common fault, the act of each of the manufacturers was deemed the act of each, the reparation was due by all and by each; in a word, joint and several liability resulted from the nature and strength of the actions.

Joint and several liability results from the impossibility in placing the responsibility of a fact of separating one of the actions which has, together with others, helped in some way, the said actions being also connected as cause and effect.

I would also cite, upon this point, Aubry & Rau, 4th ed., vol. 4, p. 23.

In the light of these decisions and of these judgments I have come to the conclusion that the City of Montreal and the Grand Trunk Company have rendered themselves guilty of a fault which

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has brought about the accident of which Scarff was the victim, and that there is, consequently, joint and several liability for it. The interruption of prescription against the Grand Trunk Company was therefore equally interrupted against the City of Montreal.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed.

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C. A.

BROWN'S TRAVELLING BUREAU v. TAYLOR. (Annotated.)

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. October 1, 1918.

INSURANCE (§ III—112)—UNDERTAKING TO HAVE POLICY READY AT A CERTAIN TIME—AGENT STAYING HAND OF COMPANY—POLICY NOT READY—LIABILITY FOR PREMIUM.

An insurance agent who undertakes to have an insurance policy ready at a certain date, and, by an unauthorized departure from the terms of the application, stays the hand of the insurance company so that the contract is not concluded or the policy issued until after the date agreed upon, cannot recover the insurance premium from the insured.

Statement.

APPEAL by plaintiff from the judgment of Cayley, Co. J., in an action to recover the amount of an insurance premium. Affirmed.

Sir Charles H. Tupper, K.C., for appellant; *Joseph Martin*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A. (dissenting):—The defence pleaded in pars. 6, 7 and 8 of the statement of defence, shortly stated, is that plaintiff at defendant's request undertook to procure a Lloyd's war risk policy of insurance on defendant's life covering a passage by sea to England and return, and undertook to deliver same to the defendant at Montreal before the sailing of the SS. "Metagama," due to sail from that port on June 2, 1917, and that the defendant failed to carry out said undertaking or request. In his evidence the defendant was asked:—

Q. Then the ground on which you contend that you are not liable, Mr. Taylor, is that they (plaintiffs) undertook to have the policy of insurance in Montreal ready for you on the 2nd of June . . . and that it was not there? A. Yes.

The judge found against the contention that the policy was to be delivered to the defendant in Montreal, but he also found that, as the policy had not actually been *written* earlier than June 4, whereas the defendant sailed on the "Metagama" on June 2,

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the defendant's instructions to plaintiff had not been carried out, and defendant was, therefore, freed from any obligation to pay the premium, notwithstanding the fact that the policy, when written, covered the risk on and after June 2. I have read the evidence, and have considered all the circumstances with care, and I am forced to the conclusion that defendant's instructions and the obligations arising thereout were reasonably carried out by the plaintiffs. Moreover, the defendant, after his arrival in England, received a cablegram from the plaintiffs which gave him notice that the policy had been written, and as it, to his knowledge, covered the round trip, I think an obligation was cast upon him to repudiate the policy if he desired, or was entitled to do so. As the matter was left, a liability was undertaken or continued in reliance upon a request which was not withdrawn, even after notice to defendant that it had been acted upon by the plaintiffs.

I think the appeal should be allowed..

Martin, J.A.

MARTIN, J.A., dismissed the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—In my opinion the appellant has failed to establish that the judgment appealed from is wrong. The case is one really of fact and the trial judge has found the essential facts that no insurance was placed in the terms of the application. There is no evidence of any acceptance of the risk, in a reasonable time, as applied to the circumstances. The respondent was on his ship at the Port of Montreal on the night of June 1, 1917, the ship leaving its moorings early in the morning of June 2, 1917, for England, and at that time there was no insurance existent, and not until June 4, 1917, was the policy written up, and then only following the instructions by telegram from the appellant to the Law Union & Rock Ins. Co. The application for the accident insurance given by the respondent to the insurance company was dated in May, 1917, and had thereon the following:—

> This insurance to be in force for four months from noon standard time of the 2nd day of June, 1917, or from whichever date shall sail from Canada or the United States to England,

filled up upon a printed form of the insurance company, and had as a foot-note, in typewriting, the following:—

> Policy only to be written subject to my sailing on above or other suitable date. Advice to be given D. E. Brown accordingly. This policy to apply if I sail for England on any other steamer line or route.

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Now, it would appear upon the evidence that the respondent understood, in fact he states that it was so agreed with him by the appellant, that the policy of insurance would be forthcoming and delivered to him with the passport also being procured for him at Montreal at the office of the Canadian Pacific R. Co. The passport was delivered but no policy of insurance. The explanation of this fact arises, and is completely explainable, when it is seen that the appellant, apparently without authority at all from the respondent, undertook to advise the insurance company under date May 29, 1917, when sending on the application to the insurance company, "that upon a receipt of a wire from us you will have the policy written and forwarded here for delivery." This was an unauthorised departure from the terms of the application and was not carrying out the agreement as between the respondent and the appellant. Nor is there any evidence that the insurance company, on its part, acted upon the application or accepted the risk, as and "from noon standard time of the 2nd of June, 1917." Then it was not until June 4, 1917, that the appellant wired the insurance company in the following terms:—

Please forward policies (other names as well as the appellant's are mentioned) Taylor dating same from June second four months parties sailed yesterday from Montreal.

As a matter of fact the ship had sailed the day before, namely, on June 2, 1917, and then, and not till then, is the policy written up antedating same to June 2, 1917. A natural query at once arises in one's mind, what would have been the position of affairs had the ship gone down before the writing of the policy or the delivery of the same? This much at any rate is clear, that the respondent was uninsured at the time of his departure upon board the ship on June 2, 1917; the failure to effect the insurance was the failure of the appellant. That being the fact, it is idle for the appellant to contend that its position in law is that of agency only and that it discharged its duty in the matter by forwarding the application for insurance and that it should not be answerable for the insurance company's delay or non-acceptance of the risk within a reasonable time—the interposition of the appellant staying the hand of the insurance company—and an unauthorised interposition renders it impossible in law for the appellant to recover the premium from the respondent. The situation would clearly appear to have been, upon the facts as disclosed in the evidence, that when

the respondent went aboard his ship at Montreal he was uninsured by the Law Union and Rock Ins. Co. If it was otherwise, and the respondent was in fact insured, the company having accepted the risk, there has been failure to prove any such case. It might be that the respondent would be liable for the premium had such a case been established, but I do not go the length of so deciding (see *General Acc. Ins. Corp.* v. *Cronk* (1901), 17 T.L.R. 233), in that it is apparent, in the present case, special instructions were given to the appellant calling for the delivery of the policy in Montreal to the respondent, which instructions the appellant failed to carry out, the result being that the respondent had to place other insurance.

The counsel for the appellant relied upon *Roberts* v. *Security Co.*, [1897] 1 Q.B. 111. This case was referred to by their Lordships of the Privy Council in *Equitable Fire and Accident Office* v. *Ching Wo Hong*, [1907] A.C. 96, Lord Davey saying:—

> 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.*, [1897] 1 Q.B. 111. It is enough for their Lordships to say that the words of 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 position, unquestionably, was that there was no insurance proved to have been placed at the time of the respondent's sailing. There was no concluded contract, and the premium not having been paid by the appellant, it is very questionable, indeed, whether even on the policy issued a claim could have been enforced if a claim had arisen, and upon this point, it is to be remembered the respondent was willing to pay the premium to the appellant at Vancouver, and it is a matter for remark that the premium the appellant sues the respondent for was not paid until October, 1917, although the appellant stated that it had been paid in the letter of the appellant of July 16, 1917. The insurance was only for 4 months and the premium was not paid until after its expiry. The fact that the premium was charged to the appellant cannot be deemed to have been payment, nor can the later payment be deemed a payment for and on account of the respondent or constitute legal liability on the respondent. The want of a concluded contract was the fault of the appellant in withholding action upon the part of the insurance company against express instructions, a

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negligent act, and alone suffices to disentitle the enforcement of the claim for the premium. Upon a review of all the facts it is highly unreasonable to suppose that the respondent would have gone upon a hazardous journey, the risk of submarines and into the war zone, with such indefiniteness of understanding as to insurance as contended for by the appellant; and the conduct of the respondent throughout was the conduct which one would expect of one, who, from the outset of the negotiations, was at all times anxious to effect a concluded contract, and his every effort was to that end, only to be disappointed and harassed at the eleventh hour in Montreal, and to be without the insurance he had so carefully arranged for. The conclusion, upon the facts, can only be a conclusion in complete accord with the trial judge. The case is not one in which the appellant has discharged the onus always resting on the appellant, of demonstrating that the judgment is wrong (*Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *Lodge Holes Colliery Co.* v. *Mayor of Wednesbury*, [1908] A.C. 323, and Anglin, J., in *Union Bank of Canada* v. *McHugh* (1911), 44 Can. S.C.R. 473, at 492. (Varied on appeal to the Privy Council, 10 D.L.R. 562, [1913] A.C. 299.)

I would dismiss the appeal. *Appeal dismissed.*

ANNOTATION.

Annotation.

What is the Exact Moment of the Inception of a Contract of Insurance.

By F. J. LAVERTY, K.C., Montreal. Author of "*Insurance Law of Canada.*"

This judgment appears to be based partly on the issue of fact as to what was the agreement between the parties, and partly on the finding in law that the policy did not cover the respondent when he went aboard his ship at Montreal on the 2nd June.

The question of the exact moment of the inception of a contract of insurance has given rise to a number of important decisions; the latest is that of the House of Lords in 1916, *Allis-Chalmers Co.* v. *Fidelity & Deposit Co. of Maryland*, 114 L.T.R. 433. Plaintiffs had requested a bond guaranteeing them against loss through the dishonesty of their Paris manager to be in force "from issuance"; in terms the bond recited that it covered plaintiffs from March 8, 1912, to March 7, 1913; it was executed on March 8, and immediately tendered to plaintiffs, but as their manager was absent, it was arranged to stand over to his return, which occurred on April 18, on which date he paid the premium. The Paris manager had disappeared on April 13, and by the 18th plaintiffs suspected that he might have absconded. They later claimed for defalcations occurring before April 18, but their action was dismissed on the grounds that they had concealed material facts, and that the contract was not completed until April 18.

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Lorebum, L.J., found that the parties had never been *ad idem* on the subject of the exact premium to be paid, and there was no evidence that the other terms of the policy were ever agreed to by the insured, or that he had ever agreed to take the usual form, whatsoever it might be.

The Supreme Court of Canada dealt with a similar question in *Donovan* v. *Excelsior Life Insurance Co.* (1916), 31 D.L.R. 113, 53 Can. S.C.R. 539, and held that there was not a completed contract of insurance between the company and the insured at the time of his death, inasmuch as the condition in the policy as to its delivery and surrender of the receipt during the lifetime and continued good health of the insured was not complied with. In this case the application stated the insured's age as 64, and the doctor's report as 65; the premium was paid and the policy written on the basis of the age being 64, and it was sent to the agent with instructions to reconcile the discrepancy. He ascertained that the age should have been 65 and obtained from insured the additional premium; a new policy was prepared and sent to the agent, who did not deliver it on learning that the insured was ill; she died a few days later.

The court distinguished *North American Life Insurance Co.* v. *Elson* (1903), 33 Can. S.C.R. 383, on the ground that in the *Donovan* case, the policy was sent to the company's agent not for unconditional delivery as in the *Elson* case, but to be delivered only upon the conditions stated in the letter from the company to their agent referring to it.

The facts of the *Elson* case were that the policy provided that it would not be in force until the first premium had been paid and accepted and the receipt delivered; the policy purported to be signed on September 27, 1894, and to cover insured until October 5, 1895; it was sent to the company's agent at Winnipeg on September 27, and forwarded by him to the insured, who received it on October 7; he died on September 30, 1897; it was held that the contract of insurance was completed on September 27, 1894, and that it had been in force 3 full years when insured died.

In the United States we find a case of *McMaster* v. *New York Life Ins. Co.*, (1901) 183 U.S.R. 25, in which the Circuit Court of Appeals held that the policy was not in force till the date of its execution, December 18, 1893, although it recited that the annual premium was to be paid on December 12 in each succeeding year; it was delivered and the first premium paid on December 26, 1893, and it was held to be still in force on the date of the death of the insured on December 18, 1894.

In the *Donovan* case the Supreme Court also distinguished the ruling in *Roberts* v. *Security Co.*, [1897] 1 Q.B. 111, where the policy recited that the premium had been paid, and that no insurance would be held to be effected until such payment; it was sealed with the seal of the company and signed by two directors and the secretary and remained in its possession. A loss occurred before payment of the premium, which in fact never was paid; it was held that there was a concluded agreement, and that the company had waived the condition as to payment of the premium.

The House of Lords in *Xenos* v. *Wickham* (1867), L.R. 2 H.L. 296, dealt with a case where a broker had submitted a slip for marine insurance, and the insurer prepared a policy in accordance; it was tendered to the broker, one of whose clerks returned it, and had it cancelled, stating that there had been a mistake. The ship being lost, the owner succeeded in recovering on

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the policy, on the ground that he had never authorized the broker to cancel the insurance; that a policy executed by an insurer is complete and binding against him, although in fact it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it, and that it is not necessary that the insured should formally accept or take away a policy, in order to make the delivery complete.

McPhillips, J.A. (in *Brown's Travel Bureau* v. *Taylor, supra*), refers to a judgment of the Privy Council, *Re Equitable Fire & Accident Office* v. *Ching Wo Hong*, [1907] A.C. 96, where the policy under consideration also contained a condition that it was to be of no effect unless the premium had been wholly or partially paid; the fact that no payment had been made was held to have prevented it from ever coming into force.

It is apparent that no hard and fast rule can be laid down to determine the moment when any particular policy may come into effect, this being a point to be decided according to the facts of the case and the wording of the instrument.

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TOWN OF MACLEOD v. CAMPBELL.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. November 18, 1918.

TAXES (§ III D—135)—TOWN ACT (ALTA.)— ASSESSMENT OF LAND—RELIEF AGAINST—DECISION OF COURT NOT APPEALED AGAINST—RES JUDICATA—ACTION TO RECOVER—DEFENCES.

If a taxpayer does not pursue the remedy provided for relief against excessive taxation by the Town Act (1911-12, Alta. c. 2) by an appeal from the Court of Revision to the District Court Judge and from him to the appellate court, the decision of either of these courts not appealed from is *res judicata*, and such excessive taxation cannot be set up as a defence to an action by the municipality for the recovery of the tax.

[*Canadian Land and Emigration Co.* v. *Municipality of Dysart* (1885), 12 A.R. (Ont.) 80, referred to; *Toronto R. Co.* v. *Toronto*, [1904] A.C. 809; *Canadian Oil Fields Co.* v. *Village of Oil Springs* (1906), 13 O.L.R. 405, distinguished; (1918), 41 D.L.R. 357, reversed. See also *North Cowichan* v. *Hawthornthwaite* (1918), 42 D.L.R. 207.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1918), 41 D.L.R. 357, which affirmed the judgment of Ives, J., at the trial, by which the plaintiff's action was dismissed with costs. Reversed.

A. H. Clarke, K.C., for appellant; *Lafleur*, K.C., and *E. V. Robertson*, for respondent.

Davies, J.

DAVIES, C.J.:—I concur with Anglin, J.

Idington, J.

IDINGTON, J.:—The judgment of the trial judge upheld by the Court of Appeal for Alberta decided that because the assessment complained of is obviously excessive and that the assessment of the lands in question does not bear a fair and just relation to the value at which other land in the immediate vicinity is assessed, this action for the recovery of taxes imposed should be dismissed with costs.

The Act under which the assessment was made provides a means of relief in such cases by way of appeal to the municipal court of revision and from that court to the District Judge. The respondent had taken an appeal from the assessment to the Court of Revision, which consisted of members of the appellant's council, and that court, of which four members heard the appeal, decided to confirm the assessment, and dismissed the appeal.

The respondent did not pursue the matter further by an appeal to the District Court Judge, which was open to her. The result was that the assessment roll stands supported by s. 285 of the Town Act, which reads as follows:—

285. The roll, as finally passed by the council and certified by the assessor as so passed, shall be valid and bind all parties concerned notwithstanding any defect or error committed in or with regard to such roll or any defect, error or mis-statement in the notice required by s. 276 of this Act or any omission to deliver or to transmit such notice.

I have long entertained the opinion that the only remedy which a ratepayer, complaining of an assessment being excessive, has, is to pursue such remedies as the Assessment Act may furnish for the redress of such a grievance.

If in the way of exceeding its jurisdiction a municipality or its officers have attempted to impose a tax which they, or it, have no power to impose, as, for example, in the case of property exempt from taxation, such taxes cannot be collected for the attempted imposition thereof is void.

It has been strenuously argued before us that inasmuch as the basis of such taxation as imposed and in question herein is imperatively required by law to rest upon an actual value, of the kind defined, that a serious departure therefrom is also beyond the jurisdiction of appellant and hence void.

Such a view of the law would be to render the collection of taxes dependent in many cases upon the very doubtful result of an issue to try what is actual value such as defined in the statute in question herein.

No decision binding us has ever gone so far.

And experience, for example in the hearing of many appeals in cases of expropriation here, tempts one to suggest that the result of such a decision as sought herein by maintaining the judgment appealed from, would bring some appalling consequences, not only to us, but also to those concerned in collecting taxes.

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Of course that is no reason for shrinking from so declaring the law if we so find it, but it makes one pause and reflect upon the view presented by many judges in dealing with similar legislation. I may be permitted to say that I never knew any one better qualified to speak upon such a subject than the late Chief Justice Hagarty, who so long presided in Ontario courts, including the Court of Appeal for Ontario, and in dealing with such a proposition in the case of *Canadian Land and Emigration Co.* v. *Municipality of Dysart* (1885), 12 A.R. (Ont.) 80, he spoke as follows, pp. 82, 84:—

> If we were to pronounce illegal some of the proceedings here complained of, I am afraid we would be exacting an ideal perfectibility in the working of our municipal system. . . . I think the design of the legislature was to work out the whole system of assessment by the machinery provided. First, the action of the assessor, secondly, the appeal to the Court of Revision; thirdly the final appeal to the County Judge or stipendiary magistrate. . . . The intervention of the courts in the manner sought for by this appeal would be disastrous to the working of the municipal system. If the Court of Revision is to be in effect prohibited from enforcing the assessment, what is to be done?

It seems to me that this was good law and sound sense (which generally coincide) and must be accepted as our guide.

The logical results of the maintenance of the argument presented on behalf of respondent would be that an over or under valuation in the assessment would be void for want of jurisdiction and hence bring the case within the line of cases such as furnished by decisions on exemption already referred to, as the statute only permits actual value as defined as the basis therefor, and hence that that issue must be determined by trial of the fact in each case of such like dispute. There is no room for drawing any other line if that mode of thought is to be applied in deciding this case.

It is not the excessive departure from actual value as defined that is involved in such a proposition. Perhaps a hair divided the false and true. The absolutely true line must be discovered if the proposition is sound.

I cannot think that such is the correct interpretation and construction of the statute in question.

The evident purpose of the legislature was to tax such actual values as the assessor, and the special appellate courts designated, might determine to be the true value of the property assessed.

When the question of excessive assessment is raised I can see another possible alternative in the way of a defence founded thereon. It is a finding of fraud which vitiates everything.

There is much to be said as to this appellant's assessor's conduct being akin to that which would lay a good foundation for such a defence when he treated, as he says, the line laid down for him in the statute as a joke. But there are others involved besides him who are said to be respectable men composing the town council. Although such a line of attack was open to the respondent she did not pursue it.

I only refer to it now as apparently a quite possible defence which some municipal authorities may have to face if they persistently disregard the law, as there is too much reason to believe there is a tendency to do in that regard in some places.

If ever such a case arise, the party suffering and feeling he cannot succeed by the ordinary course of appealing must raise the issue distinctly.

As the law stands I see no relief for those upon whom excessive assessments are imposed but the remedies by way of appealing or a charge of fraud if it exist.

I am not surprised to learn from Harvey, C.J.'s judgment that s. 267 (3) of the Town Act has done much harm. It facilitates and probably protects the perpetration of fraud by putting an impediment in the way of appellants who should be encouraged as so many inspectors, as it were, checking the careless assessor's slovenly work. It tends to confusion of thought and to defeat the purpose of a just valuation which is the object of the law.

The appeal should be allowed, but the costs should be withheld. I feel so inclined, for I agree with the courts below that there has not been that observance of the statute which there should have been.

DUFF, J.:—I am of opinion that this appeal should be allowed with costs. Duff, J.

ANGLIN, J.:—The purport and intent of s. 285 of the Town Act, having regard to the provisions by which it is preceded, is to make the assessment roll valid and binding in respect of all matters within the cognizance of the Court of Revision. The chief subject of the jurisdiction of that court is the determination of appeals based on the ground that assessments are "too high or too low." In regard to these questions its jurisdiction is exclusive. Anglin, J.

The complaint of the defendant is that her assessment is "too high"—too high because the assessor flagrantly disregarded the

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basis of assessment prescribed by the legislature—but nevertheless "too high." To make an assessment of the property in question as part of the "ratable land in the town" (ss. 265 and 266) was the duty of the assessor. Whether in the making of it he erred wilfully or through ignorance as to the application and effect of s. 267, it was an assessment which it was within his jurisdiction to make, and, therefore, essentially different from attempted assessments of exempted property held so utterly void, because made wholly without jurisdiction that they would not support taxation at all in such cases as *Toronto R. Co.* v. *Toronto*, [1904] A.C. 809, 815; *Canadian Oil Fields Co.* v. *Village of Oil Springs* (1906), 13 O.L.R. 405. While the method of assessment prescribed by s. 267 is more than merely directory, I cannot regard an intention to follow its provisions as a condition of the jurisdiction to make an assessment. An assessment in fact for an amount equal to the "actual cash value" of the land would not be a nullity merely because in arriving at it the assessor had disregarded or ignored s. 267 of the statute.

That it is within the jurisdiction of the Court of Revision, the District Court Judge, and, on appeal from him, of this court in cases involving an assessment of appealable amount to entertain taxpayers' appeals based on excessive assessments made in utter disregard of the method of assessment prescribed by the legislature is, I think, sufficiently established by such decisions as *Rogers Realty Co.* v. *Swift Current*, [1918] 44 D.L.R. 309, where my brother Idington pointed out "that in making the assessment in question the assessor had ignored the statute which ought to have bound him" precisely as in the case at bar. Although in that case the question of jurisdiction does not appear to have been raised in argument it should scarcely be assumed that this court unconsciously exercised jurisdiction to reduce the assessment which it would not unless the Court of Revision had it in the first instance.

Moreover, the defendant exercised her right of appeal to the Court of Revision in the present case. She did not further appeal, as she might have done, against its adverse judgment to the District Court Judge and, had his decision been likewise adverse, to this court. *Rogers Realty Co.* v. *Swift Current, supra; Grierson* v. *Edmonton*, [1917] 57 Can. S.C.R.; *Pearce* v. *City of Calgary* (1915), 32 D.L.R. 790; 54 Can. S.C.R. 1, are recent

instances of such appeals having been successfully taken. The judgment of the Court of Revision upon a matter within its jurisdiction is binding on the defendant as *res judicata*. It cannot be ignored in this or any other court merely because deemed erroneous either in law or in fact. As Burton, J., said, in *London Mutual Ins. Co.* v. *City of London* (1887), 15 A.R. (Ont.) 629 at 633:—

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> If in the exercise of his functions, but acting within his jurisdiction, the assessor does an erroneous act, it is no more null and void, while unquestioned by appeal, than an erroneous decision of this court on a matter within its jurisdiction, whilst unreversed. . . . The legislature has thought fit to entrust the power of adjudicating upon the correctness of that act (an assessment, right or wrong) to certain persons and as a general rule those persons alone can do so.

The observations of Hagarty, C.J.O., in *Canadian Land & Emigration Co.* v. *Dysart*, 12 A.R. (Ont.) 80, at p. 84, are also in point as to matters within the jurisdiction of the Court of Revision under s. 274 of the Town Act.

It was suggested in the course of the argument by my brother Duff that whatever may be said of what the assessor did there is nothing to shew that the Court of Revision in dismissing the present defendant's appeal and confirming the assessment, ignored the requirements of s. 267 of the statute. But, as my learned brother himself pointed out later, if there was really no assessment, there probably was no subject matter of appeal within the jurisdiction of the Court of Revision. Moreover, it is probably a fair inference, having regard to the evidence in the present record, that the Court of Revision must have committed the same error as that charged against the assessor. I prefer not to rest my judgment on this somewhat doubtful ground.

Because the only defence, in my opinion, arguable which has been set up raises a question which, I think, it was within the jurisdiction of the Court of Revision to determine, subject to appeal, and because, whether the jurisdiction of that court over it is exclusive or not, having been invoked and exercised its unappealed decision establishes a case of *res judicata*, I would, with respect, allow this appeal. The plaintiff is entitled to judgment with costs throughout.

BRODEUR, J.:—The question in this case is whether the respondent, having been assessed for a property in the Town of Macleod and having appealed to the Court of Revision on the ground that

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the assessment was too high and not having pursued further, can now resist on the same ground an action instituted by the town for the collection of the taxes.

By virtue of the law of Alberta, provision is made as to the way municipal assessments on lands should be made, and courts are provided for in those statutes for the purpose of hearing and determining whether the assessments are too high or too low.

It appears that the assessors might have put on the lands of the respondent a higher amount than the cash value for which the property should have been assessed; but at the same time it is admitted that the assessment was uniform throughout the town and that no real injustice is being suffered by the respondent as a result of that assessment. However, she appealed to the Court of Revision and she was entitled in case she would have been displeased with the decision of the Court of Revision to go before the District Judge, and she could even have come up before the Supreme Court. *Pearce* v. *Calgary*, 54 Can. S.C.R. 1; 32 D.L.R. 790. She seemed to be satisfied with the judgment of the Court of Revision and did not bring her case further. When she was sued for the taxes she pleaded that the assessment was too high and should not be maintained.

She relies mostly on a judgment which has been rendered in the Privy Council in the case of *Toronto R. Co.* v. *City of Toronto*, [1904] A.C. 809. I think that that case should be distinguished from the present one. In the *Toronto Railway* case the question to be determined was not the quantum of assessment, but the assessability of electric tramways as real estate or as fixtures. The Privy Council decided that the courts which had been established for the purpose of determining whether the assessment was too high or too low could not have jurisdiction in a case where there was a question as to the assessability of the property.

In the present case it is not a question of the validity of the assessment, because it cannot be seriously disputed that the lands in question were to be assessed; but it is simply a question of quantum. This case, then, is very different from the *Toronto Railway* case. The respondent has found it advisable to go before the courts provided by the statute to have it determined whether her assessment was too high or too low. It becomes *res judicata*, as far as she is concerned, and she could not invoke the same

reason in an action for the recovery of the taxes. The judgment of the Appellate Division of the Supreme Court of Alberta which decided in her favour should be reversed.

The appeal should be allowed with costs of this court and of the court below. *Appeal allowed.*

GARDNER v. MERKER.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Clute, Riddell Sutherland and Kelly, JJ., July 30, 1918.

GUARANTY (§ I—2a)—WARRANTY—WHAT IS—AFFIRMATIVE WORDS—INTENTION OF PARTIES—EVIDENCE.

The question whether an affirmation made by the vendor at the time of the sale constitutes a warranty depends on the intention of the parties, to be deduced from the whole of the evidence, and the circumstance that the vendor assumes to assert a fact of which the purchaser is ignorant, though valuable as evidence of intention is not conclusive of the question

Statement.

The plaintiff sued in the County Court of the County of Hastings for $760.60, the balance of a sum of $1,500, the purchase-price of a quantity of junk sold by him to the defendants.

The defendants set up that, knowing the amount and the value thereof at the current market price, the plaintiff falsely and fraudulently represented the junk as worth $2,000 and the lowest possible price as $1,800, and that, induced by this false and fraudulent representation, they executed the agreement of purchase; that they sold all the junk but a small quantity; that it realised only $800; and they counterclaimed for $2,000 damages.

The trial Judge gave judgment for the plaintiff for $200 and dismissed the counterclaim.

The defendants appealed.

W. J. Elliott, for appellants.

H. S. White, for plaintiff, respondent.

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CLUTE, J.:—Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Hastings, for the plaintiff for $200 and costs. The claim is for $760.60, balance on a sale of junk for $1,500. The defendants allege that the plaintiff represented that the stock was worth at least $1,800, and that this representation was false and fraudulent.

The agreement was in writing, and provided that, as collateral security, the plaintiff should be paid, out of the proceeds of the

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sale of the junk, to the extent of the purchase-price, $1,500. The writing, however, does not contain the allegation that the junk was worth at least $1,800, or any reference to the value of the junk.

The learned trial Judge finds that the representation was so made and that the defendants acted upon the faith of such representation, but does not find that it was fraudulent; he entered a compromise verdict for the plaintiff for $200, and left, as he says, the question of law to the Court of Appeal. There is no appeal by the plaintiff from this judgment.

The defendants on this appeal accept the finding of the trial Judge, and submit that the representation as found amounted to a warranty, and cite *Harrison* v. *Knowles*, [1917] 2 K.B. 606; *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215.

Harrison v. *Knowles* was a case of the sale of two ships, in which, in the particulars in writing furnished the plaintiffs, it was stated that the dead-weight capacity of each ship was 460 tons, when in fact it was only 360 tons. This statement as to dead-weight capacity was not repeated in the memorandum signed by the parties. The first objection was that the plaintiffs having signed the memorandum could not be heard to say that the particulars furnished to them by the defendants formed a part of the contract between the parties. It was held on the evidence that the memorandum was not intended by the parties to contain all the terms of the contract, and that the statement as to the dead-weight capacity was a term of the contract, and that such parts of the defendants' particulars as were not inconsistent with the memorandum might be read into it: see *Edward Lloyd Limited* v. *Sturgeon Falls Pulp Co. Limited* (1901), 85 L.T.R. 162; that the statement was a warranty, the normal result of which would be that the defendants were entitled to damages, but, by reason of the words "not accountable for errors in description," the defendants were not liable for damages for breach of warranty.

There is no evidence in the present case that the written contract did not contain, and was not intended to contain, all the terms of the agreement. It is pointed out in the *Harrison* case that there are cases which seem to indicate that qualifying words such as are there used do not apply to actions for damages for breach of a condition: see *Wallis Son & Wells* v. *Pratt & Haynes*,

[1911] A.C. 394; and it was decided in the *Harrison* case that the discrepancy between the statement and fact was a difference of degree and not of kind, and that the statement was therefore a warranty and not a condition.

The last case referred to (the *Wallis* case) was for the sale of seeds, and turned on the Sale of Goods Act. It was held in the Court below, [1910] 2 K.B. 1003, that the plaintiffs, having accepted and resold the seed, had put it out of their power to treat the description of the article sold as common English sainfoin as a condition, on a breach of which they were entitled to reject the goods, and could only treat it as a warranty, a breach of which would ordinarily entitle the purchaser to damages; but that, upon the true construction of the condition printed on the back of the sold note, the defendants had excluded all liability capable of enforcement by an action for breach of warranty; Fletcher Moulton, L.J., dissented.

The decision of the Court of Appeal was reversed upon the grounds given by the dissenting Judge. Lord Loreburn, L.C., [1911] A.C. at p. 395, says: "But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as if it was a breach of warranty, that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty *ab initio*, but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty. I forbear further observations, because the whole of the law has been, if I may say so with respect, admirably expressed in the judgment of Fletcher Moulton, L.J." It was held that the appellants were entitled to the remedies applicable to a breach of warranty and to recover from the respondents the damages which the appellants had been obliged to pay to the other parties.

In *De Lassalle* v. *Guildford* (*supra*), the terms of a lease were arranged, but the plaintiff refused to hand over the counterpart that he had signed unless he received an assurance that the drains were in order. The defendant verbally represented that they

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were in good order, and the counterpart was thereupon handed to him. The lease contained no reference to drains. The drains were not in good order, and an action was brought to recover damages for breach of warranty. It was held that the representation made by the defendant that the drains were in good order was a warranty which was collateral to the lease, and for breach of which an action was maintainable. The jury negatived fraud and found no breach of covenant on the ground that due notice had not been given thereunder, but found the disputed facts relating to the alleged warranty in favour of the plaintiff, and the question is put by A. L. Smith, M.R., who gave the judgment of the Court (p. 218): "First, does what the jury have found to have been stated by the defendant, in the circumstances in which the statements were made, amount to a warranty in law, or only to a mere representation, in which case no action for damages can be maintained without proof of fraud? Secondly, if the statements found to have been made by the defendant amounted to a warranty, was such warranty a warranty collateral to the lease so as to be given in evidence and given effect to notwithstanding the lease?" And at p. 221: "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not."

This view of the law is not approved in *Heilbut Symons & Co.* v. *Buckleton*, [1913] A.C. 30, as *per* Lord Moulton (head-note): "The question whether an affirmation made by the vendor at the time of the sale constitutes a warranty depends on the intention of the parties to be deduced from the whole of the evidence, and the circumstance that the vendor assumes to assert a fact of which the purchaser is ignorant, though valuable as evidence of intention, is not conclusive of the question. The dicta of Bayley, J., in *Cave* v. *Coleman* (1828), 3 Man. & Ry. 2, and of A. L. Smith, M.R., delivering the judgment of the Court of Appeal, in *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215, at p. 221, cannot be supported."

Lord Moulton says in part, at pp. 48, 49: "In the history of English law we find many attempts to make persons responsible

in damages by reason of innocent misrepresentations, and at times it has seemed as though the attempts would succeed. On the Chancery side of the Court the decisions favouring this view usually took the form of extending the scope of the action for deceit. There was a tendency to recognise the existence of what was sometimes called 'legal fraud,' i.e., that the making of an incorrect statement of fact without reasonable grounds, or of one which was inconsistent with information which the person had received or had the means of obtaining, entailed the same legal consequences as making it fraudulently. Such a doctrine would make a man liable for forgetfulness or mistake or even for honestly interpreting the facts known to him or drawing conclusions from them in a way which the Court did not think to be legally warranted. The high-water mark of these decisions is to be found in the judgment pronounced by the Court of Appeal in the case of *Peek* v. *Derry* (1887), 37 Ch. D. 541. . . . The opinions pronounced in your Lordships' House* in that case shew that both in substance and in form the decision was, and was intended to be, a reaffirmation of the old common law doctrine that actual fraud was essential to an action for deceit, and it finally settled the law that an innocent misrepresentation gives no right of action sounding in damages. On the Common Law side of the Court the attempts to make a person liable for an innocent misrepresentation have usually taken the form of attempts to extend the doctrine of warranty beyond its just limits and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation . . . But in respect of the question of the existence of a warranty the Courts have had the advantage of an admirable enunciation of the true principle of law which was made in very early days by Holt, C.J., with respect to the contract of sale. He says: 'An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended.' " He then refers to dicta inconsistent with this statement of the law (p. 50). "For example, one often sees quoted the dictum of Bayley, J., in *Cave* v. *Coleman*, where, in respect of a representation made verbally during the sale of a horse, he says that 'being made in the course of dealing, and

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before the bargain was complete, it amounted to a warranty'—a proposition that is far too sweeping and cannot be supported. A still more serious deviation from the correct principle is to be found in a passage in the judgment of the Court of Appeal in *De Lassalle* v. *Guildford*," and he then quotes the passage above referred to, "In determining, etc.," and he then proceeds: "With all deference to the authority of the Court that decided that case, the proposition which it thus formulates cannot be supported."

Applying then the principle that an affirmation at the time of the sale is a warranty, provided it appears on evidence to be so intended, which intention is to be deduced from the whole of the evidence, I am of opinion that the evidence in this case does not shew that the representation made was intended by the parties to be contractual respecting the accuracy of the statement, but was in fact nothing more than the opinion or estimate of the vendor.

The plaintiff states that he asked in the first instance $3,000 for the lot; that the defendant Merker went out and examined it and came back and offered $1,500, which was accepted. The defendant Merker's evidence is in effect:—

"Q. Did you look at the stock? A. Yes.

"Q. Was he with you? A. Yes, he went around and shewed us the stock. I says, 'What do you think? He says, 'I think there is $2,000 worth in that stock;' I says, 'We can't buy that stock because we have no money;' he says, 'Money would be no question, the only thing if you take and handle the stock you will make enough for your work;' I told him, 'If you think there is $2,000 worth of stock the only thing we can give you is $1,500;' that would leave $500 for our work and expenses."

They then agreed upon the lease and went to a lawyer, Mr. Carnew, to have the document drawn. He states that he received instructions from both parties and prepared the agreement as they went along.

"Q. Was anything said between the parties as to the quantity of stuff they were buying? A. Yes, I think Mr. Gardner said at the time that they were perfectly safe in estimating the amount of junk and stock he had on hand as being a greater amount than $1,500, but it was not a surety in any way; in my opinion, it was an estimate that Gardner had given of property that these men had all seen and had an opportunity of looking over."

The agreement contains nothing about the amount of stock that was there. The instructions were given by both parties. They were both present. The price was mentioned. If it had been intended that the amount of stock was a condition or a warranty or in any sense a part of the contract it would probably have been inserted. There is no evidence that the agreement as drawn up was not intended by both parties to contain the terms of the contract.

From the evidence, I do not think this representation was intended by either party or both parties to be contractual. The plaintiff was asked for his opinion and gave it without fraud. This is not a case which arises when goods are sold by description, and the question is whether they answered to that description or not, which then becomes a condition of the contract. There being no fraud, the defendants fail upon that branch, and there is no condition or warranty proven to support their counterclaim.

The appeal should be dismissed with costs.

MULOCK, C.J. Ex., agreed with Clute, J. Mulock, C.J.Ex.

RIDDELL, J.:—The plaintiff sues in the County Court of the County of Hastings, by a specially endorsed writ, for $760.60, the balance of a sum of $1,500, the purchase-price of some junk sold by him to the defendants. The defendants set up that, knowing the amount and value thereof at the current market price, the plaintiff falsely and fraudulently represented it as worth $2,000 and the lowest possible price $1,800, and that, induced by this false and fraudulent statement, they executed the agreement sued on; that they sold all the junk but a small quantity, and it produced only $800: and they claim $2,000 damages. Riddell, J.

At the trial the plaintiff had a verdict for $200; the defendants appeal.

Upon the argument of the appeal there were two contentions raised which do not appear upon the pleadings, viz.: (1) that the transaction was not a sale at all but a bailment; and (2) that the transaction should be set aside on the ground of fraud.

The first contention is based upon the form of the contract; it is made between the plaintiff of the first part and the defendants of the second part—"the party of the first part agrees to sell and the parties of the second part agree to buy all the junk . . .

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for the price or sum of $1,500 . . .the parties of the second part pay in cash the sum of $25 and $25 before any of the goods are removed . . . the parties of the second part agree to ship the goods in the name of the party of the first part and transfer all shipping bills or bills of lading necessary to place the title to the proceeds of the said goods wherever shipped in the name and for the interest and benefit of the party of the first part and agree to let the party of the first part receive all the proceeds of the sale of said goods and chattels until the sum of $1,500 is fully paid, and after the payment of the said sum of $1,500 all the said goods are to be and remain the property of the said parties of the second part, and all excess over and above the said payment to belong to the parties of the second part. The parties of the second part agree to proceed with due diligence in the sale of the said goods, and agree to complete the final payment on the said sum of $1,500 within three months from the date without interest—should the parties of the second part not complete the payment, the party of the first part to have the right to be paid bank interest on whatever sum is still owing and unpaid."

The defendants, through their counsel, contend that the contract was one of bailment, by which they were not bound to pay more than the goods would bring—but, irrespective of the evidence of the solicitor whose evidence the learned County Court Judge believes, it is impossible so to interpret the writing; the contract was plainly one of sale of goods with precautions provided for the security of the vendor.

(2) Fraud has not been found, and we cannot find it; in the absence of fraud there can be no rescission, the contract being completely executed and the property having passed: *Seddon* v. *North Eastern Salt Co. Limited*, [1905] 1 Ch. 326. Even if fraud had been found, as it is impossible to put the parties in their original positions, the contract cannot be rescinded: *Sheffield Nickel Co.* v. *Unwin* (1877), 2 Q.B.D. 214; the defendants cannot return the goods, and they must pay the price: *Clarke* v. *Dickson* (1858), E.B. & E. 148, 120 E.R. 463; *Sully* v. *Frean* (1854), 10 Ex. 535, 156 E.R. 551.

And it is not contended that the goods were practically useless: *Phosphate Sewage Co.* v. *Hartmont* (1877), 5 Ch. D. 394; *Adam* v. *Newbigging* (1888), 13 App. Cas. 308.

The defendants do not in their pleadings set up these two contentions; but they claim damages for fraud by way of counterclaim.

No doubt, damages for deceit may be claimed although the contract is not and cannot be rescinded: *S. Pearson & Son Limited* v. *Dublin Corporation*, [1907] A.C. 351; *Webb* v. *Roberts* (1908), 16 O.L.R. 279.

As has been said, fraud has not been found, and we cannot find it on this evidence.

In the days of strict practice—still called by some (and not ironically) the "good old days" of practice—if a plaintiff chose to base his claim on fraud and failed to prove it, he had to take the consequences, his action was dismissed with costs: *Thom* v. *Bigland* (1853), 8 Exch. 725, 155 E.R. 1544; but in these days of more elastic practice we determine the facts (if so requested), and, if necessary and if so requested, mould the pleadings to suit the facts, and give judgment accordingly.

The substantive law, however, has not been changed—the varying permutations of adjective law have not affected the great principles of substantive law.

In *Thom* v. *Bigland*, 8 Ex. 725, at p. 731, Parke, B., one of the greatest masters of the English law who have adorned the Bench, says: "It is settled law that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, or" (this is explained as meaning "and" in 9 Exch. 426, note) "makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position to his damage."

The latest case in our Courts seems to be that of *Grant Campbell & Co.* v. *Devon Lumber Co.* (1914), 7 O.W.N. 209, reversing *S.C.* (1914), 6 O.W.N. 673. There it was proved that a misrepresentation was made of the number of trees to be cut, but fraud was not established. The Divisional Court held that no case was made for reformation of the contract, and that, in the absence of fraud, the plaintiffs could succeed only if they were "entitled to repudiate the contract," etc. The Court found that by reason of their conduct they were not entitled to repudiate the contract, and accordingly dismissed the action.

In the present case there is no pretence that the contract can

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be reformed—there is no doubt that the goods intended to be bought and sold were "all the junk on lots Nos. 16 and 17," etc. The price was to be $1,500, the other provisions are properly expressed in the document, and the contract cannot be repudiated.

It is, however, argued by Mr. Elliott that, as this is a case of a sale of goods, the plaintiff is liable as upon a warranty—the liability upon a warranty is of course irrespective of fraud. "Warranty in a sale of personal property is a statement or representation made by the seller, contemporaneously with and as a part of the contract of sale, though collateral to the express object of it, having reference to the character or quality of, or the title to, the goods or article sold, and by which the seller promises or undertakes that certain facts are, or shall be, as he represents them:" 30 Am. & Eng. Encyc. of Law, 2nd ed., p. 129. But, although the warranty is generally of the quality or title, apparently there is no reason why there should not be a warranty as to quantity. "If there were a warranty as to quantity on the part of the sellers, and if there were a breach of that warranty, the defendant is entitled to damages:" *per* Meredith, C.J.C.P., in *London Electric Co.* v. *Eckert* (1917), 40 O.L.R. 208, at p. 219. In that view, the evidence should be carefully examined to see if there really was "a warranty as to quantity."

The plaintiff says that the defendants came to him and wished to rent his store:—

"They asked me if I would rent the place; I says, 'I can't rent it with all this stock on hand, if I could sell the stock out then I might talk about renting it.' They asked me what I would take for the stock; I says, 'I will take'—in an offhanded way I says, 'I will take $3,000 just as it was;' they went around and went around the heaps of iron outside and went through the barn and up and down through it and finally they made me an offer of $1,500. The stock was laying different places, and they came back and offered me $1,500; they then asked me what I would take for the rent of the place; I says, '$30 a month.'

"Q. That is, they proposed to buy your stock and rent the place? A. Yes, sir. Then they offered me $15; I says, 'No, I wont take no $15;' I says, 'You can't have it for no $15 a month.' There were a few words passed.

"Q. What was eventually done? They offered me the $1,500

for the stock, and I told them they couldn't have the place less than $20 a month anyway, but I would consider the stock at $1,500.

"Q. What do you mean by you would consider? A. I meant I would not give them an answer.

"Q. You wanted to think it over? A. Yes, and I wanted to have a talk with my son, for he had money locked up in the stock.

"Q. You did come to a conclusion about it? A. Yes, sir.

"Q. Tell us what was done—as the result of the conversation with your son, what did you do? A. The next week I told them they could have the stock for $1,500.

"Q. And what about the place? A. It was to be $20 a month.

"Q. After that what was done? A. Well, on August 1st or 2nd we came down here to Mr. Carnew, and he drew up the writings, the agreement.

"Q. You came down to Mr. Carnew, and were the writings drawn as quickly as you came down? A Yes, they were drawn up that day.

"Q. Who gave Mr. Carnew instructions to draw them? A. I did.

"Q. Were the other gentlemen there? A. Yes, sir.

"Q. And the agreement you say was drawn? A. Yes, sir.

. . . . . .

"Q. What did you say to them in reference to the value of the iron and stock that was there? A. I didn't say anything and they didn't ask me anything.

"Q. What do you mean? A. They didn't ask me what was there: I only went by what money I had invested in the stock.

"Q. How did they get at the value? A. They just walked around it and looked at it and made me that offer.

"Q. They went down and sized it up themselves? A. Yes, sir.

"Q. And they offered you $1,500? A. Yes, sir.

"Q. And you have not been paid the balance of that $1,500? A. No, sir.

"Q. You were to get $1,500 for the stock? A. Yes, sir.

"Q. And you were to get $240 a year for the premises? A. Yes, sir.

"Q. How much did you have there? A. As nearly as I could

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tell I had $1,500 locked up in that stock, me and my boy together.

"Q. Your judgment of quantity must be poor too for you to think there was $1,500 worth of stuff there; what do you say to that? A. I claim if the stuff had been handled as it should have been handled there was between $1,800 and $2,000 worth of stuff.

"Q. In fact you told them there was $2,000 worth? A. I told them it ought to fetch $2,000 at any kind of price, and if I had had it this spring I could have made $3,000 out of it.

"Q. How did you come to tell them there was $2,000 worth? A. That was long after the bargain was made.

"Q. Was it before the agreement was drawn? A. After the agreement was drawn.

"Q. How did you come to tell them that? A. I was passing through the yard one day, and they were shipping and loading, and I says, 'There is a fine lot of iron there,' and they says, 'Yes,' and I says, 'There ought to be between $1,800 and $2,000 worth of stock there.'"

Mr. Carnew, the solicitor who drew the agreement, says:—

"Q. Was anything said between the parties as to the quantity of stuff they were buying? A. Yes, I think Mr. Gardner said at the time that they were perfectly safe in estimating the amount of junk and stock he had on hand as being a greater amount than $1,500, but it was not a surety in any way; in my opinion, it was an estimate that Gardner had given of property that these men had all seen and had an opportunity of looking over."

The defendant Merker says:—

"Q. Just tell what took place? A. We came in and we told him we heard he wanted to rent the place, and we would like to see if it was possible for us to rent it from him. The first thing he says, 'You can't get that place unless you get the stock with it; I says, 'How is that?' He says, 'I can't let the place go until I dispose of the stock;' so I told him we are not wholesale buyers, we are peddlers. Well, he says, he was an old man and he couldn't get along with that business, and his children wanted to get out of the business, and he would try and give us the stock to handle it, and then we would be able to get the place.

"Q. Did you look at the stock? A. Yes.

"Q. Was he with you? A. Yes, he went around and shewed

us the stock. I says, 'What you think?' He says, 'I think there is $2,000 worth in that stock;' I says, 'We can't buy that stock because we have no money;' he says, 'Money would be no question, the only thing if you take and handle the stock you will make enough for your work;' I told him, 'If you think there is $2,000 worth of stock the only thing we can give you is $1,500;' that would leave $500 for our work and expenses."

A week or so afterwards:—

"We started to talk over the matter again; the first thing I told him before anything; 'Mr. Gardner, we are poor men, we are trying to make a living for our family, and if you think there is not enough stuff to cover the money, we will not go into business together.' He said he was perfectly satisfied it would pay us to handle the stock.

"Q. And pay him the $1,500? A. Yes.

"Q. Was that talked of again? A. Yes; he said the children wanted to give up the business, and he decided he would let us have the stock."

Later on:—

"Me and Presternat came there, and Mr. Gardner was waiting for us, so we walked to the station and I told Mr. Gardner, I says: 'Before we make any expenses I want to consider, before it piled the stuff there, I don't know what is lying on the bottom, there may be iron on top and stone on the bottom, you know most, and if you think it would not pay for us, there is no use to make expenses.' He says, 'I am perfectly satisfied you will make a big $500 for your work and expenses.' That is the conversations had between the Gilbert House and the C.N.R. station.

"Q. He was satisfied you would make $500 over and above? A. Yes."

Speaking of the first interview, Merker says:—

"Q. Talk about the price? A. I asked him about selling; he says, 'There is $2,000 worth of stock there.' I told him if he thinks there is that much we will take it for $1,500.

"Q. How did you arrive at the $1,500? A. That was the same day.

"Q. How did you arrive at the price? A. He said there was over $2,000 worth of stock, he told us he would give us a show to make a few dollars to handle the stock, to make over our

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expenses a few dollars: I told him if we could handle the stock, if there is that much stock in it as he says, we will give him $1,500 and $500 for ourselves and our expenses."

Presternat, the other defendant, examined *de bene esse*, says that on examination he and Merker estimated the junk at 150 tons, but the plaintiff says it was more than that, that he just wanted to get value of it, and "he said distinctly there is $2,000 positive sure at the price it is now . . . $2,000 worth of stock . . . he was sure of $2,000." When they came back the second day "the whole three of us . . . we told him we don't know what it is worth . . . 'If you are sure you have $2,000 worth of stuff we will give you $1,500 . . . so long as it comes to $1,500 you will receive the money and after that the balance we will take' . . . He said, 'That is fair enough.' Later on he said, 'You sure as anything will have $500 profit, that means $1,500 and $500 profit.' "

Called in reply, the plaintiff says:—

"Q. You are still under oath, Mr. Gardner? A. Yes, sir.

"Q. You heard the statement of the defendant Merker and the evidence of Mr. Presternat that you stated positively without any qualifications that there was $2,000 worth of stuff there, what do you say? A. I said nothing of the kind; I said, 'I am satisfied in my own mind there is between $1,800 and $2,000 worth of stock there if it handled right,' and I am satisfied yet . . .

"Q. The questions of $1,500 and $2,000 were mentioned by you when Mr. Carnew was drawing the agreement? A. I say so still.

"Q. What were they mentioned for? A. For the stock that was on hand.

"Q. What do you mean by $2,000 when you mentioned it, what was your object in mentioning $2,000? A. I claim they were getting that value.

"Q. They were getting $2,000 worth of iron? A. Between $1,800 and $2,000.

"Q. And the difference between the $1,500 would give them a margin for their work? A. Certainly.

"Q. Did you have any ground upon which you based that? A. All the ground I had was the amount of money I had expended and put into the stock.

"Q. Did you tell them that is the money you had put into it? A. I don't know as I did.

"Q. Did you tell them how you arrived at that quantity? A. No; they didn't ask me; I asked them $3,000 for the stock, and they went around and looked around more than once, went around the pile and looked at it, and they came back and offered me $1,500; I said I would consider it.

"Q. At that time you know you didn't have $3,000 worth? A. If I had had all my stock on hand this spring, I would have made $3,000.

"Q. We won't bother with that; you knew then you didn't have $3,000 worth at the market price? A. Not at the price it was then; I told them I supposed there were between $1,800 and $2,000.

"Q. You told me that a few moments ago? A. I said I believed there was between $1,800 and $2,000 there, and I believe so still.

"Q. You didn't put in the word 'believe' in the first place at all, you are mistaken, you didn't say to them in this way, 'There is a quantity of iron, I believe I had $2,000 worth, that is the amount of money I put into it and you will have $500 over and above the $1,500 for your work;' you didn't say it to them like that? A. Yes.

"Q. Just these words? A. Yes, that is the way I put it."

The evidence seems very loose and unsatisfactory; we have not the witnesses before us, and we must do the best we can with the material such as it is.

The learned County Court Judge finds that the defendants "merely wished to be certain that they would come out even on the junk in order that they might have the place. And further than that I am satisfied that they relied almost entirely, if not entirely, upon the plaintiff's statement that there was $1,500 to $2,000 of value in the junk. They say they figured it out in their own minds that if they gave $1,500 for it it would cost $500 perhaps to handle it, and in that way they would come out even. That, according to their evidence, was all they were figuring on, and there is nothing to contradict that view-point, and that is why I am impressed with the fact that they were not speculating on making a profit but merely figuring to come out even, and there is nothing in the evidence of the plaintiff differing from that."

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It is not enough that the buyers relied "almost entirely" or indeed "entirely" upon the seller's statement to make the statement a warranty. Lord Abinger's criterion has never been bettered: "An express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it:" *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, 404, 150 E.R. 1484; *cf.* *Stuckey* v. *Bailey* (1862), 3 F. & F. 1. A mere expression of opinion or belief, where the matter is necessarily one of opinion and belief, is not a warranty, however emphatic; but an affirmation made at the time of sale is a warranty, provided it appears that it was intended as such: *Pasley* v. *Freeman* (1789), 3 T.R. 51, 100 E.R. 450; *Richardson* v. *Brown* (1823), 1 Bing. 344, 130 E.R. 138. It may fairly be said that an affirmation is a warranty if the seller assume to assert a fact of which the buyer is ignorant and does not merely express an opinion.

The trial Judge accepts the plaintiff's account of the statements made—the plaintiff alone speaks of $1,800 or $2,000, and what the plaintiff says is, "I said I believed there was between $1,800 and $2,000 there." Where the property is before the buyer at the time of sale and open to his inspection, there is no presumption that there is an intention on the part of the buyer to warrant, and the intention to warrant must be shewn: 30 Am. & Eng. Encyc. of Law, 2nd ed., p. 140.

I do not think this expression of belief can be considered a warranty—and, while the defendants may have relied upon it, it gives no cause of action.

The learned County Court Judge pursued a course which was clearly wrong—he says:—

"I think I shall do something in this case which I have never done before; I will give a judgment perhaps not judicial in the sense of reaching a conclusion as to the point of law, but which I think is equitable on the facts, and which is as nearly fair between the parties as I could reason it out—in other words, just such a judgment as a jury might give. We will leave it open then to either side, if they think wise, to have the matter again investigated by the Court of Appeal, who might think it wise to consider it more strictly from a purely legal standpoint; but perhaps that point is so open on either side—there may be sufficient doubt as

to what the Court would do—that the parties might see fit to accept the judgment.

"I think I shall discharge my duty and satisfy my conscience to the plaintiff by giving judgment for $200 with costs."

No Judge has the right to give a "judgment not judicial:" it is not the duty of a Judge to do justice according to some supposed rule "equitable on the facts." We have got far beyond the practice of measuring by the length of the Chancellor's foot. The Courts are not established or sustained to do retributive justice, but justice according to the law; and no Judge has any more right to substitute his views for this than Cyrus in the old story to take away from the small boy his large cloak and give it to the larger. The Judge must find the facts and apply the law to the facts so found, and nothing else or less should satisfy the judicial conscience, as nothing else or less will be discharging the Judge's duty.

If there were found to be a warranty of quantity and a breach, the defendants, according to the law of England, would be entitled to set off the difference in value in diminution of the purchase-price: *Allen* v. *Cameron* (1833), 1 C. & M. 832, 149 E.R. 635; *Cousins* v. *Paddon* (1835), 2 C.M. & R. 547, 150 E.R. 234; or even in extinction thereof: *Basten* v. *Butter* (1806), 7 East 479, 103 E.R. 185; *Poulton* v. *Lattimore* (1829), 9 B. & C. 259, 109 E.R. 96.

In our Province they would be entitled to a judgment against the plaintiff for the excess of their damages over the balance of the purchase-price, even without a counterclaim: *Smart* v. *Bowmanville Machine and Implement Co.* (1875), 25 U.C.C.P. 503; *Parsons* v. *Crabb* (1871), 31 U.C.Q.B. 434; *Sinclair* v. *Town Council of Galt* (1859), 17 U.C.Q.B. 259.

The judgment, if no warranty was found, should be for the plaintiff for the amount sued for; but here there is no cross-appeal to increase the amount; and, finding, as I do, that there was no warranty, the judgment should be to dismiss the appeal with costs.

The judgment of the County Court could be right only if a warranty were found and a breach resulting in damages $200 less than the balance of the purchase-money.

SUTHERLAND, J., agreed in the result.

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KELLY, J.:—This is not a case where the goods were sold solely by description or by sample, but after what appears from

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the evidence to have been a careful personal inspection by the purchasers, a circumstance which is not without weight in determining whether there was either a misrepresentation or a warranty.

As the evidence presents itself to me, there has not been established misrepresentation such as would entitle the defendants to resist payment of the unpaid part of the purchase-money, or a warranty for the breach of which they could claim damages. The plaintiff's reference to the value of the goods sold did not amount to more than an expression of his opinion or of an honest belief that the value was from $1,800 to $2,000. Nor can the statement be said, on the evidence, to have been made with the intention of warranting it as a fact. That interpretation of the evidence seems to me reasonable, and it is not inconsistent but rather in accord with the conclusions of the trial Judge, expressed though they appear to have been with some hesitation.

If the opinion I entertain, both as to misrepresentation and warranty, is correct, the plaintiff was entitled to succeed for the unpaid portion of the purchase-money, and the defendants' counterclaim consequently failed. The trial Judge, however, awarded the plaintiff, not the full unpaid balance, but $200, and the plaintiff has accepted his ruling in that he has not appealed.

The trial judgment should therefore not be disturbed, and the respondent should have the costs of this appeal.

Appeal dismissed.

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BANBURY v. BANK OF MONTREAL.

House of Lords, Lord Finlay, L.C., Lords Atkinson, Shaw, Parker of Waddington, and Wrenbury. June 25, 1918.

1. STATUTES (§ II A—96)—STATUTE OF FRAUDS AMENDMENT ACT—CONSTRUCTION—APPLICATION.

S. 6 of the Statute of Frauds Amendment Act (1828) applies to fraudulent misrepresentation only. It does not apply in an action where damages are claimed for negligence and breach of duty in giving advice as to an investment in the course of business, where no fraud is charged.

2. APPEAL (§ VII M—636)—EVIDENCE WARRANTING NONSUIT—FAILURE OF DEFENDANT TO ASK—VERDICT FOR PLAINTIFF—POWER OF APPELLATE COURT ON APPEAL.

If a court of appeal is of opinion that they have all the facts before them, and that there is no reason to think that further evidence of importance could be produced at another trial, and is also of opinion that the evidence given at the trial was such that the presiding judge should, if asked by the defendant's counsel, have either nonsuited the plaintiff or directed a verdict for the defendant, the court has power under order LVIII. r. 4 (Eng.) not only to set aside a verdict for the plaintiff, but to enter judgment for the defendant. A requisition to a judge at the trial to enter a nonsuit or direct a verdict for a defendant is not a condition precedent which must be fulfilled in order to entitle him to do either.

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Statement.

APPEAL by plaintiff from the Court of Appeal in England, in an action claiming damages against the defendant, for negligence and breach of duty of one of its branch managers, in advising as to an investment. Affirmed.

G. J. Talbot, K.C., *Douglas Hogg*, K.C. and *S. Lowry Porter*, for appellant.

P. O. Lawrence, K.C. and *Norman Raeburn*, for respondents.

Lord Finlay, L.C.

LORD FINLAY, L.C. (dissenting):—My Lords, this action is brought by the appellant against the respondents to recover damages, first, for negligent advice alleged to have been given to the appellant by the manager at Victoria, B.C., of the respondents' branch there, in reliance on which the appellant invested and lost $125,000, and, secondly, for applying moneys belonging to the appellant without authority in payment of a certain mortgage. The case was tried before Darling, J., with a special jury. A number of questions were left to the jury by the judge, and upon their answers he gave judgment for the appellant for £25,000, the equivalent of $125,000. His judgment was set aside by the Court of Appeal, who directed that judgment should be entered for the respondent bank. The decision of the Court of Appeal proceeded upon two grounds, namely, that Lord Tenterden's Act barred any action for negligence in advising, and that there was no evidence which could in point of law support the appellant's case on either head of claim. I shall deal with these points in the order in which I have mentioned them.

The defence under Lord Tenterden's Act was added by amendment, and after argument before Darling, J., was overruled by him. It was upheld by the Court of Appeal. I think that Darling, J.'s judgment on this point was right. The provision in Lord Tenterden's Act (9 Geo. IV., c. 14), upon which the Court of Appeal relied was s. 6:—

> No action shall be brought whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, ability, trade or dealings of any other person to the intent or purpose that such other person may obtain credit, money or goods upon (*sic*) unless such representation or assurance be made in writing signed by the party to be charged therewith.

The action was brought on the allegations that the respondents, as bankers, advised their customers as to Canadian investments; that the appellant was a customer; that the respondent bank,

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through their local manager at Victoria, advised the appellant that $125,000 might be prudently lent to the Westholme Lumber Co.; that the appellant, in reliance on this advice, made the loan; that the advice was negligent, and that the money was wholly lost. In my opinion, an action of this nature does not fall within s. 6 of Lord Tenterden's Act at all. The action is for the breach of the duty which it is alleged the bank had undertaken of advising the appellant, and not for misrepresentation.

The mischief which s. 6 was passed to remedy is well known. As a matter of legal history, it is common knowledge that that section was introduced to prevent the evasion of the provision of the Statute of Frauds requiring that a guarantee to be enforceable should be in writing. It was decided in 1789, in the case of *Pasley* v. *Freeman* (1789), 3 T.R. 51, that an action would lie upon a false and fraudulent representation by which the plaintiff received damage. After this decision it became a common practice, where there was no guarantee in writing, to use the words which, but for the Statute of Frauds, would have been alleged to amount to a guarantee as evidence of a false and fraudulent representation as to the credit of the third person. We have Lord Tenterden's own authority for the statement that s. 6 was introduced in order to check this abuse. I may refer to what was said in the case of *Lyde* v. *Barnard* (1836), 1 M. & W. 101, by Gurney, B., by Alderson, B., by Parke, B., and by Lord Abinger, C.B. All of these judges, speaking at a time when Lord Tenterden's Act was still recent (it had been passed in 1828, only 8 years before), took the view which I have above stated as to the object of the enactment. It has never before the present decision of the Court of Appeal been treated as relating to a case in which the action was based, not upon misrepresentation, but upon breach of duty arising *ex contractu* or *quasi ex contractu*.

It is, of course, always possible that the words of a statute may go beyond the object with which it was passed, and it was said in the Court of Appeal in the present case that the words of the statute are wider than this object as explained in *Lyde* v. *Barnard*, *supra*. I cannot agree. S. 6 appears to me upon its plain meaning, to be confined to actions brought upon misrepresentations as such, and not to bar redress for failure to perform any contractual or other duty. Very many cases have been decided upon the statute,

and in not one of them has the view which commended itself to the Court of Appeal been suggested as possible. It was alleged by the respondents that the section applies to actions to charge any one not only "upon" but also "by reason of" representations, and it was alleged that the words "by reason of" involved the extension of the scope of the enactment to such cases as the present. These words appear to me to have no such effect. The present action is not brought either "upon" or "by reason of" any misrepresentation. It is based upon the alleged existence of a duty to take reasonable care in advising the plaintiff, and is neither "upon" nor "by reason of" any misrepresentation.

The most significant feature in the long list of authorities cited to your Lordships in this case is that the section is uniformly treated as applying to actions for fraudulent misrepresentations only. The case of *Haslock* v. *Fergusson* (1837), 7 Ad. & E. 86, is no exception. That was an action for money had and received. It was alleged that the defendant had made fraudulent representations as to the credit of a purchaser who thereby obtained the goods on credit, sold them, and paid over the proceeds to the defendant, to whom she was indebted. It was claimed that the proceeds of the goods received by the defendant might be treated as money had and received to the use of the plaintiff, as he had been induced to deliver the goods by the fraud of the defendant. The case rested entirely upon the alleged fraudulent representation, and as it was not in writing it was held, and rightly held, that the action failed.

The new departure made by the decision of the Court of Appeal in the present case as to the construction of the law of s. 6 of Lord Tenterden's Act would lead to results of a somewhat startling nature. A merchant may employ at a salary a traveller to make inquiries about the standing and credit of possible customers and to report to him thereon. The traveller negligently, without inquiry or on insufficient inquiry, reports orally that a particular person may safely be trusted, and his employer acts upon his information and sustains loss thereby. In the view of the Court of Appeal the employer would have no remedy because the report falls within the terms of s. 6 of Lord Tenterden's Act. The same thing might apply in the case of an action against a solicitor for negligence in the discharge of his duty as such. Such a construction

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of the Act is a complete novelty. During the ninety years which have elapsed since it was passed it has always been applied only to actions upon representations as such, not to actions in which the gist of the action is breach of duty. This action appears to me not to fall within s. 6 at all, and in my opinion the judgment of the Court of Appeal on this point is erroneous.

I now proceed to consider the decision of the Court of Appeal; that judgment should be entered for the respondent bank on the ground that there was no evidence in support of the appellant's case against the bank. Two separate causes of action are set out in the statement of claim. The first is for negligent advice; the second is for the application of part of the appellant's money without authority for the discharge of a mortgage held by Leiser & Co. The former of these claims is set out in the 2nd paragraph of the statement of claim as follows:—

In the year 1912 the plaintiff was a customer of the defendants, and in or about the month of September, 1912, orally consulted the defendants as to investing money in Canada. The defendants, by their agent and manager, one Galletly, orally advised the plaintiff to invest a sum of $125,000 in a loan on mortgage to a company known as the Westholme Lumber Co., Ltd., and that the said investment was perfectly safe, and that the mortgage would be a second mortgage ranking only behind a first mortgage held by the defendants, and that the said money was required and would be used only for the purpose of completing a contract then in progress for the City of Victoria, and that with the said loan the said company would be able easily to carry out the contract without having to borrow any further money.

In later paragraphs it is alleged that the appellant advanced $125,000 in reliance on the respondents' advice, that the advice was negligent and unskilful, and that the money was wholly lost.

There was a great deal of discussion during the argument in your Lordships' House as to the meaning of the word "advised" in this par. 2 of the statement of claim, and it was alleged that the word could properly be used only with reference to the counsel given to the appellant to invest his money, and that it would not cover the reasons for that counsel which are also set out in par. 2, and that these reasons must be taken to be in the nature of representations and not to form part of the advice. I am unable to agree with this view or with the suggestion that it was the duty of the judge at the trial to have explained to the jury the meaning of the words "advised" and "advice." The verb "advise" and the substantive "advice" are ordinary English words which require

no judicial interpretation. They cover not merely counsel given to take a particular line of action, but also anything said at the time in support of the counsel given. When it is alleged that the defendants "advised" that the investment was perfectly safe, that the mortgage would be a second mortgage, and that the money was required and would be used only for the purpose of carrying out the contract then in progress for the City of Victoria, and that with the loan the company would be able easily to carry out the contract without having to borrow any further money, there is no inaccuracy of language. These further allegations are really reasons given for the recommendation to make the investment, and form part of the advice just as much as the counsel to make the investment itself. It is not correct to speak of the words to the effect that the mortgage would be a second mortgage, or as to the proposed use of the money, or the effect which the loan would have on the ability of the company to carry out the contract as being, as the respondents alleged, either independent representations or prophecies as to the future. They all form part of the advice given to make the investment; and the description alleged to have been given by the bank as to the nature of the investment when they recommended it forms part of the "advice."

The paragraph of the statement of claim relating to the alleged unauthorized application of a portion of the money advanced by the plaintiff is the 5th, which runs as follows:—

> The defendants negligently and in breach of their duty to the plaintiff did not advance the plaintiff's said money on second mortgage or for the purpose of completing the said contract, but without any instructions or authority from the plaintiff used or allowed to be used the said money or a part thereof to pay off a mortgage given by the said company to Simon Leiser & Co., Limited, and paid the said money to the said company on the security of a fourth or fifth mortgage.

This paragraph is independent of par. 2, and related to the alleged obligation of the bank to apply the appellant's money to the purposes for which it had been remitted to them by him.

The defence alleged that no advice was given to the appellant by Mr. Galletly, that Galletly gave the appellant all the information about the Westholme Lumber Co. which he possessed, and that the appellant formed his own judgment on the matter and did not act on any advice from Galletly. The defence further traversed the various allegations in the statement of claim. The

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7th paragraph alleged, in the alternative, that if Galletly gave advice he was acting outside the scope of his duty as manager, and par. 8 further alleged that if Galletly gave the advice it was honestly given in good faith and without negligence.

The case was tried twice. The first trial was before the Lord Chief Justice, to whose summing-up I shall have occasion afterwards to refer, and resulted in the disagreement of the jury on the question of negligence. The second trial was before Darling, J. The questions which he left to the jury and their answers are as follows:—

(1) Had Galletly authority as a manager of a branch of defendant bank to advise the plaintiff to invest $125,000 on mortgage to the Westholme Lumber Co.?—Yes.

(2) Did Galletly advise the plaintiff: (*a*) That such investment was perfectly safe?—Yes. (*b*) That the mortgage would be a second mortgage ranking only behind the first mortgage held by the defendant bank?—Yes. (*c*) That the money was required and would be used only for the purpose of completing the water contract for the City of Victoria?—Yes. (*d*) That with such loan the Westholme Lumber Co. would be easily able to carry out their contract without further borrowing?—Yes.

(3) Did the plaintiff rely on such advice?—Yes.

(4) Did he invest his money on the strength of such advice?—Yes.

(5) Was the advice (if any) given by Galletly to the plaintiff negligently and unskilfully given by him?—Yes.

(6) Did the defendant bank act negligently or in breach of their duty to the plaintiff in allowing a part of plaintiff's money to be used in paying off the mortgage of Leiser & Co.?—Yes. Damages (if any).—£25,000 and all securities to be returned to defendant bank.

An argument took place before Darling, J., as to the effect of the findings and upon Lord Tenterden's Act, and he directed judgment to be entered for the appellant for £25,000. The Court of Appeal set aside this judgment, and entered judgment for the respondents. The grounds on which the Court of Appeal arrived at this conclusion as regards the first head of claim (that for giving negligent advice) were, apart from Lord Tenterden's Act, that there was no evidence that Galletly had authority from the bank to advise the appellant to make this investment, and further that there was no evidence of a duty to the appellant on the part of the respondent bank as to advising him with reasonable skill and diligence. To appreciate these points it is necessary to refer to the history of the transaction as presented in the evidence. Galletly was in 1912, and for some years before that, the manager of the respondents' branch bank at Victoria, B.C. The Westholme

Lumber Co. had an account at this branch bank and were heavily indebted to the bank, which held a mortgage for $200,000 upon lands in British Columbia, and the chattels of the company. The company were also indebted to another company closely allied with the respondent bank, the Royal Trust Co., which held another first mortgage on the same lands, and in the course of the case these two mortgages are referred to as if they were but one, constituting the first charge. The Westholme Lumber Co. had in 1911 entered into a contract (referred to in the evidence as the Sooke Lake contract) with the City of Victoria to construct certain waterworks for the corporation. The correspondence shews that the financial position of the Westholme Lumber Co. and the prospects of their contract with the corporation gave the bank a great deal of anxiety. Galletly was actively engaged on behalf of the bank in endeavouring to get things put on a more satisfactory footing. I may refer to the letters of July 20, 1912, and of August 13, 1912, from Galletly to Sweeny, the superintendent of the British Columbia branches of the bank, as shewing the efforts which Galletly was making on behalf of the bank to make arrangements to promote the satisfactory prosecution of the contract. These letters shew that he had interviews for this purpose with Mr. Russell, of Messrs. Colman, Evans & Co., and with the city controller. In the latter of these two letters he says:—

> We shall have to do some wire-pulling with the several members of the council;

and he adds a postcript:—

> I should like to get all this straightened up before I leave.

Galletly was thoroughly conversant with the position of the company, and it was largely through him that the bank acted in endeavouring to promote, in the interest of the bank, the success of the company's contract with the city. There is a long correspondence in which the superintendent, Sweeny, repeatedly impresses upon Galletly the propriety of not making further advances to the lumber company. On July 31, 1912, Galletly says in a letter to Sweeny:—

> With some $100,000 additional capital and estimates (*i.e.* the certificates) prompty paid in full by the city, the company should be able to carry out the contract satisfactorily.

In all this Galletly acted as manager of the branch and in the course of his duty. In a letter of July 27, 1912, Sweeny says to Galletly:—

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As Cameron (the manager of the company) does not seem to be getting any forwarder with his plans for the financing of the contract, we cannot wait longer, and you will please insist upon the company accepting the offer of $200,000 for part of their Prince Rupert property, reported in your letter of the 20th instant.

On September 14, 1912, Galletly, writing to the general manager at Montreal, refers to his giving over charge of the branch bank to Mr. Fraser before leaving, and adds:—

I think everything will be found in good order. The Westholme Lumber Co. account, which has apparently caused head office some uneasiness in the past, has, I am happy to say, been straightened up and in a few days will be in good shape through the acquisition of additional capital.

This refers to the $125,000 to be advanced by the appellant. He goes on to refer to a report by a Mr. Cartwright upon the contract, and says: "It is on the strength of this report that they succeeded in obtaining the additional capital referred to . . ."; and expresses the hope "that the bank will continue to finance the company if necessary in the future as they have in the past." It was proved by Newham, the secretary of the lumber company, whose evidence was taken on commission, that he always kept Galletly fully informed of the financial position of the company (appendix, vol. 1, p. 136, letters D and E), and that the bank knew that the Westholme Lumber Co., to continue, must have money from some source (vol. 1, p. 226, C to G). It was in September, 1912, that the appellant first came to Victoria, B.C. He had been at Montreal in 1911, in July, as the guest of Sir Edward Clouston, the general manager of the respondent bank, with whom he had some discussion with regard to investment of money in Canada, and Sir Edward gave him the following letter:—

Head Office, Bank of Montreal,

Montreal, July 6, 1911.

The Managers, Bank of Montreal.

Dear Sirs:—I take pleasure in introducing to you Captain Banbury, of London, England, who is visiting this country on pleasure. Should he apply to you for assistance or advice you will be good enough to place yourselves at his disposal.

Yours faithfully,

E. S. CLOUSTON, General Manager.

This letter was not used by the appellant in 1911, but in July, 1912, he again visited Canada, stayed with Sir Edward Clouston, and again discussed the subject of investment in Canada. Sir Edward asked the appellant whether he wanted a letter, and the appellant informed him that he had the letter given him in 1911,

which Sir Edward said would do as well. In July, 1912, the appellant opened an account with the respondent bank in Montreal, and also a deposit and current account with the Vernon branch. He went on to Victoria, and on September 7, he went to the branch bank there and saw Galletly, to whom he shewed Sir Edward Clouston's letter of introduction. He asked Galletly whether he could put him on to some good "agreements for sale." Galletly said he did not know of any, but would try to find some. The evidence of the appellant proceeds as follows:—

A. Then he said: "In the meantime I should like to put before you an industrial proposition." I answered that I was afraid that they were of a speculative nature, and, therefore, did not interest me. Galletly told me that there was nothing speculative about the proposition which he had in his mind. He then proceeded to tell me about the contract which the Westholme Lumber Co. had secured for supplying the City of Victoria with water. After discussing it for a little while I asked him what the security would be, and he said he did not think the company would give me any security, but that they would give me a good rate of interest—a high rate of interest, I think, he said—and a large share of the profits. I told him that I could not entertain the proposal, as I could not afford to lend money without security.

Q. Was anything said about the bank's position with regard to the lumber company? A. Yes, he told me that the bank and the Royal Trust Company, I think, had lent them money on this contract, or in connection with the contract.

Q. Do you remember whether anything was said about the Cartwright report at that interview? A. I am not absolutely certain about that, but I rather think it was mentioned. I think Galletly said that an engineer had been asked to report upon it. Whether I actually saw it or not I should not like to say, but I rather think it was mentioned.

Q. Then you said you would not do it without security. What happened next? A. Galletly said that he would try and find some agreements for sale for me, and asked me to call again on Monday.

Q. On the Monday, that is September 9, did you in fact go in and see Galletly again? A. I did.

Q. Will you tell us in your own words what happened at that interview? A. When I saw Galletly I asked him if he had found any agreements for sale for me. He told me he had not been able to do that, but that he had seen the Westholme Lumber Co., and that they now offered me a second mortgage. The mortgage was to be secured on the same security as that held by the bank. I think Galletly explained to me that the Royal Trust and the bank were so closely allied that their two mortgages could be considered as one, and mine was to be the second of those two. I asked him if the security would be sufficient for both loans, and he said it would be ample. I think the amount of the estimated securities was $470,000.

Darling, J.:—The value of the two? A. No, my Lord, the value of the securities held by the bank as security for the loan. In the bank's opinion this amounted to $470,000 or something like that.

Douglas Hogg:—What happened next when he told you that? A. I

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asked him if the company, with my loan, would have sufficient funds to reap the full advantage of the contract, and he told me they would. A little later he brought in Cameron, who was the representative of the Westholme Lumber Co.

Q. He was the president of the Westholme Lumber Co? A. Yes. He brought in Cameron from the outer office of the bank and introduced me to him. Cameron practically confirmed what Galletly had already told me, and he went further and said that if I made the loan the company would be able to secure a bond with an insurance company. As I understood him, the effect of that would be that the city would then release very much more of the so-called hold-back that they now retained. I think the figures were 45 down to 15 per cent., and that would give the company so much more working capital.

Q. What was said next? Was anything said about your lending any further capital beyond the £25,000. A. Yes. Cameron confirmed what Galletly said. When I asked Cameron if that would be enough money I said I could not produce any more.

Darling, J.:—Any more than the £25,000? A. Yes, my Lord, and he said he thought it would be enough.

Q. Who said he thought it would be enough? A. Cameron.

Douglas Hogg:—What was said next? Do you remember? A. I do not know that I can remember in the exact order what happened.

Q. Do you remember anything more that was said at that interview with regard to this investment? Was anything said about the matter in the hands of the city? A. Yes. I have explained that the company were to get more working capital by the issue of an insurance bond. Then I asked if the city were capable of paying for the contract, and I was told both by Galletly and by Cameron that the money for the payment of the contract was on deposit at the city bank of which I have forgotten the name.

Q. The Bank of British North America? A. And that it would be used for no other purpose than for the paying of this water contract.

On September 10 the appellant called at the bank again. The following is an extract from his evidence as to that day's conversation:—

Q. Did you then go and see Galletly again? A. Yes. I went and saw Galletly again, and I had some more conversation with him.

Q. Will you tell us what Galletly told you on this occasion about this investment? A. There were two extra things. I remember one was that if he were not the servant of the bank he would put as much as he could of his own money in this thing, and the other was that Sir Thomas Shaughnessy, who, I believe, was a director of the bank, and also connected with the Canadian Pacific Railway, was expected in some ten days, or something of that kind, and he thought that if I did not take this offer Sir Thomas Shaughnessy would.

On the 11th the appellant went to the bank again and told Galletly that he had decided to invest his money in the Westholme Lumber Co., giving his reasons for so doing. With Galletly's assistance he drew up the memorandum, of which the following is a copy:—

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Cecil Banbury, retired army captain, agrees to lend the Westholme Lumber Co., Ltd., $125,000. The company agree to pay 8½% interest and 12½% of the profit on the Sooke water supply proposition and to use the loan solely for this proposition. The interest to be paid quarterly into Captain Banbury's account at the Bank of Montreal, Victoria. The company agree to give as security a second mortgage (similar to the one held by the bank) on all the securities of the company according to the schedule which amounted to about $475,000.

The appellant's evidence proceeds:—

Q. Then was anything arranged about the mortgage, the document that had to be signed? A. I asked if I should have the mortgage to sign, if they would send it on to me to sign, and Galletly told me there would be nothing for me to sign. I left the business in his hands and he was to collect the mortgage for me. I was to pay the money into my account.

Darling, J.:—He was to collect the mortgage for you, was he? A. Yes, my Lord—I mean the actual document; and I was to pay the money into my account at the bank at Montreal.

Q. The £25,000? A. Yes, my Lord, which Galletly was going to transfer to the Westholme Lumber Co. on receiving the mortgage. The interest was to be paid into my account at the Bank of Montreal.

The appellant left Victoria the next morning, and about October 2, he sent to the respondent bank at Victoria the £25,000, and the bank had the whole conduct of the investment of this money. After his arrival in England the appellant received from Fraser (whom he had seen along with Galletly in his office at Victoria, and who had by this time succeeded Galletly as manager there) the mortgage to him from the lumber company and the land certificate. The mortgage was to secure the £25,000, and contained the following clause:—

The mortgagors shall use the said sum of $125,000 for no other purpose than for expenses incurred in the construction of the said water supply.

The land certificate contained a reference to the fact that on the title there appeared an application for registration by Simon Leiser & Co. The appellant also received a letter of November 9, 1912, from Fraser in which he mentioned the fact that after receiving the appellant's loan, Leiser's mortgage for $25,000 had been discharged and went on to say that at that time they thought that with the appellant's money they would have ample funds for carrying on the contract work, but that he feared the company had seriously miscalculated the capital required for their undertaking. The appellant replied to this letter in a letter dated November 23, in which he said:—

I am more than surprised to hear that $25,000 of my money should have been used to pay off Simon Leiser & Co., Limited, and that that company

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had a prior charge. I saw this on the mortgage when I received it but I never heard of them before then, and I was most distinctly given to understand that I had a second mortgage and that the only prior claim was that of the Bank of Montreal. I am extremely anxious to know why the city has no funds, because, as I stated in my last letter, I understood that the necessary funds were deposited with the bank and could be used for no other purpose. As far as I can see, there is nothing left for me to do but to foreclose, and, if you think this step is advisable, I should be extremely obliged to you if you would have this done for me if my interest is not paid at the right time.

In 1913 the appellant received from the respondent bank their circular of March 7, 1913, with reference to the opening of a branch in the West End of London, which concluded with the following announcement:—

In accordance with our long-established custom, it would afford our West End office pleasure to supply our Canadian and other friends with any advice or information in its power.

There were various communications and interviews, and ultimately, in the month of December, 1913, the appellant's solicitors wrote to the respondent bank claiming repayment of the $125,000 which had been advanced on Galletly's advice. The bank repudiated all liability, and on March 10, 1914, the present action was brought. The appellant was cross-examined with the view of shewing that he had been led to make the investment by the report of Cartwright, dated September 7, 1912, giving a favourable account of the prospects of the contract, but, as the jury have found that the appellant acted in reliance on Galletly's advice, it is unnecessary to go into any details on this point. The appellant stated that to the best of his belief he did not read Cartwright's report till after he had lent the money, and that in doing this he had relied on the bank, and the jury believed him.

For the respondent bank, Sir F. W. Taylor, their general manager, was called. During his evidence he was asked a question as to the authority of bank managers to advise on behalf of the bank with regard to investments, and, on objection to the question, a discussion arose in the course of which Gordon Hewart, the leading counsel for the appellant, put the case in this way: (*Gordon Hewart.*) "I submit that the question whether they have authority is a question which in each case has got to be determined upon the circumstances of the case. The word 'authority,' in other words, is an ambiguous word which may refer to an express authority." (*Darling, J.*) "Mr. Raeburn is sure to cut it up into express or general. He will first of all ask if they have general authority."

(*Gordon Hewart.*) "I should submit that the proper question is as to the express authority, and it is for the gentlemen of the jury to determine upon the facts of the case, in my submission, what their authority in fact was." Darling, J., ruled that the question might be asked whether the bank managers had any general authority to advise, and in answer to the question "Have your branch managers any general authority to advise on behalf of the bank as to investments?" the witness replied "None whatever." He suggested that Sir Edward Clouston's letter was of a social nature and might have led to shooting or fishing being offered. In cross-examination the witness drew a distinction between bringing schemes to the notice of persons and recommending them. He said that the latter would be beyond the province of a bank manager while the former would be within it. The respondent bank also called under the commission to Canada Montizambert, who had been for many years one of their managers. He stated that a manager in giving advice would be acting for himself and not for the bank, and said that if Captain Banbury has asked him about the Westholme contract he would have told him to take the advice of some lawyer or some one conversant with the business. The respondents also called under the commission, Cartwright, the gentleman who had made the report above adverted to, on which, it was suggested by the bank, that the plaintiff had really relied in deciding to make the investment. He stated (vol. 1, p. 625) that he had estimated the additional capital which the Westholme Lumber Co. would want at $98,000, that they needed additional capital principally for putting in the steel pipe-line and the concrete pipe-line; and further he said (p. 449), in answer to a question whether the contractor had an insufficient plant and was getting on too slowly, "That is what he needed more capital for." This evidence was certainly for the consideration of the jury in deciding whether it was not essential that the appellant's loan should be spent in acquiring the necessary plant for the prosecution of the contract. I believe that I have now referred to the most material parts of the evidence and documents, except on the head of damages, which I reserve for separate consideration. Galletly and Sir Edward Clouston had both died before the case came on.

The Court of Appeal entered judgment for the respondent bank, dismissing the action on the grounds that Galletly had no authority

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to bind the bank by advising the appellant, and that the bank owed no duty to the appellant that reasonable care should be taken in advising him. If the bank owed a duty to the appellant to advise with due care, there was clearly evidence on which the jury might find negligence. Scrutton, L.J., says so in terms, and there is nothing to the contrary in the judgments of the other members of the Court of Appeal. The two points on which the Court of Appeal proceeded in finding that the bank owed no duty to the appellant are a good deal connected, and were so dealt with by the Lord Chief Justice in his summing-up on the first trial, in which he left to the jury the question whether Galletly advised the plaintiff and the question whether the plaintiff relied on that advice in making the investment. It is beyond dispute that in what he was doing generally with reference to the affairs of the Westholme Lumber Co. in 1912 Galletly was in the strictest sense acting in the course of his employment as bank manager, and that the bank would be liable for his actions. But the contention of the bank is that his authority as bank manager stopped short of power to give advice as to investments. The limits of a banker's business cannot be laid down as a matter of law. The nature of such business is a question of fact on which the jury are entitled to have regard to their own knowledge of business, and to the evidence in the particular case, and it is from that point of view that the present case must be considered. It cannot be treated as if it were a matter of pure law.

The appellant came to Galletly bringing with him the letter of introduction from Sir Edward Clouston, dated July 6, 1911. It has not been contended before us that that letter should not have been left to the jury, and no such contention was possible. Sir Edward Clouston was the general manager of the bank, and on neither of the trials was there any question raised as to his authority, and no such point is raised now. The question of the weight to be attributed to the letter was for the jury. Counsel for the appellant and for the respondents respectively put the views of their clients upon the construction and effect of this letter before the jury. The respondents contended that the letter pointed merely to assistance and advice of a social character, the appellant that the advice to be given was not so limited and might extend to matters of business. It is to be observed that neither the appel-

lant nor Galletly treated the letter as asking for assistance or advice merely of a social character. When it was presented the appellant proceeded to ask, and Galletly to give, advice of a business character as to investments. The effect of the letter on this point was for the jury, as laid down by Lord Davey in delivering the judgment of the Privy Council in *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182. Even if this letter had stood by itself, it would, in my opinion, have been impossible to withdraw the case from the jury, but it must also be taken in connection with the whole course of business of the bank with regard to the Westholme Lumber Co. The letter, of course, would not be read by any bank manager as authorizing him to give advice on any matter of business whatever, but if the advice related to a matter which had passed through the manager's hands in the course of his business, and with which he was thoroughly conversant, the letter did authorize him to give advice to the appellant upon it, of course, subject to the limitations which I shall presently point out as to interest and information obtained in confidence.

While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business. The circular of March 7, 1913, quoted above shewed that it had been the long-established custom of this bank to supply Canadian and other friends with any advice or information in its power. If a question arises as to investments with regard to which a banker has special means of knowledge, it will not be out of the ordinary course of business for the banker to advise a customer who asks for his counsel. Of course, if the banker's familiarity with the subject arises from the fact that he has himself a pecuniary interest in it, he would be bound in advising the customer to make full disclosure to him of this circumstance, but as long as the full disclosure is made he may, if he pleases, advise, and in doing so he would not be stepping outside the business of a banker; and it may be noted in passing that the case made by the bank at the trial was that Galletly had told the appellant everything. It is possible that the banker may be in possession of information obtained in confidence from other customers which he is not at liberty to disclose, and under such circumstances it might be his duty to refuse to advise, as his hands

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would be tied in regard to the material parts of the transaction on which he was consulted. Subject to these considerations a banker may, as such, give advice on investments to a customer who consults him, or, indeed, to any one who comes to him for advice, and whom he chooses to advise. If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently. The extent of the obligation to care in such cases is well stated in a passage of the Lord Chief Justice's summing-up on the first trial. It is as follows:—

> Now negligence in a case of this kind involves a breach of duty. There can be no negligence in law unless it is the failure or omission to perform or discharge some duty which is imposed upon you. If there is a duty, then the defendants' servant would be bound to discharge that duty with ordinary reasonable care and skill such as a man would have the right to expect in the circumstances. What I mean by that is that, supposing a bank manager does undertake the duty of giving you advice (which is the simplest way of putting this part of the proposition), it does not mean that for one moment he commits a breach of that duty if by the exercise of some extraordinary skill or care he might have discovered something which he did not discover, and which might have affected the advice he had given. But, on the other hand, if a bank manager undertakes to advise you, you are entitled to that care and skill which you would ordinarily expect from a man in that position. The question in this case is whether, in the circumstances that have been proved before you, you are satisfied that the defendants' manager failed to exercise that care and skill in the advice that he gave to the plaintiff if he gave it.

Exactly the same considerations as to giving advice apply to the case of the manager of a branch bank with regard to the business which is immediately under his care as manager. It is noteworthy that throughout the correspondence which followed on the appellant's complaint against the bank when the loss occurred the position taken up by the bank was a denial that Galletly had in fact advised. It was never suggested in this correspondence that it was beyond the scope of his duties to advise the appellant as alleged. It is a fallacy to argue that because the bank was interested in the matter the manager could not on behalf of the bank advise. That circumstance threw upon him the duty of making a full disclosure of the interest of his employers. If he failed to do so, he would be guilty of a breach of duty to his employers, but this would not prevent liability of the employer to those to whom negligent advice had been given. His employers would be

liable on the familiar principle on which the employers of a chauffeur is liable for his negligence in driving, though the negligence is a breach of duty to the employer and contrary to his instructions.

It was strenuously contended on behalf of the bank that the matter on which Galletly was said to have advised the appellant was as to the sufficiency of the mortgage which it was proposed he should take, and that this was a matter, not for a banker, but for a lawyer and a valuer. This argument involves a total misconception of the nature of the transaction. The prospects of the success of the contract for the construction of the waterworks were vital to the question of the propriety of the investment. Not only did the prospects of the receipt of the 12½ per cent. of the profits on the contract depend entirely upon its success, but the success or failure of the contract would vitally affect the question of the adequacy of the mortgage security itself for the principal and interest, inasmuch as, if the contract were a failure, the contractor would be unable to pay the bank and the trust company, and their first mortgages would have to be enforced, with the effect of seriously impairing the value of the appellant's second mortgage. The bank then contended through their counsel that if the appellant wanted advice as to the prospects of the contract for the waterworks he should have consulted an engineer. This suggestion hardly bears examination. Upon the financial aspects of the contract a banker who had been financing the contractor and was intimately acquainted with all the conditions of the problem would be a much better adviser than an engineer. The jury accepted the evidence that the bank, through Galletly undertook to advise the appellant, and he was eminently qualified to do so from the attention he had paid to the contract in the interests of the bank. These considerations were in my opinion quite enough to render it necessary to leave to the jury the question whether Galletly was acting in the course of his employment in giving the advice which the jury have found he gave. The case made for the bank at the trial was that Galletly had not advised at all, but had simply brought the matter to the attention of the appellant and left him to form his own conclusions. The jury accepted the evidence of the appellant on this question of fact, and it is not questioned that there was ample evidence on which they might come to that conclusion. No submission was made to Darling, J., that the case

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should be stopped on the ground that there was no evidence that Galletly was acting in the course of his employment, or that he had no authority to bind the bank in the matter. Nor, indeed, was any such submission made on the first trial before the Lord Chief Justice. Scrutton, L.J., is mistaken when he says (vol. 2, p. 758, B) that the defendants, on the first trial, submitted that there was no evidence of authority. What the defendants did submit was that there was no evidence of negligence, and after the first trial had proved abortive owing to the inability of the jury to agree on the question of negligence, counsel for the bank applied to the Lord Chief Justice to have judgment entered for the bank on the ground that there was no evidence of negligence in advising the plaintiff. The question was fully argued on March 16, 1916, and he said that it was a question for the jury and refused to enter judgment for the defendants. In the course of his judgment upon this point he made the following observations:—

> The effect of making the submission to me this morning is, no doubt, that it puts the defendants in the position, if they desire it, of taking the opinion of the Court of Appeal upon the point, but I left it for the jury, reserving it for future discussion.

(Typed copy of proceedings of March 16, 1916, pp. 30 and 31.)

It was argued on behalf of the respondents that, even if authority from the bank to Galletly was assumed, as the advice to be given was gratuitous, no liability in law could follow from an undertaking to give such gratuitous advice. It is beyond dispute that on a gratuitous bailment the bailee may be made liable for want of ordinary care. But it was said that the consideration there consists in his being entrusted with the property of another. The consideration really is the confidence reposed in the person who undertakes the duty. He need not undertake it at all, but if he does he must exercise due care in discharging it. This consideration applies just as much to the case of gratuitous advice as to that of gratuitous bailment. Indeed, it was admitted in argument, or at least it was not denied, that a physician who undertakes to treat a patient gratuitously would be liable for negligence, but it was sought to distinguish such a case on the ground of the important and responsible public duty which such a profession involves. There is in point of law no difference between the case of advice given by a physician and advice given by a solicitor or banker in the course of his business. By undertaking to advise he makes

himself liable for failing to exercise due care in the discharge of his duty to the person who has trusted him, and the fact that he undertook it gratuitously is irrelevant. But in truth it is a mistake to treat the present case as one merely of advice or of merely gratuitous advice. The bank was to undertake the receipt and application of the money if advanced, and this, apart altogether from the bankers' interest in the success of the contract, shews that the whole transaction was a purely business one. It cannot be put in the same category as advice given out of charity or benevolence. For the reasons I have given I think it clear that, even in such cases of charity or benevolence, failure to exercise due care would entail liability on the person who has voluntarily undertaken the duty. But from beginning to end this was a business transaction on the part of the bank, as was pointed out by the Lord Chief Justice in his summing-up on the first trial. For these reasons it appears to me that the case was properly left to the jury, and that the decision of the Court of Appeal entering judgment for the respondents was erroneous.

There is, however, another question of great importance with reference to the conduct of cases tried with juries, and that is whether this point was open to the respondents on appeal, having regard to the conduct of the trial. The only point of law taken at the trial before Darling, J., was that the action was barred by Lord Tenterden's Act. It was not submitted that there was no evidence in point of law of Galletly's authority, or of the advice having been given in the course of his employment, and Darling, J., pointedly called attention to this in his summing-up (appendix, p. 727, B.C.). Indeed, Sir John Simon, who appeared for the bank at the trial, in the course of a discussion at the end of the plaintiff's case on July 20, 1916, said before Darling, J.:—

> If your Lordship will kindly take the pleadings as they now stand—in the first place I ask your Lordship to observe that the statement of claim is framed in two ways—so far as the first way is concerned, alleging that there has been reliance upon the assurance of Galletly as representing the bank as to the credit and standing of this Westholme Lumber Co. That, no doubt, is a plea which, as it stands, on the evidence, subject to one point, may have to go to the jury.

Sir John Simon then went on to make a submission as to the Leiser mortgage, adding that his submission had nothing to do with the claim for negligence and breach of duty while acting as bankers

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and advisers for the plaintiff, and a further submission as to Lord Tenterden's Act, which he claimed was fatal to the case made for negligence in advising. The one point on which he made reservation, while admitting that the claim for negligence in advising may have to go to the jury, is obviously the point as to Lord Tenterden's Act, so that not merely was there an entire omission to raise the point now sought to be made, but there was an admission that, subject to the question of Lord Tenterden's Act, the question of negligence might have to go to the jury. Your Lordships have to deal not merely with the failure to raise the point now made, but with the express admission to which I have just called attention. But in truth the conduct of a case speaks as clearly as words. The question is not one of any technicality, but of consistency between the line taken at the trial and that in the Court of Appeal. The position of the respondents upon this point seems to be as hopeless as that of a defendant who at the trial, in the belief it might help him to get a verdict, stated that he did not raise any objection in point of law to the sufficiency of the evidence, and wished to take the opinion of the jury, and then tried to argue in the court of appeal that he should have judgment as the evidence was not sufficient in law.

The course of practice has always been regarded as well settled that points of law alleged to entitle the party raising them to verdict or judgment must be made at the trial, and that if they are not then made they cannot be raised afterwards. This practice is illustrated by what took place on the first trial of this case before the Lord Chief Justice, when the counsel for the bank submitted that there was no evidence of negligence, and this was reserved for argument, and by the observation of the Lord Chief Justice which I have above quoted that what had taken place put the bank in a position to take the opinion of the Court of Appeal upon the point. The rule was applied in *Graham* v. *Huddersfield Corporation* (1895), 12 Times L.R. 36. That was a case in which an action had been brought by a contractor against the corporation to recover payment for sewerage works. The action was tried before Mathew, J., and a special jury. The plaintiff had not received any certificate under the contract, but the jury gave a verdict for the plaintiff on the issue of an alleged parol contract with the health committee on behalf of the corporation. After the verdict counsel for the

corporation submitted to Mathew, J., that judgment should be entered for them on the grounds that the contract was not under seal, and therefore not binding on the corporation, and that under s. 200 of the Public Health Act, 1875, the committee had no power to bind the corporation by any such contract. Mathew, J., refused the application on the ground that the point had not been taken before the verdict. The corporation appealed to the Court of Appeal, and the case was heard there by Lord Esher, M.R., Lopes, L.J., and Kay, L.J. Lord Esher said, in giving judgment:—

that the objection that the defendants had taken their point too late must prevail. Whether they could have waived the point before they came into court it was not necessary to determine. But they had waived the point in court during the trial by allowing the case to proceed till verdict on the basis that the only issue was whether there had been a promise in fact to pay for this work. In his opinion it was not open to them to take the point now, and the application must be dismissed.

Lopes, L.J., and Kay, L.J., concurred on the ground that the point had been waived and that it would be too late to raise it after verdict. Lord Esher and Mathew, J., were judges of the highest authority on such matters, and the decision is, in my opinion, clearly right and in conformity with settled practice. There may be cases in which by consent of counsel on both sides, express or implied, a different practice may be pursued, especially nowadays in the Commercial Court, but apart from consent the law is clear. I may add that in the present case it is plain that the course taken by counsel for the Bank of Montreal was taken deliberately as being in their opinion the most politic. I may mention also in this connection the case of *Jones* v. *Provincial Insurance Co.* (1857), 26 L.J. (C.P.) 272, where the court refused to allow to be argued points of law which had not been taken at the trial.

The following cases, though not turning upon the same point, also illustrate the principle which lies behind the rule of practice now in question. In *Macdougall* v. *Knight* (1889), 14 App. Cas. 194, 199, Lord Halsbury, L.C., after setting out what Huddleston, B., at the trial had stated as to the questions which he proposed to leave to the jury, said:—

Now I think it was the duty of those who are suggesting that other questions ought to have been asked and other issues raised to have intervened at this point, and to have requested Baron Huddleston definitely and distinctly to put the questions that they now insist ought to have been submitted to the jury. But nothing of the sort was done. The parties took their chance of what the jury would do, and I think nothing could be more

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mischievous than to allow litigants to raise new questions when, under such circumstances, the jury have decided against them. If such a course were permitted no end could possibly be found for litigation.

And in *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A.C. 68, 76, Lord Halsbury used similar language with regard to complaints of non-direction by the judge or his not leaving a question to the jury when the point had not been raised. *Seaton* v. *Burnand*, [1900] A.C. 135, may also be referred to upon this point. The respondents cited cases in which it has been laid down that it is the duty of the judge to rule if there is no evidence. These cases have no bearing upon the present question. In *Ryder* v. *Wombwell* (1868), L.R. 4 Ex. 32; in *Metropolitan R. Co.* v. *Jackson* (1877), 3 App. Cas. 193; and in *Dublin, Wicklow, and Wexford R. Co.* v. *Slattery* (1878), 3 App. Cas. 1155, which were the cases relied on by the respondents, the objection was raised at the trial, as appears on the face of the reports. The decisions relate to the duty of the judge when the point is taken as it had been in these cases, and do not touch the question whether it can be raised for the first time when the trial is over.

It is, of course, within the power of the presiding judge at the trial, if it occurs to him that there is a point of law which is being overlooked by the counsel in the case, to call their attention to it, and if after argument he thinks that it concludes the case, so to decide. This is a power which should be exercised sparingly, as the judge would no doubt think it right to abstain from interfering with the conduct of the case by experienced counsel in the manner which they considered most in the interests of their clients. It would be exercised when it is apparent that, owing to inexperience or some accident, a point material to be considered has escaped the notice of counsel. When a point had been so raised on the initiation of the judge at the trial it would, of course, be open on appeal. At the trial further evidence may be called to remedy the supposed defect. It is a novel proposition that when the trial is over a court of appeal may be invited by the counsel on one side or the other to enter judgment on a point which they deliberately did not put forward at the trial. It was suggested by the respondents that in such a case it would be the duty of the court of appeal to ascertain whether the defect might have been cured by further evidence, and only in this case to refuse to entertain the objection.

This would be most inconvenient, and indeed impracticable. The introduction of such a practice might encourage unscrupulous litigants to abstain from raising a point at the trial because they thought this would improve their chances with the jury and then to bring it forward in the court of appeal in the hope that the other side might fail in satisfying the court of appeal that evidence might have been available to meet the point if it had been taken at the trial. It is at the trial that such points of evidence should be dealt with. It is then that further evidence to remedy the suggested flaw may be tendered if it exists, and an adjournment may be obtained for the purpose. That is the time to test the existence of further evidence. For this reason the law of practice has provided that such a point cannot be raised on a motion for a new trial if it had not been taken, and this applies *a fortiori* to an attempt to get judgment entered. The rule is intended to secure the fair conduct of jury trials. Any relaxation, such as the respondents contended for, would throw upon the court of appeal the duty of entering upon a very difficult, and in many cases impossible, inquiry as to what evidence there might have been. I should add that it is in my opinion far from clear that further evidence as to the practice of bankers as to advising could not have been obtained. This point is not, in my opinion, affected by the rules under the Judicature Act. Several rules have been referred to on behalf of the respondents. O. 39, r. 6, provides that a new trial shall not be granted because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned. This has no bearing on the point now under discussion. It is the duty of the judge to put the proper questions to the jury, and this rule merely provides that if there was an omission to do so on a point to which his attention had not been called, a new trial should not be granted for that reason, unless there had been thereby occasioned some substantial wrong or miscarriage. O. 40, r. 10, was also cited, but it also appears to me to be irrelevant. It was, however, contended that O. 58, r. 4, carried the matter further. Among other provisions that rule contains the following:—

The court of appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.

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The effect of this part of the rule is simply that when the court of appeal is dealing with an application for a new trial it may, instead of ordering a new trial, direct judgment to be entered if, in the opinion of the court, there is no evidence in support of the case of the plaintiff or defendant, as the case may be. This rule does not touch the question of the effect of omission to take the point at the trial. It merely provides that, to save expense, instead of granting a new trial, if it is clear that the judge upon the new trial would be bound in point of law to enter judgment for the plaintiff or defendant, as the case may be, the court of appeal may do so itself, but there are no words to shew that the necessity of having raised this point at the trial is dispensed with. The respondents failed to produce any authority for this proposition. In *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672, where the action was to enforce forfeiture of a lease for breach of a covenant, the appeal against judgment for the plaintiff did not come on for hearing until s. 14 of the Conveyancing Act, 1881, providing for relief in such cases, had come into operation. The court of appeal held that they could give relief under it in virtue of O. 58, r. 4. The point could not have been taken at the trial, as the statute had not then come into operation. This case obviously does not affect the question whether a point which was open at the trial can be taken for the first time in the court of appeal under this rule. In *Millar* v. *Toulmin* (1886), 17 Q.B.D. 603; (1887), 12 App. Cas. 746; it does not appear from the report that there had been any omission to take the point at the trial. The observations made in the court of appeal in that case upon O. 58 r. 4, therefore, are not relevant to the present case, and their authority has been shaken by what was said by Lord Halsbury, L.C., in the House of Lords, when the judgment of the court of appeal was reversed. In the case of *Allcock* v. *Hall*, [1891] 1 Q.B. 444, O. 58, r. 4, was also considered, and under it judgment was entered for the defendant. Here, again, it does not appear that there had been an omission to take the point at the trial, and the judgment does not deal with the effect of such a failure.

It must be remembered that in a jury case the verdict was in early days final, subject only to the ancient writ of attaint against the jury, which has been obsolete for many centuries (see Blackstone's Commentaries, bk. 3, c. 25), while matters appearing on

the record might form the subject of a motion to arrest judgment or to enter judgment *non obstante veredicto*. In the seventeenth century the practice of granting new trials came into vogue. But no one was allowed to apply for a new trial on a point of law unless he had taken it at the trial. An application for a new trial on the ground that the verdict was against the weight of evidence was, of course, a different matter altogether, and on the hearing of a rule for a new trial upon this ground it is now open to the court of appeal to enter judgment on the ground that there was no evidence, always subject to the consideration that the point must have been taken at the trial, as there is nothing in the rule to supersede the existing law upon the subject.

I should add that there is a vital distinction between the cases in which judgment may be entered on the ground that there was no evidence and those in which a new trial may be ordered on the ground that the verdict was against the weight of evidence. Judgment can be entered only if there was in point of law no evidence fit to be left to the jury. If there was any evidence, however plain it may appear on the probabilities of the case or the balance of evidence that the jury went wrong, a new trial only can be ordered. This distinction is not impaired in the slightest degree by the rule now well established that a verdict will not be disturbed unless it be one which the jury could not reasonably find. Judgment can never be entered on the ground that the verdict was against evidence. The respondents urged that this point was not taken by the plaintiff in the Court of Appeal when the bank asked for a new trial, or for judgment on points of law taken at the trial. The shorthand notes of the argument in the Court of Appeal were, so far as material on this point, read to your Lordships. They shew that while no preliminary objection was made by the plaintiff's counsel, yet when he came to deal with each ground of appeal he in terms, called the attention of the court to the fact that the point had not been taken at the trial. It is true that he did not expressly say that for that reason he objected to the court's going into the question, and the counsel for the bank suggested that he referred to the fact merely as detracting from the weight to be attached to the argument. But I think that when on each such ground the plaintiff pointedly drew the attention of the court to the fact that the matter had not been raised at the trial, it threw

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upon the court the duty of considering whether the point was open to the bank on appeal, and it is impossible to say that the conduct of the plaintiff's counsel in the Court of Appeal amounted to a waiver of the objection which we are now considering. The Canadian Bank Act, R.S.C. 1906, c. 29, was referred to by the respondents. I do not think that this Act contains anything which for the present purpose is material. The Master of the Rolls said in the Court of Appeal that the bank, according to the law of Canada, cannot advise as to investment, but there is nothing in the Act to support this view. S. 76 empowers the bank to (*d*) "engage in and carry on such business generally as appertains to the business of banking." This leaves open the question whether advising upon certain occasions may form part of the business of banking. A number of sections in the Act were read to your Lordships, among others ss. 79, 80, 89, and 146, but none of them have any real bearing upon the case now before your Lordships.

The claim in par. 5 of the statement of claim for the payment of the Leiser mortgage is of secondary importance. It is merely a claim on another and independent ground for a portion of the $125,000 claimed as damages for negligent advice; it does not claim any sum in addition to the $125,000. This question was left to the jury upon the first trial by the Lord Chief Justice in a somewhat elaborate summing-up (pp. 66 to 71 of the typed copy of the summing-up on first trial). He put two questions to the jury upon this: (1.) Did the bank by paying the Leiser mortgage with part of the money of the plaintiff act contrary to the plaintiff's instructions? and (2.) Did the plaintiff acquiesce in this action of the bank? The summing-up of Darling, J., on the second trial is on p. 720 of the appendix. The question which he left to the jury was this: "Did the defendant bank act negligently or in breach of their duty to the plaintiff in allowing a part of plaintiff's money to be used in paying off the mortgage to Leiser & Co.?"

It is now said that these questions should not have been left to the jury at all on the ground that there was no evidence of any mandate from the appellant which was violated by the payment. It is extraordinary that on neither of the trials was there any submission on this point. Indeed, on the second trial, Sir John Simon, for the bank, told the judge that an issue on which he might have to direct the jury was whether the Simon Leiser mortgage was

mentioned to the appellant (appendix, p. 576, E), and in making a submission at the end of the plaintiff's case he based himself, so far as this point is concerned, solely on alleged ratification of the payment. At both trials the respondents elected to rest their case upon the question whether the Leiser mortgage was mentioned to the appellant at the time when he had his interviews with Galletly, and upon the question whether if the payment was unauthorized in the first instance the appellant afterwards ratified it. Upon this the jury found for the plaintiff, the present appellant. Whether the mortgage was mentioned was a pure question of fact, and must be taken to have been decided by the jury in favour of the appellant. There was evidence on which they might fairly have found ratification, but I do not think it is possible to say that they were bound in law to do so. The point now sought to be raised upon the Leiser mortgage is, in my opinion, not open to the respondents for the reasons I have given earlier in this judgment. I should, however, add that it appears to me inconceivable that, if the case stood as is now asserted, the respondents should have acquiesced on both trials in its being left to the jury upon this point. But in truth I think there was evidence that as between the bank and the appellant the bank should not have made this payment. It is a fallacy to say, as was said for the respondents, that this would be to vary the written contract contained in the mortgage of September 13, 1912, and the memorandum of September 11, 1912. These two instruments did not set out any contract as between the bank and the appellant. They were contracts between the appellant and the Westholme Lumber Co. At the interviews of the appellant with the bank the point was emphasized that the important matter was that the appellant's money should be available for providing the plant required for the further prosecution of the contract, and the appellant's mortgage should be a second mortgage, with only the mortgages of the bank and the Royal Trust Co., which were taken as one, in front of it. It was open to the jury to infer from this—and it seems to me not an unreasonable inference—that when the bank took the appellant's advance they took it as between him and them to be applied in getting the necessary plant, and not in paying off the mortgage in priority to the appellant's, of which he had never been informed. Unless this was the case, the course taken at both trials is quite inexplicable. There seems to me to be

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a certain absence of reality about this part of the respondents' case.

Misdirection was also alleged by the respondents, and it was said that this would entitle them to a new trial. The alleged misdirection was upon five points. The first was that the judge should have told the jury that no action would lie for want of care in giving advice gratuitously. For the reasons I have already given there is, in my opinion, nothing in this point. The second point is that in the summing-up at p. 724, A, of the appendix the judge told the jury there was nothing either to confirm *or rebut* the appellant's evidence. This was described by the learned counsel for the respondents as a very small point. There is really nothing in it at all. As was pointed out when it was made, the judge distinctly put the respondents' version to the jury. The third point was that the judge did not explain to the jury what "advice" meant. I have already dealt with this point in the earlier part of this judgment. The fourth point was that the question as to the Leiser mortgage should not have been left to the jury. With this point also I have already dealt. The fifth point was that the judge mentioned the interest of the bank in the Westholme Lumber Co. as a reason for supposing that authority was given to Galletly to advise. The judge refers to this as one point made by Gordon Hewart, counsel for the plaintiff. It was contended that the interest of the bank negatived the authority. I cannot agree. For the reasons I have already given, this circumstance only imposed the duty of making a full disclosure to the appellant of the bank's interest. It was the interest of the bank that led to Galletly's thorough familiarity with the affairs of the company, and this appears to me to be an element in the question whether Galletly might advise upon that particular matter as distinguished from advising generally as to investment. I cannot see any misdirection in point of law which would justify an order for a new trial, nor, in my opinion, could the verdict be set aside as against the weight of evidence. Upon the question of liability the judge seems to me to have put the case to the jury fairly and adequately.

There remains, however, the question of damages, and on this point I think that the judgment for £25,000 was not warranted by the finding of the jury. They found damages for "£25,000 and all securities to be returned to the defendant bank." The jury had

no power to give a verdict of this kind. The appellant held the securities, and the jury ought to have estimated their value and allowed it, if any, in reduction of damages. Unfortunately, the judge had been compelled to leave before the jury returned, and indeed there was no verdict given in court, as for this the presence of the judge is essential. There was no opportunity for clearing up the meaning of this finding by further questions to be put to the jury or of affording assistance to them by further directions from the bench. It is now suggested by the appellant that all that the finding meant was that the securities were worthless and that the finding did not mean to award that the securities should be given up to the bank, the whole £25,000 being given as damages. But as the finding stands I do not think it can be said that this is its meaning. I think, also, that there ought to have been a fuller summing-up as to the law on the question of damages, such as was given by the Lord Chief Justice on the first trial.

The result is that there must be a new trial on the question of damages in the absence of an agreement between the parties. I think that in this case the damages might be ascertained without retrying the case as a whole. The damages are in respect of the negligent advice to advance the $125,000, not in respect of a number of representations, in which case it would have been necessary that it should be ascertained in respect of which of the representations the damages were to be given. Assuming a verdict for the plaintiff, the damages would be the money advanced under the negligent advice, subject to a deduction of the value of the securities held by the plaintiff, and the only inquiry necessary would be as to the value of these securities as to deduction. In my opinion the appeal ought to succeed, subject to a new trial or inquiry as to the amount of the damages. It appears to me that the order of the Court of Appeal entering judgment for the defendants was erroneous on the law and the merits, and that it proceeded upon grounds not open upon the appeal. If it stands it may have an unfortunate effect upon the conduct of jury trials.

Lord Atkinson.

LORD ATKINSON:—My Lords, I regret that I am unable to concur in the judgment just delivered by my noble friend upon the woolsack.

The Court of Appeal, by the order appealed from, has directed that the judgment entered for the appellant, the plaintiff, in the

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action out of which this appeal has arisen, should be set aside and judgment be entered for the defendants in the action, the respondents in this appeal. The Lords Justices based their judgment on two grounds: (1) that there was no evidence before the jury proper for their consideration upon which they, as reasonable men, could find that the respondents had authorized their local manager at Victoria, one Galletly, to advise the appellant on the subject of his investments in Canada, or that the respondents owed any duty to the appellant to advise him carefully or at all on that subject; and (2) that Lord Tenterden's Act applied to an innocent representation, such as Galletly was alleged to have made, as to the nature of the investment upon which the plaintiff did, in fact, invest his money. I agree with the Court of Appeal as to the first ground on which they based their judgment. I cannot agree with them as to the second. On the contrary, I think, for reasons I shall give presently, that Lord Tenterden's Act only applies to fraudulent representations, not to an innocent representation such as Galletly is alleged to have made.

It is admitted that at the trial before Darling, J., out of which the appeal arises, counsel on behalf of respondents did not ask the presiding judge to direct a verdict for the defendants, the bank, on any ground whatever. What occurred at a previous abortive trial, with which this appeal has nothing to do, is, in my opinion, absolutely and entirely irrelevant. A preliminary point has been raised on behalf of the appellant before your Lordships, and pressed most persistently, namely, that by reason of this omission the Court of Appeal, notwithstanding the provisions of O. 58, r. 4, of the Rules and Orders of the Supreme Court of 1883, had no jurisdiction to make the order which has been made by it. The contention amounted to this, that the making of this requisition to the judge presiding at the trial is a condition precedent which must be performed before judgment can be given for a defendant by the Court of Appeal, however absolute and complete may be the absence of all evidence to sustain the verdict found by a jury in a plaintiff's favour. The Court of Appeal have not dealt with this preliminary point, apparently because, though mooted in argument, it was not really pressed before them. It is, however, a very important point, and should, I think, be ruled upon by this House. It is therefore necessary, in my view, to consider what is the duty

of a judge presiding at a trial before a jury in cases in which no evidence has been given upon which, in his opinion, they could, as reasonable men, find a verdict in favour of the plaintiff in an action. Willes, J., and Lord Cairns, Lord Penzance, Lord Coleridge, and Lord Blackburn amongst others have, I think, each stated, in no ambiguous language, what that duty is. In *Ryder* v. *Wombwell*, L.R. 4 Ex. 32, which was an action brought against a minor for the price of goods, alleged to be necessaries, supplied to him, Willes, J., in delivering the judgment of the Court of Exchequer Chamber, composed of himself, Byles, Blackburn, Montague Smith, and Lush, JJ., said:—

> Such a question (*i.e.*, whether the goods were necessaries or not) is one of mixed law and fact; in so far as it is a question of fact it must be determined by the jury, subject no doubt to the control of the court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, as stated by Maule, J., in *Jewell* v. *Parr*, (1853), 13 C.B. 909, 916, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.

It is quite true that in that case the judge at the trial had, it is stated, refused to nonsuit, so that he apparently had been asked to do so, and had reserved to the defendant liberty to move to enter a nonsuit if the court should be of opinion that there was no evidence to go before the jury that either of the articles supplied was a necessary. I do not find, however, that this most learned, painstaking, and accurate judge, in laying down the general principle, suggests in any way that it should be qualified by a proviso to the effect that a verdict is not to be directed against the person on whom the burden of proof lies unless his opponent, by himself, or his appointed advocate, asks at the trial that it should be so directed.

In *Metropolitan R. Co.* v. *Jackson*, 3 App. Cas. 193, in which the action was brought against the defendant company for the injury caused to the plaintiff by the alleged negligent act of one of the company's servants in closing the door of the carriage in which

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the plaintiff was travelling at such a time and in such a manner as to injure the plaintiff's thumb, it is stated that the judge at the trial ruled that there was evidence of negligence to go to the jury. I do not know that it can be inferred from this statement that he was asked to rule the contrary. The jury found a verdict for the plaintiff. A rule was obtained to set aside this verdict and enter a nonsuit or a verdict for the defendants on the ground that there was no evidence of negligence proper to be submitted to the jury. There had been a great division of judicial opinion in the courts below, and Lord Cairns said (*Ibid.* 197):—

> The case as to negligence having been left to the jury, the jury found a verdict for the respondent with £50 damages. There was not, at your Lordship's Bar, any serious controversy as to the principles applicable to a case of this description. The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is ,in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever.

But this is precisely what would happen, if the appellant's contention be sound, in every case in which the presiding judge ought to have nonsuited the plaintiff, or directed a verdict for the defendant if asked so to do, but abstained from doing it because he was not asked. Lord Blackburn quotes with approval the passage I have quoted from the judgment of Willes, J., in *Ryder* v. *Wombwell*, *supra*, and concurs with Lord Cairns. In *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery*, *supra*, an action was brought by a widow whose husband had been killed by the alleged negligence and mismanagement by the appellants of their railway. At the close of the plaintiff's case the counsel for the railway company submitted to the presiding judge, Palles, C.B., that there was no evidence of negligence on the part of the defendants, the company, to be left to the jury, that even on the plaintiff's evidence there was contributory negligence shewn, and that the deceased was a trespasser, and asked the Chief Baron to nonsuit the plaintiff, which the judge refused to do. Lord Hatherley said (p. 1168):—

I will, in the first place, state my concurrence with Mr. Justice Barry's opinion in the court below, viz., "When once a plaintiff has adduced such evidence as, if uncontradicted, would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury." But I concur, also, in the opinion expressed by Palles, C.B., that "When there is proved, as part of the plaintiff's case, or proved in the defendant's case and admitted by the plaintiff, an act of the plaintiff which *per se* amounts to negligence, and when it appears that such act caused or directly contributed to the injury, the defendant is entitled to have the case withdrawn from the jury."

It is to be observed that the proposition is not that the defendant is entitled to have the case withdrawn from the jury if he should ask that to be done. There is no such qualification. Lord Penzance says (p. 1175):—

> There are, no doubt, cases in which there is either no reasonable evidence of the want of due and reasonable care in the defendant's conduct, or, if such want exists, of its connection with the accident in the relation of cause and effect. And in such cases it is the recognised and unquestioned duty of the judge to withdraw the case from the jury, upon the simple ground that there is no evidence in support of the issue fit for them to take into their consideration.

Lord Coleridge says (p. 1194):—

> Now it is admitted that in order to justify a case being submitted to the jury, there must be evidence of negligence on the part of the defendants, and also that the negligence in fact caused the injury complained of. . . . It is also clear that if the undisputed evidence, or the admissions in the case, negative the latter proposition, the judge must withdraw the case from the jury, because the plaintiff has not satisfied the onus which lies on him.

Lord Blackburn, after pointing out that the jury are not bound to believe the whole or any part of a witness's evidence, says (p. 1201):—

> And (according to what the state of the evidence is) he (*i.e.*, the judge) should either direct the jurors that if they believe the witnesses, there is reasonable evidence on which they may properly find facts, and draw inferences, such that they may find for the party against whom the onus lies; or that, even though they believe the whole of what is sworn to, there is no evidence on which they can properly find the question for that party on whom the onus of proof lies, and, therefore, to direct them to find the verdict against that party. . . . To justify a direction to find a verdict the onus must be one way, and no reasonable evidence to rebut it.

Though a requisition was apparently made in this case, as I have already pointed out, the rule laid down is stated in general terms in each of these judgments, and no reference is made to the necessity of a requisition to impose upon the presiding judge the duty referred to.

It is no doubt true that in practice a judge does not generally withdraw a question from the jury unless asked to do so. There is,

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I think, an obvious reason for that. It is this: If it should turn out that he was wrong in so withdrawing it he might inflict great cost upon the litigant in whose favour he withdraws it, though the latter might possibly have got from the jury a finding in his favour. But the question whether he has jurisdiction to withdraw the issue from the jury, though not asked to do so, is quite another matter, and the above cited authorities are, I think, much more in favour of the existence of such a jurisdiction than of its non-existence. I confess I cannot bring myself to believe that a judge presiding at a trial before a jury is bound to leave to them an issue which, in his opinion, there is not, in point of law, any evidence to justify them, as reasonable men, in finding in favour of the party upon whom the burden of proof of that issue lies, simply because the opposing party, or his counsel, has not asked him to withdraw the issue from them. The omission to make such a requisition cannot, in my view, relieve the judge from ruling upon the question of law, which, by reason of the absence of such evidence, is by the conduct of the case raised for his decision. In the abstract, therefore, I incline to the opinion that a requisition to a judge to enter a nonsuit or direct a verdict for a defendant is not a condition precedent which must be fulfilled in order to entitle him to do either. But then comes in the question of the alleged binding effect of the course of the trial.

The well-known passage from Lord Halsbury's judgment in *Macdougall* v. *Knight*, 14 App. Cas. 194, 199, to the effect that when parties take their chance of what a jury will do nothing can be more mischievous than to allow litigants to raise new questions when the jury have decided against them, was much relied upon for the appellant, but those observations, the wisdom and justice of which cannot be questioned, were made in reference to a contention urged on behalf of a litigant that questions other than those put to the jury by the judge at the trial should have been put, though those appearing for that litigant never asked to have them put. That is entirely different from the present case. There the judge could at once have remedied the defect, if it was a defect, if his attention had been called to it. Here the judge could not remedy the defect, namely, the absence of all evidence upon which the jury could properly find for the plaintiff. *Seaton* v. *Burnand*, [1900] A.C. 135, is to the same effect. Cases such as these, or

cases where what is complained of is misdirection or non-direction by the judge presiding at a trial, do not, in my view, touch cases such as the present, for the simple reason that in them the objection, if made, could at once be met and the alleged defect cured, while in the present case, all the evidence possibly procurable having been given, the defect could not be cured. It seems hardly just or right that a verdict which never should have been found should be allowed to stand simply because the judge was not asked to prevent its being found. I now turn to O. 58 and rr. 1 and 4. The first rule provides that an appeal shall be a rehearing; the fourth that the court of appeal shall, on the hearing of appeals, have power to receive further evidence upon questions of fact, but that, upon appeals from a judgment after the trial or hearing of any cause upon the merits, such evidence is to be admitted by leave on special grounds. The rule further provides that the court of appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made. But the rule does not stop there. It goes on to provide that that court shall, in addition, have power to make "such further or other order as the case may require." These later words must have some meaning assigned to them. They evidently extend to the making of an order which the court appealed from could not have made. In the case of trial by juries that court was, at the time these rules and orders were made, the Divisional Court. It is now, under Finlay's Act, the Court of Nisi Prius in which the trial takes place. The powers conferred upon a Divisional Court are by these orders much more restricted than those conferred upon the Court of Appeal. By O. 40, r. 10, it is provided that upon a motion for judgment, or upon an application for a new trial, the Divisional Court can draw inferences of fact, but only such inferences of fact as are not inconsistent with the findings of the jury. In addition it is provided by O. 39, r. 6, as amended in 1913, that a new trial may be granted by the court of appeal on the ground of misdirection or the improper admission or rejection of evidence, or because the verdict of a jury was not taken upon a question which the judge at the trial was not asked to leave to them, if that court should be of opinion that some substantial wrong or miscarriage has been thereby occasioned. The question as to what

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amounts to "substantial wrong or miscarriage" within this rule has been considered in *Bray* v. *Ford*, [1896] A.C. 44, and several other cases, but at all events the rule comes in conflict to some extent with the doctrine that parties are absolutely bound by the course of the trial, since it provides that in the cases mentioned a new trial may be granted because the verdict of the jury was not taken upon a question which the judge was not asked to leave to them.

The construction and reach of O. 58, r. 4, has been considered in several cases. It is necessary to examine a few of them in some detail. In *Quilter* v. *Mapleson*, 9 Q.B.D. 672, which was an action brought by virtue of a condition of re-entry on breach of a covenant to insure contained in a lease, the defendant claimed relief under the statute 22 & 23 Vict. c. 35, s. 4. The plaintiff recovered judgment on July 14, 1881. On August 4, 1881, the defendant appealed. A stay of execution was granted and renewed, so that the plaintiff never recovered possession. On January 1, 1882, the Conveyancing and Law of Property Act, 1881, came into operation, after which the appeal was heard. The Court of Appeal held, first, that this last-named statute was retrospective in its operations, and, second, that, even if the order of the court below was right, as the law stood at the time it was made, the Court of Appeal was, by the words "to make such further or other order as the case may require," empowered to grant to the tenant the relief to which he was entitled according to the law as it stood on the hearing of the appeal. Jessel, M.R., and Lindley and Bowen, L.J.J., delivered judgments, which appear to me to be absolutely convincing, to the effect that O. 58, r. 4, was designed to enable the Court of Appeal to do complete justice between the parties litigant, even though it should involve the making of an order which neither the judge at the trial nor the Divisional Court had jurisdiction or power to make. In *Millar* v. *Toulmin*, 17 Q.B.D. 603, 605, the jury found a verdict for the defendant. The Divisional Court made an order for a new trial on the ground of misdirection, and of the verdict being against the weight of evidence. The Court of Appeal, composed of Lord Esher, M.R., Bowen, L.J., and Fry, L.J., held that, as in their opinion they had all the facts before them, they had power, instead of merely making an order for a new trial, to order that judgment should be entered for the plaintiff, though no

requisition had been made by the plaintiff's counsel to the judge at the trial at the end of the defendant's case to direct a verdict for the plaintiff. Lord Esher, in giving judgment, said:—

In the present case I am of opinion that we have all the facts before us, and that no further evidence could be given which could alter the result, and therefore, instead of directing a new trial, we ought to enter judgment for the plaintiff. If there is any question as to amount, it can be settled by the Master.

Bowen, L.J., said:—

I am of the same opinion. I think that the verdict was against the weight of evidence, and must be set aside, and I think we have all the facts before us. I agree with the Master of the Rolls that under O. 58, r. 4, the Court of Appeal has power to relieve against all miscarriages of justice, and can direct judgment to be entered, if satisfied that no jury could properly come to a different conclusion.

And Fry, L.J., said:—

I also think the verdict was against the weight of evidence. The question then arises, what is our duty? Have we power, not only to set aside the verdict, but to enter judgment the other way? The difference between O. 40, r. 10, and O. 58, r. 4, is very great, and the latter rule, which applies to the Court of Appeal, gives larger powers than the former. The reason appears to be that the Court of Appeal has power to hear fresh evidence, and therefore they ought not to be bound by the finding of the jury in drawing inferences of fact.

Now, as all these judges thought the verdict was against the weight of evidence and should be set aside, what conclusion must they have come to with reference to that evidence? They must, according to the decision in *Metropolitan R. Co.* v. *Wright* (1886), 11 App. Cas. 152, have come to the conclusion that "the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find." And what conclusion should a judge come to before he can direct a verdict to be entered for a defendant? Why, that there is no evidence to go before the jury upon which they could, as reasonable men, find a verdict for the plaintiff. No doubt in cases where the verdict is set aside as against the weight of evidence there will be evidence on both sides, but now that the scintilla doctrine has been abandoned, the tasks of the court in the two classes of cases closely approach each other. It is, no doubt, true that when this case of *Millar* v. *Toulmin*, 17 Q.B.D. 603, came on appeal to this House, 12 App. Cas. 746, it was held that there was no misdirection by the judge at the trial, and that the verdict of the jury was not against the weight of evidence; and the judgment of the Court of Appeal was reversed. Lord Halsbury

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alone of the noble Lords who heard the appeal expressed doubt as to whether O. 58, r. 4, conferred upon the Court of Appeal jurisdiction to make the order they had made, finding, as he says in effect, a verdict for themselves and actually assessing damages. The other noble Lords abstained from expressing any opinion upon this point. It is obvious that Lord Halsbury's criticisms are inapplicable to a case where a verdict might properly have been directed for the defendant had such a direction been asked for, and the only defect was that it was not asked for.

In *Allcock* v. *Hall*, [1891] 1 Q.B. 444, the jurisdiction of the Court of Appeal under O. 58, r. 4, again came up for consideration. The action was tried before Hawkins, J., and a special jury. The evidence was conflicting. The jury found a special verdict in favour of the plaintiff on the main issue between the parties. The judge reserved judgment. On an application for a new trial on the ground that the verdict was against the weight of evidence the Court of Appeal, applying the principle laid down in *Metropolitan R. Co.* v. *Wright*, 11 App. Cas. 152, set aside the verdict, holding that it was utterly irreconcilable with the evidence in the case when reasonably considered. They also decided that when applications under Finlay's Act (53 & 54 Vict. c. 44), though not technically appeals, came before the Court of Appeal, that court could exercise all the powers possessed by it under O. 58, r. 4, and following *Millar* v. *Toulmin*, *supra*, and being satisfied that nothing would be gained by ordering a new trial, they entered judgment for the defendant. Lindley, L.J., delivered the leading judgment, and, after the other judgments had been delivered, made this important statement: "I wish to add that we have consulted our colleagues in the other branch of the court, who have carefully considered the point and agree in our decision." This case must therefore be regarded as one of very high authority indeed. My Lords, in the face of this decision it is, in my view, now impossible to deny that if the Court of Appeal should in any given case be of opinion, first, that they have all the facts before them, and that there is no reason to think that further evidence of importance could be produced at another trial, and, secondly, should be also of opinion that the evidence given at the trial was such that the presiding judge should, if asked by the defendant's counsel, have either nonsuited the plaintiff or directed a verdict for the defendant,

that court has now power under O. 58, r. 4, not only to set aside a verdict found for the plaintiff, but in addition to enter judgment for the defendant. If the court can do this, as these cases decide it can, where there is conflicting evidence in a case, but an overwhelming balance of it on one side, it would be strange indeed if the same court should not have power to do it where there is no evidence proper and sufficient to sustain a verdict found for a plaintiff, simply because the counsel for the defendant has at the trial omitted to ask that this should be done. To hold so would appear to me to make this doctrine that parties are to be bound by the course of the trial an instrument of great injustice.

In the case of *The Tasmania* (1890), 15 App. Cas. 223, 225, the court below held that the ship the "City of Corinth," with which the "Tasmania" collided, was alone to blame. The Court of Appeal took the same view. In the latter court the point was for the first time raised that the evidence shewed that the "Tasmania" was also to blame. Lord Herschell deals with the point thus:—

> My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. . . . It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground thare put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box.

The rules here laid down, admirable and just in a case to which they apply, have no application whatever to a case like the present, where all the defendants ask for is to get the opportunity to shew that the verdict found against them has no proper evidence to support it, and object to be shut out from doing this by the omission of a technical formality. In my opinion, therefore, the omission of the defendants' counsel at the trial to address to the judge the requisition I have mentioned did not, having regard to the provisions of O. 58, r. 4, deprive the Court of Appeal of jurisdiction to make the order they have made based upon the first ground. The privilege of raising in your Lordships' House points not raised in the court below is a matter of grace, not of right.

The cases of *Misa* v. *Currie* (1876), 1 App. Cas. 554, 559,

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Connecticut Fire Insurance Co. v. *Kavanagh*, [1892] A.C. 473, and *Sutherland* v. *Thomson*, [1906] A.C. 51, lay down the principles which should guide the House in the exercise of its discretion in this matter. In the present case I think the appellant was properly allowed to raise the point, even on the assumption that it was not raised in the Court of Appeal.

Having dealt with the preliminary objections, I now turn to the consideration of the substantive case. I think in the first place that the statement of claim is extremely ambiguous in its language and most embarrassing. Its 2nd paragraph contains five distinct averments: (1) That the respondents, the bank, acting by and through their agent Galletly, advised the appellant to invest a sum of $125,000 in a loan on mortgage to the Westholme Lumber Co., representing the mortgage as a perfectly safe investment. (2) That the bank by the same agent represented that the mortgage would be a second mortgage ranking only behind a first mortgage held by the bank itself. This representation deals with a future event, and amounts either to an undertaking or a prophecy, but, whether the one or the other, the appellant has in fact got what it was represented to him he would get. He has got a second mortgage on the lands of the company ranking only behind the bank's own mortgage. (3) That the bank by the same agent represented that the money to be advanced by the appellant was required and would be used solely for the purpose of completing a contract then in progress in the City of Victoria. This representation is treated in par. 4 of the statement of claim as amounting to an undertaking, or contract, that the appellant's money would be so applied, which undertaking imposed upon the bank a duty towards the appellant to see that it was so applied, and that the bank, in breach of that duty, allowed a portion of the money to be used to pay off a mortgage given by the company to Simon Leiser & Co. In addition a question was at the trial framed upon this alleged breach of duty and left to the jury, who answered it in the affirmative. It is quite impossible to say how far their award of £25,000 damages was influenced by this fact. In my view there was no evidence whatever before the jury upon which they could, as reasonable men, find that the bank ever promised, undertook, or contracted to see to the application of the appellant's money in the way described, or that the bank ever owed any duty to the

appellant to see that it was so applied, or that they ever received any money from the appellant for the purpose of so applying it or of having it so applied. The terms of the two most important documents in the case, namely, the appellant's memorandum of September 11, 1912, and the mortgage deed of September 13, 1912, especially the latter, are irreconcilable with such an arrangement. The former merely provides that the loan is to be used for the Sooke Lake water proposition, that is, the contract mentioned in the 1st paragraph of the statement of claim, and the latter expressly provides that the mortgagors, the Westholme Lumber Co., shall use the sum of $125,000 for no other purpose than for expenses incurred, or to be incurred, in the construction of the water supply. This latter provision was observed in fact, and the only past debts of the company paid out of it were debts incurred in the construction of the waterworks. (4) That the bank through this same agent represented that with this loan the company would be able to carry out the contract without having to borrow any more money. That is merely an anticipation. It is not a contract. (5) In par. 3 of the statement of claim it is averred that the appellant instructed the bank to carry out the investment. Whatever may be the true meaning of the word "advise" as used in the 1st paragraph of the statement of claim, it cannot, I think, cover and include an engagement or promise to see to the application of this loan for the purposes mentioned. Still less, I think, can it cover an undertaking to carry out an investment. There is no evidence that the bank ever undertook such a work as this latter.

During the progress of the lengthy argument which was addressed to your Lordships many efforts were made, but without success, to obtain from the appellant's counsel some definition of this word "advise." It was insisted that it included something more than the expression by the adviser of an opinion *bonâ fide* believed by him to be true. But what that something else was could not, apparently, be described in precise language. Giving advice, it was admitted, did not require that the adviser should disclose to the advised the ground upon which the opinion he expressed was based. Neither did it require that the adviser should disclose to the advised all the information he possessed which might be calculated to enable the advised to form his own

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independent opinion. All that Talbot could be induced to attempt in the way of a definition was that the advice must not be "misleading." I confess I have some difficulty in appreciating what is here meant by the word "misleading." It does not mean, I presume, merely that the advice must not be given in ambiguous language. The language used in the present case was plain and simple. Nor does it mean, I presume, even where the advice is given gratuitously, as in this case, that it must be sagacious, prudent, wise, sound, or cautious. Fraud has not been charged against Galletly, either in the shape of deliberate deceit, or in the shape of that recklessness which has been held to amount to wilful misstatement. The man is dead, as is also Sir E. Clouston. Neither of them has ever had the opportunity of giving his account of the respective conversations with the appellant, and fraud, not being charged explicitly, cannot be insinuated, so that it must be taken that, whatever advice Galletly gave, he gave it honestly, expressing an opinion he *bonâ fide* believed to be true. I confess I entertain the greatest doubt that anything beyond that was required of him. It was suggested that he should have informed the appellant of the fact, of which he no doubt was aware, that others held an opinion different from his own. Well, it was urged that Canadian banks and their officers in this matter of advising their customers as to investments are in the position of skilled persons, such as doctors and lawyers, who, if they undertake, even gratuitously, to treat or advise a person, are bound to use the skill and knowledge they have, or profess to have, and that if they omit to do so they are guilty of gross negligence: *Shiells* v. *Blackburne* (1789), 1 H. Bl. 158; *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 1 Sm. L.C., 12th ed., 191. Even if that were the true position of these officials, it would not by any means follow that Galletly was, as agent of the bank, bound to give to the appellant the information suggested. It could not, I think, be contended that if a doctor, when advising a patient gratuitously, told the latter that in his, the doctor's, opinion the patient's symptoms were those of indigestion, not heart disease, he was bound in addition to inform the patient, if the fact were so, that many other doctors thought that symptoms such as the patient's were indicative of disease of the heart, or that a lawyer who was advising a client gratuitously on a point of law was not only bound to tell him truly what his opinion

on the point was, but in addition, if the facts were so, to add that several lawyers held a contrary opinion. No authority was cited in support of such a strange proposition. Moreover, so far from there being anything to shew that the bank and its officers are in fact, or hold themselves out as being, persons skilled in advising upon investment, though they are by R.S.C. 1906, c. 29, s. 76 authorized to engage in and carry on such business as generally appertains to the business of banking, yet they are, except so far as authorized by that Act, prohibited from lending money or making advances on the security of or by the hypothecation of land. S. 80 no doubt empowers them to hold mortgages of real or personal property as security for debts due to the bank by their customers. These provisions would tend to shew that these officers have not the opportunity or training to become skilled persons in such matters, but rather the contrary. It was not, however, contended in this case, as I understand the evidence, that it was within the scope of the employment of every local manager, or even of the general manager of the bank, to advise all their customers gratuitously, or at all, upon the subject of investment; but that, owing to certain special facts and circumstances proved in evidence in this particular case, it might be inferred that Galletly, as manager of the Victoria branch of the defendant bank, was acting within the scope of his authority and in the course of his employment, in recommending the appellant to make a loan to this company on the security of a second mortgage of the portions of their property mentioned in the schedules annexed to the deed of mortgage. The facts and circumstances so relied upon appear from the passages printed at pp. 670 and 679 of the appendix to be the following: (1) That the bank had at this particular time, to the knowledge of Galletly, a considerable interest in this Westholme Co., *i.e.*, a pecuniary interest, the company being in fact indebted to the bank to a considerable amount, and the bank holding a first mortgage over their land and a floating charge over all their assets. (2) That Galletly was at the time taking various steps, in the interest of the bank, in relation to the company and taking part in certain negotiations. (3) That in these negotiations he recommended the appellant to put his money in, *i.e.*, lend his money to the bank's debtors. (4) The letter dated July 6, 1911, written by Sir Edward Clouston, he then being the general manager of the

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bank. It is clear from several passages in the summing-up of Darling, J., that he understood the appellant's case was to this effect. At p. 718 of the appendix he pointed out to the jury that it was not alleged that it was the general duty of a bank manager to advise everybody, and at p. 726 occurs the following passage, which, in justice to the judge, I cite at length. It runs thus:—

> Now I must ask you these questions; I have read you the first one. "Had Galletly authority as manager of a branch of the defendant bank to advise plaintiff to invest $125,000 on mortgage to the Westholme Lumber Co.?" You notice that there is nothing said there about the general authority to advise any customer who might come in about investing money. Hewart does not contend that a branch manager had any such general authority. He says, "I admit he had not," but he says in those particular circumstances, seeing what were the transactions between the defendant bank and the Westholme Lumber Co., seeing what was the correspondence between the manager at Vancouver, Sweeny and Galletly, seeing what was the interest of the bank in getting financial assistance for the Lumber Company, there was authority given to Galletly to advise Captain Banbury. It is true he says he found it first of all upon the letter of Sir Edward Clouston written upon that. He says, "There it is;" it says "advice," it does not say advice must be limited to shooting or fishing or beauty spots on the coast, or anything of that sort; it says "advising," and then, Galletly being engaged in keeping on foot this Westholme Lumber Co. so that they could carry out their contract for the benefit of the bank, he says upon all the letters that have been read to you, and all the evidence that has been given, you may come to the conclusion that although there was no general authority in every branch manager to give such advice as Galletly is said to have given to Captain Banbury, yet in this particular case there was authority to give the advice which Galletly did give to Captain Banbury. Now, gentlemen, that is for you to decide; it is not for me to decide. All I can tell you is that there is evidence that I feel justified in leaving a question about. If the learned counsel thought there was no evidence he would have submitted to me that I ought not to leave the question to you. That has not been submitted, and I therefore leave that question to you.

I think that the judge did not receive from the counsel engaged in the case the assistance he was entitled to expect.

My Lords, if this letter of Sir Edward Clouston formed, as is alleged, some presumptive evidence of the intention of the writer to create the legal confidential relation between Galletly and the appellant of adviser on behalf of the bank and advised, the matters mentioned under the foregoing heads Nos. 1, 2 and 3, would have effectually rebutted that presumption; inasmuch as in that relation the interest and the duty of both Galletly and the bank would have been in direct conflict. The interest of Galletly as local manager of the bank, who allowed the company to become so heavily

indebted to the bank, as well as the interest of his principal, the bank, would have been to procure a loan to be made to the bank's debtors on any security they could offer, whether good or not, in order to put the company in funds to help them to carry out their contract, lessen their debt, and enhance the value of the bank's securities; while the duty of Galletly as plaintiff's adviser would have been to put out of view the bank's interest, and to think only of the appellant's interests in advising him to make this loan. It would be as legitimate to contend that from the mere fact that a man was employed by an owner of property to sell it one may presume that he had implied authority to buy it himself, or that from the fact that a man was appointed trustee of certain property he had implied authority to buy the trust funds from the *cestui que trust*. You cannot infer from the fact that a man is put in a certain position, that he has power and authority to do that which by reason of that very position the law forbids him to do. Sir William Taylor, the general manager of the respondents' bank, when examined as a witness on the bank's behalf, proved that the branch managers of the bank have no general authority whatever to advise any one as to investments (p. 644), and at p. 671 he further proved that if Galletly during the negotiation about the aforesaid company brought to somebody's notice a scheme for financing the company, he would, in that matter, be acting in the course of his employment as manager of his branch, but that if he proceeded to recommend that scheme to this person as a thing to invest in, he would be exceeding his authority. That evidence was not contradicted in any way. The burden of proving that Galletly, in giving advice, acted within the scope of his authority and in the course of his employment rested, of course, upon the appellant. And yet one would almost suppose from some of the questions put that the burden was reversed. For instance, a point was made and pressed that amongst the written rules of the bank for the guidance of managers there was no rule forbidding them to advise as to investments.

Again, much of the argument addressed to your Lordships might have more force if Galletly was himself the banker. He by advising the appellant, though gratuitously as he did, might have taken upon himself a duty which he was bound to discharge at least without gross negligence, but that is not the position at all.

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The point is, even if he did so advise, are the respondents bound by his acts, and responsible for his alleged breach of the duty he had become bound to discharge? A wholly different matter. If the four matters relied upon to establish that Galletly was, in giving advice to the appellant, acting within the scope of his authority and in the course of his employment the letter of Sir E. Clouston alone remains. I proceed to consider it. It would, under any circumstances, be much to be regretted that Sir E. Clouston was not alive to give his account of the circumstances surrounding the writing of his letter, the conversation with the appellant leading up to the giving of it, the purpose for which it was asked and given, and the matters to which it related. I think it is in the present circumstances doubly regrettable because the appellant's evidence upon this point is neither precise nor detailed. He says that in July, 1911, he visited Sir Edward Clouston in Canada and had with him on that occasion a discussion with regard to investments in Canada. No particulars whatever are given as to the nature of this conversation, whether it was merely a general conversation about Canadian investments, or whether or not the appellant informed Sir Edward that he was anxious to invest money in Canada and was looking out for "a suitable investment" there. Nothing of the kind. On the contrary, on cross-examination he admitted that Sir E. Clouston was a personal friend of his; that he, the appellant, visited the country in 1911 for pleasure; that the Canadians are a very hospitable people; that they would pass a visitor on from one part of the country to another in order that he might have a good time; that he knew perfectly well a letter of the sort that Sir Edward Clouston wrote was constantly given by kindly, hospitable people in order that a person going from one place to another might know what hotel to go to and secure that he should be well received; that he went to the Island of Vancouver in 1911 on a fishing visit and did not use the letter; that he did not do any business in 1911 and was only looking around, and only presented the letter for the first time when he went to Victoria in September, 1912, fourteen months after it had been written. The letter runs as follows:—

Head Office, Bank of Montreal,
July 6, 1911.

The Managers, Bank of Montreal.

Dear Sirs:—I take pleasure in introducing to you Captain Banbury, of

London, who is visiting this country on pleasure. Should he apply to you for assistance or advice you will be good enough to place yourselves at his disposal.

Yours faithfully,
(Sgd.) E. S. CLOUSTON, General Manager.

If this be read as it should be, in the light of the respective positions of the writer and of the receiver, the object of the latter's visit and the social habits of the Canadian people, as described by the appellant himself, I think it is clear that originally, at all events, it was nothing more than a friendly letter, the writing of it merely an act of kindly courtesy designed to secure for the bearer of it as he went from place to place a good reception, and the performance of the friendly services he mentioned. The letter is addressed to all the local bank managers without distinction. It is a kind of circular letter. There is nothing ambiguous about it. Its language is clear enough. It contains no reference to investments or explicitly to any business matters. And it is, in my mind, perfectly impossible to believe that a man of sagacity and of experience in business, such as Sir Edward Clouston must have been, could ever have intended to create between the appellant and his bank, through the agency of any branch manager to whom the letter might be presented, the legal confidential relation of advisor and advised on the subject of investment of money, entailing on the bank all the responsibilities such a relation would impose. But it was, as I understood, contended that, even if this letter was originally given merely as an act of courtesy and friendship to secure for the appellant the kindly services I have mentioned, it was, on the appellant's interview with Sir Edward when he visited him in July, 1912, applied to an altogether different subject-matter —converted into a business document, its whole nature, character, and purpose changed. The appellant's account of what took place at that interview is this: He says he again discussed with Sir Edward the subject of investment of money in Canada, that the latter asked him if he wanted a letter, that the appellant replied that he had the letter Sir Edward had given him the previous year, and that Sir Edward then said that would do as well. And no doubt it would do as well if Sir Edward's object was merely to secure for the appellant the friendly services and attention I have mentioned; but it was wholly inadequate as a business document, it was meant to have the effect now contended for. If Sir

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Edward meant to give to all his local managers to whom this letter might be presented by the appellant, the vast authority it is urged he has given, no reason can be suggested why he should not have done that in clear and specific language. There is the same vagueness, too, in the appellant's account of this interview as there was in that of his first interview. He does not say explicitly that he asked Sir Edward to give him any advice on the subject of Canadian securities, or to procure for him advice of that kind from his branch managers, nor to authorize those branch managers to carry through for him any investment he might decide upon. Nor does he say that Sir Edward Clouston ever promised to do any one of these things. Everything is left vague. In my opinion this letter does not derive from the occurrences alleged to have taken place at the second interview any significance or meaning beyond what it had from the first. I am, therefore, of opinion that there was not before the jury any evidence proper for their consideration upon which they could, as reasonable men, find, as they have found, (1) that Galletly was clothed with authority to give, on behalf of the respondents, advice to the appellant as to his investments; or (2) that the respondents owed any duty to the appellant to advise him upon the matter of his investment carefully, or at all. Having come to that conclusion, it is not necessary for me to decide whether, if such a duty as is last mentioned had existed, there was any evidence before the jury to sustain a finding that the bank were, through their agent, guilty of a breach of it amounting to gross negligence, but the inclination of my opinion is that there was no such evidence before them. I have already expressed my view as to the other issues raised in the pleadings, and I am of opinion, on the whole case, that if the judge had at the trial been asked, on the grounds I have mentioned, to direct a verdict for the defendants, the bank, he should have done so. Ogden Lawrence contended on behalf of the respondents that the principle of *Coggs* v. *Bernard*, 2 Ld. Raym. 909, never could apply to the mere giving gratuitously of advice. No doubt in most, if not all, of the authorities mentioned in the notes to that case in 1 Smith's Leading Cases, 172, 188, *et seq.*, something amounting to agency existed between the person for whom the gratuitous service was performed and the person who rendered it; but in the case of persons who possess or purport to possess skill and knowledge in

some art or profession, such for instance as doctors or lawyers, I do not think it can be said that the giving of advice is not an act done for the patient or client advised, as the case may be. It is well established that if a doctor proceeded to treat a patient gratuitously, even in a case where the patient was insensible at the time and incapable of employing him, the doctor would be bound to exercise all the professional skill and knowledge he possessed, or professed to possess, and would be guilty of gross negligence if he omitted to do so. I think prescribing medicines or a course of dietary for a patient would come within the same rule, and I do not well see any difference between a doctor telling a patient he has heart disease, for instance, and prescribing a remedy, and merely telling him he has heart disease without prescribing a remedy. In both cases he must do something on the body of the patient. Neither do I think it can be said that a solicitor who merely advises a client as to his legal rights, but does not undertake to conduct his cause, can well be said not to do something for the client. In other words, I do not, as at present advised, think that the acts done, or to be done, can be confined, at all events in the case of skilled persons, to physical as distinguished from mental acts. Owing to the view I take on the other issues in the case it is not necessary for me to express a definite opinion on this point, and I abstain from doing so.

Lord Tenterden's Act (9 Geo. 4, c. 14) is entitled "an Act for rendering a written memorandum necessary to the validity of certain promises and engagements." S. 1 deals with actions of debt or upon the case grounded on any simple contract, and enacts that no acknowledgement or promise shall be sufficient unless made in writing signed by the party chargeable, but leaves untouched the effect of the payment of any principal or interest. S. 3 deals with the indorsement of memoranda of payments on promissory notes, bills of exchange, etc., and s. 6, which is evidently modelled on s. 4 of the Statute of Frauds, enacts that:—

no action shall be brought whereby to charge any person upon, or by reason of, any representation made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon (*sic*). [The word omitted or transposed by a clerical error is generally believed to have been "credit": *Lyde* v. *Barnard*, 1 M. & W. 115; it has also been suggested that "upon" represents an insufficient cancellation of "thereupon": *ibid.* 123, 124.—F.P.], unless such representation or assurance be made in writing signed by the party to be charged therewith.

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I assume for the purpose of the construction of this section that the findings of the jury as to Galletly's authority and as to the advice given by him to the appellant are correct; that the representation made by Galletly amounted to a representation or assurance concerning or relating to the credit, ability, and trade of the Lumber Company, and was given for the intent and purpose that that company might obtain money from the appellant. It is admitted that any representations made by Galletly were made innocently. The question then is, does this section of Lord Tenterden's Act apply to innocent representation? No doubt the words of the section are general. On its face it applies to every representation, innocent or fraudulent; but one cannot construe these words, general in character though they be, without having regard to the circumstances in reference to which they were used, and to the object appearing from the statute which the legislature had in view in using them. Lord Coke in the well-known passage in *Heydon's* case (1584), 3 Rep. 7b, lays it down that to get at the scope and object of an Act one should consider, (1) what the law was before it was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy parliament has appointed; (4) the reason for the remedy. In *Hawkins* v. *Gathercole* (1855), 6 D. M. & G. 1, 20-1, Turner, L.J., said that, "in construing Acts of Parliament, the words which are used are not alone to be regarded." He then quotes with approval and adopts a passage from the judgment in *Stradling* v. *Morgan* (1560), 1 Plowd. 199, 204, 205. This statement of the law was by Turner, L.J., stated to be the best he knew of. It has been approved of by Lord Hatherley in *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, 950, by Lord Selborne in *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354, 362, and by Lord Halsbury in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks*, [1898] A.C. 571, 575. The passage from Plowden is so applicable to the present case and, approved of as it has been, is so authoritative that one may be excused for quoting it at length. It runs thus:—

> The judges of the law, in all times past, have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the interest was particular;

and after referring to several instances proceeds:—

from which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign (*i.e.* extraneous) circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.

Well, there cannot be any possible doubt as to what was the cause and necessity of the passing of Lord Tenterden's Act. It was the evasion of the 4th section of the Statute of Frauds by the decisions in those actions for deceit, of which *Pasley* v. *Freeman*, 3 T.R. 51, was the first. In these actions the parties were made liable, not for innocent representations and assurances, but for false and fraudulent representations and assurances of a third party's solvency, made by parol with intent to deceive, and acted upon by those to whom they were made. In *Lyde* v. *Barnard*, 1 M. & W. 101, 107, Alderson, B., is reported to have said:—

that the decisions in that class of cases, commencing with *Pasley* v. *Freeman*, 3 T.R. 51, had raised a well-founded complaint in the profession as having in fact virtually repealed the Statute of Frauds, by which a guarantee was required to be in writing, and that the object Lord Tenterden had in view was to place both on the same footing, and to provide that a written document should be equally required in both. The two cases are, I think, identical in principle; for, a guarantee increases the ability of the third person who is about to be trusted, by adding to the value of his personal responsibility that of the person making the guarantee. And, in like manner, as the false and fraudulent representation as to the third person's ability equally adds, in the opinion of the person trusting to it, to the value of the third person's responsibility; it ought justly to have, and it has in law, the effect of pledging also the personal responsibility of the fraudulent representer of the facts. The fraud in substance amounts to an implied guarantee of the third person's solvency. I think, therefore, that we should take this as the key to the true construction of Lord Tenterden's Act.

Parke, B., is reported as expressing himself to practically the same effect, 1 M. & W. 114; and Lord Abinger, C.B., says, *Ibid.* 117:—

The obvious policy of this statute (*i.e.*, the Statute of Frauds) was to prevent that fraud and perjury which had been found by experience, or was thought probable to arise from trusting to evidence of less authority than that of a written document for fixing upon a defendant the responsibility for

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the debt, default or miscarriage for which another person was primarily liable. . . . This statute seems to have successfully accomplished its object, till a mode was discovered of evading it, by shaping the demand, not upon a special promise, which the statute supposes, but upon a tort or wrong done to the plaintiff, by some false or fraudulent representation of the defendant, to induce him to contract with another person. The first case of this kind was that of *Pasley* v. *Freeman*, 3 T.R. 51. . . . It was to remedy the inconvenience resulting from the frequency of those actions that Lord Tenterden introduced the statute 9 Geo. IV., c. 14, s. 6.

The judges who heard this case were equally divided upon the question whether or not the representation relied upon referred to Lord Edward Thynne's personal responsibility and credit or merely to the condition and extent of his property, but they were all agreed as to the proper construction of Lord Tenterden's Act. That statute was in truth an evidence Act in the same sense that the 4th section and possibly the 17th section of the Statute of Frauds are evidence enactments. Lord Blackburn in *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, 488, is reported to have said:—

I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract.

In my opinion the object of Lord Tenterden's Act was somewhat similar, namely, to secure that in all actions for deceit, such as *Pasley* v. *Freeman*, *supra*, the false and fraudulent representation relied upon should be proved by a written document signed by the party to be charged, and in no other way. No new statute was required at the time the Act was passed to deal with innocent representations. This statute was, I think, designed to deal with false and fraudulent representations and those alone, and, being of that opinion, I think that, despite the generality of the words "any representation or assurance," I am, acting on the principle of interpretation of statutes laid down in *Stradling* v. *Morgan*, Plowd. 199, 204, bound to construe the Act so as to carry out the intention of the legislature which passed it, and to hold that it applies to representations and assurances of this latter character and to those alone. In *Lyde* v. *Barnard*, 1 M. & W. 101, Lord Abinger gives his reasons for coming to the conclusion that the word "upon" in the phrase "upon or by reason of" occurring in Lord Tenterden's Act was introduced by mistake. On the whole, therefore, I am of opinion that this appeal fails and should be dismissed with costs here and below, but if this conclusion be not

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arrived at by your Lordships' House, I think this verdict cannot be allowed to stand. Issues were left to the jury upon which there was no evidence, the case of the defendant was never properly put before them, the damages were assessed upon an entirely erroneous basis, and were possibly awarded in respect of causes of action not proved to exist.

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LORD SHAW OF DUNFERMLINE (dissenting)—(read by the Lord Chancellor):—My Lords, I have had the great privilege and advantage of perusing and reperusing the judgment by the noble and learned Lord Chancellor which he has just delivered. In the light of it and of the other judgments in the case I have anxiously considered the serious step which this House is asked to take in affirming the judgment of the Court of Appeal and in making a pronouncement on the merits of this case in contradiction to the verdict of the jury upon it. My Lords, I am humbly of opinion that the judgment of my noble and learned friend on the woolsack is correct. I agree with it and with every part of it. I may be allowed, however, to add a statement of the position of the case from my own point of view; but after the fulness and care with which the narrative of facts, the statements of procedure, and the propositions of law have been set out by the Lord Chancellor my exposition will naturally be brief. I am, indeed, induced to do this as unfortunately I cannot but fear that, if the judgment of the Court of Appeal stands, the place and value of jury trial as a recognized part of the judicial machinery in civil causes in England may have been seriously impaired, and that not by parliamentary action, but by the interposition by the judiciary into our legal proceedings of doctrines which appear to me to be novel and which I cannot, for the reasons also set forth by the Lord Chancellor, reckon to be sound. It is true that the impanelling of the jury would remain, but, standing the judgment of the Court of Appeal, the finality which in general attaches to a jury's verdict would be rendered unsure, and it would become, instead of practically conclusive in the general sense, merely an incident in a more or less protracted litigation, both before and after the jury has sat. I think that such results have been pointed to and condemned by judges of the highest eminence and notably in this House by Lord Halsbury.

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Whether to my advantage or disadvantage, I am able to look

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at the situation with regard to legal procedure from a point of view probably more detached than the English practitioner. In Scotland jury trial as a means of obtaining a verdict upon fact is also an established institution, but the procedure prior to the remit of a case to a jury is materially different from that in England. The statements of parties are articulately set forth on record, and the pleas in law proponed by each party are also articulately set forth. Before the determination is come to as to whether a jury shall try the case issues are adjusted for the trial. And it is at that stage that the exact legal bearing of the case is determined. The relevancy of the statements of either party to go to probation is adjudicated upon, and the adjustment of the issues for the trial is the latest appropriate stage when the issues of law come to be determined. If I were to illustrate the procedure from the present case, the entirety of the discussion with which your Lordships were favoured by the Bar on the subjects of what was the business of the bank under its charter, and what was the duty of the bank in regard to the matter of advising about investments, and lastly, what was the possible authority that can be delegated in view of such duty and business to one of the agents of the bank, all that would have been threshed out at the preliminary stage to which I have referred. If the action was legally excluded, as in substance it would appear to be by the judgment of some of your Lordships, by reason of the business, the duty, and the delegated authority of the bank not covering a transaction of the kind alleged, that would have been affirmed and the action would have been dismissed. But if not affirmed, the non-affirmation would depend upon this—that each of these questions was a question depending upon facts to be elicited on the line of the averments, and issues would have been adjusted for the trial of the case. Before the jury the parties would have been confined to the scope of their own averments, and the issue thus obtained on specific and definite lines would have been final in fact, unless it was unsupported by any reasonable evidence, in which case a new trial would have been granted. As to law, it would also have been final except in two cases, first, the improper admission of evidence by the judge, and, secondly, a misdirection of the jury by the judge. But in both of these cases, my Lords, *exception must be taken at the time, and in the presence of the jury, and noted.* If that be not

done—and it is one of the most anxious duties that counsel have to discharge—the verdict is a final verdict, and no court of law will entertain such exceptions afterwards. While the system in England, my Lords, is different, in my humble opinion, its essentials are the same, and at the heart of these essentials, so far as points of law are concerned, lies this proposition, that it is neither competent nor proper for courts of law, after the trial and entering up of the verdict, to entertain them. The duty of counsel, in my opinion, includes in England at one stage, namely, the trial stage, the duty which in Scotland, for obvious and satisfactory reasons, occurs at two stages, namely, both those of the relevancy and of the trial. That duty is to make clear before the judge charges the jury what are the propositions in law which are desired from the former, and what are the propositions in fact which are desired from the latter. As I read the procedure in England—and in this I am greatly fortified by the opinion of the Lord Chancellor—this has been in substance the universal practice of English law courts, and in my opinion there is every ground in reason and principle for compelling adhesion to it.

So clear, to my mind, are these things, that I am somewhat surprised that there is any authority upon them, as authority is generally confined to seriously disputed propositions. Such authorities as there are, however, confirm in the highest quarters the view just expressed. I refer to the judgment of Williams, J., in *Jones* v. *Provincial Insurance Co.*, 26 L.J. (C.P.) 272, 274. That judge, delivering the judgment of the court, referred to the course taken at the trial rendering it unnecessary to pronounce an opinion upon certain points argued, and stated broadly: "The defendants, therefore, cannot now be heard to argue any such points not raised at the trial." The Lord Chancellor has referred at some length to *Graham* v. *Huddersfield Corporation*, 12 Times L.R. 36, 37, and the judgment of Lord Esher, who said:—

> that the objection that the defendants had taken their point too late must prevail . . .; they had waived the point in court during the trial by allowing the case to proceed till verdict on the basis that the only issue was whether there had been a promise in fact to pay for this work. In his opinion it was not open to them to take the point now.

And in this the other Lords Justices concurred. The points not taken were important, namely, first, that the contract relied on was not under seal and not binding, and, secondly, that by a

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certain section of the Public Health Act no committee could enter into such a contract and bind a corporation. These things were legally vital. There is some analogy, my Lords, to that in the present case, in which, after the verdict of the jury delivered and entered up, points are raised which are also mentioned to be legally vital—as to the scope of the bank's business, duty and the like, and the competency of any bank agent to bind his employers. Yet these things were not permitted to be introduced as the subject of decision for the purpose of upsetting the verdict, prior to which they were not taken.

In *Macdougall* v. *Knight*, 14 App. Cas. 194, 199, Lord Halsbury made these observations, which I think are appropriate to the present case:—

> I think it was the duty of those who are suggesting that other questions ought to have been asked and other issues raised to have intervened at this point (that is, in the course of the trial) and to have requested Baron Huddleston definitely and distinctly to put the questions that they now insist ought to have been submitted to the jury. But nothing of the sort was done. The parties took their chance of what the jury would do, and I think nothing could be more mischievous than to allow litigants to raise new questions when, under such circumstances, the jury have decided against them. If such a course were permitted no end could possibly be found for litigation.

In *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A.C. 68, 76, the same great judge said:—

> Where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect.

And in *Seaton* v. *Burnand*, [1900] A.C. 135, 143, Lord Halsbury said:—

> The learned judge, with great care and deliberation, formulated questions and submitted them to counsel, and gave counsel time and opportunity of considering whether any other questions ought to be asked; and, after taking time for consideration, the learned counsel for the defendant stated that there was no other question which they wished the jury to be asked, nor did they wish to vary the form of the questions that were proposed to be asked. Under such circumstances, it would really be putting a premium upon the loosest possible mode of conducting business to suggest that questions could be again formulated by counsel and then submitted to another jury.

I do not further attempt to enunciate the principle thus amply fortified by authority; but I now proceed to call attention to the fact that the judge at the trial, Darling, J., seems, in my judgment, to have most properly relied upon this being the state of the law.

It would further appear to me that the counsel representing the bank also accepted that situation. To permit the bank now to go back upon that humbly appears to me to upset correct legal procedure, to be unsound in law, and to be fraught with dangerous consequences. While most unwilling to add to the survey of the facts made by the noble and learned Lord Chancellor, I may be permitted to refer to the leading particular of this case illustrative of the general principle to which I have referred. It is also fair to Darling, J., that I should do so. I allude to the manner in which the question of Galletly's authority on behalf of the bank to advise the appellant as to investments was treated. That gathers within itself or has a most important bearing upon many of the questions mooted, and some of them unfolded, in the debate in this House. Could the letter from the general manager to the local manager bear the construction put upon it? Had the general manager himself any such authority? Could the bank, in view of its charter and the scope of its business, give, or be assumed to give, any such authority? My Lords, how was this question dealt with at the trial? It was treated as an issue dependent on the particular circumstances, and was put to the jury as a question of fact. This was so done in the presence, to the knowledge, and, in my opinion, with the entire assent of counsel for the bank itself. The question put was:—

> Had Galletly authority, as manager of a branch of defendants' bank, to advise the plaintiff to invest $125,000 on mortgage to the Westholme Lumber Company?

In putting this to the jury the judge described the contentions of parties upon it. And I should say pointedly that the evidence upon the issue was all admitted without objection or exception or reservation in law. Having stated the rival views on the point, Darling, J., said, and in my opinion, looking to the conduct of the case before him, most reasonably and properly said:—

> Now, gentlemen, that is for you to decide; it is not for me to decide. All I can tell you is that there is evidence that I fee' justified in leaving a question about. If the learned counsel thought there was no evidence, he would have submitted to me that I ought not to leave the question to you. That has not been submitted, and, therefore, I leave that question to you.

What more could be demanded of a judge in such circumstances I am quite at a loss to see. The course in this particular was, in my opinion, in accordance with practice, precedent, and good sense.

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But, my Lords, one further occasion arose, before the trial judge parted with the case, upon which any legal issues then competent to the bank could have been, according to English practice, submitted, namely, on the motion to enter up the verdict. The course taken on that occasion was equally significant of the bank's legal attitude. Two submissions, and two alone, were put forward by Sir John Simon. These were: (1) That (upon a matter to which I shall presently allude) the verdict for £25,000 was incompetent as having attached to it a condition as to handing over certain securities to the bank, and that such a conditional verdict could not be a ground of judgment against the respondents. The second point taken was that under Lord Tenterden's Act. I do not dwell upon the latter, concurring as I do with all your Lordships that the judgment of the Court of Appeal on that topic is erroneous in law and that the point is bad. No other points were taken.

It therefore appears to me, my Lords, demonstrated that this case, upon its facts, falls within the principles to which I have already referred, and that to allow other points to be taken, either in the Court of Appeal or in this House, would be violation of those principles. In these circumstances the verdict would stand in its entirety but for the point as to the conditional form of the verdict of damages.

One can see how it arose. Counsel for the appellant treated the securities in the hands of his client as substantially worthless and offered to hand them back. The judge did not explain the impossibility of a conditional instead of an appropriate and final verdict to the jury, and unfortunately when the jury returned to court he was unable to be in his place to do what possibly might have saved much anxiety to all concerned, namely, to ask the jury to retire and to put their verdict in an unobjectionable form. I agree, accordingly, that the case, failing arrangement of parties, must be retried on the question of the proper assessment of damages.

Further, my Lords, in no view could I have agreed with the course taken by the Court of Appeal that this was a case to which O. 58, r. 4, truly applies. The case, in my opinion, in any event, would have had to be retried upon such issues as the court could have indicated to be proper. But I cannot view this case as one in which either the Court of Appeal or this House is able to affirm

that it has before it all the material necessary and possibly available in order to enable it to determine the cause. Unless that be so, I am of opinion that the rule referred to should not be put into operation.

My Lords, I desire to add two observations. The existence of the rule and the very fact that a court can, in certain circumstances, exercise such a power and supersede a new trial by its own judgment give force to the submission that in all respects, whether as regards admission of evidence or the tabling of any submissions upon points of law at the trial, that trial shall be conducted in the strictest compliance with those canons of propriety and practice to which I have alluded. To allow these to be neglected at the trial and to allow new points afterwards to be brought forward, and thereupon, upon that new matter, either in whole or in part, to give a judgment in a sense entirely contrary to the jury's verdict, this appears to me to be in a special sense contrary to those principles and accompanied by those dangers to which I have alluded. For it appears to me to be manifest that this is, in a cause appropriate for trial by judge and jury, to make a decision on the one hand upon issues of fact never laid before the jury, and on the other hand upon issues of law never laid before the judge. I cannot see my way to assent to an argument, rather hinted at than actually submitted, that if appellate courts differ from the results properly arrived at by the appropriate tribunal upon the law and facts before it it would be wrong to give effect to those results. On the contrary, in my view it would be wrong to substitute one's own opinion and to proceed to exercise a function and a duty cast in other quarters. That would be a usurpation.

Before I close I desire to say that I think too little, very much too little, account was taken in the court below of the evidence of the appellant. He was carefully and searchingly examined and cross-examined, and he was believed. I also think that too little account was taken of the actual position of the bank at the time when these representations were made by its local agent. They were large creditors of a customer, their indebtedness and insecurity had reached such a point that they instructed their sanguine representative to stop every penny of further advance, and their desire for cover was the subject of anxious communication between the head and the local office. In these circumstances I lay no blame

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upon their counsel for not taking the point at the trial that the bank's authority did not extend to what was done. It appears to me that the bank adopted the creditable as well as the judicious course in facing the issue of fact whether careless representations were made. In these circumstances I can hardly agree that it lies with courts of law to reach a result by means which the bank itself did not seek. This also, my Lords, confirms the general conclusion upon procedure with which I have ventured to trouble the House.

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LORD PARKER OF WADDINGTON (Read by Lord Wrenbury):—My Lords, in the action in which this appeal arises the appellant sought to make the respondent bank liable in damages for the negligence of Galletly, one of their local managers, in advising the appellant to invest £25,000 on a mortgage of land in Canada. It is, I think, obvious that if it be part of the bank's business to advise their customers with regard to Canadian investments the bank would be liable for any negligence of their branch manager in transacting this class of business on the bank's behalf. *Primâ facie* the person held out by the bank as the manager of one of their branches would have authority to transact all the bank's business in connection with that branch, and no limitation of such authority as between him and the bank would affect a person dealing with the bank without notice of the limitation. The statement of claim shews a correct appreciation of this position. It, in effect, alleges (par. 1) that it is part of the bank's business to advise their customers as to Canadian investments; (par. 2) that the appellant was a customer of the bank, and that the bank, through their manager, advised him to make the investment in question; (par. 3) that he made the investment relying on such advice; (par. 4) that the advice was negligently given; and par. (6) that by reason of such negligence the appellant lost his money. On this statement of claim the appellant had to prove *in limine* that it was part of the business of the bank to advise their customers with regard to Canadian investments. If he established this, he need not trouble further as to the authority of the manager. The scope of such authority would be coincident with the scope of the bank's business. If such business included advice as to investments, the manager would have a general authority to advise on investments on the bank's behalf.

My Lords, in the course of the trial counsel for the appellant

admitted that the manager had no general authority to advise—in other words, that it was not within the scope of the bank's business to advise on investments at large. I take this to include Canadian investments; otherwise there would be no point in the admission. It does not appear why the admission was made. It may have been because the powers of the bank were by statute confined to carrying on a banking business; and it would be difficult to establish that advising on investments was part of the business of banking. However this may be, the contention ultimately put forward on the appellant's behalf was that under the special circumstances of this particular case the manager had authority to advise the particular investment which he did in fact advise. In my opinion, as soon as counsel had made the admission and formulated the contention above referred to he ought not to have been allowed to proceed further without amending the statement of claim. I doubt whether he could have amended it without making it demurrable, for he would have had to state the special circumstances on which he relied, and, as will appear presently, these circumstances all point to the impossibility of the manager having had the authority suggested. Moreover, the contention ultimately put forward on the appellant's behalf is not free from ambiguity. I think it must be taken to mean that the special circumstances referred to made it part of the bank's business to advise with regard to the particular investment in question, and, therefore, that the general authority of the manager as such extended to giving this advice. But it may have been intended to suggest that the special circumstances referred to invested the manager with a special authority beyond the general authority incident to his position as manager. At any rate, it is only on this latter footing that so much importance can have been attached to the letter of Sir Edward Clouston, the general manager of the bank, dated July 6, 1911. This letter has little or no bearing upon the question whether the special circumstances of the case made it part of the bank's business to advise the investment in question, but, construed as the appellant's counsel desired, it might be evidence of a special authority conferred by the bank through their general manager upon their branch managers. Unfortunately the bank, being a corporate body governed by statute and not a natural person, were incapable of conferring, through their general manager or otherwise, authority to do any-

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thing outside the scope of their authorized business, and, inasmuch as the branch manager had already a general authority to transact on behalf of the bank all the bank's business in connection with his branch, no further authority was necessary. The real question must, therefore, be whether the special circumstances of the case made it part of the bank's business to advise on this particular investment. If they did, the manager's general authority was amply sufficient to bind the bank. If they did not, no special authority could, even if proved, be of any avail.

My Lords, the judge at the trial, without objection by the respondent bank, left it to the jury to say whether Galletly, as manager of a branch of the defendant bank, had authority to advise the plaintiff to lend his money on the mortgage in question. I take this question to mean that the jury were to say, not whether Galletly had any special authority beyond his authority as branch manager, but whether his general authority as branch manager extended to advising the appellant to make this particular investment. In other words, it asks whether the special circumstances of the case made it part of the bank's business to give the advice which Galletly gave on their behalf. The jury answered the question in the affirmative. On appeal, by way of motion for a new trial or other relief, the court held that there was no evidence upon which the jury, acting as reasonable men, could come to the conclusion that Galletly had the authority referred to in the question put to them, and, acting upon the powers conferred on them by the Rules of the Supreme Court, O. 58, directed judgment to be entered for the respondent bank.

My Lords, I am clearly of opinion that the Court of Appeal were right in holding as they did. The special circumstances relied on in favour of Galletly's having had authority to advise the appellant are really only two. First, there is the letter to which I have already referred. Even if construed as the appellant desires, I cannot see that it has any bearing on the real issue. But such a construction is to my mind impossible. The letter, in effect, asks Galletly (among others) to befriend a person who is travelling on pleasure by giving him assistance and advice. It does not contemplate Galletly contracting with the traveller any such relationship as would give rise to legal liabilities on the part either of the writer or the bank. Secondly, there is the circumstance, amply

proved both by the documents and oral evidence, that the bank were deeply interested in obtaining, and had, through Galletly, already endeavoured to obtain, financial assistance for the company to whom the appellant advanced his money. This circumstance is no doubt of the utmost importance, but it seems to me to prove almost conclusively that the question left to the jury ought to have been answered in the negative. No one is in a position to give advice where his interest conflicts with his duty, and facts which prove that the bank were not in a position to advise at all are certainly not evidence that it was part of the bank's business to give advice. If the question of authority was to be left to the jury, the jury should have been warned that these facts were evidence against, and not in favour of, the appellant's contention. It may well be that the interest which the bank had in the company's financial stability made it part of the bank's business to assist the company in obtaining a loan, but this same interest made it improper for the bank to advise any proposed lender.

My Lords, the above considerations would be sufficient to dispose of the main question which arises on this appeal but for a preliminary point taken and pressed by counsel for the appellant. It was contended that, inasmuch as the matter was left to the jury without objection on behalf of the respondent bank, it was not open to the Court of Appeal to inquire whether there was evidence which could justify the jury, as reasonable men, in finding as they did. This contention does not appear to have been raised in the Court of Appeal. The fact that the respondent bank had not objected to the matter being left to the jury was no doubt mentioned, but rather as shewing that there must have been evidence for the jury to consider than as excluding the jurisdiction of the court. It would perhaps be enough to say that the point, not having been taken in the Court of Appeal, must be treated as waived and is not open before your Lordships' House. But in my opinion the point, if taken in the Court of Appeal, must have been overruled. There are no doubt cases in which the Court of Appeal have refused to allow points of law not taken in the court of first instance to be raised on appeal. But these cases do not go to jurisdiction, but to discretion. It may be that if a point of law had been taken below further evidence would have been adduced, or a further or different question left to the jury. In such cases it would

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be manifestly unfair and unjust to allow the point to be raised for the first time in the Court of Appeal. In the present case there is no such element of unfairness or injustice. It is not suggested that had the point been taken below any further evidence could have been adduced, or any further or different question left to the jury. Why, then, should not the Court of Appeal have felt itself at liberty to do complete justice between the parties on the evidence before them? I can see no reason at all. It was suggested that, having regard to the nature of the point of law in this particular case, the old *nisi prius* procedure was of some materiality and shewed that the point, if taken at all, must be taken at the trial. I cannot agree. The difference between there being no evidence to go to the jury and the jury's verdict being against the weight of evidence was no doubt of more importance then than it is now. It may be that the former point had to be taken by asking a direction from the trial judge, but clearly the latter point could not be taken at the trial. It could only be raised on motion for a new trial. It must, therefore, have always been open in the court which had jurisdiction to grant a new trial. That court is now the Court of Appeal. But the Court of Appeal have certain further powers under the Rules of the Supreme Court, O. 58. Instead of granting a new trial, they can, in a proper case, direct judgment to be entered for the defendant. They ought, in my opinion, to exercise this power whenever such a course will, in their opinion, do complete justice between the parties—for example, when they have all the available evidence before them, and there is no chance of a new trial bringing to light other material facts. It appears to me that this is precisely that case. See *Millar* v. *Toulmin*, 17 Q.B.D. 603.

My Lords, though, strictly speaking, it is unnecessary, I agree that it is desirable to express an opinion on the proper construction of s. 6 of Lord Tenterden's Act (9 Geo. IV, c. 14). The cases which have been cited on this point are numerous, and I shall not deal with them in detail. We know Lord Tenterden's object in asking the legislature to pass the Act which bears his name. The advantages intended to be secured by s. 4 of the Statute of Frauds had, in his opinion, to some extent been destroyed by the readiness of juries not only to find that alleged oral representations as to the credit of another had in fact been made, but that such representa-

tions had been made fraudulently so as to give rise to an action of deceit. Now I agree that Lord Tenterden's object would be irrelevant if the words of the 6th section of the Act were clear and unambiguous, but this is far from being the case. The section provides that "no action shall be brought whereby to charge any person upon or by reason of any representation," as to the credit, etc., of any other person, unless such representation be in writing signed by the person to be charged therewith. In one sense, no doubt, it may be said that an action is brought to charge a person upon or by reason of a representation whenever the representation is a necessary link in the chain of evidence which establishes the cause of action. Thus an action for breach of warranty of the soundness of a horse may be said to be brought upon or by reason of a representation that the horse was sound, though it would be more natural to say that the action was brought on the warranty. On the other hand, it must be remembered that the only representation which itself gives rise to a cause of action on the part of a person injured thereby is a fraudulent representation. An innocent representation, except possibly as raising an estoppel or implication of contract, has in itself no legal effect at all. It being possible, therefore, to give the words of the section a wider or a narrower meaning, it is quite in accordance with sound principles of construction to examine into the abuses which the Act was intended to remedy, and such examination is all in favour of the narrower meaning. Moreover, s. 6 of the Act, if construed as the appellant contends it ought to be construed, might involve very serious consequences. It is in the ordinary course of business constantly part of the duty of a solicitor to examine into and advise upon the pecuniary position of a person with whom his client is about to deal. It would be a serious matter if the solicitor could escape liability for negligence in the performance of this duty by giving his advice orally or under the signature of his managing clerk rather than under his own signature. Indeed, the fact that the writing required by Lord Tenterden's Act cannot be signed by an agent is an additional argument in favour of the narrower interpretation of the words of the section. Lastly, until the present case no attempt appears to have been made to construe the section to include actions for negligence. It is true that in *Haslock* v. *Fergusson*, 7 Ad. & E. 86, and in *Swann* v. *Phillips*,

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8 Ad. & E. 457 [The only authority for regarding the cause of action as *assumpsit* appears to be the use of that word in Adolphus & Ellis's head-note. Pleadings, argument, and judgments all treat the action as being on the case for deceit.—F.P.]; the section was held applicable to actions of *assumpsit*; but if these cases be examined it will be found, (1) that the representation sought to be proved was fraudulent, and (2) that the plaintiff might have brought an action for fraud though he elected to proceed in *assumpsit*. Whether rightly or wrongly decided, these cases have no bearing on the present question, for it is common ground that Galletly acted honestly throughout. In my opinion, Lord Tenterden's Act does not apply to an action for breach of a duty to take care. I may add that the word "person" as used in the 6th section in my opinion includes a corporation.

My Lords, there is one further matter which requires consideration. It appears that the plaintiff having made up his mind to advance £25,000 on the security of the second mortgage in question transmitted the money to the bank with instructions to complete the transaction on his behalf. He seeks in the alternative to recover this £25,000 from the bank as money received to his use on the ground that the bank did not carry out his instructions, but (1) applied part of the money in paying off a mortgage on the property given by the company to Simon Leiser & Co., and (2) advanced the remainder of the money to the company on the security not of a second mortgage but of a fourth or fifth mortgage. With regard to (2) I need say nothing, for it is quite clear that the security which the plaintiff obtained was a second mortgage and not a fourth or fifth mortgage. With regard to (1), part of the plaintiff's money no doubt went in paying off the Simon Leiser mortgage. This mortgage had to be discharged in order that the plaintiff might get a second mortgage. It would be the bank's duty to see that it was discharged, and *primâ facie* there was no reason why it should not in ordinary course be discharged, out of the moneys to be advanced by the plaintiff. The plaintiff, however, contends that this was contrary to his intention, as the bank well knew. His advance was to enable the company to complete their water supply contract, and in so far as his money was applied in any other way his intention was defeated. I think there are two answers to this contention. First, according to the

memorandum made by the plaintiff himself on September 11, 1912, and left with the bank as their instructions, the company is to use the loan solely for the purposes of the contract; but I do not read this as precluding the use of the money in paying expenses already incurred in carrying out the contract. In order to carry out a contract it may be as imperative to provide for past expenses as it is for future outlay. This was the view taken by the solicitor employed on the plaintiff's behalf in British Columbia and embodied in the mortgage of September 13, 1912. It is quite certain that the amount due on the Simon Leiser mortgage represented moneys expended in the performance of the contract. Secondly, even if this be not the true view, the plaintiff, with full knowledge that part of his advance had been applied by the bank in paying off the Simon Leiser mortgage and that the value of his own security had been increased by the amount of such payment, accepted such security and thereby ratified the payment made on his behalf, even if such payment had been originally unauthorized. The jury have found that the bank acted negligently and in breach of duty in allowing part of the plaintiff's money to be used in paying off the Simon Leiser mortgage. They were not asked, and did not find, anything as to ratification. The facts were, however, beyond dispute, and the finding could not, under the circumstances, justify any relief under this head.

My Lords, a number of other points were raised and argued during the many days which this appeal occupied before your Lordships' House. It is, in my opinion, unnecessary to deal with them. I should like, however, to say this. The trial judge is said to have misdirected—I think in several respects he did misdirect—the jury. But I cannot think he received the assistance which might have been expected in so complicated a case. For example, the conflict of interest and duty involved in the bank advising the plaintiff in this particular matter appears to have been overlooked; and, again, with regard to the value of the plaintiff's security, the effect of the doctrine of marshalling was never even suggested. If the judge's attention had been called, however shortly, to the various points of law and fact discussed at such length before your Lordships' House, I cannot help thinking that the jury would have been more fully directed and that the parties would have been

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spared a prolonged litigation. Nor do I blame counsel. The fault lies in the system which permits a plaintiff to set up at the trial, without amending his pleadings, a case other than that put forward in the statement of claim. When this is done the new case cannot possibly be formulated with the precision necessary to elucidate either the principles of law which may be applicable or the issues of fact which may be involved. Both the counsel and the judge labour under great disadvantages, and a miscarriage of justice is all too likely to occur. The system of pleading introduced by the Judicature Acts was, no doubt, intended as a compromise between the rigid system which prevailed in the common law courts and the loose prolixity of the bill in Chancery. The bill stated all the facts at great length, and prayed such relief as the petitioner might be entitled to in the premises. The chancellor or vice-chancellor had to find out for himself what might be the equities between the parties. For this he could take what time he liked, and often took a very long time. The present practice appears to me to have most of the vices of the old procedure in Chancery. There are pleadings, it is true, but the pleadings are, for all practical purposes, disregarded. The plaintiff is allowed to prove what he likes and set up any case he can. The judge has no longer to deal with a case formulated on the pleadings, but to make up his mind whether on the facts proved there is any and what case at all. This disadvantage is accentuated when there is a jury, for the judge cannot take time to consider the matter, and counsel have not considered it as they would have done had they been compelled to embody their case in a statement of claim. Under these circumstances there is little wonder that a judge should misdirect a jury, and that the real questions of law or fact should, as in this case, emerge only after prolonged discussion on appeal. Had the plaintiff, after admitting that it was not within the scope of the bank's business to advise on Canadian investments at large, been compelled to amend his statement of claim by stating the special circumstances which, as he alleged, brought it within the scope of the bank's business to advise the plaintiff on this particular investment, I doubt whether the action would have proceeded further, and I am clearly of opinion that the question of authority would not have been left to the jury. The impossibility of the plaintiff's case would have been manifest on the record.

I agree that the appeal must be dismissed with costs.

LORD WRENBURY:—My Lords, this is not an action for fraud. it is an action for negligence and breach of duty. The defendants are a corporation. The alleged negligence and breach of duty are those of an agent. These considerations limit to a large extent the field which must be covered to arrive at a decision of the case. The following points arise in the following logical sequence: (1) Lord Tenterden's Act; (2) authority; (3) duty; (4) negligence; (5) measure of damages. If No. 1 be decided in favour of the respondents, the bank—if, that is to say, it is held that, the representation or advice not being in writing signed, the action is not maintainable—it is unnecessary to go further. If, however, No. 1 be decided in favour of the appellant, then No. 2 arises for decision. If upon No. 2 it is held that Galletly had no authority, again it is unnecessary to go further, and so on throughout the list. Alternatively No. 2 might be taken first, and if upon that point it were held that Galletly had no authority, it would be unnecessary to determine No. 1. But as the point upon Lord Tenterden's Act has been elaborately argued, I shall express my opinion upon it, although, having regard to my opinion upon No. 2, it is not really necessary to do so.

I take, then, first the question of Lord Tenterden's Act, and proceed to inquire whether s. 6 of that Act applies in an action brought, not for fraud, but for negligence and breach of duty in a matter in which, for the purpose of the inquiry, I assume that a representation was made or given concerning the character, conduct, credit, ability, trade, or dealings of another person, to the intent, etc., in the words of the section. The Statute of Frauds (29 Car. II. c. 3) having required that in any case covered by s. 4 of that Act an action should not be brought unless the agreement upon which it was brought, or some memorandum thereof, should be in writing signed by the party to be charged or some person by him lawfully authorized, *Pasley* v. *Freeman*, 3 T.R. 51, upheld the device which had been discovered for evading that Act by founding the action, not upon a special promise which the statute supposes, but upon tort or wrong done to the plaintiff by a fraudulent representation of the defendant. *Pasley* v. *Freeman* is the authority upon the common law action of deceit. In this state of things the statute of 9 Geo. IV. c. 14 (commonly called Lord Tenterden's Act), was passed. In *Tatton* v. *Wade*, 18 C.B. 371, 381, Pollock, C.B.,

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said that Lord Tenterden had told him that his motive in procuring the passing of the Act was that he was struck with the fact that, numerous as were actions for false representation as to character and credit of third persons, the plaintiff almost invariably succeeded, which induced him to think that there was some latent injustice which required a remedy. In *Lyde* v. *Barnard*, 1 M. & W. 101, 107, 117, Alderson, B., and Lord Abinger, C.B., stated in somewhat similar terms what in their view was the object of the statute.

Douglas Hogg has most conveniently brought to the attention of the House, in order of date, the decisions, so far as he can trace them, upon Lord Tenterden's Act. For convenience of reference hereafter, and for the purpose of my observations upon them, I state them here in order of date. They are as follows: (1) *Lyde* v. *Barnard* (1836), 1 M. & W. 101; (2) *Haslock* v. *Fergusson* (1837), 7 Ad. & E. 86; (3) *Swann* v. *Phillips* (1838), 8 Ad. & E. 457; (4) *Devaux* v. *Steinkeller* (1839), 6 Bing. N.C. 84; (5) *Craig* v. *Watson* (1845), 8 Beav. 427; (6) *Tatton* v. *Wade* (1856), 18 C.B. 371; (7) *Williams* v. *Mason* (1873), 28 L.T. 232; (8) *Swift* v. *Jewsbury* (1874), L.R. 9 Q.B. 301; (9) *Hosegood* v. *Bull* (1877), 36 L.T. 617; (10) *Pearson* v. *Seligman* (1883), 48 L.T. 842; (11) *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q.B.D. 512; (12) *Hirst* v. *West Riding Union Banking Co.* (1901), [1901] 2 K.B. 560. All of them were cases of fraud. Not all were actions of deceit upon the case. No. 2, *Haslock* v. *Fergusson*, *supra*, was *assumpsit* for money had and received. *Clydesdale Bank* v. *Paton* (1896), [1896] A.C. 381, was upon the Mercantile Law Amendment Act, Scotland, 1856, s. 6, which was in terms similar to those of Lord Tenterden's Act, but with the modification that the writing may be signed "by some person duly authorized by him," words which are not found in Lord Tenterden's Act. In No. 8, *Swift* v. *Jewsbury*, L.R. 9 Q.B. 301, 311, 316, Coleridge, C.J., states that the subject of s. 6 of Lord Tenterden's Act is the charging of a person for an act of fraud, and Bramwell, B., that:—

> the effect of the statute is this, that a man should not be liable for a fraudulent representation as to another person's means unless he puts it down in writing, and acknowledges his responsibility for it by his own signature.

My Lords, these being the authorities, the question to be answered is: does s. 6 of Lord Tenterden's Act apply to an innocent

misrepresentation? In my opinion it does not. The words of the section are: "to charge any person upon or by reason of any representation," etc. The words "charge any person upon any representation" point, I think, plainly to an action for deceit. To maintain such an action there must be fraud, and there must be damage. If these two are satisfied, nothing more is required. Fraud is the cause of action. The charge is made upon the tort committed by the fraudulent misrepresentation. The same is not true of an innocent representation. An innocent representation *per se* constitutes no cause of action. If there existed a duty, an action lies for negligence and breach of duty, and in that action the fact that there was misrepresentation, although innocent, is material. But an action cannot be maintained upon an innocent representation *simpliciter*. It is maintained upon the breach of duty. The innocent misrepresentation is not the cause of action, but evidence of the negligence which is the cause of action. The words "charge upon any representation" refer, I think, only to a case in which fraud is alleged. There are, however, the words "by reason of." These words do not, I think, bring within the provisions of the section a class of case not covered by the word "upon." They cover only, I think, similar cases, *e.g.*, a case in which the defendant did not make the representation, but it was so made as that he was liable in respect of it, *e.g.*, that it was made by a third party who may have been his agent. Another reason which leads me to the same conclusion is that Lord Tenterden's Act, which certainly was made in view of the Statute of Frauds, omits the words "or some other person thereunto by him lawfully authorized." Under Lord Tenterden's Act the writing must be signed "by the party to be charged therewith." The signature of an agent will not suffice. The reason, I take it, is that a man shall not be charged with fraud unless his own signature is attached to the document which evidences the fraud. My Lords, for these reasons I hold that in this action, which is not an action for fraud, but an action for negligence and breach of duty, the appellant is right in his contention that Lord Tenterden's Act does not apply. I am unable to agree upon this point with the judgments in the Court of Appeal. I may add that if I had been of opinion that in other respects the Act did apply, I should further have been of opinion that the defendants, who are a corporation, are a "person"

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within that word in the section. The word "person" is three times used. If it does not include a corporation in the one place of user, it will not include it in another. If "person" does not include a corporation, the result would be that a representation as to the credit of a corporation would not be within the section. This cannot be the meaning. The decision in *Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K.B. 560, upon this point was, I think, right.

Being of this opinion as to Lord Tenterden's Act, it becomes necessary to go on to consider the next point, and that is whether Galletly had authority. The appellant has argued that, inasmuch as the point of law that there was no evidence of authority was not taken at the trial, the respondents could not raise in a Court of Appeal a question of law not raised in the court of first instance. It would require a great deal to persuade me that a Court of Appeal is bound to adjudicate wrongly because it had not occurred to either judge or counsel to raise a point of law in the court below. The way the appellant seeks to put it is that the Court of Appeal is not in such case asked to decide wrongly, but only to say that the point is one which it is not competent to them to decide at all because it was not argued below. The result, however, is the same. The result of the contention, if it be correct, is that the Court of Appeal is bound to make an erroneous order because a point of law has been overlooked below. It may well be that under the circumstances the Court of Appeal could not justly allow the point of law to be raised. For instance, it may be that if the point had been raised in the court of first instance the party whose interest it was to dispute it would or could have called evidence which would affect the result. If so, the Court of Appeal would no doubt say that it would not be fair to allow it to be raised. But this is a totally different thing from saying that it cannot be raised.

However, in the present case, what has happened is this: The point of law is whether there was any evidence to go to the jury on the question of authority. The judge was not asked to rule that there was no evidence. The appellant says it cannot be raised now. In the Court of Appeal, however, that point of law was raised and argued and was decided by the court. In other words, there was waiver of the right (if it existed) to exclude it from decision. I am not, however, content to stop there. I have read and agree with

the judgment of my noble and learned friend Lord Atkinson on this point. I am of opinion that the question was open in the Court of Appeal and is open in this House.

The point, then, is this. To the question "Had Galletly authority as a manager of a branch of defendant bank to advise the plaintiff, etc.," the jury have answered "yes." The respondents say there was no evidence to support that finding. The Court of Appeal have held that there was no evidence. In my opinion, that is right.

The materials, quite shortly stated, consist of a letter of July 6, 1911, and the oral evidence. In my judgment the letter is not capable of a construction which would attribute to it that the general manager was giving to the local manager authority to give assistance or advice in matters of business as distinguished from matters relevant to the wants of a gentleman who was in Canada on pleasure. Being of this opinion, it is unnecessary to say whether, if the general manager had by the letter given authority to give assistance or advice in such a matter as advising upon investments, it would have been within his own authority either himself to bind the bank in such a matter or to give a like authority to a local manager. It is obvious that that is a question which lies at the root of the whole matter, but it seems that that general question was not raised at the trial, and, if it had been raised, it would, of course, have been properly the subject of evidence. I may add, however, that the case seems to me to have proceeded throughout upon the footing that advising upon investments was not in such manner part of the business of bankers as that it would fall without more within the scope of the authority of a manager of the business. Throughout the argument I have been unable to see that the following dilemma was ever recognized or met at the trial. Either advising upon investments was within the business of bankers, or it was not. If it was, then not the head manager only but the local manager within his district would also hold authority to do that business so as to bind his principals. If it was not, then the head manager could not do it, neither could he authorize the local manager to do it. The question whether it was within the scope of the business, therefore, lay at the root of the matter. But assuming (without at all suggesting that it is the fact) that the general manager could have given such authority, the letter in

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my opinion, upon its true construction, did not purport to give it. As regards the oral evidence the matter stands as follows: Gordon Hewart, who appeared for the plaintiff, disclaimed a general authority in Galletly to advise at large about investments. He had not cross-examined, he said, for the purpose of suggesting that there were any general instructions to the branch managers to advise about investments or that it was part of their normal duty to advise about investments in general. But, said he, he was putting it to the witness that if in the negotiations dealing with the water company, in which the bank had an interest, the local manager recommends somebody to put his money in, he is doing that in the course of his employment as manager. The proposition is to my mind impossible. The question here is whether from a particular state of facts there is to be implied an authority which was not given expressly. The fact from which the implication is sought to be raised is that the transaction was one in which the bank itself had an interest. The contention, therefore, is that in a case in which the duty and interest of the bank were in conflict there is a presumption that the agent of the bank had authority to advise because the bank itself was interested in a successful issue of the advice. The presumption, of course, is exactly the other way. The jury ought to have been told that the evidence that the bank was itself interested in the matter was evidence against, and not in favour of, an implied authority. At any rate, that is the view which I take of this evidence. There remains only the evidence of Sir F. Williams Taylor. He says that in recommending investments the manager would be exceeding his authority. My Lords, in this state of things, I am of opinion that there was no evidence of authority, and that the Court of Appeal were right in holding that judgment ought to be entered for the defendants.

Under these circumstances no further question arises for decision. The subsequent heads which I detailed, namely, (3) duty, (4) negligence, and (5) damages, all fall to the ground, because the defendants never became bound by anything which Galletly did in this matter. I may add, however, that in no case could the judgment, in my opinion, have been allowed to stand. The verdict "£25,000 and the securities to be returned to the bank" was an impossible verdict. And, if it were not, the judg-

ment for recovery of £25,000 dropping altogether anything about the return of the securities was a judgment not according to the verdict. There was misdirection in telling the jury that the evidence that the bank was itself interested in the matter was evidence in support of the issue of authority, whereas the direction should have been that it was evidence against it. But it is unnecessary to go further.

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My Lords, in my judgment the order made by the Court of Appeal was right: this appeal fails and must be dismissed with costs. *Appeal dismissed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Anglin and Brodeur, JJ. March 25, 1918.

COURTS (§ III—195)—JUDGMENT OF LOCAL GOVERNMENT BOARD (SASK.)—APPEAL—JURISDICTION OF SUPREME COURT OF CANADA TO HEAR.

The Supreme Court of Canada has jurisdiction under s. 41 of the Supreme Court Act to hear an appeal from a judgment of the Local Government Board of Saskatchewan, sitting in appeal from the Court of Revision, in respect of assessments for taxation purposes.

[*Pearce* v. *Calgary* (1915), 54 Can. S.C.R. 1, 32 O.L.R. 790, 23 D.L.R. 296, followed.]

Statement.

APPEAL from the decision of the Local Government Board of the Province of Saskatchewan confirming the decision of the Court of Revision, in respect of assessment, for taxation purposes, of subdivided lots of land belonging to the appellant. Reversed.

F. H. Chrysler, K.C., for appellant; *Harold Fisher*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I concur in the disposition of this appeal made by Anglin, J.

I have, however, much reluctance in allowing the appeal because, firstly, I rather doubt our jurisdiction. *Montreal Street R. Co.* v. *City of Montreal* (1909), 41 Can. S.C.R. 427; and, secondly, because the local authorities ought to be more competent to fix the value of the properties in question than I can assume to be.

Idington, J.

IDINGTON, J.:—I think this appeal should be allowed and the assessment of the lands in question put at $100 an acre, or the equivalent thereof, for the lots which are said to be a tenth of an acre each.

The parties, it is said, agreed that the evidence taken in another

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appeal, by the Hudson's Bay Co., should be read along with that taken in this. The only evidence directly taken in this case was that given by Mr. Reith, and he values the land in question at $75 to $100 per acre. The use of the evidence in the *Hudson's Bay* case being agreed to, suggests, as well as did the location on the map in evidence, that the land in each case was practically of about the same value. But it seemed to be as to either that as subdivisions into town lots they are for the present time worthless.

In regard to the other lands the assessor was examined and gave the following evidence:—

Q. How did you arrive at the assessment of $350 per acre? A. We know of acreage being sold much in excess of $350.

Q. Then your witness stated it is valueless. Do you agree with that? A. I do, to a certain extent.

Q. You do not think it could be sold at the present time? A. No.

Q. Could you trade it for anything? A. I do not know.

Q. You know nothing you could trade it for? A. I do not know.

Q. The nuisance ground occupies 40 acres? A. Yes.

It is not difficult to understand from that evidence of the assessor, in regard to land which other evidence in the same appeal shewed was not good for much else than for subdivision, although not subdivided, that in making the assessment in question he had ignored the statute which ought to have bound him. I infer that if subdivided it would probably be more valuable in subdivisions than that in question in this case. When evidence was given, in regard to either property, of values some years ago, we cannot shut out from our minds the common knowledge that such values, founded upon delusions that prevailed some years ago, exist no longer.

The statute imperatively requires that land shall be assessed at its fair actual value and buildings and improvements thereon at not more than 60% of their actual value. That statutory obligation clearly was not observed by the assessor, nor has it been observed by the Court of Revision or the Local Government Board.

Indeed, it was not argued that the evidence would warrant the finding. It was argued, however, that inasmuch as under s. 415 (11) of the city's Act, it was provided as follows:—

The board may, of its own motion, revise the assessment of the city generally, or of any part thereof, or of any individual properties in respect of

which no notice of appeal has been given, and for such purpose it may set a day or days for the hearing and adjourn the same from time to time, and may cause such notices to be given and such parties to be served as may be deemed expedient.

that it was not competent for us to interfere and that the judgment of the board must be accepted as infallible notwithstanding the evidence. I do not so read the statute. That section certainly gives the board unusual powers, but it was not sitting in pursuance of the sub-section just quoted, which relates to causes in which no notice of appeal has been given and requires it to give notice of the sitting of such court, and the parties concerned to be served. That is not the proceeding that is in question here. All that is in question here is a judgment of that board sitting in appeal from the Court of Revision.

It is quite competent for the legislature, if it see fit, to treat such a board, when discharging other duties than its appellate ones, as infallible, as section 11 seems to contemplate; according to the argument presented.

The legislature, however, has not seen fit to attach that weight of infallibility to the board in question or attach any importance whatever to an inspection or judgment based upon an inspection of the premises.

The powers given for the board to revise of its own motion cannot be made to imply more than giving it jurisdiction to initiate a revision of its own.

Reason and common sense suggest that when it is required to give notice to those concerned of its intention to proceed to such a revision, that it must hold a sitting and hear evidence just as any other tribunal. That it has not done in any such capacity as indicated by the sub-section.

All it did pretend to do was to hear the appeal from the Court of Revision upon which there is only the one witness's evidence which bound, or should have bound, the board appealed from, as it binds us.

This is the fourth appeal of this kind of property once valuable in booming times, now greatly depreciated, and in each instance heretofore the value placed by the witness has been taken for our guide. I see no reason for departing from the mode of disposing of an appeal which has been used heretofore.

The respondent should bear the costs of this appeal.

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ANGLIN, J.:—Our jurisdiction to entertain this appeal under s. 41 of the Supreme Court Act is unquestionable. Our duty, if the evidence satisfies us that the assessment appealed against exceeds the "fair actual value" or the "true value" of the property to a "substantial" extent (stats. of Sask., 1915, c. 16, s. 387), is to allow the appeal and to reduce the assessment to such "fair actual value" as disclosed by the evidence. *Pearce* v. *Calgary* (1915), 32 D.L.R. 790, 54 Can. S.C.R. 1.

We have not the advantage of any statement of the grounds on, or the reasons for, which the Local Government Board affirmed the assessment of the appellants' Rosemount property. We are informed, only by the certificate of the city clerk, that "the members of the board made a personal inspection of the property and also made personal inspection of adjoining properties and personal inspection of various other properties throughout the city of Swift Current and compared the assessment upon such properties with the assessment in question."

We can merely surmise to what extent the conclusion reached was influenced by these inspections and comparisons.

The right of the board sitting as an appellate tribunal, in the absence of statutory provision therefor, to take a view has been challenged. It is at least questionable. There is nothing to indicate that the special jurisdiction conferred by s. 415 (11), of the City Act (stats. of Sask. 1915, c. 16) was exercised by the board. In the case of "individual properties" that jurisdiction appears to be confined to those "in respect of which no notice of appeal has been given."

But, making every possible allowance for the effect of the board's inspection of the property (assuming it to have been rightly made) and for the facts that the weight to be attached to the evidence in regard to the Hudson's Bay Co's property (introduced by consent) is materially lessened by the circumstance that the property now under consideration is in immediate proximity to the city's nuisance ground, that the original assessment was supported by the oath of the assessor, and that only one witness was called to give evidence in regard to the value of the Rosemount subdivision, I am nevertheless satisfied that the assessment of the latter as building lots at an average value of about $120 apiece—a valuation approximating $1,200 an acre—was improper and grossly exceeds its true or fair actual value.

The evidence of J. K. Reith, a real estate dealer of some years' experience in Swift Current, who was the sole witness that spoke as to Rosemount, was that "there is not any lot in the whole subdivision worth $25; the only thing you could use it for is farm land," and he placed its value at $75 to $100 per acre. This witness's testimony was not affected by his cross-examination; and the city chose to leave it uncontradicted. The assessor, in giving evidence in regard to the assessment of the Hudson's Bay Co.'s property, which he had placed at $350 per acre, said that he agreed to a certain extent with a witness called for the appellants in that case who had stated that that property was valueless. Other witnesses had valued it at from $25 to $30 and from $25 to $50 an acre—none at any higher figure. Mr. Reith added that Rosemount "is not any better" than the Hudson's Bay quarter.

It must always be extremely unsatisfactory for an appellate court, lacking the local knowledge, the familiarity with assessment work and the opportunity of personal inspection possessed by a local tribunal, to attempt to revise its valuations on the mere record of oral testimony of witnesses called before it. While such a duty is imposed upon us, however, we must discharge it as best we can.

In the present case, I am satisfied that the assessment is not merely substantially but grossly excessive. It would almost appear that the board, regarding the maintenance of "a fair and just proportion" between the assessment of the land in question and "the value at which lands in the immediate vicinity of the lands in question are assessed" as the dominant requirement of the statute, had subordinated, if it did not ignore, the imperative provision that "land shall be assessed at its fair actual value." The maintenance of "a fair and just proportion" between it and other assessments in the vicinity becomes material only where there is not a substantial difference between the amount of the assessment in question and the "true value" of the property. The only evidence of "fair actual value" or "true value" before us is "from $75 to $100 per acre."

I would allow the appeal and reduce the assessment to $100 per acre.

BRODEUR, J. (dissenting):—This is an appeal from the judgment of the local Government Board of the Province of Saskat-

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chewan against the assessment of subdivided lots of land known as Rosemount in the City of Swift Current. The judgment of the Local Government Board had confirmed the decision of the assessor of the municipality and of the Court of Revision.

The Local Government Board has been instituted a few years ago for the purpose of controlling the municipal authorities concerning the raising of moneys by way of debentures, to supervise the expenditure of moneys borrowed, to revise the assessment of municipalities and to hear assessment appeals. Their powers are very extensive, since, as regards assessments, the Board may, of their own motion, revise the assessment of a city, even when there is no notice of appeal and no complaint (1915, ch. 16, s. 415 (11)). It is declared by the Act that the decision of the board shall be final and conclusive in every case adjudicated upon (sub-s. 15).

The evidence that we have in this case is very meagre and we have no reasons of judgment either from the Court of Revision or from the Local Government Board. It is common ground, however, that members of the board have made a personal inspection not only of the properties at issue but also of adjoining properties and various other lands throughout the city of Swift Current and have compared the assessment upon such properties with the assessment in question in this case. The certificate of the city clerk states that in the opinion of the board the properties in question had been given their fair actual value and it bore a fair and just proportion to the value at which lands in the immediate vicinity of the land in question was assessed.

In those circumstances, it seems to me that we could not very easily interfere with the views expressed by the board, since the members thereof had an opportunity of visiting the land and forming a fair opinion upon the assessment of the properties in the municipality.

It may be that at the present moment those properties could not be sold for the price at which they have been assessed because we are at a time when money is very scarce and when it is likely very hard to dispose of properties. But this is only temporary, and on that point the board is in a far better position to determine the actual value of the property than we are ourselves.

I am of opinion then that the judgment appealed from should be maintained with costs. *Appeal allowed.*

*CANADIAN NORTHERN PACIFIC R. Co. v. CORPORATION OF KELOWNA.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Galliher and McPhillips, JJ.A. December 21, 1917.

TAXES (§ I F—80)—EXEMPTION—RAILWAY PROPERTIES—WHAT ARE RAILWAY LANDS.

Lands acquired by the plaintiff railway company cannot be said to form part of the railway, nor can they be classed as lands used in connection with the operation of the railway, so as to be exempt from taxation under clause 13 (*e*) B.C. statutes 1910, until plans of these lands have been filed, or submitted for approval, by the Minister of Railways. [*Canadian Northern P.R. Co.* v. *New Westminster*, 36 D.L.R. 505; [1917] A.C. 602, followed. See also *Canadian Northern P. R. Co.* v. *Vernon*, following].

Statement

APPEAL by defendant from the trial judgment, in an action based on par. 13 (*e*) c. 3, B.C. statutes 1910, as amended by s. 7, c. 58 of 1913, for an order setting aside a sale of lands for delinquent taxes; and for a declaration that such lands were exempt from taxes. Reversed.

The trial judge set aside the tax sale and granted the injunction. The Court of Appeal allowed the appeal in part, McPhillips, J.A., being of the opinion that there should be a new trial or a reference to ascertain what portion of the lands would come within the purview and meaning of the decision of the Privy Council in *Canadian Northern P. R. Co.* v. *New Westminster Corp.*, 36 D.L.R. 505, [1917] A.C. 602; which affirmed (1915), 25 D.L.R 28, 22 B.C.R. 247.

R. M. Macdonald, for appellant; *Douglas Armour*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A. concurs with Galliher, J.A.

Galliher, J.A.

GALLIHER, J.A.:—I would allow this appeal except as to the portion of lands comprising the right of way as shewn on the plan filed and approved by the Minister of Railways, and also filed with the land registrar, being the lands referred to in the book of reference also filed and approved—in all 6,325 acres.

Mr. Macdonald took objection to the sufficiency of the plan as filed and approved, but I think that plan is a substantial compliance with the Act, and in any event is approved by the Minister. In reference to the balance of the lands, they are not in my opinion exempt.

I would refer to the judgment of this Court in *Re Canadian Northern P.R. Co. and New Westminster* (1915), 25 D.L.R. 28,

*This case was only recently released for publication.

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22 B.C.R. 247; affirmed on appeal to the Privy Council, August 3, 1917; *sub nom.*, *Canadian Northern P.R. Co.* v. *New Westminster Corporation* 36 D.L.R. 505, [1917] A.C. 602.

No plan of these lands having been filed or submitted for approval they cannot be said to form part of the railway, nor can they be classed as lands used in connection with the operation of the railway.

In the *New Westminster* case, *supra*, their Lordships of the Privy Council in dealing with the interpretation of clause 13, sub-s. (*e*) of the agreement between the Province of British Columbia and the C.N.P.R. expressed themselves thus:

> It is essential to the argument of the appellants that the Board should read the words "which form part of and are used" as including lands "acquired for the purpose of forming part of and being used," but the words of the clause are in the present tense, "form part and are used," and clause 9 of the agreement quoted in the judgment of McPhillips, J.A. (p. 49 of the record), gives the Government security over the property of the company "acquired for the purpose of and used in connection with" the lines and ferry, thus shewing that the framers of the agreement, and the legislature which adopted the words of it, had in their minds the distinction between lands acquired for the purpose of being hereafter used and lands actually now used.
>
> To read the clause in the way desired would be to add to it words which are not to be found in it, and it appears to the board that there is nothing in the context or in the object of enactment, or in the incorporated enactments, which make it necessary or justifiable to read in the necessary words.
>
> The company are, no doubt, justified in buying land which they expect they will want for the railway before getting their compulsory powers, and they are probably in most cases acting providently in doing so, as they may have to pay more for the lands when they come to exercise their powers, but there seems no reason for giving the exemption to such lands as soon as they become the property of the company. They may remain for some time in use for the purpose for which they have previously been used. In this case the lands are said to include some mills and such like buildings still being used as before. Why should they be exempt from taxation to cheapen the ultimate cost to the company of the lands required for their undertaking, when the public are neither getting the actual railway, nor having it already in process of construction for their ultimate benefit? The benefit expected to the public from the railway is, of course, the consideration for the remission of taxation. From the time the lands are definitely appropraited as part of the railway and taken from other uses there appears reason for the exemption, and at any rate it is then clearly given.

The appellants should have their costs of appeal.

McPhillips, J.A.

McPHILLIPS, J.A.:—I am of the opinion that under the judgment of the Privy Council no lands are exempt unless it is shewn that they are not used for other purposes—that is, *per se*, the filing of the plan does not constitute exemption, and I must say

that the evidence to me is insufficient upon which to determine what portion should be exempt; and I am of the opinion that there ought to be a new trial, or a reference, and a report back to this court upon the evidence as to what lands would come within the purview and meaning of the judgment of their Lordships of the Privy Council, because it appears to me that they have unquestionably determined this point—that the mere filing of the plan is not in itself an exemption as to the area defined therein; and that being so, it is incumbent upon this court to determine what is and what is not exempt. *Judgment accordingly.*

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British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, McPhillips and Eberts, JJ.A. November 5, 1918.

TAXES (§ IF—80) RAILWAY PROPERTY—WHAT IS—EXEMPTION FROM TAXATION—EVIDENCE AS TO USE.

The plaintiff company having led evidence, defining and fixing a right-of-way so as *primâ facie* to bring it within the exemption fixed by (clause 13 (*e*) c. 3, B.C. Statutes 1910), the agreement between the plaintiff and the Province of British Columbia. It is incumbent upon a corporation seeking to tax a portion of such right-of-way to establish that such portion, declared to be exempt, was in use for other than railway purposes.

[*Canadian Northern P.R. Co.* v. *New Westminster* (1915), 25 D.L.R. 28; 22 B.C.R. 247; (1917) 36 D.L.R. 505, [1917] A.C. 602; *Canadian Northern P.R. Co.* v. *Kelowna* (*ante* p. 315), referred to.]

Statement.

APPEAL by defendant from a judgment of Macdonald, J. Affirmed.

Ladner, for appellant; *Douglas Armour*, for respondent.

Macdonald, C.J.A.
Martin, J.A.
McPhillips, J.A.

MACDONALD, C.J.A., and MARTIN, J.A., dismissed the appeal.

MCPHILLIPS, J.A.:—In my opinion, the appeal of the Corporation of the City of Vernon, as well as the cross-appeal of the Canadian Northern Pacific R. Co., should be dismissed. That is, I am of the opinion that, upon the evidence as adduced before the trial judge, Macdonald, J., arrived at the right conclusion. In passing I feel constrained to say that if the Corporation of the City of Vernon was in a position to shew that any portion of the right-of-way declared to be exempt by the judgment appealed from was in use for other than railway purposes, within the meaning of the judgment of their Lordships of the Privy Council in *Canadian Northern Pacific R. Co.* v. *New Westminster* (1915), 25 D.L.R. 28, 22 B.C.R. 247, [1917] A.C. 602; 36 D.L.R. 505, it was incumbent upon the corporation to have established this—

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the railway company having led evidence defining and fixing its right-of-way, *primâ facie*, the statutory exemption was operative, and without evidence to the contrary, the declaratory judgment that the right-of-way as shewn on the plans duly approved and registered was exempt from taxation was rightly made. I was of the opinion that a new trial should be had in the *Canadian Northern Pacific R. Co.* v. *Kelowna** (as yet unreported), but that action was tried and the appeal therein was standing for judgment during the prosecution of the appeal to the Privy Council in *Canadian Northern Pacific R. Co.* v. *New Westminster*, *supra*. The trial of the present action having taken place after the judgments in both of the above-mentioned actions, it is to be observed that the defence offered no satisfactory evidence whatever in justification of the assessment of the lands comprised in the right-of-way to which lands only the judgment appealed from extends.

In view of the facts and circumstances, therefore, and the advantage of knowing at the time of the trial and for a considerable time prior thereto, what parcels of land comprised in the right-of-way would not be exempt (if any) within the language of Sir Arthur Channell, who delivered the judgment of their Lordships of the Privy Council in *Canadian Northern Pacific R. Co.* v. *New Westminster*, *supra*, no forceful position is made out in the present case for the direction of a new trial upon any such ground. It may be further remarked that the notice of appeal of the corporation does not ask that a new trial be directed. In any case I consider that the present case is not one requiring any such order to be made.

Then it was also submitted that the railway company not having appealed to the municipal Court of Revision, the present action was not maintainable. It is only necessary upon this point to refer to *Toronto R. Co.* v. *Toronto*, [1904] A.C. 809, at 815, followed by this court in *North Cowichan* v. *Hawthornthwaite* (1917), 42 D.L.R. 207. The head-note of the *Hawthornthwaite* case reads as follows:—

> If an assessment of land is illegal the person assessed is not compelled to resort to the remedy of an appeal to the Courts of Revision, but may resist an action under the Municipal Act (B.C. (1914), c. 52, s. 275) to recover the taxes:—

and the statute law under consideration by their Lordships of the Privy Council in the *Toronto R. Co.* v. *Toronto*, *supra*, was similar

*See p. 315 ante.

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in terms to the B. C. Municipal Act. The particular line of railway authorized to be constructed (see Canadian Northern Pacific Railway Extension Act, 1912, c. 32, Statutes of B.C., 1912), the right-of-way of which has been, by the trial judge, declared exempt from taxation, is exempt from taxation by statutory exemption until July 1, 1924. (See c. 3, statutes of B. C., 1910, schedule 13E, "Canadian Northern agreement.")

McPhillips, J.A.

Now, in my opinion, the onus which rested upon the corporation, of displacing this statutory exemption, was not discharged, and the corporation has failed to shew that the trial judge arrived at a wrong conclusion. Likewise, the railway company has failed to shew that the trial judge should have granted a more extensive exemption. I do not consider it necessary to add anything more in the way of reasons for judgment upon this appeal further than to say that, having had the opportunity to read the judgment of my brother Martin, I wish to say that I am in agreement with all he has said. In the result, in my opinion, both appeals should stand dismissed, and the judgment of the judge affirmed.

Eberts, J.A.

EBERTS, J.A.:—I would dismiss the appeal.

Appeal dismissed.

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CANADIAN NORTHERN PACIFIC R. Co. v. ARMSTRONG.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The reasons for judgment given by me in *Canadian Northern Pacific R. Co.* v. *City of Vernon* are equally applicable to the appeal in this action. I would, therefore, dismiss the appeal, and being in agreement with my brother Martin, would also dismiss the cross-appeal.

Macdonald, C.J.A.
Martin, J.A.
Eberts, J.A.

MACDONALD, C.J.A., MARTIN and EBERTS, JJ.A., dismissed the appeal. *Appeal dismissed.*

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WHALLEY v. VANDERGRAND.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 21, 1918.

1. APPEAL (§ VII M—536)—MISAPPREHENSION OF EVIDENCE BY TRIAL JUDGE —REVERSAL OF JUDGMENT BY APPELLATE COURT.

Where it is evident that a trial judge has misapprehended the evidence, an appellate court will reverse his finding and give judgment in accordance with the weight and reliability of the evidence.

2. ANIMALS (§IC—26)—INJURY BY TRESPASSING—LIABILITY OF OWNER.

The owner of an animal in which by law the right of property can exist, is bound to take care that it does not stray onto the land of his neighbour, and is liable for any trespass it may commit, and for the ordinary consequences of that trespass.

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Lamont, J.A.

APPEAL by plaintiff from the judgment at the trial, dismissing an action for damages for injuries caused by being kicked by defendant's colt. Reversed.

H. E. Sampson, K.C., for appellant; *N. R. Craig*, for respondent.

LAMONT, J.A.:—The plaintiff's claim is for damages sustained through being kicked by the defendant's colt.

The plaintiff is a boy, 16 years old, living with his mother on her farm. He claims that on May 3, 1916, being then in the employ of his mother, he, in the performance of his duty, mounted a horse and rode out to the field for the purpose of rounding up and bringing to the barn a mare and 3 colts. When he got to the field he found there, not only his mother's animals, but two colts belonging to the defendant, one of which was a sorrel. The defendant's colts were about 12 ft. from the animals belonging to the plaintiff's mother. Into this space the plaintiff says he rode, when the defendant's sorrel colt turned and kicked out with both hind feet and caught him on the leg. The colt kicked a second time, but the plaintiff slipped off and the horse he was riding received the blow. The boy called for his mother. She heard him and came, but could not carry him home. She then went for a neighbour, one Charles Hayes, who carried the boy to the house and then went for a doctor, who found that the boy's leg had been fractured.

The trial judge dismissed the action. He did so on the ground that the evidence of the plaintiff was unreliable. His chief reason for holding it to be unreliable was because he was contradicted by the evidence of the doctor who attended him the night he was injured. The plaintiff testified that he told the doctor when he came that his injury was caused by a kick. The doctor testified that on the occasion of his first visit he was unable to find out either from the boy or his mother the cause of the injury. In giving judgment—which he did at the close of the case—the trial judge makes the following observations:—

> The evidence of the doctor contradicts both the boy and the mother, and it is on his evidence that I place the strongest stress because I cannot see any possible suggestion as to why he should not tell the truth. Whatever suggestion there might be of Hayes favouring the plaintiff or being an enemy of the plaintiff there has not been any suggestion of the doctor being biased in any way. The doctor says he could not find out that night the cause of the trouble, neither the young man nor the mother told him how it happened. It

was his business to find out so as to know how to treat the accident. If his evidence is true then the plaintiff's evidence is not true because the plaintiff says he told the mother that night that he was kicked by Vandergrand's sorrel mare and he also told Hayes. Now had he told his mother that night the doctor would not have had any trouble finding out, not from himself, but from the mother. I am not at all surprised that the boy himself, suffering as he was from pain, would not be in a position to answer the doctor's inquiries, but the mother was there and ready to answer any questions she knew, and if she had known that night she certainly would have told the doctor. I cannot think that the boy's evidence is true in that respect and not being true in that respect it casts a great deal of doubt on the main question here for us to find out, that is whether the defendant's horse actually did the kicking.

In my opinion the trial judge clearly misapprehended the evidence. With reference to the witness Hayes the judge says:—

I see no particular reason for disbelieving Hayes and I have searched in vain. I have perused Hayes' evidence very carefully and watched him on the witness stand, and I cannot see any reason for discrediting Hayes' evidence and if Hayes' evidence is true, that is another reason for disbelieving the boy.

The boy testified that when Hayes came to him he told him that he had been kicked by Joe Vandergrand's colt. Hayes says he told him that he had been kicked, but did not say it was the defendant's colt. Hayes, however, says when he went for the doctor he told the doctor that the boy had been kicked.' Further, he says that in presence of himself and the boy's mother the doctor—on the occasion of his first visit—asked the boy where he was when he got kicked. In this Hayes is corroborated by the boy and his mother. Hayes was a witness for the defence. If Hayes' evidence is to be believed—and the trial judge says that it is—then the doctor did know on the occasion of his first visit that the boy's injury had been caused by a kick, and his evidence to the contrary was not in accordance with the fact.

The testimony of the doctor and of Hayes are so diametrically opposed on the point which led the trial judge to reject the testimony of the boy, that it is quite clear he was under a misapprehension as to the effect of the evidence of one or the other, otherwise he could not have reached the conclusion that both were credible.

After the judge had given his judgment, counsel for the defence, who, apparently, was not under any misapprehension as to the effect of the evidence, asked the judge if he would feel like expressing an opinion generally as to the demeanour and credibility of the plaintiff's witnesses, in case an appeal should be taken on the

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facts. The judge then stated that, on account of the boy's demeanour in the witness stand, and his evidence generally, he did not consider him worthy of belief at all.

The demeanour of the boy can have no bearing upon the evidence of Hayes that the doctor knew on his first visit that the boy had been kicked, and, as this was the point upon which the judge placed the most reliance in reaching the conclusion that the boy's evidence could not be relied upon, the finding cannot stand.

Some of the evidence given by the doctor would lend colour to the view that, in saying he could not find out from either the boy or his mother the cause of the accident, he was not referring to the mere fact that the injury was caused by a kick, but meant that he did not learn that it was the defendant's colt that did the kicking. After he had sworn that neither the boy nor his mother told him how the accident happened, he was asked this question: "Did they ever tell you?" To which he replied that on his second or third visit they told him that Vandergrand's horse had kicked the plaintiff in the leg. On re-examination he was asked what the boy or his mother said when he asked them as to the cause of his injury. His reply was:—

I could not exactly remember what answer they gave me, all I know was that I did not know that this horse was blamed for producing the injury until I went back again.

In addition, his evidence shews that he had very little recollection of the occurrences in connection with his first visit. He could not remember if he made his visit at 8 o'clock in the evening or after midnight. He had no recollection of how he went out to the plaintiff's place, if he went alone or if someone took him out; whether he drove his own car or went in another auto. When first asked what time he reached Whalley's place, he said 8 o'clock, but when asked if he would contradict Hayes should he say that it was after midnight and that he had been employed on another case until midnight, he replied that he would not contradict Hayes as he had no recollection of it.

In view of the doctor's inability to recollect any of these occurrences, and his admission that he was not prepared to contradict Hayes should Hayes' recollection be different from his own, the proper conclusion in my opinion from the evidence is, that Hayes' statement that the doctor did know the boy had been kicked is correct, but that it had escaped his mind along with these other

occurrences. As there was nothing in the evidence to raise a suspicion that it was a horse belonging to the plaintiff's mother that kicked him, the finding, in my opinion, should have been that the plaintiff was kicked by the defendant's colt.

The next point to be considered is, whether or not the defendant is liable for the injury done by his colt.

In my opinion he is. The colt was admittedly a trespasser. He got onto the land of the plaintiff's mother through an opening in the defendant's fence which the defendant had neglected to repair. Furthermore, a by-law of the municipality prohibited horses from running at large between April 15 and November 15.

The liability of an owner of a domestic animal is laid down in *Cox* v. *Burbidge* (1863), 143 E.R. 171, 13 C.B. (N.S.), 430; at p. 438, Williams, J., says:—

> I apprehend the general rule of law to be perfectly plain. If I am the owner of a annimal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial.

The same principle is laid down in vol. 1, Halsbury, p. 375-6, in these words:—

> The owner of animals *domitæ naturæ* is bound to keep them under control, and is liable, if they escape, for such damage as it is ordinarily in their nature to commit. . . . The liability is limited to the reasonable and natural consequences of the animal escaping.

It was argued by counsel for the defendant that the damages claimed were too remote, as it could not be reasonably contemplated by the defendant that the colt would kick the plaintiff.

In *Lee* v. *Riley* (1865), 18 C.B. (N.S.) 722, 144 E.R. 629, the defendant's mare strayed from his close through defective fences, which it was defendant's duty to repair, into a field of the plaintiff's in which was a horse. The animals quarrelled, and the result was that the plaintiff's horse received a kick from the defendant's mare which broke his leg and he was necessarily killed. It was held that the defendant was responsible for his mare's trespass and that the damage was not too remote.

On this point the author of Halsbury's Laws of England, p. 376, says:—

> It is naturally to be expected that when cattle, sheep, poultry, and the like, stray into a neighbour's land or garden, they will devour his grass, corn or vegetable produce, and their owner is liable for the damage. It is in the

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ordinary course of nature that one horse should kick another, especially a strange one, when loose in a field, and the damages are not too remote. . . . It is not, however, in the ordinary course of nature for horses to kick human beings.

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An owner is, therefore, presumed to know that if his horse strays into his neighbour's field in which his neighbour's horse is, that it is quite probable the horses will kick at one another, and I think the same principle applies whether the neighbour's horse is running loose or whether someone is upon its back. As it is not in the nature of a horse to kick a human being, but is in its nature to kick another horse, the presumption is that the defendant's colt was kicking at the horse the plaintiff was riding. The defendant knew that the plaintiff frequently rode on horseback. It is quite customary in this country to ride horses when bringing home horses or cattle.

I am, therefore, of opinion that the damages claimed are not too remote. As damages, I would allow the plaintiff 5 months' wages at $40 per month: $200; doctor's bill: $60; general damage: $250; in all, $510.

The appeal, in my opinion, should be allowed with costs; the judgment below set aside, and judgment entered for the plaintiff for $510 damages, and costs.

Haultain, C.J.S. Elwood, J.A.

HAULTAIN, C.J.S., and ELWOOD, J.A., concurred with Lamont, J.A.

Newlands, J.A.

NEWLANDS, J.A. (dissenting):—The infant plaintiff was injured by a kick from a horse and, by his next friend, brings this action for damages. He says the defendant's horse kicked him. He is the only one who can give evidence on this point. He is corroborated as to the horse being there at the time. He says he told his mother and Hayes that it was defendant's horse that kicked him. His mother corroborates this, but Hayes says he did not tell him. The doctor says he could not find out that night how the accident happened. I do not, however, put much confidence in the doctor's evidence, because he can neither remember who drove him to plaintiff's house nor what time he got there. He thinks about 8 o'clock. Hayes says he drove him there, and it was between 12 and 1 o'clock. The case, therefore, depends on the boy's evidence, and he is contradicted on a material point by Hayes, who the trial judge finds to be an independent witness and one whom he believes. If the boy is not telling the truth

when he says he told Hayes that the defendant's horse kicked him—and Hayes says he is not—and as the trial judge says he does not believe the boy's evidence, then I do not see how this court can upset the finding of the trial judge. He having found for defendant on contradictory evidence, I think his finding should be sustained, and the appeal dismissed with costs.

Newlands, J.A.

Appeal allowed.

Re LANDS & HOMES OF CANADA: ROBERTSON'S CASE.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. December 16, 1918.

COMPANIES (§ IV—156)—MEETINGS OF OFFICERS—OUTSIDE OF PROVINCE OF INCORPORATION—LEGALITY OF.

Where meetings of members or directors of a company relate to the internal affairs of the company only or to transactions in the province of incorporation the mere holding of such meetings in another province is not carrying on business outside the boundaries of the province of incorporation in a manner that transcends the limitation to provincial objects imposed on the company by sec. 92 of the B.N.A. Act. The receipt of applications for shares in the company and the issue of such shares to applicants may take place outside the province because such transactions do not of themselves involve extra-provincial objects. [*Bonanza Creek Gold Mining Co.* v. *The King*, 26 D.L.R. 273; [1916] A.C. 566, discussed.]

Statement.

APPEAL from an order of Macdonald, J., sustaining an order of the referee placing appellant's name on the list of contributories under the Winding-up Act, R.S.C. 1906, c. 144. Affirmed.

F. M. Burbidge, K.C., and *Hugh Mackenzie*, for appellant, contributory; *G. A. Elliot*, K.C., for respondent, liquidator.

Perdue, C.J.M.

PERDUE, C.J.M.:—I have read the judgment of my brother Cameron and am quite in accord with his conclusions. There are one or two points upon which I would like to comment briefly.

On March 5, 1912, the company obtained from the Lieutenant-Governor-in-Council of the Province of Manitoba a license to carry on its business in that province, pursuant to c. 10 of the statutes of Manitoba passed in 1909. The memorandum of association of the company purports to authorize it to carry on its business in any part of the world: See clause 3, sub-clause (*u*). Clause 87 of the B. C. Companies Act, R.S.B.C., 1911, c. 39, is to the effect that a company formed under the Act may by writing under its common seal empower any person as its attorney to execute deeds outside the province. S. 88 of the same Act declares that

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A company whose objects require or comprise the transaction of business in foreign countries may, if authorised by its articles, have for use in any territory, district or place not situate in the province an official seal, etc.

The Act clearly contemplates and confers on the company the capacity, in so far as it may, of accepting extra-provincial powers and rights. We should assume that the legislature, in conferring this capacity, intended that the company should apply for and obtain from the proper authority outside the province power to carry on business within the territory over which that authority extended. Statutory provision has been made in British Columbia and in the neighbouring provinces for granting licenses to extra-provincial companies and enabling them to carry on business in the province granting the license. It is reasonable to infer that the intention of both the statute and the memorandum of association was to permit operations outside the province if power for the purpose were obtained *ab extra*. In this view the company would be endowed with a capacity to accept extra-provincial powers. This would bring the case within the principle to that effect enunciated in *Bonanza Creek Gold Mining Co.* v. *The King* (1916), 26 D.L.R. 273. I would, therefore, conclude that, after the Manitoba license had been obtained, the company was authorized and empowered to carry on business in that province.

In regard to holding meetings of the members or of the directors outside the province, I can find only one provision in the Act which affords assistance. S. 72 (3) declares that "every general meeting of the company shall be held within the province." This restriction applies only to annual general meetings. The inference is that other meetings may be held elsewhere than within the province. *Expressio unius exclusio est alterius.* For the application of this maxim in construing the meaning of statutes, reference may be made to the following cases: *Gregory* v. *Des Anges* (1836), 3 Bing. N.C. 85, 132 E.R. 342; *Att'y-Gen'l* v. *Sillem* (1864), 10 H.L.C. 704, p. 727; 11 E.R. 1200; *Newton* v. *Holford* (1845), 6 Q.B. 921, 115 E.R. 347; *Watkins* v. *G.N.R. Co.* (1851), 16 Q.B. 961, 117 E.R. 1150.

If an extraordinary general meeting, or any meeting except the annual general meeting is held outside the province the Act does not say what consequence shall follow. By s. 72 (1) it is enacted that a general meeting shall be held once at least in every

calendar year, and if it is not so held, a penalty is imposed on the company and every director, manager, secretary and other officer who is knowingly a party to the default. No such consequence follows a breach of sub-s. 3 of the same section. The last mentioned sub-section would appear to be directory only. I would, therefore, conclude that if a general meeting is held outside the province and all the shareholders attend, or are represented at the meeting, and no objection is taken, they would be bound by what is done at the meeting.

On four different occasions between January 5, 1912, and August 20, 1912, the appellant Robertson applied for and obtained shares in the company. In January, 1914, he was elected a director of the company and acted in that capacity. In January, 1915, he was again elected a director and continued to act in that capacity up to the last meeting of directors recorded in the minute book as of March 27, 1915. He attended several meetings of shareholders personally and took part in the proceedings. He paid a call of 20% on his shares in December, 1913. He received a cash dividend of 25% on his shares in June, 1912. In Lindley on Companies (1902), p. 70, the law of estoppel as against a shareholder is stated as follows:—

> If the shares can, under any circumstances, legally exist, then, however improper their issue may have been, the company and the holder of them may be estopped from denying their existence and the holding of them by him; but if they cannot legally exist, the person taking them cannot, by estoppel or otherwise become a member in respect of them.

It cannot be said that the shares issued to the appellant had no legal existence. I would further add that all of the 25 shares held by him, except one, were applied for by him and issued to him after the company had obtained its license to carry on business in the Province of Manitoba.

The appeal should be dismissed.

Cameron, J.A.

CAMERON, J.A.:—An application by the liquidator to place Thos. S. Robertson on the list of contributories under the Winding-up Act, R.S.C. 1906, was granted by the referee whose order was sustained by Macdonald, J., from whose decision this appeal is taken.

The company was incorporated September 11, 1911, by memorandum of association registered under the Companies Act of British Columbia, R.S.B.C. 1911, c. 39, by which the capital was fixed at $25,000, divided into shares of $10 each.

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The minute book of the company shews that the first meeting of the stockholders was held at Victoria, September 13, 1911, where, by resolution, the capital stock was increased to $1,000,000, in shares of $10 each.

The second meeting of stockholders, according to the minute book, was held at Winnipeg, in this province, November 18, 1911. It is stated: "This meeting was called by Mr. Stewart (the president) waiving all notices, personal notice having been given. All stockholders present." The former resolution fixing the capital stock at $1,000,000 was rescinded and the same was fixed at $100,000 in shares of $100 each.

A copy of extract of minutes of the company certified to by the registrar of joint stock companies, produced before us and admitted, refers to the meeting of November 18, 1911 (as there was no other meeting in that month) and sets forth a resolution which makes no reference to the former resolution passed at the meetings held in September fixing the capital stock at $1,000,000, but purports to rescind the resolutions of September, 1911, fixing it at $25,000, which it increases to $100,000.

The third stockholders' meeting was held December 1, 1911, at which the minutes state: "All the stockholders were present," and a resolution was passed thereat authorizing the increase of the par value of the shares from $10 to $100.

According to a certified copy from the registrar of joint stock companies of British Columbia, filed, a resolution was passed by the directors at a special meeting held on December 15, 1911, "pursuant to special resolutions of the company in general meeting passed on November 18, 1911, and December 1, 1911, increasing the nominal capital to $100,000, divided into 100 shares of $100 each."

By s. 48 of the Act a company, if authorized by its articles, may increase its share capital by the issue of new shares and consolidate and divide its shares into shares of a larger amount than its existing shares.

By s. 53 share capital may be reduced by special resolution but the consent of the court is required. Nothing of the kind was done in this case, but, as will be seen, it was not requisite.

By s. 77 the requirements of an extraordinary and a special resolution are set forth. The latter is substantially an extra-

ordinary resolution confirmed by a subsequent meeting of which notice has been given, after the lapse of 14 days.

By art. 41 (to be read as part of the memorandum, and with the provisions of s. 48 above) the directors may, with the sanction of an extraordinary resolution, increase the capital stock of the company.

By art. 44, the company may, by special resolution, consolidate and divide its share capital into shares of larger amounts than those previously existing.

In the result:—(1) An increase of the capital stock must be made by a resolution of the board of directors with the sanction of an extraordinary resolution. (2) A consolidation and division of the share capital into shares of a larger amount than its existing shares must be made by special resolution, *i.e.*, by a resolution passed in the same manner as an extraordinary resolution and confirmed at a subsequent general meeting.

Now let me deal, first, with the shareholders' resolution of September 13, 1911, increasing the capital stock from $25,000 to $1,000,000. There appears in the records no resolution of the board of directors authorizing this shareholders' resolution as required by the articles. It was, therefore, inoperative and void, and we can eliminate this incident from consideration.

The way was then clear for the passing of the extraordinary resolution of November 18, by which the original capital of $25,000, as it still stood, was increased to $100,000. And this resolution was duly acted on by the directors on December 15, 1911. This increase is, therefore, in accordance with the articles.

The consolidation and division of the shares into shares of a larger denomination by the resolution of November 18 was confirmed by the meeting of shareholders held December 1, 1911, whereby it became a special resolution under s. 77 of the Act, so that this proceeding was entirely regular, save for the objection as to the time. The directors, at the meeting of December 15, ratified this resolution.

It was objected that the time between the resolution passed on November 18 and the confirmatory resolution of December 1 was insufficient. But, in such a case, where the matter dealt with affects the shareholders only, the requirement as to time can be waived by them. See Thompson on Corporations, secs. 824, 825.

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There was some discussion as to the meaning of the alterations apparent on the face of the record of the meeting of November 18, but we can infer no wrongdoing, and must take these alterations as having been made to accord with the facts.

Attention was also called to the form of the resolution as it appears in the certified copy where no reference is made to the increase as proposed at the meeting of September 13, to $1,000,000, set out in the record in the minutes. But that proposed increase was never authorized by the directors, and was and can be disregarded as I have indicated, and it was, therefore, unnecessary to mention it in the resolution transmitted to the registrar. The proposed resolution of September 13 was clearly of no effect. The original capital stock of $25,000 remained unaffected, and its increase to $100,000 was duly authorized by the shareholders and by the directors.

It was further objected that under s. 72 (3) of the Act, these meetings were invalid as not having been held within the Province of British Columbia. This provision is, in my opinion, however, restricted to the annual general meetings which are referred to in that section and cannot affect the meetings in question.

Certain further objections were taken, based on the entries in the stock register and on other considerations that the statements in the minutes as to the presence of all the stockholders were contrary to the fact. These minutes are evidence of the proceedings by s. 79, and the presumption is that they are correct. It must not be lost sight of that it is immaterial whether the shareholders are present in person or by proxy.

My conclusion is that the resolutions which are questioned were regularly passed under the memorandum, the statute and the articles, and are sufficient for the purposes thereof, and that the shares, subsequently issued pursuant thereto, were validly issued and are not open to attack on this ground.

In this view, it is not necessary to deal with the question of estoppel. If there was any irregularity in the proceedings, such as was contended, I concur in the opinion expressed by the referee that Robertson acquiesced in and accepted the position of shareholder.

It was argued that, on the authority of *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566, 26 D.L.R. 273, all the

acts and transactions of the company outside of British Columbia were invalid. It was there held that he B.N.A. Act confines the powers and rights which a legislature can bestow upon a company to powers and rights exercisable within the province, but that does not preclude the legislature from legislating so as to create a corporation with this general capacity. Here, we have the provision in the memorandum giving the company power "to do any or all of the above things in any part of the world" under the Act which authorizes the incorporation of any five or more persons "associated for any lawful object," which can exercise all the functions of an incorporated company under s. 26 (2). This seems to me to give ample authority for holding that the legislature intended to confer the capacity to exercise extra-provincial powers. "The capacity of such a (provincial) company 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 the incorporation took place, did not authorize, and therefore excluded, incorporation for such a purpose." Lord Haldane, at pp. 284-5 of the *Bonanza Creek* case. It appears to me that the B. C. Act and the memorandum thereunder have conferred upon the company a capacity analogous to that of a natural person to the same extent as if it had used the explicit terms of the recent Manitoba legislation, c. 52, 7 Geo.V. If, on the other hand, the shareholders' and directors' meetings cannot be considered as carrying on business, the case is not one that comes within the inhibition laid down in Lord Haldane's decision, and such meetings are not open to impeachment on this ground.

It was urged that, if Robertson is to be placed on the footing of a shareholder, the court ought to stay these proceedings, inasmuch as he is both a creditor as a debenture holder as well as a debtor whose unpaid calls are subject to the lien of his debentures, and that there must necessarily be an ultimate set-off of these respective claims. But, whatever might be the position if there were no other creditors than these debenture holders, this argument cannot arise here where there are other creditors. This is not the stage of the proceedings at which the assets of the company are made known and settled, or where the precise rights of

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the debenture holders or of their possible assignees are to be determined, or the rights and priorities of the debenture holders or their assigns and the other creditors with respect to each other are to be fixed. These and other questions that it is now impossible to foresee may arise, and it seems to me quite out of the question to accede to the request for a stay.

The appeal must be dismissed.

Haggart, J.A. Fullerton, J.A.

HAGGART and FULLERTON, JJ.A., concurred in dismissing appeal. *Appeal dismissed.*

THE KING v. BARRON.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Lamont and Elwood, JJ.A. December 21, 1918.

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SEDITION (§ I—20)—SEDITIOUS WORDS—EVIDENCE OF PREVIOUS STATEMENTS —INTENTION.

On a charge of uttering seditious words, evidence as to previous statements of the accused are admissible to prove intention. The words, "Every-one who gives to the Red Cross is crazy. If no one would give to the Red Cross the war would stop. The other country would beat this country if no one would give to the Red Cross," held, under the circumstances in which they were spoken, to be seditious as being calculated and intended to stir up discontent and disaffection among His Majesty's subjects.

[*Makin* v. *Att'y-Gen'l for New South Wales*, [1894] A.C. 57; *Reg.* v. *Burns* (1886), 16 Cox. C.C. 355; *Rex* v. *Trainor* (1917), 33 D.L.R. 658, referred to.]

Statement.

Case stated by McKay, J. on the conviction of accused on a charge of uttering seditious words. Conviction affirmed.

H. E. Sampson, K.C., for the Crown; *W. M. Blain*, for the accused.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The charge against the accused in this case was:—

that he did utter seditious words, to wit, "Everyone who gives to the Red Cross is crazy. If no one would give to the Red Cross the war would stop. The other country would beat this country if no one would give to the Red Cross."

On this charge the accused was tried by McKay, J., with a jury and convicted. In the course of the trial, the trial judge admitted evidence as to the previous statements of the accused.

The following questions have been submitted by the trial judge for the opinion of the Court:—

(1) Does the amended charge disclose any indictable offence? (2) Are the words in the amended charge, sworn to have been used by the accused under the circumstances set out in the evidence, seditious? (3) Was the evidence of Mike Haliuk as to previous statements of the accused admissible to prove intention?

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Haultain, C.J.S.

I will deal with 3 first: By s. 134 of the Criminal Code "everyone is guilty of an indictable offence . . . who speaks any seditious words." "Seditious words" are defined by s. 132 as "words expressive of a seditious intention." In this case, the intention of the accused was of the essence of the offence and a very important issue before the jury, and on the authority of *Makin* v. *Att'y Gen'l for New South Wales*, [1894] A.C. 57, 65, the evidence of previous statements of a similar character was properly admitted. See also 9 Hals., pp. 380-1.

I would, therefore, answer 3 in the affirmative.

As to the 1st and 2nd questions. A seditious intention has been defined by Sir James Fitzjames Stephen in his Digest as, among other things, "an intention to raise discontent or disaffection amongst Her Majesty's subjects." This definition was approved in *Reg.* v. *Burns* (1886), 16 Cox C.C. 355, at p. 360.

Were then the above words calculated or likely to raise disaffection among His Majesty's subjects?

In the case of *Rex* v. *Trainor* (1917), 33 D.L.R. 658, Stuart, J., pointed out the distinction between the mere expression of a disloyal or unpatriotic opinion, and the uttering of seditious words calculated to raise disaffection amongst His Majesty's subjects. The facts of that case lent point to the distinction. There, the alleged seditious words only amounted to the expression of an opinion, in a chance conversation, that Germany was justified —as a measure of war— in sinking the "Lusitania." It was only an expression of opinion on a past event. There is more than an expression of opinion in this case. It is not the mere expression of a hope that the enemy will win the war. The accused, according to the evidence, made statements more than once which may be reasonably assumed to have been intended to dissuade his hearers from contributing to the Red Cross Fund for the avowed purpose of enabling the enemy to win the war. If such was his intention, it was surely his intention to create disaffection amongst His Majesty's subjects. Disaffection is defined in the New English Dictionary as "political alienation or discontent; a spirit of disloyalty to the government or existing authority."

To stir up a spirit of disloyalty, even by a mercenary appeal, leading to action or inaction in favour of the enemy, is, in my opinion, equivalent to raising disaffection.

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Elwood, J.A.

I would, therefore, answer the first two questions in the affirmative and confirm the conviction.

ELWOOD J.A.:—On October 8, last, the accused was tried before McKay, J., and a jury on the following charge, namely:

that he, the said William Barron, at or near Birmingham, in the said province, on or about the 10th day of June, 1918, did utter seditious words to wit: "Everyone who gives to the Red Cross is crazy. If no one would give to the Red Cross the war would stop. The other country would beat this country if no one would give to the Red Cross," contrary to the Criminal Code of Canada.

The accused was convicted of the charge.

During the trial, the trial judge admitted the evidence of Mike Haliuk as to previous statements of the accused to shew his intention in speaking the words with which he was charged. The trial judge submitted the following questions for the opinion of this court:—

Does the amended charge disclose any indictable offence? (2) Are the words in the amended charge, sworn to have been used by the accused under the circumstances set out in the evidence, seditious? (3) Was the evidence of Mike Haliuk as to previous statements of the accused admissible to prove intention?

In the case if *Rex* v. *Giesinger* (1917), 32 D.L.R. 325, 27 Can. Cr. Cas. 53, Brown, J., in delivering the judgment of the Court, is reported as follows, p. 330:—

The conclusion that I arrive at from the foregoing cases is, that the words complained of constitute a seditious libel if they are expressive of a seditious intention, and that they are expressive of a seditious intention if they are both calculated (likely) and intended to stir up and excite discontent and disaffection among His Majesty's subjects. If the words are not calculated to have the alleged effect, there is no libel, and if they are not intended to have that effect they are not seditious; if they are both calculated and intended to have the effect alleged, then we have a libel that is seditious.

The intention of the words spoken by the accused was to dissuade people from giving to the Red Cross. It is immaterial, in my opinion, whether or not the giving to the Red Cross would be of assistance to this country in the prosecution of the war. The expressed desire of the accused was that Germany should win the war, and his expressed desire was, in effect, that no effort should be made which would assist the war and which would be of assistance to this country in the prosecution of the war. These words, particularly under the circumstances under which they were uttered, in my opinion, "are both calculated (likely) and intended to stir up discontent and disaffection among His Majesty's subjects."

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No objection was made before us as to the trial judge's charge, and I must assume that he properly charged the jury as to what is necessary in order to constitute a seditious libel, and also as to the intention of the accused with respect thereto, in order to render him liable for the offence. There was evidence that would justify the jury in coming to the conclusion that the words were intended to have the effect necessary to constitute a seditious libel. Previous statements are admissible for the purpose of proving intention.

I am of the opinion that the various questions should be answered as follows: 1. Yes. 2. Yes. 3. Yes.

Lamont, J.A.

LAMONT, J.A. (dissenting):—The accused was found guilty of having uttered seditious words. The words charged against him were as follows: (See Haultain, C.J.)

The utterance of such words was alleged to be contrary to the Criminal Code. This shews that the accused was not convicted under the order-in-council of May last. The trial judge submitted, for the opinion of this court, this question (among others): "Are the words in the amended charge seditious?"

By s. 134 of the Code, it is an indictable offence to speak seditious words. By s. 132, "seditious words" are defined as "words expressive of a seditious intention." What is meant by the expression "seditious intention" is not defined by the Code. We must, therefore, look to the common law to ascertain its meaning. In Crankshaw's Criminal Code, 4th ed., p. 132 (1915), I find the following:—

> In s. 102 of the English Draft Code there is, in addition to what is above contained in our s. 133, a clause defining a seditious intention as, "An intention to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or the Government and Constitution of the United Kingdom or of any part of it as by law established, or either House of Parliament, or the administration of justice; or
>
> to excite Her Majesty's subjects to attempt to procure, *otherwise than by lawful means*, the alteration of any matter in church or state by law established; or
>
> to raise discontent or disaffection amongst Her Majesty's subjects; or
>
> to promote feelings of ill-will and hostility between different classes of such subjects."
>
> In a note to this definition of a seditious intention, the Royal Commissioners say that it is as accurate a statement of the existing law as they can make.

The above definition is taken from an article in Stephens' Criminal Digest, and was approved of by Cave, J., in *Reg.* v.

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Burns, 16 Cox C.C. 355, at p 360, and by the King's Bench Division in Ireland in *Reg* v. *McHugh*, [1901] 2 I.R. 569.

Such being the definition of seditious intention at common law, the question is, do the words which the jury have found the accused uttered bring him within that definition?

The words used express the belief that the work done by the Red Cross was strengthening the resistance which our country was offering to the enemy in the war then being carried on, and the belief that, if such support were withdrawn, the enemy would win.

Considered as a whole, the words may be taken to express a hope that the enemy would win the war. Such sentiments are most disloyal, and, to me, most detestable. But the question is not, did the utterances of the accused shew disloyalty, but were they seditious?

In giving the judgment of the Alberta Appellate Court in *Rex* v. *Trainor* (1917), 33 D.L.R. 658, at 664, Stuart, J., said:—

> I think it is about time that the distinction between entertaining disloyal and unpatriotic sentiments and giving utterance to them in a chance expression, on the one hand, and the crime of uttering seditious words on the other, should be adverted to. There was a long struggle in British legal history to establish the righteous principle that to convict of treason you must prove some overt act. So with sedition, it is not the disloyalty of the heart that the law forbids. Neither is it the utterance of a word or two which merely reveal the existence of such disloyalty that the law can punish under the name of sedition. It is the utterance of words which are expressive of an intention to bring into hatred or contempt, or to excite disaffection against, the person of His Majesty or the government and constitution of the country, to excite people to attempt otherwise than by lawful means the alteration of any matter in the state by law established, to raise discontent and disaffection among His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of His Majesty's subjects.

And at p. 665 he said:—

> Now, I detest such an opinion as strongly as any one, but my present duty is to decide the law, not to express my moral or patriotic sentiments.

As the Red Cross is carried on through the effort and subscriptions of individuals, it is not a work by the government as a war measure. I fail to see, therefore, how the expression of a desire for its discontinuance and the expression of a desire that the enemy should win the war can be said to be calculated as likely "to bring into hatred and contempt or to excite disaffection against the person of His Majesty, or the Government," or in any other way come within the first two paragraphs of the definition above quoted.

Then, were they calculated and intended to "raise discontent or disaffection amongst His Majesty's subjects?"

This does not mean discontent with or disaffection towards the person who gave utterance to the disloyal and unpatriotic sentiments. Such utterances are, generally speaking, bound to produce great discontent with the person uttering them, and I think may be said to tend towards a breach of the peace, but I fail to see how they are calculated to raise discontent or disaffection amongst His Majesty's subjects, as subjects. On this point, Stuart, J., in the case above referred to, said, p. 666:—

> Then, were the words calculated or intended to create disaffection and discontent among His Majesty's subjects? I am bound to say that I cannot understand how a declaration of an opinion in an argument in a country store that Germany was justified, as a measure of war, in sinking the "Lusitania," detestable though the opinion is in the hearts of all of us, can be said to have been calculated or expressive of an intention to stir up discontent or disaffection among His Majesty's subjects. It is, of course, running counter to the opinion of every one who has any moral instinct at all, but why should the expression of an erroneous and even detestable opinion on the proper limits of civilised warfare be calculated, or expressive of an intention, to raise discontent and disaffection?
>
> In deciding the law of sedition I do not think we should merely say, "This fellow is evidently a German sympathiser so we will clap him in jail." We must shew that he has broken the law, as properly interpreted, before we can do that.

Then, were the expressions of the accused calculated to promote feelings of "ill-will and hostility between different classes of subjects?"

As pointed out by Stuart, J., in the judgment above quoted, this means to promote feelings of ill-will and hostility between certain broad, general classes of people, for example, French and English Canadians, Catholics and Protestants, foreign-born subjects and natural-born subjects. I cannot see how the expression of a hope that the enemy would win the war can be said to promote hostility between these classes. The words used were undoubtedly disloyal, and unpatriotic, and well merit any punishment which the law provides for disloyal utterances, but, unless the law has provided a penalty for the expression of disloyal and unpatriotic sentiments, we are not justified in punishing the utterer therefor. Had the Parliament of Canada deemed it advisable, it could have made it sedition to give utterance to a hope that the enemy would win, but, as it has not done that, the accused, in my opinion,

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cannot be punished for uttering seditious words, no matter how much we detest the sentiments to which he gave expression.

In my opinion, the question should be answered in the negative.

Conviction affirmed.

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ATT'Y-GEN'L OF BRITISH COLUMBIA v. BAILEY.

British Columbia Supreme Court, Murphy, J. December 19, 1918.

1. STATUTES (§ IIA — 104) — MUNICIPAL ACT (B.C.) — IMPERATIVE AND DIRECTORY CLAUSES—INTERPRETATION.

The provision of sec. 53 (176) par. 2, R.S.B.C. 1911, c. 170 (the Municipal Act), requiring every by-law passed under the provisions of the sub-section, before coming into effect to be published in the "Gazette" etc. is not complied with by publishing merely a notice of such by-law, and stating that it is on file and may be inspected at the office of the clerk of the Municipal Council.

[*City of Victoria* v. *Mackay*, (1918) 41 D.L.R. 498, followed.]

2. HIGHWAYS (§IA—4)—COMMON LAW METHOD OF ESTABLISHING—DEDICATION, ACCEPTANCE AND USER—HIGHWAY ACT—MUNICIPAL ACT—EVIDENCE.

Sec. 13 of the Highway Act (R.S.B.C. 1911 c 99.) does not abrogate the common law method of establishing a highway by dedication, acceptance and user, and although a by-law to widen a municipal street may be invalid through lack of proper advertising as required by the Municipal Act, such by-law, and all the proceedings carried out under it, may be looked at as evidence of the establishment of such highway in this manner.

Statement.

ACTION to determine whether the plaintiff corporation (the City of Victoria) is entitled to registration of a conveyance of certain lands to it—free from defendant's mortgage. Judgment for plaintiff.

R. W. Hannington, for City of Victoria; *F. A. McDiarmid*, for defendant.

Murphy, J.

MURPHY, J.:—*City of Victoria* v. *Mackay* (1918), 41 D.L.R. 498, decides that publication is essential to the validity of street widening by-laws. The case does not decide what is publication under the statute. Par. 2 of s. 53 (176), R.S.B.C., 1911, c. 170, is what is material, and reads:—

> Every by-law passed under the provisions of this sub-section shall, before coming into effect, be published in the "Gazette," etc.

What is set up as "publication" under this sub-section is ex. 4:—

> MUNICIPAL ACT.
>
> Notice is hereby given that the Municipal Council of the Corporation of the City of Victoria, under the authority of the Municipal Act, has passed a by-law numbered 1183 and entitled "A by-law for the widening of Pandora Ave., from Douglas St. to Amelia St., and also between Chambers St. and Fernwood Road," and for that purpose has expropriated certain land and real property in the said by-law more particularly described.

The said by-law is on file, and may be inspected in the office of the Clerk of the Municipal Council, City Hall, Douglas St., Victoria, B.C.

Dated this 18th day of May, A.D., 1912. Wellington J. Dowler, C.M.C.

In my view, this does not satisfy the requirements of the statute. Ex. 4 is not the by-law, but a notice that such by-law has been passed. It is very far from setting out all the terms of the by-law. Especially, it gives no particulars whatever of the property of which it is proposed to dispossess owners, a factor which looms largely in some of the majority judgments in the *Mackay* case if I read them aright. To gain such knowledge it imposes on owners the necessity of either personally, or by agent, attending at the city clerk's office to inspect the by-law. The statute gives the city council no authority to impose such a requirement. In short, to hold ex. 4 to be a compliance with the sub-section involves at least the reading into said sub-section some such words as "notice of." This would be legislation, not construction. I, therefore, hold the by-law invalid.

The plaintiff corporation and the Attorney-General then set up dedication of the land in dispute as a highway. In my opinion, although as stated the by-law is invalid, it and all the proceedings carried out under it, including the conveyance by the owner Moody to the plaintiff corporation, can be looked at as evidence to prove the first essential of dedication, viz., intention to dedicate, by Moody, the owner in fee. If so, I think such intention is clearly expressed in writing, particularly in the recitals of the conveyance. If this is an error, then I think such intention can clearly be established as against the owner in fee in view of his acts and behaviour in the light of all the surrounding circumstances: 16 Hals., p. 33, s. 42, and authorities there cited.

In April, 1914, the fences were moved back, and during that year a concrete sidewalk was laid over the strip of land in question, which sidewalk has ever since been used by the citizens of Victoria. No steps whatever, on behalf of the owner, so far as the record shows, have been taken against such user. User is evidence of dedication, and there is no fixed minimum period which must be proved in order to justify an inference of dedication: 16 Hals., p. 38, pars. 51 & 52. When the surrounding circumstances in this case are considered, viz., the history of this widening, the evidence shews it was and has continued to be a matter

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of much public interest in Victoria *vide* the newspaper exhibits and legislation for the relief of the taxpayers of Victoria in connection with such improvements, the laying of the concrete sidewalk, the situation of Pandora Ave. in the city of Victoria, the uninterrupted user as aforesaid, etc., there is, I hold, ample evidence of dedication by the owner in fee. Acceptance and user is established by the same evidence. I cannot agree that s. 13 of the Highway Act abrogates the common law method of establishing a highway by dedication, acceptance and user. That section clearly, I think, applies merely to the case where the owner of land desires to have the Minister of Public Works establish a highway under the provisions of the Highway Act. If I am correct thus far the strip of land in dispute is a public highway. If so, by virtue of s. 5 of the Highway Act (the city's deed not being registered) the fee is vested in His Majesty, and authority is not needed for the proposition that the Attorney-General is the proper official to enforce any public rights in connection with such highway, one of which would clearly be the obtaining of a declaration that the disputed land is in fact a public highway. If this is correct, what is defendant Bailey's position? In the interval between the giving of the deed by Moody and the starting of work in April, 1914, he had obtained and registered a mortgage from Moody which covered, probably by error, the disputed strip. His contentions, assuming, as I have held *supra*, that the land is a public highway by dedication, acceptance and user, are two, (1) that user is essential to establish a public highway; (2) that by virtue of the registration of his mortgage, before the date of such user, it has priority and, in effect, destroys such public highway, with the result that he is entitled to enforce his mortgage to the exclusion of such public highway and to claim damages against the city for trespass. As shewn hereafter, I think the Moody conveyance valid, at any rate apart from the provisions of the Land Registry Act. If so, the defendant must rest his position solely on the fact of the registration of his mortgage. Conflicts based on the Land Registry Act provisions as to charges are essentially different according as such conflicts arise between registered and unregistered charges and between registered charges and unregistered ownership of the fee. *Bank of Hamilton* v. *Hartney* (1918), 43 D.L.R. 14. S. 34 of the Land Registry Act makes registration

of a charge *primâ facie* evidence of the mortgagee's estate or interest subject only to such registered charges as appear existing on the register and *to the rights of the Crown*. As stated, I think all the proceedings under the invalid by-law, including the Moody deed, may be looked at on the question of dedication. If so, I think they establish intention to dedicate by Moody and acceptance of such dedication by the plaintiff corporation, prior to the giving of the mortgage by Moody to the plaintiff. Assuming, without deciding, that user is essential to the establishment of a public highway, the effect of what occurred, prior to the giving of the mortgage, was, I think, to give a right to the plaintiff corporation to at any time, at any rate prior to revocation by Moody of his dedication, if that were possible—establish a public highway over the disputed ground by throwing it open to the user of the public. As soon as this was done, if I am correct in the view already expressed, the fee would vest in the Crown until plaintiff corporation registered its deed. The Crown then, from at any rate the date of the Moody conveyance and the payment of the purchase-price by the plaintiff corporation, had a right *in posse* to the fee which might at any time be reduced to a right *in esse* by the throwing open of the disputed land to the user of the public by the plaintiff corporation without registration of the Moody conveyance. If such right existed, s. 34 of the Land Registry Act expressly preserves it, since registration is made subject to the rights of the Crown. In my opinion, on the facts here, this right did exist in the Crown and at any rate now that it has been reduced to a right *in esse* by the act of plaintiff corporation the Attorney-General is entitled to a declaration that the plaintiff's mortgage is a cloud on the title of the Crown. But if this view is incorrect, and assuming that where a mortgagor is in possession of mortgaged premises the mortgagee's assent is necessary to a dedication, and further assuming that user is essential to a valid dedication, I hold, on the facts here, the defendant must be held to have given such assent. The inference of assent by a mortgagor cannot, I think, require more cogent proof than does the inference of dedication by the owner. If so, the evidence (excluding everything that occurred prior to April, 1914) already referred to as establishing dedication by Moody establishes, in my opinion, assent by Bailey. In addition to this evidence, the record shews that

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Bailey was throughout this period resident in Victoria, that at any rate, some short time after the actual work was entered upon, he devoted particular attention to this property because of default in the payment of interest, that he has personally used the sidewalk built on the disputed land and that he made no objection until his pleadings in this action were filed. If there was such assent, the Attorney-General's action must succeed.

I am further of the opinion that the plaintiff corporation is entitled to a declaration that defendant's mortgage is a cloud on its title and that it is entitled to registration of the Moody deed clear of such cloud. If the deed is valid, plaintiff corporation, by s. 104 of the Land Registry Act, has the right to have same registered. If I am correct, as to Bailey's assent to the Moody dedication, that assent would operate in favour of the plaintiff corporation, as well as in favour of the Crown to the extent at any rate of plaintiff corporation's interest in said public highway. Under s. 370 of the Municipal Act, c. 170, R.S.B.C. (1911), the possession of public highways within its corporate limits is vested in the plaintiff corporation, and the possession of the Moody conveyance by virtue of s. 104, as stated *supra*, confers on plaintiff corporation the right of registration if the deed is valid. Its validity is impugned on the ground that plaintiff corporation can only acquire real estate under by-law authority, and the by-law being, as I have held, invalid, the deed is void. The original incorporation Act of plaintiff corporation, passed in 1867, gives it the general power to hold real estate. In a careful review of all succeeding legislation affecting this statute, Mr. Hannington points out that its provisions are only repealed in so far legislation. In all the various Municipal Acts passed since affecting plaintiff corporation there is, in my opinion, nothing repugnant to or inconsistent with the general power to hold real estate conferred upon it by its Act of incorporation. What these various Acts do, when they do not expressly confer a general power to hold real estate, is to prescribe particular modes whereby municipalities governed by them may acquire real estate. It cannot, I think, be said, under the wording of the various statutes, that prescribing a particular way whereby land may be acquired destroys the capacity plaintiff corporation had of holding real estate to the extent of making void an otherwise valid deed purporting to convey land to it. I, therefore,

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hold that plaintiff corporation is entitled to registration of the Moody conveyance freed from any cloud on its title arising by virtue of defendants' registered mortgage.

As to the counterclaim, the disposition of the original action disposes of the trespass claim. In so far as it is thereby sought to attack the various assessment by-laws, I think it is clear such attack in the form it takes in this action can only be made by someone having a legal or equitable interest in the property assessed. Defendant Bailey in his discovery expressly repudiates any such interest. At the trial, I added the other plaintiff, the Cameron Investment Co. Ltd. On consideration, I think this is an error, since whatever instrument of title they possess is unregistered and, therefore, by virtue of s. 104 of the Land Registry Act, passes to them no interest, legal or equitable. Even if this is incorrect, no evidence of title appears on the record. Title cannot, I think, be proved by Bailey's statement that he had parted with his interest to his co-plaintiff. But assuming either plaintiff has a status to maintain the counterclaim, I think s. 141 of c. 52, B. C. Statutes (1914) is, on the facts here, a complete bar to this cause of action. To adopt the narrow application of this section, contended for by counsel for plaintiffs by counterclaim, would, in my opinion, be to invite the very disastrous consequences which their Lordships of the Privy Council in *Wilson* v. *Delta Corporation* (1912), 8 D.L.R. 881, [1913] A.C. 181, stated it was the object of this and cognate sections to prevent.

The counterclaim is dismissed. *Judgment for plaintiff.*

HERMAN v. CANADIAN PACIFIC R. Co.

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Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 21, 1918.

RAILWAYS (§ IIA—10)—NEGLIGENCE—RAILWAY YARD—SWITCH STAND TOO NEAR TO TRACK.

In an action by a freight conductor in the employ of the defendant company for damages for injuries sustained while making a flying or drop switch, the jury found that there was no negligence on the part of the plaintiff, but that the defendants were guilty of negligence in building the switch which the plaintiff was operating at the time of his injury.

HAULTAIN, C.J.S., on appeal held that in view of the evidence, which was conflicting, the verdict could not be said to be perverse and should not be disturbed.

Newlands, J. A., thought that, the jury having held that the defendants were guilty of negligence, in having the switch too near the track, not for all purposes but for the purpose of performing the operation in which the plaintiff was injured and that operation being a proper one to be

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performed, at the time and having been properly performed, the verdict should not be disturbed.

LAMONT and ELWOOD, JJ.A., held that, according to the evidence, the cause of the accident was the cutting away of the engine from the cars at a point too close to the switch and whoever was responsible for this was guilty of the negligence which caused the accident. Also, the defendants could not be said to be negligent in placing the switch-stand when it was done under the advice of their railway experts, with whose opinions nearly all the experts at the trial agreed, Juries could not be allowed to set up a standard which should dictate the practice of railway companies in the conduct of their business and the verdict should be set aside.

[*Nelson* v. *C.P.R. Co.* (1917), 39 D.L.R. 760, 55 Can S.C.R. 626; *Mallory* v. *Winnipeg Joint Terminals* (1916), 29 D.L.R. 20, 53 Can. S.C.R. 323, discussed.]

Statement.

APPEAL by defendant company from the judgment at the trial in an action for damages for injuries received by plaintiff while in the employ of defendant company. Affirmed by an equally divided court.

J. A. Allan, K.C., and *J. L. Reycraft*, K.C., for appellant; *P. M. Anderson*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—Having had the opportunity of looking over the judgment of my brothers Newlands and Lamont in this case, I was at first very much led to the conclusions of the latter. The case, certainly, in my opinion, does not come within the principle of the decision in *Nelson* v. *C.P.R. Co.* recently decided in the Supreme Court of Canada (1917), 39 D.L.R. 760, 55 Can. S.C.R. 626. In that case, there was no evidence offered by the defendant, and the questions of standard equipment and "good railway practice" were not involved. The citation from Beven (3rd ed., p. 615) relied on by my brother Lamont, supported as it is by numerous decisions in the Supreme Court and other Canadian courts, would be conclusive, if the evidence with regard to standard equipment, good railway practice and ordinary usage had been all one way. The evidence on these points was conflicting, and was very carefully summed up in his charge to the jury by the learned Chief Justice of the King's Bench, who tried the case, and who also expressed a strong opinion on the comparative weight of the evidence. The jury found in favour of the plaintiff, and, in view of the evidence, I cannot say that the verdict was perverse.

There is another ground which might have been urged with some force by the appellant. That is, that the finding of no contributory negligence was not warranted by the evidence. The fact that the method of operating the switch adopted by the

plaintiff was dangerous must have been obvious. He knew, or must have known, that by obtruding his body over or close to the rail within a moment or two of the passing of the separated cars was dangerous. The evidence shews that the switch could have been thrown in another way, not so conveniently, perhaps, but safely, and he deliberately adopted the more dangerous method. This point, however, was not raised.

Haultain, C.J.S.

With very much doubt, I would dismiss the appeal.

Newlands, J.A.

NEWLANDS, J.A.:—The plaintiff, a freight conductor in the employ of the C.P.R., was injured in the Regina yards while making a flying or drop switch, and he brought this action against the company for damages. The jury found that there was no negligence on the part of the plaintiff, but that the defendants were guilty of negligence in building the switch which the plaintiff was operating at the time of his injury too near the track.

This finding, I think, must be taken with the qualification, not that the switch was too near the track for all purposes, but that it was too near to be operated for a drop or flying switch. This drop switch was a proper and necessary operation in railroading and at the time the plaintiff made it. It was made for the purpose of placing two cars on a track different from that on which the engine that was hauling them was on. It was made by the engineer slackening the speed of the train while a brakeman drew the pin between the engine and the cars; the engineer then speeded up the engine, and, when it got about 10 ft. beyond the switch, the plaintiff threw the switch to allow the cars to take it and go on a different track. While performing this operation, the cars, in passing, struck him and injured him.

The evidence taken as a whole was to the effect that the switch was built according to good railroad practice, but that it was dangerous for making a drop or flying switch.

Now the jury having found no negligence on the part of the plaintiff, and having found the defendants guilty of negligence, in having this switch too near the track, not, as I have already said, for all purposes, but only for the purpose of performing the operation in which the plaintiff was injured, and that being a proper operation to be performed at the time and having been properly performed, I do not see how we can disturb the verdict.

It was sought to distinguish between this case and *Nelson* v.

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Newlands, J.A.

C.P.R. Co., 39 D.L.R. 760, [1918] 2 W.W.R. 177, and to bring this case within the decision in *Mallory* v. *Winnipeg Joint Terminals* (1916), 53 Can. S.C.R. 323, 29 D.L.R. 20.

When the switch in question was thrown, the handle by which it was operated would be within 9 inches of a passing car. In the operation the car would pass immediately after the switch was thrown. Under these circumstances, the remarks of Anglin, J., at pp. 186-7 in the *Nelson* case are most pertinent:—

> I confess my inability to appreciate the contention that it is not within the province of a jury to find, without expert evidence to that effect, that a given space is not reasonably sufficient to permit of the safe passage through it of a man riding on the side-ladder of a freight car whose duty it is to be ready to alight immediately after passing through such space, or that the failing to allow a greater space, there being admittedly no necessity so to restrict it, and no evidence of any advantage in doing so, was not warranted by good railway practice. Mr. Anderson very briefly, but very distinctly, pointed out the clear distinction between the question of ordinary common sense presented by the case at bar and the scientific and technical issues which arose in *Mallory* v. *Winnipeg Joint Terminals*, 53 Can. S.C.R. 323, 29 D.L.R. 20, and in *Phelan* v. *G.T.P.R. Co* (1915), 23 D.L.R. 90, 51 Can. S.C.R. 113.
>
> Moreover, employers are not entitled, unnecessarily, to expose their servants to dangers which they can escape only by constant vigilance or unfailing alertness. While a railway employee must incur certain unavoidable risks—while, owing to the inherently dangerous nature of his employment, more than ordinary vigilance and care may be expected from him, he is, nevertheless, human, and subject to occasional momentary distractions and inadvertences. To paraphrase some observations of the Chief Justice to the jury: (1917), 10 S.L.R. 125, 35 D.L.R. 318). Precautions are not required for the superhumans who are never preoccupied and never unwary. In determining whether the switch-stand in question was dangerously close to the side-ladders of passing cars, the human element and the ordinary brakeman's mode of discharging his duties must be taken into account. If, tested by that standard, the position of the switch involved a peril to the defendants' servants, the existence of which was neither sanctioned by lawful authority nor necessitated by any exigency of the situation, negligence in so maintaining it, in my opinion, cannot be gainsaid. A jury has so found and under the circumstances its verdict should stand.

The switch in question could have been placed further from the tracks. It was first laid out to be placed across the track immediately to the north, but was changed to its present location because it was more convenient and less expensive to maintain. There, it was suitable for all purposes excepting a drop switch. Under these circumstances, it comes within the decision of Anglin, J., in the above case, and the appeal should, therefore, be dismissed with costs.

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Lamont, J.A.

LAMONT, J.A.:—The plaintiff was in the employ of the defendants as freight conductor, running between Moose Jaw and Broadview. On November 1, 1917, he ran his train into the defendants' yards at Regina, where he received instructions from the yardmaster to pick up two cars on the west end of the yard and switch them to another track. He decided to make what is known as a drop or flying switch, which, under the circumstances, was a proper thing to do. That operation consists in approaching the switch with the engine coupled to the car nearest the switch. The approach is made with sufficient speed to give the cars considerable momentum, then the pin coupling the engine to the cars is drawn and the engine shoots ahead, and gets away from the cars, and passes the switch, which is then thrown so as to send the cars on a different track from that followed by the engine. The plaintiff, as conductor, was in charge of the operation. The plaintiff stationed himself at the switch at which the drop was to be made, and instructed the engineer and brakeman to go up the track and pick up the two cars. The cars were about 15 car lengths from the switch. The engine was coupled to the cars, and then began backing towards the switch. At a certain point—how far from the switch does not appear—the brakeman drew the coupling pin. The engineer then put on speed, got ahead of the cars and ran over the switch. The moment the engine was clear, the plaintiff threw the switch over. To throw the switch, the plaintiff stood between the switch handle and the track and pulled the handle around about a quarter of a circle. The distance between the switch stand and the track is 4 ft., but the body of a box car projects over the rail about 2 ft. 6½ inches. The handle of the switch—when in position to send the cars along the track destined for them—was pointing at an angle towards the track, leaving a space of about 9 inches between the switch-handle and a passing car. When the engine ran over the switch, the on-coming cars were about one car-length behind it. Before the plaintiff could throw the switch and get from between the switch stand and the track, the cars were upon him. He says he was knocked down by the box car while throwing the switch, his left arm was cut off by the wheel, his left leg broken, and he suffered nervous shock to his system.

Alleging that his injuries were caused through the negligence

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of the defendants, the plaintiff brought this action. The negligence alleged was as follows: "In having the switch stand in question too close to the rail, which was a fact well known to, or ought to have been known by the defendant, but unknown to the plaintiff.

The action was tried with a jury. The following are the questions submitted to the jury and the answers returned by them:—

1. Q. Did the plaintiff receive his injuries while engaged in the discharge of his duties as a conductor of the defendant company? A. Yes.

2. Q. Were the defendants guilty of negligence in placing the switch-stand in question where it was located? A. Yes.

3. Q. If so, was the defendants' negligence the real, direct and immediate cause of the misfortune? A. Yes.

4. Q. What damages, if any, do you allow? A. (1) special, $1,210; (2) general, $16,000—$17,210.

Judgment was entered for the plaintiff for the amount awarded by the jury, and from that judgment the defendants now appeal.

The main question on the argument was: Were the jury entitled to find negligence on the part of the defendants in placing the switch-stand where it was located?

The record shews that a number of witnesses—trainmen, and one civil engineer—called on behalf of the plaintiff, testified that the switch-stand in question was improperly placed, in that it was too near the rails. For the defendants, three divisional superintendents, their chief engineer, a civil engineer from St. Paul, in the employ of the Northern Pacific R. Co., and a civil engineer from Minneapolis, who had an extensive railway experience, testified that the switch-stand was properly placed, and that in placing it where they did, the defendants followed the practice adopted by many railways in Canada and the United States. The evidence upon this point was summed up by the Chief Justice of the King's Bench in the following words:—

Now you have a number of men, as I have already intimated, who were called here on the part of the plaintiff, who have given their evidence, I am satisfied, in a fair, unprejudiced way, and who state that the switch-stand could be placed north of those other tracks. . . . On the other hand, you have just as many men, and I think the evidence is clear in most cases men of wider experience, men of greater competency, to say that it is safer and more efficient to have it where it was.

Can the defendants be said to be negligent in placing the switch-stand at a particular point when it was placed at that precise point upon the advice, and in accordance with the opinions of their railway experts, and when nearly all the engineers and

experts called at the trial agreed with those opinions? I fail to see how they can. Negligence is the failure to do that which a prudent and cautious man, under the circumstances, would do. What more could a prudent man do in determining where a switch-stand should be placed than adopt the opinion of qualified experts in railway matters, especially when that opinion coincided with the practice generally adopted on railways?

In Beven on Negligence, 3rd ed., p. 614, I find the following:—

> Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community.

In view of the fact, therefore, that the defendants' witnesses established that the switch-stand in question was of standard type, and that the distance it was placed from the rail was that adopted by many railways in Canada and the United States for that class of switch-stand—the evidence on these points not being disputed—and in view of the fact that the defendants produced evidence of equal weight, to say the least, to that produced by the plaintiff, that it was good railway practice to place the switch-stand where it was placed, and that, located there, it was more efficient than if located across the tracks to the north as suggested, it was not open to the jury, in my opinion, to say that the defendants had been guilty of negligence in placing it at the point they did, and that, notwithstanding the fact that on the Grand Trunk Pacific Railway similar switch-stands were located further from the track. As intimated by Mr. Beven at the end of the passage above quoted, juries cannot be allowed to set up a standard which shall dictate the practice of railway companies in the conduct of their business, nor do I think they can be allowed to say that one company has been guilty of negligence simply because another company has adopted a different practice, and one which commends

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itself to the minds of the jury. For these reasons, the verdict, in my opinion, cannot stand.

For another reason, also, I am of opinion that the plaintiff's action cannot be maintained. That reason is, that the negligence as found by the jury was not the act of negligence which was the real cause of the accident, as disclosed by the evidence.

On the evidence, I would find that the real cause of the accident was the negligence of the engineer or brakeman, whichever was responsible, in cutting the engine from the cars at a point too near the switch to permit the switch being safely thrown before the cars reached it.

Oscar Sjoberg, switch-foreman in the defendants' Regina yards, was called as a witness for the plaintiff. His testimony as to the safety of the switch in question in making a drop switch was as follows:—

Q. Well, is it safe or is it not? A. Well, it might be safe if a man took a lot of room, enough room to get away from the cars.

Q. Well, but is there enough room there to operate the switch when the cars are going by? A. Not when the cars are going by.

Q. Well, is it or is it not safe wher you are making a drop switch? A. It is safe if a man took enough room that he could throw the switch before the car come on top of him.

Q. But if the cars are going by at the same time he is throwing the switch is it safe? A. Well, there isn't any room for him.

Q. Is it safe? A. I say it is safe if he would have room to throw the switch before the car comes on top of him.

His Lordship: He says if he were operating that he would make sure that the car was a long distance away.

Mr. Anderson: Would it be safe to throw that switch, that shop track switch, while a car was going by? A. No. Because you have to throw the switch before the car comes.

Q. Well, is it safe or is it not safe to use that switch-stand for a drop switch? A. Well, I told you twice now. They are safe if a man have enough room.

Q. Well, can he take enough room? A. Sure he can.

He explained that by taking room enough he meant that the engine should be cut from the cars far enough from the switch to enable the switchman to throw the switch after the engine passed and get out of the way before the arrival of the cars.

Robertson, another witness for the plaintiff, testified that in operating a switch you move away from it before the train passes. To the same effect is the evidence of Clement, one of the defendants' experts, who testified that at the time a switchman is throwing the switch there is nothing occupying the track. This evidence

to my mind establishes that, in the contemplation both of the employees and the company, a switchman is supposed to have a switch set before the cars arrive at the switch. The plaintiff testified that the moment the engine got past the switch he began to throw it, and was in the act of throwing it when the box car hit him. He also testified that he "must have at least over a car-length when the engine went by to throw the switch." The engine had to be 8 or 10 ft. past the switch points before he could commence to throw it, as the wheels held the switch rails for that distance. He also said that the engine came along fast, 8 or 10 miles an hour, and that the cars were but a car length behind the engine when the switch was thrown.

Now if the engine was 8 or 10 ft. past the switch when the plaintiff began to throw it, there was not a car-length between the on-coming cars and the switch-stand when the plaintiff pulled the switch-handle. Had the engine been separated from the cars at a point farther away from the switch, the plaintiff could have thrown the switch and got away before the cars hit him. That was not done, and, as a result thereof, the plaintiff was injured. The cause of his injury was, therefore, the cutting of the engine away from the cars at a point too close to the switch. Whoever was responsible for that act was, in my opinion, guilty of the negligence which caused the accident. As that was not the negligence found by the jury, the verdict cannot be supported.

On behalf of the plaintiff it was argued that the facts of this case brought it within the principle of the recent decision of the Supreme Court of Canada in *Nelson* v. *C.P.R. Co.* (1917), 39 D.L.R. 760.

In my opinion, there is a clear distinction between that case and the present one. In the *Nelson* case, the employee was obliged, while riding on the side of a box car in the performance of his duty, to pass his body between the switch-stand and the car, and, as the space allowed for that purpose was found not to be reasonably sufficient therefor, he was held entitled to recover. In the present case, there is nothing in the evidence from beginning to end that would indicate that it was ever contemplated that a switchman would be obliged, in the performance of his duty, to be between the switch-stand and a car which was passing the switch. All the evidence on the point seems to me to indicate

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clearly that a switchman is supposed to have the switch set and be back from the track when the car reaches the switch.

In my opinion, therefore, the appeal should be allowed with costs; the judgment below should be set aside, and judgment entered for the defendants with costs.

ELWOOD, J.A., concurred with Lamont, J.A.

Affirmed; court equally divided.

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SCANLIN v. CANADIAN PACIFIC R. Co.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. December 10, 1918.

CARRIERS (§III C—385)—DELIVERY TO— LOSS OF PART OF GOODS—NO EXPLANATION—PRESUMPTION OF NEGLIGENCE—LIABILITY FOR LOSS.

Where goods are shewn to have been delivered to a railway company for carriage, and they are not delivered at their destination, and no explanation is furnished, negligence may be presumed. Where the initial carrier undertakes the entire transportation, the connecting carriers through whose hands the goods pass in the performance of the contract are the agents of the initial carrier, who is liable for their negligence.

[*Ferris* v. *C.N.R. Co.* (1905), 15 Man. L.R. 134; *Henry* v. *C.P.R. Co.* (1884), 1 Man. L.R. 210, followed.]

Statement.

APPEAL by defendant company from the judgment at the trial in an action to recover the price of grain lost in transit. Affirmed.

L. J. Reycraft, K.C., and *H. A. V. Green*, for appellant.; *J. Auld*, for respondent.

Cameron, J.A.

CAMERON, J.A.:—In September, 1917, the plaintiff, who has a large farm adjoining Domain in this province, delivered to the defendant a carload of rye for shipment to Duluth, in the State of Minnesota, consigned to the Lake of the Woods Milling Co. The grain was brought to the station by the plaintiff's servants in wagons and there weighed, according to a scale, by a weigh-master, who was independent of the defendant, and then loaded into the car. The weigh-master issued a ticket for each load of grain. The total amount of rye shown by these tickets as having been weighed came to 1,250 bushels. The defendant's agent issued a shipping bill, giving the car number and the weight, subject to inspection, as 70,000 lbs. The grain was carried from Emerson to Duluth over the Minneapolis, St. Paul and Sault Ste. Marie R.R. and delivered, when it was discovered that the out-turn was only 50,820 lbs. or 889.20 bushels instead of 1,250, and the action is brought to recover this difference, the excess of

the claim over $500 being abandoned. For that amount the County Court Judge entered a verdict, and from this the defendant appeals.

Objections were taken to the sufficiency of the proof of the quantity shipped, but the Court was satisfied that this had been established. The point in dispute really narrowed down to the one question whether the out-turn at Duluth had been proved by proper evidence. There is no doubt that the certificate of the weigh-master at Superior, an official of the State of Wisconsin, cannot be considered evidence. The examination for discovery of Frederick Elder, freight claims agent of the defendant, was put in at the trial, and he produced a copy of a freight receipt, showing the consignee of the contents of the car in question indebted to the Minneapolis, St. Paul and Sault Ste. Marie Ry. for the sum of $72.60, being the charges on 60,000 lbs., of which the actual weight is shown in the receipt to have been 50,820. Mr. Elder said the only knowledge his company had of the weight was that contained in this receipt. The question arises whether this receipt is evidence against the defendant company.

There can be no dispute that the Minneapolis, St. Paul and Sault Ste. Marie R. Co. was the agent of the defendant company for all purposes necessary to complete the contract for the shipment of the grain.

Where the initial carrier undertakes the entire transportation, the connecting carriers through whose hands the goods pass in the performance of the contract are the agents of the initial carrier. Cyc. VI. 479.

Now this document comes from the defendant's possession and documents in a party's possession, which he has in any way *recognised, adopted* or *acted upon*, are, generally speaking, evidence against him of the truth of their contents. Phipson on Evidence, 4th ed., p. 236.

The Minneapolis, St. Paul and Sault Ste. Marie R. Co., made this statement in the course of business as agent for the defendant, and "the acts, contracts and representations of the agent bind the principal, if falling within the scope of the agent's employment."

Relevant statements of an agent within the scope of his duty to the corporation are admissible against it. Cyc. XVI. 1019. The declarations of an agent of a corporation as to the matter in his charge, accompanying his acts as agent, stand on the same ground as the acts themselves and both go to shew what has been the conduct of the corporation in the matter to which they relate. Cyc. X. 947.

He who sets another person to do an act in his stead as *agent* is chargeable

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by such acts as are done under that authority, and so too, properly enough, is affected by admissions made by the agent in the course of exercising that authority. Wigmore on Evidence, Can. ed., 1078 (where he quotes at length with approval from a statement of the rule in an early Pennsylvania case from which the following is taken): Whatever is said by an agent . . . accompanying the performance of any act, within the scope of his authority, having relation to, and connected with, and in the course of the particular contract or transaction in which he is then engaged, is, in legal effect, said by his principal and admissible in evidence.

For the purposes before us now, therefore, this document is the defendant's statement. Whether it was prepared by it or its agent is not material. It comes from the defendant's possession and we can take it as a reasonable presumption that it was prepared, issued and forwarded in the regular course of business. In point of fact, there can be no question as to its authenticity and accuracy. From an evidential point of view I think it is admissible against the defendant.

In my opinion, the appeal must be dismissed with costs.

Haggart, J.A.

HAGGART, J.A.:—I cannot say there is no evidence to support the finding of the trial Judge. The plaintiff has proved the quantity put into the car at Domain. It was strongly urged by the defendants that there was no evidence as to the outturn at Duluth. We have the certificate of the weigh-master at that point which comes from the custody of the defendants. The defendants received the car loaded at the shipping point. Upon whom is the onus of proof as to the quantity in the car at its destination?

In considering this question in *Ferris* v. *C.N.R. Co.* (1905), 15 Man. L.R. 134, at 138, Perdue, J., the trial judge, says:

> It was strongly urged on the part of the defence that no negligence was shewn and that negligence must be proved. . . . Finding as I have that 1,270 bushels of wheat went into the car, it rests upon the defendants to shew what became of the difference. No evidence was offered which would enlighten me as to what actually happened which caused the loss of the grain or the non-accounting for same, and it is useless to speculate as to what casualty may have overtaken it or what error may have been made. In the absence of other evidence *res ipsa loquitur* and points to the loss as occurring through some act or default on the part of the defendants,

and again, on the same page, he goes on to say:

> Where goods are shewn to have been delivered to a railway company for carriage and they are not delivered and no explanation is furnished, negligence may be presumed.

The judgment of Perdue, J. was afterwards affirmed on an appeal to the full Court.

It is not open to the defendants to urge the conditions in the shipping bill.

Henry v. *C.P.R. Co.* (1884), 1 Man. L.R. 210, was an action brought for the non-delivery of sawn lumber delivered by the plaintiffs to the defendants at Portage la Prairie to be carried by them to Brandon. The defendants pleaded a condition on the shipping bill that the company would not be responsible for any deficiency in weight or measure. The evidence shewed that the lumber was loaded at Portage la Prairie and that a portion was not delivered at Brandon. There was no evidence as to how the loss occurred.

It was held that the defendants were precluded from setting up the endorsed condition when a loss was charged as happening through their own negligence, and that, in the absence of evidence, the non-delivery might be assumed to have arisen from misdelivery to some other person or from the actual use by the defendants for their own purposes.

Wallbridge, C.J., in his reasons, on p. 211, says:

> The plaintiffs, in my opinion, are entitled to recover as it is not shewn (and the burden of this is on the defendants) how the loss occurred and that it occurred in such manner as gave them exemption within the meaning of the condition.

Randall v. *C.N.R. Co.* (1915), 21 D.L.R. 457, 19 Can. Ry. Cas. 343, and 25 Man. L.R. 293, followed *Ferris* v. *C.P.R. Co.*, and this court held that it is not open to a railway company, which has actually received grain for transportation, to dispute the bill of lading or shipping bill issued on its regular form, merely on the ground that its agent had not, by reason of some inside regulations between the company and its servants, the power to sign the bill, where the company received and carried the grain, collected the freight and made delivery pursuant to its terms, and further that, where there is nothing in the bill of lading or shipping bill to limit the responsibility for the weights or quantities entered on the bill, the railway company is estopped from denying that approximately the quantity stated, with the addition of the words "more or less," had been received for shipment. It was also held that where the bill of lading called for "1,100 bushels more or less" of flax and the evidence proved the delivery of over 900 bushels in a carload lot, the onus is upon the company to account for the deficiency on the car arriving at its destination with only half

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the quantity stated in the bill and where no satisfactory explanation of the loss is given by the railway, negligence may be presumed against it. See also the cases *Erb* v. *G.W.R. Co.* (1881), 5 Can. S.C.R. 179; *Curran* v. *Midland R. Co.*, [1896] 2 I.R. 183 (1896); *Czech* v. *General Steam Navigation Co.* (1867), L.R. 3 C.P. 14.

The appeal should be dismissed.

PERDUE, C.J.M. and FULLERTON, J.A. agreed in dismissing appeal. *Appeal dismissed.*

N. S.

S. C.

FULLERTON v. RANDALL.

Nova Scotia Supreme Court, Harris, C.J., Russell and Longley, JJ., Ritchie, E.J. and Mellish, J. December 14, 1918.

EASEMENTS (§ II C—20)—NECESSITY—WAY OF—ONLY EXISTS WHEN NO OTHER MEANS OF ACCESS.

A right of way of necessity only exists where the grantee has no other means whatever of reaching his land. If there be any other means of access, no matter how inconvenient, no way of necessity can arise.

Statement.

APPEAL from the judgment of Drysdale, J., in an action by plaintiffs claiming a declaration as owners in fee simple and in possession of certain lots of land to be entitled to full right and liberty of way over two new streets for all purposes connected with the use and enjoyment of the lots of land of which they were owners.

The judgment appealed from is as follows:—

In 1873 one B. N. Fullerton owned a tract of land at the place called Mill Village, near Parrsboro. In that year he divided a portion of such lands into building lots, had a plan made of such subdivision and sold lots according to such plan. The real difficulty arises over the loss of the plan. Lots 2 and 3 were sold and conveyed to Bent Fullerton who built thereon. The plaintiffs claim through Bent Fullerton and the defendants through the grantor, B. N. Fullerton. Lots 2 and 3 were bounded eastwardly on a street as marked on said plan. Such street in fact did not exist, but was evidently a proposed street for such subdivision. Defendants are estopped from denying the existence of such a street as the eastern boundary of lots 2 and 3. Bent Fullerton built on lot 2, facing such street or proposed street, and to get access convenient to such house used a path over other lands of the grantor to Main St. Such path was a well recognized means of ingress and egress to and from the house and lot 2 and used as of right for many years. Obstruction to the path by defendants is the cause of this action and the subject of the litigation herein. The proposed street is shewn on McKenzie's plan E. 1. Some time after 1873, Bent Fullerton purchased from the same grantor lots 1 and 4 immediately to the north and south of 2 and 3, according to the plan of subdivision, again specially referring to the eastern boundary as a street. Defendants are not permitted, in my opinion, to say that a street does not exist as the eastern boundary of 1, 2, 3, and 4, and if this is so, means

of access to the public ways over the grantor's lands must follow. After 1 and 2 were sold and conveyed, a well defined footpath was laid out over the lands of the grantor leading from lot 2 to Main St., through what is now the Randall property. I think this passed with the street as a necessary and convenient outlet to the highway. It was open and used with the grantor's consent for many years as a convenient access by foot passengers to the subdivision lots. The grantor cannot be heard to say no street, and when he gave an outlet over his other lands for the benefit of the subdivision lots he is as little entitled to say no outlet as no street. In short, I am of opinion that the outlet to Main St. was incidental to the proper use of the lots and a street to the east, that the original grantor and grantee recognized this and adopted and used the footpath in question over other lands of the grantor as a necessary and convenient outlet for the proposed street to Main St. through the roadway K.L. on E. 1. Plaintiffs are entitled to a declaration of their right to this footway through the lands of Randall all with costs.

V. J. Paton, K.C., and *J. A. Hanway*, for appellants.

F. L. Milner, K.C., and *V. B. Fullerton*, for respondents.

The judgment of the court was delivered by

RITCHIE, E.J.:—The appeal is asserted only in respect to that part of the judgment which relates to the pathway. There is, in my opinion, no pathway of necessity through the defendant's lands to Main St., it is quite true that it would be a convenient way, and would probably enhance the value of the plaintiffs' property but it is necessity, not convenience, that I have to deal with. The law as I understand it is correctly stated in the judgment of the court in *McDonald* v. *Lindall* (1827), 3 Rawle 492 at 495. It is there said:— Ritchie, E. J.

> The right of way from necessity over the land of another is always of strict necessity, and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That a road through his neighbour's would be a better road, more convenient or less expensive, is not to the purpose; that the passage through his own land is too steep or too narrow does not alter the case. It is only where there is no way through his own land that the right of way over the land of another can exist.

In 11 Hals. 289 it is said:—

> A right of way of necessity can only exist where the grantee has no other means whatsoever of reaching his land. If there be any other means of access to the land so granted, no matter how inconvenient, no way of necessity can arise, for the mere inconvenience of an alternative way will not of itself give rise to a way of necessity.

If the legal standard was convenience, the plaintiffs would be entitled to their pathway, but the legal standard being necessity they are not so entitled. Mrs. Fullerton says she used the pathway "for an entrance to Main St. short cut." I quote again from her evidence:—

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Q. I will now shew you the plan E. 1; was your street to run out to the steep hill? A. No, in other direction; out towards Lamb's and up the hill to the old road.

Q. The old road was then in existence and it was to join the old road? A. Yes.

Q. Keep on a straight line? A. No, go up through our lot along the east and up to meet the old road through our lot.

There is access to Main St. from the old road. It is longer and not so convenient as to use the pathway through the defendant's fields, but that does not, in law, make the pathway a way of necessity.

It is further contended that the plaintiffs acquired the right to the pathway by grant. As to this point I adopt the following quotation from 11 Hals. Laws of England as laying down the sound rule of law. At p. 254, it is said:—

> Upon the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent accommodations afforded by the part retained to the part granted and which are of such a nature that they may form the subject matter of an easement, and which are necessary to the reasonable enjoyment of the property granted and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted; this is upon the principle that a man shall not derogate from his grant.

As far as lots 2 and 3 are concerned, the facts do not bring them within the law as I have quoted from Halsbury, but when the deed of lots 1 and 4 was made the plaintiffs and people coming to and going from their house on lot 2 were openly and continuously using the pathway to lots 2 and 3 and, of course, from these lots they could get to lots 1 and 4, but I cannot come to the conclusion that under the law this results in an implied grant when the deed of lots 1 and 4 was made. It is, therefore, not necessary to decide the question of abandonment, but the long time during which the plaintiffs did not use the pathway and the unequivocal act of joining with the defendants in the building of the fence would be very serious difficulties for the plaintiffs. It is so clear that the plaintiffs have no prescriptive right to the pathway that I do not discuss it.

The appeal, in my opinion, should be allowed with costs. The plaintiff met with success on a substantial point, namely, as to the street; from this there was no appeal. I think, therefore, that they are entitled to the costs of the action, except the costs of the issues as to the pathway, and as to those issues I think the defendants are entitled to the costs. *Appeal allowed.*

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S. C.

New Brunswick Supreme Court, Appeal Division, Sir J. D. Hazen, C.J., White and Grimmer, JJ. November 22, 1918.

NEW TRIAL (§ II—9a)—DAMAGE ACTION—DEFENDANTS INDEMNIFIED AGAINST LOSS—EVIDENCE—WRONGFUL ADMISSION OF.

In an action for damages for injuries sustained through the negligence of the defendant's servants, the plaintiff has no right whatever to prove that the defendants are indemnified against any verdict that might be given in favour of the plaintiff by an indemnity company. Such evidence puts the real defendant in a position of manifest and incurable disadvantage, and if the trial judge does not warn the jury against allowing their conclusion to be affected by such evidence, a new trial will be granted, unless the plaintiff consents to a reduction of damages—where the court considers they have been assessed too high, owing to the admission of such evidence.

Statement.

APPEAL from a verdict entered for the plaintiff for $800, before Chandler, J., and a jury, at the St. John Circuit.

New trial granted on amount of damages only, unless plaintiff consents within 30 days from service of rule to a reduction of damages to $600. Defendants to be allowed costs of appeal.

F. R. Taylor, K.C., for defendants, moves for a new trial, or reduct on of damages.

D. Mullin, K.C., *contra*.

Hazen, C.J.

HAZEN, C.J.:—The jury in answer to questions submitted to them by the trial judge, found that the proximate cause of the injury sustained by the plaintiff on January 5, 1918, was his being hit by a car owned by the defendants and driven by their chauffeur, and that the injury was due to the chauffeur's negligence, which consisted in driving the car at an excessive rate of speed.

There was ample evidence to justify these answers, and the contention that they were against the weight of evidence cannot be successfully maintained. At the commencement of the case, after plaintiff's counsel had opened to the jury, defendants' counsel stated that he did not think it would be necessary for him to trouble the plaintiff to call witnesses on the question of liability, as the matter could be confined to the amount of damages sustained by the plaintiff. For reasons which no doubt were satisfactory to himself, plaintiff's counsel refused this offer, stating that he was not prepared to accept it, and that he had a right to shew the facts, and the case proceeded in the ordinary way. During the course of the trial Dr. Bentley, a physician practising in the city of St. John, was called as a witness. He was not the physician who had been called in to treat the plaintiff at the time the accident

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occurred. He saw him professionally on January 12, one week afterwards. In the course of his cross-examination, he stated that he was employed by defendants to visit the plaintiff and examine him. He was then asked if he was representing any insurance company, and this question was allowed subject to objection. He replied that he did not know, and he was then asked:—

So far as you are concerned you do not know whether there was any indemnity company concerned in the matter? A. I do know there is an indemnity company concerned in the matter, but I didn't know at the time.

The question asked by the plaintiff's counsel was, in my opinion, undoubtedly a most improper one, and he had no right whatever to prove that the defendants were indemnified against any verdict that might be given in favour of the plaintiff by any indemnity company. Defences, as has been pointed out in other cases, by or on behalf of insurance companies, are not favoured, but the reverse, by juries, and if it comes to the knowledge of a jury that the defence is not by or on behalf of an individual or individuals, but of an insurance company, this must have a strong effect upon them in arriving at a conclusion. It was said by Falconbridge, C.J., in *Loughead* v. *Collingwood Shipbuilding Co.* (1908), 16 O.L.R. 64, at p. 65, and I entirely concur in his statement, that:—

The mere putting of the question does all the mischief. The jury will draw their own inferences from the objection taken by defendants' counsel and the ruling of the court. The real defendant is placed in a position of manifest and incurable disadvantage. The proper course for the judge in such a case would be to discharge the jury, and put off the trial to the next ensuing sittings or, preferably, to discharge the jury and try out the case himself.

In the same case, Anglin, J., states that such evidence is irrelevant to the issues upon the record, and that the only pretence upon which it could be sought to justify its introduction would be for the purpose of impeaching the credibility of the witness to whom the question was put. He points out further that an irrelevant question may not be put to a witness for the mere purpose of impeaching his credibility by subsequently contradicting his answer.

From a perusal of the authorities referred to in the case just mentioned, and others that I have consulted, I think there can be no doubt whatever as to the impropriety of such evidence, and that under ordinary circumstances the defendants would undoubt-

edly be entitled to a new trial. As, however, there is no question in this case in regard to the negligence of the defendants, as the defendants practically admitted liability at the commencement of the trial, I do not think that any good purpose would be served by sending the case back for a new trial generally, I feel, however, that the damages awarded are large, under the circumstances, and that it is not unreasonable to conclude that they were aggravated by the introduction of the evidence which should not have been admitted. The trial judge did not warn the jury, as I am satisfied he should have done, against allowing their conclusion to be affected by the fact that evidence had been given to shew that there was an indemnity company concerned in the matter, but confined himself to telling the jury that it was entirely within their province to make up the damages at any reasonable amount they saw fit, and later said that he would say no more on the question of damages, because it was entirely for their consideration, and nobody had a right to interfere with them, unless they exceeded the limits of reasonable men. I do not think the amount awarded for damages is so great as to shock the "judicial mind," nevertheless, it is, in my opinion, too large, and I cannot help coming to the conclusion that the jury must have taken into consideration matters which they ought not to have considered, such as the fact that a guarantee company was behind the defendants.

Evidence was given to shew that the plaintiff, who was a checker in connection with work in the harbour during the winter months, had, in consequence of the accident, lost ten weeks' work of an average value of $35 a week, and that he had incurred a doctor's bill amounting to $35; $400 at the very outside would cover all the damages thus incurred by the plaintiff. The verdict was for $800. It is evident, therefore, that the jury, over and above the amount of monetary loss, awarded the further sum of $400 which may have been intended, although there is no division of the damages into items, as a compensation for the pain and suffering which he incurred. It seems to me, in view of the evidence, that this would be an excessive amount. The injuries of the plaintiff were not of a very serious character, no bones were broken, and he was only confined to his bed for a few days, after which he was able to get around with a cane. He continued to improve, and

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started to work about the 10th or 12th of March at the same kind of employment that he had been engaged in before meeting with the injury, but for the first 2 weeks he was not able to earn as much as he had been earning previous to the accident, in consequence of the condition of his leg. After that he worked at the same work and made good time, averaging the $35 a week up to May 13, when the winter-port business came to an end.

Had it not been for the evidence regarding the guarantee company, I would not have felt it my duty to interfere with the finding, although of opinion that the amount of the damages awarded was unduly large, but I am forced to conclude that that evidence had an effect upon the damages, and that by its introduction they were aggravated, and under those circumstances I am of opinion that there should be a new trial on the question of damages, unless the plaintiff consents, within 30 days of service of the rule, to a reduction of damages to the amount of $600, as I consider $200 a liberal sum to allow plaintiff in excess of the monetary loss which he sustained.

As the defendants were compelled by plaintiff's action in putting in improper evidence, to either suffer the injustice of having to pay too large a verdict, or to apply as they did, I am of opinion that they should be allowed their costs of this motion.

Grimmer, J.

GRIMMER, J.:—This is an action against the defendants to recover damages for injuries sustained by the plaintiff in being struck by an automobile of the defendants, in charge of and driven by their chauffeur. It was tried by Chandler, J., and a jury at the St. John June Circuit, 1918. The jury found for the plaintiff, and assessed the damages at $800. At the trial the judge left the questions of fact to the jury and the verdict was entered upon the answers thereto. The facts are quite fully stated in the judgment of Hazen, C.J., which I have had the privilege of reading, and need not be extended here. At the trial, and before evidence was offered, the counsel for the defendants stated it would not be necessary for him to trouble the plaintiff's counsel to call witnesses on the question of liability. The matter could be confined to what damages the plaintiff had sustained. This offer was not accepted, and the trial proceeded, with the result indicated above. An appeal is now taken, and a new trial asked for on the ground that the damages are excessive, that there was misdirection on the

part of the judge, and improper admission of evidence. The latter ground, which I will deal with first, arose out of the evidence of Dr. Bentley, called by the defendants. On his cross-examination the plaintiff's counsel asked him the following questions:—

Q. Were you representing any insurance company? A. I don't know. I presume the reason I came into the case—Q. So far as you are concerned, do you know whether there was an indemnity company concerned in the matter? A. I do know there is an indemnity company concerned in the matter, but I didn't know at the time. Q. Did Grant & Horne engage you to see the plaintiff and make a report—is that what you said? A. That is what I said.

This was all objected to by defendants' counsel on the ground that it was improper, inasmuch as it would tend to prejudice the defendants before the jury, but it was allowed, and no reference was afterwards made to it by the judge in his charge. In my opinion, the evidence was improper and should not have been received, as the only object it could possibly effect was to prejudice the minds of the jury on the trial; the fact that the defendants had protected themselves or not from possible liability not in any way being relevant to the issues. It could not assist the plaintiff, and is not a material fact upon which the plaintiff relied. This case is precisely the same as *Loughead* v. *Collingwood Shipbuilding Co.*, 16 O.L.R. 64, and if nothing further was involved there should be a new trial. As, however, the question of excessive damages has been discussed and may possess a certain amount of merit, yet where there is power in the court to measure, adjust or regulate the damages as to it shall seem just and right under the evidence, and so prevent extended and expensive litigation, for the reason stated by the Chief Justice in his judgment, I agree with the conclusion he has reached that there shall be a new trial unless both parties consent to a reduction of damages to $600, such consent to be filed within 30 days from the service of the rule, and if there shall be a new trial it shall be confined to the question of damages.

In view of the circumstances involved in this case, the costs of the appeal must be allowed the defendants.

WHITE, J., agrees. White, J.

Judgment accordingly.

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BEVERLY COAL MINE AND HUMBERSTONE COAL COS. v. GRAND TRUNK PACIFIC R. Co.

Board of Railway Commissioners. July 31, 1918.

JURISDICTION (§ II A—14)— SPURS — CONSTRUCTION — OWNERSHIP — AGREEMENT—RAILWAY ACT, S. 222.

A spur line constructed under the provisions of s. 222 does not become part of the railway from whose line it is built under the provisions of an agreement with the owner providing that the railway company furnish the rails, ties and fastenings, which remain their property, and the owner provides the right-of-way, even if no reference is made to such agreement in the Board's order authorizing the construction of the spur, and the Board has no jurisdiction to authorize an adjoining owner to use such spur.

[*Blackwoods and Manitoba Brewing & Malting Co. v. Canadian Northern R. Co. and City of Winnipeg* (1910), 44 Can. S.C.R. 92, 12 Can. Ry. Cas. 45; *Clover Bar Coal Co.* v. *Humberstone, Grand Trunk Pacific R. and Clover Bar Sand & Gravel Cos.* (1911), 45 Can. S.C.R. 346, 13 Can. Ry. Cas. 162; *Boland* v. *Grand Trunk R. Co.* (1915), 21 D.L.R. 531, 18 Can. Ry. Cas. 60; *Kammerer* v. *Canadian Pacific R. Co.* (1916), 21 Can. Ry. Cas. 74, followed.]

Statement.

APPLICATION for an order authorizing the right to use a spur leading to the Humberstone Coal Co.'s mine near Edmonton.

The application was heard at Edmonton, June 11, 1918, and subsequently disposed of on written submissions on file with the Board.

S. B. Woods, K.C., for the applicant.

H. H. Parlee, K.C., for the Humberstone Coal Co.

H. H. Hansard, for the Grand Trunk Pacific Ry. Co.

Commissioner Boyce.

MR. COMMISSIONER BOYCE:—The applicants at the Edmonton sitting, on notice to, and in presence of, counsel for the railway company and William Humberstone, asked the Board to make an order giving them the use, for the purposes of their coal mining industry at Beverly, of a portion of the spur track (or as it is sometimes called) branch line, from the Humberstone mine to the junction with the main line of the Grand Trunk Pacific Railway—the spur track (or branch line) referred to being about one mile in length.

The railway company was not unfavourable to such an order being made, and, at the hearing, and subsequently by written submissions, contended that where a siding is already constructed, and can be used to advantage, it would be improper to put applicants and the railway company to the expense of operating a new and special siding to specially serve the applicant, a contention, not without some merit, but subject to the rights of other parties interested.

The respondent William Humberstone, at the hearing, and subsequently by written submissions, objected strenuously to the order being made, and challenged the jurisdiction of the Board to make it.

The facts, now before the Board, are as follows:—

William Humberstone and the Grand Trunk Pacific Railway Company entered into an agreement, dated September 1, 1914, and filed upon the hearing of this application, providing for the construction of the siding (or branch line, if it may be so called) from the mine to the main line of the railway. Whatever steps were taken to give, or endeavour to give, to the situation any other and perhaps extended or higher application, there can be no doubt whatever that the agreement alone was the basis upon which the connecting track between the Humberstone Mine and the main line of the Grand Trunk Pacific Railway was to be constructed and upon, and subject to the terms of which, and to the respective and relative rights of the parties under it, the connecting line was built. It was intended to be, it was, and it is, an industrial track, serving a private industrial concern—and creating and conserving private rights to the owners of the industry whose private interests were to be served by it. As much may turn upon this agreement it may not be amiss to epitomize its terms. It recites that the owner (Humberstone) is the occupant of the northwest quarter of lot 7, township 53, range 24, west 4th meridian (shewn on plan)

And desires having a siding built connecting the said premises with the railway, and the company is willing to construct such siding on the terms and conditions herein expressed.

It provides:—(*a*) That the company, *at the request and at the expense of the owner* (Humberstone), *and subject to the approval of this Board*, construct the siding as per plan; (*b*) That the owner will pay the cost of the siding, except rails, fastenings, spikes, and switch materials which the company furnishes, but of which it retains ownership (*c*) The owner is to pay a compensation or rental to the railway for the use of the rails, etc., use of which is furnished by the company, $262.15 per annum, and also pay the expenses of necessary signals, signalmen, protection, appliances, *and other similar expenses at any time incurred by reason of the use*

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of the siding by the owner, and also pay to the railway *all costs and expenses which may be incurred by the company in maintaining and keeping the siding in good repair and condition and open for traffic;* (*d*) Subject to the proper use of the siding by the owner the time and manner of using it shall be regulated by the company; (*e*) The company to have the use of the siding at all times, in so far as it shall not be required by the owner, and the company may, upon reasonable compensation to the owner, permit the use of the siding by other parties, provided such use shall not interfere with its use by the owner, and may connect or cross the siding with any other siding and use it as an approach to or continuation of any other siding; (*f*) The owner is to protect the railway of the company as to cattle, indemnify the company from all claims for injury to persons or property arising out of any negligence or omission on owners' part in operation or maintenance of the siding, and assumes all risk of loss or damage by fire to buildings or property on the lands and premises, *the owner acknowledging that it is at his invitation that the company agrees to permit its locomotive engines to operate upon the siding*, and that this provision is one of the chief considerations moving the company to enter into the agreement; (*g*) *The owner, at his own cost, is to provide the right of way for siding outside of the land of the company;* (*h*) *The owner to pay all taxes and assessments of every kind, and to keep the right of way of the siding free from combustible matter and obstruction;* (*i*) That there shall be no assignment without leave; (*j*) That on default of payment of rent and maintenance, or observing of accounts for 2 months, the company may in specified manner discontinue operation of the siding, and may, in certain events, remove the siding from the property and terminate the agreement. Either party may terminate the agreement at *any time*, on specified notice to the other; and, (*k*) That on the termination of the agreement, materials furnished and work done on the portion of the siding on the land of the company becomes the property of the company absolutely, and the company shall remove from all other portions of siding, rails, fastenings, spikes, and switch materials.

Such is the agreement which originated this siding, and subject to the conditions of which it was constructed, and is maintained and operated.

Humberstone paid for the right-of-way for the siding, and for perishable cost, or original siding ($7,008.43) and of additional or substituted siding ($4,078.82). His total expenditure in cost being some $45,000. The non-perishable material cost, borne by the railway, was fixed at $4,702.58, on which sum the Humberstones pay a rental of 6%, or $282.15 per annum.

It is stated, and not denied, that the owner, William Humberstone, has leased the mine to an independent company, and has granted to that company the exclusive use of the entire length of the siding. As the railway company makes no reply to this statement, it can fairly be assumed that the transmission of interest took place with its consent, necessary under the agreement.

The Board, by its order No. 22850, dated November 10, 1914, reciting the approval of the Humberstone Coal Company and Trowley and Ketchum, property owners affected, dispensed with the publication of notice and authorized the construction of the branch line or spur as was contemplated by the said agreement. There was correspondence both before and after the order, which is on file, indicating that the Humberstones, and not the railway company, were in reality purchasing the right-of-way for and building the spur. For instance, on December 2, 1912, the solicitor of the railway company writes:—

> In the matter of order of the Board No. 17827 (subsequently rescinded by order No. 22850), directing the construction of spur *to serve the Humberstone Coal Company*, I beg to hand you herewith application on behalf of the Grand Trunk Pacific Railway Company under ss. 222 and 237 of the Railway Act, for an order authorizing, etc.,

and adds:—

> *And approval seems necessary in order to enable expropriation of a small piece of right-of-way which the coal company seems unable to secure without such procedure.*

The natural meaning to be gathered from the expressions *italicized* was that the railway company was applying in place of and for the benefit of the private owners, as was undoubtedly the case, as the subsequent agreement of September 1, 1914, abundantly shews. To the same effect was the letter of the solicitor for the railway company to the Board, dated December 14, 1912, asking for an extension of time for construction under the order then in force, providing for the construction of the spur according to a plan which was, however, changed for the one authorized by

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order 22850, of November 10, 1914. In that letter the solicitor for the railway states that:—

The Humberstone Coal Company has so far been unable to construct grade, and I shall, therefore, be obliged if, when plan of spur is approved, an extension of time for completion can be extended until May 30, 1913.

A clear intimation to the Board that the Humberstone company, and not the railway company, was constructing the spur line, as was undoubtedly the case.

Whatever, therefore, is the effect of the order No. 22850, of November 10, 1914, authorizing the construction of this spur—or branch line—the ownership of it and rights over it were determined by and rested upon the agreement I have referred to, and not by the order. It was built as a private spur for, and under agreement with, the Humberstone people, they paid for it, they maintained it, paid rent and other onerous charges in connection with its maintenance as a private spur—and having paid for its construction, and for the lands acquired for it, to the amount of some $45,000, they have acquired, by agreement with the railway company, rights of ownership and proprietary interests in, and with respect to it, which prevent the railway company from professing that this spur is part of its line of railway or of its railway system.

The order (No. 22850), authorizing its construction, is invoked by counsel for the applicant as creating this spur—built and paid for privately, under a private agreement with the owners of the industry, to be served by it into a branch line of the railway—a part of the railway—thus giving the Board a jurisdiction over it which it otherwise would not possess. Certainly the railway company cannot contend that it is a branch line or part of its line of railway. If it attempted to so contend, it would be estopped by the agreement to which it was a party.

Then, what is the effect of the order of the Board referred to? Is it sought thereby to disguise a privately built and privately owned spur as a branch line of the railway, and so give this Board the power, if it chose to exercise it, of violating the rights of property and domain of individuals and corporations, in the lands, property and easements represented by its construction and maintenance and guaranteed by the railway company under its agreement? Certainly the railway company makes no such con-

tention. It made it reasonably clear, in its correspondence with the Board, that the authority asked of the Board was for the purpose of a private siding—not a branch line.

If this Board has any jurisdiction to grant this application it would be upon the fiction or illusion that the spur, or siding, was a branch line and, therefore, part of the railway. But this spur is not part of the railway. It was built, right-of-way purchased, and is maintained by private ownership, and the ownership of its right-of-way is not in the railway but in Humberstone, who—or his successors—can, upon notice, compel the railway company to take up the tracks, signals, switches, and equipment and destroy its existence as a railway line—he or they retaining the ownership, as of right of purchase, of the land upon which it is built. What does it profit then to call a branch line that which is clearly, in fact, but a private spur track? The illusion is colourless. The fiction is threadbare. The track is no part of the railway, and the order of the Board cannot, in the circumstances, make it so. To declare it a part of the railway would be to grossly invade and violate private rights. If the order of the Board purporting to call this spur a branch line could be utilized for such a purpose, this Board had no power to make such an order. But I think all that was asked of, and all that was intended to be given by the Board, was an approval of the spur line as contemplated by clause 3 of the agreement for its construction.

I fail to see that decisions in *Blackwoods and Manitoba Brewing & Malting Co.* v. *Canadian Northern R. Co. and City of Winnipeg*, 44 Can. S.C.R. 92, 12 Can. Ry. Cas. 45, and *Clover Bar Coal Co.* v. *Humberstone, Grand Trunk Pacific Ry. and Clover Bar Sand & Gravel Cos.*, 45 Can. S.C.R. 346, 13 Can. Ry. Cas. 162, are inapplicable here. I think they are distinctly applicable and must be followed.

The Assistant Chief Commissioner is of opinion that neither the above cases, nor that of *Boland* v. *Grand Trunk R. Co.*, 21 D.L.R. 531, are applicable to the present case. The fact that in this case, as in the latter case, the spur was, in fact, built pursuant to an agreement, now before us, and plainly indicated in the applications of the railway company to the Board, identifies this case closely and undistinguishably with the principles there laid down. To the same effect is his judgment, concurred in by

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Commissioner Goodeve in *Kammerer* v. *Canadian Pacific R. Co.*, 21 Can. Ry. Cas. 74. The Assistant Chief Commissioner suggests that because the order of the Board was not expressly made subject to the terms of the agreement then in force, the line in question became part of the railway of the Grand Trunk Pacific and as such subject to the jurisdiction of the Board. The answer to that suggestion or opinion, of course, is that the order of the Board was, in fact, subject to and the application for it was based upon, and in futherance of, the agreement, and not in the public interest, and the Board dispensed with otherwise necessary formalities precedent to the application because no public interests were involved and the private interests (the Humberstones) consented, and so recited in its order.

I think it would be a grave interference with the undisputed private rights of the Humberstones under the agreement to give effect to such a contention. Those rights are plainly before the Board upon this application and whether the order protects or ignores them in its wording, they are now insisted upon, and I hold the view that they are entitled to respect, and that, respecting them, we must yield to the argument that we have no jurisdiction to violate them.

Even if in the circumstances we were bound by the letter of the order, I would be disinclined, in the face of the facts now before us, and in existence when the order was made, to exercise the discretion resting with us, to encroach upon the private rights created by the agreement. We are plainly confronted with the fact, evidenced by a written agreement, that what the Board purported to treat as a branch line for a specific named purpose was, in fact, only a private spur, and I think that we would be unwise to make the order asked in the face of objection by the private owner.

Let us suppose that the order suggested by the Assistant Chief Commissioner were made, and that, under it, the applicant built its siding and connected it with that of the Humberstones constructed under the agreement with the railway company. The agreement would not be extinguished. The rights of the parties as recited would not be affected *quoad* the spur, and one of them authorizes either party, at will, on short notice to terminate the agreement and abolish the connection with the railway's main

line—the ownership of the land remaining where it now is with the Humberstones, who bought and paid for it. The effect would be that the order of the Board would be subject to rights of private parties as defined by a contract before the Board when making its order, and the exercise of those rights would render the Board's order useless. The situation would then be similar to that stated by Anglin, J., in *Clover Bar Coal Co.* v. *Humberstone, Grand Trunk Pacific R. Co. and Clover Bar Sand & Gravel Cos.*, 45 Can. S.C.R. 346, at p. 351 (cited in the written argument of counsel for Humberstone, p. 9).

Commissioner Boyce.

I think it is also clear that there is no power under the Act for this Board to settle compensation or fix terms as suggested by the Assistant Chief Commissioner. Were such an order made an anomalous and complicated situation would be created.

It is urged that the applicants have no operating mine and that their difficulties are such that they cannot expect to have one, and that it would be impracticable and useless to construct this spur—a further reason for allowing them to establish, as did the Humberstones, their own connections with the railway if, and when, their business justified it.

I would dismiss the application.

Commissioner McLean.

MR. COMMISSIONER MCLEAN:—I am unable to distinguish what is involved in the present application from the principle as laid down by the Board in *Boland* v. *Grand Trunk R. Co.*, 21 D.L.R. 531, 18 Can. Ry. Cas. 60.

The Assistant Chief Commissioner.

THE ASSISTANT CHIEF COMMISSIONER (dissenting):—By order No. 22850, dated November 10, 1914, this Board, on the application of the Grand Trunk Pacific Railway Company, under s. 222 of the Railway Act, authorized that company to construct, maintain, and operate a branch line to the property of the Humberstone Coal Company distant about a mile from the main line of the Grand Trunk Pacific Railway Company east of Edmonton.

The branch line was in due course constructed and is still being operated by the railway company pursuant to that order. The Beverly Coal Company has applied to the Board, under s. 226 of the Railway Act, for an order directing the Grand Trunk Pacific Railway Company to construct and operate a spur or branch line from a point on the branch line leading to the Humberstone mine, about half a mile from the company's main line, to a coal mine on

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the property of the applicant some distance west of the branch line leading to the Humberstone mine.

Counsel for the Humberstone Coal Company objected to the application, on the ground that the branch line to the Humberstone property was not part of the railway of the Grand Trunk Pacific Railway Company, but was the property of the Humberstone Company, and that, therefore, this Board had no jurisdiction to grant the order applied for. Counsel for the Humberstone company further submitted that if the Board, being satisfied that it had jurisdiction, granted the application, that the Humberstone company should be remunerated for the use of the Humberstone spur by the applicant.

An agreement was entered into between the Grand Trunk Pacific Railway Company and William Humberstone, dated September 1, 1914, providing for the construction of the Humberstone spur. That agreement was not before the Board when the order authorizing the construction of the Humberstone spur was issued, and no reference to it was made in the order.

In the agreement, which is on the company's standard printed form, Humberstone is called the owner. The following clauses of the agreement are worthy of consideration in connection with this matter:—

(4) The owner will pay to the company the cost of the siding as certified to by the general superintendent, the company excepting therefrom the cost of rails, fastenings, spikes and switch materials which the company will furnish, retaining, however, the ownership therein.

(8) The times and manner of using the siding shall be regulated by the officials of the company; provided always that their control shall not interrupt the proper use of siding for the business of the owner.

(9) (a) The company shall at all times, during the continuance of this agreement, have the use of the siding in so far as it shall not be required for the use of the owner;

(b) The company may, upon reasonable compensation to the owner (the amount to be fixed by the railway company in case of dispute) permit the use of the siding by other parties (provided such use shall not interfere with the proper use of the siding for the business of the owner).

(c) The company may connect the siding, or cross the same with any other siding, and use the siding as an approach to or continuation of any other siding;

(16) Either party may terminate this agreement, at any time, upon giving to the other party notice in writing of the intention to do so, and naming in such notice a day at least two months distant on which the agreement is to terminate; on the day so named, this agreement shall terminate; and thereafter the owner shall not have the right to use the siding or to pass upon the

property of the company upon which any part of the siding is laid; and if it be terminated by a notice as aforesaid during any year for which rental has been paid, then the company shall repay the proper proportion of such rental.

Since the hearing at the sittings of the Board in Edmonton, counsel for the applicant and for the Humberstone company have each put in a submission in writing. Counsel for the latter company lays most stress on his contention that the Board has no jurisdiction to grant the order applied for, because the Humberstone spur is not part of the railway of the Grand Trunk Pacific Railway Company. He relies upon *Blackwoods and Manitoba Brewing & Malting Co.* v. *Canadian Northern R. Co. and City of Winnipeg*, 44 Can. S.C.R. 92, 12 Can. Ry. Cas. 45; *Clover Bar Coal Co.* v. *Humberstone, Grand Trunk Pacific R. Co. and Clover Bar Sand & Gravel Cos.*, 45 Can. S.C.R. 346, 13 Can. Ry. Cas. 162. In my opinion neither of these cases are applicable, because in neither case was the piece of the railway in question authorized by order of this Board. In both cases the railway was constructed under an agreement between the owners of an industry and a railway company. A stronger case in support of the contention of counsel for the Humberstone company that the Board has no jurisdiction to grant the order applied for is *Boland* v. *Grand Trunk R. Co.*, 21 D.L.R. 531, in which the Chief Commissioner decided that a branch line built under an order of this Board, under s. 222 of the Railway Act, was not part of the railway where it was built pursuant to an agreement and the order authorizing the construction of the spur was made subject to the terms and conditions of the agreement. In my opinion the present case is not similar to any of the three quoted, because the spur in question was built on the authorization of this Board without reference to any agreement between the owners of the industry to be served and the railway company.

S. 221 of the Railway Act authorizes the company to construct, maintain, and operate branch lines; and s. 222 says that the branch line shall not be commenced until certain steps have been taken by the railway company in the way of filing plans, etc. These steps were taken by the Grand Trunk Pacific, and the Board, after being satisfied that the branch line was necessary in the public interest, authorized its construction pursuant to s. 223 of the Railway Act.

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BEVERLY COAL MINE AND HUMBERSTONE COAL COS. v. GRAND TRUNK PACIFIC R. CO.

The Assistant Chief Commissioner.

In view of these facts, to my mind it is quite clear that the Humberstone spur is part of the railway of the Grand Trunk Pacific Railway Company, and that this Board has jurisdiction to grant the order applied for.

Bearing in mind the provisions of the agreement between the railway company and Humberstone, by which, of course, this Board is not in any way bound, I think it would be reasonable that some compensation should be granted Humberstone for the use of the portion of the spur lying between the railway company's main line and the point where the applicant desires its spur to branch off. We were told that this piece of track is about half a mile in length—*i.e.*, about one-half of the entire length of the Humberstone spur. We were not given very definite evidence on the cost of the spur. In his written submission, counsel for the Humberstone company says that his client pays the Grand Trunk $282.15 per annum, apart from any switching rates, as a rental for the use of the rails, spikes, fastenings, and switch materials in the spur, and that from Humberstone's books the cost of the whole siding to him had been upwards of $45,000. This amount, he says, doubtless includes a diversion of the line south of the portion the applicant desires to use.

From an examination of the plan and profile of the Humberstone spur and the consideration of what has been submitted by both parties, I am advised by one of the Board's engineers that a fair valuation of the portion of the Humberstone spur, which the applicant desires to use, would be $7,719. Eight per cent. is a fair rate of interest to be paid for money in Alberta at present, and I think 8% on the $7,719 would be a fair amount to be paid by the applicant to the Humberstone company for the applicant's joint use of the portion of the Humberstone spur in question.

As far as the maintenance of the portion of the spur in question is concerned, the applicant should contribute to it on a wheelage basis.

I think an order should go accordingly.

Application dismissed.

SUTHERLAND v. SPRUCE GROVE.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. January 2, 1919.

1. JUDGMENT (§ I G—55) — ELIMINATION OF PART — EFFECT — NOTHING DECIDED THAT IS NOT SHEWN IN REASONS.

The mere elimination of a declaration of invalidity of assessment and taxation does nothing more than leave the formal judgment without any declaration on the point and nothing can be deemed to be decided except what is shewn by the reasons.

2. BARRISTERS AND SOLICITORS (§ II C—30)—SOLICITOR'S LIEN—WHAT IS—DIFFERS FROM ORDINARY LIEN.

A solicitor's lien is not a lien in the ordinary sense of a charge on property in possession, but is a right to acquire a charge on property of the client, but not on property of someone else; unless the costs become the costs of the client there is nothing to which a lien may attach.

[*Leonard* v. *Whittlesea* (1918), 43 D.L.R. 62, referred to.]

Statement.

APPLICATION on behalf of the plaintiff to vary the minutes of judgment proposed for settlement upon the reasons given by the appellate division on October 25, 1918. The notice of motion proposes to ask the court to alter the judgment from one which it delivered in favour of the defendants to one in favour of the plaintiff. The court declined to hear any argument on the merits of the appeal, which had been fully argued before it, but heard argument upon the proposed disposition of costs, that question not having been argued on the appeal, as well as on the terms of the formal judgment to give effect to the reasons.

A. M. Sinclair, for appellant; *E. B. Edwards*, K.C., for respondent.

The judgment of the court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The judgment of the trial judge declared the assessment, taxation and tax enforcement proceedings illegal and invalid. We decided that he was wrong in holding the assessment illegal upon the ground taken or any other ground appearing in the case, but we found, as he had, that the tax enforcement proceeding was, in part at least, invalid, and upheld him in setting aside the certificate of title founded upon the confirmation of the tax enforcement proceedings. As that was the only consequent relief asked it seemed simpler to strike out the whole of this declaration of the trial judgment, which was, in part, wrong, than to amend it.

The plaintiff, while asking that the declaration be restored, which, of course, would be to reverse our judgment, argues also

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that the mere striking of it out might be deemed to be a declaration of the validity of the assessment taxation and tax enforcement proceedings. It is plain that it could not be so considered, for we expressly found that the tax enforcement proceedings were not valid and the mere elimination of a declaration of invalidity of assessment and taxation does nothing more than leave the formal judgment without any declaration on the point, and nothing could be deemed to be decided except what is shewn by the reasons. I understand counsel for the defendant, however, to be willing to have inserted in the formal judgment a declaration that will remove any doubt, and I have no doubt that can be arranged between counsel.

Plaintiff's more serious objection is to the disposition of the costs. There was no argument on this with the general argument, and we thought it right that we should hear and consider any objections before formal judgment is signed. See *Leonard* v. *Whittlesea*, 43 D.L.R. 62, 13 A.L.R. 550. We directed that the costs of the appeal should be borne by the plaintiff. He objects to this on the ground that the defendants were only partially successful. If that objection were good then it should apply to the costs of the action which were allowed to the plaintiff, though he succeeded only in part, and that by no means the most substantial part of his claim. I see no reason for altering the disposition of costs in this respect. However, we directed that the costs of the appeal should be set off against the costs of the action and any excess of the latter set off against the taxes due on the land.

It is contended that we have no right to order this set-off, as it interferes with the solicitor's lien.

Our r. 20 (Alberta Rules of Court, 1914) as to costs provides that:—

> A set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is allowed.

The Court of Appeal in England held, in *Bake* v. *French*, [1907] 1 Ch. 428, that this rule did not apply to different actions or proceedings. The same court, differently constituted, in *Reid* v. *Cupper*, [1914] 2 K.B. 147, while considering itself bound by the former decision, expressed dissent. They held, however, that the right to set-off, as between different proceedings, was in the court

in its discretion, regardless of the solicitor's lien, apart from the rule. It is pointed out in that case and by Younger, J., in a later and very carefully considered judgment in *Puddephatt* v. *Leith*, [1916] 2 Ch. 168, that the solicitor's lien, so called, is not a lien in the ordinary sense of a charge on property in possession, but is a right to acquire a charge on property of the client, but not on property of someone else and that, unless the costs become the costs of the client, there is nothing to which the lien may attach. It is pointed out that it might be manifestly unjust to make a solvent person pay costs owing by an insolvent where the latter is indebted to him.

We are not bound by the decision in *Bake* v. *French*, and are quite at liberty to accept the view of the same court in the later case, but it is unimportant to decide the real intention of the rule because it is clearly held to be a matter of discretion.

There is no doubt that the set-off of costs of the appeal against the costs of the action is authorized and, in my opinion, it is proper. I feel little doubt also that, if the defendants had a judgment against the plaintiff for the taxes, it would be within our discretionary right to set the costs off against them, but the defendants have no such judgment, and, while the action was in respect of the taxes, and their validity as being properly imposed on the land, its determination did not involve the consideration of the personal liability of the plaintiff for those taxes.

This aspect did not present itself to us when making the direction we did, and inasmuch as it may be that the plaintiff is not personally liable for the taxes, to make him pay part of them by a credit of costs due him would be to compel him to pay someone else's debt, which would be manifestly unjust.

I would, therefore, on this ground and not on any consideration of solicitor's lien, modify the direction as to costs by eliminating the direction of set-off against taxes. There should be no costs of this application. *Judgment accordingly.*

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Ex. C.

MARCONI WIRELESS TELEGRAPH Co. OF CANADA v. CANADIAN CAR & FOUNDRY Co.

Exchequer Court of Canada, Audette, J. November 12, 1918.

COURTS (§ V F—322)—SUPERIOR COURT OF QUEBEC—EXCHEQUER COURT—CO-ORDINATE JURISDICTION—INTERLOCUTORY INJUNCTION—COMITY.

If the Superior Court of Quebec has dismissed a motion for an interlocutory injunction in a suit instituted with writ and declaration, the Exchequer Court, being a court of co-ordinate jurisdiction, will not entertain a similar motion. Where the motion and application have been entertained by the Superior Court without the issue of any writ or institution of action upon counsel undertaking to do so, the Exchequer Court will refuse a similar motion on the ground of comity, although the matter is not, strictly speaking, *res judicata*.

Comity, as applied to judicial proceedings, means nothing more than the observance of a rule of etiquette or conventional decorum between courts of co-ordinate jurisdiction. It is not a rule of law, because it is not imperative. It is a useful ultra-legal adjunct to the judicial doctrine of *stare decisis*.

[*Plimpton* v. *Spiller* (1876), L.R. 4 Ch. D. 286, followed; see also *Marconi* v. *Canadian Car and Foundry Co.*, 43 D.L.R. 382.]

Statement.

ACTION for the infringement of a patent.

E. Lafleur, K.C., and *C. Sinclair*, for plaintiffs; *Peers Davidson*, K.C., for defendants.

Audette, J.

AUDETTE, J.:—This is an action for the infringement of two Canadian patents of invention, one of which appearing, on its face, to have already expired.

The matter comes now before the court on two motions, on behalf of the plaintiffs, against the two defendants, respectively, for interlocutory injunctions, until trial, seeking to restrain the defendants from supplying, vending, etc., a certain wireless apparatus protected by a patent of invention, which, *primâ facie*, is good and valid until the question of its validity has been raised and passed upon.

The Superior Court of the Province of Quebec and the Exchequer Court of Canada have, in such matters, concurrent and co-ordinate jurisdiction.

Similar motions and applications to those now made here were made before a judge of the Superior Court, at Montreal, P.Q., and on October 25, 1918, and judgment was thereon rendered dismissing the same with costs. (43 D.L.R. 382.)

The question raised in this court is identical with that decided between the same parties by the Superior Court Judge of the Province of Quebec, upon similar interlocutory applications, and the defendants are brought twice before the courts in respect of one and the same matter. While I would not rest my decision on

the ground that the question is *res judicata* in the strict sense of the term, I would, however, feel bound to exercise that jurisdiction which is inherent in the court to prevent vexatious litigation which amounts to an abuse of its process. *Stephenson* v. *Garnett*, [1898] 1 Q.B. 677, 13 Hals. 334.

At p. 81 of Everett & Strode's Law of Estoppel (2nd ed.), we find:—

> So that, even if the former proceeding were interlocutory, yet if the court decided an issue between the parties which was within its jurisdiction, the same cannot be raised in subsequent proceedings between the same parties; and though the matter may not be, strictly speaking, *res judicata*, an attempt to raise such an issue will be dealt with as frivolous and vexatious, and an abuse of the process of the court.

These motions and applications were entertained at Montreal, P.Q., without the issue of any writ or institution of an action, but with, I am informed by counsel, the undertaking to do so.

The Exchequer Court has obviously no jurisdiction to entertain such matters by way of appeal from the Superior Court of the province. And had the Superior Court suit been duly instituted with writ and declaration, I would, at this stage, without hesitation, have refused to entertain or consider these motions and sent the plaintiffs back, as a matter of propriety, to the forum first chosen by them, when they were at liberty to institute their suit in either court.

Having gone so far, it remains for me to say that Mr. Lafleur, of counsel for the plaintiff, declared at bar that no writ had been issued in the Superior Court at Montreal, and he formally declared, on behalf of the plaintiffs, they did not intend to prosecute any further proceedings at Montreal. To that extent, however, I am free and untrammelled; but, I cannot overlook and ignore the finding of a judge upon similar matter in a court of co-ordinate jurisdiction. In Ontario a judge is by law bound by that decision. (R.S.O. 1914, c. 56, s. 32.)

Must the motions be refused out of considerations of comity? A careful examination of the subject will shew that the word "comity," as applied to judicial proceedings, means nothing more than the observance of a rule of etiquette or conventional decorum between courts of co-ordinate jurisdiction. It is not a rule of law, because its obligation is not imperative; and the most that can be said of it in a practical way, is that it is a useful ultra-legal adjunct

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to the judicial doctrine of *stare decisis*. Nothing, however, need be added to the admirable definition of the term by Brown, J., in the patent case of *Mast, Foos & Co.* v. *Stover Mfg. Co.* (1900), 177 U.S. 485, at p. 488, where it was claimed that comity demanded that the court below should have followed the decision of another court of co-ordinate jurisdiction on the same patent. He says:—

> Comity persuades, but it does not command. It declares not how a case *shall* be decided, but how it may with *propriety* be decided. It recognises the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play, and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of the co-ordinate tribunals. Clearly it applies only to questions which have been actually decided and which arose under the same facts.

Now, seeing that a similar motion has been refused by a judge of a provincial court of co-ordinate jurisdiction, considerations of comity or propriety would induce me to stay my hand on this motion even if there were not other and more cogent reasons present in the material before me for declining to make an order for an interim injunction.

In such matters, does not the fundamental principle of law rest upon the question of, 1st, irreparable damage; 2nd, balance of convenience, and 3rd, the maintenance, if possible, of the *status quo*, as between the parties until the hearing upon the merits?

In a case of this nature the court has first to consider whether the damages resulting from the refusal of the injunction would be irreparable, and upon this point it has been asserted, without contradiction, that the defendants are quite solvent and well able to satisfy any pecuniary damages that might ultimately be adjudicated against them. And it is further contended by counsel on behalf of the plaintiffs that besides this pecuniary damage there is also that class of damage which would result from the dissemination of these alleged infringing machines all over the world, an advertisement amounting to an encouragement to further infringements. But this class of damage is too remote and cannot be classed with what is termed, in such matters, as irreparable damage. Moreover, it appears from the argument before me, that the apparatus now being installed by the defendant company upon the 12

vessels which are being built for the Republic of France are similar to those installed and used on the French and American vessels, and that that is the very reason why they are now so installed on these 12 vessels with the view of maintaining uniformity in the two fleets. There could be no justification to interfere peremptorily with such undertakings.

Moreover, as said in the leading case of *Plimpton* v. *Spiller*, 4 Ch. D. 286, 289, *et seq.*, in such case the court will cautiously consider the degree of convenience and inconvenience to the parties by granting or not granting the injunction. And as there pointed out, on the authority of the judgment of Lord Cottenham, in *Neilson* v. *Thompson* (1841), 1 Webs. P.R. 278, there are cases in which very much greater mischief would be caused the defendant by the granting of an injunction, if it should ultimately turn out that it ought not to have been granted, than you would cause the plaintiff by postponing the injunction when there was ground for its being granted.

If the injunction were granted in the present case the defendants would be unable to deliver, completed and ready for use, the balance of the 12 vessels under construction, and these vessels would be tied up in the ice, at Fort William, for the winter. The practical effect of such injunction would be to stop a going trade and adopt a course which might result in very great difficulty in finally assessing compensation. If, in the present case, the defendants should ultimately prove to be right, and an injunction were to issue to-day, the damages would be most serious. And it is worthy of mention that all vessels delivered and which, as was mentioned at the argument, were at Montreal at the time of the application made there, would have been foreign vessels protected by s. 53 of the Patent Act.

Under the circumstances, I have come to the conclusion that the plaintiffs have not made out a case for interlocutory injunction, and the two motions are dismissed. The costs of and incidental to these motions will be, as is usual in such cases, costs in the cause.

Motion dismissed.

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REX v. DOMINION DRUG STORES LIMITED.

REX v. C.N.R. Co.

Alberta Supreme Court, Beck, J. January 17, 1919.

1. CERTIORARI (§ I A—9)—MAGISTRATES—NECESSITY OF MAKING NOTE OF APPLICATIONS AND ORDERS—TO BE FURNISHED ON REQUEST OF EITHER PARTY.

Magistrates should be specially careful either to make a note themselves or to see that a note is made of every application, and of every ruling made during the course of a case before them, so that no party may possibly be deprived of any advantage he may be entitled to, and having taken, or caused to be taken, such notes, to return them along with the depositions in answer to a notice by way of *certiorari* or to furnish them on request to either party to the proceedings, who is prepared to pay the proper fees.

2. APPEAL (§ II C—50)—MAGISTRATES—QUESTION OF LAW—APPEAL UNDER ALBERTA LIQUOR ACT—DUTY OF MAGISTRATE TO SIGN AFFIDAVIT.

It is not within a magistrate's jurisdiction to decide the question of law, whether or not a defendant, having moved by way of *certiorari*, can yet proceed by way of appeal in an action under the Liquor Act (1916, Alta., c. 4). It is his duty to take the affidavit required by s. 4 (10) of the Act when requested to do so.

Statement.

MOTIONS to quash two convictions on *certiorari*. Convictions quashed.

J. M. Macdonald, for the Crown; *Gordon Winkler*, for accused in *Dominion Drug Store* case.

Gordon Winkler, for the Humane Society; *N. D. Maclean*, for accused in *C.N.R. Co.* case.

Beck, J.

BECK, J.:—I have before me two motions to quash convictions on *certiorari*. I deal with them together, although they have no relation to each other, because I feel very strongly constrained to make some observations upon the conduct of the Police Magistrate of Edmonton in regard to each of them and I prefer to say what I have to say once for all.

The first case is one laid under the Liquor Act (c. 4 of 1916). The defendant company was charged for that it "did unlawfully sell intoxicating liquor contrary to the Liquor Act of Alberta, 1916, and amendments thereto."

The defendant company was convicted and a fine was imposed.

In substance the grounds of the motion are two: (1) That there is no evidence to sustain the conviction; (2) that the magistrate refused to adjourn the hearing to permit the defendant to call a particular necessary and material witness.

Some affidavits were filed on behalf of the defendant company in support of the second ground.

Mr. Winkler, solicitor for the defendant company, in an

affidavit says in substance as follows: that he was counsel for the defendant company at the hearing before the police magistrate on December 27; that on December 24 one Girvin, the secretary-treasurer of the defendant company, informed him that Inspector Fisher, of the Alberta provincial police, Edmonton, wished to see him in his office for the purpose of having him identified, if possible, by two men who were then in custody, named Welton and Curtis; that he attended with Girvin at Inspector Fisher's office, and Curtis, who was subsequently a witness for the prosecution, was brought into the office, introduced to Girvin and then taken back to the cells; that Inspector Fisher informed him, Winkler, that there was an allegation that Curtis, together with Welton, had purchased certain liquor at the Dominion Drug Stores, Edmonton, of which company Girvin was secretary-treasurer; that he, Winkler, then asked Inspector Fisher if he wished him to bring the other officers and servants of the company to his office for the purpose of identification, but that the inspector stated that it would not be necessary, as they intended to prove that it was Girvin who made the sale and no other officer or servant of the company; that he, Winkler, attended with Girvin on the hearing, and he refers to what appears in the transcript of the notes of evidence and is as follows:—

Mr. Winkler: I would like to know from the prosecution what officer of the company it is alleged acted on behalf of the company in the sale of this liquor.

THE COURT: It makes no difference.

Mr. Winkler: I think I am entitled to know that. The summons was served on Mr. Girvin, the secretary-treasurer.

THE COURT: The evidence will have to shew.

Mr. Winkler: If they identify them. I assume it was Girvin they were alleging that served it, but it may turn out they are alleging someone else — that they got it from someone else.

Mr. Heffernan: The evidence will probably set that out.

Mr. Winkler continues, saying that at the conclusion of the evidence for the prosecution he moved for a dismissal (which was refused), and was led to believe from remarks of the magistrate that he might assume that some other servant or officer than Girvin had made the sale; that he then decided to call every officer and servant of the defendant company and that he succeeded in getting them all but one Rowland, who was not then on duty at the defendant's store and could not then be located; that he

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thereupon requested an adjournment in order to enable him to procure the attendance of Rowland, and that the adjournment was refused in spite of his protest, and the defendant company was thereupon convicted.

Mr. Winkler's affidavit further states that upon perusing the transcript of the stenographic notes of the proceedings at the hearing, he found, as the fact is, that there is no note of what took place with reference to Rowland or the adjournment; that he then asked Morrey, the police court reporter who took the stenographic notes, why this was not contained in his return, and that Morrey stated that, although it was in his notes, it was not included in the return, owing to instructions received by him not to include it, but that Morrey would not disclose the source of his instructions.

On the motion coming up for hearing before me, Mr. Macdonald for the prosecution, took the preliminary objection that, in view of the provisions of the Liquor Act, *certiorari* would not lie in such a case as this. After hearing argument upon the preliminary objection, I reserved judgment without hearing the motion on the merits and suggested to Mr. Winkler that, as it was the last day for serving notice of appeal, he had better take the precaution of appealing. He pointed out that not only had he to serve his notice of appeal but also to have an officer of the company make an affidavit denying the truth of the charge, and that this affidavit was, by the terms of s. 41 (10), required to be made before the convicting magistrate, though this requirement does not apply to the like affidavit to be filed on a motion for *certiorari* (s.40 (8)). No difficulty was suggested, however, in all this being done. I also stated to Mr. Macdonald that a transcript of the stenographic notes of what took place regarding the application for the adjournment must be produced.

During the afternoon Mr. Winkler came to my room and informed me, to my astonishment, that upon telephoning to the magistrate asking him when it would be convenient to him to take the affidavit, he had said that he would not take it. I told Mr. Winkler to put what he had told me into the form of an affidavit and serve it upon Mr. Macdonald, and tell him that I required the magistrate's explanation. On the motion coming

before me again, the magistrate's affidavit was filed in which he says that when asked to take the affidavit:—

I explained that I had nothing further to do with the case. I advised him that where it was sought by aggrieved parties to review the proceedings of an inferior court before a superior court there were certain proceedings laid down in the Criminal Code and in the Alberta statutes providing for the removal by *certiorari* or appeal. In this particular instance, I had signed the return called for a motion of *certiorari* and had sent forward to the honourable court referred to all the papers and documents in my possession having reference to this case and, as I believed, I was estopped from doing anything in the case of an appeal as I had no means of carrying out the provisions of the Code with reference to an appeal to a junior court whilst the case was being reviewed by a senior court; and it would be improper for me to do anything whatsoever, whilst the case was under review by a judge of the superior court, and that if he desired me to do anything in the matter I would request him to obtain from the trial judge an order calling upon me to do such acts, matters or things as he considered necessary in this case.

He further said:—

It is a correct statement of facts that in this case, as in other cases, I have refused at the trial to permit an adjournment once the case was started, for obvious reasons.

There was also filed an affidavit of Morrey, the police court reporter, who said that he had not taken down any notes of what took place regarding the adjournment, that what he had furnished was a complete transcript of his notes and he denied what Mr. Winkler had alleged, that he had stated that he made such notes but had not transcribed them because he was instructed not to do so.

Mr. Winkler, with my leave, put in an amended notice of motion, and also his own affidavit, verifying the correspondence regarding the stenographic notes of the proceedings in the other case with which I am to deal.

I then heard the argument upon the merits. I have also become aware that the magistrate, having been advised that he ought to have taken the affidavit, which the defendant required to enable it to appeal, subsequently took it, dating the jurat as of the date when the affidavit was first tendered to him, though making a note upon the affidavit of the correct date, and that with the consent of the prosecution the appeal has been entered for hearing.

In the second case, the railway company was convicted for a breach of s. 544 of the Criminal Code, which requires cattle, being transported, not to be confined for more than 28 hours without

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being fed and watered, and makes a breach of this provision made "knowingly and wilfully" an offence punishable on summary conviction.

Briefly the grounds of the motion are that the convicting magistrate refused to permit the defendant to give evidence on its own behalf, and that the evidence does not justify a conviction.

In an affidavit filed in support of the motion the counsel for the defendant says in substance as follows: That when the case for the prosecution was closed he moved to dismiss the charge on the ground that the information disclosed no offence inasmuch as it did not contain the words "knowingly and wilfully," and that the evidence did not shew that the offence, if committed, was done knowingly and wilfully; that, having so moved, an argument by way of answer was made by counsel for the prosecution; that instantly the magistrate pronounced the defendant guilty and imposed a fine; that counsel for the defendant instantly pointed out that he had been merely moving to dismiss the charge as not established by the evidence for the prosecution; that he had intended, if his motion was refused, to call evidence in defence; that he had, as the fact was, his witnesses present in court ready to call; that the magistrate refused to hear evidence for the accused, saying it was too late.

It further appears that the solicitor for the defendant, having on request been furnished with a copy of the stenographic notes of evidence taken at the hearing, and finding that they contained only the evidence and no further notes of what had taken place at the trial, applied to the stenographer—in this case one Walsh—for an extended copy of his further notes, and received a reply to the effect that he was instructed to supply only the depositions; that in October last he had received a letter from the Department of the Attorney-General instructing him to take his instructions as to his duties from the police magistrate; that upon being asked for a transcript of the proceedings following the taking of the evidence he had laid the matter before the magistrate and asked for instructions, whereupon the magistrate instructed him to supply only the deposition and the information and conviction if asked for. The solicitor for the defendant then wrote the police magistrate asking whether or not a copy of these further notes would be supplied. The police court clerk wrote in reply:—

I am directed by the police magistrate to advise you in reply to your letter of the 23rd inst. that the business of this court is not conducted by correspondence and that any applications which are made by counsel receive all consideration.

I asked that counsel for the prosecution should obtain the magistrate's answer to this affidavit. He contents himself with an affidavit verifying this correspondence and affirming the truth of the facts set forth in the correspondence and saying that to the best of my ability I gave the defendant the Canadian Northern Railway Co. and its counsel every opportunity after the close of the case for the prosecution to make full answer and defence thereto.

I have not insisted, as undoubtedly I have the power to do, upon being furnished with a transcript of the stenographic notes of the proceedings at the hearing in addition to the depositions of the witnesses. Such notes are undoubtedly included in the words: "All other papers or documents touching the matter" appearing in r. 827 (No. 7 of the Crown Practice Rules).

The statement of the counsel for the defendant company as to what took place at the conclusion of the case for the prosecution is uncontradicted either on the part of the prosecution or on the part of the magistrate. The magistrate's instructions given to the police court stenographer to refuse to give out notes of anything but the evidence are, I am convinced, in consequence of decisions of this court or judges thereof quashing convictions because just such notes of the proceedings have shewn that the defendant was denied justice.

This course of procedure on the part of the magistrate has all the appearance of an attempt to prevent all the facts and circumstances which occurred at the hearing coming to the knowledge of this court in the event of *certiorari* or similar proceedings being taken, and thereby preventing justice from being done.

Fortunately, it is quite settled that affidavit evidence on behalf of a defendant is admissible to shew what actually took place at the hearing whether such notes are taken or not. *Rex* v. *Richmond* (1917), 39 D.L.R. 117, 12 A.L.R. 133; *Rex* v. *Barlow* (1918), 29 Can. Cr. Cas. 381.

All judges of the ordinary Courts of Justice are specially careful either to make a note themselves or to see that a note is made of every application and of every ruling made during the course of a case so that no party may possibly be deprived of any advan-

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tage he may be entitled to. This magistrate would be well advised to act in the future upon this principle, and having taken or caused to be taken such notes, to return them along with the depositions in answer to a notice by way of *certiorari* or to furnish them on request to either party to proceedings before him, who is prepared to pay the proper fees. The notes actually taken in the present case, and which the magistrate has refused to permit to be transcribed, I am quite satisfied do not shew anything differing from what the affidavit of the solicitor for the defendant states. If they do it is inexplicable why the magistrate has not either produced a transcript of them or stated his version of what occurred.

I revert now to the first case. I am not entirely satisfied that some note was not made of the application for the adjournment and the magistrate's ruling. At all events, the statement of the solicitor for the defendant company as to what took place stands.

As to the refusal of the magistrate to take the affidavit required in connection with the appeal, the magistrate's conduct was wholly unjustifiable. It was not his business to decide the question of law whether or not the defendant, having moved by way of *certiorari*, could yet proceed by way of appeal. I am quite sure that any judge of this court placed in such a position, though having such an opinion, would have intimated that opinion but would, nevertheless, have taken the affidavit so that should he be mistaken no injustice would result. In fact and in law the magistrate was, however, absolutely wrong. The fact that the defendant had commenced proceedings by way of *certiorari* constituted no reason why he should not appeal in the ordinary way to the District Court. Had he first appealed and then moved for *certiorari*, in all probability the court would have dismissed his motion for *certiorari*, but even then it would have been in the exercise of a judicial discretion and not by reason of any unalterable and infallible rule.

The excuse that having returned the conviction to this court he could not comply with s. 757 of the Code by sending the conviction to the District Court was not a valid one. The provisions of that section have been held to be directory only. *R.* v. *Williamson* (1908), 13 Can. Cr. Cas. 195; *Harwood* v. *Williamson* (1908), 14 Can. Cr. Cas. 76; and quite obviously the defendant could, without difficulty, have had the conviction transmitted in proper time to the District Court, as in fact he did.

In view of all the circumstances, I think I should deal with this case, as I would have done, had the appeal to the District Court not been entered.

I am not at all sure that, inasmuch as the conviction does not shew on its face that it was a sale by a druggist, or upon or in respect to a druggist's premises, an appeal lies. If an appeal does not lie, *certiorari* is the only remedy. But if an appeal does lie in such a case, still *certiorari* lies if an appeal would not afford an adequate remedy. At the time I was called upon to deal with the case upon its merits, the defendant had been deprived of his right of appeal by the misconduct of the magistrate. Because the proceedings on appeal have been patched up in consequence of the magistrate at length doing what he ought to have done at once, seems to me no reason why I should not now deal with the *certiorari* application as if the appeal proceedings had not been taken—for two reasons, (1) because I think it doubtful whether an appeal lies, and (2) because there may be a doubt as to the jurisdiction of the District Court owing to the irregularity of the proceedings on appeal.

Dealing with the first case, I quash the conviction on both grounds taken: (1) In my opinion there is not sufficient evidence to justify a conviction, and (2) I think the refusal of an adjournment under the circumstances was a manifest denial of justice to the defendant and prevented it from being afforded an opportunity to make a "full answer and defence" to the charge (C.C., s. 715), and under such circumstances the magistrate loses jurisdiction. *Rex* v. *Tally* (1915), 21 D.L.R. 651, 23 Can. Cr. Cas. 449; *R.* v. *Sproule* (1887), 14 O.R. 375; *R.* v. *Lorenzo* (1909), 16 Can. Cr. Cas. 19; *R.* v. *Luigi* (1909), 16 Can. Cr. Cas. 25; *Rex* v. *Farrell* (1907), 12 Can. Cr. Cas. 524.

As to the second case, it was a gross denial of justice to refuse the defendant the opportunity of putting into the witness box the witnesses then and there in attendance. The magistrate wholly without justification refused to permit the defendant to make a full answer and defence. He, therefore, lost jurisdiction. This conviction also must be quashed.

The magistrate will doubtless be much displeased with the comments I have made upon his conduct in these cases. I do not for a moment suggest any dishonesty of purpose, but I should

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feel that I had failed grievously in my duty as a judge of this court reviewing his proceedings, if I had failed to say as much as I have with regard to the attitude of mind which he appears to take up when his decisions or opinions are called in question. The position of Police Magistrate of the City of Edmonton, the capital of the province, is a high office, and the magistrate has a wide jurisdiction both as to territory and persons. It is all the more important on that account that those, whose duty it is to criticise the proceedings of inferior courts, should not falter in their case however distasteful it may be to say what they feel bound to say, though they might be inclined to be gentler with an inexperienced country justice of the peace. *Convictions quashed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. 1918.

APPEAL (§ II A—35)—DAMAGES—AMOUNT—JURISDICTION OF SUPREME COURT OF CANADA.

An action was brought to recover the sum of $3,615.35 as damages representing the value of timber cut on timber limits, the boundaries of which were in dispute. At the trial and before *enquête* the amount of the claim was by consent reduced to $1,369.45.

The court held, Fitzpatrick, C.J. and Idington, J. dissenting, that the Supreme Court of Canada had jurisdiction to hear an appeal.

Statement.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Rimouski, and maintaining the plaintiff's action for the sum of $1,367.45, after deduction, from the amount of the *demande*, of $1,248.90, by consent of the parties at the trial and before *enquête*.

The action was for $3,616.35, the value of timber which the plaintiff alleges was cut in trespass on its timber limits. The defendants denied the trespass and alleged title in themselves to the trees as having been cut on their own limits.

Belcourt, K.C., for the motion; *Hall Kelly*, K.C., *contra*.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—This is a motion to quash for want of jurisdiction.

The action was brought to recover the sum of $3,615.35 *as damages* representing the value of timber which the plaintiff alleges was cut in trespass on its timber limits. The defendants, by their plea, denied the trespass and alleged title in themselves to the trees.

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At the trial and before *enquête* the amount of the claim for damages was reduced by consent to the sum of $1,369.45.

On those facts, I am of opinion that we are without jurisdiction to hear this appeal. As has already been said in many cases: in determining the sum or value in dispute the proper course is to look at the conclusions of the declaration. There is no question of title involved; the plaintiffs brought their action in a form which imposed upon them the obligation to prove that they were injured as alleged. This they could not do if there was any doubt about their title. *Béliveau* v. *Church* (1893), 2 Que. Q.B. 545, at 546. Here the only claim is for damages, the amount of which was by consent before trial reduced below the appealable limit. *Outremont* v. *Joyce* (1910), 43 Can. S.C.R. 611; *Dufresne* v. *Fee* (1904), 35 Can. S.C.R. 8. As was said in *Toussignant* v. *Nicolet* (1902), 32 Can. S.C.R. 353, it is settled law that neither the probative force of a judgment, nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration. The only thing to be considered is the matter directly in controversy and necessary to be determined to dispose of the rights of the parties in the particular case. As to the effect of *retraxit*, see Cameron, 267.

Motion granted; appeal quashed with costs.

Davies, J.

DAVIES, J.:—I am of the opinion to dismiss this motion with costs.

Idington, J.

IDINGTON, J. (dissenting):—It is quite clear that there cannot be any matter in controversy in this appeal which involves an amount of the "sum or value of two thousand dollars" as stated in s. 46 (*c*) of the Supreme Court Act to be the limit of jurisdiction for Quebec appeals, when the amount demanded had before judgment expressly been fixed by the agreement of the parties at a sum much below that.

Therefore, I cannot find the amount so involved a basis for our jurisdiction.

The facts in *Dufresne* v. *Fee*, 35 Can. S.C.R. 8, relied upon, render it distinguishable, and I do not think the decision therein affirms any principle of action which we must abide by herein. Nor do I find any actual dispute of title involved. And, according to the judicial system in Quebec, as I am advised, this dispute of boundaries within which the timber in question was cut cannot test anything relative to title.

The motion to quash should prevail with costs.

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DUFF, J.:—It is very clear, I think, that the proceedings out of which the appeal arises involve a controversy regarding a title to lands and that the appeal is consequently not excluded by s. 46. It is not disputed that in other respects the conditions of jurisdiction under s. 37 are fulfilled.

ANGLIN, J.:—I think this case is indistinguishable in principle from *Dufresne* v. *Fee*, 35 Can. S.C.R. 8, and would, therefore, dismiss the motion to quash. *Motion dismissed.*

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FIELDHOUSE v. CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Maclaren, Magee and Hodgins, JJ.A., and Clute, J. October 7, 1918.

MUNICIPAL CORPORATIONS (§ II G—236)—SEWERAGE SYSTEM—AUTHORISED BY LEGISLATURE—NEGLIGENCE IN CONSTRUCTION AND OPERATION—DAMAGES.

No action will lie against a municipal corporation for doing that which the Legislature has authorised if it be done without negligence although it causes damage; but an action does lie for doing that which the Legislature has authorised if it be done negligently causing damage.

[Review of authorities: *Re J. F. Brown & Co. and City of Toronto* (1916), 29 D.L.R. 618, (1917), 37 D.L.R. 532, 55 Can. S.C.R. 153; *City of Hull* v. *Bergeron* (1913), 9 D.L.R. 28, referred to.]

Statement.

APPEAL from the judgment of Mulock, C.J.Ex. in an action to restrain the defendants, the Corporation of the City of Toronto, from maintaining a nuisance and for damages. Affirmed.

The defences were denial of the nuisance and statutory authority to do what was complained of.

At the opening of the case the plaintiffs Martin and Fazackerley were added as co-plaintiffs.

The judgment appealed from was as follows:—

MULOCK, C.J. EX.:—The circumstances giving rise to the plaintiffs' complaints are as follows:—

The defendants, in professed exercise of the powers conferred on municipal corporations by the Municipal Act, established a sewage disposal plant in the vicinity of Ashbridge's Bay, within the city limits, and the plaintiffs contend that the plant when in operation has given off odours so offensive as to injure the properties of the plaintiffs Fieldhouse and Fazackerley, to interfere with the reasonable enjoyment of the properties of the plaintiffs, and to be injurious to the health of themselves and of their families.

The following is a brief description of the plant and of its operation:—

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Trunk sewers convey large quantities of sewage to the plant. This sewage first passes through screens, which intercept solids too large to pass through the meshes of the screens, and these solids are then thrown out on the ground in heaps and are intended to be covered with chloride of lime, hay and shavings, in order to prevent offensive odours escaping. The sewage then passes into large settling tanks, where much fæcal matter settles to the bottom of the tanks. This concentrated sewage is called "sludge," and each night this sludge, by the opening of valves in the bottom of these tanks, flows by gravitation through a pipe into a settling area. In all, the defendants have about 19 acres for settling areas, and this acreage is divided by piles into areas 80 feet by 250 feet in size and about 5 or 6 feet in depth. The acreage was part of Ashbridge's Bay; and, after the piling was completed, each area remained full of water. The pipe carrying the sludge into the area discharges it under water until the area is nearly full of sludge. Then the mouth of the pipe is suspended above the surface, and the sludge falls into the area. The process of filling an area occupies about 4 or 5 weeks. During that period, for about 5 hours each night, sludge at the rate of 1,000 gallons a minute is discharged with considerable force into the area. During this discharge the contents of the area are in a violent state of agitation, "boiling" up to the surface and giving off offensive odours. The sludge entering the area causes the water in it to overflow into the adjoining area, and such overflowing continues for about 4 or 5 weeks. By this time the contents of the area being full of the sludge, the sludge becomes semi-fluid. Then it is covered more or less effectually with chloride of lime, hay, shavings, etc., in order to prevent the escape of offensive odours; but, notwithstanding these measures, the mass for 3 or 4 months continues to give off odours.

When one area is thus filled, the sludge in like manner is discharged into the area which has already received the overflow. It was said that a scum would form on such second area, and that it assists in preventing the escape of gases whilst the area is being filled with sludge. But this scum is a very ineffective preventive to gases escaping. At times the wind breaks up the scum and drives it to the side; heavy rains also cause it to sink. Such conditions must have always been more or less present. As one area becomes filled, the sludge is discharged into another area; the filling never ceasing.

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I now return to trace the effluent of the sewage from the settling tanks. In order to take care of it, an outfall pipe was laid from the plant across the marsh to Lake Ontario, a distance of about one mile. This outfall pipe, except in cases of emergency, was expected to take care of all the effluent from the tanks, but it is of insufficient capacity, and in consequence much of it passes by what is called the storm overflow passage into Ashbridge's Bay. This storm overflow passage was intended only to meet emergencies; but, owing to the insufficient capacity of the outfall pipe, it is obliged to receive continuously a part of the normal volume of effluent; further, there are two serious breaks in the outfall pipe, and through them large quantities of sewage, instead of passing into the lake, escape into the bay, and have there deposited much fæcal matter, from which offensive gases escape into the atmosphere.

The defendants contend that they have statutory authority to establish and operate the plant, and that in consequence this action will not lie. They also contend that it is being operated with reasonable care in order to prevent a nuisance, and, if such is the case, that they are doing all that they are required to do. They have statutory authority to establish a sewage plant, but no authority to create a nuisance by its operation; and inability to operate it without causing a nuisance does not, in my opinion, furnish an excuse for their creating a nuisance. While I am of the opinion that the operation of the plant causes a nuisance, and the absence of negligence would not furnish a defence, I think the facts shew that the nuisance is traceable largely, if not entirely, to negligence: e.g., fæcal matter called "screenings," being dumped on the surface of the ground, is at times insufficiently covered or disinfected, and in consequence offensive smells are given off. The evidence shews that when properly covered no offensive odours escape from these screenings.

Further, no serious attempt has been made to destroy or render innocuous the odours that arise nightly from the sludge being discharged into the areas. For over 5 hours each night it runs into the areas in large volume and with great force, stirring up the mass, making it boil, as witnesses describe it, and throwing off foul and sickening odours, and so polluting the atmosphere that frequently in the hot summer season people living in the neighbourhood have

in consequence been unable to sleep and have been obliged to close their doors and windows, preferring the stifling air of the closed house to the foul and disgusting smell from the sewage.

Further, the break in the outfall pipe has been allowed to continue a long time without any attempt to repair it, and there has escaped in this way into the bay a steady stream of sewage at the rate of probably half a million gallons each 24 hours, and there is now in the bay a large quantity of fæcal matter, which in the course of putrefaction during the warm weather throws off sickening odours. No excuse has been given for the defendants' failure to repair this pipe. The engineers who designed this plant contemplated this pipe being maintained in efficiency; and, tested from this standpoint alone, the defendants' failure so to maintain it is an act of great negligence.

The settling tanks are frequently flushed, and during the period of flushing give off most offensive odours, but no steps appear to have been taken to carry off these odours or to render them inoffensive.

Whilst the odours complained of have their origin in these various sources, I think the chief source is the settling areas, and no reasonable steps have been attempted in order to prevent or minimise the nuisance arising therefrom.

According to the evidence of Mr. Hatton, civil engineer, one of the defendants' witnesses, it is probable that by a comparatively inexpensive treatment the gases can be rendered harmless. Mr. Hatton has for years made a special study of the treatment of sewage, and he impressed me as a most fair-minded and capable engineer; I attach great weight to his opinion.

It is not for the Court to direct what steps the defendants should take to abate the nuisance, but I think they would be well advised if they acted upon his advice.

I find that the operation of the plant since its inception has so polluted the atmosphere with foul and offensive odours, arising from fæcal matter, as to create a nuisance, especially injurious to the plaintiffs.

As to Fieldhouse, he was, and still is, the owner of two brick stores which he rents for business purposes. The odours in question have injured the rental value of the property, and in consequence he has been unable to realise therefrom as much as, but for the

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nuisance complained of, he would have been able to obtain. I have not the evidence before me in sufficient detail to enable me to determine the exact extent of his loss, but it amounts, I think, to at least $600 up to the present time, and I award him damages to that extent; but, if either party is dissatisfied with that amount, he may have a reference, the costs thereof to be in the discretion of the Master.

The plaintiff Fazackerley owns a store in which he resided and carried on business, but the odours injured his business and made his wife ill, and she was unable to withstand the injurious effects of the odours. In consequence he was compelled to remove elsewhere.

The plaintiff Martin owned a house within 200 or 300 yards of the disposal beds, and his wife also became ill because of the odours, and he also was obliged to move elsewhere. Further, the odours made it difficult for him to keep his house rented, and in consequence at times it remained vacant and at others was let at reduced rates.

No evidence as to the extent of the pecuniary loss of the plaintiffs Fazackerley and Martin was given, and therefore I am unable to award them pecuniary damages; but I find that the odours were so injurious as to interfere with the reasonable enjoyment of their properties.

For these reasons, my judgment is, that the defendants should be restrained by injunction from so operating their plant as to cause a nuisance to the plaintiffs; that they pay to the plaintiff Fieldhouse $600 damages or such sum, if any, as shall be awarded by the Master in the event of a reference, and such costs as the Master in his discretion may give; the defendants to have until the 1st May, 1918, in which to abate the nuisance, with leave to them from time to time to apply for further extensions of time; the plaintiff Fieldhouse to be entitled to a reference from time to time for any further damages he may sustain during the continuance of the nuisance; costs of such reference to be in the discretion of the Master. The defendants must pay to the plaintiffs the costs of this action.

Irving S. Fairty and *C. M. Colquhoun*, for appellants.

T. R. Ferguson, for respondents.

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Clute, J.

CLUTE, J.:—Appeal from the judgment of the Chief Justice of the Exchequer, dated the 29th January, 1918.

This action is brought for damages and an injunction for the negligent installation and maintenance of a system of sewerage in the City of Toronto and the negligent, defective, and inadequate disposal of the same, whereby the plaintiffs suffered special injury.

The defendants deny that they were guilty of negligence and plead statutory authority to do what is complained of.

The facts are fully set forth in the reasons for judgment of the trial Judge.

In order to take care of the effluent of the sewage from the settling tanks, an outfall pipe was laid from the plant across the marsh to Lake Ontario, a distance of about one mile. This outfall pipe, except in case of emergency, was expected to take care of all the effluent from the tanks, but the trial Judge found that it is of insufficient capacity, and in consequence much of it passes by what is called "the storm overflow passage" into Ashbridge's Bay. This storm overflow passage was intended to meet emergencies; but, owing to the insufficient capacity of the overflow pipe, it is obliged to receive continuously a part of the normal volume of effluent. Further, there are two serious breaks in the outfall pipe, and through them large quantities of sewage, instead of passing into the lake, escape into the bay and there deposit much fæcal matter, from which offensive gases escape into the atmosphere.

The defendants contend that they have statutory authority to establish and operate the plant and that this action will not lie. They also contend that it is being operated with reasonable care in order to prevent nuisance, and, if such is the case, they are doing all that they are required to do.

The trial Judge found that the nuisance is traceable, largely if not entirely, to the negligence of the defendants whereby they have created a nuisance injurious to the plaintiffs' property in the pleadings mentioned, the particulars of which are fully set forth in the reasons for judgment.

These findings are, in my opinion, fully supported by the evidence, and justify the judgment pronounced against the defendants in this case.

It is quite clear that, while the plant was intended to provide for the disposal of 33,000,000 of gallons per day, it is called upon

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for the disposal of 45,000,000 of gallons per day. This caused the overflow and shortened the time allowed for settling.

The serious breakage in the outfall pipe has continued for a long time without any attempt to repair, and in this way a steady stream of sewage to an amount of half a million gallons per day found its way into the bay, increasing the nuisance to a very considerable extent.

No excuse is offered for the defendants' failure to repair the break or to provide a sufficient outfall pipe to the lake.

This negligence is established quite apart from the statutory right claimed by the defendants, and the judgment may well be supported on that ground; but the plaintiffs deny that the defendants have a right in this case to rely upon any statutory authority, even if that would be an answer to the plaintiffs' claim, for the reason that no by-law was passed to authorise the installation of the plant and that no approval for the plant as installed was obtained from the Board of Health. It is admitted by the defendants' counsel that no by-law can be found.

During the argument permission was given, if such by-law existed, to put in the same as part of the evidence, and counsel said that after every effort and care to ascertain whether such by-law had been passed no trace could be found, and I think it may well be taken that no by-law was in fact passed. This point was not taken, as I am informed, before the trial Judge.

Section 398 of the Municipal Act, R.S.O. 1914, ch. 192, provides that by-laws may be passed by the councils of all municipalities (7) for the construction of sewers, providing an outlet for a sewer or establishing works or basins for the interception or purification of sewage, and making all necessary connections therewith, and acquiring land in or adjacent to the municipality for any such purposes.

Section 94 (1) of the Public Health Act, R.S.O. 1914, ch. 218, provides:—

"Whenever the construction of a common sewer or of a system of sewerage, or an extension of the same, is contemplated by the council of any municipality, the council shall first submit the plans and specifications of the work together with such other information as may be deemed necessary by the provincial board, for its approval.

"(2) The board shall inquire into and report upon such sewer or system of sewerage, as to whether the same is calculated to meet the sanitary requirements of the inhabitants of the municipality, and as to whether such sewer or system of sewerage is likely to prove prejudicial to the health of the inhabitants of the municipality or of any other municipality liable to be affected thereby." (It does not appear that the inquiry and report were made in compliance with sub-sec. 2.)

"(3) The board may make any suggestion or amendment of the plans and specifications or may impose any condition with regard to the construction of such sewer or system of sewerage or the disposal of sewage therefrom as may be deemed necessary or advisable in the public interest.

"(4) The construction of any common sewer or system of sewerage shall not be proceeded with until reported upon and approved by the board, and no change in the construction thereof or in the disposal of sewage therefrom shall be made without the previous approval of the board.

"(5) The board may from time to time modify or alter the terms and conditions as to the disposal of sewage imposed by it, and the report or decision of the board shall be final, and it shall be the duty of the municipal corporation and the officers thereof to give effect thereto."

Certain extracts from the minutes of the city council and copies of by-laws were, by consent, produced and put in upon the argument.

From these it appears that by-law No. 5167 was passed on the 14th July, 1908, which recites that, in the opinion of the council, it has become desirable that the sewage of the city shall be prevented from overflowing into the waters of Toronto Bay, Ashbridge's Bay, and the lake, in the immediate vicinity of Toronto, and a system of sewage disposal shall be adopted.

In the report No. 15 of the board of control it is recommended that by-laws be submitted to the qualified ratepayers to vote thereon to authorise debentures for trunk sewers and sewage disposal plant to the amount of $2,400,000.

This report of the board of control was adopted by the council on the 26th May, 1908, by by-law No. 5167, which enacts provisions for raising the money required, but no by-law was passed authorising the construction of the plant.

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By-law No. 5194 provides for the purchase of certain tracts of land as a site for the sewage disposal plant.

The trunk sewer proposition provides for the construction of high and low level intercepting sewers and clarification of the sewage by means of septic tanks—these works to be constructed south of Queen street and in close proximity to Ashbridge's Bay—and it gives the estimated cost of the trunk sewer.

The report further recites that the vice-chairman of the board of health and the medical health officer and deputy city engineer were authorised to visit Philadelphia and other cities in the United States where extensive plants had been recently installed and efficiently operated, and their report is appended.

The report of this committee is signed by Charles Sheard, M.D., C. L. Fellowes, deputy city engineer, and W. S. Harrison, M.B., representative of the board of control, and is set forth in the said report No. 15.

On the 15th December, 1908, the city engineer (Rust) wrote a letter to Dr. Charles Sheard, chairman of the board of health, stating that on the 15th December, 1908, the board approved the plans for the construction of two intercepting sewers and for the construction of septic tanks in the neighbourhood of the Woodbine.

After approval by the board, opposition developed on the part of the property-owners in the neighbourhood of the location of the tanks, and the city council engaged the services of J. G. Watson, C.E.M.I.E., of Birmingham, England, and Mr. Rudolph Herring, of New York, to advise upon some change in the methods of constructing the tanks. The city engineer then submits for the approval of the board the plans as amended. The receipt of this letter is acknowledged on the 25th January, 1910, stating that the same will be submitted to the board at the next meeting, and in the meantime he asks that a copy of the plans be forwarded to the health office for filing.

The city engineer the next day acknowledges receipt of the letter and asks that the plans be returned to have copies made of them. The amended plans were approved by the board and returned to the city engineer on the 11th February, 1910, but it does not appear that the board did more than approve of the plans.

No description of the method proposed was presented to the board for their approval, nor did they give any approval of such

method beyond that disclosed by the plans, and it does not appear that any further or other report and approval by the board was made or given.

The letter from the city health officer to the city engineer (Rust) of the 11th February, 1908, states that the plans are returned, and "I am instructed to inform you that same were duly approved of by the board at a special meeting held yesterday. You will note certificate of approval on each plan."

Neither these plans with the certificate nor a copy of the certificate were produced in evidence at the trial. I understood counsel to say that changes were made in the plans which were not approved, and certainly the approval of the board was not obtained for the discharge of the effluent into the bay, nor did the board approve of the defendants loading the system with a larger quantity of sewage than that it was made to carry, thus causing the overflow.

It was said by counsel that this increased quantity of sewage began at or very nearly after the time the works were completed; and on the 3rd July, 1913, complaint was made of the nuisance, and the council adopted a resolution "that the board of control and city officials be requested to at once abate the nuisance caused by the sewage being taken into the Morley avenue septic tanks;" and on the 19th July this resolution was forwarded to the commissioner of works.

On the 4th May, 1914, a deputation of property-owners, residing in the vicinity of the Kingston road and Queen street, appeared before the board and protested against the unsatisfactory operation of the sewage disposal works at the foot of Morley avenue, claiming that the stench arising therefrom was almost intolerable at times.

The board ordered that the foregoing be referred to the commissioner of works with the request that he make a thorough investigation and "advise if there is anything that can be done," etc., etc.

On the 6th May, the board forwarded to the commissioner of works the minutes of the meeting held on that day, and he was asked to report:—

(a) Is there any likelihood that the sewage disposal plant at Morley avenue will be less of a nuisance during the present summer than it was last summer?

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(b) Are any steps being taken or can any steps be taken to abate the nuisance?

(c) Are sewage plants of a like character in other cities equally objectionable?

(d) Are there any steps that can be taken or can the city by the expenditure of additional moneys during the present summer abate this nuisance?

(e) If the nuisance cannot be abated, is the construction such that the plant can be abandoned and the sewage disposed of as formerly until such time as an improved system can be installed?

On the 12th May following, the plaintiff Fieldhouse refers to his letter of the 23rd April to Commissioner Harris, to which he had received no reply, and complains that, unless something is done at once to make this a safe place to live, and compensate him for the damage up to the present time, he will bring action. This letter was sent by the commissioner of works to the city solicitor. On the 16th June, 1914, the board of control passed a resolution that the commissioner of works be asked to report forthwith the names of the experts who advised the construction of the sewage disposal plant at the foot of Morley avenue, and that he forward to the board a copy of the reports made by them in relation thereto. The reports are dated the 9th March, 1909, made by Messrs. Rudolph Herring, C.E., of New York, and John G. Watson, C.E., of Birmingham, England, with reference to the sewage disposal plant, and were forwarded to the mayor.

It is pointed out in this letter that the experts replied to a series of questions propounded by Mr. Rust, the city engineer, in the communication to them dated the 2nd March, 1909, and attention is drawn to question No. 2—the experts suggest that the sludge should be pumped daily to the western end of Ashbridge's marsh, there to be mixed and covered with refuse deposited by the street commissioner's department. They state that, in their opinion, if this course were followed with ordinary care, no offensive odour would be perceptible more than a short distance from the site of deposits. It is further stated that this plan was not followed, but instead a large area was enclosed with piling, adjoining the sewage disposal works, for the deposit of the sludge therein, and it is from this that the offensive odour emanates.

In reply to question 3, the experts state that no nuisance will

arise from the tanks if they are properly constructed and operated. "This has been borne out by our experience. The offensive odour comes from the sludge and not from the tanks."

Replying to question 4, they state that residents in the neighbourhood of the tanks will experience no odour from them; but, if the sludge were deposited in proximity to them, they are of opinion that cause for complaint would arise. The condition which they predicted in this reply is now evident.

"I have consulted with the city solicitor herein, and he advises that the city has no remedy as against the experts, even had they advised that the present system in its entirety would be inoffensive. It is but just to point out, in this connection, that the advice of the experts relative to sludge disposal was not followed, and the condition which they foresaw if sludge were deposited contiguous to the premises has eventuated."

It thus appears that, the defendants having taken the advice of eminent experts, this advice was not followed, and in adopting a different plan they were forewarned by the experts as to what would follow and what did follow, namely, the creation of a nuisance intolerable to property-owners, that has continued to this day and still continues, and this in spite of repeated protests of property-owners residing in that vicinity. Such a deputation waited on the board on the 2nd July, 1914; and on the 8th July, 1914, the board ordered that the commissioner of works be requested to submit a report shewing the necessary "improvement which in his opinion should be made to the Morley avenue sewage plant in order to render the system satisfactory."

On the 18th July, 1914, the council, following up the order of the board, resolved "that the works commissioner be requested to report at the earliest possible time a way of remedying the smells at the Morley avenue sewage disposal works." And a resolution was passed by the board on the 20th July to the same effect.

On the 16th November, 1914, the city council passed the following resolution: "That the board of control be requested to undertake at once, through the works department and the medical health department, a comprehensive inquiry into the most effective method of abating the nuisance caused by the Morley avenue sewage disposal plant, securing whatever expert advice is necessary, and reporting to the council at the earliest possible date a plan with details and estimates of cost."

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On the 12th December the commissioner of works replied that "conditions have been such since last summer as to practically obviate complaint. This was accomplished by reducing the area over which the sludge was deposited, thereby decreasing the surface over which gas might be evolved."

This is a partial abatement, for the time at least, of the nuisance mentioned by the council. But the abatement would seem to have continued for only a short time, for, on the 5th May, 1915, the residents of that neighbourhood, through their solicitors, made complaint to the provincial board of health "of the unbearable stenches and stink given out at times from the city's sewage disposal plant on the shore of Ashbridge's Bay in that locality." They say the plant is a "bungle," the operation of it an unbearable nuisance, and Ashbridge's Bay there, where it is used, a seething cesspool and menace to public health, and they want proceedings taken to abate the nuisance or indict the city for creating it. "Before taking steps we would like to ask you to visit the place."

The provincial inspector of health, Dr. R. W. Bell, was sent to examine, and made a report in which he said: "I have no hesitation in pronouncing the complaints as well-founded, as the pollution of the atmosphere by this plant cannot help but be a nuisance and menace to the health of the near-by residents who are compelled to breathe it. Undoubtedly some different method of treating and disposing of the sludge is required and should be insisted upon without unnecessary delay." Inspector Bell fully confirmed this report in his evidence at the trial.

This report was brought to the attention of the city authorities, and, after delay for one cause or another, and, after further deputations of ratepayers had visited the council, the city health officer and commissioner of works made their report on the 21st July, 1915, in which they state: "The sewage tanks were not designed for the storage of sludge, the intention being to discharge the accumulation of fresh sludge into Ashbridge's Bay for reclamation purposes. If this method had been adopted, serious consequences would have followed."

Upon the completion of the plant it was deemed advisable to "confine the sludge within a definite area, contiguous thereto, and for the purpose a portion of Ashbridge's Bay immediately to the south was enclosed. After considerable sludge had been

deposited in this area the ebullition of gases caused odour. In order to minimise this, about 18 months ago, we split the aforementioned area into comparatively small pockets, which virtually act as separate digesting lagoons. Sludge was deposited in each of these until filled—in this way the sludge depth was increased and the superficial area exposed to the atmosphere reduced, thereby retarding the rate of gas ebullition. Immediately upon the discharge of fresh sludge, the deposit is covered with shavings, and lime or bleach spread thereon. This method has proved quite effective, and is being continued."

It will be observed that the principal causes referred to by the trial Judge as creating the nuisance, namely, not sufficiently protecting and covering the piles of screenings, the overflow of the effluent into the bay, caused by breaks in the outfall pipe, and the plant not being sufficiently large to carry off the increased amount of sewage, and other matters referred to in the evidence and by the trial Judge, are not mentioned in this report.

Upon receipt of this report, the board of control passed an order asking the commissioner of works "what should be done to remedy matters at the . . . plant."

The matter was taken up from time to time by the council and by the board, but nothing has been done, the breakage has not been repaired, the overflow continues to the extent of half a million gallons per day, and the evidence is overwhelming that the operation of the plant creates an intolerable nuisance.

It is quite clear that the board of health never approved of the plant as it has been operated. It thus appears upon the evidence and findings that the defendants, without the authority of a by-law and without the approval of the board of health, have constructed, maintained, and operated a plant causing a nuisance, and thereby causing damage to the plaintiffs' land. Having taken the advice of experts, the defendants did not follow the same, and in departing therefrom created the nuisance complained of. The works as now established and operated were not authorised by statute; and, under the facts and circumstances in this case, the defendants cannot rely upon the statute as an answer to the plaintiffs' claim.

The general rule of law is that if the thing complained of, although an act which would otherwise be actionable, be authorised by statute, then no action will lie in respect of it, if it be the very thing that the Legislature has authorised.

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See *Corporation of Raleigh* v. *Williams*, [1893] A.C. 540; *East Fremantle Corporation* v. *Annois*, [1902] A.C. 213; *Faulkner* v. *City of Ottawa* (1909), 41 Can. S.C.R. 190.

In this latter case it was held, Idington and Duff, JJ., dissenting, that damages being claimed for flooding of the plaintiff's premises by water backing up from the sewer, the city was not liable where it was shewn that the standard there adopted was recognised as sufficient to meet the requirements of good engineering and was the standard adopted by the cities of Canada and the Northern States. It is said by Duff, J., one of the dissenting Judges (p. 213), that "the principle is equally applicable to persons and bodies acting under legislative authority for their own profit and to public bodies exercising powers conferred upon them for the public benefit. In both cases where the authority is in general terms merely it may be inferred from the general scope and provisions of the statute that the powers conferred are not to be exercised to the prejudice of private rights. This was the view taken of the statute under consideration by the House of Lords in *Metropolitan Asylum Dist. Managers* v. *Hill* (1881), 6 App. Cas. 193, and of that construed by the Privy Council in *Canadian Pacific R. Co.* v. *Parke*, [1899] A.C. 535. It is, nevertheless, entirely a question of the true meaning of the statute."

He refers to Lord Halsbury's statement of the law in *Westminster Corporation* v. *London and North Western R. Co.*, [1905] A.C. 426, 427, where he said:—

"Assuming the thing done to be within the discretion of the local authority, no Court has power to interfere with the mode in which it has exercised it. Where the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorised."

Upon this passage Duff, J., observes that it "must be read subject to two important observations, that is to say, that in the absence of some provision (either express or clearly implied) to the contrary it must be taken that in carrying out works authorised by a statute or in exercising powers conferred by a statute you are not to act negligently and you are to act reasonably, that is to say,

you are to prosecute the work or you are to exercise the power, as the case may be, in such a manner as not to do unnecessary injury to others. Lord Macnaghten, at p. 430, said: 'It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first.' "

In *McClelland* v. *Manchester Corporation*, [1912] 1 K.B. 118, Lush, J., said (pp. 129, 130), quoting Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, at pp. 455, 456: "It is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

In *Thompson* v. *Bradford Corporation*, [1915] 3 K.B. 13, *McClelland* v. *Manchester Corporation* was followed, and it was held that where the post office authorities had removed a pole and filled in a hole, and shortly afterwards the corporation threw the road open for traffic, the defendants were liable, "the corporation upon the ground that they were altering the character of part of an old road . . . and their duty was so to make it that when they threw it open for public use it should be reasonably safe for the purposes for which it was intended to be used; the post office authorities upon the ground that having done, perhaps voluntarily, a piece of work, they did it negligently." Bailhache, J., said (p. 22): "If a person does a piece of work negligently, although he need not have done it at all, he is liable for the consequences of his negligence. If he undertakes to do it he must do it with reasonable care, and the post office authorities appear to have neglected their duty in that respect, and on that simple ground, apart from the statute, it seems to me they are liable."

In *Re J. F. Brown Co. Limited and City of Toronto* (1916),

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36 O.L.R. 189, 29 D.L.R. 618, the official arbitrator awarded damages for injuries to the claimants' land by the erection of and maintaining upon and under the street upon which the land abutted a public convenience. The Appellate Division equally divided in opinion as to the right of the land-owners to recover under sec. 325 of the Municipal Act, and the award of compensation was, in the result, affirmed.

This section, 325 (1), of the Municipal Act, expressly provides that where land is injuriously affected by the exercise of any of the powers of a corporation under the authority of the Act the corporation shall make due compensation for the damages necessarily resulting therefrom. In such a case (2) the amount of compensation, if not mutually agreed upon, shall be determined by arbitration.

It may be, probably is, the fact in the present case, that a portion of the damages suffered by the plaintiffs necessarily resulted from the exercise of such powers, and so it might to that extent be a subject-matter for arbitration, and it was urged by counsel for the defendants that the plaintiffs could only recover that portion of the damage occasioned by the negligence (if any) of the defendants. I am not of that opinion. Where, as here, the plaintiff has a right of action, and it is impossible to say what proportion, if any, of the damages necessarily resulted from the exercise of such powers, the remedy is not confined to arbitration. The case is not within sub-sec. (2). The appropriate remedy is by action, where full damages may be recovered.

Compensation for injurious affection was first provided in the Municipal Act of 1873, sec. 373: *In re Yeomans and County of Wellington* (1878), 43 U.C.Q.B. 522, affirmed (1879) 4 A.R. (Ont.) 301.

"When no land has been taken, the words 'injuriously affected' . . . are limited to loss or damage under the following heads:—

"1. The damage or loss must result from an act made lawful by the statutory powers of the promoters.

"2. The damage or loss must be such as would have been actionable but for statutory powers.

"3. The damage or loss must be an injury to lands, and not a personal injury, or an injury to trade.

"4. The damage or loss must be occasioned by the construc-

tion of the authorised works, and not by their user:" Cripps on Compensation, 5th ed., p. 136; and see *In re Collins and Water Commissioners of Ottawa* (1878), 42 U.C.R. 378, 385.

It was held in *City of Hull* v. *Bergeron* (1913), 9 D.L.R. 28 (Que.), that where a statute provides for indemnity to be fixed by arbitration, that does not deprive the injured person of his common law recourse, if he has any, and he may therefore sue for damages without any reference to arbitration, and reference was made to what was said by Patterson, J., in *Williams* v. *Township of Raleigh* (1892), 21 Can. S.C.R. 103, 131, but apparently it is overlooked that that learned Judge went on to say that "if the act that injures you can be justified as the exercise of a statutory power you are driven to seek for compensation in the mode provided by the statute, or if (as has sometimes happened) no such provision is made you are without remedy."

Here, in sub-sec. (2) of sec. 325 the word "shall" is used, but sub-sec. (1) gives the right to compensation where property is injuriously affected.

I am of opinion that where, as here, the major part if not all of the damage arose from negligence in the operation of the plant, and it seems impossible to assign any particular portion of the injury to the lawful exercise of the powers given, the plaintiff is not precluded from recovering full compensation in the action which he is compelled to bring in order to seek an adequate remedy.

The fourth heading, as quoted above from Cripps, that "the damage or loss must be occasioned by the construction of the authorised works, and not by their user," may not have full application to the present case under the Municipal Act; but, if it has, the damage here was occasioned by the user of the plant, and might under that heading not be protected by the statute.

For authorities bearing upon this case, see Meredith's Municipal Manual, pp. 24, 25, 353.

As to the weight of evidence in a case of this kind, see *Great Central Railway* v. *Doncaster Rural District Council* (1917), 15 Local Government Reports, part 1, p. 813. This was a case of sewage refuse. A large number of witnesses for the plaintiffs stated that the smells were dangerous to health. An equal number of witnesses for the local authorities swore that the smells were not serious and not detrimental to the public health, and that

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they had greatly diminished or ceased altogether since the tip had been covered by a layer of earth. Held, that where, as in *Bainbridge* v. *Chertsey Urban District Council* (1914), 13 Local Government Reports 935, a strong weight of reliable positive evidence is produced by the plaintiff, such evidence cannot be set aside by reason of mere negative testimony on the part of the defendants.

Here the plaintiffs' evidence was to my mind overwhelming against the evidence offered by the defence.

In the present case the defence under the statute fails, in my opinion, because: (1) the requirements of the statute in regard to by-law and sanction by the board of health were not complied with; (2) the damages suffered by the plaintiffs were caused by the defendants through their negligence; (3) while the evidence is conclusive that the plaintiffs suffered damages, it is impossible to say whether any portion of such damages necessarily resulted from the exercise of the defendants' powers.

The appeal should be dismissed with costs.

Magee, J.A. MAGEE, J.A., agreed with CLUTE, J.

Maclaren, J.A. MACLAREN, J.A.:—This is an appeal from a judgment of Mulock, C.J. Ex., rendered on the 29th January, 1918, whereby he held that the defendants had created a nuisance by the establishment and operation of a sewage plant in the vicinity of Ashbridge's Bay, near the property of the plaintiffs, and condemned the defendants to pay the plaintiff Fieldhouse $600, or such other sum as might be ordered in case of a reference: the defendants to have until the 1st May, 1918, to abate the nuisance.

I quite agree with the findings of the learned Chief Justice upon the mass of evidence brought before him, and I do not see how he could have found otherwise. The neglect of the defendants in not repairing the broken waste-pipe and in allowing the enormous escape of fetid sewage seems to be inexplicable.

There is, in addition, what I consider to be even a stronger ground, and which does not appear to have been brought to the attention of the learned Chief Justice. Such a work comes under the provisions of sec. 94 of the Public Health Act, R.S.O. 1914, ch. 218. It has not been shewn that the provisions of this Act were complied with, and no by-law of the city council ordering it has been produced.

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I am consequently of opinion that the appeal should be dismissed.

The time for the abatement of the nuisance should be extended to the 1st March, 1919.

HODGINS, J.A.:—I agree with my brother Clute in his analysis of the evidence in this case. This sewage disposal work may have been done and maintained in the way described therein under the pressure of necessity and with every desire to minimise its unpleasant results. But, while recognising this, the Court is bound to inquire why the provisions of the Public Health Act were not followed, or, if followed, why that fact was not properly proved.

I regard that Act (R.S.O. 1914, ch. 218, sec. 94) as intended to modify the usual powers of a municipality with regard to a system of sewage or of sewage disposal by making the approval of the provincial board of health a prerequisite to their exercise. Before that approval is given, the board is charged with the duty of ascertaining whether the system "is calculated to meet the sanitary requirements of the inhabitants of the municipality, and as to whether such . . . system of sewerage is likely to prove prejudicial to the health of the municipality or of any other municipality liable to be affected thereby."

It is also empowered to make suggestions and impose conditions in regard to the construction of the system or "the disposal of sewage therefrom as may be deemed necessary or advisable in the public interest."

The work cannot be proceeded with until approved of, and no change in the construction of the system or disposal of the sewage therefrom is to be made "without the previous approval of the board."

While the board may modify or alter the terms and conditions which it has laid down as to the disposal of the sewage, its decision, while standing, is final, and the duty of giving effect to it is directly laid on the municipal corporation itself as well as on its officers.

This very reasonable and extremely simple method of proceeding puts the responsibility upon the provincial board of health, where it properly belongs. It supplies the corporation with an answer to complaints, because the statute declares it to be the duty of the corporation to give effect to the decision of the board.

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There is also eliminated the need for considering whether the corporation has adopted the best system, because the exact proposals are required to be set out in plans and specifications, which the board may modify, and the execution of which may be subject to conditions imposed by the board in the public interest.

It is not to be presumed that the provincial board of health would proceed with its inquiry without some notice to those immediately concerned from the point of view of health—nor does the execution of the plans so approved prevent the work being one which is done in the exercise of the powers of the corporation.

The provisions of sec. 97 of the Public Health Act impose the further duty of such proper repair "as may be necessary for the protection of the public health." In this respect want of repair was proved sufficient to justify the judgment under appeal.

Having failed to comply with these provisions, the appellants cannot, in my judgment, rely upon statutory authority justifying the acts complained of.

I think the appeal should be dismissed, but the time for abating the nuisance should be extended till the 1st March, 1919.

Appeal dismissed.

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Manitoba King's Bench, Mathers, C.J.K.B. December 2, 1918.

COURTS (§ IV B—262)—AGREEMENT TO TRY DISPUTES IN COURT OF ANOTHER PROVINCE—FOREIGN COURT—MANITOBA ARBITRATION ACT (R.S.M. 1913, c. 9)—ENFORCEMENT OF CLAUSE—STAY OF PROCEEDINGS.

Courts of one province are, with respect to the courts of other provinces, foreign courts, and a clause in an agreement to refer any disputes that might arise to the decision of a foreign court is a submission within the meaning of the Manitoba Arbitration Act (R.S.M. 1913, c. 9). Such clause can only be enforced by granting a stay of proceedings, where an action is brought in the courts of another province than that specified, but, in order to succeed, the application must be made within the time specified by the Act.

Statement.

APPLICATION for a stay of proceedings in an action on a contract of service. Refused.

E. A. Cohen, for plaintiff.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—The plaintiff resides in the City of Winnipeg, and the defendant is a life insurance company with head office in the City of Toronto, Ontario, but with branch offices in Winnipeg and many other cities in Canada and the United States. It is licensed to do business in Manitoba under

the Dominion Insurance Act, and also under the Manitoba Insurance Act.

On or about January 3, 1916, the plaintiff and the defendants made and executed in Toronto a contract whereby the plaintiff agreed, for a certain remuneration, to serve the defendants as agent. It was within the contemplation of the parties that the services should be rendered in Western Canada, and, as a matter of fact, the services rendered by the plaintiff under the contract were largely performed in the Provinces of Manitoba and Saskatchewan.

The contract contained this clause:—

27. Any action or proceeding involving any matter arising out of this contract or out of the employment of the agent, or involving the construction or interpretation of any of the provisions hereof, shall be tried at the City of Toronto in the Province of Ontario, and not elsewhere, and any judgment recovered in any court of competent jurisdiction sitting in the said City of Toronto shall be final and binding upon both the parties hereto.

The clause quoted is part of a printed form of contract, and in common use by the company in contracts with agents.

The plaintiff has brought an action in this court in the eastern judicial district, alleging a breach of this contract, and asking for damages, and also asking for an account of commissions alleged to be due to the plaintiff, and for other relief arising out of the contract.

The defendants entered a statement of defence and counterclaim. With the exception of making the contract the defendants deny all the allegations in the statement of claim, and set up several matters by way of substantive defence. By way of counterclaim they claimed over-payment to the extent of $2,437, which they seek to recover.

Par. 16 of the statement of defence is as follows:—

This court has no jurisdiction to try or determine the plaintiff's claim by virtue of clause 27 of the above contract.

Upon an agreed statement of facts my brother Metcalfe ordered that it be referred to a judge in court to determine the following questions, namely:—(1) Is clause 27, which is set out in the statement of facts, valid and binding upon the plaintiff, or is it void and of no effect? (2) If the former, by reason of said clause, (a) Had the plaintiff a right to bring this action? (b) Has the court jurisdiction, or will it, or should it, assume or exercise jurisdiction to entertain or try this action? (c) If

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the plaintiff had no right to bring this action, is the defendant entitled to have this action dismissed or stayed upon the facts stated in the statement of facts hereinbefore referred to?

During the course of the argument it became very apparent that an answer to the questions submitted would still leave undecided the real issue of law intended to be raised, namely, the right of the defendant, because of clause 27 of the contract, to a stay of proceedings under all the circumstances, and both parties requested me to determine that point irrespective of the form of the order of submission. In order that the proceedings so far may not be abortive, I propose to accede to this request.

The defendants based their right to a stay of proceedings in this action upon the binding effect of clause 27 of the agreement and the *primâ facie* duty of the court to give effect to it. The plaintiff admitted that the clause constituted a valid agreement, but submitted that the jurisdiction of this court was not thereby ousted, and that the defendants, having neglected to avail themselves of their right to apply for a stay of proceedings under s. 6 of the Arbitration Act, had now no right to have the action stayed.

From the earliest times both common law and equity courts have recognized and given effect to the principle that parties cannot, by contract, oust the courts of their jurisdiction, and that a provision to refer any dispute which might arise, not to the ordinary tribunals, but to some forum of their own selection, could not be pleaded in bar to an action upon the contract. *Thompson* v. *Charnock* (1799), 8 D. & E. (T.R.) 139, 101 E.R. 1310; *Harris* v. *Reynolds* (1845), 7 Q.B. 71, 115 E.R. 414; *Scott* v. *Avery* (1856), 5 H.L.C. 811, 10 E.R. 1121; *Cooke* v. *Cooke* (1867), L.R. 4 Eq. 77; *Dawson* v. *Fitzgerald* (1876), 1 Ex. D. 257; *Doleman* v. *Ossett*, [1912] 3 K.B. 257.

At one time it was supposed that the principle underlying these decisions was that an agreement to prevent the enforcement of a cause of action through the medium of the ordinary tribunals of the country was void as contrary to public policy, and indeed expressions to that effect may be found in the reports of cases of comparatively recent date: *Horton* v. *Sayer* (1859), 4 H. & N. 643, 157 E.R. 993; *Edwards* v. *Aberayron Mutual Ins. Co.* (1875), 1 Q.B.D. 563.

That an agreement to refer any disputes that may arise to arbitration is not void, but on the contrary is perfectly legal, and that an action for damages will lie for its breach was conclusively decided in *Livingston* v. *Ralli* (1855), 5 E. & B. 132, 119 E.R. 430. In that case Campbell, L.C.J., pointed out that such an agreement is founded upon a sufficient consideration, and is neither immoral nor contrary to public policy.

To the same effect is *Donegal* v. *Verner* (1872), I.R. 6 C.L. 504, per Jessel, M.R.; *Dawson* v. *Fitzgerald* (1876), 1 Ex. D. 257, at 260, and *Doleman* v. *Ossett*, *supra*.

The true ground for holding that the jurisdiction of the courts cannot be ousted by an agreement between parties is that the courts derive their jurisdiction either from the statute or common law, and no mere contract *inter partes* can take away that which the law has conferred.

The effect of such a provision with a covenant not to sue superadded has never, so far as I am aware, been authoritatively decided. In two cases countenance is given to the proposition that an agreement to refer future disputes to arbitration, coupled with a covenant to abide by the award and not to sue, may constitute a bar to an action.

The cases referred to are *Halfhide* v. *Fenning* (1788), 2 Bro.C.C. 336, 29 E.R. 187, a decision of Lord Kenyon, and *Dimsdale* v. *Robertson* (1844), 2 J. & Lat. 58, decided by Lord St. Leonards. In the latter case Lord St. Leonards said, at p. 92:

> At all events, I think that an agreement to refer, and arbitrators named and a covenant not to sue and a power to make the submission a rule of court—particularly having regard to the legislative provisions in such cases—do prevent a party from filing a bill with a view, as in this case, to withdraw the case from the arbitrators.

While neither of these cases can be said to have been overruled, they have both been more than once adversely commented upon, *Scott* v. *Corporation of Liverpool* (1858), 3 DeG. & J. 334, 44 E.R. 1297, and as stated by Page-Wood, V.C., in *Cooke* v. *Cooke*, *supra*, the question "remains *in dubio*."

The clause in question, in this case, does not contain a covenant not to sue, but it was argued that it is in effect such a covenant. It does not appear to have that effect at all. It clearly contemplates that an action may be brought. It merely seeks to restrict the parties to courts sitting in Toronto as the only forum open to them.

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Neither does the clause come within the principle of those cases of which *Scott* v. *Avery*, 5 H.L.C. 812, 10 E.R. 1121, is the leader, which decide that where the ascertainment of the amount to be paid or the liability of the defendant therefor by the award of arbitrators is a condition precedent to the accrual of a cause of action, an action is not maintainable until after the award has been made, in which case the agreement to refer may be pleaded in bar of the action: *Patterson* v. *Central Canada Ins. Co.* (1911), 20 Man L.R. 295, and cases collected in Redman's Law of Arbitrations, 53.

Not only is the jurisdiction of the courts unaffected by an agreement between parties to refer any disputes that may arise to arbitration, but if in breach of such an agreement one of the parties sued the other, the courts were powerless, prior to the Common Law Procedure Act, 1854, s. 11, to grant the vexed party any relief. The agreement to refer could not be enforced by an action for specific performance, and there was no power to stay proceedings. 1 Hals. 445.

In *Roper* v. *London* (1859), 1 E. & E. 825, 120 E.R. 1120, Lord Campbell points out that apart from the statute the defendant had no means of enforcing such an agreement. The law was similarly stated by Bowen, L.J., in *London & Chatham R. Co.* v. *South-Eastern R. Co.* (1888), 40 Ch.D. 100, at 107, by Cotton, L.J., in *Davis* v. *Starr* (1889), 41 Ch.D. 242, and by Vaughan-Williams, L.J., and Fletcher Moulton, L.J., in *Doleman* v. *Ossett*, *supra*.

In this state of the law, the Common Law Procedure Act, 1854, s. 11, was passed. That statute has been repealed, but s. 11 is re-enacted as s. 4 of the Arbitration Act, 1889 (Imp.), and it appears as s. 6 of the Manitoba Arbitration Act, having undergone certain verbal changes which do not, however, alter the sense.

These statutory provisions do not confer upon a defendant a right to plead an agreement to refer to arbitration as a bar to the action. In that respect the statute makes no change in the law. Its effect is very succinctly stated by Moulton, L.J., in *Doleman* v. *Ossett*, *supra*, at p. 268, as follows:—

> It enables the defendant to an action brought in breach of an agreement to proceed by arbitration to apply to the court to stay the action and the court is given power so to do. Prior to these statutable provisions, the court could

not refuse to settle any such dispute which was brought before it because it not only had the jurisdiction but also the duty to decide that dispute if called upon so to do. It has, under these provisions, power to refuse its aid to a person who appeals to it in breach of an agreement to decide the matter by arbitration. But the statute very properly requires that the necessary application so to do should be made by the defendant immediately on appearance and before taking any step in the action. If the defendant allows the action to proceed for a while, he cannot subsequently withdraw it from the courts. If the court thus refuses its assistance to the plaintiff he is driven to have recourse to arbitration as his sole means of obtaining redress and thus the original agreement to submit the matter to arbitration is indirectly enforced.

The Lord Justice was speaking with reference to s. 4 of the Arbitration Act, 1889 (Imp.), but the language used is equally applicable to s. 6 of the Arbitration Act of this province. It is enacted by that section that:—

> 6. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, before delivering any pleadings or taking any other step in the proceedings, apply to that court to stay proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matters should not be referred in accordance with the submission, and that the applicant was, at the time the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

This Act does not give an agreement to refer the effect of depriving a plaintiff of his right of action, nor, as before pointed out, does it permit a defendant to plead such an agreement as a defence; but it does enable him to take advantage of the agreement by an application to stay proceedings in the action, and compel the plaintiff to resort to his remedy by arbitration: *Roper* v. *London*, 1 E. & E. 825, 120 E.R. 1120.

As pointed out by Moulton, L.J., in the passage quoted from *Doleman* v. *Ossett*, a defendant must make his application at the stage of the proceedings indicated in the statute, or he loses the advantage which it conferred upon him, and he is remitted to the position he was in before the statute was passed; that is to say, he cannot avail himself of the agreement to refer at all, and so far as he is concerned it is a dead letter. The Imperial statutes require the application to be made after appearance and before delivering any pleadings or taking any other step in the proceedings. The decisions under both the Common Law

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Procedure Act, 1854, s. 11, and the Arbitration Act, 1889, s. 4, have been uniformly to the effect that the statute is imperative in requiring the application to be made before pleading or taking any other step in the proceedings: *West London Dairy* v. *Abbott* (1881), 44 L.T. 376; *Chappell* v. *North*, [1891] 2 Q.B. 252; *Ives* v. *Willans*, [1894] 1 Ch. 68, affirmed, [1894] 2 Ch. 478; *Parker* v. *Turpin*, [1918] 1 K.B. 358.

In this province we have no such thing as an appearance, the first proceeding by a defendant being the delivery of a statement of defence. Before the Arbitration Act, an application was made under s. 11 of the Common Law Procedure Act, 1854, by the defendant in *Northern Elevator Co.* v. *McLennan* (1902), 14 Man. L.R. 147. The defendant had delivered a statement of defence, and it was contended on his behalf that a statement of defence under our procedure was the equivalent of an appearance under the English practice, and that, consequently, his application was in time. The late Richards, J., held that the application was too late, and, on appeal, his judgment was affirmed. A like opinion was expressed in *Northern Electric* v. *Winnipeg* (1913), 10 D.L.R. 489, 13 D.L.R. 251, 23 Man. L.R. 225.

The defendants did not make an application for a stay of the action "before delivering any pleading," but, on the contrary, delivered a statement of defence upon the merits, together with a counterclaim against the plaintiff. It is true that by one paragraph of the defence the jurisdiction of the court is challenged, but, as I have already pointed out, the jurisdiction of the court is unaffected by the agreement, and the plea constitutes no defence. It was argued that the question having been raised by the defence, the defendants entitled themselves to the benefit of the enactment. The same course was pursued in *Dawson* v. *Fitzgerald* (1873), L.R. 9 Ex. 7, reversed in appeal (1876), L.R. 1 Ex. D. 257, and in *Cooke* v. *Cooke* (1867), L.R. 4 Eq. 77. That is to say, the defendant pleaded the agreement to refer as a defence, but the court held in both cases that that was not sufficient and in both cases the action would probably have been stayed, had the defendant availed himself of the provisions of the statute.

The tendency of modern decisions where parties have agreed to refer their disputes to some domestic tribunal is to hold them to their agreement. As stated by Selborne, L.C., in *Willesford* v. *Watson* (1873), L.R. 8 Ch. App. 473, at 480:

If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then, since the Act of Parliament (C.I.P. Act, 1854) was passed a *primâ facie* duty is cast upon the courts to act upon such an agreement.

And the cases are rare in which the court ought to refuse the order to stay proceedings: *Russell* v. *Russell* (1880), L.R. 14 Ch. D. 471; *Hamlyn* v. *Talisker*, [1894] A.C. 202. But before the court can be called upon to act, or has acquired any jurisdiction to interfere with the prosecution of the action, the defendant must see that he has taken advantage of the machinery with which the statute has supplied him.

The agreement in this case is not a reference to arbitration in the ordinary sense. It purports to bind the parties to refrain from enforcing any cause of action arising upon the contract in any court other than those sitting in the City of Toronto. The question of whether a clause in an agreement to refer any disputes that might arise to the decision of a foreign court is a "submission" within the meaning of the statute has been before the court in England in three cases, and in each case the answer has been in the affirmative.

In *Law* v. *Garrett* (1878), L.R. 8 Ch. D. 26, a partnership agreement was entered into between three British subjects, two of whom resided in England, and the other in Russia, to carry on business in Russia. The agreement, which was in the Russian language, and was executed and registered in Russia, contained this clause:

In case of any disputes arising between the parties to this agreement or their executors, such disputes, no matter how or where they may arise, shall be referred to the St. Petersburg Commercial Court or to any court which may have taken its place, the decision of such court shall be final.

Upon an action brought by two of the parties in England the defendant moved for a stay of proceedings by virtue of s. 11 of the Common Law Procedure Act, 1854. Bacon, V.C., made the order asked for, and his decision was affirmed in the Court of Appeal.

In *Austrian Lloyd* v. *Gresham Life*, [1903] 1 K.B. 249, it was held that a provision in a life insurance policy effected by a foreigner with an English insurance company having a branch office at Budapest, that:

for all disputes that may arise out of the contract of insurance all the parties interested expressly agree to submit to the jurisdiction of the courts of Budapest having jurisdiction in such matters,

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was a submission within the meaning of s. 4 of the Arbitration Act, 1889.

In *Kirchner* v. *Gruban*, [1909] 1 Ch. 413, at 414, one clause of an agreement provided that:

> The contracting parties submit themselves in all cases of dispute to the exclusive jurisdiction of the Royal Landgericht or of the Amtsgericht at Leipzig, and the German law shall exclusively hold good.

Upon being sued upon the agreement in England the defendant entered a conditional appearance, and then moved to stay proceedings under s. 4 of the Arbitration Act, 1889, and Eve, J., made an order staying the action.

These cases sufficiently establish that an agreement to refer disputes to a foreign court is a submission within the meaning of the Act.

In Canada, the courts of one province are, with respect to the courts of the other provinces, foreign courts. It appears to me, therefore, that clause 27 of the agreement sued upon is a "submission" within the meaning of s. 6 of the Arbitration Act, and the defendants, not having applied for a stay of proceedings within the time specified, have lost the right to have the clause enforced in the only way in which it could have been enforced, and that the action must now proceed.

Counsel for defendants relied upon *Hamlyn* v. *Talisker* as shewing that the contract was to be construed according to the law of Ontario. My impression is that the contention is well founded, but I do not think the point material. S. 6 of the Arbitration Act relates to procedure, and the principle that procedure is governed by the *lex fori* and not by the *lex loci contractus* is universally admitted: Dicey's Conflict of Laws, 2nd ed., 708.

For these reasons the defendants are not entitled, in my opinion, to have the action stayed. The plaintiff is entitled to the costs of, and incidental to, this application in the cause in any event. *Application refused.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. 1918.

CONTRACTS (§ II D—188)—CONTRACTOR—ABANDONMENT OF CONTRACT—COMPLETION OF BY OTHER PARTIES—SAVING ON ORIGINAL PRICE—NOT ENTITLED TO AMOUNT SAVED—ENTITLED TO RETURN OF DEPOSIT.

A contractor who has entered into a contract to do certain work, who abandons the contract before completion, such contract being completed by other parties at a saving on the original price, is not entitled to the amount so saved. A deposit made by the contractor on entering into the contract as security for its "due performance" if not used in accordance with the terms of the contract for the construction and completion of the work must be returned to the defaulting contractor.

[*Dussault and Pageau* v. *The King* (1917), 39 D.L.R. 76, affirmed.]

Statement.

APPEAL from the decision of the Exchequer Court of Canada, 39 D.L.R. 76, 16 Can. Ex. 228, maintaining in part the petition of right of the plaintiff. Affirmed.

Belleau, K.C., and *Marchand*, K.C., for appellants; *Drouin*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting on the cross-appeal):—The pleadings in a case are meant to bring out clearly the issues presented for the decision of the court. It would be very difficult to gather these from the petition of right in this case and we need not try because the appellants' counsel in their factum say:—

> At the trial many of the allegations of the petitions of right were abandoned and on behalf of the appellants we submitted that they were entitled to recover a sum of $5,168.41 for the following reasons:

They proceed to set out certain amounts and value which they allege the respondent received from them and which, after deducting certain credits, leave a balance of the mentioned sum.

It is necessary to set out briefly the facts of the case in order to see what is really the claim now advanced.

The appellants entered into a contract with the respondent for the construction of a wharf for the sum of $33,775, and they deposited security to the amount of $3,600. Before the wharf was nearly complete, the appellants, in breach of their contract, as found at the trial, abandoned the works which were thereafter completed by another contractor, one O. Poliquin. When the appellants threw up their contract they had received from the respondent the sum of $15,300, the total payments made to them on account, and they left on the premises materials to the value of $10,183.30. These, however, to the value of $4,949 were unpaid for and the respondent subsequently paid this amount, the value of the appellants' materials which the respondent took over under the terms of the contract being thus only $5,233.41.

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The contract between Poliquin and the respondent provided that the contractor should take over and utilise in the completion of the wharf all the materials on the site at the valuation of $10,183.30, this being set-off against the total price payable of $22,490. It may be noted that this sum of $22,490 included a small extra of $350.

It thus appears that the total cost of the bridge, not including the $350 extra, was:—

Cash paid appellants		$15,300
Value of material handed over to Poliquin and put into the bridge	$10,183.30	
Cash to Poliquin	11,956.70	22,140
Total		$37,440
The original contract price was		33,775
An excess of		3,665

The appellants admit their liability for this excess but claim to set against it

The value of their materials taken over by the respondents	$5,233.41	
Their deposit	3,600.00	$8,833.41
Deduct the above excess		3,665.00
leaving a balance, which is the amount of their claim of		$5,168.41

The assistant Judge of the Exchequer Court has held that under the contract the appellants are not entitled to recover any part of the value of their materials, but inasmuch as such value exceeded the excess cost to the respondent over the original contract price they are entitled to recover their deposit.

The appellants, therefore, are appealing for the difference between the above sum of $5,168.41, and the deposit allowed them, $3,300=$1,368.41.

The respondent cross-appeals against the judgment to return the deposit.

The fallacy underlying the claim and partly adopted in the judgment appealed from consists in treating the case as if it were an action by the respondent for breach of the contract. The case is, however, quite different and the question of damage sustained does not enter into it at all. In an action for breach of contract the plaintiff must, of course, prove his damages and cannot recover if it is shewn that he has sustained none. It is, however, useless for the appellants to shew that the respondent

suffered no damage, unless they can shew that this fact gives them a claim on the respondent. This is not done and the appellants can only claim, if at all, under the terms of the contract. They can only succeed if they are able to prove a claim regardless of whether or not the respondent suffered any loss by the breach of the contract. This appears to have occurred to the learned judge, but he has not borne it clearly in mind because he refuses the claim as regards the materials on the ground that the contract provides as "security to the building owner, for the performance of the works," that all the materials provided by the contractor shall be the property of the Crown if the builder fails to complete his works; but he allows, though "not without some hesitation," the claim for the deposit made as security, although the contract provides that "if the said contractor should make default under the said contract His Majesty may dispose of said security for the carrying out of the construction and completion of the work of the contract."

Under this provision the appellants might be entitled to recover any part of the deposit which the Crown had not paid for the completion of the work. If, for instance, the Crown had only paid $3,000 for such completion, the appellants might be entitled to recover $600, the balance not so employed. Here, however, the Crown has paid $16,906.59 for the completion of the work, and must be entitled, under the terms of the contract, to utilise the deposit towards payment of this sum.

A possible view would perhaps be that the materials having become the property of the Crown, the appellants cannot claim any credit in respect of them, and that consequently they are liable, as the assistant judge suggests they might be, for the excess cost over the contract price, that is, $3,665, an amount exceeding the deposit, which is only $3,600. As to this, however, I express no opinion. It is sufficient to say that the appellants, having proved no claim against the Crown, the appeal should be dismissed and the cross-appeal allowed with costs. But the majority are of a different opinion.

DAVIES, J.:—The appellants were contractors with the Crown for the construction of a pier or wharf under written contract. After they had entered upon their contract work, and partly

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performed it, they, as found by Audette, J., "threw up their contract and abandoned its completion."

The Crown thereupon entered into another contract with other parties for the completion of the work, and it was completed by these other contractors. The cost to the Crown was somewhat less than the suppliants (appellants)—the original contractors—had agreed to complete the work for, and the first claim made by them in this petition of right is that, although they had abandoned their contract work and left it unfinished, nevertheless, as the Crown was enabled through other contractors to finish the work for a less sum than the appellants had originally contracted to complete and finish it for, they were entitled to recover the difference or saving to the Crown between their tender price and the actual cost of the work.

The judge found as a fact that this apparent saving to the Crown amounted to $1,568.41, but he very properly and rightly, in my opinion, dismissed this claim of the defaulting contractors as one which could not be allowed.

A second claim made by the appellants was with respect to the sum of $3,600 delivered by them to His Majesty on their entering into their contract as security for its "due performance." Their contention was that this $3,600 had been deposited by them merely as security for the performance of their contract, and had not "been disposed of by the Crown in carrying out the contract work" after the work had been abandoned by them but was still in the Crown's hands, and that the work having been completed for a less sum than their contract provided for, and no evidence whatever having been given of any part of the deposit having been disposed of in carrying out the contract, they were entitled to its return.

The contract between the appellants and the Crown with reference to this $3,600 deposit was a separate one from the contract for the carrying out of the work contracted for, and the respective rights of the appellants and the Crown must be determined by the terms of this subsidiary contract.

It stated in its first clause that "the said security ($3,600) had been delivered to His Majesty and was to be held by him as such for the due performance and fulfilment by the contractors of the said contract." After providing in its third clause that

the contractors "should be entitled to receive back the value of said security with interest upon the full performance and fulfilment of the said contract," it went on in its fourth clause to provide for the contingency of their defaulting under the contract.

In that event it provided that "His Majesty may dispose of said security and of the interest for the carrying out of the construction and completion of the work of the contract and for paying any salary or wages that may be left unpaid by the said contractors."

Nothing whatever is said in this subsidiary contract as to a forfeiture of this $3,600. It provides for the two contingencies of completion and non-completion of the contract by the contractors. In the former case it provides for the return of the security moneys to the contractors and in the latter for the right of His Majesty to dispose of the security moneys in carrying out the contract which the contractors had failed to do.

The $3,600 was, therefore, a mere security for the performance of the contract. If the contract had been duly performed the money would, of course, have been repaid to the contractors. If, as the fact was, the contractors defaulted, the Crown might have "disposed of the security in carrying the contract out."

But, as the result proved, they were not called upon so to dispose of it because the work was completed under the new contract entered into by the Crown for a less sum than the appellants had originally contracted to complete it for.

The Crown gave no evidence whatever that any such disposition of the $3,600 security as the subsidiary contract provided for had been resorted to.

The facts shew that no such disposition became necessary and the security moneys now remain in the Crown's hands.

Under these circumstances, it seems to me the learned judge's disposition of this branch of the claim declaring the suppliants to be entitled to a return of this $3,600 security was also right. I think, however, that whatever interest that sum has earned in the hands of the Crown up to the date of the demand and thereafter at the rate of 5% should also be allowed, the amount to be settled by the registrar.

I would, therefore, dismiss the appeal of the suppliants without costs and the cross-appeal of the Crown with costs.

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IDINGTON, J.:—The appellants contracted with the respondent to execute a work for $33,775 and were paid directly $15,300, and indirectly $4,949,89, making a total of $20,249.89. They abandoned their contract which meant by the terms thereof the abandonment of materjal on the ground as well as in the work.

The respondent relet the work, transferring all such material on the ground, estimated to be worth $10,183.30, to the contractor who had tendered to complete the work, including an extra of $350, for $22,490, and thereby became only entitled to get a balance of $11,956.70 in cash applicable to the appellants' contract price when due credit was given for said extra and for said material. Respondent paid that balance of cash in addition to the cash paid to and for the appellants as above set forth; and as I read the story had thus $1,568.41 left to meet the incidental expenses caused by the default of appellants.

I fail to see any alleged profit therein. I surmise it would probably, on examination, be needed to cover immediate expenses and possibly a year's interest on the advance caused by appellants' many delays.

Moreover, it cannot be recovered in face of the express terms of the contract.

Hence I think the appeal should be dismissed save as to the items of interest on the security deposit as hereinafter mentioned. But I think there should be no costs of the appeal.

The cross-appeal arises out of and depends upon another contract, though of same date as that I have disposed of, and by the express terms thereof presumably executed after that other, and is itself a distinct contract or suretyship for the due performance thereof.

This contract must be construed by its own express terms and the necessary implications therein, having due regard to its obvious purpose.

The cross-appellant having entered into a contract letting to cross-respondents certain work to be constructed by them for him, it became important to ensure the due execution of the work and he received from them for that purpose certain securities and moneys, valued in the whole at the sum of $3,600.

The agreement, in its operative part, declared firstly that the said security had been delivered to the cross-appellant to be

held by him for the due performance and fulfilment by cross-respondent of the said contract and of all the covenants, agreements, provisions and conditions therein mentioned, by them to be performed and fulfilled; next that His Majesty was not to be held responsible for the payment of interest on the security so deposited; and then upon the full performance and fulfilment by cross-respondents of the said contract, and of all the covenants, agreements, provisions and conditions as aforesaid, the cross-respondents should be entitled to receive back the value of said security together with the interest, if any, which might have accrued out of the deposit whilst in the hands of the Finance Department.

Such is the tenor of the agreement followed by a provision that the cross-respondents assumed the risk of loss of the security through insolvency of any bank on which any cheque had been drawn or in which any deposit had been made in connection with the security.

Then follows clause 4 of the agreement which is as follows:—

4. But if at any time the said contractors should make default under the said contract, or if His Majesty, acting under the powers reserved in the said contract, shall determine that the said works, or any portion thereof remaining to be done, should be taken out of the hands of the contractors, and be completed in any other manner or way whatsoever than by the contractors, His Majesty may dispose of said security and of the interest which may have accrued thereon for the carrying out of the construction and completion of the work of the contract and for paying any salaries and wages that may be left unpaid by the said contractors.

It is upon the construction of this clause, when read in light of the entire scope and purpose of the agreement, that the claim of the cross-respondents which has been allowed by the learned trial judge below must rest.

The contract for which the deposit was made by way of surety for its performance was, after a great part of the work had been performed, abandoned by cross-respondents, and thereupon the cross-appellant, as entitled by the terms of the contract, took possession thereof and of the material on the ground and relet the execution of the work to another contractor who finished same at less expense than the balance of the original contract price when due credit was given for the material abandoned by the cross-respondents and taken over by the cross-appellant.

No part of the security was ever needed to be resorted to,

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or in fact resorted to, for the carrying out of the construction and completion of the work to be done under the contract, or for paying any salaries and wages left unpaid by the said contractors.

It is only by an unjustifiable confusion of two entirely separate contracts and juggling of two sets of figures that have really nothing to do with each other that the semblance of argument is made in support of the cross-appeal.

So far has this been carried that the cross-appellants' factum presents one statement alleging the second contractor had been paid by cross-appellant $17,256.59, when in truth he was only paid $12,306.70.

The difference was made up by use of the material the cross-respondents had abandoned, and which the second contractor was bound to use and make allowance for.

The specifications in the original contract, if the parties had chosen to abide thereby, might require consideration, but they are not incorporated with this suretyship contract, or referred to therein, and as I view it have nothing to do with it.

It might well have been, as sometimes happens, that a third party, such as a guarantee company, might have given its bond expressed in substance with conditions such as set out in this second agreement for the like purpose.

What would have been said had the Crown sought to recover under the circumstances existent here upon such a bond?

I need not pursue the matter further except to say that on the facts I think the security is only the property of a subject, detained by the respondent, when it ought to have been returned the moment that events had so developed that the work was complete, and that without loss to the Crown.

And I observe that the judgment fails to give interest which, I think, ought to be added from the date when the security should have been returned.

Any interest earned by the deposit whilst rightfully in respondents' hands should also be allowed.

If the parties cannot agree as to the date when the deposit was returnable, the matter should go back to the learned trial judge to fix it. That can be done if not by virtue of this cross-appeal then by virtue of the main appeal.

The cross-appeal should be dismissed with costs.

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DUFF, J.:—I am of the opinion that the appeal and the cross-appeal should be dismissed with costs.

ANGLIN, J.:—I concur with my brother Davies, J.

Anglin, J.

Appeal dismissed without costs; cross-appeal dismissed with costs.

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New Brunswick Supreme Court, Appeal Division, Sir J. D. Hazen, C.J., McKeown, C.J.K.B.D., and Grimmer, J. November 22, 1918.

CERTIORARI (§II—19)—APPLICATION FOR—NOTICE NOT GIVEN—NOTICE LEFT AT OFFICE OF SOLICITOR—SOLICITOR HAVING APPEARED ON HEARING.

An application for a writ of *certiorari* on the ground that notice of the time and place for hearing the matter in review, as directed by 1903 C.S.N.B. c. 122, s. 6, was not given to the plaintiff, will not be granted when the notice was left at the office of the counsel retained on the first hearing, and he has actually appeared on the hearing in review.

APPLICATION for a writ of *certiorari* to remove into the Appellate Division the judgment of a County Court Judge, with a view of quashing the judgment. Refused.

Statement.

P. J. Hughes, for applicant.

The judgment of the court was delivered by

HAZEN, C.J. (oral):—The facts of the case are certainly extraordinary and, I am pleased to think, exceptional. It appears that Dr. Mayes Case, a physician practising in St. John, placed a claim of fifty odd dollars in the hands of J. H. F. Teed for collection, the claim being against the Christie Woodworking Co., of that city, for services rendered to a person who was injured while in the employ of the Christie Woodworking Co., and who was attended by Dr. Case, it is alleged by Dr. Case, on instructions received from the Christie company, who became liable for payment of the amount. The matter was tried in the City Court, Mr. Teed appearing for the plaintiff, and Mr. Horace Porter for the defendant, and a verdict was rendered for the plaintiff. The plaintiff, having obtained a copy of the proceedings from the magistrate, applied, under c. 122, s. 6, to the County Court Judge for a review, and at the time and place for hearing the parties on review, Mr. Teed again appeared for Dr. Case, and Mr. Porter for the defendants, and having heard the parties on review, Armstrong, J., made an order reversing the decision or setting aside the judgment entered in the Police Court by Ritchie, J., in favour of the plaintiff. An application is now made by the plaintiff for

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a writ of *certiorari*, on the ground that notice of the time and place for hearing the matter, as directed by s. 6 of c. 122, was not given to the plaintiff; that is, Dr. Case, although counsel appeared on his behalf before Armstrong, J.—the same counsel that appeared on his behalf in the Police Court—and argued the matter before Armstrong, J., now comes to this court and says that Armstrong, J.'s judgment should be set aside by *certiorari* because notice of the time and place for hearing the parties on review was not given to him. This is supported by an affidavit of Dr. Case, and an affidavit of Mr. Teed, who appeared and argued the case before Armstrong, J. Dr. Case says in his affidavit:—

I never was served with, and never received from any one, and no one gave to me notice of the time and place appointed for the hearing of the review in this action, nor did I have notice that this action would be reviewed save and except the statement from Mr. Teed that the defendant had applied for a copy of proceedings for that purpose.

In other words, that the order fixing the time and place for hearing the parties on review was not served on him. Mr. Teed, in his affidavit, states:—

4. That I practise law in partnership with my father, Mariner G. Teed, in the City of Saint John.

5. That from papers brought to my notice it appears that John Russell Armstrong, Judge of the Saint John County Court, did on June 20, 1918, appoint Thursday, June 27, 1918, as the time for the hearing of the review of said judgment. I myself was absent in the City of Fredericton on the said June 20, and was not served with any papers in connection with this review, but on my return from said City of Fredericton on the 21st I found at my office a copy of the appointment of His Honour Judge Armstrong, and copy of affidavit of Charles Christie hereto annexed.

6. I did not think to inquire from whom the papers had been received, but took it as a matter of course that the proper notice of the hearing of the review had been given and that I was authorised to appear and oppose the same. I did not advise the plaintiff, Dr. Case, of the hearing for review, or notify him that the order or appointment for review had been made, and he never actually gave me any instructions as to opposing the same, but when I found the papers at my office upon my return from Fredericton I assumed that I was authorised to act for him in connection therewith, and I did, on the day appointed, attend before His Honour Judge Armstrong and argued the matter of said review.

That judgment was reserved by Judge Armstrong, and on August 16, 1918, he delivered judgment herein.

That I the next day, August 17, wrote a letter to Dr. Case advising him of the result of the hearing. I did not have any reply to said letter, nor did I hear from Dr. Case until September 3 instant, when he met me on the street and told me that he had just returned from out of town after an absence of several weeks, and had only the day before received my letter. He further

told me to the effect that he didn't understand how the hearing, without any notice to him, could have been held, and he then told me that he never received from any one any notice of any time or place for the hearing of any review and had no knowledge and had never received notice from any one either that a time had been appointed for the hearing of review or that the hearing had been held or judgment delivered prior to my letter which he received September 2.

Then Mr. Teed goes on to say:—

I personally am very much dissatisfied with the judgment of Judge Armstrong, and submit and contend that the same is absolutely wrong in law and is such that this court or a judge thereof should not permit it to stand and that the same should be quashed and set aside as having been made without jurisdiction and as being absolutely wrong in law.

It would appear from this, then, that the order appointing the time and place for hearing the parties on review was left at Mr. Teed's office. It was stated here, I think, in the course of the argument, that it was handed to his father, who had nothing to do with the case and knew nothing about it, and who left the paper for his son to get.

Mr. J. F. H. Teed went before Armstrong, J., and argued the matter. The attorney, on reading the notice appointing the time and place, being the attorney who had acted for the plaintiff, in my judgment followed the course generally followed in practice, because, as a rule, I think an attorney employed to try a case of this sort, while he would not be considered the attorney on the record, would naturally go on and argue the case on appeal. That, of course, doesn't make it right. There is a statutory provision, and that may not have been complied with. But, in any event, Mr. Teed argued the case, and no injustice was done in any way to Dr. Case. No one can have any doubt but what Dr. Case would have instructed Mr. Teed to appear and argue the case on review, and, therefore, no injustice whatever was done him. Therefore, it seems to me a somewhat singular proceeding, to say the least, that an attorney who did this should afterwards come to this court and ask that the proceedings be set aside, basing such application on his own affidavit.

But still more extraordinary is something that has come to our notice since this motion was made. The court has been informed that an application for a rule for a *certiorari* was made to Barry, J., and that Barry, J., on these very affidavits, having heard the matter, declined to grant the rule. I have no hesitation in saying that it was a most improper thing that this court was

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not put in possession of that very important fact when the application was made to it for a rule. In saying that, I do not wish for a moment to be understood as attaching any blame to the counsel who made the application. He made the application under instructions, and may not have known that application had previously been made, on the very same ground, in the very same matter, to Barry, J., who had refused it; but the fact was within the knowledge of those who gave the instructions, and the counsel should have been so instructed and should have informed this court at the time.

Without deciding the point that is raised with regard to the sufficiency of the service of the order fixing the time and place for hearing the parties in review, and without deciding that this court would, under no circumstances, have the right to entertain such an application, even though the application had been previously made to a judge and refused by him, I have no hesitation in saying that this rule ought to be refused.

It should be borne in mind, I think, in dealing with the matter, that under O. 62 of the Judicature Act, application for *certiorari* can be made to a single judge, who can grant the order, making it returnable before himself or any other judge or before the court; so that he practically has all the powers in regard to *certiorari* that this court has, sitting as an appellate division; and that being the case, if the court entertains an application for a *certiorari* after an application has been made to a judge of the court, who has refused it, it would be practically sitting on appeal from the judgment of that judge. I can see no reason for doing so in this case. For the purposes of *certiorari*, under the Judicature Act, Barry, J., was vested with all the powers of this court. For reasons which were no doubt thoroughly proper, he refused to entertain the application, and having done so, this court is not disposed to review Barry, J.'s action, particularly in view of the circumstances connected with the case, and, therefore, the rule is refused.

Application refused.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Anglin and Brodeur, JJ. March 11, 1918.

INSURANCE (§ V B—195)—APPLICATION FILLED IN BY COMPANY'S AGENT—MISREPRESENTATION—ACCEPTANCE BY COMPANY—ESTOPPEL.

An insurance agent who negligently fills in an application for insurance without asking necessary and material questions, and induces the applicant to sign the application without reading it, assuring him that "it is all right," is bound to communicate the facts and circumstances to his principal, and his knowledge will be imparted to it; by issuing the policy and retaining the premium the principal is estopped from setting up misrepresentation on the application.

[*Whitney* v. *Great Northern Ins. Co.* (1917), 32 D.L.R. 756, 10 A.L.R. 292, affirmed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta, 32 D.L.R. 756, 10 A.L.R. 292, affirming the judgment of Walsh, J., at the trial and maintaining the plaintiff's action with costs.

G. H. Ross, K.C., and *Barron*, for appellant; *Auguste Lemieux*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The respondent sued for $800, the amount of an insurance on the life of a stallion. The only defence raised is that in the application for the insurance it was stated that the price paid for the horse was $1,500, whereas in reality it was only $800.

There is no suggestion that there was any bad faith on the part of the respondent. The facts are that the company's agent who induced the insurance took the documents home and filled them out and sent them back to the respondent to sign. The respondent's sight is not very good and he did not check the statement over; the agent told him to sign it, that it was all right. The respondent, however, swears, and there is no contradiction, that the question of price as to what he paid was never mentioned, that the agent merely asked what the value of the horse was. The trial judge has found that "it is quite clear from the evidence that this stallion at the time this application was made was really worth $1,500."

Walsh, J., gave judgment for the plaintiff for $800, which he reduced to two-thirds thereof, *i.e.*, $533.33, on his attention being called to clause 11 of the policy regarding the payment of not more than two-thirds of the amount "and in view of the defendant counsel's consent."

The judgment proceeds on the ground that it was the agent's

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and not the plaintiff's fault that the payment made for the horse was given as $1,500, and that "notwithstanding the clause in the application which provides that if another person other than the applicant fills out this form or any part of it he shall be deemed the agent of the applicant and that Luckwell was the agent of the defendant and not the agent of the plaintiff."

The defendant's appeal was unanimously dismissed by four judges composing the court.

The judgment may be upheld for the reasons given in the courts below and further because it is submitted the cost and the value are not sufficiently distinguished. The cost or price paid for the animal, though important for the purpose of checking the value at the time of the application for insurance and preventing over-insurance, can be no absolute criterion of the value, for, first, it must depend on how long before the insurance the purchase was made; and in this case, it was two years before; and, secondly, a horse may be bought cheap like anything else, or indeed more so than most things. Curiously enough, it is the company's counsel who in his cross-examination of the respondent suggests that this was so in the present case and that the real price of the horse was then $1,500.

The contract contains a mass of complicated conditions under some or one of which the company could probably wriggle out of most insurance they might write. The officials of the company suggested a settlement. But the company, apparently seeing a loophole to avoid making any payment, repudiated its liability *in toto*.

If the appellant company gave to the statement made with respect to the price paid for the horse the importance it now seeks to attribute to it, I cannot understand why, when the application for insurance was received, the attention of its officers was not drawn to the palpable alteration of the figures which appear on the face of the document. The original price of the horse was, in the first instance, given at $800 and this was changed to $1,500; and apparently no inquiry was made about the reason for this alteration.

It is, in my opinion, clear that the respondent throughout acted in good faith; when he filed his proof of loss he stated the price of the horse at $800. Appeal dismissed with costs.

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Idington, J.

IDINGTON, J.:—I think, in the peculiar circumstances presented in this case that the knowledge of Luckwell, the agent, was that of the appellant. Indeed, I am disposed to infer from an inspection of the alterations in the figures in the parts of the application of which so much has been made, that no one else than Luckwell, on behalf of the appellant, ever read and passed upon them or there would have been an inquiry started as to why the obviously altered figures were in the condition they were.

In such an event no doubt the result would have been due rectification and a very ready acceptance of the risk which never involved more than the judgment recovered.

Treating Luckwell as the agent of the company and it responsible for the condition of the application, I see no escape from the conclusions unanimously reached by the learned judges who have had occasion to pass upon the defence set up, and hence agree that the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—This appeal, in my opinion, lacks merit.

I am not satisfied, if the answer in the application as to the "price paid" for the horse should be taken, as against the insured, to have been $1,500, that it was absolutely untrue. There is more than a suggestion in the record that the horse had been sold by one Hodges for "$1,500" to Harker, that Harker had re-sold him for the same price to a purchaser, who paid only $700 and made default for the balance of $800, and that in consideration of the plaintiff paying this balance, he then obtained the animal from Harker, to whom the price paid was thus actually $1,500. But on both the "application" and the "description" furnished with it the figures "$1,500" have manifestly been written over other figures, which may well have been $800. If the representation as to the cost price was regarded as material, it is scarcely conceivable that an application and description with such obvious alterations in these figures should have been acted upon without verification or inquiry. The almost irresistible inference is that as only $800 of insurance was sought upon a horse valued at $1,500 the price paid by the assured was deemed negligible.

The fact that the policy limits the risk of the insurer to "two-thirds of the actual cost" of the animal insured confirms this view.

Clause 22 of the policy provides for immunity of the insurance

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company "where it shall be found that the material statements set forth in the application upon which the acceptance of the risk was based were untrue."

If the statement as to cost was untrue and was binding on the assured, it has not been established that it was in fact, or was deemed, material, or that the acceptance of the risk was induced by, or based upon, it.

BRODEUR, J.:—This is an action on a contract of insurance of a horse. The insurance company contends that the application contains a false statement which was material to the risk, namely, that the plaintiff paid $1,500 for the horse, whereas, in fact, he paid only $800.

The application, which was declared by the contract to form part of the policy, was prepared by the agent of the company and was signed by the applicant. It was a condition of the policy that if the application is prepared by a person other than the applicant that person should be deemed the agent of the applicant and not the agent of the company.

The applicant was never asked by the agent how much he had paid for his horse. There is a question, however, in the application by the answer to which he would have been supposed to declare that the horse had cost him $1,500.

All the parties seem to be in good faith in the matter, and the mistake which has occurred was likely due to the fact that the applicant declared to the agent that the horse was worth $1,500. The evidence shews that the horse was worth that price.

It is in the circumstances of the case somewhat of a technical defence that is raised by the insurance company. Luckwell, the agent who filled up the application, was acting as agent of the company; and if he has not thought fit to inquire as to the price paid for the horse, his negligence would be the negligence of the company. Besides, the statement which was made would not be considered as being a material statement in the circumstances of the case because it is pretty clear by the application that the figures $1,500 or $800 seem to have been changed and altered. That fact should have been sufficient for the company to inquire as to it. They have not done so, however. I think that the company should be called upon to pay the insurance.

The judgment of the courts below which dismissed its plea should be maintained with costs. *Appeal dismissed.*

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Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ., Ritchie, E.J., and Mellish, J. December 21, 1918.

ARREST (§ I A—3)—BY POLICEMAN—MEASURES TO PREVENT ESCAPE—CIRCUMSTANCES—JUDGMENT OF OFFICER—INTERFERENCE BY APPELLATE COURT.

If a policeman, making a sudden arrest, makes up his mind that it is necessary to handcuff a prisoner in order to prevent his escape, an appellate court will not interfere with such judgment, unless the circumstances, under which the handcuffing was done, give them reason to believe that there was a particular desire to administer harshness.

Statement.

APPEAL from the judgment of Russell, J., in favour of plaintiff in an action claiming damages for false arrest and for unlawful assault.

J. McG. Stewart, for appellant; *W. A. Dickson*, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—This is an action brought against the chief of police for the town of New Glasgow for false and malicious arrest, and for unlawfully putting handcuffs on the plaintiff. The facts leading up to the arrest of the plaintiff are as follows:—A quantity of liquor—some 12 cases—arrived at New Glasgow (in which the N.S. Temperance Act is in force) about 11 o'clock in the evening of the 14th or 15th day of May, 1917, in an express car along with a quantity of other express goods. All the other goods were at once removed from the car to the office of the express company except the 12 cases of liquor. The defendant, who is also inspector under the N.S. Temperance Act, hearing of the arrival of the liquor, instructed police officers to watch the car to see that the liquor was not stolen. Liquor had frequently been stolen from cars at New Glasgow previous to this. The officers by looking through the windows with a flash light counted the cases, and ascertained that there were 12. Later on, on returning, they found the side door of the car had been opened and 2 cases stolen, and, entering by this door, the defendant and another officer concealed themselves in the car, suspecting that the thieves would return for the other 10 cases.

Between 2 and 3 o'clock in the morning, the end door of the car was unlocked and two men entered the car. The defendant and the other officer say that these men lit a match, and one of them said, "There is quite a dose of it here, isn't there?" And the other said, "Yes, we might as well get this as old Soy to take it."

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The men lighted another match and held it up and then, apparently, saw the policemen, and made for the door. The defendant and the other officer pursued them, reached the door first and arrested the two men. Just at this moment, the plaintiff came in the door and he also was arrested. Outside was another man who came the next day to give bail for the release of the 3 men arrested. The 3 men arrested were handcuffed and searched, and a loaded revolver was found on one of them.

One of them, Simon Patterson, was a clerk in the office of the express company, and his story is that he went to the car to check up the 12 cases, not having had time, as he says, to do it when he checked the other goods in the car. The plaintiff and the other man who was with young Patterson testified that they were friends of Patterson, and just went along with him to the car with the intention of accompanying Patterson home after he had done the checking.

When the 3 men had been arrested and handcuffed, they were taken to the police station and kept under arrest until the next morning, when they were discharged, no charge having been laid against them.

The case was tried with a jury, and the questions put to the jury with their answers are as follows:—

1. Did the defendant himself believe that the plaintiff was about to steal liquor from the car? A. Yes.

2. Did the plaintiff attempt to escape from the peace officer? A. No.

3. Was it necessary to handcuff the plaintiff in order to prevent his escape? A. No.

4. Did the defendant himself believe that the plaintiff might escape if not handcuffed? A. Yes.

5. Did the defendant have reasonable grounds for such belief? A. No.

6. Did the defendant have any reasonable or probable grounds for believing that the plaintiff had committed the offence of stealing goods from the express car when he arrested him? A. No.

7. If the arrest was illegal what damages should plaintiff recover? A. $200.

8. If defendant had right to arrest the plaintiff but the handcuffing was wrongful, what damages should plaintiff recover? A. $100.

The judge thereupon, after argument, filed his decision in writing as follows:—

The defendant arrested the plaintiff under circumstances stated more or less fully in the charge to the jury. Several questions were put to the jury which, I fear, were not the best calculated to lead to a proper result. The arrest of the plaintiff was made in the night time, and I was asked at the

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time to amend the defence by adding a plea to justify the defendant on the ground that the plaintiff was loitering and about to commit a felony (to wit, stealing liquor from a car). No ruling was made on this application but it was intimated that an amendment could be made later if necessary. The jury has answered the first question by saying that the defendant honestly believed that the plaintiff was about to steal liquor from the car. I think this amounts to a finding that defendant believed plaintiff was attempting to commit a felony. At all events, taken with the facts of the case, it is clear that the plaintiff was liable to be arrested without warrant, and if any amendment of the pleadings is necessary to state the actual justification of the defendant as established by the evidence, I think it should be made.

The jury has also found that the defendant honestly believed that the plaintiff might escape if not handcuffed, but they said it was not necessary to handcuff him, and that the defendant had not reasonable grounds for such belief. I think the findings are against the evidence and against the charge. The arrest was made at night. There were 3 prisoners. One of them had a revolver which had been taken from him by the policeman.

I think the peace officer had the best possible reasons for fearing an escape if the prisoner was not handcuffed. But, as the jury has found otherwise, I do not think I can order a judgment to be entered that would be inconsistent with their findings. I must, therefore, order that judgment be entered for the plaintiff for $100 damages and costs.

A judgment was entered for the plaintiff against the defendant for $100 damages and costs, and there is an appeal from this order, and the defendant's contention is that he is entitled to a judgment on the findings of the jury.

The findings relied upon are the 1st and 4th, and the defendant's counsel's contention is that the question as to whether the defendant had reasonable grounds for believing that the plaintiff might escape is a question for the judge, and not for the jury. I think it is probably for the jury.

One cannot read the evidence in the case without reaching the conclusion that the story as to the plaintiff and his associates being in the car for a lawful purpose is open to very grave suspicion, to say the least of it, and there is no doubt that the jury were quite right in finding that the defendant believed that the plaintiff was about to steal liquor from the car. They have also found that the defendant believed that the plaintiff might escape if not handcuffed. The question is whether it was necessary to handcuff the plaintiff, or, in other words, whether the defendant had reasonable grounds for his belief that he might escape if not handcuffed. The whole circumstances must be considered—the hour, between 2 and 3 a.m.—the belief of the defendant that

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the plaintiff and his associates were in the car for the purpose of stealing—the fact that there were 3 strong young men on the one hand and only 2 officers—the revolver found in the pocket of the men—the presence of the fourth man outside—the chances of some or all of them escaping must have been apparent.

I agree absolutely with the trial judge that the officer had the best possible reasons for fearing an escape if the prisoner was not handcuffed, and in my opinion, to use the words of Russell C.J., in *Reg.* v. *Taylor* (1895), 59 J.P. 393, "reasonable necessity existed for it."

The fifth finding is against the evidence.

The plaintiff denied that he had made any attempt to escape, and in answer to his own counsel as to whether he had resisted in any way, said: "No, I told him if he was going to put me in jail to put cuffs on me."

He ought not to be allowed to recover against the officer under these circumstances.

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

Longley, J.

LONGLEY, J.:—The defendant is the chief of police and inspector of licenses for the town of New Glasgow. At about 11 o'clock at night there came in an express car, and the defendant had reason to believe that it contained liquor, and that if left all night some people would break in and steal. Between 1 and 2 o'clock in the morning he concealed himself in the car with a policeman, Lewis, beside him. At something after 2 o'clock the car was opened and a young fellow named Fraser and a man named Patterson came in the car. He heard them make this expression: "There is quite a dose of it here, isn't there?" and said, "We might as well get this as old Soy to take it." Then the defendant and his assistant seized upon them and arrested them. One man was Patterson, who is a son of the express agent at New Glasgow, and he asked him if he was there on business, and he answered "No." Beyond all doubt the policeman had a right to assume at that hour they were there for stealing purposes, and he, in arresting them, found there were three of them, and that it would be best to handcuff them, as they seemed to show a disposition to run away, and as there were only 2 policemen while there were 3 defendants, and they were young active parties and they would be apt to get away from them unless they were made safe.

Now these were the facts that were left to the jury. Certain questions were put to the jury, and were answered by them:—

1. Did the defendant himself believe that the plaintiff was about to steal liquor from the car? A. Yes.

Now the answer to that question is sufficient evidence certainly to destroy any action for false imprisonment or arrest that they might have against him; if the policeman believed they were about to steal, he certainly was justified in arresting them.

Longley, J.

2. Did the plaintiff attempt to escape from the peace officer? A. No.

Which is of no consequence one way or the other.

3. Was it necessary to handcuff the plaintiff in order to prevent his escape? A. No.

4. Did the defendant himself believe that the plaintiff might escape if not handcuffed? A. Yes.

If the defendant actually believed that it was necessary to handcuff them, I think that pretty nearly ended the matter. A policeman has always a right to judge of the circumstances attending a case, in the matter of a sudden arrest, and if he makes up his mind one way or the other it should be conclusive, only excepting one thing, that is, if the circumstances under which the handcuffing is done were needless and gave reason to suspect that there was a particular desire to administer harshness in it, then it would probably be open to question; but usually a policeman is the sole judge of the circumstances under which he is to arrest, and the fact that there were 3 to 2 of them seems to me sufficient authority.

5. Did the defendant have reasonable grounds for such belief? A. No.

This seems entirely inconsistent with the answer to the first question.

6. Did the defendant have any reasonable or probable grounds for believing that the plaintiff had committed the offence of stealing goods from the express car when he arrested him? A. No.

This question refers to the two cases stolen previously, and the finding is of no importance in view of finding No. 1.

In moving for judgment the judge states:—(See Harris, C.J.).

I think there were reasonable grounds for placing the handcuffs on the parties, and, therefore, the verdict should be set aside and the plaintiff's action dismissed with costs.

DRYSDALE, J.:—I agree with Mellish, J.

Drysdale, J.

RITCHIE, E.J.:—I would allow the appeal and dismiss the action, both with costs.

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Mellish, J.

MELLISH, J.:—This is an action for false arrest and for trespass in handcuffing the plaintiff by the defendant, a police constable. In view of the findings of the jury, the plaintiff's counsel admits that the arrest was justified, but complains of the handcuffing. I think a proper form of question for the jury would have been whether the handcuffing was reasonably necessary under the circumstances as a matter of precaution to prevent the prisoner's escape. If the answers which the jury has given as to the reasonable ground for defendant's belief, that plaintiff might escape, can be on this point said to answer this question in the negative, I should say that it is unsupported by the evidence. I agree that the question is one for a jury and not for the judge, but I also think there is no evidence to support a negative answer to this question, especially in view of the other findings of the jury. Having these in view, I think that when the jury answered that there was no reasonable ground for defendant's belief, that the prisoner might escape unless handcuffed, they meant that the prisoner in fact did not intend to escape, which is irrelevant. If the arrest was justifiable I cannot see how the handcuffing under the circumstances was not justifiable also as a means of reasonable precaution. It may be worth noting that the plaintiff himself appeared to be of the same opinion.

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

Appeal allowed.

RUR. MUN. OF SNIPE LAKE v. MARTIN.

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Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands and Elwood, JJ.A. December 21, 1918.

TAXES (§ V D—207)—COLLECTION OF—"SURTAX" PROVISIONS—DEFENCES—REGULARITY OF PROCEDURE NOT IN QUESTION.

The fact that a municipality is using the taxes collected under the "surtax" provisions of the Rural Municipality Act (R.S.S., c. 87) and amendments, (see stats. 1912-13, c. 31, s. 4), for municipal purposes is no defence to an action for recovery of such taxes if the regularity of the procedure for the levy and assessment is not called in question. The ultimate use or destination of such taxes is a matter to be settled between the province and the municipality after the collection has been made by the municipality.

Statement.

APPEAL by plaintiff from the trial judgment in an action brought for the recovery of certain taxes levied under the "surtax" provisions of the Rural Municipality Act (R.S.S., c. 87) and amendments. Reversed.

F. L. Bastedo, for appellant; *J. A. Allan*, K.C., for respondent.

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RUR. MUN. OF SNIPE LAKE v. MARTIN.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The trial judge dismissed the action, on the ground that, as the municipality was using the taxes for municipal purposes, while the Act does not specifically devote them to those purposes, it has no right of action.

The fact that the municipality has used or claims the right to use these taxes for its own purposes does not seem to me to have anything to do with this case. The statute distinctly confers power to levy, assess and collect (s. 323 (*b*)). By s. 323 (*i*) all the provisions of the Rural Municipality Act respecting the assessment, levy and collection of municipal taxes, and for enforcing payment of the same are made to apply to the taxes in question, and, by s. 309, any taxes or arrears of taxes due to the municipality may be recovered by suit in the name of the municipality.

The regularity of the procedure for the levy and assessment of these taxes is not called in question, so that the plaintiff's right of action in my opinion is complete, and cannot be affected by any question as to the ultimate use or destination of the taxes. That is a question, if there is really any question about it, to be settled between the province and the municipality *after* the municipality, which is at least the duly authorized agent for collection, has got in the money. There is no doubt, in my mind, that the surtax amendments were enacted for the purpose of supplementing the municipal revenue. S. 323 (*b*) says "*in addition* to the tax assessed under the provisions of s. 252 hereof" a further tax shall be assessed, levied and collected. It will be noticed also that the new sections providing for the surtax are added to that part of the Act which deals with taxation. In the absence of express words to the contrary, the presumption is that the additional taxing power was given for municipal purposes, although, as I have already pointed out, the purpose or ultimate destination of the tax is immaterial.

A great deal of stress was laid on the wording of ss. 294 and 295 of the Act by the trial judge, and on appeal, by counsel for the respondent. It was argued that these sections make full provision for meeting all "the needs" of the municipality by means of a uniform system of taxation and that the legislature has indicated "that the surtax is something over and above any tax required to meet the needs of the municipality."

I must confess that I fail to appreciate the significance of these statements, even if they are correct. The council is not

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required to prepare a statement of the *needs*, but a statement of the *probable expenditure* of the municipality. That expenditure would necessarily be governed by the amount of assessable property in the municipality and the maximum rate permitted by the statute. To say that all the needs, or even all the estimated expenditure, of the municipality was to be provided for by the uniform rate is not accurate. The municipality has several other sources of income, such as license fees, fines for infraction of by-laws, arrears of taxes collected within the year, taxes levied on land in hamlets under s. 300, etc., etc. It is reasonable to suppose that the council, in preparing its estimate of probable expenditure for any year, would also take into consideration its probable revenue for the same period from all sources before fixing the uniform rate, and, in estimating its probable expenditure, it would be governed by the amount of its probable revenue. In other words, it would be obliged to cut its coat according to the cloth.

The legislature evidently considered that all the needs of the municipality could not be supplied by the original method of taxation, and, by later legislation, which must govern if there is any inconsistency, has empowered the municipality to assess, levy and collect these additional taxes.

Another ground taken by counsel for the respondent is, that the tax is not direct taxation within the meaning of s. 92 (2) of the B.N.A. Act, 1867. That it is a direct tax is self-evident, and it is a direct tax within the province in order to the raising of a revenue for provincial purposes whether it goes in the end into the provincial or municipal treasury. *Lynch* v. *Canada North West Land Co.* (1891), 19 Can. S.C.R. 204, 212.

Questions concerning the form, nature, incidence and method of this taxation cannot affect the result in this case, so long as the tax is direct and for provincial purposes. *Fortier* v. *Lambe* (1895), 25 Can. S.C.R. 422. Questions of that sort belong exclusively to the realm of academic or political discussion.

For the foregoing reasons the appeal should be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for the amount of its claim and costs.

Newlands, J.A.

NEWLANDS, J.A., concurred with Haultain, C.J.S.

Elwood, J.A.

ELWOOD, J.A.:—In consequence of the conclusions I have come to in the case of *Rur. Mun. of Bratt's Lake* v. *Hudson's Bay*

Co. post p. 445. I am of the opinion that this appeal should be allowed with costs, and judgment entered for the amount claimed by the plaintiff against the defendant with costs. *Appeal allowed.*

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RURAL MUNICIPALITY OF BRATT'S LAKE v. HUDSON'S BAY Co.

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Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands and Elwood, JJ.A. December 21, 1918.

TAXES (§ I D—40)—RURAL MUNICIPALITY ACT (R.S.S., c. 87)—DIRECT TAXATION FOR RAISING REVENUE FOR MUNICIPAL PURPOSES—POWERS OF PROVINCIAL LEGISLATURE.

Sec. 323 (*b*) of the Rural Municipality Act (R.S.S., c. 87; see Amends. 1912-13, c. 31, sec. 4) imposes a direct tax for the purpose of raising a revenue for municipal purposes, and is therefore legislation within the powers of the provincial legislature. A tax imposed on the appellant company under the provisions of sec. 323 (*b*) of the Rural Municipality Act (Sask.) and amending Acts is not an "exceptional tax" within the meaning of clause 11 of the deed of surrender between the appellant company and the Crown under the provisions of the Rupert's Land Act, 1868.

APPEAL by defendant company from judgment in favour of plaintiffs, rural municipalities. Affirmed. Statement.

J. A. Allan, K.C., *D. H. Laird*, K.C., and *S. J. Rothwell*, K.C., for appellants; *Hon. W. F. A. Turgeon*, K.C., and *P. M. Anderson*, for respondents.

HAULTAIN, C.J.S.:—The first branch of this appeal turns on the questions raised in the case of *Rur. Mun. of Snipe Lake* v. *Martin* (1918), 44 D.L.R. 442. For the reasons stated in my judgment in that case, the appellant must fail on this branch of its appeal. Haultain, C.J.S.

The second branch of the case deals with the meaning and effect of clause 11 of the Deed of Surrender, which, by the terms of the order-in-council of June 23, 1870, made under the authority of s. 146 of the B.N.A. Act, 1867, imposes a constitutional limitation on the taxing powers both of the Dominion and the provinces. This limitation was further recognised and imposed by s. 23 of the Saskatchewan Act (4-5 Edw. VII. c. 24).

In view of the very full discussion of this branch of the case by the trial judge and by my brothers Newlands and Elwood, I shall confine myself to very general terms in what I have to add to the discussion.

The argument against the tax in question turns almost entirely on the meaning and significance of the word "exceptional." The main contention of the appellant—logically carried out—

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leads to the proposition that by the clause in question both the Dominion and the province, so far as the land and servants of the company are concerned, are limited to systems and principles of taxation which were known, recognised or established on June 23, 1870. Anything new is exceptional. This position is, in my opinion, quite untenable. In the first place, the argument, even if sound, does not apply to the facts of this case. The particular tax in question comes within the general description of a "progressive tax." According to Prof. Seligman of Columbia University, in his book entitled "Progressive Taxation in Theory and Practice" (at p. 1), cited by counsel for the appellant:—

> A survey of the history of taxation will shew repeated attempts made to introduce the progressive principle, from the early legislation of Solon down to the present time. If we confine ourselves to the nineteenth century we shall find, indeed, that the general sentiment in many places is in favour of proportional taxation, but that on the other hand almost every country has to some extent introduced the progressive principle into its tax system. This is true, not only in monarchies like those of continental Europe and Japan, but in democracies like those of America, Australia and Switzerland. To give a few instances: We find progressive income taxes in most of the German states, Austria, Sweden, Denmark, Holland and Belgium as well as in Switzerland; progressive rental taxes in France and Australia; progressive property taxes in Switzerland, Holland and Australia; and progressive inheritance taxes in France, Germany, England, Switzerland, Australia, Canada and elsewhere. Even in the United States, which is supposed to be *par excellence* the home of proportional taxation, we have had a progressive property tax, like the federalist house tax, and some decidedly progressive income taxes, both national and local; and we still have progressive income taxes, progressive inheritance taxes, and progressive land taxes. It is hence idle to claim that proportional taxation is the rule; on the contrary, practice seems to be tending more and more to the partial or complete adoption of the progressive principle.

The system in question is, therefore, not new, or unusual or exceptional in its permanent and generic features. It is a species of the genus "progressive tax." It is quite true that in actual practice the tax falls exceptionally heavily on the Hudson's Bay Co. But that is, in my opinion, an accidental and non-essential accompaniment of the tax. It is a permanent and essential feature of the tax that it falls more heavily on the class of large land-holders, but it it only an accidental and transitory feature as regards any member of that class.

Under any system of progressive taxation, whether of incomes, of inheritances, of rentals or of property, there will always be some person, or some estate, which pays the largest amount;

but that would not be a good ground for contending that any particular person or estate had been singled out as the object of "exceptional taxation."

The appellant's argument seems to me to fail in two respects. In the first place, it discusses the word "exceptional" from the objective instead of from the subjective point of view. (See *Thetford Mines Town Corp.* v. *Amalgamated Asbestos Corp.*, 29 D.L.R. 517, [1916] 2 A.C. 588, *per* Lord Buckmaster, L.C., at p. 592.) It is not a question of what sort of a tax it is, *quâ* tax, but what sort of a tax it is in relation to the Hudson's Bay Co. In the second place, it confuses the accidental with the essential, and attempts to create a specific and permanent difference out of a transitory condition.

The appeal should be dismissed with costs.

NEWLANDS, J.A.:—The plaintiff municipalities imposed a tax of 6½ cents per acre on lands of the defendants under s. 323, (*b*) of the Rural Municipality Act, and brought this action to recover the sums and judgment was given in their favour by the trial judge. From this judgment the defendants appeal on 3 grounds:—1, that the tax sued for was not direct taxation within the province in order to the raising of a revenue for provincial purposes, within the meaning of s. 72 (2) of the B.N.A. Act; 2, that the said tax was not validly imposed; and 3, that the said tax is an exceptional tax within the meaning of clause 11 of the Deed of Surrender between the appellants and the Crown under the provisions of the Rupert's Land Act, 1868.

The first two grounds of appeal are in effect only one, as the appellants admit that, if the tax is validly imposed, that it is direct taxation, but they claim that, not being validly imposed, it is not a tax, and, therefore, not direct taxation, these first two grounds may, therefore, be considered together.

The wording of the section of the statute under which this tax is imposed is the basis of this argument. The appellant claims that there is no purpose stated in the Act for which this tax is levied; that to be a good tax and within the powers of the provincial legislature it must be for public purposes within the province; that the Act does not state that the tax is for provincial or municipal purposes, or for either. I do not think that this is a question in which the appellants are interested at this stage.

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It is sufficient for them to say that the legislature has given the plaintiffs power to raise the tax in question and to sue for it, all of which the legislature had power to do. No question is raised as to the provisions of the statute not having been carried out, and, therefore, it is only the power of the legislature to pass the the law, and the effect of that law, that is attacked.

As there is, in my opinion, no question as to the power of the legislature to pass the law, it only remains to decide the meaning of that Act. The section in question is as follows:—

323(*b*). In addition to the tax assessed under the provisions of s. 252 hereof, it shall be the duty of the council of every rural municipality and it shall have power to annually assess, levy and collect a tax of six and one-quarter cents per acre hereinafter called a "surtax" on all lands within the municipality made subject to the same as hereinafter set forth, provided, however, that the said assessment and levy shall first be made during the year 1914.

This section is contained in the Rural Municipality Act, which Act provides for the constitution and powers of rural municipalities. On the face of it, it is a section giving a source of revenue to a rural municipality. Is it necessary, then, to ask for what purpose is this revenue given? Surely for the purposes of the rural municipality. But, the appellant says these purposes have all been provided for by ss. 294 and 295 of the Act. These sections are as follows:—

294. The council of every municipality shall, as soon as practicable in each year, prepare in detail an estimate of the probable expenditures of the municipality for the year, and such estimate shall include the sum or sums required to repay any temporary loan, or to meet any debenture coupons which may fall due during the year.

295. Upon the completion of the said estimate the secretary shall lay before the council the revised assessment roll of the municipality for the year certified to as provided by s. 292 hereof and the council shall, by resolution, authorise the treasurer of the municipality to levy upon all the lands entered in the said roll such taxes at the uniform rate on the dollar as shall be deemed sufficient to meet the said estimate of expenditure and in fixing the said rate the council shall make due allowance for the non-payment of taxes.

The municipality is to prepare an estimate of the probable expenditure for the year, including such sum as may be required to pay for a temporary loan or to meet debentures falling due, and in striking the rate they are to make due allowance for the non-payment of taxes. Nothing is said in either of these sections as to taking into consideration other sources of revenue, and the municipality would have several other than that mentioned in s. 323 (*b*), as, for instance, licenses, fines, unpaid taxes, etc. All

these sources of revenue, as well as that provided for in s. 323(*b*), would be taken into consideration in making their estimates and striking the rate, and the use of the words "in addition to the tax assessment under the provisions of s. 252"—s. 252 being the section which provides for the assessment under which the rate provided for in ss. 294 and 295—means exactly what it says, that the rate of 6¼ cents per acre is an additional source of revenue, but as I have already stated one that would necessarily be taken into consideration in ascertaining the amount to be raised under s. 295. I am, therefore, of the opinion that the clause in question imposes a direct tax for the purpose of raising a revenue for municipal purposes, and that it is therefore legislation within the powers of the legislature.

The next ground of appeal is that the tax is an "exceptional tax" within the meaning of clause 11 of said Deed of Surrender. This clause is as follows:—

> 11. The company is to be at liberty to carry on its trade without hindrance in its corporate capacity; and no exceptional tax is to be placed on the company's land, trade or servants, nor any import duty on goods introduced by the said company previously to such acceptance of the said surrender.

It was argued on the part of the appellant that the words "exceptional tax" meant a tax that was different from the ordinary method of taxation in force in either England or Canada at the date of the Deed of Surrender.

I cannot agree with this interpretation, if for no other reason than because at that time there was no system of taxation in force in the country surrendered to the Crown; there were no provincial or municipal institutions in existence there; that in the larger part of the country the only inhabitants were the servants of the Hudson's Bay Co., and that in most of the territory the only land owned by other than the Crown was 1-25th of the fertile belt, i.e., the lands south of the Saskatchewan River, granted to the company. It was not the kind of tax that the parties meant to provide against, but rather that the company should not be made an exception and be made liable to a tax which fell, not generally upon the lands or the people of Canada, but upon the lands or the servants of the company alone. The Parliament of Canada was, at that time, the only authority who could tax them, and they provided that no tax should be imposed upon their trade, land or servants, that was not imposed generally

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throughout Canada. The company was to be liable to the general system of taxation throughout Canada, as when a province was formed throughout the province, but were not to be made an exception and have imposed upon their trade, lands or servants a tax that was not imposed generally throughout the country.

I would, therefore, interpret the expression "exceptional taxation" in the same way the Privy Council interpreted "a special tax" in *Thetford Mines Town Corp.* v. *Amalgamated Asbestos Corp.*, 29 D.L.R. 517, [1916] 2 A.C. 588. In that case it was provided in the town charter that other than a certain tax imposed thereby, the respondents were exempt from "any other special tax in respect of their mining operations." Lord Buckmaster, L.C. (p. 519), said:—

> It may not be easy to define exactly the line which will separate, in all cases, a special from a general tax. It is sufficient to say that a tax may be special either by reason of the object for which it is levied, or the subject out of which it is raised. In the present case, there is no doubt that the tax is a special tax by reason of the purpose for which it is imposed, and it is declared to be so by the by-law by which it was authorised. Their Lordships think, however, that the sub-section must be read, not as meaning a special tax by reason of the purposes to which it is to be applied, but as a tax specially laid upon mining operations, and this condition the present tax certainly does not fulfil.

Applying this language to the present case, a tax may be exceptional either by reason of the object for which it is levied or the subject out of which it is raised. This tax may be exceptional as being different from the ordinary municipal tax. I think, however, that the clause must be read, not as meaning a tax different from the ordinary, but as a tax laid on the Hudson's Bay lands, trade or servants as distinct from the general public, making them the exception from the general rule, which this tax certainly does not.

It is quite true that this tax does not touch the public generally, and that in some cases it may be avoided either by residence or cultivation, but it does touch a large class of land-owners. Some 229 persons or corporations were such large land-owners that they could not escape the surtax either by residence or cultivation. The appellant company was one of this number. They are not, therefore, an exception from the general rule, and the tax cannot, as far as they are concerned, be an exceptional tax.

There is, in my opinion, nothing in the argument that the tax is one imposed in addition to another tax, nor that it is a

flat rate on the acre instead of on the value of the land. It is but a sum of money payable on a quantity of land, which all land taxes are, and it can make no difference that the amount is fixed by the quantity rather than the value of the land. Nor can it be said to violate the rule as to municipal taxation laid down in the Rural Municipality Act, because this provision is a part of that Act, and if it is not consistent with the principle therein set out, it must be taken as an exception thereto.

In my opinion, the tax is validly imposed, and is not an exceptional tax on the appellants' land, and that the appeal should therefore be dismissed with costs.

ELWOOD, J.A.:—This is an action brought by several rural municipalities to collect from the defendant a tax known as a surtax under the provisions of c. 31 of the statutes of Saskatchewan for 1912 and 1913, and c. 46 of the statutes of Saskatchewan, 1913. At the trial, judgment was given for the plaintiffs, and from this judgment the defendant has appealed.

For the appellant it is contended that the tax is not a direct one.

That it is a direct tax seems to me to be concluded by the case of *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575.

It was further contended that it was not imposed for the purpose of raising revenue for provincial purposes.

The moneys to be raised by the tax would be used either by the province or by the municipality levying it. If by the province, then it must be assumed, in the absence of evidence to the contrary, that it will become part of the general revenue of the province, and will be expended in the same manner as the general revenue. If it is to be used by the municipality, then in like manner it must be assumed that it will be expended for municipal purposes. In either event it would be for provincial purposes. *Lynch* v. *Canada North-West Land Co.* (1891), 19 Can. S.C.R. 204, 212.

It seems to me that the fact that the provision directing the levy of the surtax is contained in the Rural Municipality Act, and there being no contrary indication of intention, shews that it was the intention of the legislature that the monies raised by the tax should become part of the revenue of the municipality levying it.

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It was also contended that all of the requirements of the municipality are provided for by what I shall hereafter call the "general power to tax" given by section 250*a*, and following sections of the Rural Municipality Act.

It seems to me that counsel for the appellant has fallen into an error in assuming that the requirements of the municipality are fully met by the power to tax given by the general power to tax. S. 296 of the Act limits the rate to be levied in any one year by the latter form of taxation, but that does not mean that the requirements of the municipality for that year are fully provided for. Slight reflection and a very casual knowledge of municipal affairs shew that many important and necessary municipal undertakings cannot be proceeded with because the revenue is not sufficient. The limitation on that mode of taxation is imposed because the legislature has thought it wise not to permit the imposition on the taxpayers of a greater burden, and not because the requirements are fully met. That, however, does not prevent the legislature from permitting the imposition of further taxes to be levied in any manner that may be directed by statute so long as the tax is direct and for provincial purposes. In *Fortier* v. *Lambe* (1895), 25 Can. S. C. R. 422, at p. 429, Taschereau, J., is reported as follows:—

> The contention of the appellant based on the ground that this tax has not been legally apportioned, and is null for want of uniformity and equality, is, in my opinion, untenable. Whatever political economists and other writers may say on this subject, I know of no law in the Dominion that in any way puts any restriction, limitation or regulation of that kind on the powers of the federal or provincial authorities in relation to taxation within their respective spheres.

The surtax legislation was enacted by amendment after the general law with respect to taxation had been enacted, and that seems a strong argument for the contention that it was never intended that the general power to tax was thereafter to embrace the whole power of the municipality to tax.

Much of the argument before us might have been advanced in a contest over the powers of a municipality to enact taxing by-laws, but such argument is of no application when considering the powers of the legislature to enact taxing statutes.

A perusal of the legislation under consideration, I think, should convince one that the legislature has indicated its intention that

the surtax should be levied in addition to any tax levied under the general power to tax.

It seems to me, therefore, that the legislature had power to enact the statute under consideration, and that its intention was expressed with sufficient clearness.

There remains to consider whether the defendant is exempted from the tax by reason of the provisions of clause 11 of the Deed of Surrender from the defendant to Her Majesty Queen Victoria. That clause is as follows:—(See judgment of Newlands, J.A.)

Is the tax an exceptional tax within the meaning of the above clause? It is claimed that it is because it is unusual; that it discriminates between lands of residents and lands of non-residents; between owners of large and owners of small holdings; between those who do and those who do not cultivate land; that it falls more heavily on the defendant than on others.

When the Deed of Surrender was executed the defendant knew it came under the general law of the land, including the power to tax; that the country would likely progress; that methods of taxation would change from time to time as the country became settled and progressed; that what might be the accepted method of taxation at one period, might not be the accepted method at a later period.

The tax may be unusual; but any tax not in force at the date of the Deed of Surrender would be unusual in the sense contended for by the appellant. There were no taxes at that time levied in the territory now known as Saskatchewan. It would, therefore, mean, if the contention of the appellant is correct, that there was to be no progress in the country, or if there were progress, that the defendant was not to bear its share of the taxes imposed in consequence of such progress. Many changes have taken place in the mode of taxation. We at one time had a flat rate of so much an acre; we have a supplementary revenue tax of so much an acre; we have various forms of exemption from taxation. Exemption on the ground of cultivation is only, at the most, a new form of exemption. Any exemption in some degree discriminates.

That the defendant cannot cultivate the land and obtain exemption, places it in no worse position than other companies holding land liable to the tax.

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That in one municipality it pays all the tax is an accident consequent on its happening to have the only land in that municipality liable to the tax. We are not dealing with a tax levied by any particular municipality, but with a tax imposed on certain lands throughout the whole province.

That it pays more of the tax than anyone else is another accident, on account of its large holdings. In time, it may, and probably will be, one of the small taxpayers.

In the Deed of Surrender it recognizes its liability to pay customs taxes. Those taxes change from time to time. There is no unchangeable method or principle of levying them. They are, at least, claimed to be unequal, discriminatory, and not uniform.

It will be noticed that clause 11 of the Deed of Surrender also refers to exceptional tax on the company's servants. With respect to the surtax the company and its servants are entitled to raise the same objection and to the same exemption. If a servant of the company owned a quarter section which if owned by someone else would be liable to the tax, would he be exempt because he was a servant of the company on any of the grounds raised by the appellant? I apprehend not, and I apprehend that the defendant is in no different position. To my mind the defendant does not seem to be singled out by the surtax. It merely has to bear its share of the tax with those in the same class. The extent and the effect of the tax does not make it exceptional.

I am, therefore, of the opinion that this appeal should be dismissed with costs. *Appeal dismissed.*

N. S.

S. C.

DAVIS v. CANADIAN EXPRESS CO.

Nova Scotia Supreme Court, Harris, C.J., and Russell, Longley and Drysdale, JJ. and Ritchie, E.J. December 21, 1918.

CARRIERS (§III G—450)—INJURY TO ARTICLE DELIVERED FOR CARRIAGE—NEGLIGENCE—LIABILITY.

If a carrier injures an article delivered to him for carriage, the owner of such article may recover damages, not only for the amount which it may be necessary to spend for repairs but also for the loss of the article injured during the period that the repairing may occupy. The damages must, however, be such as may be reasonably supposed to have been in the contemplation of the parties when the contract was made.

Statement.

APPEAL from the judgment of Chisholm, J., in favour of plaintiff in an action claiming damages for loss of profits caused by the

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negligence of defendant company, or its servants, in connection with the carriage of a moving-picture machine from Hubbards, in the county of Halifax, to Enfield, Hants county. The machine was damaged owing to careless handling by employees of the company, and the claim was for loss of profits during the time that the machine was undergoing repair.

S. Jenks, K.C., for appellant; *E. Ackhurst*, for respondent.

The judgment of the court was delivered by

Harris, C.J.

HARRIS, C.J.:—The plaintiff is a moving-picture operator travelling through the province giving exhibitions. He lived at Enfield and shipped a moving-picture machine valued at $400 from Hubbards to Enfield by the defendant company. When the machine reached Enfield, on January 18, it was negligently thrown off before the train stopped at the station and was broken. Early in March, the defendants offered to take the machine to Montreal for repairs, and considerable correspondence took place between the defendants and the plaintiff's solicitors which resulted in an agreement by which the defendants undertook to effect repairs without delay and return the machine to plaintiff. The plaintiff, through his solicitors, early in the correspondence, wrote the defendants that the plaintiff would expect compensation for his loss of time, stating that plaintiff was formerly engaged in the moving-picture business and since his machine was damaged he had been obliged to give up business. The defendants in their reply stated that if repairs could be made they would have them attended to without delay, and they added:—

> **Any claim thereafter will be dealt with on its merits and in accordance with the contract entered into when the shipment was handed over to the Halifax and South Western Railway.**

This was the basis upon which the repairs were undertaken.

The machine was not repaired and returned to the plaintiff until June 11, and plaintiff sues claiming damages for the detention of the machine from January 18 to June 11, and the trial judge assessed the damages at $500, made up on the basis of the amount which the plaintiff would have earned with the machine in giving exhibitions throughout the province during the period in question. From this, the defendants have appealed, and the contention is that a wrong basis was adopted in assessing the damages;

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that the defendants had no knowledge of the special use to which the machine was being put, and cannot be charged with the profits which plaintiff would have made by this special use of the machine.

Before referring to the authorities, it is necessary to state the facts relevant to this branch of the case. It appears that when the machine was shipped at Hubbards it was described in the contract of carriage as "1 trunk moving-picture apparatus, 1 package, 1 chest, value $400," and the defendant's agent who received the goods testified that the plaintiff declared them as moving-picture apparatus.

The plaintiff says he had been engaged for 18 months giving exhibitions at different places in the province, one of which was Hubbards. He says he advertised by posters in the different towns, posted up prior to the date fixed for the exhibition. There is no evidence whatever to shew that the defendant's agent ever had any knowledge or information as to the business in which the plaintiff was engaged and, so far as the evidence shews, he may never have heard of the plaintiff or his business before he shipped the goods. Whether the plaintiff had just given an exhibition at Hubbards does not appear. There are no circumstances proved from which it can be inferred that the defendant's agent knew that plaintiff was using the machine for the purpose of giving exhibitions, or that he would suffer special loss or damage by delay in delivery, and it is, therefore, impossible to say that, when the contract of carriage was entered into, the parties had this matter in contemplation.

So far as appears the case must be treated as an ordinary contract to carry the goods in question.

The question principally argued was as to whether the amount allowed as damages by the trial judge could be upheld, and I have reached the conclusion, with deference to the trial judge, that the damages have not, under the circumstances, been assessed on the proper basis. The authorities seem to be clear that, before the plaintiff can recover damages for loss with respect to special contracts or special uses to which the property was to be put,

> the knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.

This is the language of Willes, J., in *B. C. Saw Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499, at p. 509.

See also *Great Western R. Co.* v. *Redmayne* (1866), L.R. 1 C.P. 329, and *Horne* v. *Midland R. Co.* (1873), L.R. 8 C.P. 131.

But it does not follow that the plaintiff cannot recover anything under the circumstances in evidence. By reason of the negligence of the defendants he has lost the use of his machine from January 18 to June 11, and I am of opinion that defendants are liable for damages for this loss of use of the machine, and there is nothing in the contract which precludes such recovery. The real difficulty is as to the proper basis upon which these damages should be assessed.

I should point out that the trial judge has found that there was unreasonable and unnecessary delay in having the repairs made in Toronto after the machine was sent there.

There is, unfortunately, no evidence as to what would be a proper time within which to make these repairs and return the machine, but the trial judge's finding is one which commends itself to my judgment and, as a juror, he was, I think, justified in reaching that conclusion. The machine was an inexpensive and comparatively simple one and the repairs should have been made in a short time.

In *The "Greta Holme,"* [1897] A.C. 596, a public body, not a profit-earning body, sought to recover damages for the loss of the use of a dredger sunk by the "Greta Holme" and raised and subsequently repaired. They claimed £1,500 for loss of the use of the dredger while she was under repair. The contention was made that, as the public body was not authorized to make any profit out of the use of the dredger such as a private individual would make, they could not recover because they had sustained no tangible pecuniary loss. The House of Lords decided against this contention and, in discussing the law, Lord Halsbury, at p. 601, said:—

> It is a sufficiently familiar head of damages between individuals that if one person injures the property of another damages may be recovered not only for the amount which it may be necessary to spend in repairs, but also for the loss of the use of the article injured during the period that the repairing may occupy. Nor has it ever been doubted, so far as I am aware, that if a passenger in a railway collision is injured by the negligence of the railway company, he may recover damages not only for the pain and suffering and injury to his health, etc., but also for the loss which he sustains by reason of being unable to pursue his ordinary avocations.

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And Lord Herschell, in concurring with Lord Halsbury, said, p. 605: "If the appellants had hired a dredger instead of purchasing one that the respondents would have been bound to make good the sum so paid during the time of repair is beyond doubt. Now, should they be deprived of payment because they purchased the dredger? The money invested in the dredger was paid out of their pocket, and while deprived of the use of the dredger they had to pay interest on the money. Surely a sum equivalent to that they were at least entitled to. But I think they are entitled to general damages. It is true that these damages cannot be measured by any scale, nor could that be done in the case of deprivation where an individual has purchased something for the purpose of comfort and not of profit."

It is true that this was said in a case in which a dredger of the plaintiff was sunk by the negligence of those in charge of the defendant ship, and in which there was evidence that the dredger could have been let at a certain rate per week, but I can see no reason why the same principle does not apply here.

In *Cobb* v. *Great Western R. Co.*, [1893] 1 Q.B. 459, at p. 464, Bowen, L.J., said:—

The law is that the damages must be the direct and natural consequence of the breach of obligation complained of. The law is the same in this respect with regard both to contracts and to torts, subject to the qualification, that in the case of the former the law does not consider too remote damages which may be reasonably supposed to have been in the contemplation of the parties when the contract was made.

Lord Halsbury, in the *Greta Holme* case, refers with approval to what Bowen, L.J., said in *Cobb* v. *Great Western R. Co.*

See also 1 Beven on Negligence, 109; Sedgewick on Damages, s. 854; Mayne on Damages, 48 and 49; *Re Trent and Humber Co.* (1868), L.R. 4 Ch. 112, *per* Lord Cairns, L.C.

I do not think it can be said that the amount which the plaintiff could make by exhibitions is necessarily the measure of damages; all the circumstances have to be considered, and the amount of damages cannot, as Lord Herschell said, "be measured by any scale."

There is no evidence that a moving-picture machine can be hired out like a dredger, and there must be much uncertainty as to the proper amount which ought to be allowed, but, taking all the circumstances into consideration, and applying as best I can

the principles deducible from the authorities, I think the damages should be reduced to $100, for which amount the plaintiff will have judgment with costs.

There will be no costs to either party on the appeal.

Judgment varied; damages reduced.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 28, 1917.

PUBLIC WORKS (§ IV—65)—PUBLIC WHARF—SCOW ATTACHED TO—INJURY TO—DAMAGES—EXCHEQUER COURT ACT (R.S.C., 1906 c. 140).

A scow lying beside and attached to a public wharf and being used in making repairs to that public work is engaged "on a public work," within the meaning of s. 20 (*c*) of the Exchequer Court Act (R.S.C., 1906 c. 140).

APPEAL from a judgment of the Exchequer Court of Canada (1916), 32 D.L.R. 506, dismissing the plaintiff's petition of right.* Statement.

The appellant, under a contract with the Commissioners of the Transcontinental Railway, was ordered by them to do some repairs to a wharf situated at Levis and belonging to the Commissioners. In order to do the work, the appellant had to use a derrick-scow and to make her fast to the face of the wharf. The "Leonard," a ferry-boat belonging to respondent, was also using the wharf for ferrying the cars of the Transcontinental Railway from Quebec to Levis. The scow was crushed against the wharf by the "Leonard," and was sunk.

Marchand, K.C., for appellant; *Meredith*, K.C., for respondent.

FITZPATRICK, C.J.:—It is a little difficult to say from the record in what way this appeal comes before this court. The Assistant Judge of the Exchequer Court before whom the petition of right came on for trial took all the evidence, but in his judgment says:—"At the opening of the case, it was ordered, both parties agreeing thereto, that the questions of law raised herein should be first disposed of before entering into the question of the quantum of the damages." It would seem from this either that the Crown admitted negligence of its officers or servants or else that the case was argued on demurrer. No point of law is raised by the statement of defence which simply alleges negligence on the part of the petitioner. Fitzpatrick, C.

*Reporter's note.—Since the judgment of the Exchequer Court, s. 20 (*c*) of the Exchequer Court Act has been amended. (7-8 Geo. V. c. 23, s. 2.)

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The judge has held that "the case does not come within the ambit of s. 20 (*f*) of the Exchequer Court Act, since that section only applies to the Intercolonial Railway or the Prince Edward Island Railway." In this I think he is wrong.

By the Government Railways Act, R.S.C. 1906, c. 36, s. 80, the Intercolonial Railway is defined as follows:—

80. All railways, and all branches and extensions thereof, and ferries in connection therewith, vested in His Majesty, under the control and management of the Minister, and situated in the Provinces of Quebec, Nova Scotia and New Brunswick, are hereby declared to constitute and form the Intercolonial Railway.

By the National Transcontinental Railway Act, as amended by the Act to amend the National Transcontinental Railway Act, 4 & 5 Geo. V., c. 43, it is provided:—

After the Eastern Division is completed and until it is leased to the company, the said Eastern Division shall be under the control and management of the Minister of Railways and Canals who shall have power to operate the whole or any part of the said Division as a Government railway under the provisions of the Government Railways Act, R.S.C. 1906, c. 36.

Par. (*f*) added to s. 20 of the Exchequer Court Act by the Act to amend the Exchequer Court Act (9 & 10 Edw. VII., c. 19) was, no doubt, intended to include, and did in fact then include, all Government railways in mentioning the Intercolonial Railway and the Prince Edward Island Railway.

Since, then, the Eastern Division of the National Transcontinental Railway is certainly now a Government Railway, and as regards the locus with which we are now concerned is within the letter of the statute a part of the Intercolonial Railway, I think we are justified in holding that, for the purposes of the present case at any rate, it forms part of the Intercolonial Railway so as to entitle the appellant to rely upon par. (*f*) of s. 20 of the Exchequer Court Act.

It does not perhaps necessarily follow from the case falling within the extended terms of liability in this par. (*f*) that the appellant is entitled to relief even if negligence is proved, as to which we have no finding by the Exchequer Court.

Inasmuch as the appeal was really from a decision on a point of law which is overruled, the case should, I think, go back to the Exchequer Court for determination and, if necessary, assessment of damages.

Davies, J.

DAVIES, J. (dissenting):—I am of opinion that Audette, J., of the Exchequer Court was perfectly right in holding that the

damages sustained by the scow or dredge of the suppliants while lying alongside of the Quebec Warehouse Wharf were not recoverable under s. 20 (*c*) of the Exchequer Court Act, because the injuries complained of did not occur "on a public work."

The scow or dredge was at the time of the accident moored at the face of the wharf, and a diver was preparing to descend the river at the face of the wharf to ascertain whether the foundation was strong enough to build on.

He had not, however, completed his preparations when the collision with the steamer "Leonard" occurred, and to hold that the scow or dredge at the time of the collision was "on a public work" within the terms of the section would be to run counter to the construction of the sub-section established by this court in the cases of *Chamberlin* v. *The King* (1909), 42 Can. S.C.R. 350; *Paul* v. *The King* (1906), 38 Can. S.C.R. 126; *Hamburg-American Packet Co.* v. *The King* (1907), 39 Can. S.C.R. 621; and *Olmstead* v. *The King* (1916), 53 Can. S.C.R. 450, 30 D.L.R. 345.

Paul's case is, in many respects, like this one and the construction of the section in question there determined must prevail in the case now before us unless that case is overruled. The decision, however, in *Paul's* case has been consistently followed ever since.

As my colleagues, however, have reached the conclusion that the cases I have referred to can be distinguished from this one, this case must, of course, go back to the Exchequer Court to have it determined whether there has been such negligence as the Crown is liable for and, if such is held, to assess the damages.

As far as I am concerned, I would dismiss the appeal and the suppliant's petition of right with costs.

Idington, J.

IDINGTON, J.:—I agree with the trial judge below that a very narrow construction has unfortunately been placed upon the words "on a public work" in the statute in question, but I cannot agree that any of them have gone quite so far as the judgment now appealed from. There was always something to distinguish physically the spot where the alleged negligence took place from the actual spot where the work was actually being conducted.

In this case it is hardly possible unless we give the meaning to the word "on" of "upon" and insist that the scow in question could not be said to be "on a public work" unless it was on the

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top of the very spot in the wharf under and with which the appellant's men were engaged. I have also come to the conclusion that there was negligence attributable to the servants of the respondent which caused the destruction of the said scow whilst on the work in question. This court must, when the issues have been fully tried out as admittedly they were here, and all the evidence has been adduced that either party desires to present, give the judgment which the court below should have given. The judgment, I conceive, in this case should be to adjudge the respondent liable for the amount of the damages which the suppliant sustained in consequence of such negligence. Inasmuch, however, as the actual quantum of the damages was not dealt with in the evidence adduced, it will be necessary to refer the matter to the learned judge to assess the damages.

I think the appeal should be allowed and judgment entered accordingly.

Duff, J.

DUFF, J. (dissenting):—I am of the opinion that the appeal should be dismissed for want of jurisdiction.

Anglin, J.

ANGLIN, J.:—This case seems to me, with respect, to be distinguishable from the series of decisions on the construction of clause (c) of s. 20 of the Exchequer Court Act (R.S.C., c. 140), culminating in *Piggott* v. *The King* (1916), 53 Can. S.C.R. 626, 32 D.L.R. 461, the facts in which perhaps most nearly resemble those now presented. In none of these cases was the property injured, in respect of which damages were sought, employed at the time of injury in the construction or repair of a public work. Here, though not physically "on a public work," the injured scow, lying beside and attached to a public wharf, was in the course of being used in making repairs to that public work. It may properly be said to have been engaged "on a public work" just as the men on the scow and the diver (to whose claims, if they had sustained personal injuries in the crushing of the scow, I think the clause in question would have applied) might properly be said to have been "on a public work." It does not seem to me to involve any undue straining of the language of the statute to hold that it covers a claim for injury to property so employed. "Public work" may, and I think should, be read as meaning not merely some building or other erection or structure belonging to the public, but any operations undertaken by or on behalf

of the government in constructing, repairing or maintaining public property. In this sense, the appellant's scow was "on a public work" when it was injured. The judgment of the Exchequer Court cannot, therefore, be sustained on the ground on which it was based.

In the view he took the trial judge found it unnecessary to pass upon the issue of negligence. To determine that issue without the benefit of the trial judge's view as to the credibility and weight of the testimony, and without ourselves having had the opportunity of hearing the evidence and seeing the witnesses would be most unsatisfactory. The question of damages was not considered at all.

The case must, therefore, be remitted to the Exchequer Court to deal with it in accordance with the judgment now pronounced.

Appeal allowed.

BROCK AND PATTERSON LTD. v. ALLEN.

Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ., Ritchie, E.J., and Mellish, J. December 21, 1918.

HUSBAND AND WIFE (§ II D—72)—MARRIED WOMAN CARRYING ON SEPARATE BUSINESS — LIABILITY OF HUSBAND — CERTIFICATE REQUIRED — MARRIED WOMEN'S PROPERTY ACT (R.S.N.S. 1900, c. 112).

When a married woman carries on or proposes to carry on business as a trader, separately from her husband the husband is liable on all contracts made by her so long as the certificate required by s. 18 (1) of the Married Women's Property Act (R.S.N.S. 1900, c. 112), is not filed, but is not liable on contracts made by her after such certificate has been filed.

[*Browning* v. *Carson* (1895), 163 Mass. 255, followed.]

Statement.

APPEAL by defendant from the judgment of Russell, J., in an action for the price of goods sold and delivered to the defendant Dora A. Allen at her request while she was a married woman and the wife of the defendant S. G. Allen. Affirmed.

F. L. Milner, K.C., for appellants; *T. R. Robertson*, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—Goods were sold in December, 1917, and January, 1918, to a married woman who was carrying on business as a trader separately from her husband. At the time the debt was contracted the certificate provided for by s. 18 (1) of c. 112 had not been filed in the Registry of Deeds. The certificate was filed on April 22, 1918, and on May 15, 1918, the plaintiffs sued the husband for the debt due by the wife and the trial judge gave judgment for the plaintiffs and there is an appeal.

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One contention is that s. 19 of the Act in question refers only to the certificate referred to in s. 18 (2) required to be filed in case of the place of business being changed. I can see no reason to suppose that the legislature intended to so restrict the provisions, and I think the rules of construction are all against giving the statute such an interpretation, leading, as it does, to absurd results.

There was another contention, that, assuming the provisions of s. 19 applied, and made the husband liable for failure to file the certificate referred to in s. 18 (1), the husband ceased to be liable when the certificate was filed on April 22. I think the proper construction of the Act is that the husband is liable on all contracts made so long as the certificate is not filed, and that he is not liable on contracts made by the wife after the certificate is filed. That is the view expressed by Field, C.J., in *Browning* v. *Carson* (1895), 163 Mass. 255, at p. 260.

On the argument I thought the appeal was hopeless, and I am still of the same opinion.

The appeal should be dismissed with costs.

Longley, J. Ritchie, E. J. Mellish, J. Drysdale, J.

LONGLEY, J., RITCHIE, E.J., and MELLISH, J., concurred.

DRYSDALE, J.:—I agree with the judge below and for the reasons by him expressed. I desire to add nothing, and I would dismiss the appeal with costs. *Appeal dismissed.*

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NORTH WESTERN NATIONAL BANK OF PORTLAND v. FERGUSON.

Supreme Court of Canada, Davies, Idington, Anglin and Brodeur, JJ., and Falconbridge, C.J. ad hoc. December 9, 1918.

PRINCIPAL AND SURETY (§I B—12)—ADVANCES BY BANK TO CUSTOMER—CONTRACT GUARANTEED—SILENT AS TO TIME OF REPAYMENT—RENEWAL NOTE BY BANK—RELEASE OF SURETY.

A contract which guarantees "advances" made by a bank to a customer up to a certain amount, and which is silent as to the time when such advances should be made, and the period or periods of credit, and there being nothing to shew that any time for repayment was contemplated, and where the nature of the customer's business makes it clear that the advances were to be made from time to time, is a continuing guarantee and the guarantor is not relieved from liability by the bank consenting to take a renewal note for the amount advanced without the consent of such guarantor.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial in favour of the respondents. Reversed.

A. R. Clute, for appellants; *McKay*, K.C., for respondents.

DAVIES, J.:—I think we are all agreed that the defence set up by the primary debtor, W. W. Ferguson, in this case of misrepresentation on the part of the bank which discharged him from payment of the debt was properly held invalid by the trial judge and the Appellate Division.

The only ground, therefore, upon which the judgment below, affirming the dismissal of the action as against the defendant guarantor, John Ferguson, can be upheld is that he was a guarantor of a debt due and payable at a fixed time and was discharged from his liability by an extension of that time to the primary debtor without his knowledge or consent.

The guarantee is evidenced by a telegram from John Ferguson, the guarantor, to the bank and a letter confirming the telegram.

The former reads: "I hereby guarantee advances to my son up to $10,000."

And the letter reads: "I beg to confirm my guarantee to you to the extent of $10,000 if necessary as per your wire to me."

In order to fully understand and construe this guarantee it is necessary to know the chief facts and circumstances under which it was given.

Olmstead, the vice-president of the bank, states in his evidence that W. W. Ferguson, the son and primary debtor, had told him that his father, the defendant John Ferguson, had a contract to buy horses and would be willing to guarantee such sums as the bank would advance to him, W. W. Ferguson, and that he, Olmstead, told him in reply he had looked up his father's financial ability and found it good and that he would submit the matter of an advance to the bank committee and that he did so and the advance was agreed to be made. This was some time in October, 1914.

On November 21 following, the defendant, John Ferguson, telegraphed the bank as follows:—

All acceptable stock purchased by my son and Robert Smith will be paid for immediately on inspection. I will personally stand behind them in transaction.

To which the bank wired him a reply as follows:—

Referring your telegram Saturday must have guarantee from you for any sum advanced your son up to $10,000 regardless of stock being acceptable.

Whereupon John Ferguson sent the telegram in reply: "I hereby guarantee advances to my son up to $10,000."

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An advance of $3,000 was accordingly made on December 24 and a short-term note of 30 days, with interest at 7% taken for it by the bank.

Olmstead further states that on the day they made the advance the plaintiff bank telegraphed the defendant, John Ferguson, as follows:—

We loaned your son $3,000 to-day. Wish you would send us a letter confirming your telegram wherein you agreed to pay the advances paid to your son. Do you want Smith's name on the notes?

On the next day, he sent the plaintiff bank the following telegram:—

I appreciate your telegram. Wrote you as requested. I expect my son's associates to join in liability to the proportionate extent of their interest in transaction with him. You may be wired regarding their ability to fill contract which I am negotiating on 25 per cent. profit.

The contract John Ferguson here refers to and for the carrying out of which the advances were being made related to the purchase of horses for the French government. The exact relations between the son, W. W. Ferguson, and his associate, Smith, in the purchase of these horses does not appear. Whether they were simply agents of John Ferguson receiving a commission or other remuneration, or partners with him, is not disclosed.

Reading the guarantee in question in the light of the disclosed facts, I have no hesitation in reaching the conclusion that it was an absolute and a continuing one, and covered any advances which might be made from time to time by the bank to Ferguson and Smith up to $10,000.

No reference was made to the time at which the advances were to be repaid. That was a matter with other details left by John Ferguson to the bank and primary debtors.

It was arranged by the bank and primary debtors in accordance with bank usage and custom that a 30-day note should be given which afterwards was renewed for another 30 days.

Now, it does appear to me clear that, if the defendant's contention is right, the taking of the 30-day note in the first instance operated as a discharge of the surety equally with its subsequent extension. The advance in the absence of any time for its repayment being agreed to would become payable at once. Surely, no one looking to the facts of the case could put a construction upon the transaction determining that the advance became payable next day after it was made and if extended a day beyond that

without guarantor's knowledge and consent would discharge him. The renewing of the 30-day note had no greater legal effect on the guarantor's liability than the taking of the 30-day note by the bank in the first instance. In my judgment the guarantee being an absolute and continuing one guaranteeing whatever advances might be made from time to time under it up to $10,000, and leaving all details with respect to the taking and renewing of notes in accordance with bank custom and usage to the parties giving and taking the advances, was binding on the guarantor notwithstanding the taking of the 30-day note or its extension.

There was nothing in the guarantee or the evidence, anywhere, shewing that any definite time for repayment of the advances was contemplated, and in my judgment the extension of the 30-day note and taking of a new one had no greater or other effect upon the guarantor's liability under the continuing guarantee than the taking up of the 30-day note in the first instance. Both were matters of detail which John Ferguson left to be settled between the bank and his son. The defendants knew from the telegram sent to him by the bank at the time the advances were being made that notes were to be taken for them, and he was asked whether he wanted Smith's name also on the notes, to which he replied that he expected his "son's associates to join in liability to the proportionate extent of their interest."

He said nothing about the time the notes were to be taken for, evidently leaving that detail for the decision of the bank and his son and the latter's associate. They settled upon a 30-day note, and subsequently agreed that it should be renewed for another 30 days.

It may fairly be argued that this renewal should be treated as a fresh advance by the bank within the guarantee. I prefer, however, to rest my judgment upon the facts, as I have stated them, and my construction of the guarantee as a continuing one, and the fact that the guarantor left all questions of detail as to the time when the advances should be repaid to the bank and his son.

Under these circumstances, and for these reasons, I would allow the appeal, and enter judgment against the defendant, respondent, for the amount claimed with costs in all the courts.

IDINGTON, J. (dissenting):—The appellant advanced to W. W. Idington, J.

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Idington, J

Ferguson, son of respondent John Ferguson, and one Robert Smith, $3,000, and got their promissory note for that amount with interest at 7% per annum dated November 24, 1914, payable 30 days after date.

The money was intended to have been used in buying horses which they expected to dispose of in filling orders got for the French army through respondent, John Ferguson.

He, in anticipation of such purchases by his son, had wired from New York to appellant, carrying on business in Portland, Oregon, on October 28, 1914, as follows:—

Will accept and pay all my son's drafts on me.

On November 21, 1914, he again wired the appellant to same address as follows:—

All acceptable stock purchased by my son and Robert Smith will be paid for immediately on inspection. I will personally stand behind them in transaction.

The following reply thereto was sent by the appellant to respondent:—

Referring your telegram Saturday must have guarantee from you for any sum advanced your son up to ten thousand dollars regardless of stock being acceptable.

To this he responded as follows:—

I hereby guarantee advances to my son up to ten thousand dollars.

In answer to that, appellant sent night message as follows:—

We loaned your son three thousand dollars to-day. Wish you would send us a letter confirming your telegram wherein you guarantee to pay the advances made to your son. Do you want Smith's name on the notes?

The respondent sent also the following letter and lettergram:—

I beg to confirm my guarantee to you to the extent of ten thousand dollars (if necessary) as per your wire to me.

I appreciate your telegram. Wrote as you requested. I expect my son's associates to join in liability to the proportionate extent of their interest in transaction with him. You may be wired regarding their ability to fill contract which I am negotiating on basis of twenty-five per cent. profit.

There seems to have been no further business of buying horses carried on by Ferguson and Smith, and no further application to the appellant for advances falling within the meaning of the said guarantee than covered by the note mentioned above (if even that), yet on December 24, 1914, the appellant accepted in renewal of the said promissory note, without the consent of respondent, or indeed any reference to him as to his wishes, the promissory note of W. W. Ferguson and Robert Smith for $3,000 at 30 days with interest at 7% per annum.

There was no reservation of any recourse against the surety or anything else done to preserve such rights as may have existed up to that date against respondent.

The appellant sued upon the last-mentioned promissory note W. W. Ferguson as the maker thereof and the respondent, as guarantor, claiming he was such by virtue of the foregoing telegrams and letters.

The trial judge directed judgment against W. W. Ferguson as maker, but dismissed the action as against respondent on the ground that he had been discharged by the giving of time to the makers without his consent.

The Court of Appeal for Ontario has maintained such dismissal.

I should have supposed, but for the contrary demonstrated before us by ingenious suggestions of able counsel, that an appeal therefrom was hardly arguable.

It was suggested, notwithstanding the fact that this transaction stood and stands quite isolated, that the guarantee must be considered as a continuing one because a $10,000 limit happened to be named.

If there had been further advances and the business carried on, it is conceivable that the conduct of the parties and such complications as might have ensued might have given rise to some such aspect and room for such an argument.

But, at the very outset, it is evident that the parties all anticipated that the rapid turnover of horses bought and sold could avert any such like condition.

And again it was suggested that the appellant might have made a fresh advance of an equal amount and used the money to take up the first note.

That certainly was not made apparent, as within the terms stated in the correspondence I have quoted, which is all that passed between appellant and respondent, and would have been a breach of that good faith a surety is entitled to claim.

In short, there is nothing in that correspondence to authorize such a mode of treatment of the guarantee.

And all the ingenious suggestions of what might have happened if the parties concerned had done something else than they did, must, in my opinion, go for nothing. The case submitted

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must be decided by the actual facts and the relevant law governing the rights and liabilities of surety in such circumstances.

The following submission, which I quote from appellant's factum, represents fairly well the nature of the appellant's contention:—

> The note of November 24, 1914, was payable at the expiration of 30 days after its date and at maturity was renewed for a further period of 30 days. This renewal may be regarded as a fresh advance by the bank which it was then entitled to make. It was within the limit as to amount fixed by the father and the latter's liability was in no way increased beyond the terms of the guarantee given by him. It is submitted that, under the circumstances above mentioned, John Ferguson's liability on the guarantee is not affected by the time or times when said advances were made or were to be repaid or by the manner in which said advances were evidenced or secured; and is a continuing guarantee effective and binding until all advances up to $10,000 were actually repaid.

Hence, unless and until the appellant chose to make advances up to $10,000, it could do as it pleased and call on respondent to implement his guarantee when it pleased. I need not try to deal with such contentions. I merely submit the contract.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Consideration of the evidence has satisfied me that the conclusions of the trial judge, that "the defendants have (not) made out any case of misrepresentation or concealment which would constitute a defence to the note in question," and that it was contemplated that the advances to be guaranteed by the defendant, John Ferguson, should be made precisely as they were on the joint liability of Smith and W. W. Ferguson, are so well supported that they cannot be disturbed. There is really no evidence of misrepresentation. I fully concur in the judge's appreciation of the testimony of W. W. Ferguson. Nor was there any concealment such as would afford a defence. *Hamilton* v. *Watson* (1845), 12 Cl. & F. 109, 119, 8 E.R. 1339; *London General Omnibus Co.* v. *Holloway*, [1912] 2 K.B. 72, 83; *Royal Bank of Scotland* v. *Greenshields*, [1914] S.C. 259. John Ferguson's letter puts it beyond doubt that he was apprised of Smith's interest with his son and that the joint liability of both for the advances to be made by the bank was what he desired.

The only question at all arguable, in my opinion, is whether the plaintiff bank, by taking a renewal of the Smith-Ferguson note of $3,000 for 30 days, discharged John Ferguson as a guarantor.

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I think, with respect, that it did not. The question resolves itself into an inquiry whether the terms of the guarantee and the circumstances under which it was made warrant the inference that the parties to it contemplated that any short date note taken to evidence the advance of a part of the $10,000 should be renewable at all events until the whole $10,000 had been advanced (if not afterwards, *Merle* v. *Wells* (1810), 2 Camp. 413), or until what would be a reasonable period of credit, having regard to the nature of the transactions which it was proposed to finance, should expire. I think they do.

I fully appreciate the inflexibility of the rule that any material alteration in the terms of a guaranteed contract made by the principals without the guarantor's assent will discharge him, and that a binding agreement for extension of time without reservation of rights, will always be deemed such a variation, because it disables the guarantor, should he be minded, to discharge the principal debtor's obligation and seek recoupment from him or to compel him to do so himself, from immediately proceeding against him.

> The right of the surety to be subrogated to all the means at the disposal of the creditor is, as it has been said, one of the highest equity, and any act by which it is curtailed will, to the extent of the injury inflicted, be a defence. *Wilson* v. *Brown* (1881), 6 A.R. (Ont.) 87, 90.
>
> It has been the law of the court for many years that a surety is entitled to come into equity to compel the principal debtor to pay what is due from him, to the intent that the surety may be relieved. *Ascherson* v. *Tredegar Dry Dock and Wharf Co.*, [1909] 2 Ch. 401, 406.

But that right accrues only upon the maturity of the debt.

The guarantor's assent to an extension need be neither contemporaneous with it nor explicit. It may be implied in his own original contract assuming the liability. It may be involved in the arrangement or understanding between the principals which he has undertaken to guarantee—perhaps without sufficient enquiry. It must always be a question of the intention of the parties either expressed or, if not, to be inferred from the terms in which they have couched their agreement, construed, if they be "at all ambiguous," in the light of their relative positions and of the surrounding circumstances: *Coles* v. *Pack* (1869), L.R. 5 C.P. 65, 70; *Wood* v. *Priestner* (1866), L.R. 2 Exch. 66, 68; whether an extension without reservation of rights, relied upon as having worked the discharge of the guarantor, was or was not within the

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purview of the guarantee. To assume that it was not, if the terms are susceptible of the contrary construction, merely because it is not expressly provided for, however strong the grounds of inference that it must have been understood, is certainly unwarranted.

If the word "advances" used by the guarantor does not imply advances from time to time and an extended period of credit, it is at least susceptible of that construction and, therefore, open to explanation by proof of surrounding circumstances. However strict and well defined the rights of a guarantor, once the nature and extent of the guaranteed liability are ascertained, the contract of guarantee is not to be construed in his favour, but rather in that of the creditor (De Colyar on Guarantees, 3rd ed., 199 *et seq.*). The contract guaranteed in this instance was for "advances" up to the sum of $10,000. It is silent as to the time when such advances should be made and the period or periods of credit, and there is nothing to shew that any definite time for repayment was contemplated. The nature of the customer's business—the purchase of horses suitable for army purposes where and as they could be found—makes it clear that the advances were to be made from time to time, as the guarantor says, "to the extent of $10,000, if necessary."

There is no room for doubt that the guarantee was "continuing" in the sense that it was intended to cover a series of transactions. 15 Hals. 440; *National Bank* v. *Thomas* (1908), 69 Atl. R. 813; *Newcomb* v. *Kloeblen* (1909), 74 Atl. R. 511; and cases collected in de Colyar on Guarantees, 3rd ed., pp. 242 *et seq.* The taking of a short date note (30 days) was purely for the bankers' convenience and according to what is well known to be a usual custom, even where a longer period of credit is intended and understood. It was obtained merely to evidence the debt and Smith's joint liability. It was not meant thereby to fix 30 days as the period of credit, or to render the money exigible by the bank on their expiry. The obligation of the makers had not then matured either in the sense that the bank would have been justified in taking immediate action to compel repayment, or that the guarantor would have been entitled to force the principal debtor to liquidate the liability or secure his discharge. On the contrary, having regard to the nature of the Fergusons' undertaking and all the circumstances, I think the inference is irresist-

ible that the bank intended to give, and the Fergusons well understood when the $3,000 was advanced, that they were obtaining a more prolonged period of credit and that the 30 days' note would merely evidence the advance and might just as well have been drawn payable on demand, or at 60 days or 3 months. Any other view of what occurred would seem to me—I say it with respect—highly unreasonable. Thirty days after the advance of the $3,000 the purchasing of horses, so far as appears, was still in progress and the banker might within the terms of the guarantee have allowed the note to remain overdue and unpaid. On the other hand, if entitled then to collect it, had he done so he might immediately have made a fresh advance of $3,000 or of a larger sum for one month or for a longer period and it would have been clearly within the terms of the guarantee.

It is such a well-known custom of bankers to keep their paper "current" by taking renewals of short-date notes that business men dealing with them may properly be assumed to have contracted with reference to it. The nature of the customer's business and the other circumstances in evidence in the case at bar indicating that the parties contemplated a comparatively long period of credit during which advances should be made from time to time "if necessary," and the custom of bankers to take notes for advances at short dates, and to keep them "current," making it reasonably clear that the parties must have contemplated renewals at least of any such notes taken to evidence the earlier advances, it is not surprising to find that the renewal in question was given at the bank's instance, "because it was a time note and the time had elapsed."

The renewal would seem to have been treated as a matter of course—something which was asked for and given pursuant to the understanding of the parties as to the terms on which the advance had been made. Moreover, a renewal is usually dealt with by bankers as a fresh discount, the customer's account being debited with the amount of the old and credited with the proceeds of the discount of the new note—a process slightly more advantageous to the bank than it would be to charge interest on the original obligation, and, in effect, tantamount to a fresh advance which, as already stated, would have been clearly within the terms of the guarantee.

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I think there is more than room for doubt whether the guarantor would have been entitled, under the circumstances of the case at bar, had there been no renewal, either to assert a right to come in at any time after the first thirty days had expired—at all events without some reasonable notice—and pay off the bank and demand subrogation, or to compel the makers of the note to pay it. On the contrary, I rather incline to the view that these rights would accrue only when the bank on the expiry of a reasonable period of credit, having regard to the nature of the Fergusons' undertaking and all the circumstances, would have been entitled to call in the guaranteed loans. In this aspect of the case the renewal of the note did not interfere with or affect any right of the guarantor. But I prefer to rest my judgment upon the view that there was in reality no extension of the guaranteed loan, or that, having regard to the nature of the contract guaranteed, the renewal taken was within its terms in the sense that it was contemplated as one of the things which the creditor might do without affecting his rights against the surety. *Grahame* v. *Grahame* (1886), L.R. Ir. 19 Eq. 249, 259; *First National Bank* v. *Wunderlich* (1911), 130 N.W. R. 98, 99; *Tyson* v. *Reinecke* (1914), 145 Pac. R. 153; *National Bank* v. *Thomas*, 69 Atl. R. 813.

I agree with the plaintiff's contention that, upon the true interpretation of the guarantee, John Ferguson assumed liability to pay any sum or sums advanced by the plaintiff bank to his son within the limit prescribed, should he make default in paying it at such time as the bank should be entitled to and see fit to demand it. It is satisfactory to reach a conclusion which, if it should prevail, will frustrate a plain attempt to evade and defeat what is certainly a moral—I think it is also a legal—obligation.

In the Appellate Division, the case was disposed of at the close of the argument, the Chief Justice merely stating that the appellant had failed to shew that the judgment at the trial was erroneous. With great respect, the four Canadian cases cited by the trial judge at the conclusion of his judgment, presumably in support of it, seem scarcely relevant. In *Thompson* v. *McDonald* (1859), 17 U.C.Q.B. 304, it was merely held that the plea was insufficient because it did not allege a binding extension of time. In *Wilson* v. *Brown*, 6 A.R. (Ont.) 87, it was not contended, and there was no ground for the contention, that the suretyship was

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continuing. Moreover, the matter set up as a defence was not a binding extension of time or other alteration of the contract, but a mere forbearance to take steps to recover. *Devanney* v. *Brownlee* (1883), 8 A.R. (Ont.) 355, was a case of a single promissory note made by two persons jointly, one of whom, to the knowledge of the holder, was a surety for the other. The note was renewed by such other maker without the knowledge or consent of him held to be a surety. There was no suggestion of a continuing guarantee. *Fleming* v. *McLeod* (1906), 37 N.B.R. 630, was reversed on appeal to this court (1907), 39 Can. S.C.R. 290. Again, there was no question in this case of a continuing guarantee. The agreement relied upon and found to be established in the New Brunswick court—this court held otherwise—was for an extension of the time for payment of a single note (the entire transaction) to a fixed date without the knowledge or consent of an endorser.

I am, for the foregoing reasons, with deference, of the opinion that this appeal should be allowed, and that judgment should be entered for the appellants with costs throughout.

Brodeur, J.

BRODEUR, J.:—I concur with Davies, J.

Falconbridge, C.J.

FALCONBRIDGE, C.J. (dissenting):—This is an action by a creditor against a primary debtor and a guarantor. Judgment was given against the primary debtor, but the action was dismissed as against the guarantor. The plaintiff unsuccessfully appealed to the Appellate Division of the Supreme Court of Ontario, and now appeals to this court.

The defence of misrepresentation was properly held invalid by the trial judge and the Appellate Division, and the only defence requiring serious consideration is that the guarantor was released by the giving of time by the creditor to the primary debtor without the consent of the guarantor.

As appears by the indorsement on the writ of summons, the action was brought upon a promissory note made by the primary debtor in favour of the plaintiff dated November 24, 1914, for $3,000 and interest payable in 30 days. There is no dispute that the advance represented by this note was covered by the guaranty. The note above-mentioned was, however, renewed on December 24, 1914, for the same amount. The renewal note was taken without the consent or knowledge of the guarantor. It is, of course, elementary law, that a creditor who takes a promissory

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note or bill from a debtor who is in default, impliedly gives him time, since he cannot sue the debtor until maturity of the bill or note.

The plaintiff's counsel were apparently not able to find any case which would make this principle inapplicable to the liability in respect to the original note. It was argued, however, that the guaranty in question was a continuing one, and that it covered the liability upon the renewal note which is to be regarded as representing a second advance within the terms of the guaranty. At least, this is the way it seems to me the plaintiff must put its case in its endeavour to avoid the consequences of its having released the guarantor as regards the liability on the original note.

The plaintiff strongly relied on *Grahame* v. *Grahame*, L.R. Ir. 19 Eq. 249, p. 250. The guaranty there was in the following terms:—

7th February, 1879.

I hereby undertake to guarantee to the National Bank any advances made to my son Charles James Grahame, of the London Stock Exchange, to the extent of £1,000. GEORGE GRAHAME.

The promissory note of C. J. G. for £450 of the 11th February, 1879, at six months was renewed several successive times for different amounts. The action was on a note for £440, dated August 20, 1880, payable 6 months after date. When the last preceding note came due, August 20, 1880, the amount (£375) was debited to his account and the amount of the latest note (£440) credited to his account. The Vice-Chancellor considered that there was a new advance of £440. The guaranty was admitted to be a continuing one and therefore covered the last advance. The Vice-Chancellor says, at p. 259:—

The promissory note of C. J. Grahame of February 11, 1879, was more than once renewed, and if this claim rested on the original note, the bank might have difficulty in meeting this contention (as to giving time).

It is clear that this case does not help the plaintiff as far as the original note in the present case is concerned, and as I have already mentioned, the indorsement on the writ refers only to the original note. The statement of claim, it is true, refers to both notes, and perhaps on that account the present action might be regarded as an action on the second note. In the view which I take of the case, it is unnecessary to decide this because, in order to bring himself within *Grahame* v. *Grahame*, the plaintiff must also shew

that the second note represented a real advance. In *Grahame* v. *Grahame*, L.R. Ir. 19 Eq. 249, the fact that the amount of the indebtedness fluctuated from time to time and that the amount of the different notes varied, lends some continuance to the view adopted by the Vice-Chancellor (I am not saying anything about my opinion as to the correctness of that view), that there was an advance on the occasion of the taking of each note. In the present case, there was simply a renewal, and there was no circumstance to support the view that the renewal represented a new advance.

A continuing guaranty ordinarily means one intended to cover successive advances or credits up to a certain amount, and the continuing character may be implied from the circumstances. The appellant was, however, driven to argue that the guaranty in the present case was a continuing one in a very special sense, namely, a guaranty intended to cover the various vicissitudes and renewals of one advance so as to make it unnecessary to get the guarantor's consent to such dealings with the debtor, but there is nothing in the terms of this guaranty or in the circumstances to shew that this was the intention. The guaranty here is as follows:—

I hereby guarantee advances to my son up to $10,000.

And letter:—

I beg to confirm my guaranty to you to the extent of $10,000, if necessary, as per your wire to me.

Another case relied upon by the appellant was the *First National Bank of Antigo* v. *Wunderlich*, 130 N.W.R. 98, a decision of the Supreme Court of Wisconsin. The effective part of the guaranty was as follows:—

We, the undersigned, hereby guarantee the payment of all future sums of money advanced by you to J. N. S., and guarantee the payment of all notes executed by him to said First National Bank, for loans or sums advanced to him in any amount not to exceed the sum of one thousand dollars ($1,000).

This guaranty was clearly continuing and expressly covered successive notes, and it was accordingly held that the guaranty covered the renewal notes which were sued on, independently of any question as to extension of time on the earlier notes.

I am of opinion that the judgment appealed from is right and that the appeal must be dismissed. *Appeal allowed.*

B. C.

C. A.

HANNA v. COSTERTON.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and Eberts, JJ.A. December 16, 1918.

JUDGES (§ VII—50)—COUNTY COURT—ORDER DISPENSING WITH RESTRICTIONS OF WAR RELIEF ACT—JURISDICTION.

A County Court Judge has no jurisdiction to make an order dispensing with the restrictions of the War Relief Act, 1916, B.C. stats., c. 74, and amending Act, 1917, c. 74.

Statement.

APPEAL by defendant from the judgment of Hunter, C.J.B.C., of February 27, 1918. Affirmed

R. L. Reid, K.C., for appellant; *L. G. McPhillips*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appeal involves, *inter alia*, the question of the powers of local judges of the Supreme Court. S. 15 of the Supreme Court Act declares that the judges of the several County Courts shall be *judges of the Supreme Court* for the purposes of their jurisdiction in actions in that court, and may be styled "Local Judges of the Supreme Court," with power to do such things in respect of causes and actions in the Supreme Court as they are by statute or rules of court in that behalf from time to time empowered to do.

Whether the provincial legislature had jurisdiction to so enact may be open to grave doubt, but that question is not before us for decision.

Granting then, for the purpose of this case, that s. 15 was *intra vires*, what powers did that section purport to confer on local judges? As I read it, only such powers as shall be conferred by some other statute or rule of court. The section itself purports only to create the tribunal. Its powers are to be sought in the statutes and rules of court. There is no statute or rule in this behalf other than the order-in-council of June 16, 1906, which is headed: "Powers of Local Judges of the Supreme Court." It declares that—"The Judge of every County Court *in all actions* brought in his county" shall have the powers of a Supreme Court Judge in chambers, save the exception set forth in the order.

Passing over the inaptitude of this language which purports to confer the jurisdiction therein mentioned upon the several County Court judges, *qua* County Court judges—not *qua* judges of the Supreme Court, and assuming for the purpose of this case that the order-in-council is to be read as complementary to s. 15

of the Supreme Court Act, then it is only in *actions* in the Supreme Court that the local judge is given jurisdiction.

The interpretation clause of the Supreme Court Act defines action to be "a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court."

The War Relief Act empowers a "Judge of the Supreme Court" to dispense with the restrictions therein contained, and it is with the assumption of power by a local judge to exercise such power that this case has to do.

Shortly, the facts are these:—The appellant is the assignee of a second mortgage on respondent's lands. By a clause in the mortgage the respondent agreed to attorn and become tenant to the mortgagee (now the appellant) at a rental equivalent to the interest reserved by the mortgage. The rent being in arrears, the appellant distrained, notwithstanding that the respondent was within the protection of the War Relief Act. The respondent then made application to Swanson, County J., as local judge, for relief. It does not appear what form the application took, but the order made upon it is intituled in the Supreme Court, and "In the Matter of the War Relief Act and of the Moratorium Act" (which latter has no application to the facts), and "In the Matter of an Application thereunder by Stephen Preston Hanna," the respondent herein. It is hardly necessary to point out that the procedure, even if the judge had jurisdiction, was ill-conceived.

If the respondent could make out his case his remedy was by injunction to restrain the appellant from invading his rights under the War Relief Act. What happened was that the respondent got nothing by his application, but, on the other hand, an order was made dispensing with the restrictions of the War Relief Act, although no formal motion for such relief was before the local judge.

The respondent then brought this action for an injunction to restrain the appellant, a course which he ought, had he been rightly advised, to have taken in the first place; but before commencing this action, and up to the present time, no step was taken to get rid of the order of the local judge, which order had been duly passed and entered in the Supreme Court.

At the trial, Hunter, C.J.B.C., made the order for an injunction, ignoring the order of the local judge. The appeal is from

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the injunction order. The respondent's counsel argued in support of the order appealed from that, as the proceeding in which the order of the local judge was made was not a proceeding in an action, the local judge had no jurisdiction. I think this contention is well founded. The point was also taken that even if jurisdiction was wanting, the order must be set aside before an order inconsistent with it could be made. In other words, while it stood it worked an estoppel.

Stress was laid on the fact that the order having been entered had become a record of the Supreme Court, and on the authority of *Brigman* v. *McKenzie* (1897), 6 B.C.R. 56, must, therefore, be first set aside. I have examined a number of authorities, including *Re Padstow* (1882), 20 Ch. D. 137; *Macfarlane* v. *Leclaire* (1862), 15 Moo. P.C. 181, 15 E.R. 462; *Wood* v. *Grand Trunk R. Co.* (1866), 16 U.C.C.P. 275; and *Brigman* v. *McKenzie*, *supra*, and the more recent case of *Toronto Railway Co.* v. *City of Toronto*, [1904] A.C. 809, wherein it was held that the judgment of the Ontario Court of Appeal, affirming a finding of the Court of Revision in its decision that property of the railway company was assessable, was no estoppel in an action by the railway company for a declaration that such property was not assessable. Their Lordships said:—

> The order of the Court of Appeal of June 28, 1902, was not, therefore the decision of a court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel.

If this is in conflict with *Brigman* v. *McKenzie*, it must, of course, prevail. I would dismiss the appeal.

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

Galliher, J.A. GALLIHER, J.A.:—I agree with the Chief Justice.

Eberts, J.A. EBERTS, J.A., would dismiss appeal. No written reasons.

Appeal dismissed.

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C. A.

Re ROYAL TRUST Co. AND AUSTIN HOTEL Co.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips, and Eberts, JJ.A. November 5, 1918.

JUDGES (§VII—50)—OF SUPREME COURT—NOT TO INCLUDE LOCAL JUDGE OF SUPREME COURT—BILLS OF SALE ACT, 1911, R.S.B.C. c. 20.

The expression, "Judge of the Supreme Court," as used in the Bills of Sale Act, 1911, R.S.B.C. c. 20, does not include a "Local Judge of the Supreme Court."

B. C.

C. A.

RE ROYAL TRUST CO. AND AUSTIN HOTEL CO.

Macdonald, C.J.A.

APPEAL by Royal Trust Co from the judgment of Hunter, C.J.B.C. Affirmed.

E. P. Davis, K.C., for appellant; *W. J. Baird*, for respondent.

MACDONALD, C.J.A.:—My reasons for judgment in *Hanna* v. *Costerton*, just handed down, *ante* 478, apply to this case also in the assumption that the judge mentioned in the Bills of Sales Act in question in this appeal is not a *persona designata*. But, in my opinion, he is such. I think the same construction must be given in this case to the statute as was given in *C.P.R.* v. *Little Seminary of St. Thérèse* (1889), 16 Can. S.C.R. 606, by the statute therein in question. The court was there considering the construction of that section of the Railway Act which conferred power upon judges of the superior courts of Quebec to make certain specified orders in connection with the carrying out of the Act. What Patterson, J., said in that case, at p. 618, is peculiarly applicable to the statute in question here:—

> All these functions may be exercised by any judge of any of the courts embraced by the definition of the expression "Superior Courts"; they are functions which from their nature and object must be intended to be exercised in a summary manner, and not liable to the delay incident to the appeals from court to court.

Taschereau, J., said, p. 611:—

> Under the Railway Act, the judge and not the court has exclusive jurisdiction in the matters now in contestation.

It does not appear to me that there could be any warrant for putting a construction on the expression "a judge of the Supreme Court" which would include a "Local Judge of the Supreme Court." I think the description of the judge is used in its well-known and accepted sense, and could not be accurately applied to a local officer who may have some of the powers exercisable by a Supreme Court judge in chambers. To hold that a local judge is within the designation would result in this—that he could exercise the powers conferred not only in his own county, but in any part of the province as fully as could be done in the premises by a Supreme Court judge.

I therefore think the appeal should be dismissed.

MARTIN, J.A., allowed the appeal. Martin, J.A.

GALLIHER, J.A.:—I agree with the Chief Justice. Galliher, J.A.

McPHILLIPS, J.A. (dissenting):—In my opinion the appeal should prevail. In a province so vast as British Columbia it is to be expected that there will be found legislation admitting of McPhillips, J.A.

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the exercise of powers locally by local judges of the Supreme Court—which at other points would be exercised by judges of the Supreme Court—*i.e.*, Victoria Judicial District and Vancouver Judicial District, at which points all the judges of the Supreme Court reside. Therefore, one naturally looks for enabling powers, and in the Supreme Court Act (c. 58, R.S.B.C., 1911) is to be found s. 15 which reads as follows:—

> Judges of the several County Courts shall be judges of the court for the purposes of their jurisdiction in actions in the court, and in the exercise of such jurisdiction may be styled "Local Judges of the Supreme Court of British Columbia," and shall in all causes and matters in the court have, subject to rules of court, power and authority to do and perform all such acts and transact all such business, in respect of causes and matters in and before the court, as they are by statute or rules of court in that behalf from time to time empowered to do and perform; provided that this section shall not apply to the Victoria Judicial District or the Vancouver Judicial District.

The section as above set forth was in the same terms when *Re Hall Mining & Smelting Co.* (1905), 11 B.C.R. 492, was decided, and in that case my brother Martin (then being a judge of the Supreme Court) said, at p. 493:—

> For the guidance of the profession and of the land registrar in the future, I draw attention to the fact that the local judge has jurisdiction over this application; the statute is clear on the point, for this is undoubtedly a "matter in and before the court" within his jurisdiction as provided by s. 26 of the Supreme Court Act.

This decision was given in 1905, and to this date has not been disagreed with, and it is reasonable to suppose in fact it was stated at the bar, has been acted upon by the legal profession for now some 12 or 13 years, and no doubt hundreds of applications were made and granted extending the time for the registration of mortgage securities in this long interim of time, and particularly where money has to be often sought abroad, and there is, of necessity, long delay in the final completion of the securities—and the legislature recognising this, made the following provision in the Bills of Sale Act (R.S.B.C., 1897), s. 10:—

> 10. It shall be lawful for any judge of the Supreme Court, upon application made to him for that purpose within the period hereinbefore provided for the registration of any bill of sale, supported by affidavit setting forth the facts on which such application is based, to make an order extending the time for registration for such further period as to the said judge shall appear expedient or just, provided that such further period shall not exceed the space of two months. On the granting of any such extension of time, an office copy of the order granting such extension shall be annexed to the bill of sale or copy thereof, as the case may be, and registered therewith; and the regis-

tration of such bill of sale or copy, and copy order, within the extended period granted by such order, shall have the like effect as if such bill of sale or copy thereof had been registered within the time limited by this Act therefor.

And in the Bills of Sale Act (c. 8, statutes of B.C., 1905), we find s. 11 which reads as follows:—

11. Within one month from the date of execution of any bill of sale any judge of the Supreme Court, on being satisfied by affidavit that the omission to register a bill of sale within the time prescribed by this Act, or to file the affidavit of *bona fides*, as required by s. 7 (8), or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence or occupation, or by extending the time for such registration, on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct. An office copy of any order made as aforesaid shall be annexed to the bill of sale or any copy thereof, as the case may be, and registered therewith.

And in the present Bills of Sale Act (c. 20, R.S.B.C., 1911) s. 21, reads as follows:—

Within one month from the date of the execution of any bill of sale, any judge of the Supreme Court, on being satisfied by affidavit that the omission to register a bill of sale within the time prescribed by this Act, or to file the affidavit of *bona fides*, as required by ss. 13 or 14, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration, on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct. An office copy of any order made as aforesaid shall be annexed to the bill of sale or any copy thereof, as the case may be, and registered therewith. (Repealed 4 Geo. V. 1914, c. 5, s. 2).

And in the present Companies Act (c. 39, R.S.B.C., 1911), we have s. 105 reading as follows:—

A judge of the Supreme Court, on being satisfied that the omission to register a mortgage or charge within the time hereinbefore required, or that the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental . . . or is not of a nature to prejudice the position of the creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the judge just and expedient, order that the time for registration be extended or, as the case may be, that the omission or misstatement be rectified. (Amended 2 Geo. V. 1912, c. 3, s. 23).

The Chief Justice of British Columbia has held that the order extending the time for registration was made without jurisdiction and is to be disregarded, and that the chattel mortgage not being registered in time, the Royal Trust Co—the appellant—cannot

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be deemed a secured creditor. S. 105 (c. 39, R.S.B.C., 1911) is in like terms to s. 96 of the Companies (Consolidation) Act, 1908, Imp., it being well known that a request went to all the Overseas Dominions from the Colonial Office, that the company law throughout the Empire should be made to conform as nearly as possible to the Imperial legislation on the subject. So far as British Columbia was concerned, its legislation has been for years like in character. Palmer on Company Law (10th ed., 1916), deals with s. 96, our s. 105, at pp. 281-2.

It will be seen that in the present case the company being wound up it is now too late for the appellant to obtain an order from a Supreme Court judge. Now, under s. 15 above quoted of the Supreme Court Act (c. 58, R.S.B.C., 1911), the judges of the County Courts "shall be judges, etc." It then becomes necessary to see what the rules of court provide, and for the purpose of the inquiry on this appeal, it is only necessary to quote the following from the order-in-council of June 16, 1906, under the heading "Powers of Local Judges of the Supreme Court":—

1. The judge of every County Court, in all actions brought in his county, shall be and hereby is empowered and required to do all such things, and transact all such business, and exercise all such authority and jurisdiction in respect to the same as by virtue of any statute or custom or by the rules of practice of the Supreme Court are now done, transacted, or exercised by any judge of the said court, sitting at chambers, save and except in respect of the matters following (and matters and proceedings are set out which admittedly are not "actions").

But nothing in this rule contained shall, or shall be held to, limit the jurisdiction which the said County Court judges have heretofore possessed or exercised by virtue of any statute or custom.

It will be noticed the rule reads "by virtue, etc." Certainly it has been the "custom" of the judges of the Supreme Court as well as the local judges of the Supreme Court to make the orders, such as the one impugned, upon this appeal in chambers, extending over a long period of years. In my opinion, the rules of court give even a wider jurisdiction than the statute to the local judges of the Supreme Court when we have "custom" and "practice" introduced, and the rules have the force of statute law.

That the order made by His Honour Calder, J., was an order made by him as a local judge of the Supreme Court cannot be gainsaid. It so reads it was made in chambers, where it could rightly be made. It still stands, it has not been set aside, only ignored,

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treated as a nullity, and that with great respect to the Chief Justice of British Columbia, in my opinion, cannot be done. It has been used and is upon the register of mortgages with the registrar of joint stock companies in compliance with the Companies Act, and gives validity to the registration of the mortgage.

To illustrate, by analogy of reasoning and authority, that the order of Calder, J., was made in pursuance of Supreme Court powers conferred by statute and rules of court, it is only necessary to refer to the case of *Baker* v. *Ambrose*, [1896] 2 Q.B. 372. There it was an affidavit made in pursuance of the Bills of Sale Act, 1878 (41 & 42 Vict. 31 (Imperial)), and it was held, although it was not made in an action, that O. 38, r. 16 (Eng. Rules) applied, and we have the same rule in this province (O. 38, r. 11).

The section of the Bills of Sale Act (R.S.B.C., 1911, c. 20; 1912, c. 2) being s. 21 as amended by the Bills of Sale Act Amendment Act, 1914, in force at the time the order impeached was made, reads as follows:—

> 21. Within one month from the date of the execution of any bill of sale, any judge of the Supreme Court, on being satisfied by affidavit that the omission to register a bill of sale within the time prescribed by this Act, or to file the affidavit of *bona fides*, as required by ss. 13 or 14, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, or some other sufficient cause, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence or occupation, or by extending the time for such registration, on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct; and in the case of an extension of time being granted, such order shall be without prejudice to the rights of any third party who has in the meantime acquired title to all or some of the same chattels, either by purchase and possession or by registration of a *bonâ fide* bill of sale thereof, within the time limited for registration by this Act. An office copy of any order made as aforesaid shall be annexed to the bill of sale or any copy thereof, as the case may be, and registered therewith.

The Chief Justice of British Columbia gave no written judgment, but the reporter, in [1918] 1 W.W.R. 794, seems to have assumed, and possibly the Chief Justice, that the order was made under the Bills of Sale Act, and the section last quoted, but with great respect I think it was made under the provision as contained in the Companies Act (s. 105, c. 39, R.S.B.C., 1911), but possibly this is immaterial as in the Bills of Sale Act we have the words "any judge of the Supreme Court," and in the Companies Act (c. 39, R.S.B.C., 1911) "a judge of the Supreme Court." Again,

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reverting to the report of the decision in [1918] 1 W.W.R. 794, at p. 795, it is stated:—

> His Lordship held that the expression, "any judge of the Supreme Court" constituted a judge of the Supreme Court *persona designata* under the Bills of Sale Act and that His Honour Judge Calder had no jurisdiction to make an order extending the time for registration as above mentioned. He therefore made an order varying the registrar's report in accordance with the terms of the liquidator's application.

Now, if it can be said that an affidavit made under the Bills of Sale Act is in court, and subject to the rules of court, and admittedly it is not *in an action in the court* (s. 15, Supreme Court Act, c. 58, R.S.B.C., 1911, "in actions in the court," but see also "in all causes and matters in the court"), yet it may well be *a matter in the court*, and if so with great respect to the Chief Justice there would be an error in holding that the expression "any judge of the Supreme Court" (or as in s. 105, Companies Act, "a judge of the Supreme Court") constituted a judge of the Supreme Court *persona designata*. See *Re Bagley*, [1911] 1 K.B. 317.

It does not occur to me that the "matters relating to the registration of any instrument whether under an Act of Parliament or otherwise," as contained in the Oaths Act, 1889 (Imp.), makes any difference, words which I do not find in s. 54 of the Evidence Act (c. 78, R.S.B.C., 1911), as the Master of the Rolls did not base his decision wholly upon this point, but as we see upon O. 38, r. 16, as well. Then we have a decision of this court upon the point which is conclusive, namely, *Braden* v. *Brown* (1917), 24 B.C.R. 374, approving *Columbia Bitulithic Ltd.* v. *Vancouver Lumber Co.* (1915), 20 D.L.R. 954, 21 B.C.R. 138, having reference to a chattel mortgage under the Bills of Sale Act—which is the present case—it being held that r. 309 (which is the County Court Rule, similiar in its terms to O. 38, r. 16, of the Supreme Court Rules), which provides that an affidavit shall not be sworn before the solicitor for the party on whose behalf it is to be used, applies to the affidavit required under s. 19 of the Mechanics Lien Act (*Columbia Bitulithic Co.* v. *Vancouver Lumber Co.* (1915), 21 D.L.R. 91, followed.) Then if it be that the rules of court, whether Supreme or County apply, how can it be said that "any judge of the Supreme Court," or "a judge of the Supreme Court" is *persona designata*? If *persona designata*, he would not, in exercising his authority, be subject to the provisions of the Supreme Court

Act or the rules thereof. *Braden* v. *Brown*, *supra*, rebuts any such contention, and is decisive upon the point. That being the situation, it is at once apparent that the jurisdiction is as judge of the Supreme Court, and that being the position, it follows that under s. 15 of the Supreme Court Act (c. 58, R.S.B.C., 1911), the rules of court and the power of local judges of the Supreme Court (rules of Supreme Court, at p. 173), the local judges of the Supreme Court may exercise the jurisdiction, and His Honour Judge Calder was right in making the order which the Chief Justice of British Columbia has treated as a nullity. The legislation in England being in like terms to that of British Columbia, it is to be observed that appeals from orders made have been taken and no question of *persona designata* given effect to. To further accentuate this conclusion, the order-in-council of June 16, 1906 (p. 173, Rules of Supreme Court), cannot be confined to "actions," it is only necessary to refer to the language giving the excepted powers "save and except in respect of the matters following," and the enumeration of these demonstrates many of them not "in . . . actions brought in his county."

I have endeavoured to indicate what, in my view, was the plain intention of the legislature in conferring upon the local judges of the Supreme Court powers that are expressed to be by statute or rules of court conferred upon the judges of the Supreme Court—it being vital in the interests of the public that these powers should be capable of being exercised, especially in the remote parts of the province, such as in the present case. In this connection, I would refer to what Anglin, J., said in *Komnick System Sandstone Co.* v. *B.C. Pressed Brick Co.* (1918), 41 D.L.R. 423, and applying the language there used by him, to the view I have come to, that there was power in the local judge to make the order, as it is the application of two well-known rules to the present case, one known as "The Golden Rule," that "in interpreting all written instruments the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument," and the other that "remedial statutes should be construed liberally, and so as to suppress the mischief and advance the remedy." And whilst it is possible to say that what my brother Martin said in *Re Hall Mining and Smelting*

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Co., supra, was merely *obiter*, yet the special circumstances are to be considered, and we have "custom" and "practice" to consider—which unquestionably followed. I would refer to what Mr. Justice Anglin said in *Gagnon* v. *Lemay* (1918), 42 D.L.R. 161, 56 Can. S.C.R. 365, at p. 374, dealing with conveyancing practice, and "the wisdom of not overruling decisions of some years' standing."

Further, there is what, to my mind, is an insuperable obstacle to affirming the judgment of the Chief Justice of British Columbia. He has, with great respect, undertaken to ignore and treat as a nullity an order made by a local judge of the Supreme Court which has not been moved against, and is of record, as I assume, and I think I am entitled to assume, although there is no notation as the order appears before us of its entry. But no point was made as to this upon the argument, and it is a proper inference to draw that the order was duly and properly entered, and it certainly is of record in the books of the registrar of joint stock companies. That order still standing cannot be treated as a nullity, only when set aside in the well-known and usual manner (if it could be, my opinion, of course, being to the contrary) could it be ignored, and the rectification of the register of mortgages in the office of the registrar of joint stock companies be made. Failing that being done, the finding of the district registrar that the Royal Trust Co., the appellant, is entitled to security for its claim of $3,500, by virtue of a chattel mortgage as a secured creditor must, in my opinion, stand.

To support what I deem to be this insuperable objection to the maintenance of the judgment of the Chief Justice of British Columbia, I would refer to the language of Cozens-Hardy, M.R., in *Re Bagley*, *supra*, already quoted, wherein he said, at p. 325:—

> It suffices here to say that there is an order of the court expressly and in terms giving Chapman the right to do that which the Bankruptcy Act, 1890, says entitled him to rank as a creditor within the meaning of s. 4 of the principal Act. It is enough for the purposes of this appeal to say that that order has not been impeached and that on that ground alone the objection fails because we could not go behind the order.

Here we have the chattel mortgage registered, to all appearances duly registered, supported by an order of a local judge of the Supreme Court, and upon the register of mortgage as well in the office of the registrar of joint stock companies, and even were the registration and the register of mortgages in error, so

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long as the registration is existent, and supported by the order of the local judge of the Supreme Court—unreversed—the Royal Trust Co., the appellant, remains a secured creditor.

In *Whiteman* v. *Sadler* (1910), 79 L.J.K.B. 1050, [1910] A.C. 514, the head note, in part, reads as follows, at p. 1050:—

A bill of sale taken in the registered name of a money-lender is not void although the name was improperly registered. So long as the name remains on the register, contracts in that name are not to be held void or the money-lender's action in making such contracts punishable by fine or imprisonment.

Decision of the Court of Appeal (79 L.J.K.B. 786; [1910] 1 K.B. 868), on this ground reversed.

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In my opinion, the appeal should be allowed, and the certificate of the district registrar wherein he found that the Royal Trust Co., the appellant, was a secured creditor for its claim by virtue of the chattel mortgage, should stand. In the result, the order made by the Chief Justice of British Columbia under appeal should be set aside.

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EBERTS, J.A., would dismiss appeal—no written reasons.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. July 15, 1918.

APPEAL (§ VII M—536)—UNDISPUTED TESTIMONY—WRONG INFERENCES DRAWN BY TRIAL JUDGE—DUTY OF APPELLATE COURT.

It is the right and duty of an appellate court to reverse the findings of the trial judge, when the wrong inferences have been drawn from undisputed testimony. The proper inference to be drawn from the evidence was that the plaintiffs had failed to make out that the accident occurred solely by the negligence of the defendants and without negligence on the part of the deceased.

[*Magill* v. *Township of Moore* (1917), 41 D.L.R. 78, 41 O.L.R. 375, reversed].

Statement.

APPEAL by defendants from the judgment of Clute, J., 41 D.L.R. 78, in an action for damages for death of plaintiff's son, alleged to have been caused by the negligence of defendants. Reversed.

R. I. Towers, and *A. Weir*, for appellants.

J. R. Logan, for respondents.

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FERGUSON, J.A.:—Appeal by the defendants from a judgment of Clute, J., dated the 22nd December, 1917, pronounced after a trial at Sarnia without a jury on the 5th December.

The plaintiffs are the father and mother of James Magill, aged, at the time of the accident, 22 years, who on the 30th July, 1917,

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while engaged in drawing hay from a field on his father's farm, was killed in the upsetting of a load of hay on which he was driving. It is alleged and found that the accident occurred by reason of the deceased losing control of his horses, and that this loss of control was occasioned by his being obliged to crouch down on the load of hay while passing under the wires of the rural telephone system, owned or controlled by the defendants, and that such wires were negligently and wrongfully erected upon the highway, in being at the place where the accident occurred only 13 feet 6 inches above the level of the way, and thus not leaving sufficient space to allow the deceased to drive under them standing up on his load of hay.

The defendants contend that the accident occurred by reason of the nature of the truck and rack used for the purpose of drawing hay, and attempting with that equipment to drive the load of hay in an angling direction from the field to the travelled part of the highway, by crossing a hollow created by removing earth to grade the travelled way, and a furrow ploughed on the untravelled part of the way; and that the deceased, from his prior experience in the preceding year and on the same day, knew that the loads were apt to upset, and voluntarily accepted that risk, and also knew that it was necessary to crouch down on the load to drive under the wires; and that, even if the wires were wrongfully or negligently erected, and even if the accident occurred by reason of the deceased losing control of his horses in crouching down to pass under the wires, yet that the deceased, knowing the necessity of doing so, and the effect and danger thereof, should have made an effort to avoid such danger by sitting down on his load or by leading his horses under the wires, or by building a smaller load, or should have taken some other method of avoiding the danger of upsetting and the additional danger created by the alleged negligence of the defendants; and that, failing to make such an effort, the deceased was knowingly negligent, and that his was the ultimate negligence, or at least that his negligence was a cause so contributing to the accident as to prevent the plaintiffs succeeding in this action.

As to the defendants' negligence, the learned trial Judge says (41 D.L.R. at p. 91):—

"It is not contended that the line was not authorised or the poles not properly placed, but that ordinary care had not been used in protecting a place which, for many years and at the time the line was laid, was a place of exit from the fields upon the highway."

And finds (pp. 88, 89):—

"No date, as far as I have noted, was given when the cross-bar was put on in 1911. It would appear that, at the time the line was put up in 1908, no obstruction was caused in passing in and out of this gateway; that, if the lower cross-bar was put on after the 30th June, 1911" (sec. 26 of the Telephone Act provides that the standard specifications shall not apply to the plant or equipment constructed or operated prior to the 30th June, 1911), "and the wires placed thereon, it would be an erection upon a pole 20 feet in height instead of 25 feet, contrary to the standard specifications above referred to, which provide that all lines to carry more than one cross-arm shall consist of poles not less than 25 feet in length. If this erection took place prior to the 30th June, 1911, then I find as a fact that it was an obstruction and shewed negligence and want of reasonable and proper care in its construction." And at p. 94: "I think that the position of the wires causing the deceased to stoop or crouch down in passing under them was the proximate cause of the horses getting from under that control which was necessary to secure the safe passage of the load."

The defendants urged that neither finding in reference to the construction and maintenance of their line was justified by the evidence; but, as I view the case, it is not necessary for me to discuss those findings. In my view, the burden of the issue was upon the plaintiffs to establish that the accident occurred solely by the negligence of the defendants and without negligence on the part of the deceased; and, if the evidence offered is as consistent with the accident having arisen from other causes or from the negligence of the deceased as from the negligence of the defendants, the case of the plaintiffs is not made out: *Burns* v. *City of Toronto* (1878), 42 U.C.Q.B. 560, 575; Beven on Negligence, Can. ed., p. 115.

The plaintiffs must, I think, establish: (a) that the deceased lost control of his horses; (b) that such loss of control caused the upset; (c) that the negligent placing of the defendants' wires caused the loss of control; and, assuming that the wires were an obstruction which the defendants should not have permitted to exist, and that therefore they were in an unlawful position on the highway, yet the evidence must not disclose that the deceased, knowing they were there and the danger of doing so, did

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negligently or wittingly, and in that sense wilfully, drive under them, thereby causing the accident to happen.

The learned trial Judge has answered these questions in favour of the respondents, and the first question that suggests itself to my mind is whether or not it is open to an appellate Court to reverse his findings of fact. Had the questions been answered by a jury, I should not be able to say there was not evidence to support the finding, within the meaning of *Toronto R. Co.* v. *King*, [1908] A.C. 260, 270; or, if we were obliged to differ from the trial Judge as to the credibility of the witnesses, I would not, in view of *Wood* v. *Haines* (1917), 38 O.L.R. 583, 33 D.L.R. 166, and *Lodge Holes Colliery Co. Limited* v. *Wednesbury Corporation*, [1908] A.C. 323, 326, undertake the responsibility of differing from him; but this is not a jury action, and it is not necessary to deal with the credibility of the oral testimony; there is no dispute on the evidence; it is only a question of what is the proper inference and conclusion to be drawn from the undisputed testimony; and in that case I think it is not only within our power to differ from the trial Judge, but it is our duty to do so, if our views do not in fact agree with those of the trial Judge: *Montgomerie & Co. Limited* v. *Wallace-James*, [1904] A.C. 73, 75; Halsbury's Laws of England, vol. 23, p. 202, para. 371.

In *Jones* v. *Hough* (1879), 5 Ex. D. 115, 122, Bramwell, L.J., says:—

"Where the jury find the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the Judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like. I have no doubt, therefore, that is our jurisdiction, our power, and our duty: and if, upon these materials, judgment ought to be given in any particular way different from that in which Lindley, J., has given it, we ought to give that judgment."

See also *Read* v. *Anderson* (1884), 13 Q.B.D. 779; *Dempster* v. *Lewis* (1903), 33 Can. S.C.R. 292; *Hood* v. *Eden* (1905), 36 Can. S.C.R. 476, 484; *Ogilvie Flour Mills Co.* v. *Morrow Cereal Co.* (1917), 41 O.L.R. 58, 39 D.L.R. 463 (affirmed, 57 Can. S.C.R. 403); *Barron* v. *Kelly*, (1918), 41 D.L.R. 590, 56 Can. S.C.R. 455.

The opinion of the trial Judge is not, however, to be lightly

brushed aside as being without weight. Such cases as *Colonial Securities Trust Co.* v. *Massey*, [1896] 1 Q.B. 38, and *George Matthews Co.* v. *Bouchard* (1898), 28 Can. S.C.R. 580, establish a presumption that the opinion of the trial Judge is right, and require us to give due weight to his findings, and not to reverse him unless of the opinion that he is clearly wrong. In the case at bar, while I am unable to say that the accident might not have happened from the cause stated by the learned trial Judge, I am clearly of the opinion that the evidence does not establish either that it did so happen, or facts from which it may without reasonable doubt be properly inferred that it did so happen. In this view I am to some extent confirmed by the following statement of the trial Judge (41 D.L.R. at p. 81):—

"It was agreed by witnesses on both sides that taking the curve over these inequalities would cause the load to oscillate first to the left, then to the right, then again to the left and again to the right, and finally, in crossing the crown of the road, again to the left and to the right. The load was thrown off on the right hand side, the rack going with the load and landing upside down, resting upon the top of the ladders both front and rear."

The learned trial Judge does not explain why or how he disregards these facts as factors in the accident, and finds a loss of control of the horses as being the sole and proximate cause of the upset.

It is established that the accident occurred at about 8 o'clock at night; that the deceased had, the year prior, drawn hay from the same field through the same gateway and under some wires placed at the same height; that he had, on the day of the accident, drawn several loads of hay under these wires out of the same gate, over the same way, ditch, furrow, and rough place; that the hay was loaded upon a truck, front wheels 23 inches, hind wheels 32 inches, rigged with a flat rack, 8 feet 6 inches wide and 16 feet long, with a ladder on each end, 5 feet 2 inches high, measured from the platform of the rack (p. 33 of the notes of evidence); that the rack was fastened to the waggon by No. 12 wire twisted, instead of by bolts; that the platform of the rack was 3 feet 7 inches above the ground, and the hay stood about 6 feet 2 inches above the rack, making the top of the load about 9 feet 9 inches high, and leaving driving room or headway under the wires of 4 feet 3 inches

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(p. 35), to which should be added as headway the amount a person standing on a load of loose hay would sink down into it. It was also established that the ground over which the hay had to be driven in passing from the field to the highway and the travelled part thereof was rough and uneven, with a considerable slope down to and up from the ditch (Fawcett's evidence, pp. 48-51; John Magill, p. 67).

After a very careful perusal and consideration of the opinion of the learned trial Judge, the evidence, and the exhibits, I am not able to say that it is established in evidence that the deceased did lose control of his horses, or that, if he did, the accident was the result of such loss of control, and was not caused by the unbalancing of the load on a loose, flat rack, in being driven, even carefully, over the rough ground at the place of the accident, nor am I able to say that the deceased was not guilty of contributory negligence. Thus differing as I do from the trial Judge on a question of fact or on the proper inferences or conclusions to be drawn from the facts established, I think it is seemly that I should quote largely from the evidence; but, so as not to make this opinion too long, I have, while quoting the evidence, attached it as an appendix hereto.*

A perusal of the evidence quoted in the appendix will shew that the learned trial Judge allowed the witnesses to express their opinion as to how or why the accident occurred. As I read the evidence, the statement of the witness Hird, as to the whiffletrees striking the horses and the loss of control, was a statement of his opinion rather than a statement of fact. Some of the witnesses may have qualified so as to entitle them to express opinions—certainly the boy Hird did not qualify as an expert. However, it appears to me that it was for the trial Judge, and it is now for the members of this Court, to draw their own inferences and conclusions from the facts established, rather than to accept the opinion of any of these witnesses; and, the facts not being in dispute, it seems to me that this Court is in as good a position to draw inferences and to form an opinion on the evidence as was the trial Judge. See Beven on Negligence, Can. ed., pp. 130, 131.

It must not be lost sight of that it was not the waggon that upset, but the load and rack that left the gear. I cannot help but

*The appendix referred to is not made part of this report.

think that the flat rack, 8 feet 6 inches wide and 16 feet long, with a load on it such as is described in evidence, fastened to the truck by wire, was a dangerous kind of load to drive over any appreciably rough ground. See *Bradley* v. *Brown* (1872), 32 U.C.Q.B. 463, where it was held to be negligence to drive a load of empty barrels along a road containing, to the knowledge of the plaintiff, deep ruts, without having the rack fastened.

In this case, the deceased knew the nature of the ground. He knew of and had his attention focussed on the wires; he knew he had with each load to jump from side to side of his load either to escape in case the load went over or to balance the load. He knew that his brother had, the prior year, deemed it necessary or advisable at this spot to balance the load by walking alongside to support it with a pitch-fork; he knew and appreciated the fact that he had to crouch down under the wires—that each time the load struck the grade the horses trotted a little. I would not infer that that trotting a little on a pitch into the furrow and ditch was necessarily caused by slack lines, or a loss of control, or that such trotting was the sole cause of the accident; but, if the contrary be the proper inference, yet, to my mind, the question of contributory negligence is a serious obstacle in the way of the plaintiffs. Can it be said that, with his knowledge of the dangers, the deceased was entitled to take the risk, and, if he failed to arrive in safety, to lay the blame on the defendants' wires, or must he not bear the burden of his own folly or neglect?

Whether or not the deceased was guilty of contributory negligence is a question of fact rather than law, and of the standard of conduct, the care which a competent, prudent driver similarly placed, having the same knowledge of danger which the deceased had, would ordinarily exercise.

As said by Armour, C.J., in *Gordon* v. *City of Belleville* (1887), 15 O.R. 26, 30:—

"The care he will be required to exercise must be commensurate with his knowledge . . . such care as a prudent man would reasonably exercise . . ."

The learned trial Judge does not, in his opinion, discuss the evidence on the question of contributory negligence. He seems to assume that, because the jury in *Ferguson* v. *Township of Southwold* (1895), 27 O.R. 66, found as a fact that the defendants were guilty

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of negligence and that the plaintiff was not guilty of contributory negligence, the deceased was in an equally good position; but Lord Halsbury in *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, 208, said that no one case can be authority for another when the solution rests on evidence.

The appellate Court was asked in the *Ferguson* case to reverse the finding of a jury, and consequently to say that there was no evidence to support that finding. Here, however, we are asked and permitted to review the finding and conclusion of the trial Judge, made on undisputed facts. The two propositions seem to me to be entirely different. In the *Ferguson* case it was not shewn that the plaintiff had previous trouble or narrow escapes in passing under the limb of the tree overhanging or obstructing the travelled part of the highway. Had the accident in the case at bar occurred the first time the deceased drove under the wires, or had it not been shewn that every previous load appeared likely to upset, I should find greater difficulty in saying that the deceased knew and appreciated the danger than I now do. If he knew the danger and voluntarily accepted the risk or exercised no greater care because of the danger, he cannot, I think, succeed: *Williams* v. *City of Portland* (1891), 19 Can. S.C.R. 159; I can find nothing in the evidence which would suggest that anything different happened when the accident occurred than had happened on each previous occasion, except what ought reasonably to have been expected by a prudent man, that is, that the deceased was not able on his last venture to establish the balance of his load by jumping from side to side thereof. Should it then be said that, with this knowledge, the deceased acted as a person of ordinary care and prudence, in attempting to pass over that rough piece of ground with that truck equipped and loaded as shewn in the evidence? If not, and I cannot bring myself to think that it should, then he had no right to make the experiment except at his own risk. See also *Hutton* v. *Corporation of Windsor* (1874), 34 U.C.Q.B. 487; *Castor* v. *Corporation of Uxbridge* (1876), 39 U.C.Q.B. 113; *Carson* v. *Village of Weston* (1901), 1 O.L.R. 15.

The only principle on which I can see that the action of the deceased might be justified is, that the defendants were not entitled negligently to create a situation of danger, and then, by pointing out the danger, to relieve themselves from liability, by

taking the position that the deceased, while the danger continued, should not have used this dangerous way at all. This principle is stated and discussed in Pollock on Torts, 10th ed., p. 500; and, as there pointed out, on the authority of *Clayards* v. *Dethick* (1848), 12 Q.B. 439, 116 E.R. 932, the defendants cannot, by creating a dangerous obstruction, take away the right of the deceased to come out of such a gate or passageway; but it is also pointed out that, while the deceased is entitled to use such a dangerous gate or passageway, he cannot disregard the obstruction, but must use extra care reasonably commensurate with the danger, and the question to be decided under such circumstances is, whether or not, in using the gateway with knowledge of the danger, he used common prudence in making the attempt in the manner in which he did make it. Applying that statement of the law, and keeping in mind that the deceased was not bound to refrain altogether from the use of the gateway in question, merely because the defendants had made it more dangerous than it otherwise would have been, I still think that, had he used care or prudence commensurate with the danger, the accident could not have occurred, from the cause found, loss of control. He could have had his waggon more securely equipped and his rack more securely fastened. He could have sat down and driven; he could have built his load lower; or have so built his load as to have left himself a place to stand while driving under the wires; he could have walked and driven his team; or he could have led his team. I think he could even have abated the nuisance. In my opinion, he was not forced to take the risk he did take, or refrain from using the gateway, which was the situation in *Clayards* v. *Dethick;* see also *Butterfield* v. *Forrester* (1809), 11 East 60, 103 E.R. 926; *Mayor of Colchester* v. *Brooke* (1845), 7 Q.B. 339, 377, 115 E.R. 518; 29 Cyc. 515, 518, 521; *Lax* v. *Corporation of Darlington* (1879), 5 Ex. D. 28, 35.

True, as stated by the learned trial Judge, the deceased was not obliged to do the wisest thing; but yet he was obliged to act as a prudent man would have acted in the circumstances—no more and no less—and, in my view, he did not act according to that standard: *Thompson* v. *North Eastern R. Co.* (1860), 2 B. & S. 106, 117; 121 E.R. 1012.

For these reasons, I am of opinion that the plaintiffs have failed to make out that the accident occurred solely by the negligence of

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the defendants, and without negligence on the part of the deceased. I would allow the appeal with costs, and dismiss the action with costs.

Taking the view I do, it is not necessary for me to deal with the other questions raised by the appellants, which include a claim that their wires were not, under the Telephone Act, either wrongfully or negligently placed; that the plaintiff Louisa Magill suffered no damage, and that the plaintiff William Magill released any claim he might have by a document in writing (exhibit 7), referred to at pp. 37 and 107 of the evidence; and that the Telephone Association was not an entity that could be sued.

Ferguson, J.A.

Magee, J.A.

MAGEE, J.A., agreed with FERGUSON, J.A.

Hodgins, J.A.

HODGINS, J.A.:—The facts elicited in this case are simple enough. The deceased was driving a loaded hay-waggon out of the field on to the road. The track left the field at an angle, and the load had to go down into the ditch on this angle, and so up to the crown of the road. The three telephone wires were just where the track left the field; and, owing to the height of the load, the deceased had to go down on one knee while passing under them. He then got up on his feet, and, as the horses broke into a trot, the load oscillated, and he jumped to one side and then to the other to steady it. The load went over to the right, carrying him with it, and he was killed.

The learned trial Judge drew the inference that the deceased lost control of the horses when compelled to kneel while passing under the wires, and then he relates the accident to the wires, because their position caused the deceased to kneel. No one deposed to this nor to the loss of control as facts, but opinions were expressed that these were the real and proximate cause.

Obviously other inferences were open. The loss of control may have been due to the slackening of the reins as the horses breasted the rise from the ditch to the crown of the road, or the deceased may not really have lost control, and the overturn may have been caused by the oscillation due to faulty loading, the uneven course followed, or to his own weight being thrown upon the down side, or because his weight on the upside caused a more violent return to the other.

In these circumstances, was the negligence which the learned

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Judge found to exist in the placing of the wires the proximate cause of the death, or is the exact cause left in doubt, and is it probably or possibly due to some other condition not connected at all with the wires?

While usually the operative negligence must be proved before a plaintiff can succeed, there seem to be two instances in which it may be inferred from the facts without there being exact demonstration. These are: (1) in cases to which the phrase *res ipsa loquitur* is applied, where matters proved point inevitably to one conclusion; or (2) where, though not clearly indicated, there is only one inference that can reasonably be drawn, as in the cases of *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, followed in *St. Denis* v. *Eastern Ontario Live Stock and Poultry Assn.* (1916), 36 O.L.R. 640, 30 D.L.R. 647, and *Ryan* v. *Canadian Pacific R. Co.* (1916), 37 O.L.R. 543, 32 D.L.R. 372.

Here other conclusions are open, some of them entirely disconnected with the cause for which the appellants have been found liable. This is not a case where, as in *Kolari* v. *Mond Nickel Co.* (1914), 32 O.L.R. 470, 20 D.L.R. 412, all three possible causes involved negligence in the defendants.

The learned trial Judge was, of course, entitled to make the inference he did, or any other sustained by the proved facts, and I presume this Court is equally justified in doing the same thing. In *Toronto Power Co.* v. *Raynor* (1915), 51 Can. S.C.R. 490, 25 D.L.R. 340, the Supreme Court of Canada reversed a very similar finding, which was really an inference from the facts, although confirmed by the Court of Appeal for Ontario. And, if any of these deductions are reasonable and are inconsistent with negligence in the appellants, how can it be said that they are liable? For what happened may after all not have been caused by their fault.

The matter is left in doubt, and, if so, the respondents cannot succeed.

I think, with deference, that there is such a lack of certainty in arriving at the right conclusion as to the proximate cause, that the Court is justified in saying that the respondents have failed to prove negligence in the appellants, and that the appeal should succeed and the action be dismissed.

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Meredith, C.J.O.

MEREDITH, C.J.O. (dissenting):—I am unable to agree with the conclusion to which my learned brothers have come.

The right of the respondents to recover depends upon whether or not it is a proper conclusion upon the evidence that the obstruction to the reasonable use of the highway caused by the telephone wires was the proximate cause of the injury to the deceased which caused his death.

It was proved that, owing to the presence of the wires, it was necessary to crouch down upon the load of hay that he was driving, and that in doing this he lost to some extent the control of his horses. There was also evidence that, owing to this having happened, the horses trotted upon the uneven surface on the side of the highway, and that this caused the overturning of the load of hay and the injuries to the deceased. It is not an unreasonable inference that, as the witness Alfred Hird, who was on the load of hay, testified, the whiffletrees came into contact with the horses' legs, and that was what caused them to trot.

The case is one to which, in my opinion, the principle that one who is suddenly confronted with a danger caused by the acts or neglect of another is not bound to do that which is best in the circumstances to avoid it, applies: the deceased had, to some extent at least, lost control of his horses; and, even if after passing the wires he might have resumed that control and did not do so, he is not to be charged with having been himself responsible for the accident which happened to him.

The learned trial Judge has found that the obstruction caused by the wires was the proximate cause of the accident. That was a reasonable inference from the evidence, though no doubt the inference that my learned brothers draw might have been drawn.

I have not overlooked the evidence as to the manner in which the rack was placed upon the truck, and the argument that the overturning of the hay was due to the insecure manner in which the rack was placed. That view was rejected by the learned trial Judge, and I am unable to say that in rejecting it he erred.

I am, for these reasons, unable to see my way to reversing the findings of fact of the learned Judge; they should not be reversed unless they are clearly wrong; and, in my view, that has not been shewn.

I would dismiss the appeal with costs.

Appeal allowed; MEREDITH, C.J.O., *dissenting.*

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Supreme Court of Canada, Davies, Idington, Anglin and Brodeur, JJ., and Falconbridge, C.J., ad hoc. October 15, 1918.

CONTRACTS (§ I C—26)—PROJECT TO KEEP BOARDERS—RELINQUISHMENT OF—VALID CONSIDERATION—LIFE ANNUITY.

The relinquishment by a niece of the testator of a project of keeping boarders, in order to support herself and her mother, held to have been a valid consideration for an agreement by the testator to provide her with a life annuity.

A compromise of a disputed claim which is honestly made constitutes valuable consideration, even if the claim ultimately turns out to be unfounded.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 43 O.L.R. 479, reversing the judgment at the trial in favour of the appellant. Reversed.

The action was brought against the respondent, Norman M. Allan, personally to recover the sum of $3,000 which he had agreed to pay appellant in settlement of a claim made against the estate of Henry W. Allan, and also against the executors of that estate for the amount of said claim.

Lamport, for appellant; *R. S. Robertson*, for respondents.

Davies, J.

DAVIES, J.:—I am of the opinion that this appeal should be allowed and the judgment of the trial judge restored as to the amount adjudged by him as due the plaintiff, but that it should be entered against the defendants, Allan and Smith, as executors of the last will and testament of the late Henry W. Allan and not as against Norman M. Allan in his personal capacity only.

In one respect I differ from the trial judge, who held that the original understanding or agreement between the plaintiff, appellant, and the late Henry W. Allan, her uncle, that if she would abandon her project or intention of making a living for herself and her mother by opening and keeping a boarding-house, he would allow her a certain sum of money for her own and her mother's support "fell far short of amounting to an agreement legally enforceable by plaintiff."

The plaintiff's mother was a sister of the late Henry W. Allan, and in my judgment his arrangement with his sister's daughter, the plaintiff, that if she would abandon her boarding-house project and devote herself to looking after and keeping her mother he would provide for her as long as she lived and would pay her $50 every 4 months during her and his lifetime, and would make provision out of his estate to produce the same income during her lifetime, was an agreement enforceable in law.

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Idington, J.

My brother Idington does not make any specific finding upon this point. In all other respects than these I have mentioned, I concur in the reasons he has stated for allowing the appeal.

The judgment of the court will be, therefore, to allow the appeal; to restore the judgment in amount of the trial judge and to award it as against the defendants as executors and not as against Allan personally.

IDINGTON, J.:—Once more there is raised herein the oft-mooted question of what may be interpreted such a forbearance on the part of one claiming it to have been given and duly accepted as a consideration for a contract, such as to satisfy the peculiar requirement of our English law.

The trial judge held that the appellant had adduced sufficient evidence from which it might fairly be inferred that she had agreed to forbear and that her cousin, the respondent Norman M. Allan, after long and serious consideration of the facts which she had submitted to him in response to his request therefor, had decided to accede to her demands, in part, and promised her accordingly that he or the representative of the ample estate he enjoys as recipient of the testator's bounty, should and would pay $3,000 to cover all her claims.

The Court of Appeal for Ontario held the trial judge had erred and reversed his judgment.

In doing so it laid stress upon the moderate and conciliatory language used by appellant in presenting her claims and pressing them upon the attention of respondent Norman M. Allan, and her equally inoffensive use of the word "allow" in accepting his solemn undertaking to pay what she now claims herein as of right.

It is not necessary in order to establish that one presenting a possibly legal claim, and who actually believed in ultimate success in a court of law as possible, should assert it in offensive language, or even expressly intimate that unless acceded to an action at law would be taken. Nor for the purpose of making the forbearance from such a mode of asserting a claim a valuable consideration, is it absolutely necessary to have everything believed by either party actually expressed in words.

It is, I admit, the plain obvious inference which he, resisting and then yielding, may have drawn from the presentation to him in regard to any honest, or probably honest, belief on the part of him pressing his right of claim thereto, which may become a cause

of litigation, and the likelihood of such party being driven to try conclusions at law, that may constitute a perfectly good and valuable consideration for his so yielding and a basis for such obligation, as he, drawing such inference, may have entered into.

Long ago, in the common law courts, there prevailed an impression that unless proceedings had been taken there could *not* be said to have been a compromise in that forbearance which constitutes the valuable consideration.

Therefore in *Cook* v. *Wright* (1861), 1 B. & S. 559, 121 E.R. 822, this view seems to have been put an end to by the court holding that the mere threat of legal proceedings, though in law and in fact there was no valid claim, was sufficient, and therefore a promissory note given as a result held good.

Indeed, it is hard to conceive how any one could have supposed in that case that there was any claim in law, yet the recognition of it and the lapse of time secured thereby to the party who was liable in law, and that to the possible detriment of the party accepting the note, it was held that it must be taken there was valuable consideration.

That case was followed by the case of *Callisher* v. *Bischoffsheim* (1870), L.R. 5 Q.B. 449, decided upon the pleadings when Cockburn, C.J., made some remarks, as did also his colleague Blackburn, J., which would go far to support the appellant herein.

These utterances of Cockburn, C.J., especially, were criticized in the later case of *Ex parte Banner* (1881), 17 Ch. D. 480, by Brett, L.J., who seems to doubt the authority of that *Callisher* case.

That, in turn, evoked, in the case of *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, the opinions of the members of a strong appellate court in approval of what had been said and was so criticized.

It is quite evident that the views expressed thus, strongly approved of the views expressed in the *Callisher* case.

And of these views one was the expression of Blackburn, J., p. 452, "that the real consideration depends upon the reality of the claim made and the *bonâ fides* of the compromise," which he quoted from his own judgment on behalf of the court in *Cook* v. *Wright, supra.*

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It is only as giving something shewing the growth of the law, as it were, that the *Miles* case, *supra*, is of any value herein, for the decision turns upon the finding by a majority that there had not in fact been a compromise, though Bowen, L.J., dissented.

This opinion contains the following passage (p. 291), worth quoting for its definition of the requirements of the law:—

It seems to me that if an intending litigant *bonâ fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think, therefore, that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession.

Now let us see what the appellant claimed from respondent, Norman M. Allan.

The testator was her uncle, a brother of her mother, and had been very kind to both.

He went so far as to dissuade the appellant from taking boarders or roomers, and to avert it promised them what was equivalent to an annuity for life, which he varied later. He, however, on October 1, 1912, after continuing the payments, so varied, for some four years, made a promissory note for $1,000 payable to appellant 5 years after date, with interest at 6% to be paid half-yearly on April 1 and October 1, which he enclosed in a letter to her.

In that letter he explained that his state of health was such that he could not stand additional worry, complained of his sons being a burden instead of assistance, and then proceeded as follows:—

I am writing you in this way in order that you may see that I am compelled to make some temporary settlement at least that will help to relieve my mind of the claims that I feel from past promises you have on me.

I am sending you a note for $1,000 upon which I will pay you the interest at 6%, half yearly for 5 years. I will pay you the interest on the notes you have and this for the present you will kindly regard as a settlement of all claims.

Now, Helen, if things brighten up, I will do the best I can. In the meantime this note for $1,000 outright is absolutely good and as I do not intend to risk what I have it is just as safe as any security you could have and in the event of your death this $1,000 you can do what you like with. Should I

die before the note is due, I will instruct my executors to pay in 1 year from the date of my death.

It is to be observed that he had made a will just 4 months previously, in which he had bequeathed to her $1,500.

That will stood good and unrevoked till 6 days before his death, which took place in a hospital at Gravenhurst on March 10, 1913, and no mention was made of the appellant in said will, though in most of its features the bequests are chiefly to the same parties as in the earlier will.

Having regard to the expression in the quotation I make from the letter enclosing the note that it was "for the present," this omission is very singular.

The appellant saw him and waited on him at the hospital, next day after this last will was made.

She swears her uncle told her, after his voluntarily going over the subject of what notes he had given her, that he had made a new will and had left her in that $2,000, and that she would have altogether something over $3,000 from him.

She describes him as a man of unimpeachable character, whose word was always as good as his bond, and consequently she felt much surprised when she learned, after his death, that she was not even named in the will which seems to have been drawn in a hurried sort of emergency at the request of a doctor in charge of deceased, made to another patient, a barrister by profession, in the same hospital after 10 o'clock at night.

The barrister in question was a stranger to the testator, and when so called asked if the matter could not stand until morning, but was told not. The will, as finally drawn, was executed between 2 and 3 o'clock next morning.

Some mistake, or mistakes, in first draft resulted in its being rewritten.

The friends had been 'phoned to, and as a result of the call appellant hastened to the dying man's aid. She found him apparently able to talk, but so weak that he failed to sign cheques, which she had written out for him at his request to pay some accounts he mentioned.

All this led to a correspondence with the respondent, Norman M. Allan, which is in the case, and constitutes all there is to inform us of the claims made the nature thereof, and the resultant under-

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taking to pay appellant $3,000, and her acceptance thereof with thanks. It is to be observed that this was not done in a hurry, but after months of due consideration of a long statement by appellant of what claims she had, based on correspondence she had had with deceased, of which full extracts were enclosed and her statement of what he had told her, relative to the bequest of $2,000 in his will, that he wrote the letter from Glasgow on November 24, 1913, in which he says he had read over very carefully her "letters and copies of extracts from father's letters," and intimates his father had given him when at home to understand that he intended to give about $1,500 in all, and yet he can very easily conceive that he probably increased this in his mind before his death, and he ends that part of the letter by: "Therefore you can take it as settled and I undertake that you shall receive $3,000 inclusive of the promissory notes he gave you."

I should attach much more importance to the words "settled" and "undertake," and hold them as much more significant of what was present to the mind of respondent in writing thus than it is possible to find in her expression "allow."

It is not, however, on such like criticism and analysis of the language used that I should care to rely, but upon the broad features of the case as presented.

Did the case which her brief laid before him present to his mind the possibility of litigation ensuing unless he made some settlement; and hence was it to avert such result, no matter how confident he might be of winning out, that he signed the undertaking? If so, then he is bound. And can there be a doubt that he was solely moved by such considerations?

To assume in face of such a retraction of such promise, 14 months later, that he had been only moved by moral considerations, seems to me quite absurd.

The possessor of such an ample estate, so easily acquired, making such a retraction, and inflicting thereby such a blow of disappointment upon his cousin, who had doubtless for 14 long months assumed that all her troubles had been so happily ended, was not the man to be moved by any moral or sentimental notions.

I, therefore, have no doubt as to his attitude of mind as having relation only to, and being governed solely by, the possibilities of litigation ensuing unless he settled.

If proof were needed of this fact that the $1,000 note his father gave and coupled its giving with an assurance that his executors would be instructed to pay it within 1 year after his death, yet remains unpaid, supplies ample proof.

The fact that this assurance, forgotten in the making of the will, was brought to the respondent's mind is clear from his own letter, yet he has not been moved to regard that engagement of his father.

And the omission of all reference thereto in the will doubtless furnished another disturbing proof to him that such a will might not be quite unimpeachable under the distressing circumstances in which it was made.

Convinced as I am by these considerations that respondent was moved solely by one purpose, and that, to avert litigation, I ask myself whether he who knew appellant intimately and acted solely on the chances of her entering upon litigation, if he refused to yield, was not more likely to be right in his judgment in that regard than any judge can be when depending only on the written record and rejecting all inferences to be drawn therefrom or other palpable facts.

I have no difficulty in concluding that appellant had present to her mind her own belief in the law being likely to furnish a remedy for what she evidently thought had been a grave mistake in the framing of the will.

The question of whether or not in fact she could have succeeded is immaterial for our present purpose. But after the lapse of two years her difficulties would be much greater and hence his boldness and courage correspondingly enhanced.

Any one of long experience at the bar knows well that cases much more hopeless of success than what she presents, as her basis of possible action in regard to this will and the state of mind of the testator, are often tried.

Again, the fact that proposed litigation was in fact not mentioned in the correspondence goes for little if we accept the fact that it discloses no intention to bring this action, yet we have it.

The following cases where expected forbearance was the only consideration, and yet not a word of threat or otherwise used relative to proposed litigation, unless a solicitor's conducting the business in one instance or other people's litigation be so taken, are instructive in this connection.

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See *Alliance Bank* v. *Broom* (1864), 2 Dr. & S. 289, 62 E.R. 631; *Wilby* v. *Elgee* (1875), L.R. 10 C.P. 497; *Ockford* v. *Barelli*, 20 W.R. 116; *Oldershaw* v. *King* (1857), 2 H. & N. 517, 157 E.R. 213; *Attwood* v. ———— (1826), 1 Russ. 353, 38 E.R. 137; *Lucy's* case (1853), 4 De. G.M. & G. 356, 43 E.R. 545.

For these and other considerations presented in the judgment of the trial judge, I conclude he was right and this appeal should be allowed with costs and his judgment restored.

Anglin, J.

ANGLIN, J. (dissenting):—I would dismiss this appeal for the reasons given by the Chief Justice of Ontario.

To whatever sympathy the plaintiff may be entitled and whatever should be thought, if regarded from an ethical point of view, of the conduct of the defendant, Norman M. Allan, in repudiating his promise to her, I cannot find that that promise had either been made or accepted as the compromise of a claim preferred by her as enforceable at law. On the contrary, the sole consideration for it was of a moral character—Norman Allan's belief that his father may have entertained intentions in favour of the plaintiff unfortunately for her not expressed in a form legally binding. There is nothing to shew that either the plaintiff or Norman Allan ever thought that she had, or could have, a legal claim against the late H. W. Allan's estate.

I agree with the trial judge and the appellate division that, apart from Norman Allan's promise, the plaintiff had no enforceable claim against his father's estate.

Brodeur, J

BRODEUR, J.:—Mr. Henry W. Allan was a man of means, having left an estate of nearly $100,000. He had a sister, Mrs. Francis, who was not in very comfortable circumstances, and as she was rather advanced in years, she was looked after by her daughter, Miss Helen Francis, the appellant in this case. Mr. Allan was very kind to them, and contributed with some other relations to their support.

At one time, however, Mrs. and Miss Francis contemplated keeping roomers, and so informed H. W. Allan, since, on January 7, 1909, he wrote to his niece, the appellant, that his sister, Mrs. Francis, had worked hard enough all her life without taking lodgers, and he was sure satisfactory arrangements would be made for the mother and the daughter. He entered into an arrangement with the appellant whereby he promised to provide

a sum of $200 a year during her lifetime and to make provision out of his estate to produce the same income.

The relations of those three persons were of the best, and it is no wonder that Mr. Allan, who was occupying a high social standing and had been in public life, would have prevented his sister from taking roomers and would have provided for her and her daughter. He had no daughters himself and was not having, perhaps, from his sons all the consolations which his old age might expect. When he died he would have been alone if the appellant, his niece, had not been at his bedside; his son, the respondent, had left the country and was in Scotland.

The payments agreed upon were duly made from 1909 to 1912, when H. W. Allan became rather short of funds and gave two notes of $100 and $50 respectively in payment, payable at 2 years from date but with interest. In May, 1912, he made a will with a legacy of $1,500 to the appellant.

In October of the same year, he gave the appellant another note of $1,000, payable in 5 years also with interest to be paid half yearly.

A few days before his death he said to his niece that he had left her $2,000 in his will and that sum, with the notes, would give her a little more than $3,000, and she would then get about the same income as he had been providing for her mother and herself during the last four years.

When he was very ill and on the point of death, Mr. Allan made another will and no mention is made therein of his niece, the appellant. He was then so weak that the doctor, who requested Mr. Bruce to draft the will, said it had to be made right away during that night for fear the testator could not see the next day.

After his arrival in Canada, the respondent, Norman Allan, who was one of the executors, wrote to his cousin, the appellant, that he understood she had a claim against his father in notes and otherwise, and asked for information.

She then told him of the notes she had and the declaration he made to her as to the contents of his will, and she gave him extracts of the letters of H. W. Allan stating the circumstances under which his obligation had been contracted and the consideration for which he had undertaken to provide for her.

The respondent, after several months, answered that in those

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circumstances he was willing, though no provision was made for her in the will, to pay her $3,000 in satisfaction of her claim. But in January, 1915, he repudiated his obligation and the present action is to recover that amount of $3,000. He says in his plea that there was no consideration for the agreements alleged in the statement of claim, neither on his part nor on the part of his father.

The action was maintained against him personally by the trial judge on the ground that the obligation of the respondent was based on a compromise for a settlement of plaintiff's claims. That judgment was reversed in appeal, but judgment was given against the estate for the two notes then due and for interest.

I am of opinion that the trial judgment should be restored. There is no doubt that the appellant had valid claims for the notes which she had in her hands, namely, $1,150, since the respondents accept the judgment which condemned them to pay the note due and the interest on the other. As to the legacy of $2,000, she had every reason to believe that she had a legitimate claim.

There might be a question, besides, whether the will made in March, 1913, was valid or not. It is rather extraordinary that, willing as he was to provide for a permanent income to his niece of about $200 per year, the testator should have said to the solicitor who prepared the will, and who was an absolute stranger to him, and who did not know anything about his affairs, that he had already provided for her by way of notes, when the notes she had would give her only about $60 a year. His mind then was not clear enough to make a valid will, or he was confused as to the amount of his obligation resulting from those notes.

It is no wonder that the son, being apprised of all those circumstances, would be willing to make a settlement and to agree to pay the total sum of $3,000, which was a little less than the amount which was supposed to be in the will and the amount of the notes.

A compromise of a disputed claim which is honestly made constitutes valuable consideration, even if the claim ultimately turns out to be unfounded: 7 Hals., p. 387.

The appellant had an undisputed claim for a part of the sum which the respondent undertook to pay, and she was in perfect

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good faith when she was claiming an additional sum of $2,000 under the will; and the facts as then disclosed and known might perhaps have created some difficulty as to the validity of the will. It is no wonder that the respondent, as a son respectful of the wishes of his father, would, in such a case, have agreed to compromise and settle for $3,000; and, as the compromise was made with the evident consent of the two executors, the estate should be held liable.

The judgment *a quo* should be reversed with costs of this court and of the court below, and judgment should be rendered against the estate for the sum of $3,000 with costs of this court and of the courts below.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—I concur in the opinion of Davies, J.

Appeal allowed.

HORNSTEIN v. CANADIAN NORTHERN R. Co.

SASK.

C. A.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 21, 1918.

RAILWAYS (§ II—10)—RAILWAY ACT, R.S.C., c. 37—TENDER OF AMOUNT OF DAMAGES FOR CONSTRUCTION—CONDITION PRECEDENT—NO DAMAGES FOR SMOKE AND NOISE.

Sec. 235 of the Railway Act, R.S.C., c. 37, as amended by 1-2 Geo. V. c. 22, s. 6, does not make the payment or tender of the amount of damages the land would suffer by the building of the railway, a condition precedent to the building of such railway.

The section does not give the court jurisdiction to award damages due to noise, smoke and vibration caused by operation of the railway; any such claim should be made by application to the Board of Railway Commissioners.

[*Corp. of Parkdale* v. *West* (1887), 12 App. Cas. 602, referred to.]

Statement.

APPEAL by plaintiff from the judgment of Brown, C.J.K.B., in an action for damages to property caused by the building of a railway. Affirmed.

W. F. Dunn, for appellant; *Hon. W. E. Knowles*, K.C., for respondent.

Newlands, J.

NEWLANDS, J.:—The defendant company got the permission of the Railway Board to run their line of railway along a street in the City of Moose Jaw. The plaintiff has lots facing on this street. He sued for damages due to the construction of the railway, and also for damages due to noise and smoke and vibration caused by its operation. The trial judge allowed him damages on account of the construction, but refused to allow for damages caused by its operation. From this latter part of the judgment the plaintiff appeals.

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The plaintiff bases his argument for these damages upon the contention that the building of the railway was unlawful, because the company did not pay or tender the amount of damages his land would suffer by the building of this railway before they built the same.

He contends that s. 235 of the Railway Act (R.S.C., c. 37), as amended (1-2 Geo. V., c. 22, s. 6) which provides that:—

> Subject to the company making such compensation to adjacent or abutting land owners as the Board deems proper, the railway of the company may be carried along or across an existing highway upon leave therefor having been first obtained from the Board as hereinafter authorised,

makes the payment or tender of these damages a condition precedent.

There is no provision in the Act as to the procedure for obtaining these damages, nor the time when they must be paid. The plaintiff contended that the provisions of the Act as to the payment or tender of compensation for land taken for the purposes of the railway applied, and he cited *Corp. of Parkdale* v. *West* (1887), 12 App. Cas. 602, as an authority for this proposition. That it is not so is shewn by the remarks of Lord Macnaghten in that case on the case of *Jones* v. *Stanstead R. Co.* (1872), L.R. 4 P.C. 98. At p. 615, he says:—

> It was pointed out in the judgment that it was not the construction of the railway bridge, but the use of it when constructed for the conveyance of traffic, which injuriously affected the privilege of the appellant, and gave him, if at all, the right to compensation, and their Lordships expressed their opinion that it was not a reasonable construction of the statute under consideration to imply as a condition precedent that compensation must be paid *for such consequential injuries* before doing the work. And the appeal was consequently dismissed.
>
> It was urged that if compensation was to be paid in respect of rights over land interfered with by the construction of a railway as a condition precedent before doing the work, railway companies would be liable to be treated as wrongdoers in a variety of cases, and would be seriously hampered in exercising their statutory powers.
>
> Their Lordships do not feel pressed by this difficulty. The cases in which railway companies, in the construction of their railway, unwittingly interfere with the rights of other persons, must be very few. In the present case, certainly, the interference complained of is not due to any inadvertence.
>
> If a person whose rights are injuriously affected is refused compensation, he may be compelled to bring an action for injunction. But even in that case the court would probably not interfere with the construction of the works by an interlocutory injunction if the railway company acted reasonably, and were willing to put the matter in train for the assessment of compensation.

I think the plaintiff's remedy in this case is by application

to the Board of Railway Commissioners. He never had the right to recover, in an action, damages for noise, smoke and vibration caused by the operation of the railway. Whether s. 235 gives him the right to claim such damages before the Board of Railway Commissioners is a question I have not to decide, it is sufficient for this case to say that it does not confer upon the court any such jurisdiction.

Newlands, J.

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

Haultain, C.J.S. Elwood, J.A.

HAULTAIN, C.J.S., and ELWOOD, J.A., concurred with Newlands, J.A.

Lamont, J.A.

LAMONT, J.A.:—The point we are called upon to determine in this appeal is, whether the plaintiff is entitled to damages which he claims he has suffered by reason of the operation of the defendant's train along Home St., in the City of Moose Jaw, on which his property abuts, as distinguished from the damages he suffered by reason of the construction of the railway. In his pleadings he claimed damages for both the construction of the railway and its operation.

The Chief Justice of the King's Bench, before whom the matter came, awarded him damages for depreciation of his property by reason of the construction of the railway, but held that he was not entitled to damages for smoke, noise, and vibration due to its operation. It is from the latter portion of this judgment that the plaintiff now appeals.

In his factum, counsel for the plaintiff frankly admits that prior to 1911 the plaintiff's compensation in proceedings under the Railway Act would have been limited to construction damages only. *Hammersmith* v. *Brand* (1869), L.R. 4 H.L. 171; *Powell* v. *T.H. & B.R. Co.* (1898), 25 A.R. (Ont.) 209. But he claims that by reason of an amendment made to s. 235 of the Railway Act in 1911 the plaintiff is now entitled to recover damages for loss sustained by reason of the operation of the railway, as well as by its construction.

S. 235, as amended, in part reads:—(See Newlands, J.A.)

It was contended that the section was amended because the Privy Council in *G.T.R. Co.* v. *Fort William*, [1912] A.C. 224, held, that, as the section formerly stood, the powers of the Board of Railway Commissioners to award damages to land-owners in Fort William whose lands abutted on the street along which

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the railway ran was limited to constructive damages, and did not include damages arising from the location of the railway.

The section as it now stands does, in my opinion, empower the Board to direct that the railway company shall compensate abutting land-owners for operating damages, should the Board see fit to do so. But that is not the question. The question is: Can the plaintiff be said to be entitled to such damages unless and until the Board does so direct? In my opinion, he can not. The section provides that, subject to paying such compensation as the Board may deem proper, the railway may be carried along the highway upon leave therefor first having been obtained from the Board. In this case, the leave was obtained and the railway carried along Home St. In carrying it along the street the railway company was within its rights; but, by so doing, the company subjected itself to pay such compensation as the Board shall deem proper. That is the only condition Parliament has imposed upon the company for carrying the railway along the street.

As it is admitted that the court cannot grant the plaintiff operative damages unless s. 235, as amended, authorizes it so to do, and as, under that section, the Board is the only tribunal authorized to say what compensation shall be paid, I am of opinion that, until the Board fixes the compensation, the company cannot be compelled to pay.

The Board has not fixed the compensation. The reason it has not done so is because no person has made an application to it therefor. Counsel for the plaintiff contended that it was the duty of the company to make the application, and that, in default of such application being made, the court could fix the compensation. There is in my opinion no authority for such a proposition. Generally speaking, a party desirous of obtaining an order makes the application for it. The statute does not impose the obligation on either party. If the plaintiff wants compensation, I cannot see any reason why he should not apply to the Board for an order to have the same fixed. On obtaining an order granting him operative damages the company will be obliged to pay, but, until the Board sees fit to direct their payment, the company cannot be compelled to pay.

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

Appeal dismissed.

TREEN v. SILLIKER.

N. S.

S. C.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Drysdale, JJ., and Ritchie, E.J. December 21, 1918.

CONTRACTS (§ II A—125)—AGREEMENT TO BUY LAND—TERMS ON WHICH LAND TO BE RECONVEYED—TENDER OF INTEREST IN LAND INSTEAD OF SYNDICATE—NON-COMPLIANCE WITH TERMS.

The defendants organised a syndicate for the purpose of acquiring land in Alberta. The plaintiff subscribed for one share. An agreement was entered into, by which if the land purchased was not sold within a certain time, and the plaintiff wished to dispose of his share in the syndicate, defendants would take over the plaintiffs' interest at the actual cash amount invested by him with interest on execution by plaintiff of a good and sufficient transfer of his share containing covenants that said share had not been in any way incumbered.

The court allowed the appeal and dismissed the action on the ground that, under the terms of the agreement, it was necessary for plaintiff to tender a conveyance of his interest in the syndicate; this he had not done but had only tendered a conveyance of his interest in the land held by the syndicate.

Statement.

APPEAL from the judgment of Chisholm, J., in favour of plaintiff in an action to recover a sum of money paid by plaintiff for the purchase of a share in a syndicate formed for the purchase and sale of land at Calgary, Alberta. Reversed on a ground not taken at the trial.

F. L. Milner, K.C., for appellant; *G. H. Sterne*, for respondent.

Harris, C.J.

HARRIS, C.J.:—The defendants got up a syndicate for the purpose of acquiring lands near Calgary in the Province of Alberta. The capital was to be $12,000, divided into 12 shares of $1,000 each, and the plaintiff subscribed for 1 share, and paid $500 on account. An agreement was made between the plaintiff and defendants reciting the syndicate agreement, and providing that if the Calgary property was not sold within 3 years, and the plaintiff wished to dispose of his share in the syndicate, the defendants would take over and purchase the interest of the plaintiff in said syndicate at the actual cash amount invested by the plaintiff, with interest at 6% per annum:—

Upon execution and delivery by said B. B. Treen of a good and sufficient transfer containing covenants that said share in said syndicate had been in no way incumbered or hypothecated while in the possession of said B. B. Treen.

The property was not sold by the syndicate within 3 years, and the plaintiff tendered to the defendants a transfer of his interest in the real estate at Calgary, which contained no covenants.

We are told by counsel for plaintiff that, on the trial, he put in a bond in the sum of $1,000, given by the plaintiff to the defendants, dated May 8, 1917, containing recitals that the agree-

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ment had been made; that plaintiff covenanted that he had not incumbered or hypothecated the property or his ownership thereof in any way; and containing the following condition:—

That if the said B. B. Treen, his heirs, executors, administrators and assigns, do and shall, from time to time, and at all times hereafter, well and truly save, defend and keep harmless and fully indemnify the said Clarence J. Silliker and M. B. Vail, their heirs, executors, administrators and assigns and their lands and tenements, goods and chattels and effects of and from any claims which any persons shall have against the said B. B. Treen for any incumbrances which may be placed on the said property, and if the title to the said property shall be as good as that which the said B. B. Treen received, save for taxes or rates assessed against the said property, then this obligation shall be void, otherwise to be and remain in full force and effect.

The minutes of trial do not shew that this bond was proved or put in, nor is there any evidence that it was ever delivered to the defendants, but, assuming that these facts were proved, it is obvious, I think, that it does not help the plaintiff's case.

The contention set up on the trial, on behalf of the defendants, was that the provision of the agreement in question was a contract or option creating an equitable interest in land to arise in the future, and that this equitable interest was not created in such terms that it could not vest after the expiration of 21 years computed from the creation of such equitable interest, and was, therefore, invalid and void as infringing the rule against perpetuities.

The trial judge decided that the contract was personal and did not create any interest in land, and he gave judgment for the plaintiff.

The defendants appealed, and on the argument contended that what the contract required was an assignment or reconveyance of the plaintiff's share in the syndicate and not in the land, and, as plaintiff had not tendered a conveyance of his interest in the syndicate but in the land, the action could not be maintained.

The point, admittedly, was not taken on the trial. I think it is well taken, and that the plaintiff cannot recover.

It seems obvious that the plaintiff's interest in the syndicate and his interest in the land held by the syndicate are not the same thing. The interest in the syndicate might be worth more or less than the plaintiff's interest in the land, and the contract required a conveyance of his interest in the syndicate.

What the defendants obligated themselves to do was to repay

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the money upon execution and delivery by the plaintiff of a good and sufficient transfer of the plaintiff's interest in the syndicate, containing covenants that his share in the syndicate had not been incumbered or hypothecated while in his possession.

There was no tender of any such transfer, or any transfer of the plaintiff's share in the syndicate, nor is there any suggestion in the pleadings or proof that the plaintiff is ready and willing to transfer such share, and without this he cannot require the defendants to pay.

It is unnecessary to consider any of the other grounds argued.

As defendants succeed on a ground not taken on the trial, the appeal will be allowed without costs and the action dismissed with costs. The plaintiff will have the right to bring another action if so advised.

Russell, J.
Drysdale, J.
Ritchie, E. J.
Longley, J.

RUSSELL and DRYSDALE, JJ., and RITCHIE, E.J., concurred.

LONGLEY, J.:—It is not necessary to dwell upon the point against perpetuities because no reference is made in the judgment of this court, and it was decided by the learned judge who tried the cause that it did not apply. The only reason for overturning the judgment and granting a new trial, is the fact that the conveyance tendered by the plaintiff to defendant is not a conveyance of all his interests "in the syndicate." That part of the judgment I am unable to concur in. I think the plaintiff gave the defendant the only thing there was to give, namely, his interest in the shares of the land, and that any change of that "to the syndicate" would have been useless, purposeless and unavailing, and I think that the bond that accompanied this conveyance guaranteeing that all the plaintiff's rights, in so far as they affected it, would be reimbursed, if there were any such rights, is sufficient surety for the same. I think that a new trial would only involve needless and expensive litigation. *Appeal allowed without costs.*

FISHER v. CANADIAN PACIFIC R. Co.

QUE.
S. C.

Quebec Superior Court, Guerin, J. October 16, 1918.

CARRIERS (§III C—392)—ACCEPTANCE OF GOODS FOR CARRIAGE—NEGLIGENCE—LIABILITY FOR INJURY.

A railway company which, by its local station agent, accepts and receives goods for carriage is bound to use reasonable care for the protection of such goods. If they are carelessly left on the station platform uncovered overnight and thereby become damaged, the company is liable.

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Statement.

ACTION to recover the price of goods damaged.

On June 29, 1917, between 6 and 7 o'clock, 4 cases of dry goods were delivered by Harold Botham at Bellamy, Ont., to the station agent of the company defendant, for the purpose of being shipped to the plaintiff at Montreal. The station-master, instead of placing such cases of goods in the shed of the company, left them on the platform, telling the shipper to wait until the following morning for the bills of lading, which were, on the next day, issued and handed over to the said Botham. During the night there was heavy rain, and when the goods arrived at Montreal, it was discovered that they had been damaged by water to the extent of $350.20. The action claims that amount from the defendant.

The plea is that the 4 cases of goods were left on the platform by the carter who brought them, after having been refused by the defendant's agent, for the reason that the office was closed. It is true that the bills of lading were issued in the following day, but the same were canceled in the afternoon of the same day.

The defendant denied that there had been any fault committed by its agent; and says that it is not responsible.

The Superior Court maintained the action.

Dessaulles, Garneau and *Vanier*, for plaintiff; *Rodolphe Paradis*, K.C., for defendant.

Guerin, J.

GUERIN, J.:—Considering that, on June 28, 1917, Harold Botham, a carter, received 4 cases of dry goods, between 5 and 6 o'clock p.m., at North Augusta, Ont., from the plaintiff, who, with three others, helped to load the same on Botham's wagon;

Considering that when Botham received the cases of goods they were dry and that he carted them to the station of the defendant company, at Bellamy, which is about 5 miles distance from North Augusta, and delivered the same to the company's station-master at Bellamy;

Considering that the station-master accepted the goods for shipment by freight to Montreal, helped Botham to unload the cases and placed them on the station platform, and promised Botham that he would give the freight bills for the shipment the next morning, which promise he fulfilled;

Considering that these goods were left uncovered on the platform about 7.30 p.m., when the station-master and Botham separated, the latter returning to his home at North Augusta;

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Considering that the defendant had the goods under its care from about 7.30 p.m., and was bound to use ordinary prudence in sheltering them from danger and the possible inclemency of the weather, all of which could have been done by placing them in the company's freight shed as the goods had to remain in the company's custody until the next day, when the train for Montreal was to start from Bellamy;

Considering that during the night of the 28th and 29th of June, 1917, while these goods were in the custody and under the care of the defendant, it rained heavily, and it was found when the goods reached Montreal, that they were seriously damaged;

Considering that it appears from the evidence that the plaintiff purchased these goods for $71, and that he could have sold them for $300, had they not been damaged, and that he sold them for about what he had purchased them;

Considering that the plaintiff has proved a loss of $229, for which the defendant is responsible;

Considering that the plaintiff has proved the essential allegations of his declaration to the extent of $229;

Considering that the defendant has not proved the essential allegations of its plea;

Doth condemn the defendant to pay the plaintiff $229 with interest thereon from September 21, 1917, date of service and the costs, and doth dismiss the plaintiff's demand as the surplus claimed. *Judgment accordingly.*

MACDONALD v. MACDONALD.

N. S.

S. C.

Nova Scotia Supreme Court, Russell, Longley and Drysdale, JJ., and Ritchie, E.J. December 21, 1918.

BILLS AND NOTES (§ III B—62)—MAKERS OR INDORSERS—TRUE RELATION BETWEEN—WHOLE FACTS AND CIRCUMSTANCES TO BE REFERRED TO—LIABILITY OF PARTIES—INTENTION.

For the purpose of ascertaining the true relation to each other of the parties who put their signatures upon a promissory note either as makers or indorsers, the whole facts and circumstances attendant upon the making, issue and transference of the note may be referred to by the court, and reasonable inferences derived from these facts and circumstances are admitted to qualify or alter the relative liabilities which the law merchant would otherwise assign to them.

Statement.

APPEAL from the judgment of Chisholm, J., in favour of plaintiff for the amount of a promissory note and interest, less one-third of the same, made by an incorporated company, and

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its president, secretary-treasurer and directors in favour of one of the directors of the company, who signed the note as a director, and indorsed the same to plaintiff, his wife, by whom the action was brought. Reversed.

S. Jenks, K.C., for appellant; *J. McG. Stewart*, for respondent.

The judgment of the court was delivered by

Ritchie, E. J.

RITCHIE, E.J.:—I quote the judgment appealed from because it states the facts and the position of the parties fully and clearly:—

This action is brought to recover an amount alleged to be due in respect of a joint and several promissory note which was made and indorsed as follows:

Halifax, December 20, 1909.

$2,000 with interest.

Six months after date we jointly and severally promise to pay to the order of Henry A. Macdonald two thousand 00/100 dollars with interest at 6% per annum at his residence. Value received.

(Sgd) Macdonald & Co. Ltd.; Rufus O. Bayer, president; Rod. Macdonald, secretary-treasurer; H. A. Macdonald, Roderick Macdonald, Rufus O. Bayer (endorsed). (Sgd.) Henry A. Macdonald.

The plaintiff is the wife of the defendant, Henry A. Macdonald, the payee of the note, and the said Henry A. Macdonald, and the defendants Roderick Macdonald and Rufus O. Bayer, who signed the note with the defendant Macdonald & Co., Ltd., were at the time directors of the said company. The note was given to secure payment of a loan in cash made by the said Henry A. Macdonald to the defendant company. Henry A. Macdonald endorsed the note to the plaintiff after the same became due, and all grounds of defence which the defendant Roderick Macdonald could raise against the said Henry A. Macdonald are available to him in this action.

The action is defended by the defendant Roderick Macdonald, who pleads that, at the time of the issue of the writ of summons, the defendant Henry A. Macdonald was indebted to him in the sum of $2,833, being one-third of the amount of $8,500 paid by the defendant Roderick Macdonald to the Canadian Bank of Commerce. The amount was paid to discharge a guarantee to said bank entered into by the said defendants (other than the defendant company), which said guarantee was made to said bank on behalf of and as surety for a debt of the said defendant company to said bank. The defendant company, the defendant Roderick Macdonald claims, failed to pay the bank. He now claims to offset the said amount against the plaintiff's claim and counterclaims for the said sum and interest.

On August 7, 1910, the defendants Henry A. Macdonald, Rufus O. Bayer and Roderick Macdonald signed a joint and several guarantee to the Canadian Bank of Commerce for the defendant company, the liability being limited to the sum of $8,000 and interest. On the strength of this guarantee, the Canadian Bank of Commerce made loans to the defendant company and discounted its trade bills, and this course of business continued until April 28, 1913, when the liability to the Canadian Bank of Commerce for loans to the defendant company was paid off. The trade paper was paid off on November 10, 1913; it probably took care of itself.

The amount due to the Canadian Bank of Commerce by the defendant company on April 28, 1913, was $7,400, and it was paid by the cheque for

that amount of the defendant Macdonald & Co., Ltd., on the Union Bank of Canada. The evidence shews that the defendant company obtained a loan from the Union Bank on a guarantee signed by the defendants Roderick Macdonald and Rufus O. Bayer, the proceeds of the loan being deposited in the Union Bank to the credit of the defendant company; and the company thereafter drew cheques against the amount, the cheque to the Canadian Bank of Commerce being the first so drawn.

It is contended on behalf of the plaintiff, and I think correctly, that the liability of the sureties to the Canadian Bank of Commerce was secondary, that of the defendant company being the primary liability; so that if the primary liability, that of the principal debtor, be discharged, the liability of the surety is at an end. In other words, the surety has been discharged by the fulfilment of the contract.

DeColyar on the Law of Guarantees (3rd ed.), pp. 450-1, states an elementary principle of law:—

"The fulfilment of the purpose for which the guarantee was given has, of course, the effect of completely discharging the surety. . . . The surety will, of course, be discharged if the debt guaranteed be paid by the principal debtor."

I take the transaction in this case to amount to a payment by the principal debtor, the defendant company, to the creditor the Canadian Bank of Commerce. The payment was made by the company's cheque drawn upon the company's account in the Union Bank of Canada.

It was, in my opinion, a payment of the indebtedness by the company, and with it terminated the liability of the defendant Henry A. Macdonald on the surety contract with the Canadian Bank of Commerce. As a result of that view the defendant Roderick Macdonald cannot maintain his offset and counterclaim.

The defendant Henry A. Macdonald is both the payee of the note and one of the makers of it. This loan was to the defendant company; he took a note signed by the company and by the three directors of which he was himself one. The arrangement was, in my opinion, that the three directors signed as sureties for the company, although it is anomalous for a party to be both payee and maker. If that was the situation, and the defendant Roderick Macdonald paid the note in full, he would be entitled to call on the defendant Henry A. Macdonald for contribution. The same result is arrived at by directing judgment in favour of plaintiff for the amount of the note and interest thereon less one-third of the same. I understood from Mr. Rogers on the argument that that is the amount for which he seeks judgment against this defendant.

Counsel for the defendant Roderick Macdonald admitted that he was liable to pay one-third of the note sued on, but contested his liability to pay two-thirds of the note, and this is the only question involved in this appeal.

I quite agree with the trial judge that the three directors signed the note as sureties for the company. The question is what are their rights under the facts and circumstances of this case as between themselves. If the form of the note is the only

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thing to be regarded, then each is liable for the whole. This would mean that Henry A. Macdonald who advanced the money was undertaking as a maker of the note that he should be liable for the whole amount; this, of course, was not the intention. In order to do justice between the parties it is, I think, necessary to get at the meaning and intent of the whole transaction. It is not, I think, the case of ordinary suretyship. If the note had been given to an outside party then, of course, each party would have been liable for the whole. If one paid it all, then he would have the right of contribution against the others. That a man should make a note in favour of himself is, of course, very unusual; it is, however, I think, the key to the transaction; and the real transaction in my opinion, was that these three men, all being interested in the company, each as between themselves undertook to pay one-third of the note if called upon. The judge has decided that Henry is to pay one-third. If it was the intention that Henry was to bear one-third only, I cannot see how it could have been the real transaction that Roderick was to pay two-thirds. As makers of the note they were both purporting to undertake the same liability. I think I must get away from the ordinary rules of the law merchant and try to ascertain what the parties really had in view, and determine their rights and liabilities in the light of the whole transaction, and for this position there is high authority.

In *MacDonald* v. *Whitfield* (1883), 9 App. Cas. 733, at 745, Lord Watson said:—

> But it is a well-established rule of law that the whole facts and circumstances attendant upon the making, issue and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them.

There is a judgment against Bayer, and nothing on the record to indicate that he is not financially responsible, but, assume he is not, why should Roderick bear his share any more than Henry? Why should not each bear half of Bayer's share? They both were interested in the company, and both are makers of the note. Does not the situation indicate that the intention was that each was to bear an equal share as between themselves? I think the answer to this question must be in the affirmative.

This is the view which the plaintiff's solicitor, Mr. Rogers, K.C., took of it in his letter to Mr. Mellish, K.C., of July 6, 1916, where he said:—

> All three of the defendants, so far as they are sureties, must equally contribute to the payment of the claim if the company does not respond.

I entirely agree with this statement of the law, but if it is a sound statement why let Henry off with one-third, and make Roderick pay two-thirds?

I think the appeal must be allowed with costs, and the judgment below reduced to one-third of the amount due on the note.

Appeal allowed with costs and judgment reduced.

PULOS v. LAZANIS AND KLADIS.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Brodeur, JJ. November 18, 1918.

PARTIES (§III—120)—INTERVENTION—JUDICIAL PROCEEDING—JURISDICTION OF COURT DETERMINED BY AMOUNT IN CONTROVERSY ON INTERVENTION.

An intervention is a "judicial" proceeding within the meaning of s. 46 of the Supreme Court Act.

The amount in controversy upon the intervention is the amount that governs the jurisdiction of the Supreme Court of Canada to hear an appeal.

[*King* v. *Dupuis* (1898), 28 Can. S.C.R. 388; *Coté* v. *Richardson* (1906), 38 Can. S.C.R. 41, followed.]

Statement

MOTION to quash for want of jurisdiction an appeal from the judgment of the Court of King's Bench, appeal side, 24 Rev. Leg. (N.S.) 482, reversing the judgment of the Superior Court, District of Montreal, and maintaining the respondents' intervention.

The grounds urged on the motion raised are fully stated in the judgment now reported.

Belcourt, K.C., for the motion; *J. C. Walsh*, K.C., and *Clark*, *contra*.

The judgment of the court was delivered by

Brodeur, J.

BRODEUR, J.:—This is a motion to quash for want of jurisdiction.

An action had been instituted several years ago by the appellant in the first case, Pulos, against Lazanis, for a sum of $1,807.56. Judgment was rendered in 1912 for that sum with interest.

In 1916 a writ of *saisie-arrêt* after judgment was issued in the ordinary way to recover money in the hands of the firm of Sperdakos & Lerikos. The *tiers-saisis* declared in substance that the defendant, Denis Lazanis, was virtually a member of their firm, and that they owed him money.

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The wife of Denis Lazanis then fyled an intervention and claimed that it be declared that the defendant Lazanis, her husband, had no share in the partnership of Sperdakos & Lerikos, but that she be declared the sole proprietor of one-third share in that partnership.

That intervention was contested by the plaintiff, Pulos, and by the two other members of the partnership, Lerikos and Sperdakos. The Superior Court dismissed the intervention but that judgment was reversed on appeal.

Then the real controversy on that intervention was whether the third interest in the firm belonged to the defendant or to his wife.

The respondent contends that the jurisdiction of this court should be determined by the amount originally claimed on the main action, and relied on *Champoux* v. *Lapierre* (1883), Coutlee's Digest 56; *Kinghorn* v. *Larue* (1893), 22 Can. S.C.R. 347, and *Gendron* v. *McDougall* (1895), Cameron's S.C. Digest, 2nd ed., 1913.

On the other hand, the appellants claim that the value of the share in dispute should determine our jurisdiction.

It is now the well-settled jurisprudence of this court that an intervention is a "judicial" proceeding within the meaning of s. 46 of the Supreme Court Act; and where the appeal depends upon the amount in controversy there is an appeal to this court if the amount in controversy upon the intervention amounts to the value of $2,000. *King* v. *Dupuis* (1898), 28 Can. S.C.R. 388; *Coté* v. *Richardson* (1906), 38 Can. S.C.R. 41.

The intervening party, the respondent, stands in the same position as a plaintiff, and her proceeding is, to all intents and purposes, an action in revendication of her rights in the partnership.

The amount of money she claims to have put in the partnership is $2,000. In the Court of Appeal, the so much regretted late Chief Justice stated in his reasons of judgment that her partners offered her husband $5,500 for her share, and that the husband asked for $7,000. The affidavits fyled proved beyond doubt that the value of that share exceeds $2,000.

In those circumstances, we have jurisdiction, and this motion to quash should be dismissed with costs.

Motion dismissed.

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Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Drysdale, JJ., Ritchie, E.J., and Mellish, J. December 21, 1918.

AUTOMOBILES (§ III—221)—RULES OF ROAD—ATTEMPTING TO PASS ON ROAD—NEITHER MACHINE EXCEEDING SPEED LIMIT—RACING WITHIN S. 25 OF MOTOR VEHICLE ACT, N.S.

If two motor cars are on a public highway and one endeavours to pass the other, the first one has a perfect right to put on more speed and prevent it from doing so. If neither machine exceeds the speed limit, this cannot be considered racing within the meaning of s. 25 of the Nova Scotia Motor Vehicle Act.

[See annotation, 39 D.L.R. 4.]

Statement.

APPEAL from the judgment of Chisholm, J., dismissing an action for damages for injuries received in consequence of the negligent driving of defendant's motor car on a public highway. New trial ordered.

F. L. Milner, K.C., for appellants; *J. M. Davison*, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—The plaintiff sues for damages caused by negligence of defendant, resulting in a collision of a motor car driven by the defendant with one driven by the plaintiff.

The evidence is conflicting and the facts somewhat involved.

The trial judge reached the conclusion that the parties were engaged in an unlawful act, namely, racing on a public highway, which is expressly prohibited by s. 25 of the Motor Vehicles Act, and that no action could arise out of such unlawful act. Having reached this conclusion, he did not think it necessary to decide any of the facts in dispute as to the alleged negligence of the respective parties.

What appears to have happened is that defendant came up behind the plaintiff and gave the signal customary among drivers of automobiles and which is well understood to be a request to be allowed to pass. The plaintiff undoubtedly understood the request because he turned out to the side of the road so as to allow defendant to pass, and then when defendant came up plaintiff increased his speed, at least for a time—how long is perhaps not very clear from the evidence as reported. The defendant persisted in passing the plaintiff, but assuming they were racing in violation of the Act, I do not think that is conclusive on the question of negligence. Each owes a duty to the other, and there must be the usual findings.

There were questions left undecided as to whether on the facts

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the defendant should have abandoned his intention of passing or whether he was guilty of negligence in persisting. There was no decision as to the disputed facts as to whether the cars came into collision, and if so, whether this was due to the plaintiff turning his car towards the centre of the road or whether it was due to the action of the defendant in attempting to swing more into the centre of the road ahead of the plaintiff's car, or to both of these causes. These and other questions were left undecided, and I do not wish to be understood as expressing any opinion upon the disputed facts. I think the case ought to go back for a new trial, preferably with a jury.

Russell, J.

RUSSELL, J.:—The plaintiffs, Benjamin Canning and his wife, were motoring from Truro westward to Folleigh on a Sunday afternoon in a Ford car, the husband driving the car and seated on the right hand with his wife beside him. A Miss Smith was on the rear seat at the right and a Mr. Hall beside her on the left. The defendant was driving in the same direction a Chalmers car, which is about twice as heavy as the Ford, and his father was with him on the front seat, the driver being on the left. On the rear seat was Mr. Hennesey, son-in-law of Mr. Wood, Sr., with his wife on one side and Mrs. Wood on the other. The defendant's car was going faster than the plaintiff's. There is a bridge some distance out of Truro, and defendant overtook a car being driven by a Mr. Blakeney before reaching this bridge. After passing the bridge he overtook the plaintiff's car and sounded his horn as if desiring to pass. Plaintiff's witnesses say that the plaintiff's car drew to the left side of the road and that defendant's car passed it, colliding with it in the course of passing, and driving it into the ditch at the side of the road, after which the passing car proceeded about 100 yards, whereupon it also became ditched on the other side of the road. Some idea of the defendant's speed may be inferred from the fact that, after passing the plaintiff's car and proceeding 100 yards further, then getting out of the car and walking back to the point where the cars collided, the defendant only arrived at that point when the Blakeney car, which he had previously passed, was arriving at the same point—the scene of the collision.

All the occupants of the plaintiff's car testify to the fact of the collision. The plaintiff and Miss Smith, both of whom were on

the side nearest the passing car, swear that they saw the cars collide. Mr. Hall, who was on the side farthest from the colliding car, did not see the collision, but felt it, "more like a shove than a jolt." Mrs. Canning felt the shock of the collision, but did not see the cars colliding. She swears that she was thrown out into the ditch at the side of the road, but as to this there are some very surprising and irreconcilable contradictions with which happily it is not necessary for us to be concerned.

The defendant denies that his car collided with that of the plaintiff at all, and says that there was a space of a foot or more between the two cars all the time while he was passing. Mr. Hennesey, who sat on the rear seat, is equally certain that there was no collision, but he describes the defendant's car as sheering towards the centre of the road, as he on the rear seat came opposite to the occupants of the front seat of the other car. He will not allow the possibility of a collision sufficient to cause the accident which would not have been perceptible to him, but unless the plaintiffs have made their story out of whole cloth this seems to me the likeliest solution of the mystery. There is no expert evidence on this point, but we must remember that the defendant's car was about twice as heavy as the other and was necessarily going at a greater rate of speed, and I do not see why, in the nature of things, it may not be possible that the chauffeur, because of his preoccupation with the wheel, or Mr. Hennesey, with the defendant's child on his knee, failed to be made aware of the fact that in crossing towards the centre of the road their car had tapped the little Ford which it was passing and caused it to swerve into the ditch.

Mr. Wood, senior, seemed at first to be as confident as his son that the cars did not collide, but on cross-examination he is asked if he did not see them when they came together, to which he replies only that they did not come together "so far as his knowledge goes"; "that is my personal observation." "Your point of observation was such that you could not see the two points which the plaintiff says came in contact?" The answer is, "No."

The conclusion that I draw from the evidence is that the cars did collide, that the impact was so slight that it did not disturb the occupants of the heavier car, but was sufficient to cause the lighter car to be driven off the crown of the roadway, bringing the

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weight of the car upon the lower wheels, those nearest the ditch, and causing the rear wheel on that side of the car to collapse. I do not think that the defendant and his father would have been impelled to break up their Sunday afternoon drive to the extent of going back to Truro with the plaintiff, hunting up a garage and paying for a new wheel for the plaintiff's car, then returning to the scene of the accident and assisting in repairing the damage if they had not had some suspicion that their own car had been in some degree responsible for the accident. In the absence of some such impression on their part, it would seem to me such a quite unusual display of altruism that I cannot help regarding it as a circumstance that should go a considerable way towards turning the scale in favour of the account of the catastrophe which all the four occupants of the plaintiff's car have concurred in presenting.

I do not wonder at all that the trial judge has found a difficulty in determining the question of fact, but I think, with deference, that he erred in coming to the conclusion that, without a finding on this issue, he could dismiss the plaintiff's claim on the ground that the parties were both of them violating the law. I do not think they were engaged in "racing" with each other within the meaning of the statute, or at all for that matter. The plaintiff did no more than he was bound to do when he steered his car to the left of the roadway on hearing the defendant's horn. I do not understand the law to be that he was bound to stop his car, or even to slow down for the other car to pass him. He had the same right to the road as the defendant. If his car had happened to be the more swift he would have had as good a right to let the defendant smother in his dust as to suffer that inconvenience from the car of the defendant. But it was not so swift. The defendant was going at the rate of 20 miles an hour. The plaintiff's speed was only about 15 miles, and defendant would have passed him in safety if he had not been in too great a hurry to regain the centre of the road.

The damages have been assessed by the trial judge, and I see no good reason for complaining of the amount as unreasonable. I think the appeal should be allowed and judgment given for the plaintiff for the amount assessed.

Ritchie, E. J.

RITCHIE, E.J.:—The trial judge states his finding of fact and his conclusion of law as follows:—

In the view which I take of the matter, it is not necessary to decide whether the cars actually came into collision; because I have come to the conclusion that both parties, and more particularly the plaintiff, were engaged in an unlawful act, namely, in racing on a public highway, which is expressly prohibited by s. 25 of the Motor Vehicle Act.

The section referred to is as follows:—

No person shall operate a motor vehicle upon any public highway in a race or on a bet or wager.

Assuming that the finding of fact is correct, I am, with great respect for the opinion of the trial judge, unable to agree with his conclusion of law. It is simply a question as to the true construction of the section. I think the word "race" as used in the section means a pre-arranged race. I am inclined to think that the words "or for a bet or wager" constitute some indication in favour of the construction that the section does not cover the kind of thing which the parties were engaged in. The object aimed at, in my opinion, is the prevention of the use of the public highway as a race track, such use being likely to attract a number of people and be accompanied with danger to the public. A race conveys the idea that the persons engaged will attain as high a rate of speed as possible; it cannot, I think, be called a race within the meaning of the Act, where both parties are not exceeding the moderate rate of speed permitted by the Act. A race in the ordinary acceptation of the word is likely to cause a breaking of the speed limit and likely to be dangerous to the public, and therefore it is prohibited.

I think that if two men (neither of them exceeding the speed limit) are driving cars on a highway and one tries to pass, that he is at liberty to do so, and that the other man is also at liberty to increase his speed and keep ahead if he can. Such a state of facts is, in my opinion, not in violation of the section. I think it is not the mischief which the statute is aimed at. Of course, if either party exceeds the speed limit he is at once caught by another section of the Act.

I think the case relied on in the judgment appealed from is distinguishable. The facts of that case shew that what was done was unlawful at common law, unlawful *per se*. I think it was an unlawful assembly; it was the case of a number of persons assembling together and creating a disturbance of the peace. In 1 Russell on Crimes, p. 423, it is said:—

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Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquility and peace of the neighbourhood is an unlawful assembly.

In the case at bar the parties were operating their motor cars under license and they were not exceeding the rate of speed at which they had the right to go under the statute; this, I think, was not unlawful.

In the view which the trial judge took of the law, it was not necessary for him to decide the issue as to negligence, but, in the view I take, it must be decided. It is, I think, a difficult question of fact, and the case should, in my opinion, go back for a new trial. The difficulty as to the facts is increased if one attempts to decide from the printed evidence, instead of after seeing and hearing the witnesses.

Longley, J.

LONGLEY, J.:—I concur with Ritchie, E.J.

Mellish, J.

MELLISH, J.:—Without deciding whether the parties to this action were racing or not, in violation of the Motor Vehicle Act, I am of the opinion that, even if they were racing, it did not absolve either of the parties from using care toward the other. Racing in itself is not unlawful. If there was racing, it was merely in the wrong place and incidental. The plaintiff does not necessarily have to set up an illegal act on his own part to enable him to succeed in this action, and I think the maxim *ex turpi causa non oritur actio* has no application. The plaintiff's alleged rights do not "grow out of" a violation of the statute.

The trial judge has not dealt with many disputed questions of fact arising in the action, and I think the judgment appealed from should be set aside and a new trial had, preferably with a jury, as the evidence is quite contradictory.

New trial ordered.

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MONTREAL INVESTMENT AND REALTY Co. v. SARAULT.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 19, 1918.

CONTRACTS (§ III F—291)—SYNDICATE PURCHASE OF LAND—MISREPRESENTATION—PAYMENT OF INSTALMENT—WANT OF RATIFICATION.

The respondent, a member of a syndicate, brought an action to set aside an agreement of sale entered into by the appellant, the owner of the lots, and the syndicate, on the ground that her assent to the purchase had been procured by fraudulent representations as to the situation of the lots bought. It was shewn that the respondent, with full knowledge of the fraud, had given an option on these lots to a third party and had paid without protest an instalment due under the contract.

The court held, Davies and Anglin, JJ. dissenting, that, on the evidence and under the circumstances of the case, the respondents' acts did not constitute ratification or confirmation or a waiver of her right of revocation.

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APPEAL from the judgment of the Court of King's Bench, appeal side, 24 Que. K.B. 249, confirming the judgment of the Superior Court, District of Montreal, Panneton, J., and maintaining the plaintiff's action with costs. Affirmed.

Statement.

Lafleur, K.C., and *Rinfret*, for appellant; *Belcourt*, K.C., and *Prudhomme*, for respondent.

FITZPATRICK, C.J.:—The appellant company, defendant below, is the owner of a farm at Pointe-aux-Trembles, on the Island of Montreal, which is sub-divided into lots and offered for sale to the public. The respondent, plaintiff below, is a member of a syndicate formed to purchase a certain number of those lots.

Fitzpatrick, C.J.

The action is brought to set aside a contract entered into by the appellant with the syndicate, which was intended to operate merely as a promise to sell the lots in question. The respondent's contention is that she was induced to enter into the contract by fraud, treachery and false representations. A preliminary question having reference to the right of the respondent to bring such action without citing the other parties to the syndicate agreement was raised for the first time in the court appealed from. No notice appears to have been taken of this objection in the formal judgment of that court, and neither of the two judges whose notes are in the record refer to it. In the appellant's factum the point is dealt with in a few lines, and I do not feel that, under such circumstances, it is necessary for me, in the view which I take of the case, to do more than say that this question of procedure, which certainly suggests difficulties of a serious nature has not been entirely overlooked

Dealing with the merits: the false and fraudulent representations complained of relate to statements made by the appellant's agent as to the situation of the lots with respect to Bleau St., the River St. Lawrence, the cement factory and the tramway, proximity to which would presumably increase their value for speculative purposes. Some point is also made of the fact that one of the members of the syndicate, and the most active, was, unknown to the respondent, the selling agent of the owners of the property, and as such in receipt of a secret commission.

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It is important, in considering the case, to bear in mind that the respondent was one of a group who jointly purchased a certain number of lots in each one of which all would have an undivided interest, a fact which, in my judgment, adds to the difficulties in one aspect of the case.

If the respondent attached much importance to the precise location of the lots, she would, I think, have taken more trouble to ascertain their exact position. A reference to paragraph 8 of the respondent's declaration makes it abundantly clear, however, that she never intended to become a purchaser of any one or more of the lots separately, but rather to acquire an undivided interest in the whole property included within the cadastral area, to be held and disposed of for purely speculative purposes. And the impression left on my mind, after a very careful examination of the whole record, is that the respondent sought to repudiate the transaction and to obtain relief from her obligations thereunder after she realised that the bottom had dropped out of the real estate boom and that her venture would, in all probability, prove unprofitable. To some extent the courts below seem to have been influenced in the conclusion they reached by a desire, laudable in itself, of discourage a tendency amounting almost to a mania for wildcat speculations in real estate which seems to have developed in the Montreal district. But I am convinced that in so far as courts are concerned with such matters, the object in view can be more effectively accomplished by holding steadfastly to the rule that men and women also are expected to "keep sacred their covenants," and that they will be held to a strict fulfilment of their obligations legally contracted. Our duty is, in last analysis, to render justice, not ideal justice, but justice "according to law."

To make my point perfectly clear I will refer to the facts.

On or about May 28, 1912, the syndicate agreement, which it is now sought to set aside, was signed. On or about July 22 following, the promise of sale was executed in triplicate. The respondent did not, at the outset, attach much importance to the exact location of the lots, because it is impossible to understand from her evidence whether she visited the locus before signing the syndicate agreement. In her evidence she makes two contradictory statements within five lines as to this point.

It seems perfectly clear, however, that she did not go on the ground with Mrs. Bessette before signing the promise of sale, but was content to pass through the property on a tram car without even taking the trouble to leave her seat. Mrs. Bessette, by a wave of the hand, indicated the approximate location of the lots in question at the upper end of a 40-acre field. Further, it is to be borne in mind, that in the promise of sale the lots are described by reference to a plan which is not disputed, and in the interval between the two agreements the respondent visited the property with Langelier, the selling agent of the appellant. Moreover, before signing the promise of sale, the respondent insisted upon consulting Mr. Charruau, whom she described as her "homme de confiance," and it was only after obtaining his assurance that she was making a good bargain that she signed the document. At the time she sought the independent advice of Mr. Charruau she certainly seems to have been placed in possession of all the information she thought necessary to have, and subsequently she gave her cheque for $1,000, and signed the promise of sale.

There were meetings of the syndicate held in early October, 1912, when all the facts were admittedly known, and an option was then given Mrs. Boutillier, and another option was given the Charruau Realty Co. In November following a payment on account of the purchase-price was made. All this tends to confirm my impression that the respondent sought to repudiate the transaction only after she was satisfied that her venture would not be immediately profitable, and the only real error made was in her calculation of the probable result of her investment. The appellant relied largely on the fact that with full knowledge of the deceit practised on her the respondent subsequently adopted and ratified the contract.

There can be in this case no question of ratification in the sense in which that term is used in the civil law. Planiol says:—"Ce mot 'ratification' désigne spécialement l'approbation donnée par le maitre aux actes du gérant d'affaires."

In my view of the case, the question of confirmation does not arise either. The alleged error or mistake was with respect to the subject-matter of the contract, that is, the identity of the lots. The respondent puts his case on the facts in those words:—

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Quelque temps après, l'on a découvert que la terre s'étendait bien au delà du petit bois qui bornait la vue et *que les lots qu'on avait indiqués comme étant situés en deçà de bois* se trouvaient situés partie dans le bois et partie au delà du bois, aboutissait au trait carré des terres de St. Léonard de Port Maurice, c'est-à-dire à quartre ou cinq arpents plus loin que l'endroit que la compagnie appelante avait indiqué à l'intimée et aux autres syndicataires.

The judgment of the Superior Court has this considerant:—

Considérant que la demanderesse n'eut pas acheté sa part dans les dits lots si elle eut su qu'ils n'étaient pas à l'endroit indiqué par l'agent et la sous-agente de la défenderesse.

Cross, J., in the Court of Appeal, says:—

Her grounds of action are that her consent to the contract was obtained by fraud, trickery and false representations; that it was represented that the lots were on Bleau St., whereas they are a long distance from it in a forest at the rear of the farm in the Parish of St. Léonard; that it was represented that the lots were near certain cement works, about ten arpents from the River St. Lawrence, whereas they are more than 20 arpents from there and far distant from and without access to the lower part of the farm of which they form part.

And Pelletier, J., says:—

Cependant il y a plus. Il est établi au dossier que les lots en question ne sont pas situés à l'endroit où on a représenté qu'ils étaient et où on a prétendu les montrer.

If the mistake was brought about by fraud one can regard either the mistake or the fraud, but, in my opinion, the alleged error might have been avoided if the respondent had taken reasonable care, and, as I have already said, she did not take care. She was not interested in any one or more lots, but in the general scheme. Of course, if one contracting party is induced to enter into a contract by fraud on the part of the other, he can either confirm the contract or impeach its validity. But here the respondent says there was no contract because there was error with respect to the identity of the lots, and both courts below have so found, and therefore the question of confirmation does not arise.

There are some differences of opinion among the authors as to the circumstances under which confirmation must take place, but, of course, all agree there can be no confirmation of something which never existed. "On ne confirme pas une nullité." Planiol, vol. II., Nos. 1293 and following, in a few paragraphs, states the generally accepted opinion.

In last analysis one must bear in mind in a case like this, that all the surrounding circumstances must be looked at, and the trial judge, who not only sees the witnesses but also breathes

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the very atmosphere in which the transaction was entered upon, enjoys a position of exceptional advantage. He, no doubt, was to some extent influenced by what Planiol describes as "la physionomie de l'audience qui est un des éléments impondérables de la jurisprudence."

I am, reluctantly, to confirm and agree to do so because of the concurrent findings below.

DAVIES, J. (dissenting):—I think this appeal must be allowed with costs.

There was, no doubt, such misrepresentation of material facts with respect to the location of the lands agreed to be purchased as would have justified the respondent when she discovered the true facts in repudiating the bargain she had made.

The contract, however, was not a void but a voidable one and when she made the discovery as to the true location of the lands she could, within a reasonable time, have repudiated it. It was within her power, on such discovery, either to adopt or to repudiate the contract.

Now she took plenty of time to reach a decision. She consulted with all those who, like herself, had bought one or more of the lots as to the best course to adopt. They were all speculators sailing in the same boat. They did not buy the lands to use themselves, but to sell at a profit.

Several meetings were held at which the question was discussed. The main point as to which they hesitated was as to the chances of rise in value of the lots.

In the ultimate result, the scales turned in favour of a probable rise in value, and the respondent, with full knowledge of all material facts, elected to adopt the contract, and paid a further instalment of her purchase money.

Her expectations were not realised, the value of the land did not rise on the market, quite the contrary, and then defendant respondent, attempted to reverse her election and repudiate her contract.

In my judgment she was then too late. She had already, with knowledge of the facts, elected, and was bound by her election.

IDINGTON, J.:—Mr. Lafleur, of counsel for appellant, having properly conceded at the outset of his argument that, having regard to the jurisprudence of this court, it did not seem open

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to him to ask a reversion of the concurrent findings of fact by two courts below, but submitted that notwithstanding such findings there was, on undisputed facts, a ratification and adoption by respondent of the contract notwithstanding its originally being liable to repudiation.

I cannot say that under all the peculiar circumstances in which respondent was placed, her assenting to the several nominees of the syndicate making attempts to resell was conclusive evidence of an intention on her part to ratify and abide by the contract.

If she alone had bargained and been caught in such a difficult situation I do not think an effort on her part to resell before launching upon a sea of litigation must of itself be held to be proof of ratification.

Again, the payment of the November instalment was demanded and pressed for, and she had to choose between the risk of forfeiting the $1,000 she had already paid before discovering that she had been misled or of making the payment pending the expiration of the time given one of the said nominees to procure a sale.

These two circumstances of assenting to the attempt to resell, and the payment of the money in November, are thus so connected and dependent upon each other, that it comes back to a question of holding that such attempts as made to avoid litigation were conclusive proof of ratification.

I do not think she can be properly held to have finally determined to abandon her right of revocation.

The few months that elapsed after the payment and expiration of the option to resell before entering this action adds materially very little to the other circumstances.

It is not the length of time alone that is to be looked at, for that might not count for much, but that is to be taken in connection with the other circumstances which, in such like cases, must be weighed.

On the whole, all taken together in light of the surrounding facts and circumstances existent herein, and with which I need not labour, do not satisfactorily establish an intention on respondent's part to ratify the contract or waive her right.

In my opinion the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—In the special circumstances of this case, I am satisfied that the judgment below cannot properly be reversed. This conclusion involves no point of general application.

ANGLIN, J. (dissenting):—The plaintiff, Dame Sarault, sues to have an agreement made by herself and others for the purchase of suburban land near Montreal declared void on the ground that her assent to it was procured by fraudulent misrepresentation, and for the return of the sums of $1,037.06 and $148 paid by her on account of the purchase money. Denying the misrepresentations alleged, the defendant also pleads prescription, nonjoinder of necessary parties and confirmation.

The making of the representations, their untruth, their fraudulent character, and that they induced the contract—all these facts have been found by the trial judge, whose judgment for the plaintiff was unanimously affirmed by the Court of King's Bench. While not altogether satisfied that, if sitting as a trial judge, I should have reached all these conclusions, there is enough evidence in support of them in the record to render the appeal upon this branch of the case hopeless; and it was practically not pressed.

The plea of prescription is ill founded, the case being governed, as Pelletier, J., points out, not by art. 1530 C.C. but by art. 2258 C.C.

It may be that joinder of the plaintiff's co-purchasers as parties is not required, if, as she contends, the relief sought by her will merely have the effect of vesting her interest in the defendant. In the view I take of the merits it is unnecessary to pass upon this question, which may be somewhat formidable in view of the joint character of the purchasers' obligations. Arts. 521 and 177 (8) C.P. But see arts. 1124 and 1125 C.C.

The defence of confirmation involves very important questions. That this defence was first raised by a supplementary plea seems to me immaterial. The facts upon which it depends, as accepted by the learned trial judge and in the Court of King's Bench, are that after the plaintiff had obtained full knowledge of the untruth of the misrepresentation on which she now relies to obtain rescission of the contract, she and her co-adventurers gave to two persons successively options upon or exclusive agencies to sell the lots in which they were interested, and that she also made payment to the defendant of an instalment of the purchase money due by her under the contract.

The trial judge deals with this aspect of the case in a single paragraph:—

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Considérant en ce qui regarde la confirmation subséquente de la vente que vu que la défenderesse refusait d'annuler la promesse de vente, la demanderesse n'a fait des démarches pour vendre ces lots que pour éviter un procès en annulation, si elle pouvait ainsi vendre sans perdre beaucoup d'argent, et que le paiement qu'elle a fait en octobre, 1912, l'a été pour se protéger contre le droit qu'avait la défenderesse de résilier le contrat en gardant le paiement qu'elle avait reçu comptant.

Upon examining the record I have failed to find any evidence of a refusal by the defendant to cancel the contract, if that be material. No demand for rescission appears to have been made until long after the options had been given by the plaintiff and her co-adventurers, and the payment relied upon had been made by her.

In the Court of King's Bench reasons for judgment were delivered only by Cross and Pelletier, JJ. Cross, J., deals with the defence of confirmation in these two sentences:—

In regard to the plea of adoption of and adhesion to the contract after having had full knowledge of the facts, it is to be said that what the respondent did in the way of joining in an attempt to sell the lots does not necessarily shew an intention to abandon the right to ask for rescission. It is to be remembered that she stood confronted by a stiff covenant for forfeiture of all she had paid in, if she did not keep on paying.

Pelletier, J., discusses the question at greater length. In substance he says the payment relied upon was made by the plaintiff under pressure of a forfeiture clause in the agreement, and was not accompanied by a protest because she was without professional advice and a former protest had been of no avail. In making this payment the plaintiff sought only to guard against another danger—the loss of the money she had already invested. That is not acquiescence; it lacks the feature of positive abandonment of the right to rescind which is essential. As to the effort made to sell, it was merely an attempt to get rid of the property without litigation, which certainly did not imply acquiescence.

With great respect, I have not found any evidence of a former protest; absence of professional advice also seems to have been assumed. The judge's reference to the necessity for "un acte positif abandonnant les droits qu'on a" might seem to imply that in his opinion there could not be tacit or implied confirmation; but he, of course, did not intend that. There is not a single authority cited upon this branch of the case in any of the judgments.

The supplementary plea raising the defence of confirmation is as follows:—

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2. Même si cette erreur eût existé, ce que la défenderesse nie, la demanderesse a persisté dans le contrat après que, de son propre aveu, tous les faits lui furent connus, et a fait des actes de propriétaire, en chargeant certaines personnes, ou agents d'immeubles, de vendre les lots pour elle, entr'autres le 3 octobre et le 31 octobre 1912.

3. En plus, même après que la demanderesse se fut aperçue de cette prétendue erreur, elle a néanmoins ratifié et confirmé le contrat en faisant des paiements trimestriels subséquemment, sans réserve ni restriction.

The plaintiff's answer is in the following terms

1. La demanderesse nie les paragraphes 1, 2, et 3 de la défense;

Et elle ajoute ce qui suit:

2. Qu'elle n'a chargé aucun agent d'immeubles ou autres de vendre les lots vu qu'elle s'est toujours plainte à la défenderesse et à ses agents qu'elle avait été trompée et qu'elle n'avait pas les lots qu'elle avait voulu acheter et que c'était, dans le but simplement de tâcher de rentrer dans les déboursés qu'elle avait faits vu que les agents ne voulaient pas lui remettre son argent;

3. Elle n'a jamais ratifié ni confirmé en aucune manière que ce soit la promesse de vente qui est maintenant attaquée et si elle a fait un paiement supplémentaire, c'était sous l'empire de l'erreur dans laquelle elle était, ne sachant quoi faire pour préserver le montant de $1,000 qu'elle avait déjà déboursé, grâce aux fausses representations de la défenderesse et de ses agents.

As will have been perceived the grounds on which the plea of confirmation has been rejected are that the plaintiff attempted to dispose of the lots merely to avoid litigation and loss of her money, and that she made the payment relied upon by the defendant to prevent the latter acting on a forfeiture clause enabling it to cancel the contract, retaining the money which had been already paid on account. The allegation of the plaintiff's answer that when she did the alleged confirmatory acts she was labouring under mistake (sous l'empire de l'erreur) is ignored both by the trial judge and in the court of appeal. If by it the plaintiff means that she was still without knowledge of the defendants' fraud, her allegation is directly contrary to her own evidence and that of her friends, and a finding upon it in her favour could not be supported. If she means that she acted under misapprehension as to the effect of the defendant's fraud on her obligation under the contract, or as to her own legal rights (which was the main contention presented on her behalf in this court) unless it is involved in the holding that she made the second payment under pressure of the forfeiture clause, she has failed to obtain a finding of these facts. The judgment in her favour does not rest upon this plea.

Perhaps a few of the leading features of the law of confirmation may be noticed without inviting a charge of pedantry or incurring the reproach of dwelling upon the elementary.

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In art. 1214 the Civil Code states the essential features of an express act of confirmation. It makes no allusion to implied or tacit confirmation such as is found in art. 1338 C.N. That, no doubt, was merely because to do so was deemed unnecessary. 4 Langelier, p. 201; 6 Mignault, 31n.

Although the Code apparently ignores the distinction (art. 1214 C.C.), confirmation differs from ratification. 6 Mignault, p. 31; 4 Aubry & Rau, 1902, p. 430; Baudry-Lacantinèrie, Des. Oblig. III., No. 1985; 6 Larombière, Oblig., art. 1338, No. 3; 8 Huc, No. 276. There can be no confirmation of the null and void; confirmation applies only to the voidable or annullable. 5 Marcadé, art. 1338, s. 1, p. 94; Baudry-Lacantinèrie, Des. Oblig., III., No. 1992; 4 Aubry & Rau, 1902, p. 429; 8 Huc, No. 276.

While error and fraud are causes of nullity in contracts (art. 991 C.C.), they are not causes of absolute nullity; they only give a right of action or exception to annul or rescind them (art. 1000 C.C.). Error in the object of a contract amounting to mistake in its identity precludes consent with the result that the obligation is non-existent, or absolutely null. Error concerning the object short of this, however substantial, does not preclude consent, and therefore an obligation results, although voidable and subject to rescission. It is with this kind of error that the Code deals in the articles cited. 5 Mignault, p. 212, 15 Laurent, No. 84; Baudry-Lacantinèrie, Des. Oblig. III., Nos. 52-53 *et seq.*; Pothier Des. Oblig. No. 17; 4 Marcadé, art. 1110, Nos. 1 & 2; Fuzier-Herman, Rép. Vbo. "Erreur," No. 21 & No. 26; Dalloz Rép. Pratique. "Contrats et Conventions en général," Nos. 72 (2), 75 (tr.). In the plaintiff's declaration error is referred to not as a ground for relief but as a consequence of the fraud relied upon. Voidability is claimed not on account of error but fraud. The error shewn at the trial was not as to the identity of the property, but only as to whether it all lay between the road and a clump of trees, or whether part of it lay beyond these trees, and as to its proximity to a cement manufactory.

In answer to the plea of confirmation the plaintiff alleged not that the contract was not susceptible of confirmation because of absolute nullity entailed by mistake as to the identity of the object, but that the circumstances under which the alleged confirmatory acts were done rendered them ineffectual as confirmation.

The judgments at the trial and in the Court of King's Bench deal with the question of the sufficiency of the confirmation. There is no suggestion of absolute nullity on account of error as to the identity of the object. Nor was any such argument presented in this court. The evidence establishes that while there was no doubt error, induced by fraud, as to features of the property dealt with, which formed the principal consideration for making the contract (art. 992 C.C.) there was not in fact mistake as to the identity of the property such as would preclude consent. The contract was not void or absolutely null; it was voidable or annullable under arts. 991-2-3 and 1000 of the Civil Code, and it was as such a contract that the plaintiff presented it claiming a declaration that it had been obtained illegally and fraudulently.

The existence in Quebec law of the doctrine of implied confirmation and the conformity of some of its main features to those of the corresponding doctrine in English law was recognised by the Judicial Committee in *United Shoe Machinery Co.* v. *Brunet*, [1909] A.C. 330, 339.

It is clearly logical, says Laurent (XVIII. No. 624), that the requisites of tacit confirmation should be the same as those of express confirmation, since confirmation, however evidenced, is one and the same juridical fact (fait juridique).

Under both the English and the French systems of law the essential features of confirmation are that the act invoked as confirmatory must be done voluntarily, with knowledge of the voidability of the principal act or obligation which is to be confirmed, and with the intention of confirming it. Comp. 5 Marcadé, s. 5, No. IV., p. 98; Aubry & Rau (1902), s. 337, p. 438, with *Murray* v. *Palmer* (1805), 2 Sch. & Lef. 472, 486; and *Moxon* v. *Payne* (1873), L.R. 8 Ch. 881, 885.

Although Toullier (VIII. 519) and Merlin (Quest. Vbo. Ratification, s. 5, No. 5) were of the opinion that where an act in execution or fulfilment of a voidable obligation is relied upon as confirmatory, the party so preferring it is called upon only to prove that it was done voluntarily (in the sense of freely), the modern writers agree that he must, at least in the first instance, also satisfy the court that it was done with knowledge of the voidability of the principal act and with the intention of confirming. Baudry-

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Lacantinèrie, Des Oblig. III., No. 2010; 6 Larombière (1885), art. 1338, No. 37, p. 346; 4 Aubry & Rau, 1902, p. 439, n. 22.

The burden of establishing knowledge by the obligor or debtor of all facts essential to confirmation always rests upon the obligee or creditor, Fuzier-Herman, Rep. Vbo. Confirmation, No. 172.

The inference of knowledge of voidability must be of actual knowledge and not merely of constructive knowledge through being put upon inquiry and having possession of the means of acquiring actual knowledge, 18 Laurent, 630; 7 Rolland des Villargues, Notariat, Vbo. Ratification, No. 63-4; Fuzier-Herman, Rep. Vbo. Confirmation, No. 132; Dalloz (1856), 1, 292. Compare *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, *per* Lindley, L.J., at p. 188, and *per* Bowen, L.J., at pp. 192-3. In cases of doubt neither the inference of knowledge of voidability nor that of intention to forego the right of rescission will be drawn. 2 Solon. op. cit., No. 421; 2 Bedarride, Traité du Dol., No. 598. Moreover there must be actual execution; partial execution, however, will suffice, 4 Aubry & Rau, 1902, p. 442, No. 26; but not a mere expression of intention to execute nor mere conservatory or other equivocal acts, 29 Demolombe 778; 6 Larombière, art. 1338, No. 35; 2 Bedarride, No. 600; Fuzier-Herman, Rep. Vbo. Confirmation, Nos. 155-165. Compare *Morrison* v. *Universal Marine Ins. Co.* (1873), L.R. 8 Ex. 197.

It must always be borne in mind, however, that mistake in law affords a ground for relief, under the Civil Codes of France and Quebec where it would not avail under English law; art. 1047 C.C.; 20 Laurent, No. 354; 13 Duranton, No. 682; 10 ibid. No. 127; *Bain* v. *Montreal* (1882), 8 Can. S.C.R. 252, 265, 284.

I propose now to consider slightly more in detail the contention of the respondent, doubtfully raised in her supplementary answer, but strongly urged at bar, that the acts relied upon do not import confirmation because, though fully apprised of the facts, she was ignorant of her legal rights, and the finding, which she has secured in the provincial courts, that those acts were not voluntary.

The plaintiff's knowledge at the time she performed the alleged acts of confirmation, of the facts upon which her right of rescission depends is affirmatively established by admissions of herself and her associates. When the options were given and the November payment was made, they were fully apprised of the fraudulent deception on which they now rely to avoid their contract.

The requisites of an effectual confirmation may be established by presumptions as well as by direct testimony. These presumptions may be founded on the nature of the vice or defect in the principal obligation and the character of the act preferred as confirmation. 4 Aubry & Rau (1902), s. 337, No. 22; 5 Marcadé (7th ed.), art. 1338, s. 5, No. 4; 2 Solon, Théorie de la Nullité, No. 414 *et seq.* On this point Larombière says (vol. 6, art. 1338, No. 39):—

Du reste, les tribunaux peuvent résoudre par l'appréciation des circonstances, les deux questions rélatives, soit à la connaissance du vice, soit à l'intention de le réparer.

La nature du vice qui entache l'obligation ou de l'execution volontaire qu'on oppose comme confirmation peut servir elle-même à les résoudre. Tel est le cas où, le vice étant personnel et apparent, celui qui confirme ne peut, avec apparence de raison prétexter cause d'ignorance, et où les actes d'exécution sont tellement énergiques et caractérisés, qu'il est impossible d'admettre qu'il n'ait pas eu l'intention de purger et de couvrir tous vices quelconques, en pleine et entière connaissance.

Whether knowledge of voidability will be presumed or inferred depends upon the nature of the facts of which it appears that the obligor was cognizant, *i.e.*, whether they are such that a person knowing them would be likely to be aware of the consequent right of rescission, Dalloz, 1853, 2, 223. The presumption of the intention to confirm will likewise depend upon the degree of significance which attaches to the act of execution, 29 Demolombe, No. 774. Laurent, vol. 18, No. 620, says that execution by a person having capacity to renounce the right of rescission, with knowledge of the vice or defect which gives him that right, necessarily implies the intention to confirm. See also 2 Solon, op. cit. Nos. 415, 418, 420; Rolland de Villargues, Notariat, Vbo. Ratification, art. 3, No. 58. That such fraud as the plaintiff was fully informed had been practised in this case renders a contract affected by it voidable, and gives a right of rescission to the party thus imposed upon are consequences so well known that it is scarcely conceivable that the plaintiff and her associates were ignorant of them. Such knowledge is properly presumed (2 Bedarride, Traité du Dol, No. 603. Compare *Carter* v. *Silber*, [1892] 2 Ch. 278, [1893] A.C. 360; *Carnell* v. *Harrison*, [1916] 1 Ch. 328, 341, 343, if not conclusively, as it should be in the opinion of M. Bedarride, at least until lack of it is satisfactorily shewn. That such an act of execution of his obligation as voluntary payment to his

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creditor by the debtor cognizant of its voidability imports an election to accept that obligation and to forego the right of rescission is the view held by all the text writers of repute. While any act implying intention to renounce the right of rescission will, if unequivocal, suffice as confirmation (18 Laurent, 623; 4 Aubry & Rau, p. 443, n. 31, b., t., & q.; Dalloz, 1887, 1, 228): compare *Clough* v. *London & North Western R. Co. Ltd.*, L.R. 7 Ex. 26 at 34, Demolombe (vol. 29, No. 780) says:—

l'execution, proprement dite, d'une convention consiste pour le débiteur dans le paiement de ce qu'il doit.

See, too, 4 Aubry & Rau, 1902, p. 442, par. (a); 2 Solon, op. cit. No. 427; 18 Laurent, No. 624, *Pineau* v. *La Compagnie Neigette* (1914), 22 Rev. Leg. 154; Fuzier-Herman, Rep. Vbo. Confirmation, Nos. 117, 140. We have in the present case this typical act of implied confirmation. Compare *Webb* v. *Roberts* (1907), 10 O.W.R. 962, 969; *Re Shearman* (1896), 66 L.J. Ch. 25, 28.

Although some acts of execution accompanied by a clear (Fuzier-Herman, Rep. Vbo. Confirmation, No. 142, compare *Mutual Reserve Life Ins. Co.* v. *Foster* (1904), 20 T.L.R. 715), protest and reservation of rights will not amount to confirmation, the intention to confirm may be so unmistakably involved in the act itself that the most formal and explicit protest cannot avail: Journal du Palais, 1829, vol. 22, 2nd pt,, p. 1287; 18 Laurent 637; 8 Huc, No. 275; Aubry & Rau, 1902, p. 442, n. 25; 2 Solon, op. cit. No. 436; 2 Bedarride, No. 609; Baudry Lacantinêrie, Des Oblig. III. No. 2005 (2). Here we have payment with presumed, if not actual knowledge of the voidability of the obligation and without protest or reservation of any kind—a precaution, if it could be effectual, of which the absence is not adequately explained by the suggested lack of professional advice. *Bain* v. *Montreal*, 8 Can. S.C.R. 252, 285-7-9. The very fact of making a protest would involve an admission that the obligor knew of the voidability of the obligation, and that her act of payment was of a nature implying an intention to confirm.

The presumption of intention to confirm arising from dealing with the property as owner—giving options upon it or creating exclusive agencies to sell it—is in English law equally as strong as that arising from payment. In *Vigers* v. *Pike* (1842), 8 Cl. & F. 562, at 650-2, 8 E.R. 220, Lord Cottenham said:—

In a case depending upon alleged misrepresentation as to the nature and value of the thing purchased, the defendant cannot adduce more conclusive evidence or raise a more effectual bar to the plaintiff's case than by shewing that the plaintiff was from the beginning cognizant of all the matters complained of, or, after full information concerning them, continued to deal with the property. . . . As parties to these transactions and cognizant of the facts during the time they were acting upon the arrangement now complained of, using and appropriating the property they derived under it, they, as such company, are precluded from asking any relief to which they might otherwise have been entitled, I confine my observations to the part of the relief which prays the rescinding of the transactions.

See, too, *Campbell* v. *Fleming* (1834), 1 A. & E. 40, 110 E.R. 1122; *Ex. parte Briggs* (1866), L.R. 1 Eq. 483. Compare Baudry-Lacantinèrie, Des Oblig. III. No. 1991 (*a*); 29 Demolombe, No. 782, and 6 Larombière, art. 1338, No. 44.

In English law we are familiar with these presumptions. Indeed, English jurists are perhaps in some cases inclined to regard them as conclusive more readily than the French. Instances have just been referred to. Others are to be found in such cases as *Carter* v. *Silber*, [1892] 2 Ch. 278, 286, 288; [1893] A.C. 360; *Carnell* v. *Harrison*, [1916] 1 Ch. 328, 341, 343; *Seddon* v. *North Eastern Salt Co.*, [1905] 1 Ch. 326, 334; *Croft* v. *Lumley* (1858), 6 H.L.C. 672, 705, 10 E.R. 1459.

No doubt there are several leading text writers who incline to the view that notwithstanding the presumption in favour of confirmation which arises from acts such as we are dealing with, where the voidability of the obligation is obvious from facts known to the obligor, a bare allegation in his plea that he was ignorant of the legal effect of those facts upon his obligation or of his right to rescission, or of the confirmatory operation of his own subsequent acts, casts upon the obligee the burden of proving by positive testimony that the obligor was in fact fully cognizant of all these matters. 18 Laurent, 632, 3; 650-1, 2; Baudry-Lacantinèrie, Des Oblig. III. No. 2111. I am, with respect, unable to accept that view. It would render the establishment of tacit or implied confirmation impracticable. The reasoning of the writers who uphold the contrary opinion (4 Aubry & Rau, 1902, p. 440, n. 23; 6 Larombière, art. 1338, No. 38; 2 Bedarride, Traité du Dol, No. 603; Fuzier-Herman, Rep. Vbo. Confirmation, Nos. 136, 137, 177) commends itself to my judgment, and is, I think, more in harmony with the view taken by the Judicial Committee in the *Brunet* case, [1909] A.C. 330. M.

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Solon (2 No. 415, p. 375 to No. 420, p. 383), would preclude the obligee in cases of apparent or patent voidability from setting up error of law in answer to a plea of confirmation. He will not be allowed to prove that he was unaware of the voidability unless he can shew some error of fact. But it is otherwise in cases of concealed or latent voidability.

In the footnote to the report of *Lenoble* v. *Lenoble* in Sirey, 1860, p. 35, we find the following:—

L'exécution d'un acte nul peut avoir été consentie dans des circonstances et dans des termes tels que la preuve de la connaissance de la nullité paraisse en ressortir; c'est alors à celui qui prétend que cette connaissance n'existait pas à prouver son allègation, surtout quand il s'agit d'une nullité de droit, comme celle dont se trouvait viciée la donation attaquée dans l'espèce. Il peut arriver, au contraire, que rien n'indique que la cause de nullité ait été connue de celui qui a exécuté l'acte nul; et alors, c'est à celui qui prétend qu'il y a ratification à prouver que la ratification a eu lieu avec connaissance de la cause de nullité.

In English jurisprudence the line between mistake in law and mistake in fact is not so clearly and sharply drawn in equity as at common law; *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181, 190. But see *Stanley Bros. Ltd.* v. *Corporation of Nuneaton* (1913), 108 L.T. 986, 990, 992. A mistake in regard to a legal right dependent upon the doubtful construction of a grant or will, or having an obscure or uncertain legal foundation, will be a ground for relief in equity (*Earl Beauchamp* v. *Winn* (1873), L.R. 6 H.L. 223, 234; *Livesey* v. *Livesey* (1827), 3 Russ. 287, 38 E.R. 583; *McCarthy* v. *Decaix* (1831), 2 Russ. & My. 614, 39 E.R. 528), while ignorance of the legal consequences of known facts dependent upon a well-established rule of law will not (*Carnell* v. *Harrison*, [1916] 1 Ch. 328, 343; *Midland G. W. R. Co.* v. *Johnson* (1858), 6 H.L.C. 798, 10 E.R. 1509; *Worrall* v. *Jacob* (1817), 3 Mer. 256, 271, 36 E.R. 98; *Harman* v. *Cam*, 4 Vin. Abr. 387, pl. 2) unless it is so gross as to warrant an inference of imbecility, surprise, or blind and credulous confidence calling for the protective intervention of a Court of Equity (Story's Equity, 2nd Eng. ed., ss. 122, 124, 128), or is accompanied by other circumstances affording equitable grounds on which relief should be granted. *Rogers* v. *Ingham* (1876), 3 Ch. D. 351-357. (But see criticism of the distinction between well-known and other rules of law, in Story's Equity, 2nd Eng. ed., ss. 126-7, where it is suggested that a distinction between action taken in entire ignorance of title or

right and action when there is doubt or controversy rests on more solid foundation.) It may be necessary in some cases of private rights of the class dealt with in *Beauchamp* v. *Winn*, L.R. 6 H.L. 223, to prove affirmatively that the party alleged to have confirmed a voidable obligation had actual knowledge of his rights (*Cockerell* v. *Cholmeley* (1830), 1 Russ. & My. 418, 425, 39 E.R. 161, (1832), 1 Cl. & F. 60, 6 E.R. 839); but ordinarily the presumption is that every person is acquainted with his own rights. (Story, 2nd Eng. ed., s. 111; *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221, 241; *La Banque Jacques Cartier* v. *La Banque D'Epargne de la Cité et du District de Montreal* (1887), 13 App. Cas. 111, 118.

Such mistakes are not commonly easy of clear proof, and courts of equity, in assuming to correct alleged mistakes, must of necessity require the very clearest proof, lest they create errors in attempting to correct them. There is, too, great opportunity for the practice of fraud through alleged mistakes of law, when courts listen readily to such grounds (Story, 2nd Eng. ed., p. 83, s. 138a).

Assuming, as is the view of MM. Laurent and Baudry-Lacantinèrie, that the presumption *juris et de jure* that everybody knows the law exists only in regard to matters of public interest, and does not ordinarily apply to matters of merely private right (compare *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149, at p. 170, knowledge of private rights, as a presumption of fact, may and should be inferred where, as here, the circumstances are such that an ordinary man of the world would have been aware of those rights. (*Carnell* v. *Harrison*, [1916] 1 Ch. 328, 343.) When with that knowledge an obligor does an act in fulfilment of a voidable obligation of a nature which ordinarily implies an intention to accept the obligation and to forego any right of cancellation or rescission (the payment made by Mme. Sarault and the options given to Mme. Bouthillier and the Charruau Realty Co. were undoubtedly such acts), the intention to confirm should also be inferred. In some cases these inferences may be so cogent that an assertion of error in law made to rebut them will not be tolerated. But the weight of authority favours the view that to an alleged confirmation error of law may usually be set up as an answer though proof of it lies upon the person alleging it and may be very difficult.

As Demolombe puts it (vol. 29, No. 775):—

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A supposer maintenant que le débiteur puisse fournir la preuve que l'erreur de droit, dans laquelle il était, a eu pour résultat d'empêcher l'effet confirmatif de l'exécution de l'obligation, du moins est-il nécessaire qu'il la fournisse.

See, too, Bedarride, No. 603; Fuzier-Herman Rep. Vbo. "Confirmation," No. 130; *Bain* v. *Montreal*, 8 Can. S.C.R. 252, 282.

As already pointed out it is very doubtful whether the plaintiff has, in her pleading, alleged error of law on her part. It is certainly impossible from her answer to the defendant's supplementary plea to determine in what respect she has alleged that she was ignorant—whether of the legal consequences of fraud, of her right of rescission, or of the confirmatory effect of the acts now invoked against her. There is really no evidence that she was not fully informed as to all these matters, and there is nothing to shew that her conduct was determined by any mistake as to her legal rights. *Stone* v. *Godfrey*, 5 De G.M. & G. 76, 90. Under these circumstances the contention that what she did does not amount to confirmation because of error of law on her part, in my opinion, fails.

The evidence in support of the finding that the alleged confirmatory acts were not voluntary is very slight indeed. In view of the proof that the facts as to the fraud of the defendant were fully known to the plaintiff and the presumption of her knowledge of the voidability of her contract and of her consequent legal rights (Fuzier-Herman, Rep. Vbo. Confirmation, No. 119; 18 Laurent, 631-3; 8 Huc, 274) and of the undoubtedly confirmatory character of her subsequent acts, the only aspect of voluntary execution still to be considered is whether the plaintiff was subject to such pressure that in doing the alleged acts of confirmation she acted under constraint and, therefore, not voluntarily.

No action to compel payment was brought either against the plaintiff or against any of her associates: nor was any such action threatened. The secretary of the defendant company merely telephoned to the plaintiff notifying her that her second payment was due. She asked him to call at her house and upon his doing so, without complaint or protest, gave him her cheque dated November 22, 1912, for $148, the amount for which he asked. The fraud had then been fully known for some time. It had been considered at more than one meeting of the syndicate. At these meetings the deception practised was discussed, and at one of them Mme. Bessette, a sub-agent of the defendant, and MM.

Langelier and Beauchemin, its agents who were present, were charged with the deceit of which the purchasers complained. The chief purpose of these meetings, however, seems to have been to consider the possibility of selling the property on terms which would be profitable, or would at least save the members of the syndicate from loss. At one of them Isaie Denis, a member of the syndicate, tells us that, in reply to Mme. Bessette, who urged them to hold out for $25,000 (their purchase price had been $16,600), he said: "If you can find $20,000, sell as fast as you can."

Mme. Casavant, another member, speaking of the third meeting of the syndicate held at the residence of M. Denis, on October 3, 1912, says that it was called to discuss the best means of getting rid of the lands as quickly as possible; that Mme. Bouthillier was urged to undertake the sale of the property, that she was unwilling to do so but that she finally yielded to the pressure of the members of the syndicate and accepted a written option or authorisation to sell as agent which the members of the syndicate signed. Mme. Bouthillier confirms these statements. When giving evidence several members of the syndicate denied having given this option. But when Mme. Bouthillier produced the document bearing their signatures they found themselves obliged to admit it. The plaintiff was one of the signatories. They had previously engaged Mme. Bessette to sell on their behalf. Pursuant to the mandate given her, Mme. Bouthillier, with the concurrence of members of the syndicate, on October 31, placed the property in the hands of the Charruau Realty Co. with an exclusive right of sale. It is true that Mme. Sarault says in a vague and indefinite way that the reason she made the payment of $148 in November was because she feared that if she did not make it she would lose the $1,000 which she had already put into the property. But upon all the evidence it is, I think, reasonably clear that the members of the syndicate who had bought for speculation, although they knew they had a right of rescission, deliberately decided to hold the property in the hope of realising a profit by selling it, and the plaintiff paid her second instalment rather for this reason than because of any duress or pressure due to the forfeiture clause in the contract. The suggestion of constraint seems to have been an afterthought.

I an unable to find in the evidence proof of such pressure or

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constraint as would vitiate the acts of confirmation relied upon or would justify a court in finding that they were not performed voluntarily. Certainly pressure due to fear of litigation or of losing the money already invested was not the sole inducement for the giving of the agency or option to Mme. Bessette, and afterwards to Mme. Bouthillier. The possibility of disposing of the property to advantage affected the action of the syndicate in taking both these steps.

In a number of the French authors we find it stated that the execution of an obligation cannot be considered voluntary where it has taken place in order to escape action or suit by the creditor (pour échapper aux poursuites exercées par le créancier). Aubry et Rau (1902), p. 443; 29 Demolombe, No. 777; Fuzier-Herman, Rep. Vbo. Confirmation, No. 154. Indeed Baudry-Lacantinêrie (Des Oblig. III., No. 2005) says that "moral pressure" will suffice to render an act of execution involuntary. As an instance of such pressure, however, he gives an action or suit by the creditor.

Bedarride very forcefully and effectively combats the view that the mere threat, or even the actual institution by the creditor, of an action to compel performance, to which the debtor knows he has a complete defence (*ex hypothesi* that is the case here), can amount to such pressure or constraint as will render his execution of a voidable obligation ineffectual as confirmation. Traité du Dol. II., No. 604-5. See, too, *Bain* v. *Montreal*, 8 Can. S.C.R. 252, 284 *et seq.*

Larombière (vol. 6, art. 1338, No. 41), says:—

41. L'exécution doit enfin être volontaire, c'est-à-dire qu'elle ni doit être ni surprise par dol, ni arrachée par violence, ni *forcée par les voies de droit*. Elle ne serait pas volontaire si elle était entachée de vices qui invalident le consentement, ou si elle n'avait eu lieu qu' à la suite et en exécution d'une poursuite judiciaire ou d'une constrainte légale, ou dans le seul but de s'y soustraire.

See also 8 Toullier, No. 512.

Payment under, or to escape process of law, is the typical instance of performance under legal compulsion. Short of this there may be constraint of law, or "moral violence" sufficient to destroy the freedom of consent or liberty of action essential to a voluntary act, Story's Equity (12th ed.), s. 239. But the mere presence of a forfeiture clause in an agreement known to be vitiated by fraud in my opinion cannot, at all events, in the absence of

evidence that the obligor was ignorant of her legal position and rights, warrant the conclusion that such significant acts of execution as the payment of purchase money and dealing with the land under the contract in a manner consistent only with an affirmance of it, unaccompanied by protest or reservation of any sort, were done involuntarily.

The peculiar position of Mme. Bessette, who, while acting as a paid sub-agent for the vendors, posed before the members of the syndicate as a fellow-purchaser, having interests with their own, might have afforded the plaintiff another ground for rescission. But she does not allege these facts in her declaration and, although evidence of them was given at the trial, they were not alluded to in the judgments either in the trial court or in the Court of King's Bench. Presumably in those courts, as here, they were not urged as entitling the plaintiff to relief. There is nothing to shew when the members of the syndicate first learned of Mme. Bessette's sub-agency. It may be that it was known to them when the confirmatory acts relied upon were done, and if so, it would, of course, be affected by those acts in the same way as the misrepresentations on which the plaintiff has based her claim.

I am, for these reasons, with great respect, of the opinion that this appeal should be allowed with costs in this court and in the Court of King's Bench, and that judgment should be entered for the defendant dismissing the action with costs.

Appeal dismissed.

LABA v. McGOVERN.

Nova Scotia Supreme Court, Harris, C.J., and Russell, Longley, Drysdale and Mellish, JJ. December 21, 1918.

LANDLORD AND TENANT (§ II D—30)—LEASE OF PREMISES—ONE YEAR—OPTION OF CONTINUING—NOTICE BY LANDLORD TO QUIT—TENANT CONTINUING AFTER YEAR—OCCUPANCY UNDER OPTION—OVERHOLDING TENANT'S ACT R.S.N.S. 1900, c. 174.

The plaintiff leased certain premises to the defendant "to have and to hold . . . from the first day of May for the term of one year next ensuing . . . with the option *of continuing the lease* from year to year until one or the other give notice in writing to quit 3 calender months previous to the termination of any year." Prior to the end of the year the plaintiff gave the defendant 3 months' notice to quit; the tenant held beyond the year without giving any notice of his intention to remain. The court held that the defendant must be taken as remaining under his option (of continuing the lease) and was not an overholding tenant, within the meaning of the Overholding Tenant's Act, R.S.N.S. 1900, c. 174.

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Held, also, that the plaintiff had no right to give the notice he had given.

[*Waring* v. *King* (1841), 8 M. & W. 571, 151 E.R. 1166; *Ferguson* v. *Cornish* (1760), 2 Burr. 1032, 97 E.R. 691, considered.]

Statement.

APPEAL from the judgment of Ritchie, E.J., sustaining the judgment of a County Court Judge on an application under the Overholding Tenant's Act, R.S.N.S. 1900, c. 174.

R. H. Murray, K.C., and *B. W. Russell*, for plaintiff, respondent.

Harris, C.J.

HARRIS, C.J.:—I agree with the decision of Mellish, J. I only wish to add that there are many American cases holding the option to be well exercised by the lessee continuing in possession in a case such as this where the agreement or option does not specifically require notice.

One of the leading cases in the United States is that of *Delashman* v. *Berry* (1870), 20 Mich. 292, in which the premises were leased "for the term of 1 year with the privilege of having the same 3 years at the same rent and at the option of the lessee." The tenant remained in possession for one year and five days, and an action was brought to recover possession on the ground that remaining in possession of them was not an exercise of the option to hold them longer than 1 year. The court said, p. 297:—

> Upon principle it would certainly seem that the actual continuance of such occupation was the best and most conclusive evidence of his intention to continue. And as it was at his option to have the term expire at 1 year or 3 years, and he had covenanted to deliver up possession at the end of the term; but one inference could legally and properly be drawn from such continuance after the year, viz., that he intended to continue rightfully according to the terms of his lease rather than wrongfully in defiance of its provisions.

This case has been followed in many of the States and, so far as I can ascertain, has never been disapproved.

See *Terstegge* v. *First German Mutual Benevolent Society* (1883), 92 Ind. 82, 85; *Cusack* v. *Gunning System* (1903), 109 Ill. 588; *Kimball* v. *Cross* (1884), 136 Mass. 300; Wood on Landlord and Tenant 678.

The reasoning of the court in *Delashman* v. *Berry*, 20 Mich. 292, commends itself to my judgment, and I adopt it.

I agree that the appeal should be allowed with costs.

Russell, J.

RUSSELL, J.:—I agree with the opinion of Mellish, J.

Mellish, J.

MELLISH, J.:—The plaintiff let to the defendant certain premises in writing, dated 1st May, 1917:—

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To have and to hold the premises . . . from the first day of May for the term of 1 year then next ensuing . . . with the option of continuing the lease from year to year until one or the other give notice in writing to quit 3 calendar months previous to the termination of any year.

Previous to the end of the year the plaintiff, apparently construing the lease as meaning that the tenancy was for 1 year and so on from year to year unless one or the other gave notice in writing to terminate the same 3 months before the termination of "any" year (including the first), gave the defendant notice on January 3, 1918, to vacate on April 30 following.

The tenant held beyond the year without apparently giving any notice of his intention to remain (although there is no evidence of that fact). Proceedings were then taken before the County Court Judge to expel the tenant as overholding. Then the plaintiff apparently relied solely on the sufficiency of his notice to quit. The County Court Judge held the notice to be bad; but he also held that no notice was necessary, and that the clause giving the tenant the option to continue after the year was repugnant and void. The latter ground was not put forward before this court, nor, apparently, before Ritchie, J., from whose decision an appeal has been taken to this court. The latter judge reviewed the proceedings of the County Court Judge under proceedings taken for that purpose by the defendant under the Overholding Tenant's Act. On this review the point was raised, apparently for the first time, by the plaintiff that the tenant had not exercised his option. Ritchie, E.J., so found, and dismissed the defendant's application and decided that a notice to quit was unnecessary.

In my opinion, the defendant was not overholding. Under the express terms of the lease he had the right, if he chose, to remain as a tenant from year to year, and I think he must be taken to have so remained in the exercise of this option and not as a trespasser. *Waring* v. *King* (1841), 8 M. & W. 571, 151 E.R. 1166.

In this case the defendants took certain premises of the plaintiff for 9 months with the option at the end of that time of taking a lease for 7, 14, or 21 years. Before the 9 months expired, or at the end of the 9 months, as found by Abinger, C.J., the defendants let the premises to a coal company for a period extending 6 months beyond the 9 months, but made no application for a lease. At

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the expiration of a year following the 9 months the plaintiff sued for a year's rent and in the trial before Gurney, B., with a jury, recovered judgment. A motion for a new trial was made before Lord Abinger, C.B., and Gurney and Rolfe, BB. Lord Abinger, C.B., in giving judgment, said (p. 574), after stating the facts as above:—

In what capacity, then, is the plaintiff to look to the defendants? Not as trespassers, but as tenants, having exercised their option under the original contract by communicating an interest to other parties.

Gurney, B., concurred. I cannot understand the reasoning could have been any different if the tenants had continued to hold on themselves.

Counsel there contended for the defendants that, in order for the plaintiff to succeed, the defendants must be inferred to be tenants from year to year, which was impossible, as the original agreement was for 9 months only. Dealing with this contention, Rolfe, B., says (p. 574):—

It is not necessary to infer anything so preposterous. Here is not only an agreement for 9 months, but the parties come in with an option to be exercised at the end of that time of taking the premises for 7, 14 or 21 years. Then, after the 9 months what do they do? I think they continue in the occupation for a year; not indeed by themselves, but by the Talacre Coal Co.

Lord Abinger, C.B., then adds, evidently referring to the same contention and to the remarks of Rolfe, B.:—

I quite agree to the law that if a party takes premises for a certain time and holds over, he does not thereby necessarily become tenant from year to year, unless something occurs to shew the existence of a new contract.

(Meaning obviously a contract different from that contained in the original lease.)

The case of *Ferguson* v. *Cornish* (1760), 2 Burr. 1032, 97 E.R. 691, is instructive.

There the lease was for "7, 14, or 21 years as the lessee should think proper." This was held to be a good lease for 7 years at least, and Lord Mansfield stated in regard to it, as appears from a note in 3 T.R., p. 463, 100 E.R. 678:—

It was at least a lease for 7 years; then if he continues it is for 14 years; if at the end of that time he still continues, it is for 21 years.

If Lord Mansfield had been of opinion that it was necessary for the tenant to give notice of his intention to continue (as contended for the first time apparently in this appeal) he certainly would have said so.

It is a clear intimation on his part that the lessee would validly exercise his option simply by continuing and indeed, there, as in the present case, it is the only way by which the tenant could exercise it.

This case, of course, must be distinguished from those in which the lessee has to do something before he has the right to exercise his option, such as to give notice or apply for a renewal.

There is a statement in the case of *Lewis* v. *Stephenson* (1898), 67 L.J.Q.B. 296, where a tenant held for a term of 3 years "with the option of renewal," and the lease was silent as to the time when the renewal should be made or applied for, that the option should be exercised within a reasonable time before the expiration of the term. The above statement made by Bruce, J., is said to be clearly unnecessary to the decision of that case. (Foa on Landlord and Tenant, 4th ed., p. 310, note d.)

But that is not this case. Here, the option is expressly "of continuing the lease," which, as already pointed out, could only be exercised at the conclusion of the antecedent term.

In my opinion, the tenant in the present case was under no obligation to apply for a renewal at all. The lease was to extend for a further period if the lessee so desired, and, in my opinion, there is no implied condition that he should give any notice of such desire, or, indeed, that such desire should exist before the expiration of the year. Such an implication would, I think, be in violation of the express terms of the lease which gives the option expressly to the tenant "to continue the lease"; that is, stay on after the year has elapsed without any fetter or condition annexed to such right. See *Brewer* v. *Conger* (1900), 27 A.R. (Ont.) 10, and cases there cited.

The case of *Lindsay* v. *Robertson* (1899), 30 O.R. 229, was cited as authority for the proposition that the holding of the keys by a tenant for a few days beyond the original term, and the possession of a sub-tenant thereafter of a part of the demised premises, were not sufficient to constitute an exercise of the tenant's option to renew. This text-book statement is not borne out by a perusal of the case, which shews that, before the expiration of the term, the tenants expressly notified the landlord more than once that they did not intend to exercise their option and that the landlord was at liberty to re-rent the premises.

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It follows from what has been said that it is unnecessary to consider whether the notice to quit is good or not, as in my opinion the landlord had no right to give it.

The appeal should be allowed with costs.

Drysdale, J.

DRYSDALE, J.:—On appeal from Ritchie, J. In this case there was a lease for a term certain, viz: one year with the option to the tenant of continuing the lease from year to year. The option was not expressly exercised and the landlord took proceedings against the tenant after the year for overholding. The judge held that mere overholding was not an exercise of the option and agreed with the conclusion of the County Court Judge, Patterson, in this respect. I agree with Ritchie, J., and would dismiss the appeal. Here the tenant had a lease for a year certain with the option of continuing the lease from year to year. "Option" means the right, power, or liberty of choosing. The tenant did not exercise this right, but simply held over after the year. Nothing took place that can or could be construed as exercising the liberty of choosing. This was the right of the tenant, and could only be exercised by him. He did not do it and cannot now claim to be a tenant from year to year, a position that was quite open to him, had he on any reasonable notice availed himself of his right of choosing. I notice in the leading case (*Waring* v. *King*, 8 M. & W. 571, 151 E.R. 1166) relied upon for the appellant, a striking remark of Lord Abinger, C.B., where, in dealing with the case before him, he says (p. 575):—

> I quite agree to the law that if a party takes premises for a certain term and holds over he does not thereby necessarily become tenant from year to year unless something occurs to shew the existence of a new contract.

Why this sound statement of the law should be treated as having reference to a contract different from that contained in the original lease, I know not. Here the contract expressly provided the tenant had the option and right of converting his term into a year-to-year contract. He failed to do this, and so failing he must, I think, be held to his term.

Longley, J.

LONGLEY, J., concurred with Drysdale, J.

Appeal allowed.

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MORROW CEREAL CO. v. OGILVIE FLOUR MILLS CO.

Supreme Court of Canada, Davies, Idington, Anglin and Brodeur, JJ., and Falconbridge, C.J., ad hoc. October 9, 1918.

1. APPEAL (§ VII A—290)—QUESTIONS OF FACT—CREDIBILITY OF WITNESSES—FINDING OF TRIAL JUDGE—REVERSAL.

When a question of fact depends upon the credibility of witnesses, an appellate court will not reverse the finding of the trial judge who has had the advantage of seeing and hearing such witnesses.

2. DAMAGES (§ III P—340)—CONTRACT—REPUDIATION—BREACH—MEASURE OF DAMAGES.

Where there has been a repudiation of a contract for the sale and purchase of goods, which has been treated as a breach, the measure of damages is the difference between the contract price and the market price, on the date of the breach. Where, however, the breach occurs before the date of delivery, the party treating the repudiation as a breach is not required to take the risk of purchasing other goods before the date of delivery at a higher price than that named in the contract and so exposing himself to loss should the price decline before the date of delivery, although he must do what is reasonable to decrease the damage.

[*Roth* v. *Taysen* (1896), 12 T.L.R., referred to.]

Statement.

APPEAL and cross-appeal from a decision of the Appellate Division of the Supreme Court of Ontario, 39 D.L.R. 463, varying the judgment at the trial in favour of the plaintiffs (respondents).

Harcourt Ferguson, for appellant.

Davies, J.

DAVIES, J., concurred with Anglin, J.

Idington, J.

IDINGTON, J. (dissenting):—The appellant's place of business was Toronto, where he carried it on under the name of Morrow Cereal Co. The respondent's was in Montreal. One Weeks, a sales' agent so called of the latter, and appellant travelled on a train from Montreal to Toronto and being engaged in the like business of dealing in flour had naturally a conversation relative to prices of a certain brand of flour which went so far as the appellant naming a price he was likely to agree to for sale to respondent of a large quantity thereof for future delivery.

They parted at Toronto on the morning of Oct. 13, 1916; appellant stopping there and Weeks going on to London.

On the afternoon and evening of same day they had 'phone conversations which led to the appellant sending Weeks the following telegrams:—

Toronto, Ont. Oct. 13-16.

J. E. Weeks, Esq.,

Tecumseh House, London, Ont.

We confirm sale six thousand bags October shipment four thousand November seven five bulk Montreal also your giving us until to-night on ten thousand more at seven dollars Montreal thanks.

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J. E. Weeks,
Tecumseh House, London, Ont.

Book ten thousand bags seven dollars bulk Montreal October November shipment our option.

He further sent respondent on same and next day respectively the following:—

Confirmation of sale, Morrow Cereal Company.
Toronto, Oct. 13th, 1916.
No. 1552.

To: The Ogilvie Flour Mills Co., Ltd.
Address: Montreal, Quebec.
Date wanted, see below.

Price Per
10,000 98's -90% Patent Ontario Winter Wheat Flour.....$7.05 Bbl.
Bulk Basis Montreal.

Date of Shipment:
6,000 bags—October,
4,000 bags—November,

10,000 bags.

MORROW CEREAL COMPANY, Per "Morrow."

Confirmation of sale, Morrow Cereal Company.
Toronto, Oct. 14th, 1916, No. 1553.

To: The Ogilvie Flour Mills Co., Ltd.
Address: Montreal, Que.
Date of shipment (November)
10,000 bags 90% Patent Ontario Winter Wheat Flour,
$7.00 Bbl.
Bulk Basis Montreal.

MORROW CEREAL COMPANY, Per "Morrow."

The respondent sent, on Oct. 23, 1916, the following letter:—

We attach herewith copy of bill of lading covering 20,000 empty bags which we forwarded to you on the 19th inst., to cover our orders 279 and 280 which are being mailed to you to-day under separate cover.

and on same day wrote the following letter with the enclosures which follow it as hereunder:—

We beg to confirm exchange of wires:—Received: "Kindly confirm sale of oatmeal feed quick." Sent: "Sorry too late to confirm. Very best could do would be one car at twenty-three. Heavily oversold."

Also we herewith attach our confirmations of our recent purchase of flour from you. We are pleased to advise the empty bags in which to make shipment of this flour went forward to you last Friday per S.S. J. H. Plummer, and we would caution you to be very careful to number these different bags from the different mills as outlined during the writer's recent interview with you.

We are sorry you did not wire us on Saturday with reference to the oatmeal feed as promised, as we only concluded a sale of oarmeal feed at $24 a ton on Saturday afternoon, believing you were not going to be able to handle same.

We are now asking everybody $24 and confining our sales to small lots in mixed cars, as we are so heavily oversold we cannot take care of any more straight cars, neither do we hope to be able to do so much before the 1st January.

J. E. Weeks, General Sales Agent.

Enclosed in letter of 23rd October, 1916.
Order No. 279.

Original Oct. 14th, 1916.

The Ogilvie Flour Mills Co. Limited,
Purchasing Department, Montreal, Que.

To Morrow Cereal Co., Toronto.

We beg to confirm purchase of the following goods:—
Quantity 10,000 bags.
of 90% Patent Ont. Winter Wheat Flour, at seven dollars [illegible] cents per barrel of 196 pounds.
Inspection usual.
Delivery November.
Basis of purchase f.o.b. Mill Montreal Bulk.
Ship to Ogilvie's City Mill Sdg., Montreal.
Per Grand Trunk delivery.
Terms cash on acceptance of goods.
Payment in.....funds.
Special terms (if any).
Buyers to have privilege of inspecting cars before paying draft. Your confirmation of sale No. 1553.

The OGILVIE FLOUR MILLS CO. LIMITED.
Per.....

Please quote above Order No. on your invoice. Goods bought on grade, or sample, not accompanied by official inspection certificate, must be subject to our examination before payment of draft.

Enclosed in letter of 23rd October, 1916.
Order No. 280.

Original Oct. 13th, 1916.

The Ogilvie Flour Mills Co , Limited.
Purchasing Dept., Montreal, Que.

To Morrow Cereal Co., Toronto.

We beg to confirm purchase of the following goods:—
Quantity 10,000 bags.
of 90% Patent Ont. Winter Wheat Flour at seven dollars and five cents per barrel of 196 pounds. Inspection usual. Delivery 6,000 bags in Oct. 4,000 bags in Nov. Basis of purchase f.o.b. Mill Montreal Bulk.
Ship to Ogilvie's City Mill Sdg., Montreal.
Per Grand Trunk delivery.
Terms cash on acceptance of goods.
Payment in.....funds.
Special terms (if any).
Buyers to have privilege of inspecting cars before paying draft. Your confirmation of sale No. 1552.

The OGILVIE FLOUR MILLS CO. LIMITED.
Per.....

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Idington, J.

Please quote above order No. on your invoice. Goods bought on grade, or sample, not accompanied by official inspection certificate, must be subject to our examination before payment of draft.

On receipt of the foregoing the appellant wired as follows:—

Toronto, Ont., Oct. 24, 1916.

The Ogilvie Flour Mills Co. Ltd.
Montreal, Que.

Your acceptance of flour received this morning twelve days after our offer sorry too late heavily oversold. MORROW CEREAL CO.

To this respondent same day replied as follows:—

Montreal, Que., Oct. 24, 1916.

Morrow Cereal Co.,
Toronto, Ont.

What does your telegram of even date mean? We do not understand it.
THE OGILVIE FLOUR MILLS.

The respondent brought this action on November 7, 1916, founded upon part or whole of the foregoing if applicable.

The respondent contends that the appellant's messages from Toronto to Weeks form the contract, when read in light of the conversations had between him and Weeks.

Obviously, it would have some difficulty in making thereout alone a contract complying with the Statute of Frauds and it falls back upon the confirmation of the contract sent by appellant directly to the respondent at Montreal. If there were nothing more in the case, as the courts below evidently have held, there might not be much difficulty in respondent's way. But there are a number of things in the conversations leading up thereto in regard to which the appellant and Weeks differ.

I shall not dwell thereon for I cannot, in my view of the whole case, get rid of the opinion I have formed that the letter of the respondent and the enclosures therein which are specifically referred to as "our confirmation of our recent purchase of flour from you" were intended to form part of the contract from respondent's point of view as originally conceived.

It was clearly the result of the well-understood mode of doing business between them that each party should so express its understanding in writing otherwise no such communications would have been resorted to or have existed.

But for some such system the obvious result would be, that he, sending a telegram or letter merely as result of a prior oral bargain, would be bound in law, whilst the other would not.

It is idle to argue that such contracts are possible and that such a one-sided method of bargaining often does occur.

It is not a method, I imagine, of very extensive use. It is too absurd for business men dealing in commodities of daily fluctuating value to act upon as a rule.

However, all that may be with others, I am clearly of the opinion that such loose methods of business formed no part of the daily method followed by those litigants.

The appellant, in compliance with the sane and safe way, did not treat his telegram to Weeks as ending the business, but sent the confirmatory and explicit statement of the contract to the respondent's head office in Montreal, and its replies thereto set forth in the enclosures of 13th and 14th October respectively, were doubtless framed on the days they bear date for the purpose of being despatched to the appellant but by some oversight were delayed until Weeks had returned to Montreal and happened to observe the omission when attending to another proposal which takes up a great part of his letter but has no bearing on that in question herein.

By that time it was too late, but none the less it was so begotten of their common understanding or system adopted to express a part of an intended contract that they were sent forward as a matter of course.

It is stoutly argued that they neither formed a part of the contract now in question nor even were so intended.

I cannot agree therewith; or rather, I should say, they ought to have formed part thereof if properly framed and sent in due time.

It is not pretended that the respondent can insist on the maintenance of such contracts if their confirmations such as I indicate were respectively a necessary part thereof. The fluctuating market did not permit of any such suspense or delay.

Moreover, there is a clear departure from the express terms of the appellant's confirmatory expression of the contract as he understood it.

These points I need not elaborate. They are self-evident to any one closely analyzing each party's confirmations and comparing same.

The result is, in my view, there never was a contract and many other points made and argued at length need not be considered.

The appeal should be allowed with costs.

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Anglin, J.

ANGLIN, J.:—The evidence of the two witnesses who gave oral testimony about the contracts sued upon is so contradictory that, unless the documents in the record are decisive, the truth of one story or the other must be determined by their respective inherent probabilities or by the comparative credibility of the witnesses. The defendant's witness—he is in fact the defendant—asks us to believe that two writings, each headed "Confirmation of Sale," and otherwise in the form of a sale note, were merely offers and were sent pursuant to an understanding with the plaintiff's witness that they should be so treated by the plaintiff. This *ex facie* improbable story is denied by the plaintiff's witness, who, in turn, asks us to accept his statement that two other writings, which he calls in his letter "our confirmations of recent purchase," and on their face purport to be such—giving the full particulars of bought notes—were sent not to complete the contracts which they evidence but merely to give the defendant the number by which those contracts would be designated in the plaintiff's records—a story perhaps not quite so improbable as that of the defendant's witness, but undoubtedly not free from difficulty.

On the whole, with Riddell, J., I cannot say that the trial judge was wrong in accepting the plaintiff's version that two contracts had been concluded between Weeks and Morrow as a result of conversations on the train and by telephone and telegrams, of which the documents above referred to were, as they purport to be, merely confirmations.

I think the trial judge must have thought Weeks' testimony more credible than Morrow's. One or two incidents in the course of the trial indicate that Morrow's manner of giving evidence and the unsatisfactory character of his answers impressed the judge unfavourably.

I think it might well be regarded as "a rash proceeding" on our part, under the circumstances of this case, to reverse the finding of the judge who tried it and saw the witnesses who are in conflict in the witness-box, affirmed as it is by the majority of the judges of the appellate court. *Nocton* v. *Ashburton*, [1914] A.C. 932, 945. While I fully appreciate the right of appeal from the finding of a trial judge on fact as well as law, so much insisted upon by Meredith, C.J.C.P., in his dissenting judgment, his views seem scarcely in accord with very recent statements by their

Lordships of the Judicial Committee of the duties of an appellate court in dealing with such an appeal. In *Ruddy* v. *Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, speaking of the judgment of a trial judge their Lordships say:—

> From such a judgment an appeal is always open, both upon fact and law. But upon questions of fact an appeal court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions.

In *Wood* v. *Haines* (1917), 33 D.L.R. 166, 169, 38 O.L.R. 583, their Lordships said:—

> It must be an extraordinary case in which an appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial judge who has seen and watched them, whereas the appellate judge has no such advantage.

There remains to be considered the cross-appeal by which the plaintiffs seek a restoration of the assessment of damages made by the trial judge which was set aside by the appellate division. The appellate judges hold that the sum allowed was excessive but do not state the error in which the trial judge, in their opinion, fell and *advisedly* refrain from indicating the measure of damages to be applied on the reference which they direct. I am, with respect, of the opinion that the award of damages by the trial judge should not have been disturbed and I cannot but think it unwise, to say the least, and calculated unduly to prolong litigation, to leave a referee without any guide as to the proper basis on which to assess the damages when, as here, an appellate court holds that the trial judge was in error as to the principle upon which they should be assessed and that principle is so clear as the judges of the appellate division apparently thought it.

The trial judge allowed the plaintiffs the difference between what it actually cost them to procure flour to replace what the defendants had failed to deliver and what it would have cost at the contract prices. The latter was $7.05 per barrel for 6,000 bags to be delivered before November 1, and for 4,000 bags, $7.05, and for 10,000 bags, $7 per barrel, to be delivered before December 1. The defendants repudiated their contracts on October 24. The first evidence of any election by the plaintiffs to accept this repudiation and put an end to the contracts is furnished by the commencement of this action on November 7.

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I agree with the statement made by counsel for the defendants in their factum that the correct rule as to the measure of damages under these circumstances is stated by Lord Esher, M.R., in *Roth* v. *Taysen*, 12 T. L.R. 211, 212, in these terms:—

> When there was a repudiation of a contract for the purchase and sale of goods treated as a breach the difference between the contract price and the market price of the goods on the date of the breach was the measure of damages subject to this, that if the date of the breach was not the day of delivery another rule applied. In this latter case the repudiation when accepted was treated as a breach of the contract before the day of delivery, and the damages would not be the difference between the contract price and market price on the day of breach, but must be assessed by the jury having regard to the future day of delivery. But this latter rule was qualified by this, that the plaintiff who had treated the repudiation as a breach was bound to do what was reasonable to decrease the damages.

See also Mayne on Damages, 7th ed., p. 212.

The plaintiffs bought 7,000 bags of flour at $8.10 and 13,000 bags at $8.40 per barrel to replace the flour which the defendants had refused to deliver. As to the 6,000 bags deliverable before November 1, the defendants themselves say in their factum that the Toronto price of flour of the quality contracted for in bags was $8 per barrel at the end of October, to which must be added 15 or 16 cents a barrel for freight to Montreal. They, therefore, can have no cause of complaint as to the purchase made to cover the 6,000 bags then due at $8.10 a barrel.

But they complain of the $8.40 paid for the remaining 13,000 bags. The only evidence of market prices at the end of November is given by John Kennedy and Alex. McLeod. Kennedy says the Toronto Board of Trade quotation at the end of November was $7.65-$7.75 a barrel, to which he would add 15 cents for freight to Montreal. His last transaction, however, was on November 28, when he paid $7.90 in Montreal. But McLeod tells us that the prevailing price at the end of November was $8.45 a barrel and, giving reasons for the statement, he says that the Toronto Board of Trade quotations are not a fair indication of current prices of flour. The trial judge may have preferred to be guided by McLeod rather than by Kennedy. If so, it is impossible to say that this was an error on his part. There is nothing to indicate that McLeod is not a trustworthy and reliable witness. The judge saw and heard both witnesses and was in the best position to determine upon which of them he could most safely rely. If, therefore, the damages

in respect of the 14,000 bags then deliverable should be fixed as of November 30, the $8.40 a barrel paid for the 13,000 bags now under consideration was 5 cents less than the market price. In respect of the other 1,000 bags, the defendants have the benefit of the earlier purchase of 7,000 bags at $8.10.

There is no evidence that the plaintiffs could have obtained a contract in the interval between the 7th and the 30th of November on any better terms. The burden was upon the defendants to shew that they could, if that were possible. The plaintiffs had all the inconvenience of having to find flour to replace what the defendants failed to deliver, and it is by no means clear that during that period 20,000 bags of flour could be easily picked up on the market. At all events, I know of no principle on which the plaintiffs could have been required to take the risk of purchasing before November 30, at a price higher than those named in the contracts, thus exposing themselves to loss should the price decline between the dates of such replacing purchases and November 30.

Applying the rule laid down in *Roth* v. *Taysen*, 12 T.L.R. 211, I think the trial judge, under these circumstances, did right in taking as the measure of the damages sustained by the plaintiffs the amount by which the cost of the flour procured by them exceeded what would have been the cost to them of the like quantity of flour of same quality if delivered by the defendants pursuant to their contracts.

I would, therefore, dismiss the main appeal and allow the cross-appeal, both with costs, and would restore the judgment of the trial judge.

BRODEUR, J.:—The question is whether the appellant undertook to supply the respondent with 20,000 bags of flour. The negotiations were carried out by the appellant himself and Weeks, the sales' agent of the respondent. They met together on a train going from Montreal to Toronto. After a great deal of talk, it was stated by Weeks that his company would purchase 20,000 bags of flour, 10,000 at $7.05 and the balance at $7, and that with such a quantity they would stay out of the market for a while. Morrow is a large flour merchant in Toronto, and the respondents are likely the most important dealers in that commodity in the country.

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The appellant and the respondent are therefore serious competitors and the idea of seeing the Ogilvie company out of the market, and the price of $7.05 were very attractive to the appellant, and he was ready to close at $7.05 for the 10,000 bags, but as the contract had to be made for the whole quantity of 20,000 he would consider the matter and would communicate during the day with Weeks who was going to London, Ontario.

There is some divergence between those two men as to what was their conversation, and if the case had to be decided on the oral evidence of those two witnesses the respondent company, being plaintiff and having the onus, must fail. But the trial judge, who saw them both in the box, accepted the statements made by Weeks in preference to those of Morrow. Besides, the written evidence we have shews conclusively that Weeks' story should be accepted.

During the day, on October 13, 1916, Morrow called Weeks on the telephone and evidently said that he was ready to contract for the 10,000 bags at $7.05, but could not give a definite answer as to the other 10,000 bags. He was asked to put that in writing and sent the following telegram:—

We confirm sale six thousand bags October shipment four thousand November seven five bulk Montreal also your giving us until to-night on ten thousand more at seven dollars Montreal thanks.

MORROW CEREAL CO.

4.05 p.m.

and the same day he sent a confirmation note of the sale of 10,000 bags to the respondent company itself at Montreal:—

Confirmation of Sale, Morrow Cereal Company.

Toronto, Oct. 13, 1916.

To Ogilvie Flour Mills, Ltd.

Address: Montreal, Que., via date wanted.

Subject to our terms and conditions—see below:—

Quantity	Description	Price per bbl.
10,000	98's 90% Patent Ontario Winter Wheat Flour. Bulk Basis Montreal. Date of shipment. 6,000 bags October. 4,000 bags November.	$7.05

10,000 bags.

MORROW CEREAL COMPANY, Per Morrow.

In the evening of the same day, Morrow sent to Weeks another telegram closing the sale for the other 10,000 bags in the following words:—

Book ten thousand bags seven dollars bulk Montreal October November shipment our option. MORROW CEREAL CO.
8.17 p.m.

and the next day he sent to the respondent company a confirmation note for that last sale. There again the document is called "Confirmation of Sales."

Now the defendant, appellant, claims that those sales were made with the condition that the respondents would stay out of the market.

We do not find that condition in his telegrams and in his confirmation notes. The offer, I understand, made by Weeks to purchase those 20,000 bags of flour was made with that condition; and, as a question of fact, he has stated that they were willing to stay out of the market.

However, the condition, as far as the respondents are concerned, has been fulfilled and there is no necessity for laying any stress upon it. It seems to me with the evidence we have before us, and especially with the telegrams sent by Morrow and his confirmation notes, that there is no doubt about a contract having been entered into by which Morrow, doing business under the name of Morrow Cereal Company, undertook to ship during October and November 20,000 bags of flour, of which 10,000 was to be at $7 and 10,000 at $7.05.

I understand that it is a custom of trade with those dealers that when they make verbal contracts or agreements by telephone or by telegrams, to exchange confirmation notes. But those confirmation notes do not prevent the contract from being made from the time and date at which the agreement has been entered into. They are simply evidence of the contracts but do not constitute the agreement itself.

The appellant claimed at first that the contract was at an end because the confirmation note on the part of the Ogilvie Flour Mills Co., reached him only the week after. If, of course, those confirmation notes constituted the contract itself, the appellant might be right because on account of the market being so fluctuating an acceptance should be made without unreasonable delay. But then it would have been his duty to state in his telegram or

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Brodeur, J.

confirmation notes the period during which the acceptance should take place. But no such time limit is to be found in the telegram or in the notes.

Now he says that the acceptance of his alleged offer was not made because the confirmation note of the respondent company instructed to ship to Ogilvie's city mill siding, Montreal, and because the word *delivery* instead of *shipment* was used with regard to the months in which it should take place.

There is evidence that with regard to the words *delivery* and *shipment* they should be considered as synonymous in the trade; and besides I see that no objection was taken to them when the notes of the respondent company reached Morrow. In fact, the only reason he gave in the telegram of October 24 was

> Your acceptance of flour received this morning, twelve days after our offer sorry too late heavily oversold.

No objection then as to the word *delivery* having a different meaning from the word *shipment*. I am sure that this point is the result of an afterthought.

As to the instructions to ship to the Ogilvie's city mill siding, of course that would be a very serious objection if it would incur on the part of the appellant heavier responsibility. But it appears by the evidence that, in shipping to that siding, it would not cost him one cent more. That should be treated then simply as instructions as to delivery which would not affect the nature of the obligation of the vendor and would not increase his work.

The trial judge maintained the action and gave judgment for a fixed sum of money. His judgment was confirmed by the appellate division, but a reference was ordered to ascertain the amount of damages suffered by the plaintiff. In that regard, there is a cross-appeal by the respondents. I would be of opinion to maintain this cross-appeal for the reasons given by my brother Anglin.

The appeal is dismissed with costs and the cross-appeal maintained with costs and the judgment of the trial judge restored.

Falconbridge, C.J.

FALCONBRIDGE, C.J., concurs with Anglin, J.

Appeal dismissed with costs;
cross-appeal allowed with costs.

GEORGE v. PEART.

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Nova Scotia Supreme Court, Harris, C.J., Longley, J., Ritchie, E.J., and Mellish, J. December 21, 1918.

INFANTS (§ I B—5)—PERSON IN LOCO PARENTIS—BOARD AND LODGING OF INFANT—ABSENCE OF AGREEMENT—PRESUMPTION.

In the absence of an express agreement with a person acting *in loco parentis* that he is to be remunerated for board, lodging and maintenance, the presumption is that these are rendered gratuitously.

Statement.

APPEAL from the judgment of His Honour Patterson, J., of the County Court for District No. 5, in favour of plaintiff in an action for necessaries supplied by plaintiff to defendant's infant daughter, and for board, lodging and maintenance of said infant.

W. L. Hall, K.C., for appellant; *V. J. Paton*, K.C., for respondent.

The judgment of the court was delivered by

Ritchie, E.J.

RITCHIE, E.J.:—The plaintiff is the father of the defendant's wife. The County Court Judge has found that the defendant deserted his wife without making provision for her support or for the support of the child of the marriage. With these findings I am in entire accord. Under these circumstances, the wife left the child at her father's house. He supported the child, and for this support he sues the defendant in this action. If the plaintiff is entitled to recover it must be by virtue of a contract, express or implied, made with the defendant personally or through his agent; there is no pretence of any contract made direct with the defendant. As a matter of law, under the facts of this case, the wife became what is called in the books an agent of necessity for the purpose of pledging the husband's credit for the support of his infant child. But the crucial question remains, did the wife pledge the credit of her husband with her father for the support of the child? In other words, was there a contract between them? Careful consideration of the evidence makes it very clear that there was no express contract. Is there anything from which a contract can be implied? With great regret I am forced to the conclusion that there is not. The plaintiff in his evidence says:—

> Lizzie Peart came to my house on May 26, bringing her child Geneva, daughter of defendant. I have supported her ever since like one of my own.

The trial judge has made a finding that the wife pledged the husband's credit. I would not require much in the way of evidence to support this finding, but I must have something, and I can find no evidence of any kind, either express or by way of implication,

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and there is a clear legal presumption from the relationship of the parties that the support of the child by the plaintiff was gratuitous. Nothing short of an express contract will overcome this presumption. In *Murdoch* v. *West* (1895), 24 Can. S.C.R. 305, the relationship was that of grandfather and grandson. At p. 306, Strong, C.J., said:—

I am of opinion that there was ample evidence for the consideration of the jury to shew that services were rendered by the plaintiff's husband to his grandfather as a clerk in the management of his business; and that such services were understood not to be gratuitous but were to be remunerated by the payment of wages or by a gift by will; in short, that there was proof of an agreement to that effect between the parties. The case, therefore, in all legal aspects resembles that of *McGugan* v. *Smith*, (1892), 21 Can S.C.R. 263. and must be governed by the same principle. There is nothing in the relationship of the parties disentitling the plaintiff to recover, if the services were agreed to be paid for, as the jury have found they were. When services are rendered to a person standing *in loco parentis* to the person rendering them there is a certain presumption that such services were not to be remunerated by wages, but such presumption may be overcome by evidence of an express agreement. Here there was, as I have said, evidence of such an agreement.

I allow this appeal because I think I have no other alternative under the law. The conduct of the defendant as a husband and father has been shameful, but as Parke, B., said in *Mortimer* v. *Wright* (1840), 6 M. & W. 482, 151 E.R. 502, cited in the judgment appealed from:—

There was no proof of any contract in this case, which was absolutely necessary to render the defendant liable; and whatever may be the moral obligations of parties, juries must not be allowed to make them contracts without legal evidence.

I do not know that the court has power to deprive the defendant of costs, but if there is any legal foundation for such a contention, I think counsel should be heard in regard to it when the order allowing the appeal is moved for. *Appeal allowed.*

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McKAY v. DOUGLAS.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. November 18, 1918.

LANDLORD AND TENANT (§ III D—110)—PARTITION WALL—CLOSED DOOR—OBSTRUCTION—RIGHT OF TENANT TO REMOVE—RIGHT TO DELEGATE AUTHORITY—DISTRESS FOR RENT.

A tenant has the right to remove an obstruction placed by him against a door in the wall between the premises occupied by him and the adjoining premises, and may permit the landlord's bailiff to do so, and after such removal the entry by the bailiff being without a breaking a distress for rent is legal.

[*Douglas* v. *McKay* (1918), 40 D.L.R. 314, reversed; *Gould* v. *Bradstock* (1812), 4 Taunt. 562, 128 E.R. 450, applied.]

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McKAY v. DOUGLAS.

Davies, C.J.

APPEAL from a decision of the Supreme Court of Nova Scotia, 40 D.L.R. 314, affirming the judgment at the trial in favour of the plaintiff in an action for damages for wrongful distress for rent. Reversed.

Burchell, K.C., for appellants; *Hall*, K.C., and *McArthur*, for respondent.

DAVIES, C.J.:—This appeal is one from the judgment of the Supreme Court of Nova Scotia *in banc*, 40 D.L.R. 314, dismissing an appeal from a judgment of the trial judge but reducing the damages from $2,500 to $1,500.

The action was one brought by a tenant against his landlord for, as was alleged, an illegal distress upon his goods in his rented premises, the illegality consisting of a wrongful breaking into by the landlord of the premises.

A majority of the appeal court upheld the illegality of the distress upon the ground that there had been an illegal breaking into by the landlord of the demised premises in order to distrain for the overdue rent, and that, therefore, he was liable in the action for trespass brought.

The facts are not in dispute. The premises leased to the plaintiff were divided off from other premises leased by one Brody, by a wooden partition in which there was a swinging door which had at one time been used by the occupants of both premises to pass from one to the other.

Brody had put a simple latch on his side of the door which could be lifted with one's finger and had also placed another loose or unfastened door up against the latched door, and a case of type against the loose or unfastened door. When the landlord came to distrain he asked Brody to move his case of type, take away the second door and unhook the latch on the first door, and it was held by the Chief Justice, Ritchie E.J. and Mellish, J., that these things, having been done by Brody at the landlord's request, the latter was guilty of an illegal entry in pushing open the unlatched door and entering into the premises of the plaintiff tenant. It is right to say that Ritchie, E.J., who was a party to the judgment, expressed himself as concurring with "some doubt," while Chisholm, J., with whose judgment Longley, J., concurred, dissented in a very vigorous and, if I may be permitted to say so, a very luminous judgment.

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The question before us being reduced down to the one question whether there was an illegal breaking into the premises by the landlord, I am of opinion, after looking into the authorities on the question of illegal entry, that there was none such in the present case.

Brody, the occupier of the adjoining tenement divided from the one in question by the wooden partition with the swinging door latched on Brody's side, had, in my opinion, a perfect right to remove the case of type he had placed against the loose door, then to remove the door itself which was not fastened, and finally to lift the latch on the partition door. It does not matter in the least whether he did each and all of these acts of his own mere motion or at the instance and request of McKay the landlord. He had a perfect right to do what he did. When these obstructions were removed the way was open and clear for the landlord to push the door open, enter and distrain.

I am quite unable to follow the Chief Justice's reasoning that, assuming Brody to have the right to remove his own case of type in his own tenement, and his own loose and unfastened door, and then to lift his own latch, which he himself had placed on the swinging door on his own side, because he did so at McKay's request, "it must all be regarded as of the landlord," and was, he thinks, "clearly such an entry as could not be justified for the purpose of distress."

On the contrary, I think that Brody only did what he had an absolute right to do whether spontaneously or at McKay's instance and which, when done, enabled the landlord to enter by pushing open the swinging unfastened door and execute his distress.

Any other person than the landlord who entered to distrain would have committed a trespass, not the landlord who entered without breaking any latch or fastening, simply pushing the swinging door open for the lawful purpose of levying a distress.

I think the modern case of *Long* v. *Clarke*, [1894] 1 Q.B. 119, directly in point in this case.

There the plaintiff, being unable to get into the house by the front entrance, went into the next house; from there he went into the yard at the back, and then got over a wall (said to vary in height from 5 to over 10 ft.) into the yard at the back of the plaintiff's house, and entered the house by means of a window (the

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report does not say whether it was closed or not, but the inference from the judgment is that it was open) and distrained on the goods. Held by the court of appeal to be a lawful distress. Lord Esher, M.R., says, at p. 121:—

In this case we are dealing with a landlord's bailiff distraining for rent. What is the ordinary law applicable to such a case? It gives a right to the landlord to do that which, if any other person did it, would be a trespass, and the question is whether what has been done in the present case is within what is permitted by the law of distress. When a landlord goes into a house to distrain, whether the door be open or shut, he does that which, in any other person, would be a trespass, and it is just the same if he merely walks across the land to the front door. The sole question is what limitations on the right of the landlord to go on the premises and distrain the law imposes on him. He cannot go into any building or into any house if he can only do so by breaking into it. He can go in at the door, which is the most obvious way of entering; but further, he can get in by a window if it is left open. There is no trespass in doing either of these acts, because he does not break in. So it is incorrect to say, as has been suggested, that the landlord cannot go into the house if he finds a hole in the side of it, and for the same reason, that in so entering he is not breaking in. This law is applicable to any building into which the landlord wants to get for the purpose of distraining, such as a warehouse, a stable, or a barn. Thus, supposing he enters a curtilage without breaking anything, still he cannot break into any stable or building within the curtilage which is locked.

It is unnecessary for me to make further quotations from the judgments of the judges in that case. They are all to the same effect as that from Lord Esher, and are, to my mind, conclusive on the point now before us.

I would, however, cite the case of *Ryan* v. *Shilcock* (1851), 7 Ex. 72, 155 E.R. 861, where it was held the breaking must be such a breaking as is also equivalent to a forcible entry; and that of *Gould* v. *Bradstock*, 4 Taunt. 562, 128 E.R. 450, where the landlord himself occupied a room over that of his tenant beneath him, divided by a flooring of boards nailed on rafters, in which Sir James Mansfield justified the entry of a landlord to distrain on his tenant below him in taking up a portion of the flooring between the apartments, and entering to distrain through this aperture so made.

I think the appeal must be allowed with costs throughout and the action dismissed.

Idington, J.

IDINGTON, J.:—I am, in one respect, in the same frame of mind as the trial judge that I have some doubt as to the legality of this act complained of, but, with the greatest respect, I submit

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that such frame of mind properly directed should, in this case, have resulted in a dismissal of the plaintiff's (now respondent's) action with costs.

I, therefore, am of the opinion that the court below which, on a careful analysis of what is expressed, seems to have been in the like predicament, should have come to the conclusion that no court has a right to find a man guilty of wrongdoing unless the law clearly declares him to be so when regard is had to the relevant facts.

It seems to me that the case of *Gould* v. *Bradstock*, 4 Taunt. 562, which seems to go a great deal further than needed to maintain a dismissal of this respondent's action, stands yet as good law, though I find it was not decided by the great Mansfield, C.J., as counsel inadvertently assured me it was, when I felt puzzled by the expressions quoted, and hence prompted to inquire.

Everything Mr. Brody did to facilitate the landlord's entry was perfectly legal up to and including the lifting of the hook he had placed there for his own reasons and to serve his own uses. How doing that which a man had an absolute right to do, if he saw fit, can be made in law to demonstrate illegality in someone else's act beyond that, is what I am unable to understand. With the very greatest respect I submit that to so hold only confuses two things, one legal and the other of an undecided quality now to be passed upon, on its merits, and tends to further confusion of thought in trying to solve, or solving, the actual problem when reached.

The problem is, when otherwise approached, reduced to the question of the legality of a landlord entering by a door he presumably had placed there for common use by his tenants, or by himself and the tenant in question, as an easy mode of ingress and egress and requiring no force to open it and enter.

In the situation thus created that door was as much an outer door of the premises in question as any other door. To use the illustration I presented to counsel for consideration in the course of the argument, suppose the part of the appellant's premises occupied by Brody had been dedicated by him as a public street, would it be contended such a door was not an outer door? I submit not.

It clearly was a door in the outer wall of the premises leased

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by the landlord to the tenant, and it might well have happened that the landlord himself, instead of Brody, might have become the occupant either actively using it or merely as landlord or owner of vacant premises.

Can it be said that in such an event he could not have used the door in question, never fastened or locked in any way by the tenant in question, as a means of entry to distrain? I think it would be much easier to support as legal such an entry, than the raising of a window partly open as in *Crabtree* v. *Robinson* (1885), 15 Q.B.D. 312, or the coming down through a skylight as in *Miller* v. *Tebb* (1893), 9 T.L.R. 515, after crossing another person's premises, or analogous cases, for which ample authority is shewn hardly consistent with the judgment appealed from.

The trap-door in the roof in question in the Ontario case relied upon could not in principle be called a door in an outer wall.

I should be averse to refining away the law as already established by many decisions, even if that law is the result of over-refinement, to help a plaintiff with no better case than respondent happens to have here. And if any doubt, I repeat it should have been resolved at the trial as against him and hence so decided here.

The further ground was taken in argument that there was no tenancy. If so, then I fail to see what ground respondent has to stand upon unless and until he established a better title to the goods in question than he did.

But it seems idle to contend in face of all that transpired and is expressed in the correspondence between the parties, that he had not become a tenant of the appellant at the old well-known rental. It seems rather late, after seemingly abandoning such a ground below, to start it here.

I think the appeal should be allowed with costs throughout and the action be dismissed.

Anglin, J.

ANGLIN, J.:—More than a century ago a landlord occupied an apartment over a mill demised to his tenant from which it was divided only by a flooring of boards nailed on rafters. In order to distrain for rent the landlord took up a portion of this flooring in his own apartment and entered through the aperture thus made. Sir James Mansfield held that his interest in the floor entitled him to raise it without incurring liability for trespass, and that the entry into his tenant's premises through the opening so made was lawful. *Gould* v. *Bradstock*, 4 Taunt. 562.

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Although I do not find that this decision has been followed in any subsequent reported case in the English courts, it has never been questioned and its authority is recognised by such eminent writers on the Law of Landlord and Tenant as Foa, 5th ed., p. 525, and Bullen (on Distress), 2nd ed., p. 154. See, too, 11 Hals. 163. Mr. Foa points out that a perpendicular partition between the demised premises and another tenement in the same building formed by boards nailed upon studding would stand in the same position. The boards, if removable without injury to the demised premises, may be likewise taken off without trespass by the lawful occupant of the adjoining tenement.

The facts in the case at bar fully appear in the judgments rendered in the provincial appellate court. Assuming any controverted facts—and there are practically none—in the plaintiff's favour, I am unable to distinguish this case from *Gould* v. *Bradstock*, *supra*. On its authority it would appear that his interest in them entitled Brody, the tenant of the adjoining premises, to remove the board covering, to raise the hook and to push open the door, which it is not pretended would do any injury to the plaintiff's premises. Whether those acts were all done by Brody at the instance of the landlord or by the bailiff with Brody's concurrence or authority, is, in my opinion, quite immaterial. I see no reason why Brody could not authorise the landlord or his bailiff to do all or any of them as his agent, and it seems to be a fair inference from the evidence that some of these acts were done by Brody himself, and the others with his authority by the landlord's bailiff.

If an aperture was thus lawfully made, the landlord could certainly enter through it to make his distress, just as he might enter through an open window or a hole in an outer wall. The one thing that a distraining landlord must not do is to break into the premises. *Long* v. *Clarke*, [1894] 1 Q.B. 119, 124. The case of *Nash* v. *Lucas* (1867), L.R. 2 Q.B. 590, relied upon by the Chief Justice of Nova Scotia is, I think, with respect, clearly distinguishable. As Chisholm, J., points out, the opening of the window, the entry into the house through it, and the unfastening of the locked door, all done in that case by the landlord's direction, were acts of trespass.

Applying the principle of the decision in *Gould* v. *Bradstock*,

4 Taunt. 562, there was no breaking in in this case. Apart from that authority, however, I confess I should have been inclined to the contrary view. I cannot regard the raising of the hook on the partition door in this case as in any sense equivalent to the raising of a latch on the front door of demised premises (the usual mode of entry) permitted because the fair inference is that it was thus secured in order to keep it closed and not for the purpose of keeping persons out. *Ryan* v. *Shilcock*, 7 Ex. 72. The partition door had long ceased to be a usual mode of entry into the demised premises. It was, in my opinion, indistinguishable from a closed window. The landlord can justify having opened it only as an act done by Brody or by his authority.

The appeal should be allowed and the action dismissed with costs throughout.

BRODEUR, J.:—I cannot see how we can distinguish the present case from the case of *Gould* v. *Bradstock*, 4 Taunt. 562. Brodeur, J.

For the reasons given by my brother Anglin I would allow this appeal with costs of this court and of the courts below and would dismiss plaintiff's action with costs.

MIGNAULT, J.:—I am of opinion that this appeal should be allowed. Mignault, J.

The respondent occupied as a tenant a store belonging to the appellant, which was separated from another store in the same building, rented to one Brody, by a partition in which a door had been placed, and this door had, for a while, served as a means of communication between the two stores. Some time before the distress of which the respondent complains, Brody had placed a hook in this door on his side whereby the door could be fastened, and had also put up an outer door, on his side, which had been closed by means of nails or screws. These nails or screws had been removed by Brody on a previous occasion, when it was necessary to enter the respondent's store to close an opening through which the snow came in, and the outer door had been merely placed against the other door without being fastened. At the time of the distress, Brody removed, at the request of the appellant, the outer door, and the hook on the inner door was lifted either by himself or with his permission. In my opinion Brody had a perfect right to unhook the door or to allow it to be unhooked and consequently the appellant, in entering the respondent's premises by this door,

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was not guilty of trespass, and the distress for rent due by the respondent was not illegally made. Under the authorities cited by my brother Anglin, I am clearly of opinion that the action of the respondent is unfounded.

The appeal should, therefore, be allowed and the action dismissed with costs in this court and in the courts below.

Appeal allowed.

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SEAGRAM v. PNEUMA TUBES Ltd.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. December 9, 1918.

COMPANIES (§ IV G—140)—ONTARIO COMPANIES ACT—FAILURE TO MAKE STATEMENT — PENALTIES — SECRETARY—LIABILITY OF—WILFULLY PERMITTING.

By s. 134 (6) of the Ontario Companies Act the secretary of a company is liable to penalties for default in making out and transmitting to the Provincial Secretary the summary statement prescribed by sub-secs. 1 to 5 only when he wilfully authorizes or permits the default.

The court held under the circumstances that the conduct of the secretary, who was a barrister and also a director of the company, and who was more in control than either of the other two directors, and whose office was the head office of the company, shewed that he wilfully permitted the default.

Statement.

APPEAL from the judgment of Latchford, J., in an action for penalties. Affirmed.

The judgment appealed from was as follows:—

October 8. LATCHFORD, J.:—This is an action brought, with the written consent of the Attorney-General, against Pneuma Tubes Limited, a company duly incorporated under the Ontario Companies Act, 2 Geo. V. ch. 31, by letters patent dated the 2nd December, 1913, and against James Joseph Gray, as secretary of the company, for penalties alleged to have been incurred under sec. 134 (6) of the Act, owing to the default of the company and of Mr. Gray as its secretary in making out and transmitting to the Provincial Secretary, on or before the 8th day of February in the years 1915 and 1916, the summary statement prescribed by sub-secs. (1) to (5) of sec. 134 of the said Act.

By sub-sec. (7) of sec. 134, a corporation is not required to make out and transmit such a summary in the calendar year in which it was organised or went into actual operation, whichever shall first happen.

On the issue whether the company was organised in 1913 or

1914, I find that it was organised in 1913. It did not receive a certificate under sec. 112 (2) declaring it entitled to do business until February, 1914; but that is a matter quite distinct from organisation. The summary filed in February, 1914—unnecessarily in view of the provisions of sub-sec. (7) of sec. 134—declares that organisation was effected on the 11th December, 1913.

The summaries for the years 1914 and 1915 were not made out and transmitted to the Provincial Secretary until after the plaintiff had issued the writ in this action, when such summaries were prepared and filed with commendable alacrity.

The summary for 1914 should have been transmitted on or before the 8th February, 1915, and the summary for 1915 on or before the 8th February, 1916.

Default by the company and by Mr. Gray existed at the date on which the plaintiff brought her action, and for such default the company is clearly liable to the plaintiff as "a private person suing on his (her) own behalf with the written consent of the Attorney General:" sec. 134, sub-sec. (6).

A distinction is made in sub-sec. (6) which is of importance in reaching a conclusion as to whether Mr. Gray also is liable to the plaintiff.

While a corporation is liable for mere default, the secretary of a corporation is liable to penalties only when he wilfully authorises or permits the default.

By sub-sec. (4) of sec. 134 the affidavit verifying the summary is required to be made by the president of a company, or, in his absence, by a director, as well as by the secretary.

In 1914 and 1915 Pneuma Tubes had but three directors—Graham, Burgess, who was president, and Mr. Gray.

It is contended that, as Mr. Gray deposes that he was willing to make the summary for each of the years mentioned, but could not have it verified in either year by Graham or Burgess, he did not wilfully authorise or permit the default, and is therefore liable to no penalty.

Certain facts are of importance in determining whether effect can be given to this contention.

Mr. Gray is a barrister and solicitor in active practice in the city of Toronto. He was one of the five shareholders who applied for incorporation and were named in the charter as provisional

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directors. He states in his summary of the 12th February, 1914, that he is the secretary, the treasurer, and a director of the corporation. In the summaries for 1914 and 1915, filed on the 11th November, 1916, Mr. Gray certified that he was still secretary of the company and one of its directors. His functions as treasurer appear to have ended, and no successor is stated to have been appointed to that whilom important position. The head office of the company is given in the return for 1913 as No. 304 Lumsden Building. In the returns for 1914 and 1915 it is stated to be 43 Imperial Life Building. Mr. Gray's law office in 1913 was in the Lumsden Building, where he occupied room No. 304. In 1914 and 1915 it was in the Imperial Life Building, where he occupied room No. 43. The head office of the corporation was always in Mr. Gray's office. As a director of the company and as its solicitor, secretary, and only treasurer, he was more in control of its management than either or both of his associates. In the occasional absences from Toronto of Burgess and Graham, the entire control of the company's affairs—such as they were—was in Mr. Gray's hands.

Mr. Gray knew what his duty was in the premises. In June, 1916, he was notified by an officer of the Provincial Secretary's department that the summaries for 1914 and 1915 had not been filed, and forms for the summaries were sent to him, accompanied by a request that the statutory returns be made forthwith. Mr. Gray says it did not occur to him to mention the matter to Graham. It may be that Graham was absent at the time from the city. "Burgess," Mr. Gray "thinks," or "is positive"—he puts it both ways—"was told the returns had to be made. I think Burgess did not take the matter up, and it just drifted along."

I find that Burgess or Graham was in Toronto for considerable periods after the returns for 1914 and 1915 should have been made; that both were here on occasions at the same time; and that at no time until after the writ in this case issued was any step taken by the defendant Gray towards the preparation even of the returns. There may have been times when, had the summaries been made out, the concurrence of Graham or Burgess in the verification of a summary might have been obtainable only with some difficulty; but I am satisfied that the occasions were many indeed during the periods of default when such concurrence could have been easily

secured. However, not the first step was taken to prepare the summaries for 1914 and 1915 until the issue of the writ in this case brought home to Mr. Gray a realisation of the possible consequences of his default.

He was free at all times to exercise the power that was in his hands, and at least to attempt to comply with the statute. Had he prepared the summaries, as he alone could, and asked the concurrence of Burgess, or, upon his refusal, of Graham, in verifying them, and been refused, or if he had otherwise shewn that he could not induce one of them to join in such verification, his default could not, I think, be properly regarded as wilfully permitted. The readiness with which in the end he was able to have Graham unite with him in making the requisite affidavits is of some slight weight as indicating what he might have done at the proper times had he performed the duty which he knew to be his.

Even were the point not governed by authority, I should in the circumstances have no hesitation in concluding that Mr. Gray wilfully permitted the default. The decision in *Park* v. *Lawton*, [1911] 1 K.B. 588, confirms me in my opinion.

In that case two directors of a company were charged with an offence under sec. 26 of the Companies (Consolidation) Act, 1908, in that they "knowingly and wilfully permitted default to be made by the company in forwarding to the Registrar of Companies a copy of its list of members, with summary as to capital and shares, etc., for the year 1909, as required by sec. 26, which provides that a company 'shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only general meeting in the year, are members of the company,' which list, containing the various particulars specified in the section, must be completed 'within seven days after the fourteenth day aforesaid,' and a copy thereof is to be forwarded forthwith to the Registrar." No general meeting of the company had been held in 1909. The company was in default in that respect, and Lawton and another director were each of them knowingly parties to such default. On the part of the two directors it was contended, upon the authority of *Edmonds* v. *Foster* (1875), 45 L.J.M.C. 41, referred to in (1879), 48 L.J.M.C. 77, that, no meeting having been held in 1909, it was impossible to make up the list required by sec. 26, and that they could not

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therefore be convicted of a default for omitting to do that which it was impossible for them to do. The Justices were of opinion that, although the annual list and summary had not been forwarded, yet, there having been no meeting in 1909, they could not convict the two directors. The question for the opinion of the Court was, whether this decision of the Justices was correct in point of law.

It was held by the Court—Lord Alverstone, C.J., and Hamilton and Avory, JJ.—that the fact that no general meeting had been held was, in the circumstances, no defence to the charge of not complying with the requirements of sec. 26.

The similarity, amounting almost to identity, of the English statute with our own makes this decision applicable to the present case.

I therefore think Mr. Gray, as well as his co-defendant, is liable to the penalties claimed. Judgment will therefore be entered for $12,760 and costs.

I may add that, as the order of my brother Middleton, made in this case on the 21st September, 1917, 40 O.L.R. 301, so far as upon terms it remitted in part the penalties for which the defendants might be held liable, was not complied with, the matter appears to be still open, and may be spoken to before me, if there is no appeal from this judgment.

The defendant J. J. Gray appealed from the judgment of Latchford, J., and moved, in the alternative, for an order remitting the penalties for which judgment had been recovered, the motion being made under sec. 6 (1) of the Fines and Forfeitures Act, R.S.O. 1914, ch. 99.

The appellant appeared in person.

George Bell, K.C., for respondent.

December 9. Judgment was given at the conclusion of the argument.

THE COURT agreed with Latchford, J., that the appellant was to subject the penalties imposed by the Act; but, being of opinion that the full amount of the penalties should not be exacted, ordered that, upon payment to the plaintiff of $4,000 and interest, the plaintiff should discharge her judgment for $12,760. The Court dealt with the case on the assumption that leave to appeal

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from the order of Middleton, J., 40 O.L.R. 301, had been granted and that the appeal had been heard. The plaintiff's costs of the appeal were included in the $4,000.

The order of the Court, as settled and issued, was as follows:—

(1) Upon motion made unto this Court on the 29th day of November, 1918, and again this day, by the defendant James Joseph Gray in person, by way of appeal from the judgment pronounced by the Honourable Mr. Justice Latchford in this action on the 8th day of October, 1918, or, in the alternative, from the order pronounced by the Honourable Mr. Justice Middleton on the 21st day of September, 1917, and for an order remitting the penalties for which the said judgment has been recovered, by virtue of the power given by the Revised Statutes of Ontario 1914, chapter 99, section 6, sub-section (1), in presence of counsel for the plaintiff, and upon hearing read the pleadings in this action, the evidence adduced at the trial, and the said judgment, and the said order pronounced by the Honourable Mr. Justice Middleton on the 21st day of September, 1917, and the pleadings, evidence adduced at the trial, and the judgment therein and the order of the Divisional Court dated the 8th day of May, 1918, in the action heretofore pending in this Court of *Seagram* v. *Kemish*, and upon hearing what was alleged by the defendant James Joseph Gray in person and by counsel aforesaid, this Court was pleased to direct that the said motion should stand over for judgment, and the same coming on this day for judgment:—

(2) This Court doth order that the said judgment in this action be and the same is hereby affirmed.

(3) But this Court doth further order that, upon the plaintiff realising the sum of $4,000 and interest thereon from the date of this order under the said judgment herein, the plaintiff do release and discharge the said judgment as against both of ther said defendants.

(4) And save as aforesaid this Court doth not see fit to make any further or other order as to costs or otherwise.

Judgment accordingly.

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RE PROHIBITION ACT AND REGULATIONS UNDER THE WAR MEASURES ACT, 1914.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, McPhillips and Eberts, JJ.A. June 25, 1918.

CONSTITUTIONAL LAW (§ II B—359)—SALE OF INTOXICATING LIQUOR—PROVISIONS OF WAR MEASURES ACT—B. C. PROHIBITION ACT—OPERATION OF.

Paragraphs 5 and 11 of the regulations made and approved March 11, 1918, under the provisions of the War Measures Act, 1914, do not operate to abrogate, annul or supersede the provisions of s. 28 of the British Columbia Prohibition Act, but are meant to apply only to sales which the province has no jurisdiction to prohibit.

Statement.

REFERENCE by the Lieutenant-Governor in Council in pursuance of order-in-council of June 14, 1918, under c. 45, R.S.B.C. 1911.

The following questions were submitted to the court:—

1. Do paragraphs 5 and 11 of the regulations made and approved March 11, 1918, under the provisions of the War Measures Act, 1914, being an Act of the Parliament of Canada, 5 Geo. V., c. 2, operate to abrogate, annul, or supersede the provisions of s. 28 of the British Columbia Prohibition Act, being c. 49 of the statutes of 1916 of the legislature of British Columbia?

2. Do said regulations, or any of them, affect, and if so to what extent, the constitutional validity of the said British Columbia Prohibition Act?

Questions both answered in the negative.

J. W. deB. Farris, K.C., Att'y-Gen'l for B.C. and *A. M. Johnson*, for the Crown.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This is a reference by the Lieutenant-Governor in Council to the court pursuant to the provisions of R.S.B.C. (1911), c. 45. The following question is submitted:—

Do paragraphs 5 and 11 of the regulations made and approved March 11, 1918, under the provisions of the War Measures Act, 1914, operate to abrogate, annul or supersede the provisions of s. 28 of the British Columbia Prohibition Act, c. 49 of the statutes of 1916?

No question was raised by the Attorney-General as to the validity of the said regulations.

The provincial Act prohibits the sale of intoxicating liquors within the province. The validity of the Act is not open to question in the absence of occupation of the field by federal legislation. Para. 5 of the said regulations reads as follows:—

No person, after April 1, 1918, shall either directly or indirectly sell or contract or agree to sell any intoxicating liquor which is within or which is to be delivered within any prohibited area.

Para. 13 of the same regulations provides:—

These regulations shall be construed as supplementary to the prohibitory laws now in force, or that may be hereafter in force in any province or territory.

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and shall continue in force during the continuance of the present war and for 12 months thereafter.

So far as the regulations deal with the importation and manufacture of intoxicating liquors into and within the province, they do not enter upon the provincial field. The province could in no circumstances either prohibit the importation of intoxicating liquors into the province, or the manufacture of intoxicating liquors within the province. Read by itself said par. 5 would bear the construction that the Dominion regulations meant to enter the provincial field and prohibit sales within the province which would fall within the operation of the provincial Act. Read, however, in the light of the object aimed at as interpreted by said par. 13, I am of opinion that par. 5 should be read otherwise. This does not mean that par. 5 is by judicial construction to be in effect deleted from the regulations. It can be applied, and I think was meant to apply, only to sales which the province had no power to prohibit, as, for example, sales made by persons outside the province of intoxicating liquors owned by one of them within the province.

In view, therefore, of the clear and explicit declaration contained in said par. 13 of the supplementary character of the regulations, I think it is clear that the regulations apply only to cases with respect to which the province would have no jurisdiction to legislate. *Rex* v. *Thorburn* (1917), 39 D.L.R. 300, 29 Can. Cr. Cas. 329, 41 O.L.R. 39, is not in point, and in my opinion has no application to the matter before us.

The said question should, therefore, be answered in the negative.

There is a second question submitted, but in view of this answer it becomes unnecessary to consider it.

Martin, J.A.

MARTIN, J.A., agreed.

McPhillips, J.A.

MCPHILLIPS, J.A.:—Being in entire agreement with my brother Martin, I do not find it necessary to add but a word to what my learned brother has said. I see no constitutional or other difficulty, no conflict of laws of any nature or kind; all is supplementary; no displacement of provincial legislation has occurred.

Eberts, J.A.

EBERTS, J.A., agrees with Macdonald, C.J.A.

Judgment accordingly.

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COOK v. HINDS.

Ontario Supreme Court, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. March 1, 1918.

1. PRINCIPAL AND AGENT (§ II C—20)—AGENT OF COMPANY—DUTY TO FURTHER BUSINESS OF COMPANY—UNFAITHFULNESS—RIGHT TO REMUNERATION.

Where the duty of an agent of a company is to carry on the business of the company so as to attract further business, unfaithfulness in the performance of such duty, even without fraud, will disentitle him to any remuneration.

[*Canada Bonded Att'y* v. *Leonard Parmiter Ltd.* (1918), 42 D.L.R. 342, distinguished.]

2. COMPANIES (§ IV G—123)—DIRECTORS NOT ENTITLED TO REMUNERATION—BY-LAW AUTHORIZING PAYMENT—CONSENT OF SHAREHOLDERS NOT UNANIMOUS—INVALIDITY.

A by-law authorizing the payment out of the funds of a company of salaries to directors of the company, such directors not being entitled to remuneration from the company, is invalid without the unanimous consent of the shareholders.

Statement.

Appeal from the judgment of Masten, J. Reversed.

Wallace Nesbitt, K.C., and *A. M. Stewart*, for appellant.

R. McKay, K.C., for respondents.

Riddell, J.

RIDDELL, J.:—An appeal by the plaintiff from the judgment of Mr. Justice Masten at the trial in favour of the defendants.

In all matters of consequence on this appeal I accept the findings of fact of the learned trial Judge and base my judgment thereon.

The facts then seem to me to be that the defendants, directors of the Toronto Construction Company, and acting as servants or employees of the company, made up their minds as early as July or August, 1911, that, while they would faithfully act as servants of the company in completing contracts already entered into, they would not endeavour to obtain any further contracts for the company.

In July or August, 1911, George S. Deeks spoke to the Canadian Pacific Railway officials and told them that any future contracts would not be taken for the company, but for himself and his *confrère*. It is, I think, plain that this continued to be the fixed purpose and intention of the defendants. They carried on the affairs of the construction company in an eminently satisfactory manner so far as the construction contracts were concerned, i.e., so far as affected the carrying out of contracts already entered into; but they did so in such a way that they were destroying the business of the company and preventing its success in procuring further business to do.

There can be no doubt that "where the transactions between a principal and his agent are severable, and in some of them the

agent has been honest whilst in others he has been dishonest, he is entitled to his commission in all the cases in which he has been honest, but is not entitled to it in all the instances in which he has been dishonest:" head-note in *Nitedals Taendstikfabrik* v. *Bruster*, [1906] 2 Ch. 671.

And I think it is equally clear that, where the agent is to be paid for several inseparable duties, unfaithfulness—even without fraud—in the performance of any one of these duties will disentitle him to all remuneration; *cf.* what is said by Kennedy, J., in *Hippisley* v. *Knee Brothers*, [1905] 1 K.B. 1, at p. 9.

(In a case argued a few days ago in this Court, *Canada Bonded Attorney and Legal Directory Limited* v. *Leonard-Parmiter Limited*, 42 D.L.R. 342, I have considered certain authorities in the English Courts and our own; and I do not here set them out again.)

Remembering that it was the duty of faithful servants, agents, employees—whatever name may be thought proper—so to carry on the business of the company as to attract further business and not to put the company out of business, I cannot think that the defendants were faithful to the company at all—the duties were not, I think, severable, but were inseparable.

In *Palmer* v. *Goodwin* (1862), 13 Ir. Ch. R. 171, a land agent had faithfully collected the rents and accounted for them, but "had in several instances grievously violated his duty with respect to the management of the property" (see p. 172), and the Master disallowed his fees accordingly. It was argued before the Lord Chancellor of Ireland that he should not be deprived of all remuneration for misconduct, because he had at all events faithfully collected and accounted for the rents. The Lord Chancellor said (pp. 173, 174):—

"He may very steadily and very faithfully collect and account for the rents, and yet very steadily and very completely destroy the estate . . . I must consider agency as a trust which casts on the agent the general management of the property; and if the agent fails in any breach of his duty, he fails in all."

While that was a peculiar case under peculiar circumstances, I think the language of the Lord Chancellor applicable in the present instance. The defendants might very steadily and very faithfully complete the contracts already had, and yet very steadily and very completely destroy the company's business prospects—

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they had the general management of the company's business, not simply the supervision of work in the field. I think they failed in their duty at least as early as August, 1911, and thence continuously till the close of the company's business.

I am not applying any supposed rule of trusteeship on the part of directors, but the ordinary rules governing principal and agent; and, applying these rules, I think the defendants were not entitled to any remuneration from the company whose whole future they were ruining, even had it previously been understood that they should be paid.

Not being entitled to remuneration after August, 1911, they cannot receive from the company any remuneration for that time without the unanimous consent of the shareholders.

The by-law is for remuneration from the 1st May, 1909, to the 23rd February, 1912: I think this must be set aside—on this record, there is no need of expressing any opinion as to whether, had the by-law limited remuneration to August, 1911, as the latest date, it would be valid.

Nor do I consider the argument that the by-law was not *bonâ fide*.

I would allow the appeal with costs here and below.

Lennox, J.

LENNOX, J.:—I have had the advantage of reading the judgment of the learned Chief Justice, and, with regret and very great respect, I find myself unable to agree in the conclusions he has reached.

The Toronto Construction Company was incorporated in 1905 for the purpose of contracting for and engaging in the construction of railways in Canada, and continued to carry on this business until about March or April, 1912, when the individual defendants incorporated the Dominion Construction Company for the purpose of engaging in and carrying on the same class of work.

Although the company has not been wound up, and still legally exists, it has, through the action of a majority of its shareholders, the individual defendants, ceased to carry on business, and has not accepted any contract since 1911; nor has it been engaged in carrying on construction work since the completion of the Guelph-Hamilton contract in 1912.

The capital stock of the company is $200,000, in shares of $100

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each. Mrs. Deeks, wife of George S. Deeks, is the holder of one share and her husband of 499. The plaintiff and the other individual defendants are holders of 500 shares each. There must of course be at least five shareholders to comply with the provisions of the Companies Act; hence, no doubt, the introduction of Mrs. Deeks as the holder of one share.

At a meeting of directors on the 25th March, 1916, after the company had ceased to do business, after a new company, through the agency of the individual defendants, had been incorporated and had taken the place of the Toronto Construction Company, and almost immediately after the termination of litigation between the parties to this action, in which the individual defendants were found to have acted unfairly and dishonestly towards the plaintiff, as a shareholder in the Toronto Construction Company, these defendants—without the consent and against the protest of the plaintiff—passed the following resolution or by-law:—

"Moved by George M. Deeks,

"Seconded by T. R. Hinds,

"That there be paid to George S. Deeks, the president, he being an officer actively engaged in the management of the business of the company, a salary at the rate of and amounting to the sum of $25,000 per year for each year commencing with the 1st day of May, 1909, and down to the 23rd day of February, 1912, and amounting in all to the total sum of $70,461.43; and that there be paid to Thomas R. Hinds, an officer actively engaged in the management of the company, a salary at the rate of and amounting to the sum of $25,000 per year for each year commencing on the 1st day of May, 1909, and down to the 23rd day of February, 1912, and amounting in all to the total sum of $70,461.43; and that the amount of such salaries be paid to the said George S. Deeks and Thomas R. Hinds forthwith after confirmation of this by-law by the shareholders."

And this by-law was subsequently approved of and confirmed by a by-law of the shareholders voted upon and carried by these defendants, and, it may be, by the proxy vote of Mrs. Deeks as well. (The minutes record: "Present in person, George S. Deeks, George M. Deeks, and Thomas R. Hinds; present by proxy, Helen E. Deeks;" but this is all.)

The plaintiff, amongst other things, by this action seeks to set

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aside these by-laws, to prevent the payment of the money referred to out of the assets of the company, and to compel the repayment of it, if already paid. The Toronto Construction Company is also made a party defendant. It will be convenient to refer to the individual defendants as "the defendants." The learned Judge at the trial dismissed the action as to this relief. With deference, I am of opinion that he erred in this respect. It is not denied that, until they diverted the Lake Shore contract from the Toronto company to themselves, and to the Dominion Construction Company, when it was incorporated, the defendants, or Hinds and George S. Deeks at all events, were reasonably zealous and active in promoting the company's business; that their management as directors was efficient; or that exceptionally large profits accrued to the shareholders. Indeed, the enormous profit obtained has been made a basis for the argument that the by-laws ought not to be interfered with. I cannot see it in that way. The profits belonged to the company. My agent or trustee who unlawfully appropriates my goods or moneys can hardly justify upon the ground, "You could well afford it." That is not the question: it is wrong or it is right, be the amount little or much, and the amount is of no consequence except in so far as it lends colour to their act.

The directors in passing the by-law manifestly desired to base it upon, and expected it to derive support from, an entry in the minutes, alleged to be "a resolution" of a meeting of directors of the 10th January, 1910, in these words: "It was decided that the officers actively engaged in the management of the company should receive a salary to be settled on hereafter, this salary to date from May 1st, 1909."

The defendants to whom the salaries are to be paid under the the by-law attacked were, before and on the 10th January, 1910, and continuously thereafter, directors of the company, and have never been appointed to, or occupied, any other position. Until quite recently the plaintiff has been general manager of the company. Hinds has been and is secretary-treasurer.

The learned Judge finds, upon the evidence in this action, that the defendants Hinds and George S. Deeks, as was determined in *Cook* v. *Deeks*, (1916), 27 D.L.R. 1, were guilty of bad faith and misconduct in the discharge of their duty to the company; and

he quotes from the judgment of the Lord Chancellor, where he says: "In other words they intentionally concealed all circumstances relating to their negotiations until a point had been reached when the whole arrangement had been concluded in their favour and there was no longer any real chance that there could be any interference with their plans. This means that while entrusted with the affairs of the company they deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect." And the learned Judge (Masten, J.) concludes that there is a distinction to be drawn between the acts of these men as directors and their acts and conduct as employees or servants of the company. As to this the learned Judge says:—

"I do not think that the words used by the Lord Chancellor, which I have quoted above, apply to the question which falls to be here determined. I think the ordinary rule applies, and that these words must be taken to refer to the issue which was before the Judicial Committee in that former litigation, namely, whether or not there had been with respect to the Lake Shore contract a violation by Deeks and Hinds of the duty which their fiduciary relationship as directors imposed upon them toward the company. The present case relates to the validity of the payments made to them for their services in an executive and commercial capacity, not as directors. The two functions appear to me to be entirely distinct, and the breach of duty referred to in the judgment of the Privy Council was a breach of duty as directors; not a breach of duty as employees of the company."

And again: "In my view, the breach of their duty as directors in taking the Lake Shore contract in their own name, as found by the Privy Council, does not disentitle them from receiving the remuneration which has been awarded to them by the company, and which they earned in the subsidiary sphere of employees superintending and managing its work on the ground."

This is not, to my mind, the only or principal question in the determination of this appeal, but it is of sufficient importance to warrant discussion. With great respect, I am unable to discover a well-grounded distinction either in fact or in law. As to the fact, I am of the opinion that the wording of the by-law is opposed to this contention, and I find nothing in the evidence to warrant

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the conclusion that either of these men was at any time engaged or employed as an employee or servant of the company; or understood to be serving the company in any capacity except as a director. The company employed servants and agents, but these were engaged by antecedent agreements for specific remuneration, and with their duties defined. Every year $10,000 was credited to each of these defendants as personal expenses, but no entry for wages or salary as employees was ever made or claimed. Profits were acertained from time to time, and dividends paid on the basis of net profits, in proportion to share capital, and there is no suggestion of anything in arrear. This was the work or in the main the work, or under the superintendence, of these two defendants, at the head office in Toronto. The shares were transferable in the ordinary way.

Whatever may be said as to it being in the contemplation of the parties that something might at some time be voted by the shareholders while the company was a going concern by way of honorarium to Hinds and George S. Deeks in recognition of extra work devolving upon them as directors, I cannot bring myself to believe that they ever regarded themselves or that they were regarded by anybody as occupying any position or discharging duties other than those pertaining to their official positions; and, on the other hand, as a matter of law, I cannot perceive how misconduct which is inexcusable in a director is excusable in the case of a confidential agent and servant.

It is idle, I think, to argue in this case what may be done to bind a dissenting minority by an independent majority of directors or shareholders exercising discretionary powers and acting in good faith. The policy of the company—particularly while it is a going concern—is, within the scope of the charter, to be shaped by the directors; and their discretionary powers, when honestly exercised and confirmed by the shareholders, are not to be lightly disturbed by the Courts. They can, of course, condone the misconduct of their agents. But it is another matter where there has been grave misconduct, if there is evidence of bad faith, if independent action is impossible, if the giver and the taker is the same person, and the vote could not be carried without the vote of the beneficiary or payee, as in this case.

And again, referring to the conduct of these defendants, it is said in the judgment in appeal:—

"My conclusion on this branch of the case, therefore, is, that the defendants have not disentitled themselves to remuneration, because the only breach of duty committed by them was in respect of matters outside the scope of the duties for which they have received remuneration. And for that breach of duty the appropriate remedy has been accorded in the former action, and so that breach of duty, if it ever had any bearing on the present controversy, has been fully expiated:" and the judgment is manifestly rested upon this ground.

As I have said, there is no evidence that the defendants acted in a dual capacity; their position in relation to the company and "the scope of their duties" demanded of them the most scrupulous good faith in all things concerning the interests of all their associates. No one of them was exclusively engaged in the business of this company; all were engaged in partnerships or individuals enterprises as well, from which individual profits were concurrently accruing. By the continued experience, capacity, foresight, and energy of all—of necessity contributed in varying degrees and in different lines, but each to be set off against the other—a stage had been reached when, owing to its reputation and prestige, almost fabulous profits were accruing to the company—the common proportionate right or property of each shareholder. By the 4th December, 1911, dividends had been declared amounting to $1,162,500, on a capitalisation of $200,000, in which these so-called servants had participated, or say at the rate of $50,000 a year; to say nothing of profitable individual and partnership enterprises, and the $10,000 a year for personal expenses, which, but for the opinion of the learned Judge, I should have judged, was three-fourths "compensation" for extra activity and zeal.

It was at this stage of the company's phenomenal success, and "while entrusted with the conduct of the affairs of the company, that they" (the three individual defendants in this action) "deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect," to quote from the judgment of the Privy Council, and it was at this time and under these circumstances that the defendants to be remunerated, with the assistance of George M. Deeks, succeeded not only in diverting a profitable contract with the

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Canadian Pacific Railway Company—the subject of the litigation referred to—to themselves, but in addition turned over the practically priceless business and goodwill of "the company whose interest it was their first duty to protect" to the Dominion Construction Company. This case is of course to be decided on its own facts, and I refer to the decision in the earlier case only for principles that should guide me. All that was directly involved in the former action was the profits of the Lake Shore contracts; and these profits, so far as they can be ascertained, are to be accounted for. Is this full expiation, and, if it is, is it to be countered by the by-laws in question, carried by the same controlling majority?

I come now to what does not appear to have been so much in the mind of the learned Judge. I care little whether the remunerated shareholders were regarded as directors or servants or both. I need not consider what would be the result if the by-laws had been limited to the period during which Hinds and George S. Deeks were not shewn to have been unfaithful to the obligations their position imposed. This is not what was done—the remuneration covers one undivided period. Nor need I consider the law as applied to other facts. The fact here is that these large sums of money were voted by themselves to themselves, after the company had ceased to do business, after a long period of silence and acquiescence—which to me has not been satisfactorily explained—and on the heels of the judgment for "expiation" referred to.

Was it voted in good faith, in discharge of their duty as directors and quasi-trustees, and with due regard to the fiduciary obligations which Courts must insist upon or impose—and the circumstances point the other way—or was it, to paraphrase paragraph 4 of the notice of appeal, "an afterthought designed to operate as a set-off to the judgment obtained by the plaintiff in *Cook* v. *Deeks* rather than as a *bonâ fide* remuneration for services?" I am of opinion that the powers of the directors were not exercised *bonâ fide*; that the defendants Hinds and George S. Deeks were not fairly entitled to the sums of money voted to them; that this was not an honest exercise of the discretionary powers admittedly allowed to directors under ordinary circumstances; that what was done was knowingly and intentionally dishonest; that, whatever may be the undisclosed cause, it looks like a design, amongst other things, to counteract in some degree the judgment then just pronounced in the previous

action; that, having regard to the circumstances to which I have referred, the amount is large enough to afford evidence of fraud; and that what was done was unfair to the plaintiff, a minority shareholder, oppressive, and clearly dishonest.

The appeal should be allowed, and the judgment in appeal in so far as it dismisses the plaintiff's claim should be set aside, and for this there should be substituted a judgment setting aside the by-laws in question, and, if the moneys have been paid out, directing the repayment by the defendants, other than the company, to the Toronto Construction Company, with interest from the date of payment out, and for the costs of the action here and below, less such costs, if any, as have been already paid.

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ROSE, J.:—The only question that we have to determine is the validity of a by-law passed by the directors of the Toronto Construction Company Limited on the 25th March, 1916, and confirmed by the shareholders on the 10th April, 1916, whereby it was enacted, following the wording of a resolution passed by the directors on the 10th January, 1910, that there be paid to the president, the defendant George S. Deeks, "he being an officer actively engaged in the management of the business of the company," a salary at the rate of $25,000 a year for the period commencing on the 1st May, 1909, and ending on the 23rd February, 1912, amounting in all to $70,461.43, and that there be paid to one of the directors, the defendant Hinds, "an officer actively engaged in the management of the company," a like sum, for the same period.

In approaching the question as to the validity of that by-law, the first inquiry, as it appears to me, ought to be whether, if the by-law had not been passed, George S. Deeks and Hinds would have had any enforceable claim against the company for salary for the period in question: for, if they would not have had such a claim, the governing considerations are rather different from the considerations that would have been applicable if the by-law had merely fixed the amount to be paid in respect of services which had given rise to a valid claim for remuneration. This question as to the right to a salary, apart from the by-law of 1916, must depend largely upon the view that is taken of the effect of what was done in January, 1910. (I leave out of consideration for the present the

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question as to the effect of the misconduct established in the case of *Cook* v. *Deeks*.)

During the latter part of the year 1909, Deeks and Hinds, who were actively engaged in carrying on the company's work in connection with the contracts then on hand, seem to have become dissatisfied with their position: they thought that the plaintiff, Cook, was reaping the benefit of their labours, while he was devoting his own time to work in which neither they nor the company had any interest. Cook does not admit that there was any real ground for complaining of his conduct; on the contrary, he complains that his co-directors refused to undertake, for the company, contracts which he had procured and which he desired to turn over to the company; but it does not seem to be material to decide, at any rate in connection with the matter at present under discussion, whether Cook had or had not failed in any duty which he owed to the company or to his associates. The matter was discussed, probably in 1909, certainly on the 10th January, 1910. On the last mentioned day there was a meeting of the directors. Cook seems to have recognised the fact that it would be fair that Deeks and Hinds, who were attending to the work of the company, while he was attending to his own affairs, should be paid salaries; and there was put upon the books of the company a record of a decision "that the officers actively engaged in the management of the company should receive a salary to be settled on" thereafter; "this salary to date from May 1st, 1909." Cook denies that this was passed at the meeting, and he points to the fact that a confirmation of the minutes, which was signed by George S. Deeks and Hinds, was not signed by him; but Mr. Justice Masten finds, on the evidence, that it was regularly passed, and his finding must be accepted. There is a dispute as to what the parties meant by the resolution: Deeks and Hinds say that they were not willing to "work for Cook for a salary," and that they were unwilling, unless paid, even to finish the work that the company then had on hand, and that they so expressed themselves: Cook says that he had "no objection to their getting a salary, if they were going to continue the business, but would not have discussed a salary, under any consideration, if they were not going to continue the work of the company." Mr. Justice Masten, while giving general credit to Deeks' and Hinds' account of the conversation, finds that "it

was never stated that the remuneration which they were to receive was payable to them for winding up the company's affairs. Nothing looking in the direction of the cessation of the company's work or of the winding-up appears to have been explicitly stated to Cook, until Hinds' interview with him in March, 1912, after the Lake Shore contract had been procured."

After the 10th January, 1910, the company completed the work then on hand, and undertook and completed three other contracts, called "Seaboard numbers 2 and 3" and the "Guelph-Hamilton contract." These contracts, however, were not looked upon as new contracts: "Seaboard numbers 2 and 3 were regarded as merely a continuation of the former allotting to the company of the work on the Seaboard line, which had been originally tendered for as a whole, and, as they (the defendants) understood and contended with the Canadian Pacific Railway Company, awarded to them as a whole;" and "the Guelph-Hamilton was a small contract, taken because it was thought it could be finished about the same time as the other work which they had in hand." The way in which Deeks and Hinds were occupied after January, 1910, is summed up in Hinds' evidence on discovery, in the statement that during 1910 the Seaboard work went on, during 1911 they devoted themselves to cleaning up the work then on hand, and gradually brought the operations of the company to a close, and had the work practically completed except some reballasting, etc., that remained to be done in 1912. About July, 1911, Deeks told a representative of the Canadian Pacific Railway Company that he was "through with the Toronto Construction Company," and that any work taken by him and Hinds in the future would be on their own account; and in March or April, 1912, they took in their own names the "Lake Shore" contract, to the benefit of which, as has been decided, the company was entitled.

Both the by-law of 1916 and the resolution of the 10th January, 1910, provide for salary for services rendered from May, 1909, onwards. As to the period from May, 1909, until the 10th January, 1910, I cannot see how it can be argued that, without the by-law of 1916, there is any legal claim for remuneration. There is no pretence that, during that time, Deeks and Hinds were relying upon any express or tacit agreement, either with the company or with Cook, that they were to be paid for what they did. They

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were simply "working members" of the company, with no legal claim upon the company for remuneration: see *Re Bolt and Iron Co., Livingstone's Case* (1887-88), 14 O.R. 211, 16 A.R. 397; and the resolution or "decision" of January, 1910, providing for payment for those past services did not strengthen their position, because, apart from the fact that it did not fix the amount to be paid, there was no ratification of it by a general meeting, as required by the Ontario Companies Act then in force, 7 Edw. VII. ch. 34, sec. 88.

As to the time after the 10th January, 1910, however, Mr. Justice Masten thinks that the resolution and the contemporaneous discussion did away with any idea that the services to be performed by Hinds and Deeks, not strictly as directors, but as employees of the company superintending its operations in the field, were to be performed without remuneration; he thinks that "that so far as the action of the 10th January, 1910, proceeds:" he finds that Hinds and Deeks "rested on that; they were entitled to use it in closing up the affairs of the company, as they expected to do in 1912. Just how they would use it, and to what extent they would use it, does not appear; and they probably never reached a conclusion, knowing that, as they controlled the majority of the shares, they would be able to use the situation effectively whenever the necessity for using it arose." I do not understand the learned trial Judge to mean that the result of what was said and done on the 10th January, 1910, was that Hinds and Deeks acquired a legal right to payment for their future services—a right which they could enforce by an action for payment as upon a *quantum meruit*, if the company did not, by a valid by-law, "settle" the amount left unsettled by the resolution; I think, rather, that the language quoted was used in reference to the argument addressed to him by counsel for Deeks and Hinds, that the resolution was relied upon merely "as shewing that the action of 1916 was not fraudulent and as shewing that the action of Deeks and Hinds in not putting the company into liquidation in 1910, but in proceeding to wind up its affairs in the way they did, was the result of the resolution then passed making it plain that their services were to be remunerated." If, however, he intends to go farther, and to hold that a right to enforce payment was created, I am, with much respect, unable to agree. Assuming that the resolution, if it had

been valid or capable of being acted upon, would have served as a foundation for a claim for payment for services rendered in merely finishing the work upon the existing contracts and winding up the company's business, it is not plain to me how, being invalid, it can be treated as evidencing a contract that the officers "actively engaged in the management of the company should receive a salary;" and, in the absence of such a contract, there cannot be a claim.

Re Bolt and Iron Co., Livingstone's Case, 14 O.R. 211, 16 A.R. 397, seems to be conclusive upon that point. Livingstone was managing director of the Bolt and Iron Company Limited. There was a by-law that "the directors and managing director shall be paid for their services such sums as the company may from time to time determine at a general meeting." A general meeting determined that the managing director's salary should be $4,000 per annum until a day named. After that time Livingstone continued to perform the services of managing director, but the company did not fix his salary; and it was held by the Chancellor, whose judgment was affirmed by the Court of Appeal, that Livingstone had no claim in the winding-up, and must account for salary which he had received. The rule is stated by the Chancellor as follows (14 O.R. at p. 216):—

"The position of the managing director rendering services for which remuneration is given, is not that of a servant hired by the company. His position is aptly defined by Pearson, J., in *In re Leicester Club and County Racecourse Co., Ex p. Cannon* (1885), 30 Ch. D. 629, at p. 633, as a working member of the company who gets paid for the work he does. The rules as to hiring and notice between master and servant are therefore not applicable, and the measure of the rights of the salaried managing director is to be settled by what is provided in that behalf by the charter and by-laws of the company."

Mr. Justice Masten points out that the work for which Deeks and Hinds claim payment was not the ordinary work of directors—attending board meetings etc.—but work as employees of the company, superintending its operations in the field. The same thing was true of Livingstone: the duties performed by a managing director are quite different from the duties cast upon the other directors. Moreover, apart from the fact that a by-law for

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payment of directors is invalid and cannot be acted upon until it is confirmed by the shareholders (of course, the same is true of a *resolution*—see *Mackenzie* v. *Maple Mountain Mining Co.* (1910), 20 O.L.R. 615), Deeks and Hinds had no right to vote at a directors' meeting in respect of the proposed arrangement that they should be employed by the company, and I think they never became "employees:" The Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 89, now R.S.O. 1914, ch. 178, sec. 93; *Young* v. *Naval Military and Civil Service Co-operative Society of South Africa*, [1905] 1 K.B 687.

The case is not like one recently before us in which a general manager, who had ample power to engage servants, had engaged one of the directors as a traveller, no by-law or resolution of the directors being passed or needed; it is simply the case of "working members" of the company saying, "We will work no longer unless we are paid," passing an invalid resolution for their own payment, continuing their work, and then claiming that, because the company has had the benefit of their services, it must pay for them. If the company had gone into liquidation without passing the by-law of 1916, could it have been held, in the face of *Livingstone's Case*, that Deeks and Hinds had a valid claim? I cannot believe it, even if it is correct to say, as Mr. Justice Masten does, that from the 10th January, 1910, "Deeks and Hinds proceeded to superintend and manage the commercial and executive affairs of the company from then on until 1912, on the basis that they were to be remunerated." Moreover, I do not draw from the evidence the inference that Deeks and Hinds did their work relying upon any supposed obligation of the company to pay. If they did, what explanation is there for the facts that when, in March, 1912, there was a discussion of a proposed purchase of Cook's shares by George S. Deeks, and Deeks furnished Cook with an inventory of the company's assets, he made no reference to the necessity of providing for salaries, and will not now say that such necessity was present to his mind; that in April, 1913, there was a distribution of profits which left the company with net assets of only about $30,000 over and above the amount of its capital stock, and still no provision for salaries; that, in the six years following the resolution of the 10th January, 1910, there was never a word about salaries until the Judicial Committee of the Privy Council had decided that Deeks

and Hinds held the Lake Shore contract for the benefit of the company?

If I am right in the view that I take as to the legal position as it existed prior to the passing of the by-law of 1916, it follows that the payment authorised by that by-law was merely a gratuity. If I am right only as to the period from May, 1909, until the 10th January, 1910, then, in so far as the payment is for services rendered during that period, it is a gratuity. In either case, as it appears to me, the by-law is bad; in the one case because there is no justification for any part of the payment; in the other because it is a single payment and covers some services for which the majority cannot compel the minority to pay.

Of course, it is not necessarily beyond the powers of a company to grant gratuities to its directors: such a power may well exist as incidental to the carrying on of the business of the company; but it is only as so incidental that it can be exercised—or, at least, that it can be so exercised as against the will of a minority of the shareholders. This is explained very fully by Lord Justice Bowen in *Hutton* v. *West Cork R. Co.* (1883), 23 Ch. D. 654, at pp.671-2. He says:—

"The money which is going to be spent is not the money of the majority. That is clear. It is the money of the company, and the majority want to spend it. What would be the natural limit of their power to do so? They can only spend money which is not theirs but the company's, if they are spending it for the purposes which are reasonably incidental to the carrying on of the business of the company. That is the general doctrine. *Bona fides* cannot be the sole test. . . . The test must be what is reasonably incidental to, and within the reasonable scope of carrying on, the business of the company."

And, later on, after discussing the position of directors as regards remuneration, he proceeds:—

"One must still ask oneself what is the general law about gratuitous payments which are made by the directors or by a company so as to bind dissentients. It seems to me you cannot say the company has only got power to spend the money which it is bound to pay according to law, otherwise the wheels of business would stop, nor can you say that directors who have got all the powers of the company given to them . . . are always to be

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limited to the strictest possible view of what the obligations of the company are. They are not to keep their pockets buttoned up and defy the world unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there again is not whether it is *bonâ fide*, but whether, as well as being done *bonâ fide*, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit."

Then, after referring to some of the authorities, and after quoting a passage from Lord Justice Fry's judgment, in which occurs the sentence: "Of course, if the majority of the shareholders present think it undesirable or improper to vote remuneration for past services the directors can have no claim whatever; but in case the majority think it reasonable and fit to vote a sum of money for past services, it appears to me a matter in which the majority can bind the minority;" Lord Justice Bowen continues (p. 674):—

"If that is meant as a simple test, I confess I do not agree with it, although I need hardly reiterate the respect I have for the opinion of the Lord Justice. If it means that within certain limits that is the test, I agree; but the ultimate test is not *bona fides*, but what is necessary for carrying on business. That is the test which Lord Justice Fry has not applied to this case."

The company in the case from which I have quoted had sold its undertaking; and, although it remained alive, it was not a going concern in the full sense of the term; its business was merely to wind itself up and carry on its own internal affairs until it had distributed the purchase-money. Technically, therefore, its position was not the same as that of the Toronto Construction Company in 1916; but Lord Justice Bowen's reasoning seems to me to be quite as applicable to the *Toronto* company as to the *West Cork* company. It cannot be suggested that the by-law of 1916 was passed as incidental to the carrying on of the company's business; the business was over, and nothing remained to be done but to take the accounts and distribute the assets; no benefit could possibly accrue to the company from the making of the payments; and it seems to me to be simply a case in which, to quote Lord Davey, in *Burland* v. *Earle*, [1902] A.C. 83, 93, "the

majority are endeavouring directly or indirectly to appropriate to themselves money . . . which belong(s) to the company, or in which the other shareholders are entitled to participate." That being so, there is no question of the right of the plaintiff to maintain the action.

Before us the appellant's case was put upon a rather broader, or perhaps I should say more meritorious, ground than the ground I have taken. It was contended that George S. Deeks and Hinds had not rendered to the company, during the period in question, the faithful service to which it was entitled, but had, on the contrary, betrayed the interests of the company, which, as directors, it was their duty to protect; that they had abstained from seeking new business for the company, and had attempted to appropriate to themselves the benefit of the Lake Shore contract, which really belonged to the company. It was also contended that certain sums of $10,000 a year which each of them had taken, nominally as reimbursement for expenses incurred by them while on the company's business, were in reality taken as the salary mentioned in the resolution of the 10th January, 1910; and, finally, that the amount of the salary fixed by the by-law of 1910 was so excessive as to indicate fraud.

Mr. Justice Masten, who saw and heard the witnesses, and is in a better position than we are to decide as to their credibility, finds as a fact that the annual payments of $10,000 were not salary; and, although the evidence leaves in my mind a great doubt as to whether George S. Deeks and Hinds did really spend as much as $10,000 a year each in connection with the company's business, I am not prepared to say that the finding is wrong. So too, as to the salary fixed by the by-law of 1916: there was evidence that the amount was not unreasonable, considering the value of the services which it was assumed the allowance was intended to cover; and I think that, in face of Mr. Justice Masten's finding to the contrary, we cannot hold that the sum awarded is so excessive as to lead to the conclusion that the by-law was passed in fraud of the company.

As to the other ground, however, the ground that Deeks and Hinds had so acted as to forfeit any claim which they might otherwise have had to be paid for their services, I am in accord with Mr. Justice Riddell, whose opinion I have had the privilege of

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reading. The judgment of the Judicial Committee of the Privy Council is, to my mind, conclusive as to the quality of the acts that were in question in the case of *Cook* v. *Deeks*, and that are put forward by the plaintiff here as disentitling those directors to be paid for the services in fact rendered by them to the company; and, if these reprehensible acts were done in connection with the office to which the salary voted by the by-law of 1916 attaches, it seems to me that they destroyed any right which there might otherwise have been to be paid for the work done in that office—at least, any work done after the inception, in or about July, 1911, of the plan to exclude the company from the benefit of the Lake Shore contract. But it is said that the misconduct was in the execution of the duties of Deeks and Hinds as *directors*, whereas the salary was voted for services as *employees* of the company, superintending its operations in the field; that it was not for anything in connection with the procuring of new business. With deference, I think that this distinction is too finely drawn. Deeks and Hinds do not say explicitly how the figure of $25,000 a year was arrived at; but, as will appear, there seems to be enough on the record to shew that the salary was intended to pay for the services rendered in the very position which the Lord Chancellor describes these defendants as occupying—the very position which made it improper to attempt to divert to themselves the benefit of a contract that ought to have gone to the company.

"It" (the question that was under discussion) "cannot," says the Lord Chancellor in *Cook* v. *Deeks*, 27 D.L.R. 1, at p. 7, "be properly answered by considering the abstract relationship of directors and companies; the real matter for determination is what, in the special circumstances of this case, was the relationship that existed between Messrs. Deeks and Hinds and the company that they controlled. Now it appears plain that the entire management of the company, so far as obtaining and executing contracts in the east was concerned, was in their hands."

And again (p. 8): "While entrusted with the conduct of the affairs of the company they deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect."

And later on he says (pp. 8-9): "Men who assume complete control of a company's business must remember that they are not

at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent."

When Hinds was called as a witness, counsel for the defendants drew from him an account of the services that he and George S. Deeks had rendered to the company, including the obtaining of contracts; and then, coming to the by-law of 1916, asked him what he had to say as to the $25,000 being reasonable; to which he answered that he thought it was "very modest under the circumstances." George S. Deeks was likewise examined as to what had been done, and, after being questioned as to some other matters, was asked, "Upon what did you base your figures?" The witness answered: "We considered the magnitude of the work we were doing, the turn-over, the amount of money we were making, and also the moneys that I understood people were getting in positions similar or probably less responsible." George M. Deeks simply said that those at the meeting were absolutely satisfied—thought $25,000 very reasonable. All this seems to me to make the matter fairly plain; but it is in the evidence of the expert witness who so favourably impressed Mr. Justice Masten, and in the by-law itself, that it seems to be made quite clear that the salary was voted for the services rendered in the position which the judgment in *Cook* v. *Deeks* describes these defendants as occupying, and in which they betrayed their trust. The case that was put to the expert witness was the case of a company "managed by two men who jointly get the contracts, superintend the construction, and have general charge and control of its business." The salary, according to the by-law, is given to officers "actively engaged in the management of the business of the company." I cannot find any evidence at all in conflict with the evidence to which I have referred. Therefore, it appears to me that it is impossible to hold that the duties for the performance of which the salaries were voted are so separable from the duties which Deeks and Hinds failed to perform that there can be a right to demand payment in respect of the former, although there is no such right in respect of the latter; and upon this branch of the case I agree, as already stated, with Mr. Justice Riddell, for the reasons which he states.

I would allow the appeal.

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MEREDITH, C.J.C.P. (dissenting):—If we would bring this matter to a right conclusion, we should always bear in mind the kind of company which that in question was, what its purposes; and how, and by whom, the business done in its name was transacted, and its great profits gained. The need of this warning, and care, is made the more urgent by the not infrequent use, by Judge as well as interested counsel, of the word "company" when what was really meant was Cook, the plaintiff; and the tendency to discuss the case as if the company were one of the more ordinary character, comprising many shareholders, and having many different interests; and the defendants, other than the company, though nominally four-fifths and substantially three-fourths of it, as if something of that character which, in a celebrated case, Bacon, S.-G., seems to be reported as having described as "mere cyphers in algebra."

The company was comprised of four large, and one small, shareholders; the holder of the few shares being added because not less than five persons could become incorporated as this company was; and the main purpose of this incorporation, and all like incorporations, is "limited liability"—exemption from personal liability, of the persons concerned, beyond the amount of the unpaid price of the stock owned by them; and—that which it is very important to bear in mind—one of the main effects of such incorporation is to fasten upon all the partners—for such substantially they are—that which is commonly called "majority rule." And so we have here an incorporated company, with limited liability, having a capital of only $200,000, carrying on business involving millions of dollars, and carried on, by the defendants Hinds and George S. Deeks, in such a manner that the whole capital stock of the company may be described as insignificant in comparison with the business done and profits earned.

Then, during the period in question, the business done, in the name of the company, was carried on entirely by these two defendants, whom the plaintiff seeks, in and by this action, to deprive of all remuneration for such services; and by their labour and skill alone those great profits were won: and, during all that time, the plaintiff, though a director of the company and its duly appointed "general manager," took no part in carrying on this business or in earning in any way these profits; but carried on the like

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business elsewhere, the profits of which he made all his own. So, too, it must be borne in mind that this business could be carried on successfully only by these two defendants and the plaintiff, or some of them, and that it was intended to be so carried on only; that it was not a company which could procure a successful or suitable general manager by merely advertising for one, or indeed in any way but out of these few shareholders.

And, having regard to the character of the work done in the name of the company—mainly contracting for the construction of, and constructing, railways and like extensive works—and the great profits earned, so great that it is perhaps superfluous to say that on all hands the work done has been described as "eminently satisfactory," it should be needless to say that that work was not, nor was it at all like, a mere director's service; that it was that of very capable and very successful executive officers such as general or special managers. This was not really denied. From a business-man's point of view how could it be?

In short, the whole work was the work of these two men, and the earnings were their earnings; the company was in substance merely a name, and its capital but a "cypher" so far as the work and earnings were affected; a cypher for which these two men had no need; their capital and credit were abundantly sufficient without it.

In these circumstances, how is it possible to say, with any appearance of fair play or of business-men's reason, that these men should not be paid for their services? And, from a lawyer's point of view, why not? I know of no reason why a day-labourer for a company may not lawfully be its president, and yet receive his day's wages; nor why a general or other manager may not be a director and yet be paid a salary; we have outstanding instances in the great railway companies of this country. In the case of *Fitzgerald & Co.* v. *Fitzgerald* (1890), 137 U.S. 98, the rule as to implied contracts between companies and their directors is thus stated by Fuller, C.J. (at pp. 111, 112), in delivering the judgment of the Supreme Court of the United States of America:—

"A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But, in any case, the mere fact that valuable services are rendered for the benefit of a party does not make him liable upon an implied

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promise to pay for them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shewn, not only that the services were valuable. but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them."

Words which apply and aptly express the common sense of the business community of this Province on the subject.

If there were nothing more in the case than this, I should have no hesitation in finding that there was a tacit agreement to pay these men, and to pay them the full value of their services.

But there is much more than that in favour of these defendants. It ought to be common ground that a workman is worthy of his hire; and I find it very difficult to understand how the plaintiff, with any degree of reason, can contend that these men are not worthy of theirs: men who won by their skill and energy enormous profits, which the plaintiff, who played the part of a drone in this hive during all these years, shared with them share and share alike; and this too though during these years he too was very busy, but in laying up store for himself only in his own hive. Payment of these men during these years was more in the plaintiff's interests than theirs, for it is inconceivable that they would have gone on earning these profits and practically making a present of them to him, over and above bank interest on the comparatively insignificant amount of his money in the concern, which these defendants could quite as well have carried on, and have done as well, without.

The plaintiff testified that the share which these defendants had in the work carried on by him came to an end in 1908. What could happen then except that his in that carried on by them should end likewise, or else that they should be paid for their services?

The latter course was deliberately and formally taken, and entered in the records of the company in these words: "It was decided that the officers actually engaged in the management of the company should receive a salary to be settled on hereafter, this salary to date from May 1st, 1909:" that was on the 10th January, 1910. And, more than that, this plaintiff, who now urges that these men should have no pay, gave this testimony at the trial of this action:—

"Q. But what led up to the discussion that you speak of after the meeting and what was the discussion? A. Well, I think it was Mr. Hinds' suggestion that they might want a salary, which I did not object to.

"Q. Why should they want a salary any more than you? A. I was looking after some personal work in the west, and they were looking after this work for the Toronto Construction Company.

"Q. What else? A. Mr. Hinds said at that time, 'Well, we are pretty high-priced men, we might want $25,000 a year,' or words to that effect; and I said, 'Well, I am pretty game;' and he said, 'Well, we will let it stand for the present.'"

In the face of this testimony, and of the fact, as very properly found by the trial Judge, that the decision of the company which I have read was come to at a meeting which was attended by every shareholder, except the nominal one, and was the decision of all, it is assuredly a waste of time to urge that these men were not to be paid for their services—services not in any sense as directors, but as executive officers of the highest class and of exceptional ability, as their earning of profits, instead of making losses, of between one and two millions of dollars, very plainly proves.

Then, being entitled to payment for their services, on what ground are they to be deprived of it? The one ground alleged in the plaintiff's statement of claim is: "The said payments are not justified by any services rendered and are wrongful and fraudulent as against the defendant company, and the said actions of the individual defendants"—in taking steps towards making such payments—"are in breach of their trust and duty as directors of the defendant company and are wrongful and fraudulent as against the defendant company, and any confirmation of the same, as hereinbefore set out, is wrongful and fraudulent as against the defendant company:" but why or how wrongful or fraudulent the plaintiff

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fails to allege or shew, unless it be that the payments were to be made "without the consent of and against the protest of the plaintiff."

In view of the facts which I have set out, it is plain why only insufficient allegations of fraud were made: there were no facts upon which any sufficient allegation could be made; on the contrary, the plaintiff and the company should be estopped from resisting payment of wages well-earned upon their promise to pay. Any such defence is out of the question.

But it was contended here, and at the trial, that, as these defendants had, as directors of the company, been guilty of a breach of duty towards it, in taking for another company a contract which, as such directors, it was their duty to take for this company, they not only forfeited their right to any salary for that year, but also the salary which they had earned in the preceding years.

What happened was this: these men becoming thoroughly dissatisfied, as they well might be, at the plaintiff receiving such large profits out of the sweat of their brows, whilst they got nothing out of his, determined, in the latter part of the year 1911, to bring this uneven partnership to an end, as, of course, they had a right to do, and the only wonder is that they did not do it sooner. They formed a new company—as any one can, almost as a matter of course, and the payment of the fees exacted for the letters patent of incorporation—and then took the next contract—on the 1st day of April, 1912—in the name of this company, instead of that of the old company, in other words, for themselves instead of themselves and the plaintiff. This also they had a perfect right to do, if they had adopted other methods than that which they took; some of which might have been very much worse for the company. It was quite within their power to close its doors at any time by simply declining any longer to carry on business in its name. The company was nothing without them in the capacity of its executive officers; in other words, the moment these men turned their services over to another company or employed them in their own name, this company fell to pieces. It was their standing, experience, and ability, that brought contracts and carried them through, with satisfaction to those who let them, and with great profit to those for whom they were taken. If these men had gone out of the company at any time, as they lawfully might, it must have been

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disastrous to it in the sense of virtually ending its life. But they did not go out, nor did they stay in and say, as they might have done, "This company shall not undertake any more contracts;" and so it was held that they should have taken the last mentioned contract in the name of this company, and by the judgment of the Courts they were compelled to treat it as if it had been so taken, and the profits of it have accordingly gone to this company; that is to say: this company has been put in the same position as if no mistake had been made, the company has lost nothing, and the plaintiff has lost nothing, by it. What more can reasonably be asked?

What is asked is this: that because of that error, although full compensation for any loss that might have been sustained by it has been made, these men, who have for the years in question shared their profits with a drone partner, must, at his instance and for his sole benefit, and against the will of every other shareholder, lose all their salaries for the three years preceding the year in which this contract was performed, as well as for the year in which the wrong method of getting out of this company and carrying on their own efforts for their own benefit was taken. If that be the law, I cannot help thinking that there is some ground for some of the metaphors, used by some authors, expressive of its stupidity.

In considering what the law is, upon such a subject as this, it is much better to see whether or not it comes within well-defined and well-known principles than to search for some case which may seem to be applicable and somewhat blindly follow it; and that this case comes within such principles seems to me to be very plain; the principle applicable in the first place being that as well-known and well-defined as that one who fails to perform his contract cannot recover the price which he was to have been paid if he had performed it; nor can he recover anything for any part performance except upon an expressed or tacit promise to pay, founded on a sufficient consideration. That simple rule applies as well to contracts of service as to any other contract; so that, when a servant is lawfully dismissed, before he has earned his wages, he has no lawful claim for payment of part of them; but, if any part of his wages have become payable, misconduct afterwards cannot deprive him of them; a cause of action cannot be discharged in

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that way. But, if he sue for his wages so payable to him, his master can, in these days, meet that claim with a counterclaim for damages; and may, in a proper case, be awarded not only compensation for all his actual loss but also exemplary damages. The failure in performance of the contract must be of a substantial character to be an answer to a claim for the price agreed to be paid upon the completion of it; and if, in a case of hiring and service, the master continues to accept the services of the servant or the full benefit of them, notwithstanding known breaches of the servant's obligations, until the time for payment under the contract comes, he cannot avoid payment, but may have damages for the breaches of the servant's obligations.

Apply that to this case: the company might have had full compensation for all that it lost by reason of these men having taken the 1st April, 1912, contract for their new company instead of for this company; whether it could have had exemplary damages depended on the question whether they were guilty of actual fraud in that act. The former action was brought for the purpose of enforcing all the rights of this company in respect of that legal, quite as much as equitable, wrong. I say "wrong" not because any such wrong has been proved in this case, but because it was adjudged in the other action that such a wrong had been done, and that adjudication estops the parties to this action, who were also parties to that action, from contending otherwise. That action was brought to recover full compensation for that wrong, and that which was awarded in it against these defendants must be taken to have been full compensation; in any case no further damages, under any name, are now recoverable from them for that wrong: at law, under the name of "damages," or in equity under the name of "accounting for profits," they are the same relief.

Before the contract was made, the plaintiff was given notice of the intention to take it just as it was afterwards taken. If he is to be looked upon as the company, as quite inaccurately he has too often been, there were three courses open to him: (1) to discharge—or endeavour to do so—these servants of the company who were thus mistaking their rights, and about to do a wrong to the company, and have insisted upon the contract being taken by this company and performed by its servants, if not by its "general manager;" (2) permit them to go on with the contract, with

notice that they were still deemed to be the company's servants, and that the company would insist upon the contract being treated as theirs and their services rendered for it; and (3) discharge these servants—or endeavour to do so—and recover damages from them or have an accounting in equity, for their wrong.

Substantially the second course was taken; and, that being so, I know of no law, or equity, or case, that can justify a refusal to pay their wages thus earned, and at the same time take the full benefit of their services in taking all the profits they earned. Treating them as still working for this company, in all other respects, and yet to refuse them their wages, and to do this at the instance of the sleeping partner only, against the will of every one else concerned, and four times more concerned than he, would assuredly, as I think, tend to bring the law quite within "Mr. Bumble's" definition.

Now let us turn to some of the cases. In the case of *Tyrrell* v. *Bank of London* (1862), 10 H.L.C. 26, 11 E.R. 934, it was said of the defendant—the appellant—by the Lord Chancellor in the House of Lords (p. 44): "He forgot the first duty of a solicitor in the concealment and falsehood which were practised;" and yet that tribunal decreed that out of the secret profits he had in that manner obtained he should be allowed "the moneys properly expended" by him "in respect of the said hereditaments, including all costs, charges, and expenses incurred by him, and all payments properly made by him in relation to the premises;" the formal order of the Court being, in this respect, in these words: "the money paid by the defendant . . . or by his order, in respect of the said hereditaments, including all costs, charges, and expenses properly incurred by him and all payments properly made by him in relation to the premises."

A few years afterwards, the case of *Salomons* v. *Pender* (1865), 3 H. & C. 639, 159 E.R. 682, was decided by the Court of Exchequer; and in it an agent for the sale of land, being himself the purchaser, was considered not entitled to a commission upon the sale; but Martin, B., referring to a passage read from Story on Agency, which is in these words—"It may be laid down as a general principle, that in all cases where a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation, are to be for the

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benefit of his employers"—said: "But what is meant is that where an account is directed against agents of the proceeds of property which they have sold at a profit, they will be allowed to take credit for their commission."

In the case of *Andrews* v. *Ramsay & Co.*, [1903] 2 K.B. 635, it was held that the plaintiff was entitled to recover a commission deducted out of the price of property sold by the defendants for him because the defendants had received a secret commission from the purchaser; and this although they had already been compelled, by an action, to pay to him the amount of the secret commission received by him. The Lord Chief Justice, in the first place, based his judgment upon the case of *Salomons* v. *Pender*, which however was quite a different case and one looking on this point the other way. The plaintiff in that case was not compelled to refund any profit, he had received none except such as may have gone with the land, and that he and the others to whom the land was sold retained; and there were in it the observations which I have read from the report of it. But, at the close of his judgment, the learned Chief Justice put it rather differently thus (p. 638): "But if, as is suggested, there is no authority directly bearing on the question, I think that the sooner such an authority is made the better." But that, as it seems to me, was contrary to the precedent in the House of Lords to which I have referred, as well as that in the Court of Exchequer.

And that case is, plainly, quite different from this, for in this case all that was done was done with the knowledge of the plaintiff, and he chose to stand by and permit it to go on, and then to take the position that the defendants were accountable, just as if they were throughout the servants of this company carrying on the work in question as if it were this company's work, and, with the aid of the Courts, has obtained the same benefit as if actually it had been so; and assuredly that position must be maintained throughout, in regard to wages as well as in regard to profits. The only actual difference is that the new company—that is, substantially, these defendants—relieved this company from all danger of loss, loss which, in such a work, might have been very great. It is assuredly bad enough to have made it a case of "Heads I win, tails you lose," without doing these defendants out of their contribution in, as the learned trial Judge very accurately says, "de-

voting practically their whole time" to the work, as well as their exceptional skill in works of that character, without which not a farthing of profit would have come into being to fight over.

And soon after the decision in the case of *Andrews* v. *Ramsay & Co.*, the same Court was obliged to take something like a step backward from the new precedent, in the case of *Hippisley* v. *Knee Brothers*, [1905] 1 K.B. 1, in which it was held that, although the plaintiff could recover the amount of the secret commission, yet the defendants were entitled to their commission for the sale of the goods. The difference between the two cases, in the judgment of the Lord Chief Justice, being that in that case "there was no fraud, but that what was done by the defendants was done under a mistaken notion as to what they were entitled to do under the contract:" whereas in the other case the defendants had "acted with downright dishonesty" (pp. 7, 8).

Following cases, without great regard for the principles involved, may well be, sometimes, will-o'-the-wisp methods, leading to quagmires: as, for instance, following the earlier of these two cases in ignorance of the latter, or before it was decided; and I venture to express my view that if plain common law rules be applied to such cases as these a right conclusion can be reached without much perplexity.

But, assuming the question to be one of dishonesty and severability, in this case: what ground can there be for finding that these defendants, men of unblemished standing and of unusual skill and knowledge in their calling, and men capable of earning the great profits which for years they earned for this company, were in any sense dishonest? I am bound to say that if I should apply that ugly word to them I should deem myself without excuse, much less justification. One unquestionable fact alone would close my mouth very firmly. Six Judges of the Supreme Court of Ontario, men familiar with such things as those involved in this case and with men and things in general in this country, unanimously, not only adjudged that these defendants were not guilty of any dishonesty, but, indeed, were quite within their lawful and just rights in breaking away from this company and in taking the contract under discussion for the new company. Am I to say, in the face of that fact, not only that that which was done was without lawful right but was also dishonest, actually fraudulent; is any one, no

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matter who he may be and whether in high or low degree, to say it? Again, how can it be termed dishonest or an actual fraud when only the manner of doing it can be found fault with; when the same thing, and worse, so far as the plaintiff's interests are concerned, could have been quite as easily, and quite as quickly, lawfully accomplished? It is useless to say that it was done to forestall the plaintiff or this company. The company was but a name, and the plaintiff was entirely "out of the running," for any such contracts. These defendants and their experience, business stability, and ability, were the sole factors. Their only difficulty could have been in regard to what is commonly called the "plant" —the tools and implements—needed in the work, and that they could have converted to their own use, or else have purchased another.

Whether they acted dishonestly or not is a question which we have to determine upon the evidence adduced in this case, and upon that alone. The question was not one material to the issue in the other action; and so no finding in it could relieve us from that duty, if there had been one, of which I can find no evidence. It ought to be needless to say, that the judgment in the other action needed no fraud, that is, actual fraud, to sustain it; "constructive fraud" was quite enough; as also that there was no fraud of any character, but merely a breach of the servants' contract with their employers. But, for those who long for a case for everything, I refer to *Nocton* v. *Lord Ashburton*, [1914] A.C. 932, and to the very apposite words of the Lord Chief Justice of England in the case of *Hippisley* v. *Knee Brothers*: "I am satisfied that there was no fraud, but that what was done by the defendants was done under a mistaken notion as to what they were entitled to do under the contract." So, here, I am more than satisfied that there was no fraud; that that which was done by these defendants was done in the belief that it was their lawful right to do it. We must not treat them as imbeciles; they are men of firm standing in the community and of quite as much reason as most of us; and, that being so, why should they attempt to do anything but that which was lawful and right? What was to be gained by it? Not this contract, because this company, without them, could be no impediment in their way to get it. And, dealing with an equally shrewd man of business, like the plaintiff, no one of intelligence would lay

himself open to a certain attack by him; even if there were no other way of attaining the object lawfully and safely.

It is true that the learned Judge who spoke for the Judicial Committee of the Privy Council in the other case, did make use of some words which, divorced from all else that was said by him, give some ground for thinking that he thought these defendants had acted dishonestly; but, in the first place, it should be observed that there is not a word to indicate that the learned Judge thought that in doing that which he thought they did, or omitting that which he thought they omitted, they were not acting in the honest belief that they were in all things within their lawful right. But, however that may be, what have we to do with the learned Judge's views upon the subject except in so far as they were needful to support the judgment pronounced? It would be an extraordinary, and a lamentable, thing if the reasons of a Judge expressed in one case were to be treated not only as evidence but conclusive evidence upon a question of fact to be tried in another case, brought for a different purpose; and that no matter how experienced or inexperienced, or of how high or low degree, such a Judge might be. I say these things because of the persistent tendency to argue this appeal as if the reasons of the learned Judge, to which reasons I have referred, were uncontrovertible and conclusive evidence in this case. And I may add again this: that I can hardly deem it possible that any one should say that these men knew they were acting wrongly—contrary to our law—in the face of the opinions of the six Judges unanimous in considering that they were in truth acting rightly and quite within the law.

I find no evidence of fraud on the part of these defendants; nor indeed on the part of the plaintiff, in having taken part in inducing these men to devote three of the best years of their lives in the service of this company on the promise of payment for such service, and then seeking to deprive them of payment to any extent; his misconduct, thus, is not fraud, it is just the outcome of resentment more aptly called spite, not the desire of gain in money, for I am able still to take him at his own estimation: "Well, I am pretty game;" not dishonesty but spite drives, and spite is sometimes a vicious driver; it is said to drive some men to "bite off their noses to spite their faces;" but that is not this case, rather it has driven the plaintiff to bite off the noses of his *quondam*

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familiar friends and partners, or, more accurately speaking, to put them, with much aid from this Court, distinctly out of joint. It is not fraud, but ill-feeling, that has brought all these evil things—including tens of thousands of dollars thrown away in law costs—to pass.

But, assuming also that it is necessary to sever the wages for the three years in question from the transaction which was the subject of the other action, in order to sustain the right of these defendants to payment, there seems to me to be no difficulty in that respect in the defendants' way. "If it appear from the agreement to have been the intention of the parties that the servant should be remunerated, but the amount of his remuneration was not settled, he will be entitled to recover upon the *quantum meruit* the fair value of his services." The agreement here was to pay a salary; that is a periodical payment, monthly, quarterly, or yearly; so that at the furthest a cause of action for such salary arose yearly; the amount to be ascertained by Judge or jury if the parties had not agreed upon it. And such a right of action could not be discharged by any subsequent misconduct. Need I refer to such cases as *Taylor* v. *Laird* (1856), 1 H. & N. 266, 156 E.R. 1203.

It is true that in the third year, a month before its termination, the contract in question was taken, but it was taken openly, after full notice to the plaintiff of the manner in which it was to be taken: and so, in regard to this year, the answer to any objection to payment of the salary assuredly is this: the company might have discharged these servants if it saw fit to do so, assuming that they had done wrong in taking the contract as they did; but the company—that is, the plaintiff—for the best of self-interested purposes did not do so; to do so would have meant the loss of the contract: the plaintiff was not able to carry it out, no one but these defendants could; so that the only course for the plaintiff to pursue in order to get any benefit from it was, in effect, to require these servants to continue working for the company earning the profits of the contract for it; and that, with the aid of the Privy Council, has been effected; and so the salary for that year was earned and should be paid.

Whilst it is right to discountenance unfaithful conduct on the part of all who serve, it is quite as important to avoid making, lightly, charges of dishonesty against them. It is to be borne in

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mind that those who occupy and have always occupied a master's position may have the prejudices of a one-sided experience; and that it is very easy to carry such prejudices to unjustifiable extremes. No great esteem can be had for those who are so prejudiced as to deem the honest gardener who accepts a gift of a jack-knife from an honest seedsman, with whom the gardener's master deals, worthy only of a bad character. Fortunately, I think, the extreme notions on this subject which may have prevailed to some extent in England have not overrun this country yet; and those who are too ready to adopt them should remember that there are others besides gardeners who accept gifts even of knives when they can be had. The notion can be carried to lengths which might be termed ridiculous if it were not for the great injustice it may do. It is a self-evident mistake to be too pronouncedly self-righteous; to be too searchful for the "mote:" so too it is a mistake for the drone to be too critical of the working bee.

Besides separation, as I have stated, in regard to time, the transactions in question were entirely separable and separate in quantity and quality. Each contract was a separate and complete transaction in itself. Wrong done, or mistakes made, as to the one, had no effect upon any other. In regard to all other transactions, these defendants' conduct, as I have said, has been considered "eminently satisfactory" on all hands. How then can it be said, reasonably, that their mistake in this transaction is so inseparable from the other eminently satisfactory transactions as to vitiate all? I should have thought that in both respects the transactions were as easily separated as any under any circumstances could be.

And therefore, even if otherwise these defendants would have forfeited their three years' earnings, I should be clearly of opinion that that wrong was avoided by the severability of the vitiated transaction. And, before leaving this subject, it may be well again to say that each of the two later cases to which I have referred was a case of secret profit, the dishonesty attributed in the one case was in the secrecy regarding the profit. This case is different in all its features.

And, upon yet another ground, right, as it seems to me, can be done.

I see no reason why the company might not, as it did, make good the claims of these defendants for their salaries for the three

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years in question. In the first place, it was not a gift in any sense; it was but carrying into effect the "decision" of this company, and of every one in any way concerned in it, expressed in the records of the company, on the faith of which the services were rendered, and without which, or some better arrangement, the company would have come to an end then. Why might not the company do this; indeed what excuse could it have for not doing it, when a full recompense had been exacted from these defendants for their mistake regarding the contract of the 1st April, 1912? And why not, even if that act had not been merely a mistake as to their legal rights? What law, or equity, can there be, entitling a company to exact a great penalty or forfeiture beyond that which has been paid, and has put it in precisely the same position as if no wrong had been done? There can be none.

But, even if it had been in legal strictness only a gift, why might not this peculiar company, in the peculiar circumstances of the case, make it? Common decency required that it should be done: that these men, who had devoted substantially their whole time in the interests of this company for three years, for others who did nothing as well as for themselves, should receive a fair recompense, law or no law, equity or no equity, but common decency and common honesty, in a sense, prevailing. With more than a million and a half dollars of profits, it would be foolish to say that it came out of the capital; if that would make any difference, if really the capital is not as much the shareholders' as the profits are, if, in truth, the question is not one of fraud, upon which question whether out of capital or earnings might be important. The Privy Council have treated it in that way. Oppression of a minority by an interested majority; certain directors holding a majority of votes making themselves a present. A case of fraud. That finding is of course not binding on us; it was in respect of an entirely different action of the company which took place several years before that in question. Our duty is to find, quite independently of that finding, whether the action of the company, now in question, was fraudulent. And, as to that, let me point out that it was not a case of directors making a present to themselves; it was an act carried by the only independent shareholders and by them unanimously. Exclude the votes of these defendants who benefit by the action of the company; and,

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if that be done, for equally good reasons the spiteful votes of the plaintiff should be rejected; the result being 504 independent votes for and no vote against payment. Or include the plaintiff and exclude these defendants, then there is a majority of four in favour of standing by the promise to pay on the faith of which the services were rendered. There is no evidence of any character that George M. Deeks and Mrs. Deeks did not vote in a fair and conscientious manner, and neither had any personal interest in voting as they did: voting the other way was voting money into their own pockets, but money which they had promised to others, and which they might well think it dishonest to take back by breaking that promise. There is no evidence that these shareholders voted any differently because those defendants were not strangers to them.

To say that the claim is a mere afterthought, an outcome of the loss of the other action, is to forget or ignore the promise to pay in 1910, on the faith of which the work was done, as well as to overlook entirely the testimony of the plaintiff of his expressed willingness, in 1910, not only that these defendants should be paid, but that they should be paid the exact amount which they claim. There was nothing extraordinary in letting the matter stand during the other litigation; and, whether there were or not, that could not alter the legal rights of the parties or give any kind of justification for a contention that the claim is altogether an afterthought.

If we do not forget the peculiar kind of company which this company was, and the peculiar circumstances of the case, we shall find no semblance of fraud in any action of this company in respect of the matters in question; nor anything like an interested majority oppressing an innocent and helpless minority. In my opinion, the action of the company in question was lawful and right. Indeed, as strong words have been applied to the conduct of these defendants, it may be but fair to them for me to add, that, in my opinion, any other action on the part of the company, in view of its promise, its decision, in 1910, would have been contemplated.

That the amount at which the salary was fixed by the company in 1916 was not excessive is well proved by the circumstantial evidence: the character and volume of the work done; the great profits earned and the remuneration given to the subordinate officer; and, in addition to that, there is the very satisfactory

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testimony of the witness Mr. Jackson; to which also may be added the plaintiff's expression of willingness to pay the exact amount, in the year 1910; and there is no evidence to the contrary. But for the bitterness of the quarrel between these former friends, there hardly could have been any objection to the claims of these two defendants in this respect, from one who expressed his willingness to pay the exact amount in question, and who, whilst a sleeping general manager, received in profits probably one thousand per cent. on his investment—his partnership with these two defendants —profits won altogether by their energy and ability.

I am clearly of opinion:—

1. That these two defendants have a good cause of action against the company, under the expressed undertaking of 1910, for more than the amount which they claim.

2. That they have also a lawful right to the money in question under the action of the company in 1916. And, if these things were material:—

3. That, in taking the contract of the 1st April, 1912, these defendants believed that they were doing no more than they had a lawful right to do; and as—now—seven Judges of this Province also think they had a lawful right to do.

4. That that contract was entirely separate from those out of which their right to remuneration in question arose.

5. That, at latest, at the end of each year a cause of action arose for the salary which these men were to be paid; and that no misconduct after that could displace it.

6. That, the company having abstained from dismissing these defendants from office and taking over the work itself, and having, on the contrary, claimed and had the benefit of this contract as fully as if it had been performed by the defendants for that company and as its servants, it is unjust and inequitable to treat them as discharged servants disentitled to their wages; and there is no power in this Court to impose a penalty, except by way of exemplary damages; that otherwise the true measure of damages is the measure of the plaintiff's actual loss: see *Hamilton Gas and Light Co. and United Gas and Fuel Co.* v. *Gest* (1916), 37 O.L.R. 132, 31 D.L.R. 515, and the cases therein referred to. That though there may be cases in which a dismissed servant cannot recover wages, and may be compelled to pay over profits to his

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master, quite irrespective of any question of dishonesty, this case is obviously not such an one even in respect of salary for the year not now in question.

7. And that, in reason, and on the authority of such cases as *Tyrrell* v. *Bank of London* and *Salomons* v. *Pender*, ordinarily all that is honestly owing to a servant, honest or dishonest, should be allowed to him on his accounting for, and paying, all lawful rights and claims of his master; that, however wrong it may be for a servant to "rob" his master, that cannot make it right for the civil courts to "rob" the servant for the benefit of the master

8. That the case is obviously one of master and servant, or, if any one prefer it, of company and executive officer; and that, if it were not, if it were only of directors' fees, these defendants are entitled to be paid the "salary" in question, because of the promise of every shareholder of the company, in 1910, to pay it, reaffirmed at the shareholders' meeting in 1916.

9. And that, without at all relying upon recent days' extravagant notions of the capacity of Ontario companies—see *Edwards* v. *Blackmore* (1918), 42 D.L.R. 280, 42 O.L.R. 105—the action of the shareholders in 1910 and 1916 was *intra vires* of the company; and that neither was fraudulent, and so both are binding, though either would be enough: see *Dominion Cotton Mills Co. Limited* v. *Amyot*, 4 D.L.R. 306, [1912] A.C. 546.

The learned trial Judge was, in my opinion, quite right in his conclusions; and, accordingly, I would dismiss this appeal; but, as the other members of this Court are of a contrary opinion, it must be allowed, and the company must be restrained from paying and these defendants from receiving the money in question; and, according to the ordinary rule, costs follow the event.

Appeal allowed; MEREDITH, C.J.C.P., *dissenting*.

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British Columbia Supreme Court, Hunter, C.J.B.C. January 22, 1919.

1. STATUTES (§ I—1)—ROYAL COMMISSION—PUBLIC INQUIRIES ACT B.C.—DOMINION PENAL LAWS—INVESTIGATION—ULTRA VIRES.

A coercive commission created under the Public Inquiries Act (R.S.B.C. 1911, c. 110) as amended by 1917, c. 30 (3), to investigate breaches of Dominion penal laws dealing with the importation of liquor into the province is *ultra vires* of the Lieutenant-Governor in Council and also of the provincial legislature.

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2. STATUTES (§ II—96)—PUBLIC INQUIRIES ACT—INTENT—"GOOD GOVERNMENT"—"ADMINISTRATION OF JUSTICE IN THE PROVINCE"—B.N.A. ACT—CRIMINAL LAW—JURISDICTION OF PROVINCE.

The expression "good government," as used in the Public Inquiries Act (R.S.B.C. 1911, c. 110) as amended by c. 30, 1917, is not to be taken in the wide sense which such expression bears in the B.N.A. Act in relation to the powers of the Dominion, but rather to the exercise of the executive and ministerial functions and to the management and conduct of official business, within the scope of the power given to the Province by sec. 92 (16) of the B.N.A. Act, to legislate in respect of merely local matters within the Province.

[*Kelly* v. *Mathers* (1915), 23 D.L.R. 225, 25 Man. L.R. 580, referred to.]

By the expression "administration of justice in the Province" in the said Act (1917, c. 30 (3)), it must be assumed that the legislature did not intend to include any matter not included in the phrase as used in the B.N.A. Act. By the B.N.A. Act, s. 91 (27) the criminal law, including the procedure in criminal matters, is assigned to the Dominion.

Such a commission in so far as it is created for the purpose of inquiring into punishable violations of law, and ascertaining the malefactors with a view to prosecution, is also in violation of Imperial statutes 16 Chas. I., c. 10, and of stat. 42 Edw. III., c. 3, which statutes are still in force in Canada and the provinces except so far as altered by a competent legislature.

Statement.

APPLICATION to shew cause why a writ of prohibition should not issue to prohibit Clement, J., from proceeding under the mandate of a Royal commission, dated December 21, 1918, purporting to issue under the authority of the B.C. Public Inquiries Act. Acting under the authority of the commission, the commissioner required the applicant's attendance as a witness. On the applicant refusing to attend, he thereupon issued his warrant for his arrest, but, as I understand it, the same has not yet been enforced: hence these proceedings, and, as the case raises questions of cardinal importance, the court reserved judgment.

C. Wilson, K.C., and *R. Symes*, for Gartshore; *C. W. Craig*, K.C., for Crown.

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HUNTER, C.J.B.C.:—The commission recites that the Public Inquiries Act enacts that, whenever the Lieutenant-Governor in Council deems it expedient that an inquiry be made into and concerning any matter in connection with the administration of justice within the province (and such inquiry is not regulated by any special law), the Lieutenant-Governor in Council may appoint a commissioner to inquire into such matters. Why the words included in the brackets were inserted is not clear, as they do not appear in the new section substituted by the amending Act of 1917, but, as I think nothing turns on this, there is no need to refer to it further.

The commission directs the commissioner to inquire:—

(*a*) Whether intoxicating liquor has been unlawfully imported into the Province of British Columbia since December 24, 1917, and if so, in what manner and by what means or devices such importation was effected;

(*b*) If any intoxicating liquor was so unlawfully imported into the Province of British Columbia, the names of the persons, firms or corporations engaged directly or indirectly or in any wise connected with such unlawful importation;

(*c*) Into the disposition of all intoxicating liquor so unlawfully imported;

(*d*) Into all unlawful sales of intoxicating liquor within the Province of British Columbia since October 1, 1917, in respect of which no prosecution has been had under the British Columbia Prohibition Act or under any statute, order-in-council, or regulation having the force of law in British Columbia.

and then, by virtue of the Act and other powers vested in the Crown, clothes the commissioner

with the power of summoning before you any person or witnesses and requiring them to give evidence on oath orally, or in writing or solemn affirmation (if they be persons entitled to affirm in civil matters) and to produce such documents and things as you may deem requisite to the full investigation of the said matters.

and directs the commissioner to report, in writing, the facts found together with the evidence "and the opinions which you may have formed in relation to the matters aforesaid as a result of such inquiry."

The first three inquiries are directed to unlawful importation of liquor in the province since December 24, 1917, *i.e.*, for the period of practically a year before the date of the commission; the names of the guilty parties are to be reported and also what became of the liquor. That is to say, the commissioner is to inquire into the commission of offences against Dominion law as it has been settled by the Privy Council, that legislation relating to importation is assigned by the B.N.A. Act exclusively to the Dominion parliament, although in this matter the violations aimed at appear to be principally in respect of the prohibitions against importation and sale contained in the Dominion order-in-council of March 11, 1918, passed under the authority of the War Measures Act, 1914.

The fourth inquiry is directed to all unlawful sales of intoxicating liquor since October 1, 1917, under any law in force in the province, *i.e.*, whether Dominion or provincial.

The first question that arises is, can a Royal Commission issue under the Provincial Inquiries Act to inquire into breaches of Dominion law?

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Possibly, if the commission were not armed with compulsory powers, and people could please themselves about testifying, there would be no legal objection to a commission being issued to inquire into any subjects whatever relating to the general welfare of the province as a naked power to inquire could not bind any one for any purpose and any person conceiving himself injured or defamed by any evidence given would have his remedies in the courts. But when the commission is armed with coercive powers, which can be given only by statute, the matter assumes a different aspect.

By s. 3 of the Provincial Inquiries Act, as amended by the statutes of 1917, c. 30, it is enacted that commissions may issue to inquire, *inter alia*, "into and concerning any matter connected with the good government of the province . . . or the administration of justice therein," and it is only under one or other of these two clauses that this commission is authorized by the Act, if at all.

After consideration, I think that the expression "good government" is not to be taken in the wide sense which that expression bears in the B.N.A. Act in relation to the powers of the Dominion. I think that in using this expression the legislature rather meant to refer it generally to the administration of the government and to the exercise of the executive and ministerial functions and to the management and conduct of official business and by giving it this interpretation it would be brought within the scope of the power given to the province by s. 92 (16) of the B.N.A. Act to legislate in respect of merely local matters within the province. An example of a commission, within the meaning of such a clause, occurred in *Kelly* v. *Mathers*, 23 D.L.R. 225, 25 Man. L.R. 580, where a commission to inquire into "all matters pertaining to the new parliament buildings" was held valid by the Court of Appeal under a similar clause in the Manitoba Inquiries Act even though the result might be to expose certain persons to prosecution. But such a clause would not authorize a commission of the character in question here.

The other clause, viz., "administration of justice," is the phrase used in the B.N.A. Act itself in s. 92 (14), and of course it must be assumed that the legislature by its use did not intend to include any matter not included in the phrase as used in the

B.N.A. Act. By the said sub-section o the B.N.A. Act "the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters of those courts," is assigned to the province, while, on the other hand, by s. 91 (27) "the criminal law except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters," is assigned to the Dominion. Criminal procedure, then, on the one hand, is for the Dominion, while "the administration of justice in the province," in a restricted sense, is for the province, and the boundary is not always clear. For instance, it has been decided that whether there should be a grand jury in criminal trials is a matter of procedure and, therefore, for the Dominion; how many shall compose it is a question of organization and, therefore, for the province, while again the number, who may find a bill, is for the Dominion. Now, I do not think it would be wise to attempt to give an exhaustive definition of what is included in either of these heads of jurisdiction, as used in the B.N.A. Act, but any case which involves their consideration ought to be left to be dealt with as the occasion arises, especially as it is sometimes easier to say what is not included in one or other of them, as the case may be, than to say what is included. But if a coercive commission to investigate breaches of Dominion law, dealing with the importation of liquor, is within the meaning of the expression "administration of justice in the province," as used in the B.N.A. Act, then I see no reason why evasions of the Customs laws, as for instance with regard to opium, could not be made the subject of a provincial inquiry. Assume then, that a commissioner, directed to make such an inquiry, required the presence of Customs officers and the books of the office, and that the Minister of Customs ordered the officers not to attend or to produce the books. Here there would at once be a conflict of jurisdiction which cannot be intended by the B.N.A. Act. The underlying principle of that Act is, to divide and allot the powers of self-government between the Dominion and the provinces and not to establish or allow a clashing of jurisdiction. Therefore, it must be clear that a commission could not be issued by the province under cover of the Provincial Inquiries Act to inquire into evasions of the Customs laws or their efficacy or

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working generally, although to do so might be in a broad sense to inquire into a question of "good government" or into the "administration of justice" in the province. Therefore, I think it must follow that the legislation did not intend to authorize any coercive inquiry into matters exclusively under Dominion control. At any rate, if it did so, I think the Act is, to that extent, *ultra vires*, in view of the decision of the Privy Council in the case of *Att'y-Gen'l of Australia* v. *Colonial Sugar Refining Co.*, [1914] A.C. 237, the *ratio decidendi* of which is, that a legislature, with limited powers, cannot create a coercive tribunal to examine into matters over which it has no jurisdiction. I do not understand the principle established by that case to be one of an absolutely rigid and unyielding character: For instance, a commission to inquire into the working and efficiency of the grand jury system might, I think, be validly issued by the provincial government, even although it was called on to examine into some aspects of the system which, as pointed out, are under Dominion control. But where, as here, the commission is directed to inquire into matters that are exclusively under the control of the Dominion parliament, I think the principle applies with the result that the commission is void, so far as concerns the mandate to inquire into violations of Dominion prohibitions relating to intoxicating liquor. The commission then, from this point of view, being *ultra vires* of the Lieutenant-Governor in Council to the extent mentioned, the question might arise whether the court should declare the commission unlawful in whole or only in part. As I think there are other fatal objections to its validity as a whole, it will not be necessary to consider this point.

Reverting again to the mandate, what is its nature and purpose? Whatever other object there may have been in the issuing of the commission, the main object stands out conspicuous and clear. It is, that the commissioner shall inquire into all cases of unlawful importation and sale in violation of Dominion and provincial law and to report the names of the guilty parties with a view to prosecution. Why else should they be reported and why only those who have not already been prosecuted? While it is true that Mr. Craig made no secret of the object of it, and of the fact that the Attorney-General intended to prosecute, I think such declarations are irrelevant and that the intention must be

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gathered from the document itself. We have, then, a tribunal of a highly inquisitorial character created by prerogative Act and armed with compulsory powers designed to force the giving of evidence under oath for the purpose of discovering and reporting all offenders against certain Dominion and provincial laws during a considerable period of time, nor is there any limit set on the time during which the tribunal may carry on its operations. It appears to me that the legislature itself could not create such a tribunal, much less the executive, for the simple reason that to do so is to deal with matters of criminal law and procedure which, as already stated, are assigned by the B.N.A. Act to the Parliament of Canada. A tribunal of this character is in reality assuming to exercise some of the functions of a grand jury with certain obvious differences in the procedure which do not make in favour of the protection of the subject. Under our system, a grand jury *generally* proceeds in respect of specific charges against named accused persons: here, the tribunal is for the purpose of finding out who ought to be accused; the grand jury does not hear the accused, who cannot be compelled to give evidence; the commission, on the other hand, can force the suspect to give evidence while assuring him that his evidence cannot be used against him; the grand jury hears the incriminating evidence in private, thereby protecting the person where it throws out the bill from the injury and annoyance of being publicly stigmatized by irrelevant or malafide evidence or mere defamatory gossip; here, the tribunal hears the evidence in public which may seriously, and without any adequate remedy, injure the person against whom the evidence is directed and who has no right to test it by cross-examination.

All these matters are clearly matters of procedure, and as the inquiry is admittedly for the purpose of reporting those who are guilty of violations of the provisions of Dominion law, which are punishable with severe penalties, they are matters of criminal procedure. Mr. Craig strenuously argued that it was irrelevant to talk of criminal procedure when no specific person was being proceeded against. I fail to see any force in this. I grant that in all properly constituted criminal proceedings there must, of necessity, be an accused; but when a suspected person is forced to give evidence, which incriminates himself, and who is to be

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reported as one who ought to be prosecuted, I think that, although technically not so, he is in reality an accused person. And none the less so because the procedure happens to be by way of summary trial rather than indictment.

I, therefore, think that as the commission is created for the purpose of inquiring into violations of Dominion penal enactments, with a view to prosecution, and armed with compulsory powers in relation to the giving of evidence that its establishment has necessarily dealt with matters of criminal procedure, and that, in fact, a special kind of criminal procedure has been set up for the effecting of a particular object and that, therefore, the commission is not only *ultra vires* of the Lieutenant-Governor in Council but also of the legislature itself.

There is another fatal objection to a Royal commission created for the purpose of inquiring into punishable violations of law and ascertaining the malefactors and that is that it is in violation of the Imperial Statute 16 Charles I., c. 10, which abolished the Star Chamber. I see no reason to doubt that this statute is in force both in Canada and in the provinces, except so far as the law, which is established, may be altered by a competent legislature.

After reciting, among other matters, that by the Great Charter

> it is enacted that no free man shall be taken or imprisoned . . . and that the King will not pass upon him or condemn him but by lawful judgment of his peers or by the law of the land,

and that by the stat. 42 Edw. III, c. 3:—

> It is enacted that no man be *put to answer* without presentment before justices . . . or by due process . . . according to the old law of the land, and that if anything be done to the contrary it shall be void in law and holden for error,

and after reciting in effect that the Privy Council and the Star Chamber had abused their powers, some of which were usurped, and that the common law and the ordinary course of justice provided all proper remedies and redress, the Act proceeds to abolish the court and to provide that no court, council or place of judicature should be henceforth constituted with the powers exercised by that court. It seems to me that a commission of this character is within the sweep of the Imperial enactment, as there cannot be any doubt that when a man is asked, whether he has imported liquor within a prohibitive period, he is being "put to answer."

While the enactment relates to England and Wales, there can be no doubt of the applicability of its principle to all the self-governing Dominions, and it has been decided to be in force in New Zealand by the highest court of that colony. I think that its declarations of principle and prohibitions, so far as applicable, form part of our criminal as well as civil jurisprudence and that therefore, only the Parliament of Canada, and not the legislature, can authorize the creation of any tribunal which is within the sweep of its condemnation and designed to discover offenders against penal laws with a view to their prosecution. And if the legislature cannot do this directly it can do it indirectly under the guise of legislating concerning "the good-government of the province" or "the administration of justice" or "civil rights" or "local matters." Thus, in *Union Colliery* v. *Bryden*, [1899] A.C. 580, the legislature enacted that no Chinamen should be employed in coal mines below ground, and on behalf of the province, it was argued that it could do this under its power over "local works and undertakings" and over "civil rights." But the Privy Council held that in reality the legislature intended to strike at the employment of a certain class of aliens and that this was competent only to the parliament under its jurisdiction over aliens, which decision is really only an illustration of the fact that, broadly speaking, to make laws concerning the liberties of the people is for parliament, while to make laws relating to "civil rights" is for the legislature.

I think, moreover, the creation of this particular tribunal violates two of the fundamental principles of criminal law and procedure which are the main safeguards of persons who are being proceeded against.

The first is, that no man can be compelled to accuse himself. It is true that by both the Dominion and provincial Acts a witness cannot refuse to answer on the ground that he may incriminate himself, but is protected to the extent that it cannot be used against him, but, notwithstanding these enactments, he cannot be compelled to give evidence in any prosecution against himself. Is not this protection destroyed when he can be compelled to give evidence before one tribunal which is created for the purpose of finding out whether he should be put on trial before another tribunal?

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The second principle is, that every man is presumed to be innocent until he is proved to be guilty by a court of competent jurisdiction. In a trial by the ordinary courts of justice the court (and a jury if there be one) starts out with the assumption that the accused is innocent, and it is only when the offence is clearly proved that the accused is found guilty. Here the underlying assumption, and the very reason for the creation of the commission, are that there are one or more guilty persons whom it is the office of the tribunal to discover and report for prosecution.

For these reasons, I think that the commission was issued without lawful authority and that the applicant is entitled to the relief claimed, but, in conformity with the usual practice, there will be no costs. *Application granted.*

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TURNBULL v. GRAHAM.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck and Hyndman, JJ. December 20, 1918.

AUTOMOBILES (§ III D—350)—COLLISION—NEGLIGENCE—INSTINCT OF SELF-PRESERVATION.

It is a defence to an action for negligence, that the defendant did the act complained of in an emergency in response to his instinct for self-preservation, provided that his action was what a reasonable man might well have done under the circumstances.

[See annotation 39 D.L.R. 4.]

Statement.

APPEAL by plaintiff from the trial judgment dismissing an action for damages for injuries caused by being struck by an automobile.

I. W. McArdle, for plaintiff; *F. E. Eaton*, for defendant.

Harvey, C.J.

HARVEY, C.J., concurred with Hyndman, J.

Hyndman, J.

HYNDMAN, J.:—On September 1, 1917, about 6 p.m., the plaintiff and her daughter, Jean Turnbull, were walking homeward along the east side of First St. West, in the City of Calgary, between Sixth and Seventh Avenues, and when at a point close to the corner on the south side of Seventh Ave., in front of the building known as the Lougheed Block, the plaintiff, whilst still rightfully on the sidewalk, was struck by the defendant's automobile, knocked down and considerably injured, and sustained damages. Just as they about reached the corner, suddenly they heard a crash between two motor cars and before the plaintiff could appreciate what was happening she was struck by the defendant's car and knew nothing further until she reached the office of Dr. Birch. She was later taken to the hospital where she remained for a month and a day.

In such circumstances, the defendant is liable in damages, unless he can shew that he was not negligent. S. 33 of the Motor Vehicles Act, 1911-12, Alta., c. 6, enacts:—

When any loss or damage is incurred or sustained by any person by a motor-vehicle, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor-vehicle shall be upon the owner or driver of the motor-vehicle.

The defendant denies that he was negligent and the trial judge finds, in effect, that the accident was due to the fact that the defendant was himself run into by another motor car operated by one Nablo in such a way that it became impossible for him to avoid what happened, and expressly finds him not guilty of negligence, and that he was forced upon the sidewalk because Nablo did not give him the right of way. The evidence is fairly lengthy and conflicting, but a careful perusal convinces me that the defendant, at the time of the collision with Nablo's motor car, was rightfully where he was, was not going at an excessive rate of speed, and under city by-law No. 1876, art. 5, s. 5, had the right of way. The defendant was proceeding in an easterly direction on the right-hand side of Sixth Ave. and Nablo was going south along First St. West and it was the latter's duty to look out for cars coming from the west along Sixth Ave and allow them to pass if there was any chance of them meeting at the intersection. In my opinion, under the circumstances of this case, the defendant might very properly assume that Nablo would have made way for him and the defendant, in my opinion, in fact so assumed, and when he realized the danger of his position was unable to do anything more than he did do to avoid the collision which resulted. The evidence discloses that the defendant knew his rights under the by-law and that Nablo, according to his own admission, was under the impression that he himself had the right of way over the defendant. This, no doubt, had a good deal to do with his conduct in not being careful to allow the defendant to pass. The collision having taken place, the defendant says his foot was thrown off the clutch pedal and crowded him against the wheel, and that he lost proper control both of the machinery and the steering gear. If this were so, and the evidence convinces me of the reasonableness of such an explanation, no blame whatever can be attached to the defendant and he cannot be held liable for damages sustained by the plaintiff. Therefore, I would dismiss the appeal with costs.

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BECK, J.:—I have read over the whole of the evidence. I can see no reason for coming to a conclusion different from that of the trial judge.

The injury to the plaintiff complained of was done by the instrumentality of the defendant's automobile while being driven by himself. The trial judge, in effect, finds so far as the defendant is concerned that there was no negligence, but that it was a case of "unavoidable accident."

The general law upon this question, in the aspect here presented, is stated in 21 Halsbury, tit. "Negligence," p. 479, par. 801:—

> It is a defence to an action for negligence that the defendant did the act complained of in an emergency in response to his instinct for self-preservation, provided that his action was what a reasonable man might well have done under the circumstances.

Instances are added and authorities cited.

The question is very satisfactorily discussed in Pollock on Torts, 19th ed., pp. 138 *et seq.*, under the title "Inevitable Accident," where leading American cases are also referred to. See also 29 Cyc., tit. "Negligence," p. 437; Corpus Juris, vol. 1, tit. "Accident," pp. 293, *et seq.*, tit. "Action," p. 970.

I would dismiss the appeal with costs.

Appeal dismissed.

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RYAN v. WILLS.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell, Sutherland and Kelly, JJ. October 18, 1918.

MASTER AND SERVANT (§ I B—7)—ACTRESS—WEEKLY SALARY—TIME AT DISPOSAL OF COMPANY—NOT A SERVANT—ONTARIO COMPANIES ACT (R.S.O. 1914, c. 178).

A motion picture actress engaged by a theatrical company, at a weekly salary, to play the parts as casted, and whose time is at all times to be at the company's disposal, is not a servant of the company within the meaning of the Ontario Companies Act (R.S.O. 1914, c. 178), and cannot recover unpaid wages under s. 98 of the Act.

[*Welch* v. *Ellis* (1895), 22 A.R. (Ont.) 255, followed.]

Statement.

APPEAL from the judgment of Denton, Jun. Co. Ct.J. in an action in the County Court of the County of York by an actress who was employed by the Canadian National Features Limited, an Ontario company, to recover from the defendants, as directors of that company, the amount of a judgment recovered

by her against the company for wages: Ontario Companies Act, sec. 98.* Affirmed.

The judgment appealed from was as follows:—

DENTON, JUN. Co. Ct.J.:—The material facts in this case are not in dispute, though the inferences and conclusions to be drawn from these facts are matters of opinion. The questions involved are largely questions of law; and, if I have not arrived at the right decision, the fault does not lie with counsel, who have all given me the benefit of very full and able arguments. The facts, in so far as it is necessary to state them, are as follows:—

In 1916, a company was created and organised under the provisions of the Ontario Companies Act, under the name of the Canadian National Features Limited. The main objects of the company were, in short, to produce, buy; sell, or deal in motion pictures and motion picture films and to carry on a general theatrical business in Canada.

The company had an office in Toronto and a studio at Trenton, Ontario. The defendant Brownridge was appointed manager; and, the company having decided to produce motion picture plays and films, he proceeded to New York in December, 1916, to engage the actors and actresses. He engaged 23 in all, at wages or salaries varying in amount, one at $1,250 a week, one at $350 a week, and others at very much lower figures, their total weekly wages amounting to $4,000.

He engaged the plaintiff, whose name at that time was Weston. This engagement is in writing, and provides that it is to be for one year at a weekly salary of $75, for which sum she agreed to play the parts as casted and to be at the company's disposal at all times during the term of the contract. She also agreed to supply all modern wardrobe and to dress all parts assigned to her in a careful and painstaking manner. The plaintiff has been on the stage since she was 9 years of age. She married in New York when she was 16, obtained a divorce when she was 19, and married, in May, 1917, she present husband, Ryan, who works for the Imperial Munitions Board at Trenton. She is not 29 years of age. In fulfilment of her

*98.—(1) The directors of the company shall be jointly and severally liable to the labourers, servants and apprentices thereof for all debts not exceeding one year's wages due for services performed by the company while they are such directors respectively.

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engagement with the company, she came to Toronto and reported for duty and was sent to Trenton. It seems there were two or three companies (by which I mean companies of actors) there producing plays for the company. Each of these had a director of ceremonies, and it was the duty of the plaintiff to do what her director told her to do. She had no directing power herself, no one under her whom she had the right to control or direct. What she was required to do seems strange to those who do not live in or keep pace with the "movie" world. Sometimes she was required to ride a horse and be caught in the branches of a tree or fall from the horse into water. At other times she would appear in different situations with other women and men. It is manifest that the work she was called upon to do required intelligence, agility, vivacity, and personal attractiveness of no mean order. She commenced her duties on the 12th March, 1917, and continued therein till the 5th June, when she left because her salary had not been paid for 5 weeks and she saw little prospect of payment. She brought an action against the company for $375, being 5 weeks' wages at $75 a week, and obtained judgment on the 21st June, 1917, on which date execution was issued and placed in the hands of the Sheriff of Hastings, who made a return "*nulla bona*" on the 26th November, 1917. An order for the winding-up of the company was made on the 26th June, 1917, and the plaintiff filed her claim before the liquidator on the 10th December, 1917.

Not having been paid, she now brings this action, alleging that the defendants were directors of the company during the period for which her wages have not been paid, and as such are liable to her for those wages, under sec. 98 of the Ontario Companies Act, R.S.O. 1914, ch. 178. She claims that she is a "servant" within the meaning of this section.

All the defendants join in setting up two defences: first, that the plaintiff is not a servant within the meaning of the section; and, secondly, that the contract of employment was contrary to the Alien Labour Act, R.S.C. 1906, ch. 97, and was and is void and cannot be enforced by the plaintiff. The defendant Shea sets up the additional defence that he had ceased to be a director before the plaintiff's wages fell into arrears, if not before she began to work for the company at all. The defendants Connelly, Farley, and White also set up an additional defence, viz., that they were

not legally constituted directors, though they attended meetings and acted as such.

It is advisable to consider, first, the defence that the plaintiff is not a "servant" within the meaning of sec. 98, because if this defence prevails the others need not be considered. The original source of this legislation is to be found in ch. 40 of the Laws of New York State of the year 1848, when the first Act to authorise the formation of companies in that State was passed. The Act provided that "the stockholders of any company organised under the provisions of this Act, shall be jointly and severally individually liable for all debts that may be due and owing to all *labourers, servants* and *apprentices* for services performed for such corporation."

Our Legislature seems to have incorporated this provision into our Companies Act with the changes that the liability is placed upon the directors instead of the shareholders and the liability is limited to one year's wages. The phrase "labourers, servants and apprentices" has been considered in several cases before the Courts of New York State. These decisions, I think, should have weight with us, not as binding authorities, but as expressions of judicial opinion by the Judges of a State wherein the conditions under which people live and work so nearly correspond with our own. *Coffin* v. *Reynolds* (1868), 37 N.Y. 640, and *Balch* v. *New York and Oswego Midland R. Co.* (1871), 46 N.Y. 521, shew that from the beginning these Courts placed a restricted meaning upon the word "servant;" and later on, in 1882, *Wakefield* v. *Fargo* (1882), 90 N.Y. 213, a decision of the Court of Appeal, gave sanction and approval to this restriction. In this case the Court said (p. 218):—

"To the language of the Act must be applied the rule common in the construction of statutes, that when two or more words of analogous meaning are coupled together, they are understood to be used in their cognate sense, express the same relations, and give colour and expression to each other. Therefore, although the word 'servant' is general, it must be limited by the more specific ones, 'labourer and apprentice,' with which it is associated, and be held to comprehend only persons performing the same kind of

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service that is due from the others." And at p. 217: "It is plain, we think, that the services referred to are menial or manual services."

It was held in the *Wakefield* case that a bookkeeper and general manager at a yearly salary was not "*ejusdem generis*" with an apprentice or labourer.

A few years later, in 1890, probably as a result of this decision, the law of New York State was changed (see General Laws of New York of 1890, ch. 564) by substituting the word "employee" for the word "apprentice." The new statute came up for consideration in 1899 in *Bristor* v. *Smith*, 158 N.Y. 157. In that case it was held that an attorney of the company, who was paid a salary but who did not act exclusively for the company, was not an employee under the Act.

The last reported case in the New York Courts is *Farnum* v. *Harrison* (1915), 167 N.Y. App. Div. 704. In that case the plaintiff was a bookkeeper on a weekly wage of $50, and a majority of the Court (three against two) decided in favour of the plaintiff. The decision is put upon the ground that "those who, being continuously employed in the corporate business for a compensation paid in wages, or in salaries, and being under the orders of the managers of the corporation, are usually regarded as its servants or employees."

It was not contended in the last two cases, as I read them, that the plaintiff would have been regarded as a servant if that word had been associated with labourers and apprentices only, but it was contended that the change in the statute had enlarged the class of persons entitled.

In our own Courts, *Welch* v. *Ellis* (1895), 22 A.R. 255, is the leading case, and the judgment in *Wakefield* v. *Fargo*, 90 N.Y. 213, and the reasons therefor, were adopted as a correct statement of the law. Even the passage in the *Wakefield* case (90 N.Y. at pp. 217, 218) in which the opinion is expressed that the statute applies only to a person "from whom the company does not expect credit, and to whom its future ability to pay is of no consequence . . . who does a day's work, or a stated job," is cited by Mr. Justice Osler with approval, in spite of the provision in our own statute which allows one years wages to be recovered. Mr. Justice Maclennan says (22 A.R. at p. 261) that "servants"

means "servants such as labourers and apprentices." Mr. Harding contends that the reasoning of the Judges in this case is *obiter* and in no way necessary for the decision of the case. I suppose that it could have been held that a foreman, who does no manual labour but pays and dismisses men, is not a servant, without at the same time stating that a servant must be in the same class as a labourer to come within the Act, but the opinion of these two able Judges as to the meaning of the Act ought not to be cast aside as having no weight.

The English authorities are not of so much assistance, as the language of the statutes is different. But it may be noted that under the Employers and Workmen Act, 1875, which defines "workman" as one who is a labourer, servant in husbandry . . . or otherwise engaged in manual labour," it has been held that a person who is employed as a practical working mechanic to develope ideas and inventions is not a servant within the meaning of the Act: *Jackson* v. *Hill* (1884), 13 Q.B.D. 618. Nor is a conductor of an omnibus—*Morgan* v. *London General Omnibus Co.* (1883), 12 Q.B.D. 201—though the contrary was held in Scotland in *Wilson* v. *Glasgow Tramways Co.* (1878), 5 Sess. Cas., 4th ser., 981. Nor is a grocer's assistant: *Bound* v. *Lawrence*, [1892] 1 Q.B. 226; nor the guard of a goods train: *Hunt* v. *Great Northern R. Co.*, [1891] 1 Q.B. 601; nor a hair-dresser: *Regina* v. *Justices of Louth*, [1900] 2 I.R. 714. But a man who had taken his degree in science, employed under a contract for 5 years' service, whose duties were partly in the laboratory but mostly in manual labour, was such a servant: *Bagnall* v. *Levinstein Limited*, [1907] 1 K.B. 531.

An English statute under which the decisions are more in point is the Wages Attachment Abolition Act, which provides that no attachment of the wages of any "servant, labourer, or workman" shall be made. Under this it has been held that a secretary of a company at a salary of £200 a year does not come within it: *Gordon* v. *Jennings* (1882), 9 Q.B.D. 45. In this case Grove, J., said: "I do not think his position and remuneration can be said to come within the same description as those of manual servants or labourers. His salary is more than sufficient to keep life up; his salary and employment is such as many persons in the positions of gentlemen are sometimes glad to get"—all of which shews, if it shews nothing more, that we are living in a different age and on another continent.

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Under the same statute it has been held that a clerk on a salary of £120 a year is not a servant, labourer, or workman: *Marks* v. *Booth* (1891), 90 L.T. Jour. 302.

A case much relied on by Mr. Harding, for the plaintiff, is *Re Winter German Opera Co.* (1907), 23 Times L.R. 662. This was a decision under the "Preferential Payments in Bankruptcy Act, 1888," which provides that in the distribution of assets "there shall be paid in priority to all other debts . . . all wages or salary of any clerk or servant in respect of services rendered to . . . the company," and it was held that an actor engaged to sing in an opera at a certain sum for each performance was a "servant" within the meaning of the Act. This case is said to be on all fours with the present. With much respect, I beg to differ. The actor is here grouped with a clerk, and a clerk is in *Marks* v. *Booth*, cited above, placed upon a higher level or status than that of a labourer or servant. And another circumstance that must be noticed is that, running through our Ontario Companies Act the word "employee" is frequently used (see secs. 34 and 36 as instances), whereas "servant" is used in sec. 98. A servant is always an employee, but I think an employee is not always a servant within this section.

My conclusion is that, having regard to the terms of the contract under which the plaintiff was engaged and the nature of the services she was called upon to render and the remuneration she was to receive, she is not "*ejusdem generis*" with "labourer" and "apprentice," and is therefore not a servant within the meaning of the Act, although she is, no doubt, included in the general legal definition of the word "servant."

It would have occasioned no regret on my part if I could have arrived at another conclusion, for she has earned her wages and is entitled to them; and, moreover, it is unlikely, if I am right in this judgment, that this company had any employees who were servants under this section, as they were all, or nearly all, actors or actresses.

In the view I have taken of the case, it is unnecessary to deal with the other defences raised. If an Appellate Division should come to a different conclusion on the branch of the case dealt with, and is called upon to deal with other features, the facts are spread upon the record, and the defendants offered no evidence to refute

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them. These facts can therefore be found as readily by the appellate Judges as by the trial Judge.

The action will be dismissed. I hope the defendants will not ask for costs.

R. T. Harding, for appellant.

M. H. Ludwig, K.C., for certain of the respondents.

F. E. O'Flynn, *B. W. Essery*, *T. R. Ferguson*, and *Gideon Grant*, for several of the defendants, respondents.

THE COURT, at the conclusion of the argument, dismissed the appeal with costs, being of opinion that the case was not distinguishable from *Welch* v. *Ellis*, 22 A.R. (Ont.) 255, by which they were bound.

Appeal dismissed.

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EX. C.

THERRIAULT v. THE KING.

Exchequer Court of Canada, Audette, J. September 5, 1918.

1. EXPROPRIATION (§ III E—170)—ALTERATION OF STATE OF HIGH LAND—INJURY TO OWNER OF LOWER—DAMAGES—ART. 501 C.C.P.Q.

Where the owner of a superior heritage alters its natural state to the injury of the owner of lower adjoining land, he is liable under art. 501 C.C.P.Q., to the latter for damages, not as for a simple tort, but as for a breach of duty imposed by law.

[*City of Quebec* v. *The Queen* (1894), 24 Can. S.C.R. 420, referred to.]

2. EXPROPRIATION (§ III E—165)—COMPENSATION—NEW TAKING OR NEW WORKS—DAMAGES NOT CONTEMPLATED AT TIME OF FIRST EXPROPRIATION.

Where compensation for damages arising from an expropriation has been paid, it is no answer to a claim arising out of a new taking or the construction of new works, where the last mentioned damages could not at the time of the first expropriation be foreseen, or contemplated.

Statement.

PETITION of right to recover from the Crown the sum of $1,000, for damages to property, arising out of the taking of a large volume of water from the neighbouring lots or farms, and from the diversion of streams or watercourses flowing thereon, onto suppliant's property with a large quantity of sand, which spread upon and buried a certain area of his farm.

E. Lapointe, K.C., and *C. A. Stein*, K.C., for suppliant; *E. H. Cimon*, for Crown.

Audette, J.

AUDETTE, J.:—As appears by ex. "B," on October 9, 1910, the suppliant sold to the Commissioners of the Transcontinental Railway, an area of his farm of (5.40) five and forty hundredths

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acres, for the purposes of the railway, and was paid for the same the sum of $450, including all damages. In this indenture will be found the following clause, viz.:—

Et en considération de ce que dessus le vendeur renonce envers l'acquéreur à toutes réclamations qu'il, et ses représentants légaux pourraient avoir sur le dit terrain et décharge de plus les acquéreurs de toutes demandes et réclamations pour dépreciation ou provenant de l'expropriation et de la prise de possession du dit terrain par les acquéreurs ou encore provenant de la construction, de l'entretien et de la mise en opération sur le dit terrain de la ligne du chemin de fer National Transcontinental.

The main question to be decided is whether or not the damages complained of herein are or are not covered by this clause.

These damages occur both at the western and eastern parts of the farm.

Dealing first with the west, it appears that at the beginning of the construction of the railway, the respondent constructed a trestle, running as high as fifty feet at places, on the right of way, and later on, in 1911 and 1912, says the engineer in charge, they began to fill this trestle, and for that purpose opened a borrow-pit to the west. The eastern end of the pit begins at point "C" on plan No. 1, running west. From point "C" to Riviere Bleue on the east there is a distance of, approximately, 4½ arpents. They began borrowing earth, at nothing, at point "C," working west, on rising ground, leaving a depth of about 20 feet at the west end of this borrow-pit, which is about half a mile long.

Within that western borrow-pit there are two watercourses, one at about three arpents and the other at about five arpents from "C" on the plan. Two culverts were, at the origin, constructed to take care of these watercourses, which ran—according to their natural courses—from north to south, across the right of way. Later on, when they began borrowing for the filling of the trestle, they dug this pit 7 or 8 ft. lower than these culverts, with the result that these water courses emptied in the pit, and afterwards found their way to the suppliant's land.

At one point in the pit, at the origin, they left some sand, which acted as a retaining wall preventing the water from running on to the suppliant's lot, No. 58—but after a while, in the spring, the volume of water having increased, it mined this sand wall and finally carried it away, with additional sand, onto lot 58, between point "C" and the Riviere Bleue.

As a result, 7 or 8 arpents of the suppliant's land have been damaged. The sand at certain points has entirely buried the fences, which were about five feet high. There is on doubt that, as the result of such works, the waters of the two watercourses and the surface water of 500 or 600 acres, formerly draining into these watercourses and flowing to the south of the railway, now will empty into the Riviere Bleue, through this damaged area of the suppliant's farm. These waters run even during the summer season.

Having found that the earth on the western pit was becoming hard, the respondent opened another borrow-pit to the east on lots 59 and 60; but that also was done after the construction of a culvert, which then took care of the water, taking it to the south, on its natural course.

However, here again the excavation in this pit, of a length of over half a mile, was made about 2 ft. lower than the culvert and the waters of lots 59, 60, 61 and 62, increased by the uncovering of some large springs in the pit, followed the different undulations of the land, as shewn by the black line, indicated on plan No. 1, by letters F, B, and G, and spread on the suppliant's land. The volume of water coming from the east is also considerable.

The ditch marked D, on the plan, formerly took care of the water, at that point, on the suppliant's land; but it has now been blocked and obstructed by the high railway embankment. The engineer testified that no culvert was built at that point, because it would have been too expensive to do so, the embankment being so high and heavy.

There is no embankment opposite the eastern pit.

Following the black line, indicated on the plan by letters F, B and G, it will be seen that the water runs, for a certain space, on the right of way, and while a ditch of 2½ by 1½ ft. was originally constructed at that point, it has increased, by erosion through the large volume of water, to 9 or 10 ft. by 12 ft. in width.

As a result of these eastern waters, the suppliant contends that the only road on his farm is mined by these waters; that it remains under water for a while in the spring and in the freshets; that they delay vegetation, and prevent him from seeding a certain acreage, which has to be always in hay instead of oats, etc. All of this going to decrease the value of his farm and its productive capacity.

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It, obviously, results from the working of these borrow-pits, in the manner mentioned, that the suppliant's land, on the west, takes care of the watercourses, diverted from their natural courses, together with the surface water of 500 or 600 acres, which empty on the farm with sand, and is a source of material depreciation to his farm.

On the east, coupled with the waters coming from unearthed springs in the pit, the waters of lots 59, 60, 61 and 62, through such defective digging of the pit, are diverted from their natural course and spread, in a large quantity, upon his farm.

It must therefore be found, that when the Commissioners of the Transcontinental Railway took possession of the suppliant's 5.40 acres, and when it was represented to him, as testified in his evidence, they represented they were taking his land for the (*passage*) right of way of the Transcontinental Railway, it could not at that time be foreseen or contemplated that he would suffer the damages in question in this case. Indeed, the construction of the culverts alone would convey to him the idea that the watercourses and the surface water would be taken care of in the usual manner.

The taking of these 5.40 acres, for the right of way, was one distinct and separate act, from that of the other works and diversion of watercourses on lands which did not belong to him. He had the right to assume that these culverts were not constructed for naught, and that they would take care of the waters.

The damages claimed do not arise from the expropriation, or rather from the taking, of the defendant's land and could not form part of such damages as would arise from such taking; but they are the result of works on neighbouring lots or properties. See *Jackson* v. *The Queen* (1886), 1 Can. Ex. 144.

The compensation of $450 paid him, under the indenture of October 9, 1910, did not embrace or cover damages which could neither be foreseen, contemplated, nor even guessed at the time.

If, after one compensation has been settled, further damage is caused by new works not carried out at the time of the assessment of this compensation, but at some future or subsequent time, compensation would no doubt be allowed in respect of such further damage. *Lancashire & Yorkshire R. Co.* v. *Evans* (1851), 15 Beav. 322, 51 E.R. 562; *Stone* v. *Corporation of Yeovil* (1876),

1 C.P.D. 691; (1876), 2 C.P.D. 99; *Att'y-Gen'l* v. *Metropolitan R. Co.*, [1894] 1 Q.B. 384.

Undoubtedly the damages covered by the deed of purchase must be such as could have been then foreseen. Hudson on Compensation, I., p. 310.

The case of *Lawrence* v. *G.N.R.* (1851), 16 Q.B. 643, 117 E.R. 1026, cited at p. 310 of Hudson, is quite apposite to the present circumstances, and reads as follows:—

> Owing to the construction of a railway, which was carried along an embankment, the flood waters of an adjacent river were unable to spread themselves over the low lands alongside the river, as formerly, and flowed over a bank, which formerly protected the plaintiff's land, on to that land. Before the railway was constructed, and before the plaintiff became possessed of the land overflowed by the flood waters, the owner of this and of adjacent land, from whom the plaintiff derived title, agreed with the railway company to refer to arbitration the sum to be paid by the company for the purchase of part of such adjacent land and as compensation for all injury and damage to his remaining estate, "by severance or otherwise:" *Held*, that the compensation awarded under this agreement *related only to such damage, known or contingent*, by reason of the construction of the railway at other places as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded; that it *did not embrace* contingent and possible damages which might arise afterwards by the works of the company at other places and which could not be foreseen by the arbitrator; and that the compensation for the damage arising to the plaintiff in the present circumstances was not included in the compensation awarded.

See also Browne & Allan, Law of Compensation, 130, 135; Cripps on Compensation, 154, 155.

The respondent had, under s. 3 (*f*) of the Expropriation Act, the inherent power to divert and alter the course of these streams or water courses; but that was an act distinct and separate from the taking of the suppliant's land under the deed of 1910, and the damages claimed herein did not arise from such taking, but from such diversion and from works subsequently executed on neighbouring lots or properties, and were not included in the compensation of 1910. The construction of the culverts in question must also have led to the presumption they were so constructed to take care of the waters in question. Therefore the damages claimed herein were neither foreseen nor contemplated by the parties to the deed of 1910, and the damages satisfied under that deed did not embrace contingent and possible damages which might arise afterwards by the works of the railway at other places.

Moreover, under art. 501 of the Civil Code, P.Q., which is a

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reproduction of art. 640 of the Code Napoleon, the proprietor of the higher land can do nothing to aggravate the servitude of the lower land, with respect to waters flowing on the higher part. Therefore, as held by Strong, C.J., and Fournier, J., in the case of the *City of Quebec* v. *The Queen*, 24 Can. S.C.R. 420, 421, the Crown would be liable in damages for the injury complained of in this case not as for a tort, but for a breach of its duty as owner of the superior heritage by altering its natural state to the injury of the inferior proprietor. In support of that proposition will be found, in the reasons for judgment of Sir Henry Strong in that case, a number of authorities establishing the Crown's liability under these circumstances. See also *Denholm* v. *Guelph & Goderich R. Co.* (1914), 17 Can. Ry. Cas. 316; and *Martel* v. *C.P.R.* (1895), 11 Revue Jur. 133. Moreover, such remedy would be found under s. 20 (*d*) of the Exchequer Court Act, as held in the case of the *City of Quebec*, *supra*.

The suppliant in his evidence claims $400 for the damages resulting from the western borrow-pit and $600 for the eastern borrow-pit.

There are 7 or 8 acres affected on the west. This acreage is of low and wet land and could only have been effectively used for agricultural purposes after establishing proper drainage. The damage is real. Although the fee in the land remains with the suppliant, at present such land has very little value, and it is a question as to whether it could acquire value in the future. In 1916, when the respondent's engineer went upon the premises to make an inspection of these damages, the ground was so soft, on the western side, that he had to throw some wooden posts on the ground to walk over, as he was sinking to his knees. He further says that his idea was to expropriate that part covered by the sand on the western side and construct a drain to take the water to the Riviere Bleue. In the result, the suppliant cannot use this piece of land for agricultural purposes.

The damages arising from the eastern borrow-pit are not, under the evidence, of a very tangible nature. However, as already mentioned, he has to take care of a much larger volume of water which mines his road, floods part of his farm, delays and impedes his agricultural exploitation of the same. This is further aggravated by the closing of ditch D by the embankment.

The suppliant's witnesses place a value of $50 to $70 an acre on the west, and one of them values the damages on the west at $300 to $400, while some of the witnesses decline to place any estimate regarding the damages on the east. It is true that it appears from the evidence that the Crown paid from $75 to $80 an acre for the land expropriated in that locality; but we must not overlook that this price covered and embodied the damages resulting from the expropriation, which could be ever so much more than the actual value of the land taken. On behalf of the Crown, one witness fixes the value of the farms in that neighbourhood, without buildings, at about $12 an acre.

I will assess all damages in question herein, east and west, at the sum of $440, an amount which will amply compensate the suppliant.

Therefore, the suppliant is entitled to recover from the respondent the sum of $440 in satisfaction of all claims, once for all, for damages past, present and future, resulting from the works and construction in question herein, and with costs.

Judgment accordingly.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Sutherland and Kelly, JJ. October 15, 1918.

INSURANCE (§ VI B—280)—ACCIDENT—TERM OF CONTRACT—ACCIDENTAL INJURY—FAILURE TO NOTIFY COMPANY OF CHANGE OF OCCUPATION—LIABILITY OF COMPANY.

The plaintiff was insured against "loss resulting from bodily injuries effected directly and independently of all other causes through accidental means and as the direct result of some cause not attributable to the assured's state of health." The plaintiff suffered permanent injuries, causing "auricular fibrillation" of the heart, in a fight, in which he was not the aggressor, and the court held the company liable under the above clause; the disability being the direct cause of the fight even if the plaintiff's heart had been slightly affected, without his knowledge before that time, also that the plaintiff's change of occupation to a more hazardous one without disclosure to the company did not, under the circumstances, avoid the policy.

[*Fidelity and Casualty Co. of New York* v. *Mitchell*, 36 D.L.R. 477, [1917] A.C. 592, applied and followed.]

Statement.

APPEAL from the judgment of Lennox, J. on an action upon a policy of accident insurance. Affirmed.

The judgment appealed from was as follows:—

Lennox, J.

LENNOX, J.:—I find that prior to the 15th October, 1915, the plaintiff enjoyed good health to a degree permitted to few to enjoy, and that, judging from what is shewn as to his manner

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of life and the physical efforts he occasionally made, and succeeded in, he was at the time he effected the insurance in question and its renewals—having regard to his age, of course—to all appearance, and as far as he and people associating with him knew, a healthy, sound, and capable man.

I regard the evidence of the plaintiff and his daughter as truthful and trustworthy.

I am satisfied that the facts and circumstances they depose to relating to the plaintiff's doings and general condition of health, in so far as they knew or could judge, are reliable. I think the plaintiff endeavoured to give and in the main succeeded in giving a substantially accurate account of his condition, sufferings, and doings subsequent to his encounter with Atkinson, and that, if it be a fact—and I will deal with this later on—that when the plaintiff effected the insurance and renewals in question he was affected by any incipient or organic disease, it had not made itself manifest and was not known to him or his daughter, or to his partner in business, or presumably to Dr. Sproul, or to any one, so far as is shewn: and up to that time, and thereafter up to the 15th October, he had no premonition of or reason to suspect the existence of heart trouble of any kind, or any impairment of power attributable to that cause.

It follows, if I am right—whether it becomes material or not—that in effecting and continuing the insurance he was not guilty of bad faith, intentional concealment, or conscious misrepresentation as to his condition or state of health.

The professional or opinion testimony in this case was commendably qualified, reserved, and moderate, on both sides; but, while I entertain the sincerest respect for the very eminent professional opinion put in evidence by the defence, and, in some cases, and in the absence of facts and circumstances that speak for themselves, I might regard it as conclusive or nearly conclusive, yet the train of practically undisputed facts and circumstances in this case (for it matters not at this point who was the aggressor) and the sequence of events before and after the 15th October, are, to my mind, so distinctly opposed to the theoretic possibilities—or abstract probabilities—set up by the defence, that I am definitely of the opinion, as a conclusion of fact, that the disability from which the plaintiff is suffering began on the 15th October, 1915; and, whether

provoked or unprovoked, the origin and cause of it was the manner in which he was treated and handled by the witness Atkinson on that occasion.

I do not accept it as true that Atkinson ever doubted the outcome of the encounter or that he ever even gave heed to the plaintiff's boasts, if indeed the conversation ever occurred, nor do I believe that the plaintiff was the aggressor. The probabilities are all the other way. "Blow for blow" without time for reflection, I can understand. But, even if it were true, and I am not of that opinion, that the plaintiff began the assault, it was at an end; and the old man, incumbered with an overcoat, inert, speechless and helpless, lay at the feet of this witness, and it was while the plaintiff was in this condition, on Atkinson's own shewing, that he assaulted him and brought on the struggle which, it is claimed, culminated in the injuries the subject of this action.

I find it difficult to believe that Mrs. Atkinson, on a chilly evening in October, stood idly at her doorway for 15 minutes, or thereabouts, watching the plaintiff making his way to his sister's house, and still for another 10 minutes or so watching in the same direction, without inferring that on the occasion in question a good deal happened, and much that gave the Atkinsons ground for anxiety or alarm, that is not disclosed in the evidence of either Mrs. Atkinson or her husband; and upon the evidence, verbal and circumstantial, touching the affray, the inference I feel I ought to draw is not that it occurred in the way these witnesses described it, but, on the contrary, that Atkinson began the affray; and, if I accept his own evidence, he again assaulted the plaintiff after the first encounter was definitely at an end, as he himself says. If, as is argued, the receipt produced was given a year before—and I find it impossible to believe that these three parties committed the triple mistake of day, and month, and year—it is an important circumstance in weighing the evidence, as Mr. Phelan contended; but I have not found it necessary to sift the evidence upon this point, as, whether it was given on the 15th October or not, I had come to the conclusion above stated before my attention was directed, upon the argument, to the threefold discrepancy in the dating.

I have not overlooked the generally plausible and sometimes cogent argument as to independent witnesses. It was not urged,

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I think, in this case, and perhaps for the obvious reason that no man against whom an action can be brought or proceedings taken for an assault—nor his wife for that matter—can be regarded as an independent witness until time has barred the remedy; and even then a statement or an argument often repeated in time becomes very convincing to the person making it.

I am of opinion that the infirmity, disability, bodily injury, or change in physical condition of the plaintiff, to adopt the language of the Insurance Act, R.S.O. 1914, ch. 183, had its inception or beginning on the 15th October, 1915; and I find that this was occasioned by "external force," within the meaning of sec. 172 (1) of the Insurance Act, at the hands of the witness Atkinson, in an encounter in which he was the aggressor and in the manner already referred to, and that this happened and was brought about without the intent of the plaintiff, and not as the result, direct or indirect, of anything done by the plaintiff, and without voluntary or negligent exposure to unnecessary danger on his part, within the meaning of that section; nor is it attributable to the insured's state of health or condition of mind at the time he effected the insurance, within the meaning of the policy.

There remains the question of alleged change of occupation. I am satisfied, upon the evidence, that the plaintiff was a land agent, and this only, when the policy was obtained. When the last renewal receipt was issued and thereafter he was occasionally engaged in handling cattle. This was because land agency business was almost at a standstill. He had not abandoned the calling of a land agent, and he perhaps put through an occasional transaction, but he was occupied for the time being in what was once one of his regular callings. He was not injured while so engaged. His injuries had no relation to what he had in the meantime been engaged in.

The application for insurance contained these provisions:—

"4. My occupation is fully described as follows: real estate agent, not dealing in timber-lands."

"11. The class of risk under my occupation is agreed to be preferred according to the company's classification of risks, and I agree that for any injury received in any occupation or exposure classed by this company as more hazardous than that above stated,

I shall be entitled to recover only such amount as the premium paid by me would purchase at the rate fixed for such increased hazard."

"Declaration.

"I, the undersigned, being desirous of effecting an insurance with the Railway Passengers Assurance Company, do hereby declare that the above statement of my age and other particulars is true and complete, and that I have not concealed anything material to be known to the company; and I do hereby agree that this declaration shall be the basis of the contract between me and the Railway Passengers Assurance Company, and that I am willing to accept a policy subject to the conditions prescribed by the company and expressed in the policy.

"Dated Toronto this 17th day of June, 1914.

"Signature of Applicant A. C. Morran.

"Agency H.O. (L. H. Morran.)"

The question of materiality in this contract of insurance is a question of fact for me, or eventually a higher Court, to determine: sec. 156 (6). Having regard to the event, and to the terms and provisions of clause 11 of the application, limiting the liability of the company, as above set out, "for any injury received in any occupation or exposure classed by this company as more hazardous than that above stated," and assuming (without deciding) that the company can still rely upon the application, notwithstanding the provisions of sec. 156, sub-secs. (1) and (3), and the latter part of sec. 172 (1), I am of opinion that the intermediate change of occupation, or the failure to declare it at the date of the renewal, was not a circumstance material to the company or affecting the extent of the risk they undertook. The company expressly provided for what they thought material, namely, by limiting their liability in the event of injury received while the assured was engaged in a more hazardous occupation. I am of opinion, too, that the attempt of the company to qualify their liability or vary the terms of the policy by the receipt of the 10th June, 1915, is ineffective. Section 156 (1) provides that the terms and conditions shall be all set out on the policy, and, if not so set out, shall not be admissible in evidence, etc. The renewal receipt cannot be invoked to vary the policy or defeat the specific provisions of sec. 156.

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In the opinion I entertain as to the proper disposal of this action, it is unnecessary to consider the figures submitted by Mr. McCarthy and which Mr. Phelan proposed to submit, alternatively based upon change of occupation and increased hazard. They will be filed with the suit papers. The disability of the plaintiff is total. It is not disputed that it is. Dr. Pepler stated that he regards it as permanent. There will be judgment for the plaintiff at the rate of $10 a week from the date of the accident, less 26 weeks already paid for, with interest from the dates at which the payments fell due according to the terms of the policy, and a declaration as to the plaintiff's future rights under the policy. Costs of the action to the plaintiff.

The construction of the clause headed "Accumulative Bonus" (m) was not discussed. I have not formed any final opinion as to its meaning. Subject to what may be said as to this, I should think that the second year of the policy being current at the time of the accident the 10 per cent. addition would increase the weekly payment from $10 to $11. Counsel can speak or communicate with me as to this, if they desire to, before I endorse the record.

Wallace Nesbitt, K.C., for appellants.

T. N. Phelan, for respondent.

Sutherland, J.

SUTHERLAND, J.:—An appeal from the judgment of Lennox, J., dated the 10th January, 1918.

The plaintiff was insured against "loss resulting from bodily injuries effected directly and independently of all other causes through accidental means, and as the direct result of some cause not attributable to the assured's state of health," under policy No. 100852 of the defendant company, dated the 17th June, 1914.

The policy was to run for 12 months from date, and was subject to renewal "by mutual consent from term to term thereafter by the payment of the premium" specified or any amended premium the company might require.

Before its expiration it was renewed, and a receipt for a premium given by the defendant company in part as follows:—

"Policy No. 100852.

"Received this 10th day of June, 1915,

of Mr. Andrew C. Morran

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the sum of six.....00/100 dollars, being a premium for an assurance upon the life of himself, from the 10th day of June, 1915, to the 10th day of December, 1915, at noon."

"This renewal receipt is issued subject to all agreements, conditions, and provisions of the said policy, as well as those of any endorsement attached to said policy, and the insured upon the acceptance of this renewal, makes the further statement that the warranties in the original application are true and complete at this date, and that the hazard at this date is no greater than or different from that of the hazard at the date of the policy."

As a result of a fight between the plaintiff and one Atkinson, his tenant of a farm, the plaintiff, on the 15th October, 1915, sustained bodily injuries which, admittedly, wholly and permanently disabled him.

The plaintiff gave notice to the defendants of the accident, and of his total and permanent disability resulting therefrom, which the defendants investigated, and, at first recognising liability, paid to the plaintiff at the end of quarterly periods of 13 weeks each the weekly indemnity which they had agreed under the terms of the policy to pay, as follows: $130 on or about the 15th January, 1916, and a similar sum on or about the 15th April, 1916. Thereafter the defendants refused to make further payments and repudiated further liability under the policy.

The plaintiff thereupon issued the writ herein on the 3rd November, 1916, claiming $390, the amount of three quarterly payments of weekly indemnity at the rate of $10 per week, alleged to be in arrears under the terms of the policy.

In his statement of claim he asked for a declaration of his rights under the policy: (a) with respect to the payment of the weekly indemnity thereafter to accrue; (b) in the event of loss of the plaintiff's life resulting from the accident complained of; and (c) with respect to accumulative bonus accruing to the plaintiff.

In the schedule of warranties made by the assured, dated the 17th June, 1914, which warranties it was agreed therein were the basis of the insurance, appear the following statements:—

"(4) My occupation is fully described as follows: real estate agent, not dealing in timber-lands."

"(11) The class of risk under my occupation is agreed to be preferred according to the company's classification of risks, and

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I agree that for any injury received in any occupation or exposure classed by this company as more hazardous than that above stated, I shall be entitled to recover only such amount as the premium paid by me would purchase at the rate fixed for such increased hazard."

And it also contains the following declaration:—

"I, the undersigned, being desirous of effecting an insurance with the Railway Passengers Assurance Company, do hereby declare that the above statement of my age and other particulars is true and complete, and that I have not concealed anything material to be known to the company; and I do hereby agree that this declaration shall be the basis of the contract between me and the Railway Passengers Assurance Company, and that I am willing to accept a policy subject to the conditions prescribed by the company and expressed in the policy."

The plaintiff had been at one time a drover, but had discontinued that occupation on or before the 17th June, 1914. At the time when the said policy was renewed in 1915, his business as a real estate agent having become less active and remunerative, he had returned to his former occupation of drover, and was engaged therein at the time of the accident in question.

The defendants plead that the plaintiff, in making application for the renewal of the policy, failed to disclose to the defendants material facts referring to the change in occupation of the plaintiff; and also misrepresented the state of his health and physical condition, representing himself to be in good health, when in fact he had a disease of the heart. They further allege that on this account the policy is void. They also plead that if the plaintiff suffers from any permanent disability it is not the result of bodily injuries "effected directly and independently of all other causes through accidental means," but is due to the fact that the plaintiff suffered from a disease of the heart and was not in good physical condition at the time he received his injuries.

The judgment at the trial directed payment by the defendants of $10 a week from the date of the accident, with interest, less 26 weeks' payment already made, and a declaration as to the plaintiff's future rights under the policy, with costs.

The medical testimony on both sides is in agreement that the plaintiff after the accident was found to be suffering from a disease of the heart, known as auricular fibrillation.

During the fight, the plaintiff was knocked down by Atkinson. While attempting to rise, he caught hold of Atkinson's legs, and the latter held or pressed him back. During the plaintiff's strenuous efforts to get up, his heart was subjected to a great strain. On account of this strain on the auricle, and its inability to respond freely, it went, as it is said, or commenced to go, into a state of fibrillation, which consists in the individual fibres of which it is composed, and which in a normal and healthy condition would contract in unison, beginning to do so independently of each other, in consequence of which the auricle did not fully contract, and the blood was not properly driven by means thereof.

While the medical testimony is in agreement that this serious and disabled condition in the heart exists, the witnesses called by the plaintiff testify that such condition was caused by the strain to which, at the time of the fight, the heart was subjected, and in their opinion could be thus brought about even in the case of a heart normally sound. They admit that very generally a condition of auricular fibrillation occurs in the case of hearts not previously healthy.

Those called by the defendants testified that this condition of auricular fibrillation found to exist in the plaintiff's case was consistent only with the assumption of some previous infection of the heart. They suggested that they found a leakage in the mitral valve from some old infection, the effect of which was to cause the heart to do more work and not be in a condition of compensation. The function of this valve is to prevent the blood going the wrong way, and if a certain amount of the blood escapes and goes the wrong way the heart has to work harder and pump more blood to make compensation. The result of this is that the heart dilates. They suggested that the infected condition of the heart must have been as far back as the date of the policy and receipt already referred to.

Upon this conflicting testimony, the trial Judge came to the definite conclusion that "the disability from which the plaintiff" suffered "began on the 15th October, 1915," and that previously he had enjoyed good health and was, "to all appearance, and as far as he and people associated with him knew, a healthy, sound, and capable man."

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I am quite unable, after a careful perusal of the evidence, to arrive at the conclusion that such finding was erroneous; but, even if the plaintiff's heart had been affected by some trouble prior to the date of the accident, as to which he was ignorant, the case of *Fidelity and Casualty Co. of New York* v. *Mitchell*, [1917] A.C. 592, 36 D.L.R. 477, would be applicable. The facts in that case are set out in the head-note as follows:—

"The appellants insured the respondent against bodily injury sustained through accidental means and resulting 'directly, independently and exclusively of all other causes' in total disablement from performing the duties of his occupation. A statement by the respondent that he was in sound condition mentally and physically was made a warranty by the policy. After the issue of the policy the respondent by accidental means severely sprained his wrist. The appellants for seven quarters paid him the amount provided in the policy for total disablement, but then declined to make further payments. The respondent, being still disabled, sued upon the policy. It appeared that about ten or fifteen years before the date of the policy the respondent had suffered from a tubercular affection of a small part of his left lung, which had caused a lesion which had then healed. There were concurrent findings that at that date there was no active tuberculosis in respondent's arm, but that there was in his system tuberculosis which was latent and would have remained harmless had it not been for the accident, and that apart from tubercular infection the wrist would have recovered within six months of the accident."

The trial Judge having found (see *Mitchell* v. *Fidelity and Casualty Co. of New York* (1916), 35 O.L.R. 280, 26 D.L.R. 784, that the "diseased condition" was "not an independent and outside cause, but . . . a consequence and effect of the accident," it was held "that there was no breach of warranty, that the disablement resulted 'directly, independently and exclusively of all other causes' from the accident, and that the respondent was entitled to recover under the policy."

It was also contended on behalf of the defendants that the injury sustained by the plaintiff was not the result of accident at all, but that the fight was voluntarily entered into by the plaintiff, or voluntarily continued by him after it had temporarily ceased.

The trial Judge has dealt with this also, and apparently given

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credit to the testimony of the plaintiff as against that of the defendants. He finds that "Atkinson began the affray," and "again assaulted the plaintiff after the first encounter was definitely at an end." His finding on this point is also fully warranted by the evidence.

But it was urged on behalf of the defendants—and particular stress was laid on this by counsel upon the argument—that there was a warranty as to the occupation of the plaintiff, and, as he had changed from a less to a more hazardous one, this avoided the policy.

Sutherland, J.

By the terms of clause 11 of the warranties already referred to, however, a change of occupation was contemplated by the parties to the contract, and a provision made for the recovery of a different amount by way of compensation, in case of injury received in any occupation or exposure classed by the company as more hazardous. It is clear that in the present case the injuries sustained by the plaintiff did not occur while he was engaged in the occupation of drover.

Under these circumstances, the effect contended for cannot be given to the warranty. As to the question of the materiality of the change in occupation, sec. 156, sub-sec. 6, of the Ontario Insurance Act, R.S.O. 1914, ch. 183, applies. The question of materiality is for the trial Judge, who has found that the "intermediate change of occupation, or the failure to declare it at the date of the renewal, was not a circumstance material to the company or affecting the extent of the risk they undertook." See *Strong* v. *Crown Fire Insurance Co.* (1913), 10 D.L.R. 42, 13 D.L.R. 686, (affirmed 15 D.L.R. 832, 48 Can. S.C.R. 577) 29 O.L.R. 33, and following pages.

I think the appeal fails on all grounds, and must be dismissed with costs.

MULOCK, C.J. Ex., agreed with SUTHERLAND, J.

Mulock, C.J.Ex.

CLUTE, J.:—Appeal from the judgment of Lennox, J., dated the 10th January, 1918. The action was brought on a policy of insurance dated the 17th June, 1914, for one year (premium payable semi-annually) beginning on the 10th June, 1914. "But the policy may be renewed by consent from term to term thereafter upon payment of the premium."

Clute, J.

The renewal receipt contains this clause: "This renewal is issued subject to all conditions and provisions of the said policy as

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well as those of any endorsement upon the said policy, and the assured in the acceptance of this renewal makes the further statement that the warranties in the original application are true and complete at this date and that the hazard at this date is no greater or different than that of the hazard at the date of the policy."

The plaintiff was assured "against loss resulting from bodily injuries effected directly and independently of all other causes through accidental means and as the direct result of some cause not attributable to the assured's state of health or condition of mind."

The plaintiff claims that on the 15th October, 1915, he was violently assaulted and beaten by one Atkinson and sustained bodily injuries which wholly and continually disabled him from prosecuting any and every kind of business.

The defendants admit the policy and the renewal, but charge that the plaintiff in his application for the policy and renewal failed to disclose to the defendants material facts, and misrepresented the state of the plaintiff's health and physical condition; that the plaintiff represented himself as in good health, whereas in fact at the time of such application he had a disease of the heart and otherwise was not in good physical condition.

It is further alleged that the defendants have paid to the plaintiff the full amount due him in respect to the bodily injuries alleged, and any alleged permanent disability is not the result of bodily injuries effected directly or independently of all other causes through accidental means, but is due to the fact that the plaintiff suffered from a disease of the heart and was not in good physical condition at the time he received such injuries, and the alleged disability is not within the terms of the policy.

The learned trial Judge has found that prior to the 15th October, 1915, the plaintiff enjoyed good health, and at the time of the insurance and renewals he was —"having regard to his age, of course—to all appearance, and as far as he and the people associated with him knew, a healthy, sound, and capable man," and that "in effecting and continuing the insurance he was not guilty of bad faith, intentional concealment, or conscious misrepresentation as to his condition or state of health." He further finds, "as a conclusion of fact, that the disability from which the plaintiff is

suffering began on the 15th October, 1915; and, whether provoked or unprovoked, the origin and cause of it was the manner in which he was treated and handled by the witness Atkinson on that occasion . . . ." He does not believe that the plaintiff was the aggressor; "but, even if it were true, and I am not of that opinion, that the plaintiff began the assault, it was at an end; and the old man, incumbered with an overcoat, inert, speechless and helpless, lay at the feet of this witness (Atkinson), and it was while the plaintiff was in this condition, on Atkinson's own shewing, that he assaulted the plaintiff and brought on the struggle which, it is claimed, culminated in the injuries the subject of this action . . . ."

He is further of opinion "that the infirmity, disability, bodily injury, or change in physical condition of the plaintiff, to adopt the language of the Insurance Act, . . . had its inception or beginning on the 15th October, 1915; and I find that this was occasioned by 'external force,' within the meaning of sec. 172 of the Insurance Act, at the hands of the witness Atkinson, in an encounter in which he was the aggressor and in the manner already referred to, and that this happened and was brought about without the intent of the plaintiff, and not as the result, direct or indirect, of anything done by the plaintiff, and without voluntary or unnecessary exposure on his part, within the meaning of that section; nor is it attributable to the insured's state of health or condition of mind at the time he effected the insurance, within the meaning of the policy."

I am of opinion that the evidence fully warrants the findings of the trial Judge.

In the policy, under the heading "Schedule of Warranties made by the Assured, which warranties it is agreed are the basis of this assurance," the plaintiff is described as "real estate agent, not dealing in timber-lands." It is alleged that at the time of the renewal the plaintiff had changed his occupation to that of drover, which change was not communicated to the defendants.

Referring to this the trial Judge says:—

"There remains the question of alleged change of occupation. I am satisfied, upon the evidence, that the plaintiff was a land agent, and this only, when the policy was obtained. When the last renewal receipt was issued and thereafter he was occasionally

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engaged in handling cattle. This was because land agency business was almost at a standstill. He had not abandoned the calling of a land agent, and he perhaps put through an occasional transaction, but he was occupied for the time being in what was once one of his regular callings. He was not injured while so engaged. His injuries had no relation to what he had in the meantime been engaged in."

The application for insurance contains these provisions:—

"(4) My occupation is fully described as follows: real estate agent, not dealing in timber-lands.

"(11) The class of risk under my occupation is agreed to be preferred according to the company's classification of risks, and I agree that for any injury received in any occupation or exposure classed by this company as more hazardous than that above stated, I shall be entitled to recover only such amounts as the premium paid by me would purchase at the rate fixed for such increased hazard."

"Declaration.

"I, the undersigned, being desirous of effecting an insurance with the Railway Passengers Assurance Company, do hereby declare that the above statement of my age and other particulars is true and complete, and that I have not concealed anything material to be known to the company; and I do hereby agree that this declaration shall be the basis of the contract between me and the Railway Passengers Assurance Company, and that I am willing to accept a policy subject to the conditions prescribed by the company and expressed in the policy." (In the margin, "semi-annually, replacing No. 21262, $200.00, accum." added).

"Dated Toronto this 17th day of June, 1914.

"Signature of Applicant A. C. Morran.

"Agency H. O. (L. H. Morran)."

The learned counsel for the defendants argued that there was a change of occupation at the time of the renewal, and that this change, made without notice to the defendants at the time of the renewal, avoided the policy. But the terms of the policy are subject to the provisions of the Insurance Act, R.S.O. 1914, ch. 183, sec. 154, which section declares that secs. 155 to 158 shall apply to every contract of insurance. Section 156 (1) provides that

"all the terms and conditions of the contract of insurance shall be set out in full on the face or back of the policy or by writing securely attached to it when issued, and unless so set out no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect shall be valid or admissible in evidence to the prejudice of the assured or beneficiary."

It may be pointed out here that, while the defendants seek to import into the policy the clause above quoted in the renewal receipt, that the warranties in the original application are true and complete at the date of the renewal, and that the hazard at this date is no greater than or different from that of the hazard at the date of the policy, there is no such clause on the face or back of the policy or by any writing attached to it when issued, and the attempt to introduce such clause into the renewal receipt is ineffectual under the terms of the statute, for the reason that the renewal did not constitute or create a new policy but is expressly authorised as a term of the policy, and although it required the assent of both parties, when the assent was given, by receipt of the premium the policy was in fact renewed under the terms and conditions under which it was issued.

The statement as to occupation in the application was true, and there was no misrepresentation in respect thereof. Sub-section 2 provides that "whether the contract does or does not provide for its renewal but it is renewed by a renewal receipt it shall be a sufficient compliance with sub-section 1, if the terms and conditions of the contract were set out as provided by that sub-section and the renewal receipt refers to the contract by its number or date." Here the policy number is No. 100852, and this number is given in the renewal receipt.

But there is a further difficulty in the defendants' way. Sub-section 3 provides that "the proposal or application of the assured shall not as against him be deemed a part of or be considered with the contract of insurance except in so far as the Court may determine that it contains a material misrepresentation by which the insurer was induced to enter into the contract." This clearly refers to a misrepresentation in the original application, not in the application to renew, and in the original application it is not pretended that there was any misrepresentation as to occupation.

Sub-section 5 provides that the contract is not to be invalidated

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by erroneous statements in the application unless material, and this includes a warranty as well as other conditions and stipulations.

Sub-section 6 declares that "the question of materiality in any contract of insurance shall be a question of fact for the jury, or for the Court if there is no jury; and no admission, term, condition, stipulation, warranty or proviso to the contrary contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto shall have any force or validity."

The trial Judge has expressly found that the intermediate change of occupation, or the failure to declare it at the date of renewal, was not a circumstance material to the company or affecting the extent of the risk it undertook.

As pointed out by Lennox, J., "the company expressly provided for what they thought material, namely, by limiting their liability in the event of injury received while the assured was engaged in a more hazardous occupation."

Clause 11 clearly contemplates the possibility of a change of occupation from the preferred class to one more hazardous, and in that case provides for an injury received in any occupation or exposure classed by the company as more hazardous, etc., and limits recovery to only such amount as the premium paid would purchase. This is reasonable and fair, and excludes the contention offered on behalf of the defence that, although the plaintiff had not received any injury in such occupation or exposed class, he nevertheless would only be entitled to such an amount as the premium paid by him would purchase in that occupation or exposed class. It is not pretended here that the injury received by the plaintiff was owing to his having been engaged in the cattle business. So far as his injury was concerned, the alleged change of occupation was not material to the risk run and the injury received, and affords no answer to the plaintiff's claim and no ground for the reduction of that claim by reason of the cattle business being more hazardous than that of real estate agent.

After the defendants received the report of their agent that the plaintiff was a cattle-dealer, they paid two instalments of thirteen weeks each, thereby treating the policy as in force.

As to the alleged warranty of health, the defendants contend

that there was a breach which precludes the plaintiff from recovery. The finding of the learned trial Judge is against this contention. He points out that the professional opinion in this case was "qualified, reserved, and moderate on both sides;" and, while entertaining the sincerest respect for the professional opinions put in evidence by the defence, and in the absence of facts and circumstances that speak for themselves, he might regard it as conclusive or nearly conclusive in some cases, yet the train of practically undisputed facts and circumstances in this case and the sequence of events before and after the 15th October, are so distinctly opposed to the "theoretic possibilities—or abstract probabilities—set up by the defence, that I am definitely of the opinion, as a conclusion of fact, that the disability from which the plaintiff is suffering began on the 15th October, 1915; and, whether provoked or unprovoked, the origin and cause of it was the manner in which he was treated and handled by the witness Atkinson on that occasion."

This, together with the other findings referred to, is, I think, conclusive, supported as it is by the evidence, against the defendants' contention.

But, assuming that the plaintiff was afflicted with some heart trouble prior to the 15th October, of which he had no knowledge, the case of *Fidelity and Casualty Co. of New York* v. *Mitchell*, [1917] A.C. 592, 36 D.L.R. 477, is conclusive against the defendants. There the appellants insured the respondent against bodily injury sustained through accidental means and resulting "directly, independently and exclusively of all other causes," in total disablement from pursuing the duties of his occupation. The respondent's statement that he was in sound condition mentally and physically was made a warranty by the policy. After the issue of the policy the respondent by accidental means severely sprained his wrist. The appellants for seven quarters paid him the amount provided in the policy for total disablement, but then declined to make further payments. It appeared that about ten or fifteen years before the date of the policy the respondent had suffered from a tubercular affection which had caused a lesion of the lung which had then healed. There was no active tuberculosis in the respondent's arm when he was injured, but there was in his system tuberculosis which was latent and would have remained harmless

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had it not been for the accident, and, apart from tubercular infection, the wrist would have recovered within six months of the accident: *Held*, that there was no breach of the warranty, that the disablement resulted "directly, independently and exclusively of all other causes" from the accident.

But it is urged that the wording of the policy in this case differs from that in the *Mitchell* case. The word "exclusively" used in the *Mitchell* case is not used in the present case, and to that extent, if there is a difference, it is in favour of the present plaintiff. The words "and as the direct result of some cause not attributable to the assured's state of health or condition of mind," under the policy here considered, while not appearing in the *Mitchell* case, do not, in my opinion, help the defendants.

It cannot here be said that the condition of the plaintiff caused by the injuries received from Atkinson was the direct result of some cause attributable to the assured's state of health immediately prior to the assault; for, in the language used by Middleton, J., and approved by the Judicial Committee in the *Mitchell* case, "This diseased condition is not an independent and outside cause, but it is a consequence and effect of the accident," it is not attributable to the assured's state of health as the direct result of the cause.

Reference was made by Mr. Nesbitt to *Yorkshire Insurance Co. Limited* v. *Campbell*, [1917] A.C. 218. That was the case of a marine insurance policy under the Commonwealth of Australia Marine Insurance Act, 1909, sec. 39, where words qualifying the subject-matter of the insurance *primâ facie* were held to be words of warranty constituting a condition which must be complied with, whether material to the risk or not.

There is nothing in the Act under which that case was decided to correspond with sub-sec. 6 of sec. 156 of our Insurance Act. The decision has no application to the present case.

It was further argued that sec. 172 (1), which defines what "accident" includes, excluded the injuries received by the plaintiff from Atkinson as an accident within that definition. I am unable to agree with this view. The statute provides that in every contract of insurance against accident, etc., "the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person

injured, or as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger, and no term, condition, stipulation, warranty or proviso of the contract varying the obligation or liability of the assurer shall as against the assured have any force or validity." In the present case it cannot be denied that the bodily injury suffered by the plaintiff at the hands of Atkinson was occasioned by an external force or agency, nor can it be said that it happened with the direct intent of the person injured.

But it is said that the words "or as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger," exclude the present case from the definition of what is an accident, especially the words "such act not amounting to voluntary or negligent exposure to unnecessary danger." On the contrary, I think these later words enlarge the class of cases brought within the definition. The meaning is that the definition includes bodily injury which happens "without the direct intent of the person injured," and also the class of cases where, although it be the indirect result of his intentional act, that does not exclude it from the class where such act is not voluntary or negligent.

The plaintiff and the witness Atkinson give different accounts of what took place. The trial Judge accepted the statement of the plaintiff and discredited that of the witness Atkinson. He finds that Atkinson was the aggressor in the first place, and that when the plaintiff was lying helpless at the feet of Atkinson the assault was renewed and that it was during this last assault that the injuries complained of were suffered.

The findings of the trial Judge are fully supported by the evidence; and, in my opinion, the defendants fail upon all grounds, and the judgment of the trial Judge is right and ought to be affirmed, and this appeal dismissed with costs.

Kelly, J.

KELLY, J.:—This action is upon a policy of insurance issued by the defendants to the plaintiff on the 17th June, 1914, insuring the plaintiff for the term of one year from the 10th June, 1914, against loss resulting from bodily injuries effected directly and independently of all other causes through accidental means, and as a direct result of some cause not attributable to the assured's state of health or condition of mind, etc.

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An earlier policy issued by the defendants to the plaintiff on the 10th June, 1913, had lapsed before the date of the policy now sued upon. The policy of the 17th June states that its term is twelve months, beginning at 12 o'clock noon on the 10th day of June, 1914, and ending at the same hour on the 10th day of June, 1915, and that it "may be renewed by mutual consent from term to term thereafter by the payment of the premium above specified, or such amended premium as the company may require."

On the 10th June, 1915, a renewal receipt was issued for payment of $6 premium from the 10th June, 1915, to the 10th December, 1915.

A further term of the policy is that if the injuries insured against shall wholly and continually disable and prevent the assured from transacting any and every kind of business, the company will pay him, so long as such total disability shall last, the weekly indemnity of $10.

The plaintiff alleges that on the 15th October, 1915 (within the six months), he was assaulted and beaten by one Atkinson, and thereby sustained bodily injuries which wholly and continually disabled him from transacting any and every kind of business.

After the trial, on the 10th January, 1918, judgment was given in the plaintiff's favour for: (1) $938.34 as and for arrears of weekly indemnity and interest thereon up to the 7th January, 1918; (2) declaring that beginning on the 14th January, 1918, the plaintiff is entitled under the policy to a weekly indemnity of $10 during his natural life; (3) declaring that in the event of his death before the 15th August, 1918, as a result of the accident referred to, independently and exclusively of other causes, the defendants are liable to pay to the beneficiary named in the policy $2,000, together with 2 years' accumulation of 10 per cent. *per annum* of the principal sum, making in all $2,400, upon being furnished with such evidence as the defendants are entitled to require under the policy.

The particular grounds of the defendants' appeal are:—

"(a) That the plaintiff's present physical condition did not arise as a result solely of the alleged accident to him on the 15th October, 1915.

"(b) That the plaintiff is not entitled to recover the full amount of the policy on the basis of his total disability; the defendants submitting that, on the evidence and the terms of the policy, the

plaintiff, if entitled to recover at all, can recover only on the basis of extra-hazardous or hazardous risk.

"(c) That the occurrence of the 15th October, 1915, was not an accident, but a risk voluntarily incurred by the plaintiff; that the 'fight' on that day was commenced by the plaintiff; and that the defendants are not liable.

"(d) That it should have been found that at the time the policy was renewed in June, 1915, the plaintiff was not a dealer in real estate, but was in fact a drover of cattle, and that in so renewing the said policy the plaintiff misrepresented a material fact to the defendants, whereby the said policy was void, and that the defendants are not liable to the plaintiff thereunder."

Material parts of the contract relating to the questions so set up, are these:—

Part 4: "The provisions hereinafter contained and any endorsements hereon and the assured's proposal are a part of this contract, which is made subject thereto and to the payment of the premium of $12."

Part 8: "If the assured is injured while performing the work or duties of any other occupation, whether as an isolated act or otherwise, or in any exposure, whether as an isolated act or otherwise (except ordinary duties about his residence), classed by this company as more hazardous than that mentioned in the copy of the assured's warranties, the insurance shall be only for such sum as the premium paid by the assured would purchase at the rate charged by the company for such increased hazard."

In the schedule of warranties made by the assured when the insurance was effected in June, 1914, his occupation is given as "real estate agent, not dealing in timber-lands;" and, after having answered in the negative questions as to the existence of specific ailments or physical defects, he stated that he had no other physical defect, infirmity, or ill-health of any description; and he then declared in writing that the statement of his age and other particulars made in the warranties was true and complete.

The physical condition of an assured at the time of the insurance contract becomes in the present instance material, both as to the assured's actual condition at that time, and the knowledge he had of any lurking or latent weakness or physical impairment, if such in fact existed. On the question of such knowledge by the assured,

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much must depend on his own evidence. The learned trial Judge, whose careful and exhaustive *resumé* of the case covered every aspect of it, was so impressed with the reliability of the assured and his daughter, and the truth of their statements, that he accepted their testimony, on that point at least, without qualification, and found that "in effecting and continuing the insurance he was not guilty of bad faith, intentional concealment, or conscious misrepresentation as to his condition or state of health."

Because of the discovery after the accident that prior to that time there was a latent weakness or impairment of the plaintiff's heart, that finding assumes added importance. It was established to the satisfaction of the trial Judge, on evidence which he deemed sufficient, that, whatever weakness there may have been in the plaintiff's physical condition, down to the 15th October, 1915, it was unknown to him; that prior to that date he enjoyed good health to a degree permitted to few to enjoy; and that, judging from incidents recorded in the evidence, he was, when he effected the insurance, and at its renewal—having regard to his age—to all appearance, and so far as he and persons associated with him knew, a healthy, sound, and capable man. Entertaining an honest belief in that condition of things, he made the application for insurance which culminated in the issuing of the policy now sued upon.

By sub-sec. 1 of sec. 156 of the Ontario Insurance Act, R.S.O. 1914, ch. 183, it is provided that "subject to the provisions of section 193" (not of importance here) "all the terms and conditions of the contract of insurance shall be set out in full on the face or back of the policy or by writing securely attached to it when issued, and unless so set out no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect shall be valid or admissible in evidence to the prejudice of the assured or beneficiary."

By sub-sec. 2: "Whether the contract does or does not provide for its renewal but it is renewed by a renewal receipt it shall be a sufficient compliance with sub-section 1, if the terms and conditions of the contract are set out as provided by that sub-section and the renewal receipt refers to the contract by its number or date."

By sub-sec. 3: "The proposal or application of the assured shall not as against him be deemed a part of or be considered with the contract of insurance except in so far as the Court may deter-

mine that it contains a material misrepresentation by which the insurer was induced to enter into the contract."

By sub-sec. 6: "The question of materiality in any contract of insurance shall be a question of fact for the jury, or for the Court if there is no jury; and no admission, term, condition, stipulation, warranty or proviso to the contrary contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto shall have any force or validity."

In so far as the appellants' objection that the plaintiff's present physical condition is not the result solely of the happening of the 15th October, 1915, rests for its validity upon the presence of a latent weakness or defect in the condition of the plaintiff's heart, it is, in my judgment, satisfactorily answered by the decision of the Privy Council in the recent case of *Fidelity and Casualty Co. of New York* v. *Mitchell*, [1917] A.C. 592, 36 D.L.R. 477. The Privy Council there upheld the judgment of the trial Judge (Middleton, J.), which had been affirmed by the Appellate Division (see *Mitchell* v. *Fidelity and Casualty Co. of New York* (1916), 35 O.L.R. 280, 37 O.L.R. 335, 26 D.L.R. 784). The contract of insurance in that case insured the assured against "bodily injury sustained . . . through accidental means . . . and resulting, directly, independently, and exclusively of all other causes in an immediate, continuous, and total disability . . ." At the trial of that action, the issue was raised as to whether the injury the assured sustained resulted, independently and exclusively of all other causes, in immediate and total disability, thus raising the question as to the effect of the assured's physical condition at and prior to the accident. The trial Judge found, on the medical testimony, that it was clear that prior to the accident there had been a tubercular lesion in the lung, which had apparently completely healed, and that, no doubt, the assured was entirely unaware of his lung having been diseased in that way: he found too, on a consideration of whether the total disability resulted independently and exclusively of all other causes, and notwithstanding the prior tubercular condition, that the diseased condition (of the arm) which resulted in total disability was the direct result of the bodily injury which the assured sustained when he met with the

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accident (falling from the berth of a sleeping car), his opinion being that the tuberculosis in the system was harmless until, as the direct result of the accident, it was given an opportunity to become active. The parallel between that case and the case at bar is sufficiently complete to make that decision particularly applicable here.

Conceding that there existed a latent weakness in the plaintiff's heart prior to the accident, it was, notwithstanding that condition, the opinion of some at least of the medical witnesses that the disability from which the plaintiff now suffers was the direct result of the happening on the 15th October, 1915.

Dr. Parker, who was in attendance upon him from soon after the accident, says (p. 56 of the notes of evidence): "Now, in speaking of heart cases, one has to have the case under observation for a considerable length of time in order to make a complete diagnosis. You would have to take the past history into consideration, any previous illnesses; and my ultimate diagnosis of this case was that the man had developed, at the time of the accident had developed, a new condition that had not existed before the accident"—which the witness then described as auricular fibrillation, which (he says at p. 60) "is very apt to be permanent, it is almost certain to be permanent." This was emphasised by his answers to these questions:—

(Page 61): "Now, Doctor, what connection is there between the injury according to the history you received of it and the condition of auricular fibrillation? A. Well, my conception of the case is that the injury was responsible for the auricular fibrillation.

"Q. Is that your opinion? A. That is my opinion.

"His Lordship: Like all other causes it is consistent with what he told you? A. Not altogether that, because it is consistent with what I observed too, that is the objectives."

(Page 64): "Q. I am asking you whether or not the present disability is the result of the auricular fibrillation? A. Yes, undoubtedly, absolutely."

Dr. Louden, called by the defence, agrees with Dr. Parker, in these answers in his cross-examination:—

(Page 209): "Q. Dr. Louden, you have heard the opinions expressed by Dr. Parker as to the cause of the present condition? A. Yes, sir.

"Q. Do you agree with the opinion expressed by Dr. Parker here to-day, and if so in what respect? A. Well, I am not sure that I can recall them. I think Dr. Parker admitted that there might be disease in the heart before the accident took place.

"Q. But, as I understand the doctor's opinion, it was that the injury caused the auricular fibrillation, and that that in turn resulted in the present disability—now do you disagree with that opinion of Dr. Parker's? A. No, I do not disagree that auricular fibrillation likely came on with this accident, or after this accident.

"Q. And as a result of this accident? A. Yes.

"Q. And as a result of this accident, and the present disability is in turn the result of that auricular fibrillation? A. Yes."

This witness also says that the assault could have caused the condition of auricular fibrillation, but not of the valve affection; that he has no proof that there was a leakage of the mitral valve before the accident. His view is that there might have been some condition of that kind, whether the plaintiff was cognizant of it or not; that the plaintiff might have had a leaky valve without being conscious of it; and, if he had, it might not have interfered with his ordinary, or even his unusual, exertions.

Dr. Pepler, the regular medical officer of the defendant company, examined the plaintiff shortly after the accident. He stated as his opinion that the plaintiff was probably some years with the condition of the mitral valve which he found; and (on cross-examination) that this might have existed for years without the plaintiff being conscious of it, causing him no inconvenience and no inability to perform his ordinary work and undergo ordinary strain and effort; and that auricular fibrillation might be caused by an excessive strain, whether the heart was healthy or unhealthy; and at p. 221:—

"Q. You state that you are of opinion that Mr. Morran had a broken valve in his heart for probably many years, never giving him any trouble, but on the strain and excitement of the fight the heart dilated and for a time failed to do its work well—was that your conclusion? A. That was my conclusion, yes.

"Q. So that all this acute condition that you describe would not be attributable to the affection of the mitral valve? A. No.

"Q. There must be something added to that? A. Yes.

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"Q. And, in your view of the case, he might have gone on for years not conscious of any difficulty by reason of the condition of the mitral valve? A. Yes."

This is a positive assertion of a cause of injury independent of other causes, and there can be little, if any, doubt that the plaintiff's present total disability is the direct result of the auricular fibrillation which came on with or as a consequence of the injury he received in the accident; and the fact that prior to the accident there was this latent defect of the mitral valve, which first came to light after the accident, and of which he was altogether ignorant up to that time, and which on the medical testimony might have been present for years without interfering with his ordinary or even unusual exertions, is not so associated or connected with the condition which immediately followed upon the injury or the accident as to make it the cause of the present disability.

Whatever was his physical weakness when the insurance was effected, his absolute ignorance thereof was a factor in determining the answers to the questions then put to him and his statement in the schedule of warranties that he had no physical defect, infirmity, or ill-health of any description so far as he knew. He believed that he was absolutely and unqualifiedly a sound, healthy man, so much so indeed that he seems to have had an honest pride that he was able, without inconvenience, to submit himself to tests of energy, exertion, and endurance which few men of his age can be put to. To him there was nothing indicating defect, infirmity, or ill-health, and he had no reason to believe that any such existed.

If, as some of the medical witnesses believe, there then existed this unknown affection of the mitral valve, it was not, under the circumstances, what is ordinarily looked upon as a defect, infirmity, or ill-health, and the statement made, as he made it, should not be held to have been within the meaning of or a breach of the warranty: *Fidelity and Casualty Co. of New York* v. *Mitchell*, *supra*.

But the appellants say that, if the plaintiff is entitled to succeed, recovery must be limited to the amount recoverable by one in the extra-hazardous or hazardous class, on the ground that subsequent to the issue of the policy he had changed his occupation to one in the latter class. When the policy was issued he was an estate agent. During the ensuing year he engaged also in the business of a drover, though not relinquishing his former occupation of dealing in real

estate as a broker. Apart from whatever effect must otherwise be given to the form of the renewal receipt—and to this I shall refer later—the trial Judge has expressly found that the intermediate change of occupation, or the failure to declare it at the date of the renewal, was not a circumstance material to the appellants or affecting the extent of the risk they undertook. Under sub-sec. 5 (as amended by 5 Geo. V. ch. 20, sec. 19) and sub-sec. 6 of sec. 156 of the Ontario Insurance Act, it was for the Court to pronounce upon the materiality of that part of the contract, and we have its finding on that question.

Perusing the transcript of the evidence, and without the special knowledge possessed by the trial Judge from having seen the witnesses and heard their *viâ voce* evidence, I would be very reluctant to disturb that finding. On a mere perusal of the evidence, the conclusion can readily be reached that the change of occupation—in so far as there was a change—was not material to the contract. He still continued to be a real estate broker; and, if further emphasis is to be given to the relation of his occupation to the character of his injury, what led up to it, and the manner in which he received it, the consequences to him in no way arose out of or are attributable to his being either a real estate broker or a drover. When the accident happened, he was actually pursuing neither of these occupations; the occurrence had no relation to either of them; and his injury was not received in any occupation or exposure classed by the appellants as more hazardous than that stated in the warranties.

The objection that the injury to the plaintiff did not happen without his direct intent, or that his part in the fight amounted to voluntary or negligent exposure, within the meaning of sec. 172 of the Ontario Insurance Act, is fully answered by the finding of the trial Judge (supported by sufficient evidence) that the infirmity, disability, bodily injury, and change of physical condition of the plaintiff, was occasioned by "external force" within the meaning of that section, at the hands of Atkinson, in an encounter in which he was the aggressor, and that this happened and was brought about without the intent or as the result, direct or indirect, of anything done by the plaintiff, and without voluntary or unnecessary exposure on his part.

The form of the renewal receipt is invoked in support of the appeal. It contains this statement, intended by the appellants to

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bind the assured: "This renewal receipt is issued subject to all agreements, conditions, and provisions of the said policy, as well of those of any endorsement attached to said policy, and the assured, upon the acceptance of this renewal, makes the further statement that the warranties in the original application are true and complete at this date, and that the hazard at this date is no greater than or different from that of the hazard at the date of the policy." The language of sub-sec. 1 of sec. 156 of the Ontario Insurance Act is exacting as to the manner by which and the place where the terms and conditions of the contract are to be stated. As has already been said, the policy contains a provision that it may be renewed by mutual consent from term to term (after the first term stated in the policy) by the payment of the premium (specified in the policy) or such amended premium as the company may require. Payment by mutual consent of the renewal premium is the essential requirement for the renewal of the policy and continuing the contract in force. When the renewal premium was paid and accepted, and without the aid of the issue and delivery of the renewal receipt, the renewal of the contract was complete; and the introduction into the renewal receipt of the additional terms set out in it, and as to the consent to which by the assured there is no evidence, was an attempt by one party to vary, without the agreement or consent of the other, an already completed contract. The so-called change in the assured's occupation seems not to have been looked upon by the appellants as of material importance when the accident happened, or until a considerably later date; for, with knowledge of the extent to which the assured had changed his occupation, the appellants paid the indemnity in the terms of the policy for two terms of 13 weeks each, and only after that was the objection raised on which they now rely.

The trial Judge in his reasons for judgment, on questions most material to the issues involved, made several positive findings of fact which, to me, seem sufficiently warranted by the evidence; and, having regard to the statutory provisions covering the making of insurance contracts, the terms of the contract sued upon, and the authorities applicable to these facts, I am of opinion that the plaintiff's position is entirely established, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

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Exchequer Court of Canada, Audette, J. November 20, 1918.

CROWN (§ II—20)—NEGLIGENCE—PUBLIC WORK—HARBOUR OF VICTORIA—GOVERNMENT SCOW—FELLOW-SERVANT.

The harbour of Victoria, B.C., which was a public harbour before British Columbia entered into Confederation, is a public work within the meaning of s. 20 of the Exchequer Court Act.

The Crown is not liable for an accident happening on a Government scow in the harbour of Victoria, B.C., while engaged in work executed by the Government of Canada for the improvement of the harbour, where the negligence which caused the accident is the negligence of a fellow-servant of the suppliant.

[*Ryder* v. *The King* (1905), 36 Can. S.C.R. 462, followed; *Paul* v. *The King* (1906), 38 Can. S.C.R. 126; *Montgomery* v. *The King* (1915), 15 Can. Ex. 374; and *La Compagnie Generale D'Entreprises Publiques* v. *The King*, 44 D.L.R. 459 reversing 32 D.L.R. 506, distinguished. See also *Desmarais* v. *The King*, *post* p. 692.]

Statement.

PETITION OF RIGHT to recover damages for personal injuries while in the employment of the government. Dismissed.

R. C. Lowe and *J. P. Walls*, for suppliant; *E. Miller*, for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $5,000 as representing damages alleged to have been suffered by him, as arising out of an accident which occurred while he was acting in the discharge of his duty in the employment of the Government of Canada.

On June 3, 1914, the Crown, through the Department of Public Works of Canada (dredging branch) was carrying on, in the harbour of Victoria, B.C., the work of rock-drilling for the purpose of improving the harbour. A part of the rock-drilling plant, used for such purposes, was a vessel or scow upon which was built a platform, with steam drills installed thereon. The scow was provided with four spuds, performing the same functions as spuds do on dredges. Upon this scow was also erected the structure which appears on the photograph, ex. 1; that is, uprights joined at the top by a cross-beam, upon which was attached a traveller upon which ran a block and with ropes used, as occasion required, to lift up and let down the drills in the course of their operation. Below the cross-beam just mentioned there was a kind of truss-rod, which extended right across and passed through the uprights, being made fast to the same by a nut screwed or applied to the threaded end of the rod. Between the cross-beam and the rod there are two brackets, similar to ex. 2. The teat on the flat side part of this bracket ran into a hole, of the same size, under-

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neath and in the wooden cross-beam, and was held in position, against its natural weight, by the rod above mentioned, which was maintained in the necessary tight position to hold the brackets, by means of the nuts above mentioned.

On the date in question the suppliant was working on a night shift. About midnight, while engaged at handle B, upon ex. 1, one of the brackets fell upon his right hand, crushing the index finger. The three first phalanges of that finger were finally amputated, together with the head of the metacarpal bone at the base of that finger—the whole necessitating four surgical operations.

As a result of this accident, the suppliant has lost time, and incurred medical expenses, suffered pain, and his earning capacity has been partially reduced for the rest of his life through the impaired function of his right hand. It is comforting to know from the evidence that the Crown has paid the suppliant his wages all through his illness and the time he lost, as well as all hospital and medical charges and expenses. The suppliant was continued in his employment after the accident, after having undergone these operations, and with this diminished capacity for work was given higher wages than before the accident. He only left off working for the Government when the works were closed down in 1917.

The harbour of Victoria was a public harbour long before British Columbia entered into Confederation in 1871. As far back as 1860 the legislature of Vancouver Island passed an Act for the purpose of borrowing and spending moneys for the improvement of that harbour, and under s. 108 of the B.N.A. Act, the harbour became the property of the Dominion government.

The accident occurred in the harbour of Victoria on a government scow, fitted with drilling appliances, while engaged in works executed by the government for the improvement of the harbour.

From the above statement of facts it is manifest that this action is grounded on negligence and sounds in tort. In such a case there is no liability on the part of the Crown, unless it is made so liable by statute. The suppliant, to succeed, must, therefore, bring his case within the provisions of the statute prescribing a remedy against the Crown in respect of negligence by its officers or servants, viz., the Exchequer Court Act, s. 20 (*c*),

as it stood at the time of the accident. To bring this case within such enactment the injury must, first, have occurred "on a public work;" and secondly, it must have resulted from the negligence of some "officer or servant of the Crown while acting within the scope of his duties or employment."

In the reports there will be found a number of cases which were instituted in this court and which involved the interpretation of the term "*public work*" in the enactment in question; and it is desirable to consider some of them in respect of their bearing upon the case at bar. Most of these cases were carried on appeal to the Supreme Court of Canada. In two of them, *Paul* v. *The King*, 38 Can. S.C.R. 126, and *Montgomery* v. *The King*, 15 Can. Ex. 374, there was a similarity in fact to this case to the extent that the injury happened on a vessel employed in navigation improvement work, and in each it was sought to establish that the vessel was a "public work" within the meaning of the enactment last mentioned. This contention was not sustained by the courts; but I venture to entertain the view that not only are there controlling facts in the case before me that distinguish it from those to which I refer, and that a judgment for the suppliant in this case would, but for other considerations which are hereafter stated, be fully in harmony with decisions which I must follow because the language used by some of the Judges of the Supreme Court warrant a finding here that the *locus in quo* was a public work within the meaning of s. 20 (c) of the Exchequer Court Act.

In support of this view I would cite the language of Burbidge, J., in *Leprohon* v. *The Queen* (1894), 4 Can. Ex. 100. At p. 108 he says:—

> I think that the expression, "*public work*" occurring in s. 16 (now s. 20) must be taken to include not only railways and canals and other undertakings which in older countries are usually left to private enterprises; but also all other "public works" mentioned in the Public Works Act and other Acts in which that term is defined.

The Public Works Act mentioned by the learned judge was R.S.C. 1886, c. 36, and is now to be found in R.S.C. 1906, c. 39, and apparently also s. 2 of the Expropriation Act. By s. 3 (*c*) of the Public Works Act it is declared that "public work" or "public works" means and includes any work or property under the control of the Minister.

Now, bearing this definition in mind, and remembering that the Exchequer Court Act provides a remedy for any one injured on a

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public work as the result of negligence by an officer or servant of the Crown, it will be apprehended that the case is one to which must be applied the rule of statutory construction which declares that as all legislatures "are presumed to proceed with a knowledge of existing laws, they may properly be deemed to legislate with general provisions of such a nature in view." Sutherland's Statutory Construction, by Lewis, vol. 11, s. 355, p. 681, and s. 447, p. 852.

If this is the rule of construction to be followed, and I think it is, then the harbour of Victoria, wherein the accident happened, being "property under the control of the Minister," must be held to be a public work, and if the other requirements of s. 20 (c) of the Exchequer Court Act have been satisfied by the suppliant's proof, then he has made out a clear case against the Crown.

In the case of *Paul* v. *The King*, 38 Can. S.C.R. 126, it was held that a government steam tug and a scow, its tow, which caused a collision, while engaged in improving the ship-channel of the St. Lawrence, was not a public work, and that the suppliant must, therefore, fail since the accident did not occur on a public work.

Sir Louis Davies, J. (now Chief Justice), commenting upon this expression "public work," in the *Paul* case, *ubi supra*, said, p. 131:—

To hold the Crown liable in this case of collision for injuries to the suppliant's steamer arising out of the collision, we would be obliged to construe the words of the section so as to embrace injuries caused by the negligence of the Crown's officials *not as limited* by the statute "on any public work," but in the carrying on of any operations for the improvement of the navigation of *public harbours* or rivers. In other words, we would be obliged to hold that all operations for the dredging of *these harbours* or rivers or the improvement of navigation, and all analogous operations carried on by the Government were either in themselves public works, which needs, I think, only to be stated to refute the argument, or to hold that the instruments by or through which the operations were carried on were such public works.

If we were to uphold the latter contention I would find great difficulty in acceding to the distinction drawn by Burbidge, J., between the dredge which dug up the mud while so engaged and the tug which carrried it to the dumping ground while so engaged. Both dredge and tug are alike engaged in one operation, one in excavating the material and the other in carrying it away.

But even if we could find reasons to justify such a distinction, which I frankly say I cannot. . . .

I think a careful and reasonable construction of the clause 16 (now 20) (c) must lead to the conclusion that the public works mentioned in it and "on" which the injuries complained of must happen are *public works* of some

definite area, as distinct from those operations undertaken by the Government for the improvement of navigation or analogous purposes, not confined to any definite area of physical work or structure.

And Idington, J., in the same case, p. 134, said:—

We were referred to the interpretation given the words "public works" in the Public Works Act. If the meaning given there would be used here then this appellant's right, if otherwise entitled to succeed, would be clear.

And Duff, J., in the case of *The King* v. *Lefrancois* (1908), 40 Can. S.C.R. 431, at 436, said:—

Having regard to the previous decisions of this court, the phrase "on a public work" in s. 20 (*c*) of the Exchequer Court Act must, I think, be read as descriptive of the locality in which the death or injury giving rise to the claim in question occurs. The effect of these decisions seems to be that no such claim is within the enactment unless "the death or injury" of which it is the subject happened at a place which is *within the area* of something which falls within the description "public work." *Paul* v. *The King*, 38 Can. S.C.R. 126, and the cases therein cited.

Again, Sir Charles Fitzpatrick, C.J., in *Chamberlin* v. *The King* (1909), 42 Can. S.C.R. 350, at 351, said:—

In a long series of decisions this court has held that the phrase "on a public work" in s. 20 (*c*) of the Exchequer Court Act, must be read, to borrow the language of Duff, J., in *The King* v. *Lefrancois*, 40 Can. S.C.R. 431, "as descriptive of the locality in which the death or injury giving rise to the claim in question occurs," and that to succeed the suppliant must come within the strict words of the statute. Taschereau, J., in *Larose* v. *The King* (1901), 31 Can. S.C.R. 206. See *Paul* v. *The King*, 38 Can. S.C.R. 126.

See also *Olmstead* v. *The King* (1916), 30 D.L.R. 345, 53 Can. S.C.R. 450; *Hamburg-American Packet Co.* v. *The King* (1902), 33 Can. S.C.R. 252; *Macdonald* v. *The King* (1906), 10 Can. Ex. 394; and *Piggott* v. *The King* (1916), 32 D.L.R. 461, 53 Can. S.C.R. 626.

In the case of *Montgomery* v. *The King*, 15 Can. Ex. 374, Sir Walter Cassels, J., held, following the views expressed by the Judges of the Supreme Court of Canada in the case of *Paul* v. *The King*, *supra*, that a dredge belonging to the Dominion government is not a "public work" within the meaning of s. 20 (*c*) of the Exchequer Court Act.

In the recent case of *La Compagnie Generale D'Entreprises Publiques* v. *The King* (unreported), decided by the Supreme Court of Canada (see 44 D.L.R. 459), wherein the question of the construction of the terms *on a public work* was discussed, where a scow that was moored at a government wharf, Idington, J., said:—

In this case it is hardly possible, unless we give the meaning to the word *on* or *upon* and insist that the scow in question could not be said to be *on a*

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public work unless it was on top of the very spot in the wharf under and with which the appellants' men were engaged.

In other words, if the scow had been on the wharf it would have been found that the scow was on a public work. The scow was then in the harbour of Quebec, but the question of the harbour being a *public work* was not raised in that case. In the present case the plant in question was in Victoria harbour, *on a public work*, within the meaning of the statute and the decision above referred to.

Anglin, J., in the same case, said:—

It does not seem to me to involve any undue straining of the language of the statute to hold that it covers a claim for injury to property—so employed. "Public work" may, and I think should, be read as meaning not merely some building or other erection or structure belonging to the public, but any operations undertaken by or on behalf of the government in constructing, repairing or maintaining public property. In this sense the appellants' scow was on a public work when it was injured.

The *locos in quo* of the accident having been within the boundaries of the harbour of Victoria, the accident happened on a public work "of some definite area," as Sir Louis Davies phrases it; or, again, it happened at a "place which is within the area of something which falls within the description of a 'public work,'" to employ the language of Duff, J., above quoted. Again, it is a case to which the language of Anglin, J., in the unreported case above referred to, applies with peculiar significance. (See 44 D.L.R. 459).

This would, in my opinion, have sufficed to support a finding that the Crown was liable, had it not been that the doctrine of "common employment" or "fellow servant" was raised as a defence. I have already expressed my view (*Conrod* v. *The King* (1913), 14 Can. Ex. 472, 482), of the interpretation of s. 20 (*c*) of the Exchequer Court Act, regarding it as embodying the plain intention of parliament that the Crown would not be heard to invoke anything extraneous to the statute or excuse itself from liability by setting up defences at common law inconsistent with the liability sought to be created by the enactment, were not such an interpretation negatived by the decision of the Supreme Court in the case of *Ryder* v. *The King* (1905), 36 Can. S.C.R. 462. See also *Jones* v. *C.P.R.* (1913), 13 D.L.R. 900; *Hosking* v. *Le Roi* (No. 2) (1903), 34 Can. S.C.R. 244; *Lees* v. *Dunkerley Brothers*, [1911] A.C. 5; *Hall* v. *Johnson* (1865), 3 H. & C. 589, 159 E.R. 662;

Ruegg's Employers' Liability, 125 *et seq.*; *Smith* v. *Baker*, [1891] A.C. 325; *Brooks* v. *Rhine Fakkema* (1911), 44 Can. S.C.R. 412; *The Canada Woollen Mills, Ltd.* v. *Traplin* (1904), 35 Can. S.C.R. 424; *Ainslie Mining & R. Co.* v. *McDougall* (1909), 42 Can. S.C.R. 420.

That case is authority for the right of the Crown to raise the defence of common employment to a petition of right seeking damages under the last-mentioned enactment for the negligence of a servant of the Crown. I am bound by that case, and can do nothing but apply it here, unless the facts shew that the negligence was not secondary or derivative, but primarily that of the Crown in having defective machinery in use.

The term "negligence," as used in connection with a case of this kind, has been defined as "the absence of that amount of care which each man, in this our social state, owes his fellows." The doctrine of common employment has been characterised as:—

> Every risk which an employment still involves after a master has done all he is bound to do for securing the safety of his servants is assumed, as a matter of law, by each of those servants. 54 C.L.J. 282, 283.

The plant or machinery in question herein cannot be said to be defective. It is not as perfected and as much improved as it might be; but the Crown or an employer is not bound to have the most perfected piece of machinery or the best appliances with the latest improvements: *Wamboldt* v. *Halifax & South Western R. Co.* (1918), 40 D.L.R. 517; *The Toronto Power Co. Ltd.* v. *Paskwan*, 22 D.L.R. 340, [1915] A.C. 734. It is true a similar bracket had fallen on a previous occasion and that, while this system of construction obtains in the building of railway coaches, yet railway coaches are not subjected to such violent virbation as the plant in question. The most that can be said with respect to the plant is that as it was not as good as it might be, and as the Crown's servant had been put on his enquiry from previous accident—more care and precaution had to be used in attending to it. The first accident had necessarily—*res ipsa loquitur*—brought the matter to the attention of the authorised officer, the inspector, or any one acting for him, that more diligence and care were thereafter necessary in the working of that plant. The inspector had to see to it oftener than he did or direct someone to watch these nuts and thus prevent any further accident.

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I, therefore, find that the accident was not caused by defective plant, but for want of proper care and prudence in properly attending to it.

Therefore, the negligence which caused the accident is the negligence of a fellow-servant of the suppliant, and he is thereby barred from recovery under the case of *Ryder* v. *The King*, *supra*.

The suppliant is not entitled to the relief sought by his petition of right and the action must be dismissed.

Petition dismissed.

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STOKES-STEPHENS OIL Co. v. McNAUGHT.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Anglin and Brodeur, JJ. March 25, 1918.

CONTRACTS (§ II D—145)—BREACH—ARBITRATION CLAUSE—CONSTRUCTION OF.

In a contract to dig an oil well, it was provided: "That if at any time during the prosecution of the said work, or after the completion thereof, any dispute, difference or question shall arise between the parties hereto, or any of their representatives, touching the said work, or the construction, meaning, or effect of these presents, or anything herein contained, or the rights or liabilities of the parties or their representatives, under these presents or otherwise in relation to the premises, then every such dispute, difference or question shall be referred to . . . arbitration." The court held that the words "if at any time during the prosecution of the said work or after the completion thereof" referred to time and not to the condition of the work, and applied even although the work was not being carried on through the fault of one of the parties. *Held*, also, that it was the intention of the parties to refer all disputes or differences arising between them as well as the question whether such disputes were within the arbitration clause.

[*Stokes-Stephens Oil Co.* v. *McNaught* (1917), 34 D.L.R. 375, affirmed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta, 34 D.L.R. 375, 12 A.L.R. 501, reversing the judgment of Hyndman, J., and maintaining an application by the defendant to stay the plaintiff's action for damages for breach of contract.

The appellant and the respondent entered into an agreement for the drilling of a well for the discovery of oil or gas. The principal clause of the agreement is cited in the above head-note. The respondent proceeded under the contract, but at a depth of 2,400 feet, a joint of the casing collapsed and broke. Continuance of the work had been agreed on, but a dispute occurred between the parties as to the size of the casing; the respondent appointed an arbitrator and called upon the appellant to do the same under the terms of the arbitration clause. The appellant notified the

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respondent of the appointment of an arbitrator, though maintaining at the same time that no dispute had arisen and that the appointment was without prejudice to its right to so maintain and to dispute the validity of any award.

A third arbitrator was subsequently named and an unanimous award was made in favour of the respondent. The appellant then took an action in damages for breach of contract. The respondent made an application for stay of that action, pursuant to s. 4 of the Arbitration Act (Alta.), 9 Edw. VII., c. 6. This application was refused by Hyndman, J., but granted by the Appellate Division.

Eug. Lafleur, K.C., and *J. H. Charman*, for appellant; *A. H. Clarke*, K.C., for respondent.

FITZPATRICK, C.J.:—I have had the advantage of reading the judgment which will be delivered by my brother Anglin. He has dealt very fully with the matter, and there is little need that I should add anything to his reasons, with which I agree. Fitzpatrick, C.J.

I may say, however, that I think the courts should be reluctant to permit an appeal to them by one of the parties to an agreement to refer questions that may arise between them to a domestic forum rather than the ordinary courts, when that agreement is couched in such wide terms as in the present case. The bringing of an action in such cases on a technical point, even if necessarily held permissible, is likely to defeat the intention of the parties to the agreement, as I cannot doubt would be the case here. I think the parties to this agreement intended at the time it was entered into that all questions that might arise between them touching the subject matter of the contract should be settled by arbitration without proceedings before the courts.

This is the second attempt on the part of the appellants to withdraw these matters from the arbitrators, and such proceedings would go far to render agreements for arbitration undesirable as rather increasing than avoiding litigation.

The appellants appointed an arbitrator "without prejudice," by which I can only understand that they were willing to wait and see if the award were in their favour and accept or refuse to be bound by it accordingly. This, I think, is also a proceeding to be discouraged, and is an additional reason why I would dismiss the appeal.

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IDINGTON, J. (dissenting):—There are several rather important and difficult questions raised herein which, in the last analysis, depend upon the construction of the submission, and that ought to be determined by the court under the circumstances existent in this case.

Allowing the action to proceed will facilitate that being done. I, therefore, think the appeal should be allowed with costs. I may be permitted to add that I am very far from holding that every case dependent upon the construction of the submission must be tried out by a court. Many documents, penned by commercial men especially, I believe, would often find, if submitted to men of the class that framed them, a construction more in accord with what the parties concerned contemplated than would be apt to be given by a court.

In this case, however, I think the court probably will be the better tribunal to determine the questions raised.

I purposely abstain from intimating or discussing what points of construction may be involved, or presenting any views thereupon, and thereby embarrassing those who will have to consider and dispose thereof.

Anglin, J.

ANGLIN, J.:—Under the terms of s. 5 of the Alberta Arbitration Act (1909, c. 6), if the defendant desired to obtain a stay of this action he was obliged to apply for it "before delivering any pleadings or taking any other steps in the proceedings."

To determine on a mere perusal of a statement of claim whether the real issues between the parties are within the scope of an agreement for arbitration, or are such that, notwithstanding that they fall within its purview, the court should, in the exercise of its discretion (*Lyon* v. *Johnson* (1889), 40 Ch. D. 579), refuse to stay the action, is often a difficult matter. It is so in the case at bar. The judges of the provincial courts have differed upon this question. For my part I should, therefore, have preferred to have taken the course adopted by North, J., in *Re Carlisle* (1890), 44 Ch. D. 200, and have directed that the motion to stay should stand over until the pleadings should be closed and such evidence taken (if any) as the judge before whom the case might come for trial should deem necessary to develop and make plain the real matters in controversy. The issues would probably then be defined and it could be determined more readily and satisfactorily

whether they do or do not fall within the scope of the arbitration clause in the agreement between the parties.

I understand, however, that two of my learned brothers think the adoption of this dilatory course unnecessary and therefore unjustified. In deference to their view I shall express my opinion upon the question whether the cause of action disclosed in the statement of claim is such that the judgment granting a stay should be reversed.

The appellants seek to distinguish the case of *Willesford* v. *Watson* (1873), L.R. 8 Ch. 473, cited by the Chief Justice of Alberta, and refer to some observations upon it made by Jessel, M.R., in *Piercy* v. *Young* (1879), 14 Ch. D. 200, at p. 208. In the *Willesford* case, Lord Chancellor Selborne held that under the submission there before the court "the very thing which the arbitrators ought to do (was) to look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of is inside or outside of the agreement."

His Lordship declined to have the court "limit the arbitrators' power to those things which are determined by the court to be within the agreement."

The words of the submission, to which effect was thus given, were as follows:—

> Any dispute, question or difference . . . between the parties to these presents . . . touching these presents or any clause or matter or thing herein contained, or the construction hereof . . . or touching the rights, duties, and liabilities of either party in connection with the premises.

This arbitration clause was contained in a mining lease. The question between the parties was whether a claim arising out of the sinking by the lessees of a shaft through the leased land in a slanting direction into adjoining mining land, of which they were also lessees, was in violation of the lessors' rights. They alleged that it was, and also maintained that such a dispute was not within the provision for arbitration and accordingly they brought action for an injunction. Their action was stayed. In the case at bar the agreement provides for the arbitration of "any dispute, difference or question between the parties hereto . . . touching . . . the construction, meaning or effect of these presents or anything herein contained or the rights or liabilities of the

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parties . . . under these presents or otherwise in relation to the premises."

I am, with respect, of the opinion that it is impossible to distinguish this language from that in the Willesford agreement. The scope of the arbitration clause now before us is, if anything, wider than that dealt with by Lord Selborne, and vests in the arbitrators the power to determine whether or not any claim presented to them is within the purview of the submission. In *Piercy* v. *Young*, 14 Ch. D. 200, at p. 208, the agreement was merely for the reference to arbitration of "any differences or disputes which may arise between the partners." Such an agreement was clearly distinguishable from that in the *Willesford* case, L.R. 8 Ch. 473, as the Master of the Rolls points out, and the only relevancy of his judgment is his observation that:—

> Of course persons can agree to refer to arbitration not merely the disputes between them, but even the question whether the disputes between them are within the arbitration clause.

I may add that, except for whatever limitation may be involved in the words "at any time during the prosecution of the work or after the completion thereof," I see no serious difficulty in treating the cause of action stated in the statement of claim as a "dispute, difference or question . . . touching the effect of these presents . . . or the rights or liabilities of the parties under these presents or otherwise in relation to the premises," within the meaning of those terms as used in the agreement. To quote Lord Selborne, the parties here "seem to have taken more than ordinary pains to throw in words that cover all things collateral as well as things expressed."

The plaintiffs complain of an alleged wrongful withdrawal by the defendant of the casing, thereby destroying the well and depriving them of an opportunity to exercise an option to purchase the casing (presumably in place) given by the agreement. They also complain of the non-completion of the well to a depth of 2,500 ft. They claim payment of a balance of $10,875 of moneys deposited by them with the Royal Bank of Canada as a guarantee for the carrying out of the contract by them, out of which payments were to be made to the defendant as they accrued due. They also claim damages to the amount of $21,625.

Whether the casing was properly or improperly withdrawn from the well by the defendant in an unsuccessful effort to remove

300 ft. of it from the bottom after it had collapsed, whether the failure to complete the contract is attributable to the fault of the defendant or to a wrongful failure of the plaintiffs' managing director to give proper directions as to the diameter of the well if it should be continued below the depth attained at the time of the collapse, whether the removal of the 300 ft. of casing at the bottom of the well was impracticable as alleged by the defendant, whether the plaintiffs' managing director was within his rights in insisting that the defendant should furnish him with "conclusive evidence" of the impracticability of removing 300 ft. of casing and of the necessity for reducing the diameter of the well if the work were to be continued, whether any damage sustained by the plaintiffs is attributable to fault or misconduct of the defendant and, if so, what would be a reasonable sum to allow as compensation, and whether the plaintiffs are entitled to the balance of $10,875 deposited in bank—all these appear to be questions "touching the effect of these presents . . . or the rights or liabilities of the parties under these presents or otherwise in relation to the premises."

It is true that the determination of the practicability of carrying an 8¼-inch casing to the full depth of 2,500 ft. is by the agreement left with "the owners' managing director" whose decision upon it is made final. But whether such a decision was given or was wrongfully withheld, and what was the effect upon the rights of the parties of such a wrongful withholding if it occurred, or of the defendants' failure to carry out a proper and lawful direction if given, appear to be questions "touching the effect of these presents or the rights or liabilities of the parties under these presents or otherwise in relation to the premises."

It may be that if they should find the withdrawal of the casing to have been tortious, the arbitrators would determine that a claim in respect of it is not covered by the arbitration agreement. It would be competent for them to so hold, though for my part I find it difficult to understand how such a claim can be other than "in relation to the premises . . . under these presents or otherwise"—just as was that based on the alleged wrongful sinking of a transverse shaft in the *Willesford* case, L.R. 8 Ch. 473. The parties have seen fit, to use the language of Jessel, M.R., "to refer to arbitration not merely disputes between them, but

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even the question whether the disputes between them are within the arbitration clause."

I agree with Harvey, C.J., that the opening words relate to time and not to condition of the work and the parties would naturally be considering the contract as one to be performed and not one to be broken and in that case everything would happen "during the prosecution of the work or after the completion thereof," and in their contemplation at the time of the making of the agreement it appears to me that these words would be considered comprehensive enough to cover every question that might arise out of the contract.

Then it may be that the work has been completed. It is true that the work has not been completed by the drilling of a successful well, but if this is due to the default of the plaintiff the work has been completed in so far as the contract imposes any obligation on the defendant to complete it, and the arbitrators have so found.

I think the parties meant to provide, and have provided, for the arbitration of any dispute or difference arising between them in relation to the premises, whether under the contract or otherwise, after the commencement of the work.

But it is said that although they should be within the arbitration clause of the agreement, the plaintiffs' claims as disclosed in the statement of claim are of such a character that the court in the exercise of its discretion should not stay the action. It is the case presented by the statement of claim that must be dealt with (*Monro* v. *Bognor Urban District Council*, [1915] 3 K.B. 167).

If the judge of first instance had refused a stay in the exercise of judicial discretion the appellate court might properly have declined to entertain an appeal from his order. *Clough* v. *County Live Stock Ins. Ass'n.* (1916), 85 L.J. 2 K.B. 1185; *Walmsley* v. *White* (1892), 40 W.R. 675; *Vawdrey* v. *Simpson*, [1896] 1 Ch. 166, at p. 169. But the learned judge based his refusal on the ground that the claims set up in the statement of claim are not within the agreement for arbitration. He apparently did not exercise any discretion.

In the appellate division, on the other hand, the majority of the court held the cause of action to be within the scope of the arbitration agreement, one learned judge thinking it proper to go outside of the statement of claim and to "look at the affidavit evidence and discover what the real dispute is about."

Although there is no explicit reference to any consideration of discretion in the opinions delivered by the Chief Justice (concurred in by Walsh, J.) and Stuart, J., it should not be assumed

that those judges overlooked the fact that, although the cause of action should be within the purview of the arbitration agreement, the court would have a discretion—to be exercised judicially, not arbitrarily—to grant a stay. On the contrary, it should be assumed that the conclusion was reached that the circumstances did not call for an exercise of this discretion.

If the sole matter to be dealt with by the arbitrators were a question of law, a stay of the action on that ground might be properly refused: *Edward Grey & Co.* v. *Tolme and Runge* (1914), 31 T.L.R. 137. But where there are important questions of fact to be determined, such as the practicability of continuing the well with a diameter of ten inches, the propriety of taking out the casing, whether the managing director did or did not exercise the power conferred on him by the agreement, and the amount of damage sustained by either party, the circumstance that important questions of law are also involved will not justify the refusal of a stay if the claims in the action be otherwise proper for submission to arbitrators. *Rowe* v. *Crossley* (1912), 108 L.T. 11; *Lock* v. *Army & Navy and General Ass'ce Ass'n* (1915), 31 T.L.R. 297. Especially must this be so where the parties have, as here, expressed their purpose that all questions of the construction of the agreement, which may be the chief legal questions to be determined, should be dealt with by the arbitrators. That circumstance, with the fact that there is no claim in the present case, which is clearly outside the purview of the arbitration clause, distinguishes it from *Printing Machinery Co.* v. *Linotype and Machinery Ltd.*, [1912] 1 Ch. 566.

Neither, in my opinion, does it appear that the claim in the pending action is in itself, or that it involves, a question of such a character or arising under such circumstances that a judge in the exercise of his discretion should retain it for decision by the court. Such a case was *Barnes* v. *Youngs*, [1898] 1 Ch. 414, as is explained in *Green* v. *Howell*, [1910] 1 Ch. 495, at p. 506. On the contrary, having regard to the terms of the arbitration agreement, the questions presented by the statement of claim seem to me to be such as may very properly be dealt with by arbitration under it.

Once the conclusion is reached that the agreement for arbitration is wide enough to embrace the claims presented in the action, it is the *primâ facie* duty of the court to allow the agreement to

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govern (*Willesford* v. *Watson*, L.R. 8 Ch. 473, at 480), and the onus of shewing that the case is not a fit one for arbitration is thrown on the person opposing the stay of proceedings. *Vawdrey* v. *Simpson*, [1896] 1 Ch. 166, at p. 169. In my opinion the appellants have not satisfied that onus.

The arbitration already had—the appellants' arbitrator having been appointed under protest—resulted in a determination that it is not economically practicable to carry the well beyond its present estimated depth of 2,400 ft., at the diameter of 10 inches and that the delay in arriving at a decision as to the course to be adopted for the completion of the well is attributable to the appellant company and C. W. MacMillan, its managing director, and in an award to the respondent of the contract price for drilling to an estimated depth of 2,400 ft. and his cost of the reference. It does not appear whether the claims now made by the plaintiffs were or were not presented to the arbitrator. The submission of "all questions between the parties" by the respondent's notice appointing his arbitrator, as accepted by the appellants when they appointed their arbitrator under protest, was broad enough to include those claims. If they were not presented or dealt with, however, it may yet be open to the appellants to have "the matters referred" remitted to the same board, take them up and dispose of them (s. 11) or possibly to have a new board constituted for that purpose. On this phase of the case, which was not discussed at bar and is not before us for decision, I express no view.

I am, for the foregoing reasons, of the opinion that the order of the appellate division granting a stay of proceedings in this action should not be disturbed.

Brodeur, J.

BRODEUR, J.:—By a contract made between the parties on February 25, 1915, it was agreed that McNaught should drill a well to a depth of 2,500 ft. for the purpose of discovering oil on the Stokes-Stephens Oil Co.'s property. Clause 4 of that agreement provided that "if at any time during the prosecution of the said work or after the completion thereof any dispute, difference, or question shall arise between the parties thereto touching the said work, or the construction, meaning or effect of those presents, or anything herein contained or the rights or liabilities of the parties under these presents or otherwise in relation to the premises, then every such dispute, difference or question shall be referred to arbitration."

An action is being instituted by the oil company claiming damages for breach of that contract. They claim that the well has been destroyed by withdrawing the casing therefrom. Application was then made by the contractor McNaught, to stay this action, pursuant to s. 5 of the Arbitration Act of Alberta.

The latter section is to the effect that if a party to a submission commence legal proceedings in any court against any other party to the contract, the latter may before pleading apply to the court to stay the proceedings.

The honourable judge of original jurisdiction refused the application, but his decision was reversed by the appellate division. (34 D.L.R. 375.)

The question is whether the matters disclosed in the action come within the arbitration clause stipulated by the parties in their contract.

The plaintiff company claims that the work has been destroyed by the fault or negligence of the contractor.

The work of drilling oil wells is a peculiar one and known only to a somewhat limited class of persons. It is no wonder then that the parties have agreed to refer to arbitration matters concerning it and that their rights or their liabilities under the contract should be decided upon by arbitrators. They went even so far as to declare that the meaning of the contract itself should be passed upon by those arbitrators.

It seems to me that the intention of the parties in that respect is as formal as it could be and it would require very exceptional circumstances to prevent arbitrators from acting.

The plaintiff contends, however, that those circumstances must arise during the prosecution of the work or after its completion and that in the present case the work has not been completed and is not being prosecuted.

That provision in the contract relates to time and not to the condition of the work, and we could construe it as relating as well to a breach of the contract as to its performance. All the rights of the parties arising out of the contract, as well as all their liabilities, are within the terms of the submission.

The claim which is now being made by the appellant company arises out of the contract and its rights will have to be determined by the construction or meaning of that contract.

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The parties have agreed to determine that they will have arbitrators to decide their claims, instead of resorting to the ordinary courts of the land. It is our duty, therefore, to act upon that agreement.

It is highly desirable, as was stated in the case of *Bos* v. *Helsham* (1866), L.R. 2 Ex. 72, at p. 78, that "where an arbitration of any sort has been agreed to between the parties those claims should be held to apply."

I would rely also on the case of *Willesford* v. *Watson*, L.R. 8 Ch. 473.

For those reasons I would dismiss the appeal with costs.

Appeal dismissed.

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EX. C.

DESMARAIS v. THE KING.

Exchequer Court of Canada, Audette, J. April 2, 1918.

CROWN (§ II—20)—NEGLIGENCE—ACTION FOR TORT—"PUBLIC WORK"—STONE-LIFTER—EXCHEQUER COURT ACT.

The suppliant's husband was an employee of the Crown working on a stone-lifter, the property of the Crown, in the deepening of the ship-channel in the harbour at Montreal, and while so engaged in lifting a boulder from the channel was thrown overboard and drowned. *Held*, that the action was, in its very essence, one of tort, and apart from special statutory authority, no such action would lie against the Crown, and that the suppliant, to succeed, must bring her action within sub-sec. (*c*) of s. 20 of the Exchequer Court Act before the amendment of 1917, and that the injury complained of must have occurred on a public work, and was the result of some negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

Held, further, following *Paul* v. *The King* (1906), 38 Can. S.C.R. 126, that the death of the deceased did not occur on a public work within the meaning of the Act, and further on the facts, even assuming that the stone-lifter was a public work, that the death of suppliant was an unforeseen event which was not the result of any negligence or misconduct of an officer or servant of the Crown.

Statement.

THE suppliant, by her petition of right, seeks to recover damages in the sum of $15,000, both on her behalf and on behalf of her minor child, as arising out of the death of her husband, Isidore Pinard, an employee of the Department of Marine, which occurred while engaged working on board a stone-lifter, the property of the Crown, in course of the operation by the Crown of deepening the ship-channel, at Montreal, P.Q.

Aimé Chassé and *Adolphe Allard*, for suppliant.

A. Lanctot, for respondent.

Audette, J.

AUDETTE, J.:—The accident happened on October 14, 1916. Pinard was, at the time of the accident, first night officer on the

government dredge No. 1, which was engaged in the harbour of Montreal, in dredging the ship-channel, between Montreal and Quebec, a work carried on by and at the expense of the Crown for the improvement of the navigation of the River St. Lawrence.

As part of the plant working in conjunction with the dredge, among others, were a stone-lifter, a tug serving the dredge, and a pontoon to which both the tug and the scows would moor.

The bed of the River St. Lawrence, at the place in question, is composed of sand and a number of boulders or rocks. In order to carry on the dredging and deepening of the channel, the dredge had to be helped with or supplemented by a stone-lifter, which, at the time of the accident, was lying at and tied to the port side of the dredge, as shewn on exhibit B. On the day in question, after having lifted, with the stone-lifter, a rock or boulder of two to two and a half tons from the bottom of the river, the rock was placed alongside of the well, and was being rolled over on the deck by means of crowbars, toward the bow of the stone-lifter, when Lemoine's crowbar slipped while he was raising the boulder higher than the height obtained under Pinard's crowbar, and by the crowbar so slipping the boulder came back with a jerk on Pinard's crowbar, and as he was standing but a few feet from the side, he was thrown overboard and drowned under the circumstances detailed in the evidence. At the time of the accident Pinard was occupied in a kind of work with which he was familiar, having been engaged at such works for years before. For the purpose of the case it is unnecessary to go into further details in respect of the drowning of the suppliant's husband.

The case at bar is in its very essence in tort, and apart from special statutory authority, no such action will lie against the Crown.

Therefore, to succeed, the suppliant must bring her case within the provisions of s. 20 (*c*), of the Exchequer Court Act, before the amendment in 1917, by 7-8 Geo. V., c. 23, and the bodily injury complained of must have occurred: 1. On a public work; and, 2, must be the result of some negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

With the object of shortening the evidence, counsel for the Crown admitted that the dredge No. 1, and the stone-lifter in

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question in this case were, at the time of the accident, the property of the Government of Canada, and that the said dredge and stone-lifter were at that time employed at the execution of works done by the Dominion government for the deepening of the maritime ship-channel of the St. Lawrence.

The first question to be *in limine* decided is whether or not the accident occurred *on a public work*.

Counsel at bar for the suppliant relied very forcibly upon the definition of the expression, a "public work," which is to be found in the Public Works Act, and the Expropriation Act.

Sub-s. (*c*) of s. 3, of the Public Works Act, enacts that "public work" or "public works" means and includes any work or property under the control of the Minister. And by s. 9 of the Act, among the properties enumerated under the control of the Minister is to be found, "*the works for improving the navigation of any water*"—and by sub-s. (*h*) of that section it also covers "*all other property which now belongs to the Crown.*"

As was observed by Burbidge, J., in the *Hamburg-American Packet Co.* v. *The King* (1901), 7 Can. Ex. 150, at 173, the Exchequer Court Act contains no definition of the expression "public work"; but the Act from which this provision, now found in sub-s. (*c*) of s. 20, of the Exchequer Court Act, was adopted, contained such a definition. The Act from which it was adopted is the old official Arbitrators Act (c. 40, R.S.C. 1886), sub-s. (*c*) of s. 1, which reads as follows:—

(*c*) (The expression), "public work" or "public works" means and includes the dams, hydraulic works, hydraulic privileges, *harbours*, wharves, piers and works for improving the navigation of any water—lighthouses and beacons—the slides, dams, piers, booms and other works for facilitating the transmission of timber—the roads and bridges, the public buildings, the telegraph lines, government railways, canals, locks, fortifications and other works of defence, and all other property which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by parliament, and every work required for any such purpose; but not any work for which money is appropriated as a subsidy only.

The same definition of a "public work" is also to be found, in the same wording, as sub-s. (*d*) of s. 2 of the Expropriation Act (R.S.C. 1906, c. 143), as now in force—with, however, the addition of the words "*docks*" and "*dry docks.*"

Now, under this state of the law, as presented by counsel at bar, it was decided in the *Hamburg-American* case, 7 Can. Ex. 150, at 177, by the Exchequer Court of Canada (affirmed by the Supreme Court of Canada), (1907), 39 Can. S.C.R. 621, that:—

it cannot be doubted that the ship-channel between Montreal and Quebec is a work for improving the navigation of the St. Lawrence River; and that while the work was in the course of construction or under repair it was a public work under the management, charge and direction of the Minister of Public Works. The same may be said of any work of dredging or excavation to deepen or widen the channel of any navigable water in Canada. But it does not follow that once the Minister has expended public money for such a purpose, the Crown is for all time bound to keep such channel clear and safe for navigation; and that for any failure to do so it must answer in damages.

From that decision it would appear that while the works were being actually carried on in the ship-channel, they would be a "public work," and after the works had been completed and public moneys expended that they would cease to be a public work.

Had we only that decision for a guidance, it would apparently let in the present case, since the accident happened while the works were in course of construction; but after this decision came the judgment of this court in the case of *Paul* v. *The King*, 9 Can. Ex. 245, confirmed by the Supreme Court of Canada, (1906) 38 Can. S.C.R. 126, wherein Davies, J., with whom Maclennan and Duff, JJ., concurred, at p. 131, says:—

This court has already held, in the case of *The Hamburg-American Packet Co.* v. *The King* (1902), 33 Can. S.C.R. 252, that the channel of the St. Lawrence River, after it had been deepened by the Department of Public Works, did not, in consequence of such improvement, become a public work within the meaning of the section under consideration. . . .

To hold the Crown liable in this case . . . we would be obliged to construe the words of the section so as to embrace injuries caused by the negligence of the Crown's officials, not as limited by the statute "on any public work," but in the carrying on of any operations for the improvement of the navigation of *public harbours* or rivers. In other words, we would be obliged to hold that all operations for the dredging of these harbours or rivers or the improvement of navigation, and all analogous operations carried on by the government, were either in themselves public works, which needs, I think, only to be stated to refute the argument, or to hold that the instruments by or through which the operations were carried on were such public works.

If we were to uphold the latter contention, I would find great difficulty in acceding to the distinction drawn by Burbidge, J., between the dredge which dug up the mud while so engaged and the tug which carried it to the dumping ground while so engaged. Both dredge and tug are alike engaged in one operation, one in excavating the material and the other in carrying it away.

I think a careful and reasonable construction of the clause 16 (*c*) (now clause 20) must lead to the conclusion that the public works mentioned in it,

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and "on" which the injuries complained of must happen, are public works of some definite area, as distinct from those operations undertaken by the government for the improvement of navigation or analogous purposes; not confined to any definite area of physical work or structure.

The above-mentioned definition of the expression "public work" covers "harbours." This accident occurred in the harbour of Montreal. Would that bring the case within the ambit of s. 20 of the Exchequer Court Act?

The decision in the *Paul* case has since been mentioned and followed by the Supreme Court of Canada in many cases, and is now remaining undisturbed and binding upon this court. See *Piggott* v. *The King* (1916), 32 D.L.R. 461, 53 Can. S.C.R. 625; *Chamberlin* v. *The King* (1909), 42 Can. S.C.R. 350; *Olmstead* v. *The King* (1916), 30 D.L.R. 345, 53 Can. S.C.R. 450, and others. Therefore, following that decision, it must be found the accident did not happen on a "public work."

In *Montgomery* v. *The King* (1915), 15 Can. Ex. 374, it was further held, following the views expressed by the Judges of the Supreme Court of Canada in the *Paul* case, that a dredge belonging to the Dominion government is not a public work within the meaning of s. 20 (*c*) of the Exchequer Court Act. And again, under the dictum of Sir Louis Davies in the *Paul* case, it would be impossible, under the circumstances, to establish any difference between the dredge and the stone-lifter in the present case.

If this decision in the result were—as was contended —a curtailment by the court of a clear and unambiguous definition given by parliament itself, for the reason that if effect were given to it, it would take us too far afield, and on that very account criticized—I must say that, even assuming the stone-lifter were a public work, under the full circumstances of the case, I would be unable to find any negligence as further required by s. 20. Evidence on record fails to disclose anything upon which a court could find that an officer or servant of the Crown, while acting within the scope of his duties or employment, had been guilty of negligence from which the present accident resulted. And it must be stated that everything within human power appears to have been done to save the drowning man. A lifebuoy was thrown to him, he was caught with a boat-hook when he floated down by the stern of the dredge, but his coat gave way when a small boat from the dredge was lowered to his rescue, but unfortunately, without success.

The injury complained of is the result of a mere accident. "What happened was fortuitous and unexpected." As I already had occasion to say in *Thibault* v. *The King* (1918), 41 D.L.R. 222, 17 Can. Ex. 366:—

> The event was unforeseen and unintended, or was "an unlooked-for mishap or an untoward event which was not expected or designed." *Fenton* v. *Thorley Co.*, [1903] A.C. 443; *Higgins* v. *Campbell*, [1904] 1 K.B. 328. It was a personal injury by accident. In *Briscoe* v. *Metropolitan St. Ry. Co*, 120 Southwestern Rep 1162, at 1165, an accident is defined as "such an unavoidable casualty as occurs without anybody being guilty of negligence in doing or permitting to be done, or in omitting to do, the particular things that caused such casualty."

The accident in this case was an unforeseen event which was not the result of any negligence, misconduct of an officer or servant of the Crown.

It is gratifying, however, to know that the suppliant has received $500 in insurance, and that the Crown offered her, by the statement in defence, but without assuming any legal liability, the sum of $1,000.

Therefore, judgment will be entered in favour of the Crown, and the suppliant is declared not entitled to the relief sought by her petition of right. *Petition refused.*

ESQUIMALT & NANAIMO R. Co. v. McLELLAN.

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C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips and Eberts, JJ.A. October 1, 1918.

1. PARTIES (§ II A—71)—ACTION FOR TRESPASS—TRESPASSER CLAIMING UNDER PROVINCIAL LEASE—PRIOR GRANT TO DOMINION—ATTORNEY-GENERAL NOT NECESSARY AS A PARTY.

   In an action for trespass, where the trespasser claims under a lease from the Crown as represented by the province, such lease being subsequent to a grant which if valid must prevail, the Attorney-General is not a necessary party.

2. DEEDS (§ II D—40)—SETTLEMENT ACT B.C.—CROWN GRANT—INDIAN RESERVES EXCEPTED—WHAT INCLUDED IN TERM.

   By the Settlement Act, 47 Vict., c. 14, the Province of British Columbia granted to the Dominion a tract of land in Vancouver Island to aid in the construction of a railway. The plaintiffs undertook to build the railway, and the Dominion in consideration thereof granted the lands to them by way of subsidy. The grant did not include Indian Reserves or settlements, nor Naval or Military Reserves.

   The court held that only *de facto* Indian Reserves assigned to the Crown in right of the Dominion for the use of the Indians were excepted; the fact that lands were available or suitable for Indian Reserves did not make them reserves within the meaning of the grant.

Statement.

APPEAL by defendant from judgment of Morrison, J., 37 D.L.R. 803. Affirmed.

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ESQUIMALT AND NANAIMO R. CO. v. MCLELLAN.

Macdonald, C.J.A.

Joseph Martin, K.C., and *Abbott*, for appellant; *E. P. Davis*, K.C., and *H. B. Robertson*, for respondent.

MACDONALD, C.J.A.:—By the Settlement Act, 47 Vict. c. 14, the province granted to the Dominion a tract of land in Vancouver Island to aid in the construction of the railway from Esquimalt to Nanaimo. The plaintiffs undertook with the Dominion to build the railway, and the Dominion, in consideration thereof, granted the said lands to them by way of subsidy. It was provided in said grant that the same should not include

any lands now held under Crown grant, lease, agreement for sale, or other alienation by the Crown, nor shall it include Indian Reserves or settlements, nor Naval or Military Reserves.

The defendants claim under a lease from the Crown in right of the province the coal underlying part of the land included within the boundaries of said grant. Prior to the issue of the said lease, the defendant McLellan obtained from the plaintiffs a grant of the surface of part of the land under which the said coal lies, the coal being expressly excepted from said grant to McLellan. Subsequently, McLellan conceived the idea that neither the surface nor the coal passed under the grant from the province to the Dominion but was included in the exceptions above mentioned. He, therefore, applied to the provincial authorities for a lease of the coal under his own surface and some adjacent surface. His suggestion was that these lands were under reserve for school purposes at the date of the Settlement Act, and, therefore, did not pass to the Dominion, and hence were not acquired under plaintiffs' grant from the Dominion.

The correspondence between McLellan and the Provincial Lands Department shews that the provincial authorities considered that said area was an Indian Reserve on the date of the passing of the Settlement Act, and, therefore, did not pass from the province, and that they were at liberty to give McLellan a lease of the coal which they, accordingly, did in the year 1914. McLellan proceeded to prospect and explore for coal under colour of this lease, and this action was brought by the plaintiffs for an injunction and a declaration of their title.

There is no dispute about the validity of the grants from the province to the Dominion and from the Dominion to the plaintiffs.

The principal question in the appeal, therefore, is: Was the area in question within the above-mentioned exceptions?

In this appeal there is no distinction to be drawn between surface and under-surface rights, because, if the subject-matter of the dispute did not pass from the province under the grant to the Dominion, neither did the surface. In other words, the railway company own either both surface and under-surface rights, or nothing.

The situation, then, is that the only suggestions made prior to the commencement of the litigation derogatory to plaintiff's title was that of defendant McLellan, who asserted that the lands in question had been reserved for school purposes; and that of the Department of Lands which asserted that it was "an Indian Reserve." All sorts of suggestions were made by defendant's counsel in argument as to the possibility of the lands being within one or other of the several classes of exceptions above mentioned, and they contended that the onus was upon the plaintiffs to negative the possibility of that being so. I do not propose to follow counsel in this argument; I think I should pay no attention to suggestions other than that the lands in question were reserved for school purposes, or as an Indian Reserve or settlement.

But before taking up the merits I wish to refer to the submission of counsel for the defendants that the Attorney-General of the province was a necessary party to this action. The action being for trespass, the onus of proof of ownership is upon the plaintiffs. If plaintiffs are right, the defendants are trespassers. Defendants cannot rely upon their subsequent lease as against the prior grant. In my opinion, the lease has nothing to do with the case. The defendants put the plaintiffs to proof of their title, and when they prove that their case is made out. There can be no contest between the grant and the lease. If the defendants were to attempt to justify by setting up and proving a lease from another person, such person would not, I think, be a necessary party defendant in an action of this kind: *Child* v. *Stenning* (1878), 7 Ch. D. 413, and I do not apprehend that a different rule is to be applied where the trespasser claims under a lease from the Crown; at all events where that lease is subsequent to a grant which, if valid, must necessarily prevail.

In *Alcock* v. *Cooke* (1829), 5 Bing. 340, 130 E.R. 1092, questions analogous to this dispute were in controversy. It was not there suggested that the Attorney-General was a necessary party. The

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same observation may be made with respect to *Vancouver Lumber Co.* v. *Corp. of Vancouver* (1910), 15 B.C.R. 432; affirmed in [1911] A.C. 711. I am, therefore, of opinion that the Attorney-General was not a necessary party.

The question whether the land and coal in issue passed under the grant to the Dominion is one of fact. If the onus of proof that it fell within the exceptions lies on the defendants, who assert it, then I think they have failed to prove their case. On the other hand, if the onus is upon the plaintiffs to negative the exceptions, then I have to consider whether or not that onus has been discharged.

In my opinion, the onus is on the defendants. In the construction of penal statutes it has been laid down as a rule that when an exception from the penalty is contained in the section imposing the penalty, the party claiming it must prove that the other party is not within the exception; but where the exception is made in a subsequent section of the statute, the rule is otherwise: *Thibault* v. *Gibson* (1843), 12 M. & W. 88, 152 E.R. 1122, which has been approved and followed in the subsequent cases on the point.

I apprehend that the rule aforesaid which requires the prosecutor or plaintiff in a penal action to negative the exception was adopted because of the penal character of the proceeding, and is not applicable to a case of this kind. I think this is consistent with principle and convenience.

Now, there is a matter put forward in evidence by the plaintiffs, and to which the defendants are entitled to the benefit, if any, as indicating that the area in question was set aside for purposes within the exceptions from the grant to the Dominion. A book was produced by the plaintiffs from the Department of Lands purporting to be an Index of Government Reserves from the earliest records down to the time of the trial. *Inter alia*, the lands in question herein are referred to in this book, and across the page is written the words:—

> These Reserves are available for Indian settlements, schools, parks, or other public purposes.

Now, apart from what may be said of the authenticity of the entries made in the book, and assuming the language quoted to be authentic, and to be some evidence of the setting aside of these

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lands for the purposes mentioned, yet, in my opinion, they do not help the defendants. It is quite clear on the evidence that the lands were never used for school purposes, that is to say, the province never alienated them to trustees or otherwise applied them to school purposes in the sense mentioned in *Att'y Gen'l* v. *E. & N. R. Co.* (1912), 4 D.L.R. 337, 17 B.C.R. 427, so that they have always remained at the absolute disposal of the province, untrammelled by any alienation for school purposes. That, I think, is a sufficient answer to defendants' suggestion that they were school-reserves at the date of the Settlement Act.

Then, can the inference be drawn that they were Indian Reserves or settlements from the words cited from the said book? Indian Reserves consist of lands conveyed or assigned to the Crown in right of the Dominion for the use of the Indians. To say that lands are available for Indian Reserves does not make them Indian Reserves within the construction which I would place upon the language of the grant when it says that the grant shall not include Indian Reserves or settlements. It is not suggested, and there is no evidence from which such an inference can be drawn, that this land was ever used as an Indian Reserve or settlement; at most, if any value is to be attached to said index book as evidence in the case, the land in question was merely designated as land fit to be made an Indian Reserve or settlement. It is, however, in my construction of the deed, not such lands, but *de facto* Indian Reserves or settlements which are excepted.

I would, therefore, dismiss the appeal.

MARTIN, GALLIHER and EBERTS, JJ.A., dismiss the appeal.

Martin, J.A.
Galliher, J.A.
Eberts, J.A.
McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal brings up a question which has been a matter of litigation for a very considerable time in the courts of this province, and, in particular, two cases that require reference being made to them went on appeal to the Privy Council, namely, *Hoggan* v. *E. & N. R. Co.*, [1894] A.C. 429; and *McGregor* v. *E. & N. R. Co.*, [1907] A.C. 462. In the *Hoggan* case it was held that the lands in question were not open for settlement, being lands included in the government grant to the company, being subsidy lands (granted by 47 Vict. c. 14, B.C., to the Government of Canada and by the Government of Canada, in pursuance of an Act of 1884, 47 Vict. c. 6, Canada, granted in 1887 to the company), and in the *McGregor* case it was held as against the com-

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pany that only because of the Vancouver Island Settlers Rights Act, 1904, was McGregor entitled to the lands, *i.e.*, that the Act of 1904 (B.C.) legalized the grant and superseded the company's title. The grant from the province to the Dominion is, by statute, set forth, so far as inquiry will be found necessary upon this appeal (47 Vict. c. 14 (*f*) B.C. of preamble, and ss. 3, 4, 5 and 6).

It may be further said for the purposes of this appeal that the grant from the Government of Canada to the company was in like terms. The evidence is most voluminous, and without entering into it in detail it is, in my opinion, most conclusive that the lands called in question in this appeal were effectually granted and conveyed to the company, by reason of the force of the provincial statute (47 Vict. c. 14, B.C.), and the grant made in pursuance thereof by the Government of Canada to the company, if even the onus was upon the company (the respondent) to establish that the lands in question did not come within any of the reservations that onus was fully discharged. The statement of claim asked for the following declarations:—

(*a*) A declaration that it is the owner of all the under-surface rights set out in par. 2 hereof, under the lands specially described in the said par. 2, namely ss. 5, 6 and 7, range 7, and ss. 5, 6 and 7, range 8, Cranberry District aforesaid.

(*b*) For a declaration that the lease issued to the defendant, dated July 2, 1914, is null and void and for delivery up or cancellation of the same.

(*c*) For a declaration that there was no right to issue the said lease, and that the same is null and void.

(*d*) For an injunction restraining the defendant, his servants, agents and assigns from in any way interfering with the said under-surface rights in the said lands or from exercising any acts of ownership thereover.

The statement of claim, so far as the matters calling for inquiry upon this appeal, sets forth that:—

6. On July 27, 1912, the Minister of Lands of the Province of British Columbia, in alleged pursuance of the provisions of the Coal Mines Act, R.S.B.C., 1897, c. 159, and amendments thereto, purported to grant to the defendant a license No. 8192 to prospect for coal and petroleum under the said ss. 5, 6 and 7, range 7, and ss. 5, 6 and 7, range 8, Cranberry District aforesaid, and, thereafter, purporting to act under the provisions of the Coal and Petroleum Act, R.S.B.C., 1911, c. 159, purported to grant on July, 27, 1913, a renewal license No. 9264 of the said license No. 8192.

7. The defendant, assuming to act under the powers and authority of the said licenses No. 8192 and No. 9264 and without any authority from or consent of the plaintiff and without the plaintiff's knowledge, trespassed on the plaintiff's lands hereinbefore particularly described in paragraphs 2 and 6, by prospecting for coal on the said lands, and by sinking a shaft on the said lands and removing some of the plaintiff's coal.

8. On July 2, 1914, the Minister of Lands of the Province of British Columbia, on behalf of the Lieutenant-Governor in Council, in alleged pursuance of the powers contained in the said Coal and Petroleum Act and amendments thereto, purported to grant to the defendant a lease for 5 years from July 24, 1914, of the under-surface rights under the lands covered by the said coal prospecting licenses numbered 8192 and 9264.

9. The defendant claims for himself, his agents and assigns to be entitled under the said lease to continuously and vigorously prospect the work of coal and petroleum mining under the said lands described in paragraphs 2 and 6 hereof, and has threatened and intends or has entered upon and worked the coal under the said lands, and exercised rights of ownership in respect thereof.

10. The said lease constitutes a cloud on the plaintiff's title to the under-surface rights under the lands specially described in paragraphs 2 and 6 hereof.

In the alternative, the plaintiff says, in any event, the said under-surface rights under the said lands described in paragraphs 2 and 6 hereof were prior to and at the time of the granting of the said lease in dispute, and that there was no right to grant the said lease and the plaintiff will rely on s. 26 of the Coal and Petroleum Act, R.S.B.C., 1911, c. 159.

The appellants relied upon the licenses obtained from the Crown (the Government of British Columbia) and the lease following the same from the same authority for their entry upon the lands and mining for coal thereunder, and the counsel for the appellants in his very able argument submitted that the Crown should be a party to the action and failing this, no declaration as to the title to the lands and the under-surface rights could be made, that in any case no title can be demonstrated in the lands or the under-surface rights, *i.e.*, the coal underlying the lands until the reservations and exceptions are all effectively disposed of, and it was not established that the Crown had denuded itself of title to the lands, that it was not a case of an absolute statutory conveyance of the lands within the lines described in s. 3 (47 Vict. c. 14, B.C.), but a conveyance with exceptions, and that the evidence, as led by the respondent at the trial, did not displace the right in the Crown to grant the licenses and lease impugned in the action.

Firstly, with regard to the non-joinder of the Crown. We have, of course, O. 16, r. 11 (M.R. 133) the same as the English Rule (O. 16, r. 11, Yearly Practice, 1918, p. 173 to 178). It is to be noted that the objection is made at rather a late date for the first time at the trial of the action, yet, of course, that does not tie the hands of the Court, save that, in this case, the party said to be a necessary party is the Crown, and there is evidence that the Crown has been made aware of these proceedings and evidently

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has not deemed it right to interfere, and further, it is a matter for remark that the defendants have not pleaded "that the plaintiff cannot maintain the action at all, as, for instance, in a case where he cannot maintain it without joining the Attorney-General: *Att'y-Gen'l* v. *Pontypridd Waterworks Co.*, [1903] 1 Ch. 388," see Yearly Practice, 1918, at pp. 174-5. We are not without authority upon this point in the courts of this province, and the trial judge relied upon the decision of the full court in *E. & N. R. Co.* v. *Fiddick* (1909), 14 B.C.R. 412, in which it was held that the Crown was not a necessary party. A perusal of the judgment of the full court upon this point will demonstrate that, in many cases of somewhat similar nature, the Crown was not a party to the proceedings (also see *Victor* v. *Butler* (1901), 8 B.C.R. 100); it may well be considered that the Crown, by the grant of a lease, which imports the assertion of the reversionary interest being in the Crown, differentiates this case from the *Fiddick* case, and is not a case where the Crown has, without evidence to the contrary, parted with all its interest or claim to the lands, and that, therefore, the Crown is a necessary party. The power of the Court, however, in this matter, is discretionary, and apart from the question whether the Crown can be made a party to the proceedings not choosing to intervene, a question which I do not decide, I am of the opinion that the court will be justified, in this case, in proceeding "to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it" (O. 16, r. 11; M.R. 133)—the judgment of this court will be in no way binding upon the Crown, and I recall that I made an observation to this effect to counsel for the respondent during the argument upon this appeal. The Crown, as it appears in the present case, granted licenses and a lease to mine coal upon the lands in question. This being the situation, it would appear to me with great respect to the executive government, that the Crown would be acting rightly in intervening in these proceedings, and the Crown may yet intervene if the case proceeds further. It may be that the executive government is acting advisedly, and it is the intention to abide by the result of the litigation as between the parties. It is instructive upon this point to note the decision of the Privy Council in *Eastern Trust Co.* v. *Mackenzie, Mann & Co.*, 22 D.L.R. 410, [1915] A.C. 750.

The question as to in what cases the Crown is a necessary party is dealt with by my brother Martin in his judgment in *Quesnel Forks Gold Mining Co.* v. *Ward* (May 2, 1918) as yet unreported (42 D.L.R. 476), and in that case the contest was between Crown lessees, the leases to the plaintiffs being subsequent in point of time to the leasehold interest in pursuance of the powers granted by a private Act to the predecessors in title of the defendants, the defendants holding under assignment thereof, and it was held that the Crown was not a necessary party, and the defendants were, by the judgment of this court, held to be entitled to the placer mining ground in dispute as against the plaintiffs, the holders of the subsequent leases (also see Lord Watson, at pp. 56 and 57 in *Osborne* v. *Morgan* (1888), 13 App. Cas. 227.

Then with the premise that the action is a well constituted action, and that the matter for adjudication was jurisdictionally properly before the court below, it becomes necessary to again revert to the question for decision. Whilst not of the opinion that the *onus probandi* was upon the respondent to shew that not by any possible chance were the lands in question within any of the exceptions as contained in the grant to the respondent, I am satisfied that the respondent has shewn upon the evidence led at the trial that the lands in question were granted to the respondent and the Crown had parted with its interest therein. As to the nature of the evidence, it may be said to be most complete. I would refer in this connection to the language of Boyd, C., in *Niagara Falls Park* v. *Howard* (1892), 23 O.R. 1 (affirmed on appeal (1896), 23 A.R. (Ont.) 355), at p. 4, as follows:—

> The inquiry cannot be conducted on strictly legal evidence, for owing to lapse of time, the historical element has to be taken into account. Therefore, in reaching my conclusions, I have overlooked none of the miscellaneous matters which were more or less discussed during a seven days' argument, in addition to certain augmentations sent in after argument. I have drawn also from other sources, historical or statutory, of a public character, so that I might, if possible, harmonise the various claims made and transactions had, with reference to this property, which may be conveniently spoken of as the Chain Reserve, *i.e.*, along Niagara River from Queenston to Fort Erie. As to the propriety, and indeed necessity of using this class of material, note the observations of Lord Halsbury in *Read* v. *Bishop of Lincoln*, [1892] A.C. 644. See also *City of Vancouver* v. *Vancouver Lumber Co.*, [1911] A.C. 711, at p. 721.

There can be no question that it was a notorious fact that the

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respondent was the grantee from the Crown (Dominion) in pursuance of the statutory grant made to the Government of Canada by the province of the lands in question and the coal under the said lands. Any inconsistent statements of officers of the Crown, and it is to be noted that where these occur they are from officers holding office in very recent years, as to the lands in question still being Crown lands, cannot be of any avail as against the grant made to the respondent within the lines of the description contained in the grant, and as to the value of these statements I would refer to what Lord Davey said at pp. 83-4 in *Ontario Mining Co.* v. *Seybold*, [1903] A.C. 73.

The language of Lord Davey is exceedingly apposite to the facts of the present case.

The broad question in the present case, in my opinion, is that it being incontrovertible that the description of the grant to the respondent is comprehensive of the lands in question, and there being no sufficient evidence to shew that they fall within any of the exceptions, the grant being an express statutory grant covered by a public general statute of the paramount authority the Legislature of the Province of British Columbia, cogent evidence must be adduced establishing that the lands in question are within the reservations and exceptions as contained in the grant, because, without this being established, the grant is conclusive and effective to transfer all the lands (save demonstration to the contrary) to the respondent company within the description.

In my opinion, it is conclusively established that the respondent is the owner of the lands in question and is expressly granted the coal and other minerals underlying the lands—save the precious metals—(see *Att'y-Gen'l of B.C.* v. *Att'y-Gen'l of Canada* (1887), 14 Can. S.C.R. 345; (1889), 14 App. Cas. 295; *Esquimalt and Nanaimo R. Co.* v. *Bainbridge*, [1896] A.C. 561; and that was the decision of the trial judge, and the appellants not having shewn that the judge arrived at a wrong conclusion (*Colonial Sec. Trust Co.* v. *Massey*, [1896] 1 Q.B. 38; Lord Esher at p. 39; *Ruddy* v. *Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, 21 Can. Ry. Cas. 377, 38 O.L.R. 556; *Lodge Holes Colliery Co.* v. *Wednesbury*, [1908] A.C. 323, 326), the judgment of the court below should be affirmed and the appellants restrained, as directed

in the judgment appealed from, from in any way interfering with the under-surface rights in, upon or under the lands and from exercising any acts of ownership in respect of the under-surface rights thereof.

I would therefore dismiss the appeal.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee and Hodgins, JJ.A., Clute, J., and Ferguson, J.A. July 15, 1918.

PROCURING (§ I—1)—CAB-DRIVER—DRIVING PROSTITUTES AND MEN TO PLACE WHERE THEY MAY HAVE INTERCOURSE—NOT GUILTY OF UNDER CRIMINAL CODE.

A cab-driver who uses his conveyance to drive prostitutes and men who are mutually desirous of having sexual intercourse, to a place where they can and do have it, is not guilty of "procuring" within the meaning of s. 216 (1) (*a*) of the Criminal Code as enacted by 3 & 4 Geo. V. c. 13, s. 9. The fact that it was the cab-driver who brought them together for such purpose makes no difference.

CASE stated by the Junior Judge of the County Court of the County of Carleton in respect of questions arising upon the trial of the defendant, before that Judge without a jury, upon a charge of unlawfully procuring girls to have unlawful carnal connection with another person or persons within Canada, viz.: (1) Was there evidence of procuring? (2) Was the evidence of witnesses for the Crown corroborated? (3) Was the indictment bad for uncertainty or for having charged in one count more offences than one? Statement.

Gordon Henderson, for defendant; *Edward Bayly*, K.C., for Crown.

MEREDITH, C.J.O.:—Case stated by the Junior Judge of the County Court of the County of Carleton. Meredith, C.J.O.

The prisoner was convicted upon a charge that he at divers times between the 13th day of June and the 13th day of September in the year of our Lord one thousand nine hundred and seventeen, at the city of Ottawa . . . did unlawfully procure girls to have unlawful carnal connection with another person or persons within Canada.

The questions stated for the opinion of the Court are:—

1. Was there any evidence that the accused procured girls as charged in the indictment?

2. Having regard to the provisions of sec. 1002 of the Criminal Code—

(a) Was the testimony of the witness Germaine Bailey corroborated?

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(b) Was the testimony of the witness Emilda Poirier corroborated?

I am of opinion that the first question should be answered in the negative.

I do not think that in what the prisoner did he procured the girls in respect of whom the charge against him was made to have unlawful carnal connection with men, within the meaning of sec. 216, sub-sec. 1, cl. (*a*), of the Criminal Code, as enacted by the statute of 1913, 3 & 4 Geo. V. ch. 13, sec. 9.

The prisoner was a cab-driver, and the girls mere prostitutes. They were desirous of plying their trade, and there were men that were desirous of having carnal connection with them, and what the prisoner did was to drive the girls and the men in his cab to a place where they could have and had carnal intercourse with the men.

That, in my opinion, is not what the provision of the Code under which the prisoner was charged was aimed at; nor what, according to the fair meaning of the provision, it makes an offence.

One who merely provides the means by which men and women who are desirous of having carnal intercourse can conveniently gratify their desires does not, I think, in any fair meaning of the word, "procure" the women to have that intercourse with the men. It cannot be, I think, that if a man and woman who are desirous of having sexual connection employ a cab-driver to take them to a place where they may have it, and the cab-driver does that, he can be said to procure the women to have unlawful carnal connection with the men; nor does it, I think, make any difference that it is the cab-driver who brings them together for that purpose.

As I have come to this conclusion, it is unnecessary to answer the other questions.

Magee, J.A. Ferguson, J.A.

MAGEE and FERGUSON, JJ.A., agreed with Meredith, C.J.O.

Clute, J.

CLUTE, J.:—Case reserved by His Honour Judge Gunn, Junior Judge of the County Court of the County of Carleton.

The accused was charged, under sec. 216, sub-sec. 1, cl. (*a*), of the Criminal Code, "for that he, the said Clement Quinn, at divers times between the 13th day of June and the 13th day of September in the year of our Lord one thousand nine hundred and seventeen,

at the city of Ottawa, in the said county, did unlawfully procure girls to have carnal connection with another person or persons within Canada, contrary to the form of the statute in such case made and provided."

Questions of law submitted:—

(1) Was there any evidence that the accused procured girls as charged in the indictment?

(2) Having regard to the provisions of sec. 1002 of the Criminal Code—

(a) Was the testimony of the witness Germaine Bailey corroborated?

(b) Was the testimony of the witness Emilda Poirier corroborated?

(3) Was the indictment bad for uncertainty or for having charged in one count more offences than one?

Dealing with the last objection first, I am of opinion that the indictment is bad on both grounds—(1) for uncertainty and (2) for having charged in one count more offences than one.

This is an indictable offence, and sec. 852 of the Code is applicable. No doubt, the manner of pleading is much simplified, but it is still necessary that every count shall contain in substance a statement that the accused has committed some indictable offence therein specified, and such statement may be made in popular language without any technical averments or matter not essential to be proved, and may be in the words of the enactment describing the offence committed or in words sufficient to give the accused notice of the offence with which he is charged. In the present case no particular offence is charged, that is, the name of the girl procured is not given. The indictment would probably be good if it were stated that the person was unknown, if such was the fact. This indictment is under a general section, No. 216, in which there are twelve distinct classes of cases. I think the occasion and the offence should be identified. Mr. Bayly admitted, as I understood him, that the count was bad, but contended that objection to the form of the count was too late. No amendment was asked. I do not think this answer is tenable. In my view, the count as it stands presents no charge upon which the accused can be put upon his trial. It is true that this is not an indictment in the ordinary sense, but it requires a reasonable particularity to enable the accused to know what particular offence is charged.

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Form 64 referred to in sec. 852 gives examples of the manner of stating the offence, and it is quite clear that a mere description of a crime is not stating an offence. You cannot say that A. is guilty of murder or B. of theft or false pretences as the case may be: *Rex* v. *Bainbridge* (1918), 42 O.L.R. 203, 42 D.L.R. 493; *Rex* v. *Jackson* (1917), 40 O.L.R. 173.

The present case is that of a trial by a Judge of the County Court, under sec. 824 and following sections of the Code. It is the duty of the Judge to state to the prisoner that he is charged with the offence, describing it. If the prisoner, upon being arraigned, consents and pleads "not guilty," the Judge may proceed to try him, and sec. 833 (3) provides that the prosecuting officer in such case shall draw up a record as nearly as may be in form 61. A reference to this form shews that it describes the offence as is usual in an indictment—sufficiently specifically to identify it.

Mr. Bayly referred to *Rex* v. *Thompson*, [1914] 2 K.B. 99, where it was held that, although the indictment was bad in that it charged more than one offence in each count, yet, as the prisoner had not in fact been embarrassed or prejudiced in his defence by the presentment of the indictment in this form, there had been no substantial miscarriage of justice, and the appeal must, therefore, be dismissed. Upon reference to that case, it will be found that the charge was one of incest, and was specific in naming the person with whom the offence was committed, and the only objection to the charge was that, instead of naming a particular occasion, it charged that "on divers days" between such and such dates the offence was committed: see *Rex* v. *Edwards*, 8 Cr. App. R. 128.

In the case at bar, in my view, no offence is sufficiently charged so as to identify it. The class to which the offence belongs is stated, but there is no statement as to when or with whom the offence was committed.

Section 1007 provides that the accused may, at any time before sentence, move in arrest of judgment, on the ground that the indictment does not state any indictable offence, and (3), if the Court decides in favour of the accused, he shall be discharged from that indictment. This is not in conflict with sec. 898, which provides (2) that no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

It is true that the Imperial Act from which this is taken is qualified by the adjective "formal," but there cannot, I think, be any doubt that sec. 1007 has reference to formal defects only, and not to the entire omission of essential allegations necessary to constitute the offence.

In *Regina* v. *Carr* (1872), 26 L.C. Jur. 61, the indictment was for felonious wounding with intent to murder. Sections 32 and 78 of 32 & 33 Vict. ch. 29 allowed a motion in arrest of judgment for any substantial defect in an indictment. It was held that the omission of the words "of malice aforethought" from the averment of the intent constituted a substantial defect, and the conviction was quashed in a Court of five Judges, *dissentiente* Caron, J., who took the view that under sec. 27 the prisoner had sustained no injury, and the offence intended to be charged could be understood, and by sec. 79 that, where the offence charged is created by statute, an indictment after verdict shall be held sufficient if it describes the offence in the words of the statute creating the offence. The majority of the Court, after referring to sec. 32, which provides that every objection to an indictment for any defect apparent on the face thereof must be taken by demurrer or motion to quash, before the defendant has pleaded, and not afterwards, held, that a motion in arrest of judgment should be allowed for any defect in the indictment which could not have been taken advantage of by demurrer, or amended under the authority of the Act; that the question was now reduced to know what defects were not amendable, and that those were defects which could not be amended, and would be denominated substantial defects, as distinguished from formal defects, or defects which could be cured by amendment; and the Court further held that the omission of the words "of malice aforethought" should be considered substantial, and their omission unaided by a verdict; and judgment was arrested.

In *Regina* v. *Deery* (1874), 26 L.C. Jur. 129, it was held by the majority of the Court, Monk, J., dissenting, where the words "of malice aforethought" were in the averment of the first count of the indictment but omitted from the second, that this omission was not available in arrest of judgment. It was held that, objection to this omission not having been taken until after verdict, the count was sufficient. Dorion, C.J., refers to sec. 10 of the Act 32 & 33 Vict. ch. 20, which provides that whosoever wounds or

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causes any grievous bodily harm to any person, with intent to commit murder, is guilty of felony, and points out that the indictment is for an offence committed under this section, and refers to authorities to shew that the count was sufficient without the words "of malice aforethought," and says: "We are of opinion that, under these authorities, we are justified, notwithstanding the somewhat different ruling given in the case of *Regina* v. *Carr*, to hold that the objection made to the indictment after verdict cannot be maintained, whatever might have been its effect if it had been taken before. Upon this point we abstain from giving any opinion."

It will be observed that, at the time of these decisions, sec. 79 of the Procedure Act, 32 & 33 Vict. ch. 29, was in force, which provides that an indictment shall after verdict be held sufficient if it describes the offence in the words of the statute; and, as is pointed out by the Chief Justice, this would alone seem to justify the judgment—that, no objection having been taken to the indictment before the verdict, the verdict ought to be sustained. Having regard to the form of the indictment in that case, and the particularity with which the offence was stated, I should have thought there could have been no doubt as to its sufficiency, and that the objection was not substantial. The two cases read together lend no support to the view that, where the offence is not definitely charged so as to be sufficiently identified, the objection in arrest of judgment cannot be taken after the verdict. If the indictment is in such a form that it does not charge an offence, the Court cannot allow an amendment to remedy the defect: *Regina* v. *Flynn* (1878), 18 N.B.R. 321. This authority would probably not apply except in the case of an indictment before a grand jury, in which case it would have to be referred back to the grand jury for their approval.

What was required in the present case was not an amendment but a completed charge creating an offence under the Act.

The latest decision where duplicity has been held fatal in a conviction is that of *Rex* v. *Hammick, Ex p. Murdoch*, [1918] W.N. 111, where a conviction was quashed, two offences having been committed and included in one charge.

I think, therefore, that question 3 submitted, "Was the indictment bad for uncertainty or for having charged in one count more offences than one?" should be answered, "Yes, bad on both grounds."

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I have grave doubt as to whether the offence charged was in fact proven, having regard to the undoubted character of the girls with whom the offence is said to have been committed. There was, I think, some evidence of corroboration, very unsatisfactory, but possibly sufficient. However, in the view I take, it is unnecessary to answer questions 1 and 2.

I am of opinion that the conviction should be quashed and the prisoner discharged.

Hodgins, J.A.

HODGINS, J.A.:—Unless the Court is to give an unusual and restricted meaning to the word "procure" the offence charged appears to come within sec. 216, sub-sec. 1. The section reads: "Every one is guilty . . . who (*a*) procures or attempts to procure or solicits any girl or woman to have unlawful carnal connection, either within or without Canada, with any other person or persons."

Under the provisions of the corresponding English Act, the offence can be committed only in respect to a girl or woman (1) under 21 and (2) not being a common prostitute or (3) of known immoral character, and the word "solicits" is not used as part of the description of the offence.

This limitation may have had its influence in defining in the minds of some earlier Judges the nature of the crime. But under our Criminal Code the offence may be committed in respect to any girl or woman. It is not for the Court to cut down the effect of the provision by refusing to affirm a conviction because the girl here was a prostitute. It makes the crime less shocking than when an innocent girl is ensnared, but it does not alter its nature in any way.

"Procure" is used in sec. 215, and in several sub-sections of sec. 216, in such phrases as "procures . . . to have," "procures . . . to become," "procures . . . to come," "procures . . . to leave," and evidently is so used in its usual meaning, i.e., to cause, to bring about, to induce.

Coke, quoted in Russell on Crimes, 7th ed., p. 116, foot-note (*r*), says in speaking of forgery (3 Inst. 169) that to *cause* is to procure or counsel.

The expressions "aid, abet, counsel, or procure," "procure a miscarriage," and "procure a libel to be published," are well-

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known illustrations of the ordinary meaning of the word in criminal enactments.

In the Century Dictionary, quoted by the Court in *United States* v. *Somers* (1908), 164 Fed. Rep. 259, 262, the word "procure" is defined as "to bring about by care and pains; effect; contrive and effect; induce; cause; as, he *procured* a law to be passed."

In *The People* v. *Van Bever*, 248 Ill. 136, 141, the Supreme Court of that State held that "procure" for the purpose of prostitution meant "begin proceedings; to cause a thing to be done." In *Vogel* v. *The State* (1909), 138 Wis. 315, 332, the Supreme Court of Wisconsin regarded the word as synonymous with "aid," "abet," "obtain by any means," "to bring about."

The Imperial Dictionary, quoted in *Re Gertie Johnson* (1904), 8 Can. Crim. Cas. 243, gives "procure" as meaning "induces to do something;" and in England in *Rex* v. *De Marny*, [1907] 1 K.B. 388, and in *Rex* v. *Mackenzie* (1910), 6 Cr. App. R. 64, it seems to have been treated as having a meaning such as I have indicated.

Turning to the law of contracts, the word "procure" is used with just the same meaning as it bears in criminal law and under our Criminal Code. Lord Watson in *Allen* v. *Flood*, [1898] A.C. 1, at p. 96, defines the cases in which a person who "procures" the act of another can be made responsible. These cases are where that person "induces" the other to commit an actionable wrong or induces him by illegal means to do so to the detriment of a third person, and through all the cases which followed *Allen* v. *Flood* the word "procure" stood for "cause" or "induce." This meaning is helped by the addition of the words "or solicits," used in sec. 216 (1) (*a*), by which a light is thrown on the employment of the word "procure."

Having regard to the usual meaning of this word, the evidence of Bailey and Poirier that the prisoner frequently approached them for the purpose of getting them to accompany him and other men in his motor so as to have carnal connection with these men, and that they did both on many occasions, and the detailed accounts of three trips of that kind, shew that the prisoner did "procure" or "solicit" these two girls at various times separately and together to have carnal connection with other men.

This is, according to any of the meanings I have quoted, exactly what the statute says shall render a person guilty of the offence in question.

The prisoner did not merely provide the means to enable these women and men to gratify their desires. He went further, and induced, caused, or brought about by solicitation the having of improper intercourse, quite apart from the use of the motor as a means of transportation. It was what the prisoner did and said that procured, and he was not a mere passive link in a chain—such as an ordinary cab-driver or motor-driver would be.

I would answer question 1 in the affirmative.

As to questions 2a and 2b these must be considered in connection with 3. As to question 3, this point is covered in *Rex* v. *Thompson*, [1914] 2 K.B. 99, where an indictment for incest in practically the same language was held bad for duplicity. I think, however, that that case warrants this Court in holding that sec. 1019 of the Criminal Code may be applied. It is not shewn here that the prisoner was in any way prejudiced or embarrassed, nor is it suggested. During the trial offences were proved on specific occasions, as to the identity of which there could be no reasonable doubt and on which evidence was fully heard. Apparently the prisoner did not testify.

Under the Interpretation Act, R.S.C. 1906, ch. 1, the plural "girls" in the indictment includes the singular (sec. 31 (*j*)).

The question as to corroboration occasions more difficulty. What, under sec. 1002, such corroborative evidence must amount to, is definitely settled by the Court of Criminal Appeal in England in *Rex* v. *Baskerville*, [1916] 2 K.B. 658, 667, where it is defined as "independent testimony which affects the accused by connecting or tending to connect him with the crime."

On examining the specific occasions mentioned in the stated case, they resolve themselves into three. In the first, Bailey was procured in Hull and the offence completed there. In the second, the procuring was in Ottawa, but the offence was not completed, because Bailey did not have connection with either of the men: *Rex* v. *Mackenzie*, *supra*. In the third, Poirier was procured in Ottawa, and the offence was actually completed by her, and she was paid, dividing with Quinn.

This latter offence is amply corroborated by the evidence of

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Bailey as tending to implicate the prisoner, who is thereby shewn to have been carrying on a system of procuration of the kind sworn to by Poirier, although in the two specific cases the prosecution fails for want of jurisdiction in one and for want of proof of the offence in the other.

Question 2a should be answered in the negative, and question 2b in the affirmative.

Question 3 also in the affirmative, but cured by sec. 1019.

The conviction should therefore be affirmed.

Conviction quashed.

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Exchequer Court of Canada, Maclennan, J. November 23 1918.

ADMIRALTY (§ II—8)—AGREEMENT FOR REPAIR OF SHIP—QUANTUM MERUIT—WITNESSES—EVIDENCE—REGISTRAR PROCEEDING ON WRONG PRINCIPLE.

The plaintiff's claim was for work done and material supplied to the defendant's ship, amounting to $53,190, at Montreal, in July and August, 1917, there being no definite contract between the parties. A bond was given for $55,000 for the release of the ship and liability was admitted, but the amount claimed was denied and $35,000 was offered in full settlement, which the plaintiff refused to accept. The matter was referred to the deputy registrar to ascertain and report the amount due to the court, which the deputy registrar did, fixing the amount at $52,983.34.

Held, on a motion of defendant to vary the deputy registrar's report, that, as there was no price for repairs fixed between the parties, the plaintiffs were entitled to recover the fair and reasonable value of the work done and material supplied, or, in other words, what is the fair market value of the repairs made by plaintiffs to ship, and that in determining the value of the said repairs the principles laid down by Dr. Lushington in the *Iron-Master*, Swab. 443, as to the best evidence of the value of the ship are equally applicable to the value of repairs in this case, and that the deputy registrar proceeded on a wrong principle, and that defendant's offer of $35,000 was sufficient.

Statement.

APPEAL from report of the deputy district registrar at Montreal on references.

F. H. Markey, K.C., for plaintiff; *A. R. Holden*, K.C., for defendant.

Maclennan, J.

MACLENNAN, J.:—This case comes before the court on a motion of the defendant to vary the report of the deputy district registrar, by which the latter found $52,983.34, with interest from December 4, 1917, and costs, to be due to plaintiff by defendant.

The plaintiff's cause of action and the nature of its claim endorsed on a writ of summons, filed on November 2, 1917, is a claim for the sum of $53,190 for work done and materials supplied to the ship "Susquehanna" at the port of Montreal during the months of July and August, 1917. The defendant gave a bond for

$55,000, obtained the release of the ship and then admitted liability for the work done and materials supplied, but denied the amount claimed and offered to settle for $35,000. The plaintiff refused to accept this and defendant thereupon moved that the case be referred to the deputy district registrar in order that the necessary claims, statements and vouchers be filed and such proof as may be necessary produced, and that the registrar be ordered to report to the court the amount that he may find due to the plaintiff. Upon the order of reference the registrar reported as above stated, and the defendant appeals from the report by its motion to vary the finding of the registrar.

The S.S. "Susquehanna," which had been engaged in the lake trade, in the early summer of 1917 was cut in two at Buffalo, N.Y., in order to be brought to Montreal, where certain repairs were required to be made and the ship joined together. Certain of these repairs were made at Montreal by the plaintiff; the ship was joined together at Levis, and finally taken to New York, where the repairs were completed and the ship made ready for sea. Plaintiff's action is for the value of work done and materials supplied and for nothing else.

After the work was done the plaintiff sent the owner of the ship a memorandum reading:—"To labour and material repairing S.S. 'Susquehanna' as per specification attached, $53,190."

The specification referred to is a list of repairs to the ship containing over 180 items. No other particulars of the plaintiff's claim, although asked for, were furnished or supplied until the case came before the registrar on the reference, when plaintiff's manager produced a statement or summary which is in the following terms:—

To joining together S.S. "Susquehanna" as per statement attached:—			
Material from stock	$5,517.57		
Material purchased	829.98	$ 6,347.55	
Handling charges, 5%		317.88	$ 6,665.43
Labour		14,905.73	
Overhead factor, 90% on labour		13,415.16	28,320.89
			34,986.32
Profit, etc.			16.554.89
			51,541.21
Tug services, as per copy invoices attached			2,000.00
			$53,541.21

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It can be stated at once that the plaintiff did not do the joining together of the ship, but that its work consisted principally of the completing of so-called odds and ends about the deck and fitting of doors and a small amount of engine-room work and caulking the bulkheads and tanks. Plaintiff's statement shows that the material supplied, with 5% added for handling charges, amounted to $6,665.43, and the labour to $14,905.73, and that the total claim as shewn in this statement amounted to $53,541.21. The plaintiff in effect added over 138.9% to the amount charged for material and labour, or if labour alone is considered over 200% to the amount charged for labour in order to arrive at the total amount of the bill.

As there was no price for the repairs fixed between the parties, plaintiff is entitled to recover the fair and reasonable value of the work done and materials supplied. That was the nature of the claim endorsed on the writ. The plaintiff before undertaking the work gave an estimate of what the repairs would probably cost, but declined to enter into a contract for a fixed amount. There was no suggestion from either party that the repairs should be paid for on the basis of cost plus a percentage for profit. The plaintiff, in its factum filed before the registrar, stated that its claim is based on a *quantum meruit*, and in its factum filed before the court submitted that

> the value of the work based upon a *quantum meruit* must be determined by the fair market value at the time and in the locality where the work is done and, further, by the conditions existing at such time and place. This can only be determined by the evidence of witnesses who are competent to give evidence relating thereto.

Instead of endeavouring to prove the fair market value of the work by competent witnesses, the plaintiff endeavoured before the registrar to establish his claim on the basis of the alleged cost to it of the work, plus a net profit of over 47%. There was no contract to pay the cost and a percentage of profit, and plaintiff's action is not an action based upon any such allegation or implication.

The plaintiff could not change the nature of its action before the registrar, and the question for the court therefore is: What is the fair and reasonable value of the work done and material supplied, or, in other words, as counsel for plaintiff puts it, what is the fair market value of the repairs made by plaintiff to the ship?

In the case of the *Iron-Master* (1859), Swab. 441, at 443, where the question was the value of a ship at the time of a collision, Dr. Lushington made the following observations with reference to different kinds of evidence which might be adduced to establish such value:—

> In this case the loss is confined to a single item, the value of the ship destroyed. The evidence adduced is, as usual, of different kinds; and I think it convenient here to state how the court ranks these different kinds of evidence in order of importance, the question being the value of the ship at the time of the collision.
>
> The best evidence is, first, the opinion of competent persons who knew the ship shortly previous to the time it was lost; that evidence is manifestly entitled to most weight, because, assuming their competency to form a just judgment, they had a personal knowledge of the state and condition of the vessel herself, whereas all other persons, however skilful, could only draw general inferences from their acquaintance with the prices of vessels somewhat similar about the same time. The second best evidence is the opinions of persons such as I have just described, persons conversant with shipping and the transfers thereof.

The principles laid down by Dr. Lushington as to the best evidence of the value of a ship are equally applicable to the value of the repairs in this case. The plaintiff's case is based almost exclusively on the evidence of three witnesses: Temporary Commander Skantelbury, of Saltburn, England, and J. S. Bonnyman, of Landaff, Wales, consulting engineer, and its manager, Mr. Miller. Commander Skantelbury was in Canada representing the British Admiralty as an expert adviser in connection with Canadian ship construction, acting under the director of shipping in Canada, and had been in Montreal less than 1 year at the time of his examination. He was acting as an expert adviser in connection with construction of new vessels, drifters and trawlers, which were being built at the plaintiff's shipyard. He never saw the work done on the "Susquehanna" and had no idea how long the job took. He was not asked to testify what, in his opinion, would have been fair and reasonable compensation or the market value of the work done by plaintiff for defendant. Bonnyman, who is a consulting engineer in shipping, had arrived in Canada about 1 month before his examination, never saw the "Susquehanna" or the work done by plaintiff, and had no knowledge of local conditions in Montreal, except such as he had seen at plaintiff's shipyard from the early part of January to the time of his examination on February 16, 1918. He had been sent by the British Government

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to look after the building of merchant ships at the plaintiff's works. He admits in cross-examination that plaintiff asked him what was a reasonable price for doing the work on the "Susquehanna," but he declined to express an opinion on that question; and in re-examination explained that it was impossible without having seen the ship to make an estimate of the value of the work done. The witnesses Skantelbury and Bonnyman, while no doubt familiar with shipyards and shipping generally in Great Britain, had very limited knowledge of conditions on this side of the Atlantic, and in no part of their evidence do they undertake to give an estimate or express an opinion as to the value of the work done by plaintiff on the "Susquehanna." Mr. Miller, plaintiff's manager, had given an estimate of about $35,000 as the probable cost of the repairs, but at the reference he endeavoured to make it appear that these figures were quoted by him on a part only of the work done. He did not pledge his oath, as it would seem reasonable he should have done if he believed his firm's claim honest and proper, that the fair market value of the work done and materials supplied was the amount claimed in the action. He admitted that there was a list prepared of the work to be done, and, instead of producing that list, he produced and filed as plaintiff's ex. P-5 a list headed: "Repairs to S.S. 'Susquehanna,' job No. 1790." This latter list contains over 180 items. It is not the original list of repairs prepared by the plaintiff. Mr. Miller swore that the original list contained only 65 items and that afterwards, at some date or dates which he does not specify, 122 additional items were added. His motive in making this statement appears to have been to escape the consequence of an estimate by his works manager and by himself that the work which his firm was asked to do would cost in the vicinity of $35,000. When the ship arrived in Montreal, with Capt. Barlow in charge, Cameron, plaintiff's works manager, and Burns, one of plaintiff's sub-superintendents, went on board the ship, where they were met by Capt. Barlow, by Smith and Auditore. The latter gentleman called the attention of Messrs. Cameron and Burns to the work that was to be done, of which Cameron took note at the time. Capt. Barlow also put the items down in a little work book which he carried, and he swears that he afterwards got the repair list made by Cameron, compared it with the notes in his own book,

found they agreed and that he re-copied the list into a private book for future reference. Capt. Barlow swears that the ship was subsequently stranded, when he lost a considerable amount of personal property, clothing, and this little note-book, but he produced and filed before the registrar, as defendant's ex. D-7, the list of repairs which he had copied in his private book. This list is dated July 15, and contains over 150 items. There is no doubt it is a duplicate of the list of repairs made by Cameron and Burns 3 days before, on which both Cameron and Miller made their estimate of $35,000. A comparison of Capt. Barlow's list with Miller's list shows that the latter contained some 30 additional items, mostly small wooden jobs. Capt. Barlow swears that his list includes the work discussed with Cameron and Burns and on which Cameron was to figure on the cost. The additional items to be found in ex. P-5 were ordered in writing by Capt. Barlow as extra work and the original orders were delivered to the plaintiff. Plaintiff produced neither the original list made by Cameron and Burns, nor the orders for the extra work, and Capt. Barlow's evidence, that the extras were not worth more than $1,000 or $1,200, is uncontradicted. After the examination of the ship by Cameron and Burns, Miller wrote a letter to the owner in the following terms:—

July 12, 1917.

Frank Auditore, Esq.,
Windsor Hotel, Montreal, Que.

Mr. Cameron has been thoroughly through the "Susquehanna" and finds it absolutely impossible, in the incomplete state in which the various items are, to figure a definite price. He estimates, and, judging by the description I think he is correct, that this work will cost in the vicinity of $35,000, apart from joining together.

We are prepared to quote you a firm price for joining together of $22,000, including dock dues, but not including any repairs to damage done in coming through the canal.

We would, however, much prefer that you take the ship to New York for completion, as I am fully confident that, notwithstanding the condition of the yards in New York, you are more likely to get a quicker job from your friend Mr. Todd than from us, as we cannot possibly afford to draw a large number of men off present work.

We will be glad to let you know as soon as we ascertain the extent of the damage to the "Singapore" when your ship can get on the dock.

I am sorry we cannot quote you a firm price, but you will understand the conditions. (Sgd.) P. L. MILLER.

The examination of the ship by Cameron and Burns had been made on the morning of July 11 or July 12, before the foregoing

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letter was written by Miller, when the plaintiff had in its possession the original list prepared by Cameron containing over 150 items of repairs and agreeing with the list made by Capt. Barlow. It is worthy of note that neither Cameron nor Burns were called as witnesses on behalf of the plaintiff. Miller's letter admits that Cameron had made a thorough examination of the ship. That agrees with the evidence of Capt. Barlow. The letter further admits that Cameron estimated the cost of repairs in the vicinity of $35,000. Mr. Miller himself admits that he gave an estimate of $35,000, but says that the original list upon which he based that estimate contained only 65 items, and that 122 were afterwards added as extras. There is a serious contradiction in Miller's evidence as to when the original list was prepared. He first swore it was made up about July 25 or 26, and then stated that he had it when he wrote the foregoing letter on July 12. As the original list of repairs was in plaintiff's possession and under the control of Miller, and he did not see fit to produce it, I am unable to accept his evidence that either Cameron's estimate or his own of $35,000 was based upon 65 items of repairs. It would have been an exceedingly easy matter for plaintiff to have established that the estimate given by Cameron and Miller was based on 65 items if such were the fact. The suppression of the written evidence shewing the items on which the estimate of $35,000 was made, the failure to call Cameron and Burns as witnesses and the contradictions in Miller's own evidence, satisfy the court that his testimony on this question cannot be accepted. The work commenced in the harbour on July 13, the ship arrived at the plaintiff's works on July 18, and was finished on August 15, 1917, when the two parts of the ship were towed to Quebec and there joined together by the Davis Shipbuilding and Repairing Co., Ltd., and the ship was then taken to New York. It is common knowledge in shipping circles that shipyards on the St. Lawrence have to tender for ship-repairing in competition with shipyards in New York and other points on the Atlantic seaboard. It is proved in this case that shipyard labour at the time the work was done to the "Susquehanna" was lower at the plaintiff's works than in shipyards in New York. The defendant examined three witnesses who had examined the ship and the work done by plaintiff and were competent to give an estimate of the fair market

value of the work. Fred. L. Worke, of Brooklyn, N.Y., marine superintendent of the owner of the ship, had 19 years' connection with shipping, 10 years at sea, the greater part of that time as chief engineer, and 9 years as marine superintendent for two different companies, 5 years of the latter period being superintendent of a general ship-repairing company. He examined the ship on her arrival in New York, in September, 1917, in company with Capt. Barlow and two experts to whom I shall presently refer. The work done by plaintiff was gone over and examined in detail, and Worke's estimate of its value was around $23,500. James H. B. MacKenzie, of New York, consulting engineer and ship surveyor, who had been to sea for 7 years, part of the time as chief engineer, and who had been for 10 years in the employ of one of the biggest ship-repairing firms of the United States, for 5 years as outside foreman and for the last 5 years as assistant to the superintendent, and having a great deal to do with estimating for repair work, and for the last 6 years has been in business for himself as consulting engineer and ship surveyor, examined the "Susquehanna" 2 or 3 days after her arrival in New York. Worke and Capt. Barlow were present and pointed out to him the repairs made in Montreal, and MacKenzie estimated the value of the work done by plaintiff at $25,000. When this estimate was made, this witness was not aware of the purpose for which the estimate was wanted. The work described to this witness by Worke as having been done in Montreal is set out in a statement signed by the witness and filed as ex. D-5, and a comparison of the items contained in this statement with the plaintiff's list of repairs filed as ex. P-5 shews that the two documents correspond as far as detailed description of the work is concerned, and for that work MacKenzie's first estimate was $22,000, subsequently increased to $25,000. Charles E. Ross, of New York, naval architect, engineer and surveyor, who, since leaving the University of Pennsylvania in 1889, has been continuously employed in the ship construction and repair business, and who for some years has been in a consulting capacity associated with Frank S. Martin, of New York, chairman of the Board of Consulting Engineers and Survey of the United States Shipping Board, examined the "Susquehanna" in New York, in September, 1917, and signed defendant's ex. D-5. The nature, kind and description of the work which he examined

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on this occasion was explained to him by Worke, and his estimate of the value or market price of the work done in Montreal on the ship was $22,000, and he subsequently made a re-examination and a revised estimate of $25,000. When this estimate was made Ross had no knowledge of what plaintiff was attempting to collect. MacKenzie and Ross have no connection whatever with the defendant or the owner of the ship; they were asked to examine the work done by the plaintiff and they gave their opinion as to its value after having seen and examined it. Unquestionably, these gentlemen were competent persons to express an opinion on the value of the repairs and the weight to be attached to their testimony was in no way affected in their cross-examination.

As has already been pointed out, plaintiff at the reference before the registrar attempted to change the basis of its action and to establish the liability of the defendant on the basis of the cost of the work to the plaintiff plus a net profit of over 47% on such cost. In considering the cost of the repairs consideration must be given to the cost of the material supplied definitely ascertained and the direct labour definitely ascertained, and a further sum necessarily indefinite in amount representing a proportion of the general expenses of the company doing the work. In this case, plaintiff sought to add to the cost of the material, plus 5% added for handling charges, and the amount paid out for direct labour a further item called overhead factor, 90% on labour, and to the total so obtained added 47.3% for net profit. Miller, when asked to explain this overhead charge, stated: "The overhead covers all items which, according to our method of keeping our books, are not directly charged to the cost of doing any particular job." He then explains that other firms make up their overhead in a different manner according to their method of keeping their books. The attempt to include in the bill against the defendant an overhead factor of 90% on labour has introduced endless confusion and controversy in this case, and if it were necessary to digest the evidence relating to what properly constituted overhead charges a large mass of contradictory evidence would have to be referred to.

The principal items of the overhead charge on which differences of opinion exist are: Work supervision, depreciation, liability insurance, administration expenses and interest. It was estab-

lished before the registrar and subsequently admitted by counsel for plaintiff that there were amounts exceeding 41% overcharged in connection with the items of works supervision and liability insurance; depreciation at the rate of 50% per annum was charged on new buildings of a substantial and permanent character and fixed plant, without due regard to the reasonable life of the property; excessive amounts were charged for administration expenses and a large amount of interest on loans which, according to the most reliable evidence in the record, including an admission of one of plaintiff's experts, does not form part of the cost of the work and should not be included in overhead charges. The plaintiff's repair shop is only a small part of the plant, and it is proved that, according to a schedule produced to defendant's expert accountant when he examined the plaintiff's books in its office, the repair shop overhead was 38%, and if the deductions which were proved at the reference were taken off, that percentage would be considerably reduced. The plaintiff's plant is undoubtedly well equipped from the point of view of buildings, machinery and management. The work on the "Susquehanna" was a comparatively small repair job. One of plaintiff's experts, Commander Skantelbury, in speaking of the shipyard and the repairs in question, swore: "It is equipped for a navy yard and it is over-equipped for small work of that description." The impropriety of attempting to inflate the overhead charges against defendant for the work done because plaintiff's yard was over-equipped for small work of that description must be apparent. The general result of the evidence on the items making up the overhead charge, in my opinion, shews that if this were a case where overhead charges should be taken into consideration, plaintiff has charged nearly twice as much for that item as the evidence justifies.

The plaintiff's bill before the registrar includes an item of 47.3% net profit. It is important to bear in mind that Miller swore that the profit charged includes absolutely nothing for interference with other work, for war conditions or for any special or unusual purpose. He claims only what he designated as normal profits under the climatic conditions in Montreal. Notwithstanding the stand so taken by plaintiff's manager, counsel for plaintiff endeavoured to justify the large profit claimed by

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evidence and argument, that men had to be withdrawn from other work which was consequently delayed and that the country was at war, and therefore plaintiff was entitled to take advantage of these special circumstances in the form of higher charges than would be justified under normal conditions. Such contentions are entirely without force in face of the manager's admission. It is proved that the number of workmen employed in plaintiff's yard at the time the reference was heard was substantially the same as were employed when the repairs were made to the "Susquehanna." It is quite true that repairs cannot be carried on to the same extent in winter as in summer, but other work, no doubt equally profitable to plaintiff, was under way in the winter season, engaging the services of substantially an equal number of workmen. Commander Skantelbury swore that having regard to local conditions in Montreal, in his opinion, 30% would be a fair profit to add to the cost of the work, and then in answer to leading questions by plaintiff's counsel, which should have been rejected on the objections made, permitted himself to be led to state that having regard to conditions at the plaintiff's shipyard (and no doubt influenced by the fact that the yard was over-equipped for repair work) the account should have been for about $80,000, and later reduced the percentage of profit to about 60% on the cost. Such evidence is not reliable. Mr. Bonnyman was impressed by the severity of the Canadian winter weather and put the percentage of profit at about 40% on the cost in order to enable plaintiff's business to exist. He had no knowledge of summer conditions here or of the work done on the ship, and refused to state what the work was worth. It was proved that 7 other ships were under repair at plaintiff's yard while the work was under way on the "Susquehanna," but plaintiff offered no evidence of the profit or overhead charged for such repairs. There is, however, evidence that within the year preceding the repairs on the "Susquehanna" plaintiff made varying charges on a number of other ships as follows: 40% overhead on drifters, 45% against the Electrical Boat Co., 55% overhead and 10% profit to the British Admiralty for jobs on over 60 vessels for work done partly in the harbour and partly at plaintiff's yard, and 65% overhead on trawlers. Plaintiff appears to have had different prices for different owners, and there was no uniformity of charges to other

ships so far as such charges were disclosed. Counsel for plaintiff in his factum or written argument before the registrar says in reference to the work done for the Admiralty that "the allowance of 55% for overhead and 10% profit practically gave the plaintiff a clear profit of 65% upon the cost to it of the work." Part of the plaintiff's work on the "Susquehanna" was done in the harbour before the ship reached the shipyard and to that extent the conditions were similar to the work done for the Admiralty, and if plaintiff's claim for 90% overhead and over 47% profit were maintained, it is apparent plaintiff would make a most exorbitant profit on the job. None of these rates were disclosed to the owner of the "Susquehanna" before he entrusted his ship to the plaintiff. The manager of the plaintiff has sworn that as no price was fixed in advance he thought he was entitled to charge any price he liked, provided it was fair and reasonable. The burden was upon plaintiff to establish that its account represented the fair market value of the repairs. If the cost were definitely ascertained a net profit of 10%, or at most 12½% would have been fair and reasonable under the circumstances and in view of the evidence in the case. If the average of the overhead charges to others as just stated were added to the charges for labour and a net profit of 12½% added to the cost of material, labour and overhead so ascertained, the total would be under $35,000, the approximate estimate given by the plaintiff's works manager, and manager before the work was undertaken.

This is an ordinary *quantum meruit* action, but plaintiff sought to change its nature on the reference and endeavoured to prove its case as if the action were based upon a contract to pay the cost of the repairs, plus a profit. The registrar proceeded upon a wrong principle and granted the plaintiff everything that it asked on the reference. His report contains no finding on the fair market value of the work done and the materials supplied. The defendant's witnesses, Worke, MacKenzie and Ross, were competent witnesses within the rule laid down by Dr. Lushington, and the principle put forward by plaintiff's counsel, to give an opinion on the value of the repairs. They had seen the work and examined it, and, in my opinion, their evidence is the best evidence on the value of the work done and the materials supplied. It is true their estimate was based on New York prices, but labour at

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plaintiff's yard was lower than in New York, and the defendant was willing to pay several thousand dollars more for the purpose of avoiding the trouble and expense of protracted litigation. There is an item of $2,000 in the account for towage which is not disputed. The plaintiff's estimate of $35,000 was well over the mark and exceeded the value of the repairs. I find that defendant's offer was sufficient and the amount due to the plaintiff by defendant is $35,000.

Before the reference was applied for, the defendant, through its solicitors, filed an admission of liability for the work done and materials supplied, offered to settle for $35,000 in order to avoid further litigation, denied liability for any greater sum and notified plaintiff that if it persisted in its refusal to accept said sum defendant would ask for costs on the reference. The defendant had furnished a bond for $55,000 as security for the plaintiff's claim and, under the circumstances, there was no necessity for a tender or payment in court, and the costs of the reference should have been avoided. The defendant is therefore entitled to the costs of the reference, *The Reading* (1908), 77 L.J. Adm. 71.

There will be judgment for the plaintiff for $35,000, with costs up to the filing of the admission of liability, and the defendant's offer to pay that amount, the plaintiff will have to pay the defendant the costs of the motion for the reference, the costs of the reference and of the present motion to vary the registrar's report and the report will be varied accordingly.

Judgment accordingly.

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Re LAND REGISTRY ACT; Re BLANCHARD AND MORGAN.

British Columbia Supreme Court, Macdonald, J. January 9, 1919.

WILLS (§ III G—120)—REAL PROPERTY—ABSOLUTE DEVISE TO TWO PERSONS EQUALLY—SUBSEQUENT CLAUSE RESTRICTING—INTERPRETATION—ABSOLUTE ESTATE—REGISTRATION OF TITLE.

In construing a will, its entire contents and the circumstances existing at the time of its execution must be considered, and an endeavour made to carry out the intention of the testator. A clause "to have full use of the house and land, to reside in or let as he thinks fit until the year 1917, when the property must be sold at latest, or earlier if the amount of not less than $8,000 can be realized," following an absolute disposition previously made to the same party in equal shares with another, held not to affect the absolute disposition previously made, and that the parties were entitled to be registered as absolute owners without any limitation.

Statement.

APPEAL from a refusal of the registrar-general to register certain devisees under a will as absolute owners of the property devised.

Harold Robertson, for Blanchard and Morgan; Registrar-General in person.

MACDONALD, J.:—By her will, dated June 18, 1913, Emma Wylie "bequeathed" to her friend and manager, Edward Norris Blanchard, and to her niece, Annie Mabel Morgan, in equal shares, property described as the east half of lot nineteen (19), map 180, Lake Hill Estate, Victoria, B.C. Mrs. Wylie was killed in the torpedoing of the "Lusitania" on May 7, 1915. Her will was duly probated and an application was made to register Mr. Blanchard and Miss Morgan as absolute owners of the property. The registrar-general has refused the application in such form, and would only allow registration with the reservation that the property was held by such parties in trust. It is sought to reverse his decision in this respect. The ground taken by the registrar is, that the following words in the will removed what might otherwise have been an absolute disposition of the property in favour of the parties, viz.:—

> Edward Norris Blanchard to have full use of house and land to reside in or let as he thinks fit until the year 1917, when the property must be sold at latest or earlier if the amount of not less than eight thousand ($8,000) dollars can be realised.

This is a peculiar proviso and seems to indicate that the testatrix was satisfied that she would die before the year 1917. Otherwise it would be ineffective. It is difficult to determine what either she or the conveyancer had in mind, in thus controlling the use of the property. It may have been simply a precaution limiting the occupation of Mr. Blanchard and thus benefitting Miss Morgan. It is contended, however, that the result is that the parties are only trustees of the property. It is pointed out that at the close of the will, any residue is to be divided amongst the great-nieces and nephews of the testatrix who are alive at her death. She appointed P. Morgan and Edward Norris Blanchard as her executors.

In construing the will, I am required to consider its entire contents, so as to give it full effect. I should also endeavour, if possible, to carry out the intention of the testatrix. In taking this course, I must bear in mind that the nature of the will must be interpreted "according to its proper acceptation, or with as near an approach to that acceptation as the context of the instrument, and the state of the *circumstances* existing at the time of

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its execution, will admit of." Mrs. Wylie seems to have been possessed of various stocks and shares and the gross value of her estate was fixed at £6,535. She gave various specific legacies and, even after these had been paid, there would be considerable residue of her personalty to be divided amongst her great-nieces and nephews. I can assume that the testatrix had some good reason in referring in the commencement of her will to her manager and her niece. Did she intend, by thus singling them out for her first consideration, to simply name them as trustees, for her great-nieces and nephews? This would seem unlikely and would not be a mark of favour, but rather the contrary. It would be imposing a responsibility on two persons, one of whom was resident in England. Then again, as indicating her desire to give property to one of these parties, I find the succeeding clause in the will reads as follows:—

In addition to the above property I bequeath the sum of two hundred pounds (£200) to Edward Norris Blanchard and the use of furniture, horses, rigs and stock until he sells all, the money from sale of furniture, horses, rigs and stock to go to my estate.

The ordinary plain reading of this bequest would indicate that the testatrix entertained the belief that she had already, by her will, bequeathed property to Mr. Blanchard and was making him an additional gift, with the use of some property until it was disposed of. A further strong point, in favour of the conclusion that Mrs. Wylie gave the land absolutely, and not to be held in trust, arises not only from the wording of the will, but from the fact that if Miss Morgan, her neice, were simply to be a trustee, she would obtain no benefit whatever under the will. One trustee resident in the province would, if so intended, have been sufficient, and the mention of Miss Morgan's name would be without any apparent aim or object, unless she was to become really possessed of part of the property of the testatrix. She would not even be in as good a position as the *great-nieces*, who were to share in a division of what would be, irrespective of the real estate, a substantial residue of the estate. So I do not think the provision as to the use of the house and land, which is the sole basis for the contention as to trusteeship, controls or limits the previous portion of the will. In my opinion, Mrs. Wylie intended to give the property in question to Mr. Blanchard and Miss Morgan in equal shares absolutely. In coming to a conclusion, as to the

interpretation of this portion of the will, I have followed the principle, referred to by Buckley, J., in *Kirby-Smith* v. *Parnell*, [1903] 1 Ch. 483, at 489, 72 L.J.Ch. 468, at 470, as follows: "I ought to read the whole of the will and from it ascertain the testator's intention." I have endeavoured not to speculate on what the testatrix might have intended to do but endeavoured to carry out her intention as far as the words of the will will permit. I have sought to ascertain "what she wished by interpreting what she said," *vid.* Rolfe, B., in *Grover* v. *Burningham* (1850), 5 Ex. 184, at 193-4, 155 E.R. 79. There should be an order directing the registrar to register the property absolutely in the name of the applicants without any limitation.

Judgment accordingly.

AMERICAN SHEET AND TIN PLATE Co. v. PITTSBURGH PERFECT FENCE Co.

Exchequer Court of Canada, Cassels, J. October 23, 1918.

TRADE MARK (§ VI—30)—SPECIFIC TRADE MARK—REGISTRATION—RESEMBLANCE TO EXISTING MARK—MANUFACTURED ARTICLES DISSIMILAR.

In an application for the registration of a specific trade mark, where the resemblance to an existing registered trade mark is not sufficient to cause deception, registration should be granted.

[See annotations 2 D.L.R. 380, 31 D.L.R. 602, 35 D.L.R. 519, 37 D.L.R. 234.]

Statement.

PETITION for an order directing the registration of a trade mark.

Peers Davidson, K.C., for petitioners; *F. H. Chrysler*, K.C., for respondent.

Cassels, J.

CASSELS, J.:—The petitioners ask for an order directing the registration in the trade mark register of the Department of Agriculture, Ottawa, of a trade mark claimed to be their property.

The trade mark in question consists in the outline of a keystone bearing across the face of the same and extending at each side the word "Keystone," and above this symbol an ellipse of broken lines surrounded by the words "American Sheet and Tin Plate Co.—Trade Mark."

The drawing of the said trade mark is shewn in the application marked ex. 1, on the application before me. The registrar refused the application on the ground that representations of the keystone had already been registered in favour of the Pittsburgh Perfect Fence Co. Ltd., and Henry Disston & Sons, Inc.

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Notices as required by the statute were duly served upon the Pittsburgh Perfect Fence Co., and also upon Henry Disston & Sons. The Pittsburgh Perfect Fence Co. appeared in opposition to the petition. Henry Disston & Sons entered no appearance, but allowed the matter to go by default.

The case was tried before me on September 13 last, and at the request of counsel for the petitioners, the hearing was adjourned, written arguments to be furnished by counsel.

Arguments have been filed on the part of the petitioners, and also on the part of the respondents, and I may state that the arguments of both counsel are commendable for the clearness with which their respective views are stated. Counsel have selected certain authorities which shew the principles which would govern any applications of this nature, and I have myself refrained from multiplying citations. It is easy to multiply authorities in trade mark and patent cases by the thousand, but in my view nothing is gained by so doing.

After the best consideration I can give to the case, I am of opinion that there is no reason why the petitioners should not be entitled to registration of their trade mark. What they ask is that their registration should be for a specific trade mark, as being representative of steel sheets and plates of rolled soft steel, not tool or crucible steel. It has to be borne in mind at the threshold of the case that there is no application on the part of the petitioners to register as their trade mark the word "Keystone" by itself.

The first ground of objection by the Pittsburgh Perfect Fence Co. is to the effect that on May 27, 1904, they registered in the Department of Agriculture a specific trade mark consisting of a keystone with the words "Pittsburgh Perfect" and the initials of the company's name, viz., "P.P.F.Co." Such drawing is set out in the statement of objections on behalf of the Pittsburgh Perfect Fence Co. filed in this court.

It is conceded that since the year 1913, the petitioners in this case have continuously used their trade mark on goods manufactured and sold by them, and have built up a large business in the manufacture and sale of sheets and plates of rolled soft steel, not tool or crucible steel.

It is also conceded that the respondents, the Pittsburgh Perfect Fence Co. have never manufactured or placed upon the market

goods of a class similar to those manufactured and sold by the petitioners in this case.

It must also be kept clearly in mind that the respondents in no way claim as a trade mark the word "Keystone" or the symbol of a keystone by itself. Their trade mark has a keystone, but in combination with other symbols described in their application. Not merely have they never used their trade mark on materials of a similar class to those manufactured and sold by the present petitioners, but I do not think, notwithstanding the argument on their behalf, that they ever contemplated or intended to manufacture or to sell steel sheets similar to those manufactured and sold by the petitioners.

I think there is a great deal of force in Mr. Davidson's reference to the charter incorporating the Pittsburgh Perfect Fence Company, Limited. That charter is dated November 13, 1903. It incorporates the corporation with the corporate name of the Pittsburgh Perfect Fence Company, Limited. They are created a corporation for the purposes and objects following, that is to say:—

> To construct and erect fences of every nature and description, and for the said purpose, to manufacture, produce, buy, sell and trade and deal in iron, steel, wire and other metals of every description and all products and articles made therefrom.

It is not necessary to deal with the intricate question, so often lately discussed, as to whether or not, considering the limited purposes for which the company was incorporated, they could nevertheless embark in the general business of manufacture. The latest case that I have had the pleasure of reading, and one very instructive, is that of *Edwards* v. *Blackmore* (1918), 42 D.L.R. 280, 42 O.L.R. 105, decided by the Appellate Division of Ontario.

At present I merely refer to the fact that from the time of their incorporation, namely, November 13, 1903, down to the present time, they have never manufactured the class of goods so extensively dealt in by the present petitioners; and, moreover, the purpose of their incorporation was to construct and erect fences, and for that purpose to deal in the articles mentioned.

As I have pointed out, there has been no claim put forward upon the part of the Pittsburgh Perfect Fence Co. that the word "Keystone" forms their trade mark; and this is further empha-

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sized by the fact that on December 30, 1913 (ex. 5) a consent was given to Henry Disston & Sons, in which they state that:—

We can see no possibility of our being hampered on account of Henry Disston & Sons, Incorporated, having the keystone registered as their trade mark in Canada on the articles below enumerated,

naming these articles. Henry Disston & Sons have never, according to the evidence, used the word "Keystone" by itself as their trade mark, but always in combination; and they have only manufactured the articles referred to in their application for a trade mark, a class of articles entirely dissimilar to the articles manufactured and sold by the petitioners.

There is no suggestion of any fraudulent intention on the part of the petitioners to steal the trade of the respondents, nor could it be possible under the circumstances of this case that such contention could reasonably be put forward.

There is no similarity between the trade mark of the petitioners and the trade mark of the Pittsburgh Perfect Fence Co. From the year 1913 to the present time the petitioners have been using their trade mark without any objection on the part of the Pittsburgh Perfect Fence Co. or any other person. This is not a case of "passing off."

Our Trade Mark Act, c. 71 R.S.C., as it has been stated, differs in a great many respects from the English Trade Mark Acts. It provides by s. 5 that:—

All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade marks.

S. 11, however, which reads as follows:—

The Minister may refuse to register any trade mark—(*a*) if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade mark;

(*b*) If the trade mark proposed for registration is identical with or resembles a trade mark already registered;

(*c*) If it appears that the trade mark is calculated to deceive or mislead the public;

(*d*) If the trade mark contains any immorality or scandalous figure;

(*e*) If the so-called trade mark does not contain the essentials necessary to constitute a trade mark, properly speaking;

limits the application of the Act.

I cannot do better than quote from the language of the late Lord Macnaghten, in the case of *Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.*, [1911] A.C. p. 84. His Lordship gave the decision of the Board, and is reported as follows:—

On the question as to the validity of the alleged trade mark, their Lordships are compelled to differ from the Court of King's Beach. The Canadian Trade Mark and Design Act (1879), (42 Vict., c. 22), requires trade marks to be registered. It does not, however, contain a definition of trade marks capable of registration. It provides that "All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him applied in any manner whatever, either to such manufacture, product or article, or to any package, parcel, case, box or other vessel, or receptacle of any description whatsoever containing the same, shall for the purposes of this Act be considered and known as trade marks."

The Act, however, declares that the Minister may refuse to register any trade mark "if the so-called trade mark does not contain the essentials necessary to constitute a trade mark, properly speaking."

The Act does not define or explain the essentials of a trade mark, nor does it provide for taking off the register an alleged trade mark which does not contain the requisite essentials. In applying the Act the Courts in Canada appear to consider themselves bound or guided mainly by the English law of trade marks and the decisions of the courts of the United Kingdom.

A case that to my mind has considerable bearing on the case before me, is the case of *Re Bagots, Hutton & Co.'s Trade Mark*, [1916] 2 Ch. 103. This was a case in which a decision of Neville, J., was reversed by the Court of Appeal. The judgment in appeal is reported in L.R. 2 Ch. D. 103. The application there was on the part of Bagots Limited, for the registration for gin of a trade mark comprising the picture of a cat in boots. The allegation made by the opponents to the registration was that the proposed trade mark would be calculated to deceive by reason of the fact that in some eastern countries a certain gin manufactured by the opposers had become known as "Cat Gin." It would appear that the device of a cat was common to the gin trade. In the case before me the symbol of a keystone by itself or in combination with other words is also common. However, their Lordships reversed the decision in the court below and ordered registration of the trade mark. There was an appeal taken to the House of Lords. The case in appeal is reported in [1916] 2 A.C. 382. The appellants contended that their goods had become known in the United Kingdom, and in the markets of the world, by the name of

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"Cat Brand," and that the trade mark which the respondents were seeking to register was calculated to cause the goods bearing the same to be described as "Cat Brand" goods, and to be passed off as and for the appellants' goods.

At p. 387 the Lord Chancellor states that in this case the appellants seek to prevent registration of a trade mark which the respondents have used in this country for at least 17 years, upon the ground that if registered it would be calculated to deceive. He states that:—

> So far as the probability that deception owing to the resemblance of the two marks could occur, it is sufficient to say that a mere glance is sufficient to dispel any such apprehension.

I think the same language might be used in the case before me.

Lord Loreburn, at p. 392, states: "It was not calculated to deceive anyone in the United Kingdom."

At p. 393, Lord Haldane's reasons are set out, and he states:—

> The appellants' trade mark is not a cat, but a cat on a barrel, and the appellation of their brands ought properly to be "Cat and Barrel" brands, and not "Cat" brands. To the more general appellation they are not entitled, etc.

As I have pointed out, the Pittsburgh Perfect Fence Co. are not entitled to the trade mark "Keystone," but to this word in combination with other words, and symbols, and I fail to see how any person could be deceived by the use by these petitioners of their trade mark.

If, hereafter, any fraud is attempted by the petitioners, there is a remedy in the courts. I do not myself apprehend that such an action will ever arise. I think the application of the petitioners should be allowed, and the order made directing the registration.

The petitioners have asked that the registration should be rectified by limiting the trade mark of the Pittsburgh Perfect Fence Co. and the Henry Disston & Sons, so as to confine their trade mark to a specific trade mark for the particular goods manufactured by them, and excluding therefrom the goods manufactured by the present petitioners. I do not think that this relief is necessary.

Under the circumstances of the case I think that no costs to any party should be allowed, but each party bear their own costs.

Petition granted.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. December 15, 1918.

MALICIOUS PROSECUTION (§ II B—17)—MALICE IN FACT MUST BE PROVED—NOT LEGAL MALICE.

The malice which a plaintiff in an action for malicious prosecution has to prove is not malice in its legal sense, but malice in fact, *malus animus*, indicating that the defendant was actuated either by spite or ill-will against the plaintiff.

[See annotation 14 D.L.R. 817.]

Statement.

APPEAL by defendant from a judgment of Walsh, J., in an action for malicious prosecution. Reversed.

C. F. Harris, for appellant; *D. H. Elton*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from a judgment directed by Walsh, J., upon the verdict of a jury. The action was one of malicious prosecution.

In the conduct of the trial the trial judge first submitted the evidence to the jury for the purpose of deciding the question of reasonable and probable cause, and upon their finding he held that there was a want of reasonable and probable cause. He then directed them on the subject of malice, upon which they brought in the following verdict:—

There was no personal malice or spite proven or indicated but in our opinion the defendant did not take all necessary steps to ascertain from Mr. Scott the ownership of the heifer before taking proceedings.

To that extent, in our opinion, malice from a legal standpoint has been shewn.

They assessed the damages at $1,700.

Upon that verdict, judgment for the plaintiff for $1,700 and costs was directed.

In 19 Hals., p. 679, it is stated that:—

The malice which a plaintiff in an action for malicious prosecution . . . has to prove is not malice in its legal sense . . . but malice in fact *malus animus* indicating that the defendant was actuated either by spite or ill-will against the plaintiff or by indirect or improper motives.

It is contended by the defendant that, what the jury found was only malice in its legal sense and not malice in fact, and that they found an absence of malice in fact, and, consequently, he is entitled to judgment on the verdict.

In *Cox* v. *English Scottish, etc., Bank*, [1905] A.C. 168, Lord Davey, in delivering the judgment of the Judicial Committee, said, at p. 170:—

The principles applicable in these cases have been laid down for the English courts in the case of *Abrath* v. *North Eastern Ry. Co.* (1883), 11

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Q.B.D. 440, in which Bowen, L.J., said (p. 455), "in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution . . . and lastly, that the proceedings of which he complains, were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice."

The summing up of Cave, J., the trial judge, in the *Abrath* case was questioned, and the case went to the House of Lords, where, as well as in the Court of Appeal, it was approved. On p. 444 it is stated that he concluded his summing up as follows:—

The questions which I ask you are these:—(1) Did the defendants take reasonable care to inform themselves of the true state of the case? (2) Did they honestly believe the case which they laid before the magistrates? If both questions are answered in the affirmative, that they did take reasonable care and they honestly believed the case they laid before the magistrates, that is a verdict for the defendants, because please bear in mind that it is for the plaintiff to prove they did not. Then if either question is answered in the negative, that is, if the defendants did not take reasonable care or if they did not honestly believe the case which they laid before the magistrates, then you must ask yourselves this further question, were the defendants actuated by any indirect motive in preferring this charge? If they were not, then again your verdict must be for the defendants. If they were, then you must find your verdict for the plaintiff, and, then in that case, you must ask yourselves what damages you give.

The first two questions deal with the facts constituting reasonable and probable cause, the third with the state of mind of the defendant constituting malice.

In a later case of *Brown* v. *Hawkes*, [1891] 2 Q.B. 718, questions in almost the exact terms of those submitted in the *Abrath* case were submitted, the first being answered in the negative and the other two in the affirmative. On these answers a verdict was entered for the plaintiff, which was set aside on appeal. The principle of the decision is stated in the head-note as follows:—

By the Court of Appeal affirming the judgment of Cave, J., that, although the absence of reasonable and probable cause is some evidence from which malice may be inferred, the jury, by their finding as to the honest belief of the defendant had negatived any inference which depended solely on such evidence; and that in the absence of any other evidence of indirect motive, the finding of the jury that the defendant was actuated by malice could not be supported.

Cave, J., at p. 722, says:—

Now, malice in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice can be proved either by shewing what the motive was and that it was wrong, or by shewing that the circumstances were such that the prosecution can only be accounted for by imputing some

wrong or indirect motive to the prosecutor (and again) he (*i.e.*, the defendant as prosecutor) may also have been hasty, both in his conclusion that the plaintiff was guilty and in his proceedings; but hastiness in his conclusion as to the plaintiff's guilt, although it may account for his coming to a wrong conclusion, does not shew the presence of any indirect motive.

And on p. 723, he says:—

Of course there may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made and in that case want of reasonable and probable cause is evidence of malice. But I am not prepared to assent to the proposition that, where there is want of reasonable and probable cause the jury may always find malice, no matter what the circumstances may be.

In the Court of Appeal, Kay, L.J., at p. 728, says:—

It was assumed by the House of Lords in *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521, that if circumstances of suspicion exist which might readily have been explained by proper enquiry, and no enquiry is made, that is some evidence of want of reasonable and probable cause. . . . As I understand the argument for the plaintiff it was said that the evidence to prove malice was that the defendant did not make proper enquiry as to the facts of the case. If that is all, and if that evidence is sufficient, the result would be that the finding of the first question put to the jury, that the defendant did not take proper care to enquire into the facts of the case, would, without more, determine the action in favour of the plaintiff. That cannot be so.

In a later case, *Watson* v. *Smith*, [1899] 15 T.L.R. 473, the Court of Appeal, differently constituted, expressed much the same views. A. L. Smith, L.J., is reported as follows:—

Assuming absence of reasonable and probable cause had been made out, the plaintiff had still to prove malice in the defendant. The jury in the present case had found that the defendant had an honest belief in the guilt of the plaintiff. It seemed clear to him that the jury, by that finding, had negatived malice.

From the authorities quoted, it seems perfectly clear that absence of reasonable and probable cause is some evidence from which malice may be inferred, but that it is something entirely distinct and different. The latter is entirely a state of mind; the former is at least partly an extraneous condition arising by reason of the non-existence of certain facts. The verdict in the present case to my mind quite clearly confuses one of the elements of the former with and substitutes it for the latter.

The making of enquiry, as the cases shew, is something to be considered in determining the existence of reasonable cause, but it is certainly not a state of mind, as the malice which is necessary to support an action of malicious prosecution is.

If it be argued that the jury meant that they inferred malice

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from the failure to make the proper enquiries from the plaintiff, the answer would be that while in the opinion of Kay, L.J., above quoted, such an inference could not be drawn, the fact is that the jury have negatived that by finding that there was no personal malice or spite.

I can come to no other conclusion from the verdict than that the jury, while honestly finding that there was no actual malice, thought there ought to be protection against prosecutions instituted without reasonable enquiries in all cases. But that is not the law and the jury cannot make it so. There is no doubt that if a person honestly believing in the guilt of another and desiring only the enforcement of the law, lays a charge without making any enquiry whatever, he is not liable to an action, even though the result of enquiries would have shewn him his mistake.

Most persons, however, do not act so, but if they did the legislature might deem it in the public interest to alter the law.

I think the appeal should be allowed with costs and the action dismissed with costs.

Stuart, J. STUART, J., being absent, took no part in the judgment.

Beck, J. Hyndman, J. BECK and HYNDMAN, JJ., concurred with Harvey, C.J.

Appeal allowed.

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Ex. C.

GINGRAS v. THE KING.

Exchequer Court of Canada, Audette, J. November 27, 1918.

ESTOPPEL (§ II—20)—RAILWAYS—NEGLIGENCE—EMPLOYEES' RELIEF FUND —TEMPORARY EMPLOYEE—CONTRACT OF SERVICE.

An agreement by a *temporary* employee of the Intercolonial Railway, as a condition to his employment, to become a member of the Temporary Employees' Relief and Insurance Association and to accept the benefits provided by its rules and regulations in lieu of all claim for personal injury, is perfectly valid and a bar to his action against the Crown for injuries sustained in the course of employment. By accepting the benefits, he is estopped from setting up any claim inconsistent with those rules and regulations.

[*Miller* v. *Grand Trunk R. Co.*, [1906] A.C. 187, and *Saindon* v. *The King* (1914), 15 Can. Ex. 305, distinguished; *Conrod* v. *The King* (1914), 49 Can. S.C.R. 577, followed; *Toronto Power Co.* v. *Paskwan* (1915), 22 D.L.R. 340, referred to.]

Statement. PETITION OF RIGHT to recover damages for personal injuries to an employee of the Intercolonial Railway.

Alleyn Taschereau, K.C., for suppliant; *E. Gelly*, for respondent.

Audette, J. AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover damages in the sum of $3,000 for bodily injuries sustained

by him and which he alleges resulted from the negligence of the Crown's servants.

On the morning of July 31, 1916, between the hours of 10 and 11, the suppliant was engaged, in the Intercolonial Railway yard, at Levis, P.Q., on the government coal plant, or crane trestle, in loading railway cars, by means of coal chutes handled by him, while he was standing on the platform marked "*passerelle*" on plan ex. "E." His work consisted in opening the fly-gate, underneath the bin, by means of a lever pulled by hand, and to lower or raise the coal chutes, as from time to time required to fill the cars. The coal chute was so raised and lowered by means of a wire attached to the chute and worked on a pulley which he controlled by moving up and down, by means of a rope, the weight which appears on the plan and placed above the platform and so working alongside of wooden stringers of 12 x 12-inch.

In the course of one of these operations the nut, attached to the bolt holding together the two pieces of the pulley, having become loose, flew off, the pulley opened and the sheave fell upon the suppliant's head, and his hand becoming entangled in the rope, he was thereby lifted from the ground, having been felled by the sheave, remaining suspended on tip-toe upon the platform. *Toronto Power Co.* v. *Paskwan*, 22 D.L.R. 340, [1915] A.C. 734.

As a result of the accident he suffered much pain, a cut on the head, a fracture of the little finger of the right hand. Finally, gangrene having set in, the little finger had to be amputated, and he now remains with a crippled hand and without this finger. He was 59 years of age at the time of the accident, and he declares, being hardly able to work, earning now weekly from about a year after the accident, but a few dollars.

The Crown has paid all hospital and medical cares and charges occasioned by the accident.

In the view I take of the case, it becomes unnecessary to go into further details of the accident and the cause which occasioned it.

To this claim for damages the Crown, *inter alia*, sets up the plea that, the suppliant being a member of the I.C.R. Employees' Relief and Insurance Association, it is relieved, by the rules and regulations of that association, and by the suppliant's agreement

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on becoming a member thereof, of all liability for the claim now made.

Under the evidence, and the admission of facts filed of record, I find the suppliant, at the time he entered the employ of the Intercolonial Railway, must have signed a document called form 40, and similar to ex. "B" filed herein, and especially that he was given a booklet (similar to ex. "A") intituled "Intercolonial and Prince Edward Island Railways Employees' Relief and Insurance' Association—Rules for the Guidance of the *Temporary* Employees Accident Fund."

He has been given this booklet containing the rules of this insurance association for the *temporary* employees of the Intercolonial Railway, and he has consented to be bound thereby, as a condition to his employment, and to abide by the rules and regulations of the association.

Furthermore, the suppliant, at different dates subsequent to the accident, and in compliance with the rules and regulations of the insurance association, was paid and he received weekly allowances for which he duly gave acknowledgment.

The rules and regulations of the association contain the following provisions:—

The object of the Temporary Employees' Accident Fund shall be to provide relief to its members while they are suffering from bodily injury, and in case of death by accident, to provide a sum of money for the benefit of the family or relatives of deceased members; all payments being made subject to the constitution, rules and regulations of the Intercolonial and Prince Edward Island Railways Employees' Relief and Insurance Association from time to time in force.

Rule 3.—In consideration of the contribution of the Railway Department to the association, the constitution, rules and regulations, and future amendments thereto, shall be subject to the approval of the chief superintendent and the railway department shall be relieved of all claims for compensation for injury or death of any member.

Having said so much, it becomes unnecessary to express any opinion as to whether or not the suppliant's claim could have been sustained on the ground of negligence. The agreement (exs. A and B) entered into by the suppliant, whereby he became a member of the insurance society and consented to be bound by its rules, was a part of a contract of service which it was competent for him to enter into. And this contract is an answer and a bar to this action, for the restrictive rules are such as an insurance society might reasonably make for the protection of their funds,

and the contract as a whole was to a large extent for the benefit of the suppliant and binding upon him. *Clements* v. *London and North Western R. Co.*, [1894] 2 Q.B. 482.

Such contract of service is perfectly valid and is not against public policy, *Griffiths* v. *Earl of Dudley* (1882), 9 Q.B. 357, and in the absence of any legislation to the contrary, as with respect to the Quebec Workmen's Compensation Act, 9 Edw. VII., c. 66, s. 19; art. 7339, R.S.Q., 1909, any arrangement made before or after the accident would seem perfectly valid. Sachet, Legislation sur les Accidents du Travail, vol. 2, pp. 209 *et seq.*

The present case is in no way affected by the decisions in the case of *Miller* v. *Grand Trunk R. Co.*, [1906] A.C. 187, and *Saindon* v. *The King* (1914), 15 Can. Ex. 305, because in those two cases the question at issue was with respect to a *permanent* employee where the moneys and compensation due him, under the rules and regulations of the insurance company, were not taken from the funds toward which the Government or the Crown were contributing. It is otherwise in the case of a *temporary* employee, and I regret to come to the conclusion, following the decision in *Conrod* v. *The King* (1914), 49 Can. S.C.R. 577, that the suppliant's claim is absolutely barred by the condition of his engagement with the Intercolonial Railway. See also *Gagnon* v. *The King* (1917), 41 D.L.R. 493, 17 Can. Ex. 301.

Furthermore, the suppliant having accepted the weekly sick allowance and given the receipt therefor in the manner above mentioned, he "is estopped from setting up any claim inconsistent with those rules and regulations, and, therefore, precluded from maintaining this action." Per Sir Charles Fitzpatrick—*Conrod* v. *The King, supra.*

Therefore, the suppliant is not entitled to the relief sought by his petition of right. *Petition dismissed.*

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Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Drysdale, JJ., Ritchie, E.J., and Mellish, J. December 21, 1918.

TIMBER (§ I—1)—AGREEMENT TO SELL "CULLINGS"—SALE OF GOODS—SUBSEQUENT SALE OF LAND—TERMINATION OF FIRST AGREEMENT.

An oral agreement to sell the "cullings" of his land is a sale of goods within the meaning of the Sale of Goods Act (N.S. Acts, 1910, c. 1); it does not give the purchaser an interest in the land although the trees do not become "goods" until severed from the soil. The purchaser has a legal right as against the vendor to enter upon the land for the purpose

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of cutting and carrying away the timber, but on a sale of the land to another the uncut timber passes under the deed; the prior contract cannot be enforced to the detriment of the purchaser of the land, and becomes impossible of performance.

[*Marshall* v. *Green* (1875), 1 C.P.D. 35; *Jones* v. *Tankerville*, [1909] 2 Ch. 440, referred to.]

Statement.

APPEAL from the judgment of Chisholm, J., in favour of plaintiff in an action claiming damages for entering upon plaintiff's land and cutting and removing timber therefrom. Affirmed by an equal division.

F. L. Milner, K.C., and *W. Ferguson*, for appellant; *G. H. Vernon*, K.C., for respondent.

Russell, J.

RUSSELL, J.:—The plaintiff is the sister of Orlen Hingley, who conveyed to her a lot of land by deed dated June 15, 1917, recorded in the registry of deeds July 9, 1917. The land had been lumbered over and in October, 1916, before the conveyance of the land to the plaintiff, the owner had sold the cullings, that is, the remaining standing trees, to the defendant for $25. Until the case of *Marshall* v. *Green*, 1 C.P.D. 35, was decided, this, I think, would have been held to be the sale of an interest in land, and would have come within the so-called fourth section of the Statute of Frauds, being s. 4 of the original statute of Charles II. Even assuming *Marshall* v. *Green* to have been well decided, of which there is more than a fair doubt, this case is distinguishable, and I think it would be governed by the later case of *Lavery* v. *Pursell* (1888), 39 Ch. D. 508. Under the authority of that case I should hold that the contract was one for an interest in land. As such it was not void, but merely unenforceable by action, and the Statute of Frauds has nothing to say about the matter because the purchaser is not seeking to enforce it by action. He is simply entering upon the land under his implied if not express, and in either case irrevocable, license to cut down and remove his property.

The plaintiff is forbidding him to remove it because she thinks that the contract gave the defendant the right to only 15,000 ft. of the timber, but the trial judge has found that defendant was to have the whole of the cullings and his finding is not attacked. The plaintiff could only get by her deed what the grantor had, and would have to take the land with all incumbrances and easements and subject in equity to all valid licenses of which she had either actual or constructive notice. The contract as to the timber being an oral one could not be registered, and, moreover, the plaintiff had

notice that there was a contract empowering the defendant to enter upon the land and cut the trees. She was mistaken as to the terms of the contract, but while that may be her misfortune, it cannot control the defendant's legal rights.

I do not think any notice to the plaintiff was necessary to the completion of the defendant's rights in the timber. Apart from its effects in displacing the priorities acquired by virtue of registry acts, it is mainly in respect to equitable rights that notice plays so important a part as it does. The defendant's rights are legal rights and have priority to those of the plaintiff in the property.

I am not aware of any case in which the question has been determined whether the Sale of Goods Act has or has not changed the law with reference to the sale of trees while growing upon the land. It may be that the effect of that statute is to make such a sale a sale of goods. If so, the position of the defendant is even better than I have supposed. He was purchasing goods and not an interest in land at all; and the requirements of the Statute of Frauds have been complied with by the acceptance and actual receipt of a part of the property purchased, as was held in the case of *Marshall* v. *Green*, where the tree tops had been accepted and actually received by the vendee and the sale was thus held to be validated.

I have not thus far dealt with a difficulty presented by s. 4 of our own Statute of Frauds, which enacts that:—

> No interest in land shall be assigned, granted or surrendered except by deed or note in writing, etc.

I have considerable doubt as to the application of this section to the case of such a contract as that in question here, simply because I cannot recall its having ever been invoked in any of the numerous cases that have occurred where the question has been raised as to the validity or enforceability of contracts with reference to sales of growing timber or growing grass or fruit trees or other *fructus naturales*. The cases have always, so far as I can recall, been discussed as if the only question were whether they came within the fourth or the seventeenth section of the statute of Charles II., and I suspect that the kind of interest in land referred to in our own fourth section is something more substantial than the mere *fructus* whether *naturales* or *industriales* of the soil.

But let us suppose that s. 4 of our statute is applicable to the

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case and must be reckoned with. As between the immediate parties to the contract there would, I think, be a clear equity to have the contract specifically performed, because of its part performance on both sides, the vendor having put the purchaser in possession and the purchaser having cut and removed part of the timber. The authorities are clear that the acts of part performance for this purpose, while they must be exclusively referable to a contract between the parties and not to some other title, need not be such as to prove the terms of the contract. They merely have the effect of letting in the evidence of the actual oral contract between the parties. If it be said that this is merely an equitable right and not binding upon the plaintiff without notice, then I think that the plaintiff had notice. She had notice, not merely constructive, but actual, that there was some contract under which the defendant had a right to enter upon the land and take the trees, and it was her duty to inform herself as to the actual terms of the contract. But she admits that she made no inquiries:—

Q. Before you bought that property from Orlen, before you got a deed, did you go to Lynds about it? A. No.

Q. To find out whether it was true or not true? A. No, I did not ask him at all.

The plaintiff having been put upon inquiry by the actual notice of a contract between her grantor and the defendant, was bound to inquire of the latter as to the extent of his rights and must hold the property subject to the priority of those rights even if merely equitable and not legal.

For these reasons I think that the appeal should be allowed and the plaintiff's action dismissed.

Ritchie, E. J.

RITCHIE, E.J.:—I am of opinion that s. 2 of the Sale of Goods Act, 1910, has changed the law with reference to the sale of standing trees and that such trees must now, in determining the rights of parties, be treated as, and held to be, goods. I think it sets at rest a question which has long been a vexed one, giving rise to much difference of judicial opinion. Our Act is in the same terms as the English Act. In this case the trees were to be severed under the contract. In 25 Hals., p. 112, it is said:—

The Sale of Goods Act, 1893, relates only to goods as thereby defined, and the sale or transfer of other personal chattels is left to be regulated by ordinary law. For this purpose, unless the context or subject-matter otherwise requires, "goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops,

and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

In the note to the foregoing it is said:—

The concluding words of the definition appear to give a general rule for dealing with all things attached to the land, other than emblements and industrial growing crops, and to get rid of subtleties as to whether they were to be severed by buyer or seller, or whether they were to get any benefit from remaining attached to the land before severance. Under the Act the sole test appears to be whether the thing attached to the land has become by agreement goods, by reason of the contemplation of its severance from the soil.

The case of *Jones* v. *Tankerville*, [1909] 2 Ch. 440, was a case dealing with a contract for the sale of growing timber and at p. 445, Parker, J., said:—

Lastly, in determining the effect of such a contract at law the effect of the Sale of Goods Act, 1893, has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale.

The case of *Morgan* v. *Russell and Sons*, [1909] 1 K.B. 357, referred to in the judgment appealed from, is not in conflict with the law as laid down by Parker, J. In that case, the slag had become part of the ground or soil; it was the land itself. Lord Alverstone said:—

The contract appears to me to be exactly analogous to a contract which gives a man a right to enter upon land with liberty to dig from the earth *in situ* so much gravel or brick earth or coal on payment of a price per ton.

The distinction between the facts in that case and the facts in this case is obvious.

In my opinion s. 4 of the Statute of Frauds has no application because this is (by virtue of the Sale of Goods Act) a case of the sale of goods, and not an attempt to convey an interest in land. Of course, as incidental to every sale of goods not delivered, the purchaser has the right to go and get the goods purchased.

In Blackburn on Sales, at p. 16, it is recognized that the Sale of Goods Act has made a change in the law in regard to "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

I think that, under the contract and the statute, the trees became goods before severance because they were to be severed under the contract of sale, and when that is the case the state of facts exists which by virtue of the statute converts what was real estate into goods. The sale being in my view a sale of goods, it was the sale of an ascertained quantity of goods, namely, all the

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cullings on the lot. Part of them were severed and removed before the deed to the plaintiff and in my opinion the property in the goods sold passed to the defendant before the deed to plaintiff.

In *Marshall* v. *Green*, 1 C.P.D. 35, there was (as here) a verbal contract for the sale of certain trees; the defendant cut down some of them when the plaintiff countermanded the sale; the defendant, however, cut down the balance of the trees, and carried the whole away. It was held that the case was within s. 17 of the Statute of Frauds, and that before the sale was countermanded there was an acceptance and actual receipt of part of the goods sold within that section. Lord Coleridge, C.J., said, p. 38:—

> If there was a valid contract for the sale of trees, the plaintiff must fail: the trees had been sold, and the property had passed.

In vol. 25, Hals., p. 177, note (*g*), it is said:—

> The position of the buyer seems to be that he has a chattel interest in the thing before severance.

As to the question of when the title passes under a contract for sale of specific or ascertained goods, the crucial point is when did the parties intend it to pass? In order to ascertain the intention, r. 1, at p. 10, of the Sale of Goods Act was passed. It is as follows:—

> When there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

This contract is unconditional. It is for the sale of specific goods, namely, all the cullings on the lot. The goods were in a deliverable state; that is to say, there was nothing to be done by the seller to put them in a deliverable state; the purchaser was to go and get them. I think the title to the trees passed to the defendant when the contract was made.

The result is that the plaintiff has a deed of property on which the goods of the defendant are situate. She cannot, I think, prevent the defendant from going on the land to get his goods; more particularly as, when she got the deed of the land, she had actual notice of a contract in respect of the goods on the land. I am inclined to go further and say that she had constructive notice of the real contract because, after being put on inquiry, she did not act as a prudent purchaser would have done under the circumstances.

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

Longley, J.

LONGLEY, J.:—I concur with Ritchie, E.J.

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MELLISH, J.:—The trial judge has found that by oral agreement one Orlen Hingley undertook to let the defendant have the "cullings" of his (Hingley's) lands. This "culling" seems to mean such timber as was left thereon fit for sawing into lumber, and the agreement involved an irrevocable license by the vendor to go on the land and cut and carry away the timber within a reasonable time. I am disposed to think that this was a sale of "goods" within the Sale of Goods Act. I do not think this gave the defendant an "interest in land." The license merely renders legal an entry which, except for the license, would be illegal. Before the defendant had cut the logs in question (he had cut some in May, 1917, but apparently not as many as 15,000 ft., in respect to which no claim is made) the vendor sold the lands to the plaintiff, who, as the trial judge has found (and I agree with him as to this), had no notice of the actual agreement between the parties, but, on the contrary, was informed and believed that the agreement was limited to 15,000 ft. of lumber.

As above stated, and especially in view of such cases as *Marshall* v. *Green*, 1 C.P.D. 35, and *Jones* v. *Tankerville*, [1909] 2 Ch. 440, at pp. 444 and 445, and of the Sale of Goods Act, Acts of 1910, I am unable to say that the sale of an interest in land was contemplated. Notwithstanding this, however, I am of opinion that the trees were not "goods" until severed from the soil, and that at the time the deed was given to plaintiff they were a part of the realty and passed under the deed. I do not think the effect of the decisions or of the statute is to turn real estate into goods. If a sale of land or an interest therein is what the parties attempted, the contract might be enforceable in equity by the defendant against the vendor (*Jones* v. *Tankerville*, *supra*, at p. 443) although void or unenforceable at law; but he could not set up that equitable claim as an answer to this action, the plaintiff being in possession and holding the legal title without notice.

Assuming, however, that it is a sale of goods, and that the defendant had a legal right as against the vendor of the timber to enter on the lands for the purpose of cutting and carrying away the timber under an irrevocable license, nevertheless, I am of opinion that by selling the lands to the plaintiff the vendor made the contract between him and the defendant impossible of per-

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formance, because he "sold" as real estate the timber which he had previously "agreed" to sell as personal property. I think the property in the "goods" could not pass till the goods came into existence, *i.e.*, until the trees were severed. *Perry* v. *Fitzhowe* (1846), 8 Q.B. 757 at 778, 115 E.R. 1057,.

Under these circumstances, I do not think that the agreement could be enforced by the defendant to the detriment of the plaintiff's interest in the land which she held under the deed from Orlen Hingley, except as to the extent of the 15,000 ft., as to which she had notice, and for these reasons would dismiss the appeal with costs.

Harris, C.J. HARRIS, C.J.:—I agree with Mellish, J.

Drysdale, J. DRYSDALE, J.:—I also agree.

On equal division, appeal dismissed.

CAN.

Ex. C.

BRITISH AMERICAN FISH Co. v. THE KING.

Exchequer Court of Canada, Cassels, J. April 30, 1918.

CROWN LANDS (§ I B—11)—LEASE—ORDER-IN-COUNCIL—LEASE CONTAINING CLAUSE FOR RENEWAL—ULTRA VIRES—VOID—WHETHER RENEWAL CLAUSE SEVERABLE.

In 1904, pursuant to an order-in-council recommending the granting of a lease for 21 years to the suppliant of certain fishery privileges in waters described in the order-in-council, the Minister of Marine and Fisheries executed a lease to the suppliant for the said term. The lease contained a provision that upon complying with certain terms and conditions that the suppliants would be entitled to have the option of renewing the lease for a future period of 21 years.

In 1913 the deputy minister notified the suppliants that the lease was *ultra vires*, as not being in virtue of any statute of Canada, and as being repugnant to the common law and that the lease was *ab initio* void. *Held*, on a stated case to determine the rights of the suppliants under said lease, that the provision for the renewal of the lease was void and inoperative, and beyond the power of the minister under said order-in-council, but that the clause as to the renewal could be severed, and while that clause was void the lease itself for the term of 21 years was valid and binding.

[*Pickering* v. *Ilfracombe R. Co.* (1868), L.R. 3 C.P. 235, 250; *Re Burdett* (1888), 20 Q.B.D. 310, followed.]

Statement. ACTION claiming a declaration that a lease granted by the respondent to the suppliant is a good, valid and subsisting lease.

A. W. Anglin, K.C., for suppliant.

Cassels, J. CASSELS, J.:—The argument before me was on a special case, the facts having been agreed to by counsel for the suppliant and respondent.

On July 12, 1915, the suppliant brought this action claiming

a declaration that the document mentioned in para. 2 of the special case is a good, valid and subsisting lease.

It appears that on April 11, 1904, an order-in-council was passed recommending the granting of the lease in question for a period of 21 years, of fishery privileges in the waters described in the order-in-council. In apparent pursuance of this order-in-council, the lease which is set out in full in the special case was executed on April 19, 1904.

The lease provides as follows:—

To have and to hold unto the said lessee, subject as aforesaid, for and during the term of 21 years, to be computed from May 1, 1904, and thenceforth next ensuing and fully to be complete and ended, yielding and paying therefor to His Majesty or his successors yearly and every year during the said term the certain rent and sum of ten dollars to be paid annually and in advance.

The lease then contains a provision which, it is argued, is contrary to the provisions of the order-in-council. It provides as follows:—

Should the said lessee conform to all the terms and conditions of the present lease, and should establish at the termination of the said period of 21 years that he, or the company hereinafter mentioned, has expended in exploring, developing, equipment and improvement of the said territory hereby leased, the sum of at least $100,000, then he or the said company shall have the option of renewing the present lease, subject to the same terms and conditions, for a further period of 21 years.

It is agreed between the parties that the suppliant has complied with all the provisions of the lease, and that the rents payable by the terms of the said document were duly paid, and that if and so far as the said document was ever valid and binding upon the respondent, it has not ceased to be binding or become subject to invalidation by reason of the non-fulfilment or breach by the suppliant of any of the covenants, provisions, terms or conditions therein mentioned.

The 7th clause of the special case reads as follows:—

The suppliant has been, and now is, willing to accept the rights and premises in the said document mentioned for any part of the period or periods therein mentioned in respect of which the said document may be held to be binding upon the respondent, and, nevertheless, to pay the whole rent and to comply with and fulfil all the covenants, provisions, terms or conditions contained in the said document, and to fulfil all obligations thereby imposed upon the suppliant.

Para. 8 of the special case reads as follows:—

8. The question for the opinion of the court is: Is the said document dated April 19, 1904, binding upon the respondent in respect of the period or periods therein mentioned, or any part thereof?

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Para. 9 is as follows:—

9. If the answer to the foregoing question be in the affirmative, judgment is to be entered for the suppliant for $15,000 by way of damages with costs, and any rights and privileges or obligations conferred or imposed upon the suppliant by the said document shall thereupon cease and determine, and the judgment shall so declare; if in the negative, the petition of right is to be dismissed with costs.

On October 1, 1913, 9 years after the execution of the lease in question, during which period the lessee had been in occupation under the terms of the lease and had complied with all the terms thereof, the following letter, dated Ottawa, October 1, 1913, was written by A. Johnston, the Deputy Minister of Marine and Fisheries:—

Re Lease of Fishing Privileges for Nelson and other Rivers and Great Slave Lake and a portion of Hudson Bay.

The above lease being one granted of fishing privileges in the Nelson and other rivers, and also the Great Slave Lake and a portion of Hudson Bay, to you, bearing date of April 19, 1904, and issued pursuant to an order-in-council of April 11, 1904, was *ultra vires* of the Governor-General-in-Council to authorise as not being in virtue of any statute of the Parliament of Canada, and as being repugnant to the common law. The lease was *ab initio* void, and has never been of any force or effect, and I have been directed to so inform you by the minister.

Para. 4 of the special case, in part, reads as follows:—

It is agreed between the parties for the purpose of this special case that the right of the Minister of Marine and Fisheries to issue or authorise to be issued, fishery leases and licenses for fisheries and fishing covering the territory described in the said document is to be assumed.

On the opening of the case I pointed out to Mr. Robinson, counsel for the Crown, that it was open to serious question whether this admission does not in fact admit the validity of the lease. It was not so intended between the parties. It was intended to admit that the minister has generally the power to issue leases and licenses over this territory, but that it does not follow that he had the power to issue this particular one.

There is no difference of opinion as to what was in contemplation between the parties. I suggested that it had better be made plain.

Mr. Robinson, acting for the Crown, argued the case with ability. His submissions are two in number: 1, that the renewal clause in this lease is *ultra vires* as extending beyond the powers conferred on the minister by the order-in-council. 2, that the renewal clause in the lease is not severable from the rest of the

lease, and, therefore, if the clause providing for renewal is *ultra vires*, the whole document falls with it.

These were the two questions argued. All other questions as to the power to grant a lease over part of the territory were eliminated on the argument. As Mr. Robinson states:—

> There was some doubt as to his power (that is of the minister) over part of the territory that is included here. Now that question we intend to eliminate. He is assumed to have power to issue leases over all of this territory.
>
> His Lordship:—You assume that this was within the Dominion's jurisdiction?
>
> Mr. Robinson:—Quite so.
>
> His Lordship:—And the Dominion statute authorising the deputy is to be assumed. Is that what is contemplated?
>
> Mr. Robinson:—Yes.

So far as the contention put forward that this provision as to the renewal at the expiration of the 21 years is void, I agree with the contention of counsel for the Crown. It is a provision inserted contrary to the provisions of the order-in-council.

It is conceded by the Crown that the Governor-in-Council might have granted a lease for 42 years or for any longer period. The order-in-council, however, only providing for a lease for 21 years, and not containing any provision entitling the lessee to a further renewal, this provision in my opinion is void and inoperative. Practically the same question arose before me in the case of *The King* v. *Vancouver Lumber Co.* The case was tried before me, and I rendered judgment on May 30, 1914. It was a case relating to Deadman's Island. The decision was taken by way of appeal to the Supreme Court of Canada, which Court affirmed my judgment. Up to the present neither the judgment in the Exchequer Court nor in the Supreme Court has been reported. (See (1914), 41 D.L.R. 617, 17 Can. Ex. 329.) I understand an application was made to the Board of the Privy Council for leave to appeal from the judgment of the Supreme Court of Canada, and that leave to appeal was granted and that the case is now standing before the Board for argument.

At present I see no distinction between the case before me, and the case I have referred to, and I have come to the conclusion that the clause in the lease in question providing for the renewal is void.

The contention raised on the part of the Crown by Mr. Robinson is that the clause as to the renewal, and the lease for 21 years, are

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not severable; and, therefore, it is argued that not being capable of being severed the whole lease is void. I do not think this point is well taken. I think that the clause as to renewal can be severed, and while it is void, the lease itself for the term of 21 years is valid and binding.

In the case of the *City of Vancouver* v. *Vancouver Lumber Co.* (1910), 15 B.C.R. 432, [1911] A.C. 711, cited by Mr. Anglin, in rendering the judgment of the Board, Lord Mersey, at p. 720, after setting out the facts, makes these remarks:—

> These being the facts, the defendants take up the position that they are in possession, and (as they properly may do) they rely on their possessory title. The question, therefore, turns entirely upon the strength of the plaintiff's title. Is it better than the possessory title of the defendants?

Referring back to the judgments in the courts of British Columbia, the judgment of the trial court is reported in vol. 15 B.C.R. 432. It appears the trial judge was of opinion that the Vancouver Lumber Co., who claimed title under the Ludgate lease, were not entitled to succeed, and the action was dismissed with costs. In the Court of Appeal this judgment was reversed, and it is important to refer to the judgment of Macdonald, C.J.A. In the case in question the objection was raised that the whole lease was invalid by reason of the fact that there was a provision in the lease for a renewal not authorized by the order-in-council. The Chief Justice refers to that contention in the following language (p. 447):—

> It is also urged that the plaintiff's lease is not in accord with the order-in-council of February 16, 1899, under which it was authorised. This is true, but the provisions of the lease, which go beyond the terms of the order, are severable, in which case the lease is good for the balance. In *Hervey* v. *Hervey* (1739), 1 Atk. 561, 26 E.R. 352, Lord Hardwicke, at p. 569, said: "Suppose a power to lease for 21 years, and the person leases for 40, this is void only for the surplus, and good within the limits of the power,"

and other cases are cited for the same proposition.

The judgment of the Court of Appeal in British Columbia was affirmed by the Board of the Privy Council; and I quote the language of Lord Mersey to show that it could only have been confirmed had the lessee title as against the corporation in possession. This point as to its being severable must necessarily have come up for consideration, although nothing seems to have been said about it in the reasons for judgment.

I do not think the cases cited by Mr. Robinson support his contention. One or two of them are cases under the Bills of Sale

Act, and were determined purely upon the construction of the statute, as, for instance, *Davies* v. *Rees* (1886), 17 Q.B.D. 408, and the other cases under the Bills of Sale Act.

The facts in the case of *The Queen* v. *Hughes* (1865), L.R. 1 P.C. 81, 92, and *The Queen* v. *Clarke* (1851), 7 Moo. P.C.C. 77, 13 E.R. 808, are entirely different from the case before me. In the first case authority was conferred by statute to grant lands to the extent of 2,560 acres. In direct violation of the terms of the statute, a grant of land to the amount of 4,000 acres was executed. It was held it would be impossible to separate the lands as to which there was power out of the whole quantity granted. The case in my judgment is entirely different from the case in point.

Pickering v. *Ilfracombe R. Co.* (1868), L.R. 3 C.P. 235. At p. 250 the judgment, in part, reads as follows:—

In *Maleverer* v. *Redshaw* (1670), 1 Mod. 35, 86 E.R. 712, a sheriff's bond having been taken in a form other than that prescribed by the 23 H. VI., c. 9, it was objected that it was altogether void, the statute enacting "that bonds taken in any other form should be void," but Twisden, J., said, "I have heard Lord Hobart say upon this occasion, that, because the statute would make sure work, and not leave it to exposition what bonds should be taken, therefore, it was added that bonds taken in any other form should be void; for, said he, the statute is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest." But, after the long series of decisions on the subject, it is too late to make that distinction now. In truth, as was said by Wilmot, C.J., in *Collins* v. *Blantern* (1767), 2 Wils. K.B. 341, 95 E.R. 847, 1 Smith's L.C., 6th ed., 325, 334, "the common law is nothing else but statutes worn out." The distinction now applies only where the statute makes the deed void altogether. The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void: but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good.

I have perused all the other cases cited by Mr. Anglin, *viz.*, *Isaacson, ex parte Mason*, [1895] 1 Q.B.D. 333, etc.

In *Re Burdett* (1888), 20 Q.B.D. 310, in the Court of Appeal, at p. 314, Fry, L.J., states as follows:—

We will first consider the question upon principle. In our judgment, clauses in statutes avoiding transactions or instruments are to be interpreted with reference to the purpose for which they are inserted, and, when open to question, are to receive a wide or a limited construction according as the one or the other will best effectuate the purpose of the statute (*per* Turner, L.J., in *Jortin* v. *South-Eastern R. Co.* (1855), 6 DeG.M. & G. at p. 275). Furthermore, we adopt the language of Willes, J., in *Pickering* v. *Ilfracombe R. Co*, L.R. 3 C.P. 235, at p. 250, where he said: "The general rule is, that where you

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cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

I fail to appreciate the argument pressed upon me that in the case before me the Crown was induced to grant the lease at a small rental based upon a hope that the lessee might expend a further sum than $50,000 in the development of the territory. There is no evidence whatever adduced shewing any attempt to impose upon the Crown.

I answer the question set out in para. 8 of the special case, by stating that the document dated April 19, 1904, was binding upon the respondent in respect of a part of the period therein mentioned, that the said lease is now terminated, and I direct judgment to be entered for the suppliant for the sum of $15,000, with costs to be taxed. *Judgment accordingly.*

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LECOMTE v. O'GRADY.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. October 21, 1918.

Sir Louis Davies, C.J., and Idington, Anglin and Brodeur, JJ., and Cassels, J., ad hoc. December 9, 1918.

1. APPEAL (§II A—35)—FROM COURT OF APPEAL, MANITOBA—FINAL JUDGMENT—SUPREME COURT ACT—JURISDICTION OF SUPREME COURT OF CANADA.

A judgment of the Court of Appeal, Manitoba, on an appeal from the Court of King's Bench on a stated case, declaring that a certain document is a promissory note, and disposing of substantive rights of the parties is a final judgment within the meaning of s. 2 (e) of the Supreme Court Act.

2. BILLS AND NOTES (§ I—1)—INSTRUMENT VALID ON FACE AS PROMISSORY NOTE—INDEPENDENT MEMORANDUM WRITTEN AT BOTTOM—EFFECT.

A document which on its face complies with all the requirements of a valid promissory note is not invalidated as such by a memorandum written at the foot of the document, which constitutes an independent agreement relating to something to be performed immediately upon payment of the note.

[*O'Grady* v. *Lecomte* (1918), 40 D.L.R. 378, affirmed.]

Statement.

APPEAL from a decision of the Court of Appeal for Manitoba (1918), 40 D.L.R. 378, reversing the judgment at the hearing on a stated case. Affirmed.

A motion was made to quash the appeal on the ground that the judgment of the Court of Appeal was not final.

W. L. Scott, for the motion; *Geo. F. Henderson*, K.C., *contra*, was not called upon.

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FITZPATRICK, C.J.:—This is an action to quash for want of jurisdiction. In this case an action was brought on a document claimed to be a promissory note for $3,000. After the statement of claim had been amended a stated case was prepared by the parties which, after reciting the document, asked the opinion of the court as to whether it was a promissory note, and if the court should decide that the document was not a promissory note the plaintiff should have leave to amend, whereas if the court should hold that the document was a promissory note the defendant should have the right to set up any defence he desired. The stated case was heard by Metcalfe, J., who held that the document in question was not a promissory note. Appeal was taken to the Court of Appeal, where the judgment below was reversed, the court holding that the document was a promissory note. The defendant now appeals to the Supreme Court and the respondent moves to quash on the ground that the judgment is not a final judgment.

Fitzpatrick, C.J.

In my opinion, the judgment below finally disposes of an important element of the defendant's defence, and with respect to which he is without remedy if the appeal here is refused.

Motion dismissed with costs.

DAVIES, J.:—I concur with Anglin, J.

Davies, C.J.

ANGLIN, J.:—The respondent moves to quash this appeal on the ground that the judgment appealed against is not final. That judgment disposed of a preliminary issue of law submitted upon a stated case. It determined that the document sued upon was a promissory note. It follows, should the judgment stand, that rights peculiar to a promissory note as distinguished from an agreement to pay money not of that character have been finally accorded to the plaintiff, and the defendant has been deprived of defences which he might have had to a mere promise to pay money not in the form of a negotiable instrument. Such rights I cannot but regard as substantive rights within the meaning of the definition of final judgment adopted by parliament in 1913.

Anglin, J.

The motion, in my opinion, fails and should be dismissed with costs.

BRODEUR, J.:—This is a motion to quash for want of jurisdiction.

Brodeur, J.

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Brodeur, J.

An action had been brought on a document claimed to be a promissory note, and a stated case was prepared by the parties which, after reciting the document, asked the opinion of the court as to whether it was a promissory note or not. The trial judge held that the document in question was not a promissory note. An appeal was taken and the Court of Appeal held that the document was a promissory note. The defendant now appeals to this court.

It seems to me that we have jurisdiction. The right which has been determined by the court below is a substantive right, and, in view of the Supreme Court Act as amended in 1913, we have the power to determine now which of the parties was right as to their contentions affecting the document in question.

The motion to quash should be dismissed with costs.

On a later day the appeal was heard on the merits.

G. F. Henderson, K.C., for appellant; *E. K. Williams*, for respondent.

Davies, C.J.

DAVIES, C.J.:—This appeal comes to us in the form of a stated case, and we are asked whether a certain document is a promissory note or not.

The document in question was on a printed form, except the memorandum in the lower left-hand corner, and reads as follows:—

Winnipeg, 1st December, 1910.

On the 15th of September, 1911, without grace, after date I promise to pay to the order of O'Grady, Anderson and Co. Ltd., at the Bank of Nova Scotia, Winnipeg, the sum of three thousand dollars.

Value received.

JOSEPH LECOMTE.

Stock certificate for
50 shares Gas Traction Co. Ltd.
attached to be surrendered on
payment.

I am of the opinion that the document is a promissory note, and I answer the question submitted in the affirmative.

The point to determine was whether the memorandum on the lower left corner of the note formed an integral or substantive part of the note. I am of the opinion that it did not and answer accordingly.

Idington, J.

IDINGTON, J.:—I am of the opinion that the instrument in question herein is clearly a promissory note, and hence this appeal should be dismissed with costs.

ANGLIN, J.:—On the short ground that the appended words do not qualify the obligation created by the unconditional promise to pay which precedes the maker's signature, I would hold the document before us to be a promissory note within s. 176 (1) of the Bills of Exchange Act (R.S.C. 1906, c. 119). Any rights which the maker of the note may have under the appended memorandum will not arise until payment of the note has been made. It is, therefore, not necessary for the holder to aver or to prove readiness and willingness at the date of maturity of the note to deliver to the maker the stock certificate mentioned in the memorandum as a condition of his right to recover on the note. Still less can he be required to aver or to shew tender of the certificate either then or before action.

As Hawkins, J., said, with the concurrence of Wills, J., in *Yates* v. *Evans* (1892), 61 L.J.Q.B. 446, at p. 448:—

> The early part of the document is a complete note in itself—there is nothing in the memorandum to qualify the terms of the note and there is no ambiguity in the note—all that is necessary for the purpose of suing is that the amount claimed is due.

The decision of the English Court of Appeal in *Kirkwood* v. *Carroll*, [1903] 1 K.B. 531, overruling *Kirkwood* v. *Smith*, [1896] 1 Q.B. 582, and holding that s. 83 (3) of the Imperial statute (our sub-s. 3 of s. 176) does not import, as Lord Russell, C.J., had held in the earlier case, that "if the document contains anything more than is there referred to it would not be a valid promissory note," very materially weakens, if it does not wholly destroy, the value of a number of Canadian cases relied on by the appellant.

I would dismiss the appeal.

Brodeur, J.

BRODEUR, J. (dissenting):—The question we are called upon to decide is whether the written document on which the action is based is a promissory note.

It reads as follows:—(See judgment of Davies, C.J.)

The part in italics was written on the document before it was signed. The other part was on the ordinary printed form of a promissory note.

It cannot be disputed that these written words, providing that the stock certificate for 50 shares should be surrendered on payment of the $3,000 agreed upon, form part of the document. The signature is inserted in such a manner as to have the effect of authenticating them. Halsbury, vbo. Contract, No. 775.

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In a case of *Campbell* v. *McKinnon*, 18 U.C.Q.B. 612, decided in 1859, some words had been written on the back of an ordinary form of promissory note, and Robinson, C.J., said, at p. 614, that "the agreement written on the back must be looked upon as part of the instrument, being upon it before and at the time it was signed."

The respondent is, then, under obligation to pay to O'Grady, Anderson & Co., or to their order, at such a date, a certain sum of money provided that a certain stock certificate should be at the time of payment surrendered to him. And O'Grady, Anderson & Co., in accepting that document, become entitled to claim under it on the condition that they surrender that stock certificate. And any subsequent assignee who becomes the holder of that promise to pay cannot claim payment without tendering that stock certificate.

But is that document an unconditional promise to pay?

It was decided in England, in a case of *Bavins* v. *London & South Western Bank*, [1900] 1 Q.B. 270, that a document in the form of an ordinary cheque ordering a banker to pay a sum of money "provided the receipt form at the foot hereof is duly signed, stamped and dated" was not unconditional and, therefore, was not a cheque within the meaning of the Act.

In the case of *Bavins*, as in the present case, the document provided payment to order and was in that respect apparently negotiable; but the obligation for the payee or the bearer to sign a certain receipt in that case, and the obligation for the bearer or the payee in this case to deliver a certain stock certificate, rendered the document a conditional one. As a result, the document we have to construe is not a negotiable instrument the property in which is acquired by any one who takes it *bonâ fide* and for value notwithstanding any defect of title in the person from whom he took it. The engagement contained therein could not be transferred by simple delivery of it (Stevens, Mercantile Law, 5th ed., p. 286).

Several decisions have been brought to our attention in connection with this question of unconditional promise to pay.

I may divide them into two groups:—One has reference to those promissory notes called lien notes because in the body of the notes it is stipulated that the money which is to be paid is the

consideration for sale of property and that neither the title nor the right to possession pass until payment. The other group has reference to what I will call suretyship notes. They are notes signed by two persons of whom one is a surety, and stipulation is made in the body of the note that the time given to one of the makers of the note will not prejudice the right of the holder to proceed against the other maker.

With regard to the cases on lien notes the jurisprudence was at first somewhat uncertain. They were generally used in connection with the sale of agricultural implements. By the contract, the vendor would retain the ownership of the machines sold to the farmers, but would put the latter in possession thereof. Then the farmers would give their promissory notes, and it would be stipulated in the body of the notes that the title to the machine for which the note was given should remain in the name of the vendors until the note was paid.

In 1894, in a case of *Merchants Bank* v. *Dunlop*, decided in Manitoba 9 Man L.R. 623, it was held that the recital in the notes should be construed as simply stating the consideration for which the note was given, viz., the sale of the article and the vendor's promise to complete the sale upon payment. The note was held a valid promissory note.

In the same year (1894) the same question came before Maclennan, J., in Chambers in Ontario, on an appeal from the County Court in a case of *Dominion Bank* v. *Wiggins* (1894), 21 A.R. (Ont.) 275. In rendering his decision Maclennan, J., said that in view of the general interest and importance of the question he had conferred with the other members of the Court of Appeal, of which he was a member, and that they agreed in his conclusions, viz., that the maker of the note is not compellable to pay when the day of payment arrives, unless at the same time he gets the property with a good title, and the payment to be made is, therefore, not an absolute unconditional payment at all events, such as is required to constitute a good promissory note.

In the following cases, the decision of the Ontario case was followed:—

Prescott v. *Garland* (1897), 34 N.B.R. 291, by the full court of New Brunswick; *Bank of Hamilton* v. *Gillies* (1899), 12 Man. L.R. 495, by the full court of Manitoba; *Frank* v. *Gazelle Live Stock Association* (1906), 6 Terr. L.R. 392.

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In the group of suretyship cases there are three decisions:—*Yates* v. *Evans* (1892), 61 L.J.Q.B. 446; *Kirkwood* v. *Smith* [1896] 1 Q.B. 582; *Kirkwood* v. *Carroll*, [1903] 1 K.B. 531.

The document on which those decisions were based was in the form of a joint and several promissory note by a principal debt and a surety with a proviso that time may be given to either without the consent of the other, and without prejudice to the rights of the holders to proceed against either party.

In the *Yates* case, which was the first decided, the court held that the clause was a mere consent or license that time may be given to the principal debtor and that if time may be so given the surety will not avail itself of that as a defence.

In *Kirkwood* v. *Smith*, it was held that the documents were not valid promissory notes.

But in 1903, in *Kirkwood* v. *Carroll*, the Court of King's Bench decided that those additions to the promissory notes did not qualify them; and it was declared that *Kirkwood* v. *Smith* could not any longer be regarded as an authority.

In those documents the makers did not stipulate any conditions in their favour; the words added to the promissory notes were simply licenses in favour of the holders; and they are in that respect very different from the lien cases and the present case, where the makers practically said: I am ready to pay at such a date, but provided you give me a full title to the machine sold, or provided you give me my stock certificates.

It is a condition which is imposed upon the creditor of the debt and in favour of the maker of the alleged promissory note.

The payment of the money and the surrender of the stock certificates are to be contemporaneous acts.

Anson, Contracts, 7th ed., p. 299, says:—

> It is safe to say that, in the absence of clear indications to the contrary, promises, each of which forms the whole consideration for the other, will be held to be concurrent conditions.

Applying these principles to the present case I come to the conclusion that the document in question is a conditional one, and that it does not constitute a valid promissory note as defined by s. 176 of the Bills of Exchange Act.

I would adopt the views as expressed by the Court of King's Bench and by Fullerton, J., in the Court of Appeal.

Cassels, J.

CASSELS, J.:—I concur with Anglin, J. *Appeal dismissed.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins, and Ferguson, JJ.A. June 10, 1918.

MORTGAGE (§ VI G—105)—ACTION BY MORTGAGEE FOR RECOVERY OF MORTGAGE-MONEYS AND FOR POSSESSION—PROCEEDINGS UNDER POWER OF SALE—MORTGAGES ACT, SEC. 29.

A mortgagee of lands, who has brought an action to recover the mortgage-moneys, and for possession of the mortgaged lands until paid, is not prevented from also taking proceedings under a power of sale contained in the mortgage-deed.

Section 29 of the Mortgages Act, R.S.O. 1914, ch. 112, has no application to such a case.

[*Stevens* v. *Theatres Limited*, [1903] 1 Ch. 857, distinguished.]

Statement

APPEAL from a judgment of Meredith, C.J.C.P. refusing an application by plaintiffs for an interim injunction restraining the defendant from proceeding to a sale of mortgaged lands under the power of sale contained in a mortgage-deed. Affirmed.

The order appealed from was as follows:—

MEREDITH, C.J.C.P.:—There is no law, that I am aware of, which prevents a mortgagee of lands, who has brought an action to recover the mortgage-moneys, and for possession of the mortgaged lands until paid, also taking proceedings under a power of sale contained in the mortgage. Why should there be any such law? There is nothing inconsistent in the two proceedings. Possession is needed if the sale be made: and the amount realised at the sale must be applied towards payment of the mortgage-debt. If enough be realised upon the sale, the claim upon the covenant to pay the mortgage-moneys is satisfied; if insufficient, the judgment is needed for the recovery of the amount unsatisfied.

The enactment which was at one time commonly called Solomon White's Act—now the Mortgages Act, sec. 29*—has no application to this case: it is not contended that it has: but several cases were relied upon by Mr. Lawr in support of the application: they were all, however, cases very different from this case. That

*Section 29 (1) of the Mortgages Act, R.S.O. 1914, ch. 112, is as follows:—

29.—(1) Where, pursuant to any condition or proviso contained in a mortgage, there has been made or given a demand or notice either requiring payment of the money secured by such mortgage, or any part thereof, or declaring an intention to proceed under and exercise the power of sale therein contained, no further proceeding and no action either to enforce such mortgage, or with respect to any clause, covenant or provision therein contained, or to the mortgaged property or any part thereof, shall, until after the lapse of time at or after which, according to such demand or notice, payment of the money is to be made or the power of sale is to be exercised or proceeded under, be commenced or taken unless and until an order permitting the same has been obtained . . . from a Judge of the Supreme Court.

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which is nearest to it—if the word "near" can be applied properly to cases so far apart—is *Stevens* v. *Theatres Limited*, [1903] 1 Ch. 857, in which it was held, by Farwell, J., that, after a foreclosure decree *nisi* in an action, the mortgagee could not properly sell the mortgaged property under a power of sale contained in the mortgage; and I have not been able to find that that ruling has been questioned in any case. But, whether the ruling was based upon a merger of rights under the mortgage in the judgment, or upon an election of one of two inconsistent remedies, or howsoever, it has plainly no effect upon such a case as this. There is no foreclosure judgment or order in this action, nor could there be, as the action was not brought for foreclosure—no such relief was ever sought in it: indeed no judgment has been pronounced in it; it has been merely referred for trial to a judicial officer of the Court: and, after being in Court for so great a length of time without anything substantial having been accomplished, it is not much to be wondered at that the mortgagee should decide to take the matter into his own hands and endeavour to accomplish something in much less time.

It is said for the plaintiffs that the defendant cannot sell under the power contained in the mortgage, because it has not yet been decided just by whom and in what shares the lands are owned. But what has that to do with the case as a matter of legal right? What the mortgagee desires to sell, and that which alone he can sell, is just such rights and interests in the lands as the mortgage covers. The application is refused with costs.

J. D. Shaw, for appellants.

W. E. Fitzgerald, for respondent, was not called upon.

THE COURT dismissed the appeal with costs, the Chief Justice saying that there was nothing in the cases cited to warrant the Court in interfering with the decision below, which was clearly right. *Appeal dismissed.*

DAME ROBIDOUX v. ROYAL BANK OF CANADA.

QUE.

C. R.

Quebec Court of Review, Demers, Archer and Lamothe, JJ. September 26, 1918.

PRINCIPAL AND AGENT (§ II A—7)—POWER OF ATTORNEY—AUTHORITY TO WITHDRAW FUNDS FROM BANK—WITHDRAWAL BY SEVERAL CHEQUES —RATIFICATION.

A power of attorney filed with the bank at the time of depositing a certain sum of money, authorising the attorney to withdraw the said sum, and give a receipt for same, and to endorse all documents and cheques and ratifying in advance all that the attorney would do to withdraw the said sum, is not exhausted by withdrawing by cheque a part of the money, and the bank is justified in paying cheques issued by the attorney until the sum deposited has been withdrawn.

Statement.

APPEAL from the judgment of the Superior Court. Reversed.

Pelissier & Co., for plaintiff; *Brown, Montgomery & Co.*, for the bank..

The judgment of the court was delivered by

Archer, J.

ARCHER, J.:—On December 20, 1916, plaintiff personally, and as tutrix to her minor children, recovered judgment from the Harbour Commissioners of Montreal for $2,025 due under the Workmen's Compensation Act for the death of her husband. Her attorney in the proceedings was Mr. Arthur Delisle. On December 27, 1916, the Harbour Commissioners issued a cheque to the order of plaintiff for $2,025, and on the next day this cheque was deposited in the Quebec Bank endorsed: "For deposit only; Marie Louise Robidoux (widow Lapointe). Arthur Delisle, attorney."

At the time of the deposit, Delisle filed with the bank a power of attorney, the original of which was dated December 23, 1915. The power of attorney sets out that Marie Louise Robidoux authorized Delisle to withdraw on her behalf from the Harbour Commissioners the sum of $2,025, to give to them in her name a receipt, and to endorse all documents and cheques, ratifying in advance all he would do to withdraw the said sum.

Acting under this power of attorney, Delisle withdrew from the bank by 9 cheques the sum of $2,023, the first cheque being for $1,025, on December 28, 1915, and the last being for $48 on February 9, 1916, all cheques being payable to Arthur Delisle or bearer. Plaintiff stated in her evidence that she knew nothing of the deposit of the cheque in the bank or of the withdrawals, but acknowledged that on March 14 she drew the proceeds of a cheque for $100. The first of these cheques accounted for a cheque for $150 drawn by Arthur Delisle, in trust, to her order on his own

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account with the bank, and dated March 11, and the second accounted for a cheque for $100 drawn by him to her order on March 18. The total of these two sums, namely $250, she deducted from $2,025, and setting up—as was the fact—that the Quebec Bank had been taken over by the Royal Bank, sued the latter for the balance, on its repudiation of liability as a consequence of having paid out to her agent, Delisle, in virtue of the power of attorney.

It was held by the court below that the power of attorney was exhausted by depositing the cheque. There are several points raised by the pleadings, but the only question which arises in my mind in this case is as to the interpretation to be given by the above power of attorney dated December 23, 1915. This power of attorney had been given to Arthur Delisle, not only to withdraw a cheque from the Harbor Commissioners, but to get the cash. He certainly could have gone to the Bank of Montreal, under this power of attorney, endorse the cheque, and receive the money immediately. Instead of going to the Bank of Montreal, he got the Quebec Bank to collect this cheque for him, and instead of drawing the money out of the bank immediately, he withdrew the sum of $2,023 by 9 cheques, the first being for $1,025 on December 28, and the last on or about February 9, 1916.

When Delisle received this money from the Quebec Bank the bank had no knowledge of any breach of trust committed by Delisle, who presumably was drawing these cheques to get cash for his client, the plaintiff. Moreover, we must bear in mind the last part of the power of attorney, which says that she, Louise Robidoux, ratified in advance all that he would do in order to withdraw the said sum (ratifie d'avance tout ce qu'il fera pour retirer la dite somme). Under these circumstances, and seeing the wording of the power of attorney, I am of opinion that Delisle's mandate was not exhausted when he withdrew from the Quebec Bank the sum of $2,023, and the bank was justified in paying the cheques presented by Delisle.

Having come to this conclusion, I do not deem it necessary to discuss the interpretation to be given to ss. 95 and 96 of the Bank Act. The only recourse the plaintiff has is against Delisle, her agent. Under these circumstances I am of opinion to reverse the judgment and dismiss the action with costs of both courts.

Appeal allowed.

ROYAL TRUST Co. v. CITY OF MONTREAL.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. October 8, 1918.

1. EXPROPRIATION (§ III C — 135) — COMPENSATION — ACTUAL VALUE — HOMOLOGATION OF PLAN—DEDUCTION FOR.
Commissioners in fixing the owner's compensation in expropriation proceedings are not entitled to make any deduction from the actual value of the land taken, in respect of the burden imposed upon it by the confirmation or homologation of a plan.

2. ESTOPPEL (§ III E — 70)—EXPROPRIATION PROCEEDINGS—IRREGULARITIES—PROSECUTING CLAIM BEFORE BOARD.
In an expropriation proceedings the conduct and action of the expropriated party in appointing his commissioners and prosecuting his claim before the board estops him, after the award has been made from attacking it on the ground of alleged irregularities anterior to the notice of expropriation.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side (1917), 26 Que. K.B. 557, reversing the judgment of the Superior Court, District of Montreal, by which the plaintiff's action was maintained.

The action was taken to set aside and have declared illegal and null proceedings which had been taken by the City of Montreal by way of expropriation for opening or extending Sherbrooke street in the east end of the city and also to set aside the award of the arbitrators in so far as it affected certain lots of land required for the opening of that street and owned by the appellant in trust for the estate of one Charles Sheppard. Affirmed.

Lafleur, K.C., and *A. Chase-Casgrain*, K.C., for appellant; *Atwater*, K.C., and *Jarry*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The substantial question in this appeal is what were the rights of the appellant in the land expropriated and for which it had a claim to be indemnified.

The lots in question were within the homologated street lines shewn on a plan prepared by the city and confirmed by the court in 1887 as being included in land required for an extension of Sherbrooke street.

The proprietor of land expropriated is entitled to be compensated by payment of the value of the land taken, and s. 421 of the city charter provides, *inter alia*:—

Indemnity, in case of expropriation, shall include the *actual value* of the immovable, part of immovable or servitude expropriated and the damages resulting from the expropriation; but, when fixing the indemnity to be paid, the commissioners may take into consideration the increased value of the immovables from which is to be detached the portion to be expropriated and offset the same by the inconvenience, loss or damages resulting from the expropriation.

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S. 418, however, provides:—

418. The city shall not be liable for any indemnity or damages claimed with respect to any building constructed, or improvements, leases or contracts made by any person whatever, upon any land or property, after the confirmation of any plan or map, or of any modification or alteration of, or addition thereto.

The question is what is the effect of s. 418? Cross, J., in his reasons for the judgment appealed from, says:—

The respondent (now appellant) is in error in its pretension that it should have been awarded what would have been the real value of the land in question if it had been marketable land. It is said for the respondent (appellant) that the city is not to be permitted to depreciate land by putting it on a plan and then take the land at the depreciated value made so by its own act. To that it can be said that the city plan is given certain effect by statute. That effect causes depreciation but it is the law.

I must dissent altogether from this interpretation of s. 418.

It is a well-recognised canon of construction not to interpret an Act of the legislature in such a way as to take away property without compensation, unless such intention is clearly expressed or is to be inferred by plain implication.

In the recent case in the English Court of Appeal of *Cannon Brewery Co.* v. *Central Control Board* (*Liquor traffic*) reported in [1918] 2 Ch. 101, the Master of the Rolls in his judgment said at p. 120:—

No intention can be attributed to parliament of taking away from individuals their property without paying them for it; unless such intention be expressed in clear and unequivocal language.

(*Gibb* v. *The King* 42 D.L.R. 336, [1918] A.C. 915, 27 D.L.R. 262, 52 Can. S.C.R. 402) also.

Now I can see nothing in s. 418 to warrant the view that it is intended to have the effect of a partial and indeed almost total confiscation of the property of an owner of land. The intention of the legislature, I think, was this: Where a city improvement is proposed, the carrying out of which may necessarily take some time, parties whose land will need to be expropriated for the purpose are not to be allowed to aggravate the indemnity which they will be entitled to claim by carrying out improvements in the interval.

This does not seem to me to involve any intention on the part of the legislature to deprive the landowner of the full value of his land which he is entitled to be paid.

The power given to the city is a very exceptional one and one that, no doubt, may easily lead to considerable hardship. Under

it, the city can, owing to want of security, practically prevent a landowner making any use of his property for an indefinite time without being under any obligation to take the land at all or to pay any damages occasioned. That is sufficiently unfavourable to the landowner without an unnecessary finding in the statute of an intention to allow the owner even eventually nothing but the value of what would be scarcely more than a bare legal title, of which, indeed, the respondent's expert witness, Beausoleil, says:—

la valeur n'est que nominale et ne dépasse pas $1, pour tout le terrain.

The second clause in par. 3 of s. 421, that, namely, providing for an offset in consideration of increased value of the immovables from which is to be detached the portion to be expropriated is not, I think, effective here because at the date of the expropriation the appellant had no other lands than those expropriated. It had already disposed of its other immovables which benefited by the increased value. If it had sold them subsequently to the expropriation, the increase in their value would have had to be set against the compensation for the land expropriated. At the time of the sale, however, the extension of Sherbrooke St. had not been made, and might never have been made. No doubt there was a probability that it would be made and the purchasers were willing to accept the possibility, still I do not see how this can affect the legal rights as between the appellant and the respondent.

I think that, from the record, two facts are established: (1) that the value of land in the locality was more than that allowed in the award; and (2) that the majority of the commissioners took into consideration the homologated plan as depreciating the value of the land expropriated.

These are substantially the findings of Cross, J., who says:—

It can be said that the proof establishes that the real value of marketable land in the locality was 60c. per foot. The award is only 25c. per foot. That great disparity is suggestive of the view that the majority of the commissioners subjected themselves to some error not merely of estimate of value but to some error in principle.

And again he says:—

The fact is that the majority of the commissioners did take into consideration the effect of the homologated plan and they would have been wrong if they had not done so.

It would be difficult to say how the commissioners arrived at their award. They seem to have been agreed at first in saying that they took into account the servitude of the road although later inclining to the contrary opinion. The principles on which

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they should have proceeded, as above indicated, are, however, so simple that I think it is clear they were not guided by these. No adequate explanation is forthcoming of the difference between the allowance for these and other lands taken; whilst one of the majority of the commissioners says that if he had taken the servitude into account he would have allowed only 15c. instead of 25c. per foot. A difference of only 10c. between the full value of lands and their value burdened with a servitude which, as the respondent's witnesses say, renders them absolutely valueless is inexplicable.

I do not wish to be understood as expressing now any opinion upon the amount of the compensation which the appellant is entitled to recover. The amount awarded may for reasons which I have not considered work out as a fair and proper compensation, but if so, it has worked out right rather by chance, and the appellant is entitled to have a more satisfactory consideration and regular determination of its claim.

The appeal should, therefore, in my opinion, be allowed, and the matter referred back to the commissioners to establish the actual value of the land expropriated the amount of which is to be awarded as indemnity to the appellant, but in view of the finding below and out of respect for the opinion of the majority here I do not enter a formal dissent.

Davies, J.

DAVIES, J.:—This is an appeal from the judgment of the court of King's Bench, Province of Quebec, reversing a judgment of the Superior Court Judge which declared certain expropriation proceedings in connection with the plaintiff's property and the award of the majority of the commissioners to be null and void.

The Court of King's Bench reversed that decision and dismissed the plaintiff's action, and against this judgment the present appeal was taken.

I agree fully with the Court of King's Bench that the alleged illegalities in the antecedent proceedings of the city and the commissioners cannot be invoked in this case on the grounds stated in the court below. The conduct and action of the present appellants in appointing their commissioners and prosecuting their claim before the board effectually estopped them after the award was made from attacking it on the ground of these alleged irregularities, anterior to the notice of expropriation.

The statute makes the award of the commissioners, in such

cases as the present, final and without appeal. In order to give grounds for attacking it, either highly improper conduct on the commissioners' part, or fraud, or the proceeding by the commissioners in making the award upon an improper principle, must be clearly shewn. The latter was the ground relied upon in this case.

The Court of King's Bench held that the award attacked should not be interfered with, and I think they were right in their conclusions.

The owner of land expropriated is undoubtedly entitled to be paid its actual value at the time of its expropriation; but it is the actual value of the land to him subject to any statutory charges upon it, and not the value to the person, corporation or company taking it that is to be awarded.

The City of Montreal had, in the year 1887, laid down on a plan the lines of a proposed extension of Sherbrooke St., one of the principal streets of Montreal, which extension ran through the property in question, and had the plan confirmed by a Judge of the Superior Court.

The law provided that after the homologation of these lines by the confirmation of the plan of the same, the city was freed from liability or damages "with respect to any building constructed or improvement, leases or contracts made by any person whatever upon any land or property after the confirmation."

An amendment, 7 Edw. VII. c. 63, s. 30, speaks of portions of vacant lots between homologated lines as being reserved for "public or municipal purposes."

In 1908 the Sheppard estate, of which the plaintiff is trustee, made a plan of subdivision of its land in the locality of the locus in question and made its plan to conform to the city plan so far as concerns the site of Sherbrooke St. Afterwards, in 1912, lots on the north-east side were sold to Larivière and Messier by the now appellant, and these lots are described in the deed as being bounded by Sherbrooke St.

When the commissioners made their award, upon what principle should they have proceeded? Clearly, in my opinion, they should have awarded the actual value of the land to its owner and in finding that actual value they were bound to take into consideration the fact of the proposed extension of Sherbrooke St. and the homologation, and confirmation of the lines of that street through

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the plaintiff's lands as shewn on the plan of the same. In my judgment, the plaintiff had not a marketable title at the time of the expropriation. Such title as he had was one subject to the effect of the proposed extension of Sherbrooke St. and the confirmation of the plans thereof, in other words, subject to a statutory charge. The commissioners were obliged, in my judgment, to consider this in making their award. This statutory charge or "reservation for municipal purposes," or servitude, or whatever name you choose to give it was something which affected the value of the land and diminished its marketable value. It is true it may have raised, probably greatly raised, when adopted by the Sheppard estate in making their plan of the land in 1908, the value of the lands fronting on that proposed street, but with that we have nothing to do. The owners of these adjoining lands, in this instance the plaintiff itself, got the benefit of that increase, and no one complains or has a right to complain of that. But when they sold these adjoining lands at 60c. a foot, and then claimed to have allowed them the same price for the lands of the proposed street, the opening of which gave them the increased price they got for the adjoining lands, and contend that this was the principle on which the arbitrators should have acted they are going too far and advancing as a principle something I cannot for a moment accept. They claim properly all the increased price caused by the opening of the street to the adjoining lands and then contended that this increased price was that which should have guided the arbitrators in fixing the compensation for the street itself. As Cross, J., says: "It is simply resorting to the too common project of land speculators to get paid twice for the same thing."

Their title to the lands within the street boundaries was subject to the statutory charge or reservation I have referred to. It was not a marketable title such as that to the lands fronting on the street. It had to be valued as it stood at the time of the expropriation subject to the charge, and if that had been done by the arbitrators, I would have held it was rightly done. Cross, J., holds that the majority of the commissioners did take into consideration the effect of the homologated plan, the Sheppard estate subdivision plan and the description of the Larivière and Messier lots as bounded on the street, which consideration would, of course, tend to decrease the actual value of the street land.

If they did, from my point of view they were right, and there

is no ground for the contention that they acted upon a wrong principle.

If they did not, they omitted doing what they should have done in that respect; but the appellants have no ground of complaint on that score, as the omission would be in their favour.

I am unable to find that the arbitrators acted upon any wrong principle, and I would, therefore, agreeing, as I do, with the reasons for his judgment given by Cross, J., and with the conclusions of the Court of King's Bench, dismiss the appeal with costs.

Idington, J.

IDINGTON, J.:—I think this appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I agree with the Judges of the Court of King's Bench that the award of the expropriation commissioners cannot be successfully attacked upon the grounds of alleged irregularities in the antecedent proceedings preferred by the appellants. Whether the provisions of the charter of the City of Montreal (62 Vict. c. 58, and amendments) required or justified the commissioners in fixing the amount of compensation for the land expropriated to make a deduction from its actual value on account of rights or easements in favour of the municipality and the public to which it was subjected by the confirmation, in 1887, of a plan for the extension of Sherbrooke St., and whether they have in fact made such a deduction are, in my opinion, the only debatable questions. Both of them—the one a question of law, the other of fact—require careful consideration.

The principle of natural law which underlies art. 407 of the Civil Code: "No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid," is likewise the foundation of the well-established rule of statutory construction thus stated by Farwell, J., in *Earl of Lonsdale* v. *Lowther*, [1900] 2 Ch. 687, at 696:—

> It is a sound rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it: see *per* Lord Fisher in *Attorney-General* v. *Horner* (1884), 14 Q.B.D. 245, 257.

The city charter declares that streets and highways indicated and projected upon a plan or map duly confirmed by the Superior Court shall be deemed to be highways (s. 411). Although the city is not bound to carry into effect any projected street opening, widening, or extension so confirmed (s. 417), the owner is disentitled to indemnity, should the city subsequently expropriate the land, for any buildings or improvements constructed or made upon

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it subsequently to such confirmation (s. 418). "Nor," says s. 417, "shall the city hereafter be liable for any indemnity or damages whatever by reason merely of the confirmation of such plan or any alteration or modification thereof or addition thereto."

The only offset to the very serious interference with and deprivation of his rights thus authorised is that the property owner has by recent legislation (s. 419 (*a*), enacted by 7 Edw. VII. c. 63,. s. 30) been relieved from liability for taxes, but only if the expropriated land be vacant, and that he may make such use of his land as is practicable without building upon or otherwise improving it except at the risk of losing his expenditure, and subject to the rights of the public in it as a highway. It is obvious that so burdened the interest of the owner in the land would be of little, if any, value, and that if his indemnity on its ultimate expropriation should be confined to the value of an interest so depreciated, he will, in effect, have been deprived of his property without compensation. That such a result was intended by the legislature is most improbable.

The interval between the homologation of a plan shewing a projected highway or highway extension, and the expropriation of the land required for it, may be prolonged for many years. During that period the owner undoubtedly must submit to the hardship of the burden placed upon him by the statute as the result of confirmation of the plan without compensation because the legislature has expressly negatived his right to "any indemnity or damages whatever by reason *merely* (*simplement*) of the confirmation of the plan."

But the opening, widening or extension of a street cannot be actually made without expropriation under the provisions of the charter (s. 419), and when that takes place the case is no longer one *merely* (*simplement*) of confirmation of a plan. The land itself must then be acquired, and the statute says that the owner's indemnity "shall include the *actual value* (*la valeur rèelle*) of the immovable, part of immovable or servitude expropriated and the damages resulting from the expropriation (s. 421)." Applying to the two provisions which I have quoted from ss. 417 and 421 the rule of interpretation above indicated and harmonizing their construction as far as their language permits with art. 407 of the Civil Code, I think s. 417 should be read as suspending the right of the owner to compensation for the loss, temporary or permanent,

of the rights of which he is deprived on confirmation of the plan. The loss may be temporary only, because the city is not bound to proceed with the projected opening, etc.; it may, by altering or modifying the homologated plan with the sanction of the court (s. 415), abandon the project without incurring liability for indemnity (s. 417). The loss may be permanent if the city proceeds with the project, necessitating the expropriation of the land. Thereupon, as already stated, the case ceases to be *merely* one of confirmation of the plan of a projected improvement, and the owner becomes entitled to indemnity not by reason of such confirmation, but because his land is taken from him and the statute says that his indemnity shall include its actual value. The suspension under s. 417 is then terminated. That confirmation of the plan should produce only a suspension of the owner's claim for indemnity in the event of ultimate expropriation seems very clearly to be the purpose of the word "merely" (simplement) in s. 417, and—I say it with all becoming respect—I cannot but believe that the significance of this word has escaped the attention of those who have taken the contrary view.

I am, therefore, of the opinion that the commissioners in fixing the owner's compensation, were not entitled to make any deduction from the actual value of the land taken in respect of the burden imposed upon it by the confirmation of the plan in 1887—that it was the actual value of the land for which they were to award compensation and not merely the value of the owner's interest therein subject to the rights of the municipality and the public acquired under the homologation.

Neither can I subscribe to the contention that by selling adjacent lands as fronting on Sherbrooke St., then a projected highway, and under the statute to "be deemed to be a public highway," the owner necessarily subjected the part of his property afterwards expropriated for that street to a servitude in favour of the purchasers and their assigns in respect of which the commissioners were required or entitled to make a deduction from its actual value in ascertaining the amount of the indemnity payable to the owner on expropriation.

Did the commissioners in fact make any such deduction? Cross, J., says:—

The fact is that the majority of the commissioners did take into consideration the effect of the "homologated" plan, the making of the Sheppard

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estate subdivision plan and the description of the Larivière and Messier lots as being bounded by Sherbrooke St.; and they would have been wrong if they had not done so.

He reaches this conclusion apparently because of what he regards as the otherwise unexplained and inexplicable disparity between the 25c. a square foot allowed to the appellants as compensation and the 60c. a square foot which he says the proof establishes was the real value of marketable land in the locality.

On the other hand, the late Chief Justice of the Court of King's Bench (Sir Horace Archambeault) and Carroll, J., accepted the testimony given by each of the three commissioners who constituted the majority of the board that they had made no deduction on account of what they term "the servitude," 26 Que. K.B. 557, 565, 568, Recorder Geoffrion, chairman of the board, deposed that in taking this course the majority of the commissioners acted on the opinion of a Judge of the Superior Court obtained and communicated to them by him; and the two other commissioners confirmed this statement. Trenholme, J., the remaining member of the court, delivered no written opinion, but the formal judgment would seem to indicate that, on this point, he agreed with the Chief Justice and Carroll, J., rather than with Cross, J. It is erroneously stated in the official report that Pelletier, J., sat as a member of the court.

After careful consideration of the entire record, notwithstanding some discrepancies, and the obviously fidgetty scrupulosity of Recorder Geoffrion, I have not found sufficient reason for disbelieving the commissioners' testimony or doubting its accuracy, corroborated as it is by that of Mr. Senecal, the secretary of the board. Still less am I prepared to hold that upon this question of fact the Court of King's Bench clearly erred in its appreciation of the evidence. The mere disparity referred to by Cross, J., does not warrant such a conclusion. Moreover, I am not satisfied that the actual value of lands in the locality, "excluding any advantage due to the carrying out of the scheme for which the property (was) compulsorily acquired, *Fraser* v. *City of Fraserville*, 34 D.L.R. 211; [1917] A.C. 187, 194," was 60c. a square foot. Mr. Findlay valued the land in question at 40c. a square foot free from all servitudes and 20c. subject to the servitudes discussed, and there is no evidence how much less than the figures put upon it by the several expert witnesses it would be worth if the extension of

Sherbrooke St. were merely a possibility and not a realized possibility. *Cedars Rapids Manufacturing Co.* v. *Lacoste*, 16 D.L.R. 168; [1914] A.C. 569. So far as appears none of the witnesses who deposed to values ranging from 40c. to 75c. a square foot were examined on this footing. One of them, Mr. Beausoleil, said that, subject to the "servitude," he would value the whole lot at $1. Moreover, other properties in the locality, some of them not shewn to have been so wholly different from that of the appellants as to preclude comparison, were valued by the commissioners at the same figure, 25c. a square foot, and there are the circumstances that the property in question had been the location of a city dump, was very low, and was comparatively close to abattoirs, which the commissioners regarded as having a tendency to depreciate its value.

There is no appeal from an award such as this. The statute expressly excludes it (s. 429)—(4 Edw. VII. c. 49, s. 18). Without entertaining an appeal an award may not be set aside solely because the court is of opinion that it is too high or too low—even very considerably so—unless the disparity be so great that it is clear that the award must have been fraudulently made or that the arbitrators must have been influenced by improper or illegal considerations. The Court of King's Bench has held that neither of these grounds of invalidity has been established, and the clear case necessary to justify a reversal of its judgment, in my opinion, has not been made out.

I would merely add that if I thought it necessary to pass in detail upon the considerations that should affect the commissioners in arriving at the amount of the indemnity to which an expropriated owner is entitled under s. 421 of the Montreal city charter, I am not at all certain that where, at the time of the homologation of the plan shewing the projected improvement, he owns adjacent lands, from which the expropriated property is thereby detached, and parts with those lands in the interval before expropriation, he should not, for the purposes of the off-set of increased value of such adjacent lands provided for by that section, be in the same position as if he still held them. Why should the amount which the city has to pay for the expropriated land be increased because the owner has parted with his adjacent property since the homologation of the plan of the projected work? It would seem to be contrary to the purpose of the statute providing

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for homologation and its consequences with the apparent object of preventing changes in the condition of the property affected which would increase the burden of the expropriating municipality that it should. But on this aspect of the case it is not necessary now to express a definite opinion.

Solely on the ground that the evidence does not clearly establish that the award of 25c. a square foot was such a gross undervaluation of the appellants' property as would warrant a finding that the commissioners in making it must have been influenced by improper considerations, and *a fortiori*, that it has not been so plainly demonstrated that the Court of King's Bench erred in reaching that conclusion that a reversal of its judgment would be justified (*Demers* v. *Montreal Steam Laundry Co.* (1897), 27 Can. S.C.R. 537, I would dismiss this appeal.

Brodeur, J.

BRODEUR, J.:—The chief question that presents itself in this case is whether the expropriation commissioners in determining the amount of the compensation based it on an erroneous principle. The property expropriated was formerly a part of a vacant lot; and in 1887 the City of Montreal, under the authority of its charter, decided to extend Sherbrooke St. across this lot. It has indicated this extension on the official plan, and has had it confirmed by the Superior Court. Under those proceedings the projected street became a public way (s. 411 of the charter).

Another provision of the charter declares, however, that the city is not compelled on account of the confirmation of the plan, to open the street; nor is it compelled to make compensation or pay damages because of such confirmation (s. 417). This provision is certainly contrary to the ordinary principles of law. Indeed, the Civil Code (art. 407) says that no one can be compelled to give up his property except on being previously paid a just indemnity. Now, we have here an owner of property in the city of Montreal who sees a street laid out on his land. He could no longer sell it without making known the line to which it is subject (*Mènard* v. *Rambeau* (1888), 20 Rev. Leg. (O.S.) 448; Sirey, 1871-1-48), neither could he claim compensation or damages for the buildings which he erects on it.

The city, however, could not demand taxes for the land covered by this homologated line (s. 419a of the charter). The owner, from the moment that a line is so laid, remains indeed the owner of the land which is the street location, but he cannot build there

without putting himself in danger of it being taken away without compensation when the indemnity is determined upon for the land itself. His right of ownership is very seriously restricted; and, moreover, this land becomes a public way, as stated in s. 411, of the charter.

It is indeed true that the owner has the prospect of seeing a street cross his property; and then, for this reason, the lots which front on the projected street increase in value and compensate him. It is probably this increased value which has induced the legislature to adopt such legislation apparently contrary to the principle which ordains that there is no expropriation without compensation. But, on the other hand, if the city deemed it inadvisable to carry out its project of opening a street at the spot in question, this would create grave injustice. But that is a matter for the legislature and not for the courts.

In the present case, the street was laid on the plan in 1887, as I have above stated, and it was only in 1913 that the city determined to acquire the street, and to have the compensation settled which should be paid to the owner. The expropriation commissioners proceeded to hear the parties and their witnesses, and the majority decided on granting 25c. a foot to the owner. The latter is not satisfied with this decision, and asks that it be annulled and set aside.

The chief question raised is whether the commissioners should concede the same value to the street as to the adjoining lots. It has been shewn that the adjoining lots sold at about 60c. a foot; accordingly, the appellant claims that he should be paid the same price for the street.

It is unquestionable that from the moment a line is laid out across a vacant lot for the purpose of a street that the right of the owner is necessarily restricted. A servitude of right of way is created there, since, under s. 411 of the charter, a street laid on a plan becomes a public way. He remains indeed the owner of the land, but his right is not absolute as it was before. Then, whether we should consider this burden as a servitude or as a restriction of the right of ownership, it none the less remains that the land had not, when the commissioners fixed the compensation, the same value as the adjoining lands upon which there is no such burden. The commissioners were, therefore, bound, in my opinion, to take into consideration such burden and such right of way. There

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is some doubt in the evidence as to whether they took it into consideration or not. However, if we take the amount which has been granted as compensation, 25c. a foot, and the value, which appears to be admitted, of the adjoining lands, 60c. a foot, it seems evident to me that they should have taken into consideration, as it was their duty to do, the existence of such servitude. I concur, therefore, in the opinion expressed on this head by Cross J. For if I was certain that they had not taken account of this servitude I would then be of opinion that the award should be void, and that the case should be referred back to the arbitrators in order that it might be re-heard. But then this proceeding would probably be detrimental to the appellant, as the award might perhaps grant a less sum than what has been given. The appellant claims also, that the award should be set aside because certain antecedent proceedings were not quite regular; it alleges, for example, that the preliminary report, which should be made by the controller before the council decides to proceed to have the indemnity determined, was irregular, and that the resolution of the council was not carried by a majority of the members of the council, as the law requires.

It seems to me that the informality so claimed should have been raised *ab initio*. Besides, it is to be presumed that the appellant had every interest in the compensation being determined, for it had on its hands a piece of land which brought it in nothing, and consequently it would be desirous of the compensation being determined as soon as possible. It is too late for it, now that the award is given, to complain of proceedings in which it acquiesced by taking part itself and by submitting to their jurisdiction.

If the resolution of the council was illegal, nothing was then easier than to take the necessary proceedings to set it aside. It did not do so. I am of opinion that the appellant should observe with satisfaction that the city, after several years of waiting, was about to pay it for its land; and it is too late to-day to complain of that.

For these reasons the appeal should be dismissed with costs, and the provisions of the judgment of the Court of Appeal should be confirmed. *Appeal dismissed.*

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